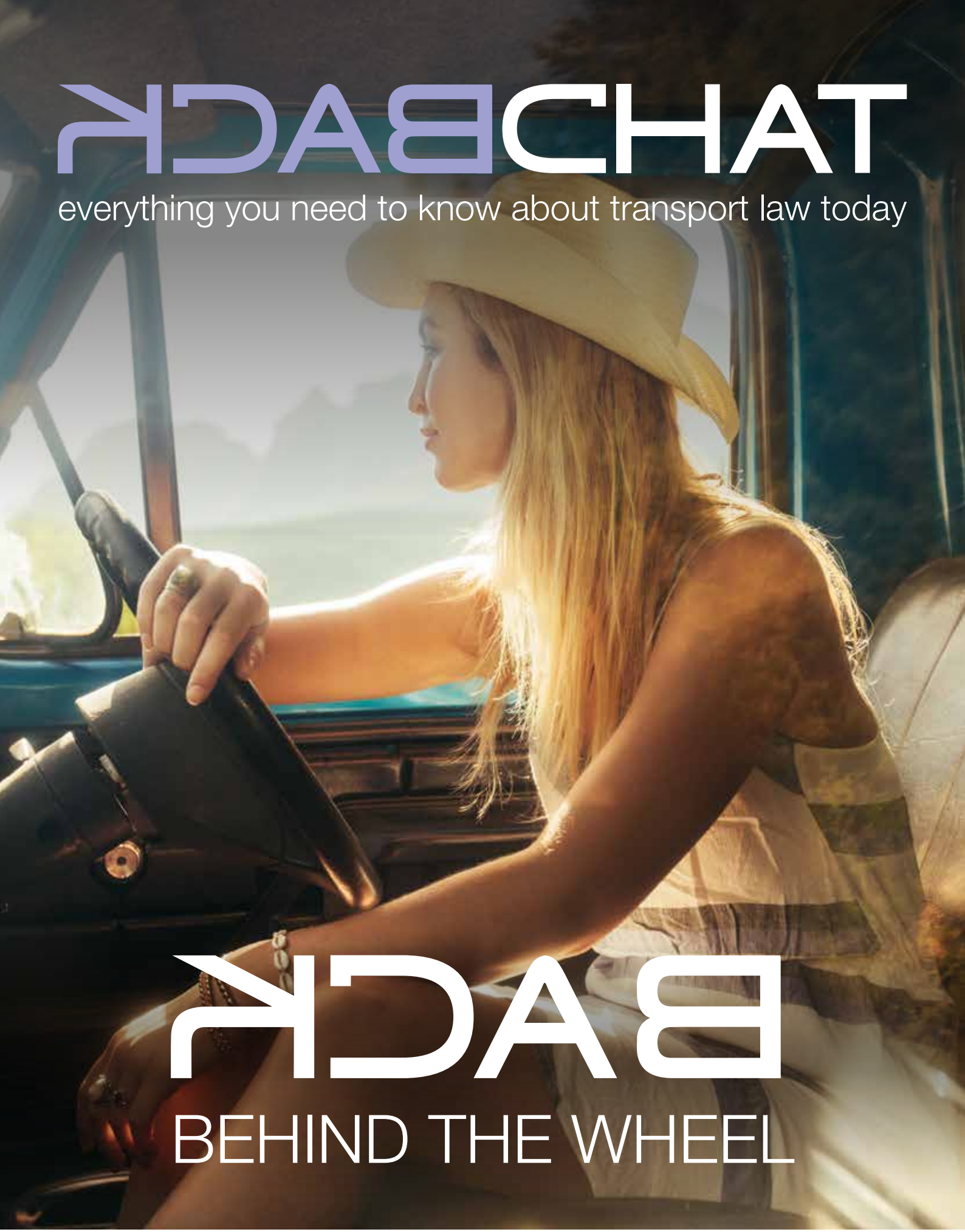
BACKCHAT

everything you need to know about transport law today



BACK

BEHIND THE WHEEL

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BACKHOUSE JONES

CONTENT

Freight Expectations

Most right thinking people within the commercial road transport industry will agree with me that the best food available to man is the salt and vinegar crisp. The combination of crunch, vinegary bite and salty tang is unbeatable. But elite transport executives who also happen to be crisp aficionados will have noticed that premium brands are simply not satisfied with humble flavours. All change. Simple labels are being replaced with the grandiose. No longer salt and vinegar but sea salt and balsamic vinegar. Not content with cheese and onion it's now mature Devonshire Cheddar and caramelised red onion.

So why all the adjectives? The answer appears to lie in expectancy theory. We experience what we expect to experience.

So what can the transport industry expect from The Prime Minister's intended resurrection of Henry VIII's Statute of Proclamation declared in 1539 to legislate by proclamation without the approval of parliament. The Great Repeal Bill of 2017 will involve a major shake up of Britain's laws to make sure we are ready for Brexit in 2019. It will explain how ministers expect to convert thousands of EU laws and directives into U.K. law to make sure they are applicable after Brexit.

With this in mind I am frequently asked "what's going to change in the next 10 years?". It is an interesting question and I answer that only politicians and lunatics predict the future and I'm not a politician. But I never get asked "what's not going to change in the next 10 years?" and yet perhaps the second question is actually the more important of the two - because you can build a business strategy around the things that are stable in time.

In their hearts, operators expect that regulation is not going to go away. Much of it is designed around Health and Safety and it would be political suicide and morally wrong to tinker with anything that increased the likelihood of less safe vehicles on the road with the increased possibility of a further tragedy such as that involving the Glasgow Bin lorry or the Bath tipper truck.

What other changes are not expected? Even I - who believes in sunlit uplands - can't imagine a client saying to me *"your lawyers are commercially ingenious, remorselessly attentive and blisteringly polite. You've treated me like Saudi Royalty ; I just wish your hourly rate was a little higher"*

Is a finance director ever likely to concede *"I adore Backhouse Jones. I just wish I could wait until the unexpected happened and then pay a significant invoice I had not budgeted for.* Impossible.

Now some might say the role of advertising is simply to change perception and expectation but that thinking sells short what the thousands of RDABUP and RHA legal services subscribers have over years of usage come to expect of our advice and training. Our fixed fee service is truly a game changer.

Knowing what is not to be expected to change Backhouse Jones puts greater effort into promoting our fixed fee subscription services in the knowledge that, today, the energy we put into our compliance and training programmes will still be paying off dividends for our clients 10 years from now. When you know you have something that is true, especially over the long term, you can afford to put a lot of enthusiasm into it.

So when it comes to Brexit. My advice is not to build your business on the ramblings of bellwethers or sheer braggadocio. Rather get all your burners firing at once by RDABing up, fixing your legal costs from 26p per vehicle per day and securing organised training from the experts here at Backhouse Jones.

When BHJ has exceeded your expectations I will settle down with a tube of Pringles. Now my least favourite flavour is prawn cocktail but as Article 50 unfolds change I can be tempted with hand cooked Scottish langoustine kettle chips with dill and Andalusian lemon.

Talking of Andalusia. Picasso, one of her most favourite sons, observed that good artists borrow and great artists steal. With this in mind a large hat tip to Jeff Bezos of Amazon and the excellent Richard Shotton of Zenith who inspired the above thinking and quotations.

news briefs

Can't leave your mobile phone alone? Beware: new law comes into effect

From 1 March 2017, all motorists in England, Scotland and Wales found using a handheld mobile phone at the wheel will get six points on their licence and face a £200 fine.

Motorists who are caught for the first time using their phone illegally, will no longer be able to choose to take a remedial course instead of receiving points on their licence.

Drivers caught breaking the law for a second time will potentially face a £1,000 fine and a six-month driving ban. Drivers of buses or goods vehicles could get a maximum fine of £2,500.

Newly qualified motorists face revocation of their driving licence the first time they are caught using a mobile phone behind the wheel.

If you require any further information, please call 01254 828300 and ask to speak to a member of the regulatory team or email enquiries@backhouses.co.uk to request a telephone call RDAB

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Your Voice is Your Choice

Have you got legal expenses insurance? Do you therefore have the right to choose your own lawyer? There have been a number of cases over the last few years which were brought before the European Court of Justice because legal expenses insurers want to restrict the freedom to choose your own solicitor. In most cases the Court has ruled in favour of the insured, this ensures the Legal Expenses Insurance Directive 87/344/EEC ("the Directive") is complied with.

Legal expenses insurance (LEI) covers policyholders against the potential costs of legal action brought by or against the policyholder. Most of the time, LEI is sold as an add-on to house or car insurance, generally for a small premium.

The Insurance Companies (Legal Expenses Insurance) Regulations 1990, which implement the Directive into UK law, state that the insured person shall be free to choose a lawyer (or other person having such qualifications as may be necessary) to defend, represent or serve the interests of the insured in any inquiry or proceedings.

In some cases, legal expenses insurers have tried to impose restrictions on when a policyholder can instruct their own lawyer. In the EU case of Eschig C-199/08, the insurance company included a clause in their conditions that stated that the company can select the legal representation itself when a large number of insured persons suffer loss as a result of the same event. The Court ruled that insurers are not permitted to reserve this right.

In the second case of Stark C-293/10, the insurer paid the costs to the legal representative limited to what would normally be invoiced by a lawyer established at the place the Court is situated. The Court said this was allowed on the condition that the reimbursement actually provided by the insurer is sufficient so that the insured person's freedom to choose a representative is not rendered meaningless. The next case was Sneller C-442/12, where the court ruled that an insurer is not allowed to include a requirement in its contract that the legal assistance will only be provided by its own employees.

There have been two cases heard recently, both arising in the Netherlands, on the freedom to choose your own lawyer. They were both concerning the same issues; in the Directive it says that a person shall be free to choose a lawyer for any "inquiry or proceedings", but what does this actually include? It is clear that this would cover cases heard in the courts, but what else?

In Massar C-460/14, the insurance company argued that a procedure before the Employee Insurance Agency was not an inquiry or proceedings within the meaning of the law. However, the Court decided that the term "inquiry" includes a procedure at the end of which a body authorises an employer to dismiss an employee.

The case of Büyüktipi C-5/15 was similar to Massar. Mr Büyüktipi suffered from various mental and physical disorders and when he asked the Care Assessment Centre to authorise his care, they refused. Mr Büyüktipi therefore lodged an objection to the refusal and approached his insurer to bear the costs of the lawyer. The insurance company refused on the grounds that it was not an inquiry or proceedings. The Court ruled in favour of Mr Büyüktipi, saying that "inquiry" covers this stage of an objection when a body gives a decision against which an action could then be brought before the courts.

Insurers still have the right to restrict what they will pay for legal representation as long as it is reasonable and provided the remuneration is not so low as to cause the policyholder's freedom of choice to be worthless.

The aim of the Directive is broadly to protect the interests of the insured both against the limitations imposed by insurance companies and from the interests of the insurer (who is paying for the lawyer) in how the proceedings are dealt with. The insurers on the other hand, periodically find themselves fighting to restrict the policyholder's freedom to choose their own lawyer in order to manage their financial exposure in a given case or class of cases!

The concern is also that a lawyer appointed by the insurer might have half an eye on not upsetting the insurer – from whom they obtain a large number of cases – and in so doing might not perform exclusively in the interests of the policyholder. The freedom to choose your own lawyer reduces this risk.

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The Art of Appealing

If I say Office of the Traffic Commissioner and Public Inquiry, many of you are likely to shiver at the very thought of the Traffic Commissioner and the dreaded regime of a Public Inquiry. Whether you have or have not been to a Public Inquiry the calling in letter will always strike fear and trepidation into the hearts of even the strongest amongst you. It is a daunting process and can be very complicated.

Those of you whose ill fate has brought you to a Public Inquiry room will likely remember the days, hours and minutes leading up to the hearing itself, the shuffling in the uncomfortable chair, the standing up, the sitting down, the difficult questions and awkward answers only to then have to wait for the decision.

If unlucky, licences can either be suspended, curtailed or revoked.

Whatever the decision, at least the process is fair. The operator at a Public Inquiry has the right to attend the hearing, to question evidence, to call evidence and most importantly be heard by a truly independent arbiter - the Traffic Commissioner.

If the decision is wrong it can be questioned upon appeal to a specialised Upper Tier Tribunal whose dedicated Judges and panel members have vast experience in transport matters.

It appears not so if you are operating in the waste industry and you have the benefit of an environmental permit. A waste permit is the same as an operating licence and for many in the waste industry, it is their 'ticket' to operate. Without it their business ceases to exist. The Environment Agency (EA) polices the waste industry. It is they that continue to monitor the operator and decide whether or not the operator remains compliant with its permit conditions. If the operator is not compliant the Agency can, and does, take enforcement and disciplinary action.

Disciplinary action includes the revocation of a permit.

Unlike operator's licences and the Public Inquiry process, an independent arbiter hearing is not available to those with a waste permit. In the event of non-compliance, the Environment Agency (EA) will make its own decision as to revocation through its revocation section and behind closed doors.

The operator will be given the somewhat meagre and in large ineffective opportunity to make a written response only.

Accordingly, the EA becomes the 'prosecutor, Judge and jury' without holding any kind of independent, fair or balanced hearing.

In the event that a decision to revoke the licence is made, appeal lies to the Planning Inspectorate. This process, though better than nothing, is certainly not the same as an independent hearing by the Traffic Commissioner at an Inquiry nor an appeal to a specialised tribunal. Only the limited rights to apply for a judicial review may save the permit. An application process which is both difficult and complicated.

Thankfully, there seems to be a light at the end of the tunnel which has come in the form of an application for judicial review of a Health and Safety Executive decision, whose processes are not unlike the EA. The High Court has given leave for the judicial review process to commence and at the same time commenting that the HSE appear to have acted as 'prosecutor, Judge and jury' in its internal disciplinary/regulatory process.

There has to be a fair procedure and an independent means of assessing what regulatory action, if any, is appropriate no matter what the jurisdiction. Operators have rights to maintain their possession such as a business free from unjustified attacks by regulators.

Operators have the absolute right to a fair and unbiased hearing and natural justice demands that this right be preserved and properly afforded to all.

As we await this significant decision, my advice must be that if any waste operators find themselves on the receiving end of threatened regulatory action from the EA contact us immediately. The sooner the problems are addressed the better the chance is of avoiding disastrous arbitrary action that can bring your business tumbling down.

Braking the ROAD of your Maintenance: Alternatives to Rolling Road Brake Testing?

What is it?

An "Electronic Braking Performance Monitoring System" (EBPMS) enables the braking performance of a commercial vehicle to be monitored and recorded during every day operating conditions.

The system autonomously collects and analyses Braking Event Data over time to produce a Braking Performance Value indicative of that vehicle's performance. This data must be monitored and compared against the statutory requirements for the type of vehicle or trailer being used.

For the purposes of operator licensing and being incorporated to a proper preventative maintenance system, a fully functional EBPMS ought to:

- Identify overall braking performance values
- Alert vehicle operators by appropriate means (email, sms, etc…) when a braking rate is below the minimum prescribed in service braking performance
- Allow a Braking Performance Report to be produced
- Provide access to historical Braking Performance Reports viewable for up to 36 months in the past (and verifiable as a true record)
- Ideally identify the position of a defective brake

It is essential that the EBPMS reports clearly identify the vehicle or trailer, the assessment date and also provide an overall result for the service braking performance since the last safety inspection.

Operator Obligations

Although the DVSA does not 'approve' software systems or hardware devices as such, it does acknowledge an industry standard specification for EBPMS. However, it is ultimately the operators' responsibility to ensure their vehicles are operated in a safe condition at all times and that any maintenance systems used are fit for their particular set of circumstances (and their operator licence).

Operators who use EBPMS as evidence for service braking performance are expected to include a braking performance report on every safety inspection record, unless a suitable roller brake test or decelerometer test was conducted. An alternative method can be used if EBPMS provides insufficient data.

If EBPMS is unable to assess parking brake performance but the service brake performance is reported to be performing satisfactorily by an EBPMS, then a visual inspection of the parking brake components and a check of system operation would be accepted as the minimum requirement for a parking brake safety inspection. However, should there be any doubt over parking brake performance further tests must be conducted.

When braking deficiencies are identified, the operator needs to ensure appropriate action is taken to investigate, remedy and evidence any reported defects, as detailed in the guide to maintaining roadworthiness.

Any change to the EBPMS that impacts upon the system's performance relative to the DVSA guidelines must be declared.

On the Rolling Road to a Public Inquiry?

If Operators choose to continue to use a Rolling Road Brake check as a method of efficiency testing it is crucial to ensure that your maintenance supplier is conducting a proper check. There have been numerous instances found at Public Inquiry of maintenance suppliers simply recording a rolling road brake check with the vehicle "unladen", wheels locking and incredibly low efficiency readings.

In order to undertake an effective and compliant efficiency brake check the vehicle/trailer must be laden and the results must be in excess of those noted above.

If, on review of your vehicle inspection sheets, you notice low efficiency readings and the vehicle is unladen, this is not a compliant brake check as per the guide to maintaining roadworthiness and you should take this up with your maintenance provider immediately.

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Managing Driver Risk

Drivers - they are regularly the face of your business; they see your customers on a daily basis and they drive the vehicles that advertise your operation. They also pose the greatest risk to your business.

Let us take three examples of incidents resulting from the ill-health of HGV drivers and one relating to that of a pilot.

Captain Lubitz, the co-pilot flying the Lufthansa plane who deliberately crashed the aircraft into the French Alps, appears to have had severe mental health problems which ultimately led to his suicidal descent on 24 March 2015 and consequently killed all 149 passengers. His employers were not aware of his mental health condition.

There had perhaps been the slightest warning sign of his altered behaviour earlier on in the day on which the fatal incident took place; Mr Lubitz is believed to have carried out an unplanned, controlled descent on the outbound leg of the flight "for which there was no aeronautical justification". What is strange about this earlier event was the lack of concern raised as to why Mr Lubitz took it upon himself to undertake the unnecessary descent of the aeroplane. No colleagues or managers questioned his actions before allowing him to make the return journey which subsequently became his last one.

Although it might seem far-removed to discuss an airline pilot in the context of HGV and PSV drivers, they essentially have the same job: to transport themselves in addition to either a group of passengers or goods and produce. A crucial element is also common between the two lines of work: to carry out the journey as safely as possible. However, both carry the risk of the driver or pilot incurring a health problem – whether mental or physical – which can result in the safety of the journey being compromised.

On Boxing Day 2015, Robert Wright, an Edinburgh City Council bin lorry driver, suffered a heart attack at the wheel of his vehicle. Despite the physical and mental distress that he must have endured during those moments, Mr Wright managed to safely drive into a barrier on the central reservation, protecting both his colleagues and pedestrians. Tragically, he died a week later.

Mr Wright had no knowledge of any heart problems and, therefore, his employers were also unaware of any medical conditions that could potentially affect his driving. Heart attacks, amongst other physical health issues, can occur with no prior warning. It is, however, highly recommended that employers and employees work together in ensuring that the drivers carry out all sensible checks in an attempt to discover health troubles which may, otherwise, be disguised until something more sinister occurs.

In July 2015, an LGV driver in Runcorn ploughed into a car that, in turn, crashed into a tipper truck that ultimately collided with a bus. Anthony Bainbridge failed to realise that the traffic in front of him was standing and, therefore, failed to stop in time. Mr Bainbridge and a lady in the car both died instantly from the incident.

At the subsequent inquest, it was heard that toxicology tests found amphetamine and cannabis in Mr Bainbridge's blood. It was, however, impossible to conclude whether the drugs had impacted his driving and thus caused the collision. Nevertheless, it was clear that drugs were in the driver's system when he was in control of the vehicle.

It is crucial for employers to carry out random drugs and alcohol testing. Both drugs and alcohol consumption can have serious immediate and long term effects which may be catastrophic whilst controlling a HGV, LGV or PSV. They have the potential to kill the driver, other road-users and pedestrians.

The infamous Glasgow bin lorry crash in 2014, which killed 6 pedestrians and injured a further 15 members of the public, involved a driver who had knowledge of his previous health problems but failed to disclose the information to his employers and other relevant third parties. It was said that the driver, Mr Clarke, fell unconscious whilst at the wheel of the vehicle.

It was found that Mr Clarke had already experienced unconsciousness at the wheel of a bus in 2010 but did not alert his employers (FirstBus) nor Glasgow City Council and the DVLA. He appears to have misled doctors about the blackout and was therefore not advised to notify the DVLA of the problem. It was discovered that he had not been honest and frank about his medical state for up to 40 years in order to gain and retain jobs. The Sherriff conducting the investigation said that the crash would have been avoided had Mr Clarke disclosed his record to the interested parties.

19 recommendations stemmed from the incident and centre around the sharing of medical information between an employer and proposed employee from the very start of employment.

Recommendations include:

- Employment to begin only when references have been obtained;
- References to include focused health questions;
- Occupational health doctors to perform examinations where there are any driving related medical concerns;
- Subject to the employee's consent, provision of the full facts and medical records if a doctor is used to advise on a driver's condition.

Certain conditions have been highlighted in recent years as having an extremely dangerous effect on driving abilities. Sleep apnoea is an illness that is often undiagnosed for long periods of time. An individual suffering from sleep apnoea experiences difficulties in breathing in their sleep, due to blocked airways, which causes the person to awake several times in the night, usually unbeknown to them. Consequently, the sufferer can become exhausted during the day and may fall asleep unexpectedly at any point – including during their driving hours and whilst driving.

Due to the sedentary nature of a HGV or PSV driver's job, there can be a greater risk of these drivers suffering from sleep apnoea. The condition can come from a lack of fitness and if an individual is significantly overweight, which is common in drivers who carry out a sedentary job. It is, therefore, important to consider the drivers who might be at a higher risk of the illness, before any undiagnosed sleep apnoea leads to unconsciousness at the wheel of their vehicle, look for overweight drivers who fall to sleep easily perhaps during their break or in training sessions, listen to comments made by their fellow drivers about their behaviour.

A further medical problem, which may only occur once in a person's lifetime but could be fatal in the transport industry, is syncope – otherwise known as fainting. It can result from various behaviours in the body, for example excessive coughing. Cough syncope, amongst other variations, causes the individual to exert so much strain on their body that their blood pressure drastically increases and decreases, causing the person to faint. Whilst the condition may only be experienced once, it is highly recommended that employers check their employees' medical history to look for previous instances of syncope and any triggers.

The HGV industry, in particular, seems to be developing an ageing workforce. Whilst every care should be taken to prevent ageism, it is possible to treat older members of the workforce differently if there is a good reason to do so.

For example, if an individual has a back problem, it would be advisable to ensure that they are not given tasks which involve heavy lifting. Assessments can be held for the older age bracket to review their skills and reaction abilities. This can enable both the employer and employee to figure out the best course of action if there is an age-related problem.

Another common but more well known condition is diabetes. You should know which of your drivers suffer from this condition and ensure regular conversations are had with them to keep abreast of any developments and changes in their condition. As a reminder, the DVLA must be informed if a driver has diabetes and if medication is used to control it. The driver will not automatically lose their HGV or PSV entitlement, but it does mean that annual assessments and management can be carried out to ensure safer driving.

In order to keep up-to-date with the medical status of all drivers – whether it be mental health, heart problems, drug use, syncope, sleep apnoea, diabetes or a whole host of other conditions – it is highly valuable to issue medical questionnaires annually and compel your drivers to complete them.

Backhouse Jones has a questionnaire available as a preventative measure, and is, of course, here to BACK you up should you or one of your drivers find themselves in an unthinkable situation.

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Sharp Rise in Director Prosecutions in Health and Safety Cases

According to figures from the Health & Safety Executive (HSE), 46 directors and senior managers were prosecuted under section 37 of the Health and Safety at Work Act (HSWA) in 2015-16. This is in stark comparison to the annual average of 24 prosecutions during the five years prior.

Prosecutions under section 37 of the HSWA can be brought if there is evidence to demonstrate that a company has breached the Act with the consent, connivance or negligence of a director or senior manager.

The following statistics provide a breakdown of the outcomes of the prosecutions from the period spanning from April 2015 to March 2016:

- 34 people were either found or pleaded guilty
- 1 was found not guilty
- 11 individuals had their charges withdrawn by the HSE
- Out of the 34 found guilty:
    - 12 directors were sentenced to either immediate or suspended imprisonment
    - 2 were disqualified from being directors

Despite the seeming shift onto the prosecution of directors in health and safety cases, a HSE spokesman said: "The HSE's policy is to prosecute directors when we have evidence that they have breached the law and when it is in the public interest, for example when the director/manager was personally responsible for matters relating to the offence. Prosecution of directors is intended to hold them to account for the failings."

The publication, Health and Safety at Work, recently revealed that there had been 20 custodial sentences issued to directors and senior managers from February to September 2016, indicating a continuation in the increase of such prosecutions.

The rise in prosecutions of directors and senior managers can be seen in comparison to a decrease in that of employees. In the years between 2010 and 2015, the average number was 13 per year. There was only 1 prosecution

of an employee during the period 2015-16. In line with the HSWA, employees can be charged under section 7 if they fail to take reasonable care for someone's health and safety – including their own – or, if they do not co-operate with their employer so far as is necessary to enable their employer to comply with a duty or requirement.

In order to avoid prosecutions under the HSWA, it is important for directors and senior managers to ensure that the companies in which they work have sound health and safety systems. This includes procedures for their own employees, plus contractors and visitors to their sites. Directors and senior managers must be aware that, in order to be safe, their policies are proactive and not reactive.

Don't wait until an accident occurs to reiew and amend your health and safety systems – it could be too late.

It is also critically important not to fail to implement advice and recommendations from external or internal audits or HSE reviews/visits. If a director or manager does not accept any recommendations as valid then that needs taking up with the auditor at the time. It must not be simply ignored.

The HSE says: "For many businesses, all that's required is a basic series of practical tasks that protect people from harm and at the same time protect the future success and growth of your business."

However, if your company – including its directors and senior managers – does fall foul of the HSWA, be sure to contact our Regulatory department, who have the in-depth experience and expertise to deal with these substantial issues. Make us your fall BACK.

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The Unexpected Happens in a Blink of an Eye

It has been a bit of day for Jim, an experienced Operator. He runs 30 wagons, a mixture of rigids and artics, mainly on general haulage.

Everything was fine until just after dinner time…

Heather (Traffic Office)
Jim, come here quick! One of our wagons has been in an accident!

Jim
What's going on?

Heather
There's a lady on the line who says she has just seen one of our artics knock over a man in Chorley, he didn't stop.

Jim
Ok, let me speak.

(Jim listens, he doesn't often, but he is listening now)

Jim
Thank you for ringing in. I have got your details. No, we have not had a report before but we are looking into it right now.

Heather
She said it was in Chorley so that is Ian's run isn't it?

Jim
Looks like it. The pedestrian has gone to hospital in an ambulance and the Police are there. She didn't get the registration number but it is definitely one of ours. I will ring Ian now.

Heather
Good job we got the handsfree kits fitted across the fleet.

Jim
Ian, it's Jim. I need a word. Can you pull over as soon as you can and ring me back? It's urgent.

(Five minutes passes)

Heather
It's Ian on the line.

Jim
Where are you right now? Blackrod? Did you drive through Chorley Town Centre? Ok, look, we have had a report of an accident with one of our vehicles. About half an hour ago. Chap knocked down. Ambulance and Police are there now.

Ian
It can't be me. I mean I would know about it. I'm not stupid. I would have stopped at once.

Jim
I know, but some woman has been on the phone and I don't think it's a wind up. I am not accusing you but will you do something for me? Have a look round the back of the trailer – is there anything to see? I will stay on the line.

(Jim holds)

Ian (a bit breathless)
Well there is a scrape on the box panel, low down, nearside rear. That wasn't there this morning when I did my walk round check. Listen boss, if I had hit someone, I wouldn't have driven off.

Jim
No, I don't think you would but you wouldn't necessarily have known. The best thing is to stay put. I will send Mark to relieve you and I am going to ring the Police and tell them where you are. I will come up to you but we need to do this right.

Ian
Ok, but I have nothing to hide. If I have hit anybody, I really didn't know.

Later on…

The Police have attended upon Ian and interviewed him under caution. He has been treated as a suspect for the offence of careless driving and failing to stop at the scene of an accident. Ian gives a full account about his drive through Chorley.

He told the Police he believed his journey had been uneventful, he was unaware of any collision. He explained that he had rung the Police after his boss had told him of the report of an accident.

At the end of the interview, the Police officer tells him that there are independent witnesses to the accident. They say the pedestrian, who was hit by his trailer, was on his mobile phone and was not looking before he stepped into the road.

Ian is back at base talking to Jim and two other drivers, Scott and Laura.

Jim
Well there are two issues. Firstly, there may have been a collision, but was it your fault? Secondly, even if it wasn't, it is an accident and needs reporting officially to the Police. If you weren't aware, you don't have to report it in law but I am going to. On second thoughts, on what I have told you, I think you should make the call yourself. Explain the report I have had and that I have told you. Tell the Police that you are aware as a result of me ringing you. If you do that, you are reporting it as soon as you reasonably can and that is what the law requires.

Ian
The bobby didn't let on to me about the witnesses. He interviewed me first to get my side.

Jim
He has got to keep an open mind. He is just doing his job. It will be all over the media soon. Our livery is great some of the time but that lad took photos with his iPhone. It is up on YouTube already. We have already had the press on and I have just told him we are liaising with the Police.

Ian
I asked about the injured man. Apparently he was thrown clear and not badly injured. Even though it is not my fault I am glad he is alright. It shakes you up.

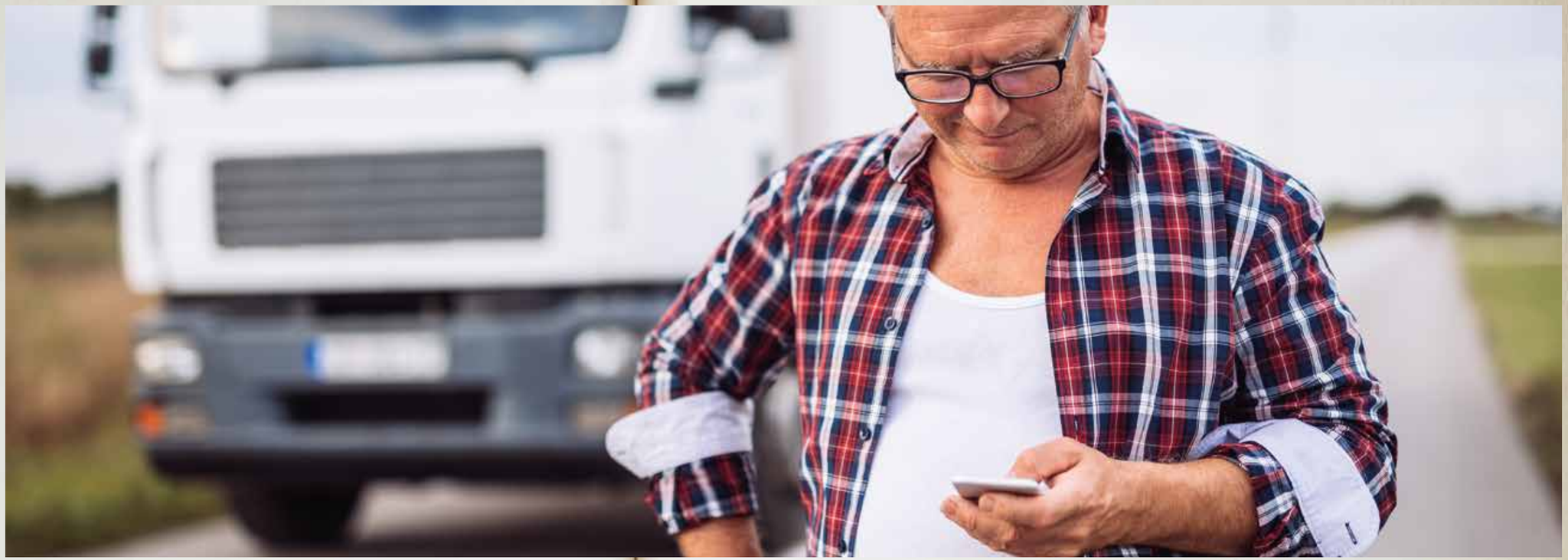
Jim
All's well that ends end. I want you to take a couple of days off. I don't blame you at all but I think that is the right thing to do. In the meantime, I have reported it to the insurers and I will want you to do a statement for them.

I thought whether we need to report the matter to the DVSA or to the Traffic Commissioner. It has not resulted in a Prohibition on the vehicle and you have not been given a Fixed Penalty for anything. It doesn't look like you are going to be prosecuted and there is no conviction. So far, there is nothing to report. If there is more publicity, I might write to tell the Traffic Commissioner what we know because he will be aware of it. I will tell him you contacted the Police as soon as we had a report and volunteered to be interviewed. I can tell him for what it's worth that it looks like you are not at fault and what happened leading to you ringing the Police.

Strictly speaking, this isn't necessary, but since the media have the story I think the TC will appreciate us telling him. They are always encouraging hauliers to keep them in the picture and have to trust us to do the right thing. Well we have in this case and I am going to write. Are you ok with that Ian?

Ian
I suppose so. From what you say you are not obliged to do so but it makes sense, go ahead.

Read our detailed conclusion →



Conclusion

A driver involved in an accident (involving personal injury, damage to another vehicle, to an animal or to property on or adjacent to the road) must stop and exchange his details and vehicle ownership details together with evidence of insurance to a Police Officer or a person reasonably requiring it (this is in summary what sections 165 and 170 Road Traffic Act 1968 require).

There is longstanding case law (Harding v Price 1948 1AER283) confirming that the duty of the driver to stop and exchange information under s170 RTA only applies if the Defendant knows that an accident has occurred. If an accident involving personal injury etc as stated above is proved to have happened, it will be for the Defendant to prove (but only on the balance of probabilities) that he did not know he had been involved in an accident. In Harding v Price, the Court decided that knowledge involved not only actual knowledge but also a wilful shutting of the eyes to the obvious. So, if there had been a severe jolt or a loud crash at the time of the accident which the Court concludes the driver must have heard, that would be sufficient to put him on notice that an accident had happened and amounted to wilful shutting of eyes to the obvious. Nevertheless, it is not uncommon, particularly with artics, for there to be a collision at the rear of the wagon of which, wherever the blame lies, the driver was genuinely unaware – we have dealt with many cases of that type. The driver might or might not be at fault for any injury but if he can satisfy the Police, or if necessary, the Court that he was genuinely unaware it had happened, he should not be guilty of "fail to stop or fail to report". This is important because if the Court feels that not only it's an accident but it is a "hit and run" that the matter suddenly becomes much more serious.

Should a driver agree to answer questions when interviewed after an accident?

This is a judgement call for the driver, if necessary after legal advice. The driver will be entitled to have a solicitor present with him in the interview. On rare occasions where the Police are satisfied at the outset that a driver is blameless for an accident, they will simply treat him as a witness and take a witness statement from him. In general however, even if the circumstances point away from the driver being at fault, the Police will interview a driver under caution advising him of his right of silence, warning him that any answers he gives may be used in evidence and that if he doesn't mention in interview something he later relies on in Court if prosecuted, the Court can take this into account – potentially what are known as "inferences".

In general terms, if a driver has been involved in an RTA, even if physically uninjured, he may be in shock. The Police are unlikely to insist on an extensive interview at the roadside or shortly after the accident. They may nevertheless ask for a "first account" from the driver and this may or may not be under caution. Even if the driver is cautioned, if he says something incriminating at the roadside when he is still shocked, the Police and Criminal Evidence Act offers protections and it may be possible to get the evidence excluded and disregarded. The reason for this is that the evidence may be unreliable because the driver is upset, is not equipped to make a decision as to how to deal with the investigation, has not had legal advice and may be generally not in a state where it's reasonable for him to be questioned. The Police may ask a driver for a first account because they generally don't know how the incident started and want to get an understanding of this.

It is much more common for a full interview to be conducted days or even weeks after the original accident. The Police will often invite a driver to attend at the Police Station for an interview under caution as a volunteer and with an appointment arranged which is convenient to everybody. A driver should certainly get legal advice and may be more comfortable having a solicitor with him at the Police Station.

A driver who genuinely feels they are not at fault for an accident will often be better giving evidence and setting out their positive account.

Even in a case where the Police say there is strong independent evidence that a driver is at least partly at fault for an accident, a driver may be better advised to give an account. Frankness and co-operation can be disarming, and many drivers as a moral approach want to give an account about what has happened.

Particularly if it is clear that there is ample other evidence, the driver may not make things worse for himself overall. Co-operation is viewed by the Police, the Courts and the victims/victims' family (in a case where somebody has been injured or killed) as evidence of remorse for what is, after all, a mistake or sometimes a piece of stupidity.

One question for the driver under investigation and their legal advisor to ask themselves is "by agreement to answer questions, am I likely to make things worse for myself?" Another relevant question may be "by giving the investigators information and facts about what I did, is this information which they cannot obtain any other way?".

The lawyer's job is to advise the driver of his options and of what is at stake. The likely penalty is relevant together with whether there is a risk of disqualification. In a serious accident involving allegations of bad driving, the driver needs to know what is at stake which may include a custodial sentance.

Also relevant will be the question of what other evidence the Police have about the driving which affects the apparent strength of the case against the driver. This may be witness evidence but it may also be forensic evidence as a result of accident investigation including skid marks, the extent of the damage to vehicle evidence from the tachograph or from the electronic black box of the vehicle. Ultimately, the decision as to whether to give an interview or not has to be that of the driver bearing in mind all these matters.

The Police of course investigate criminal offences all the time. They are aware that a commercial vehicle driver involved in an accident has done something simply in the course of his job which is often a mistake, albeit on occasions a very serious mistake with grave consequences. The Police are human and their attitude to the suspect and the investigation will be coloured by the driver's approach to the matter. There are still cases where the driver can improve his own position by "passing the attitude test" in how he deals with the investigation as far as other people involved in the accident are concerned. This will start with the investigators and generally the Police but also the DVSA, ultimately the Courts and the other road users involved in the accident.

There is certainly no "one size fits all" advice in these circumstances. At the investigation stage, the solicitor acts as an intermediary and a buffer between the suspect driver and the Police before they start the interview. He will find out what evidence the Police have, and what offence they feel they are investigating (particularly whether they characterise the driving on the information they have as careless or dangerous).

Astute and cool advice in these circumstances can assist a driver in making the right decisions about how to deal with the investigation and ensure that as far as possible that the driver does himself justice in an interview where there is a lot at stake and in circumstances which are unfamiliar to him.

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The Guide to Maintaining Roadworthiness and Planning Ahead

Operators and drivers of vehicles driven on the road are responsible for ensuring they are maintained in a roadworthy condition at all times. The guide to maintaining roadworthiness is an essential read as it sets out practical advice for operators, drivers and other staff involved in the operation of goods and passenger carrying vehicles. Acting in accordance with the guide will ensure you meet the relevant conditions and undertakings on your licence.

To ensure best practice you need to combine good quality maintenance procedures with effective management systems. The consequences of non-compliance can range from the inconvenient to the very serious. It is therefore essential to keep a good record of all vital dates.

Wall planner

The use of a wall planner is recommended to ensure that important dates, such as safety inspections and annual tests, are not missed. Ideally, planners or charts should be used to set safety inspection dates at least six months in advance and should be updated regularly. An example of a simple wall planner can be found at page 49 of the guide to maintaining roadworthiness.

Safety Inspections

It is up to you to plan your own safety inspection dates, taking into account the age of the vehicle/trailer, expected annual mileage, the conditions under which it is operated and other factors which may increase the risk of the vehicle becoming unroadworthy. Suggested intervals are provided by the TC in annex 4 of the guide. The safety inspection interval you choose when you apply for you licence (usually six-weekly), should not be exceeded without prior written notice to the Traffic Commissioner.

The guide allows some flexibility by recommending that safety inspections are carried out within the relevant International Organisation for Standardisation (ISO) week (i.e. Monday to Sunday).

This means that where a six-weekly interval has been decided and the previous safety inspection was completed on the Monday of week 1 of the ISO calendar, the next safety inspection must be completed on or before the Sunday of week 6 of the ISO calendar; this scenario provides for a maximum permitted safety inspection interval of 48 days.

This should not, however, be misinterpreted as a six-weekly safety inspection interval equating to a 48-day safety inspection interval because, if the previous safety inspection was completed on the Sunday of week 1, the next safety inspection must still be completed on or before the Sunday of week 6; this scenario provides for a maximum permitted safety inspection interval of only 42 days or less.

Brake testing

Brake performance of vehicles and trailers must be tested at every safety inspection. It is strongly advised that a calibrated roller brake tester or Decelerometer is used at each inspection. A printout recording the results of the brake efficiency test should be obtained and attached to the relevant safety inspection record. If the brake test equipment cannot produce a printout, the brake efficiency results should be recorded on the safety inspection record.

Annual test (MOT) dates

Vehicles and trailers are required to be tested every year. Your vehicles should have a thorough and effective pre-MOT inspection to ensure, insofar as it is possible to do so, that they pass upon initial presentation. The pre-MOT inspection should include a roller brake test and headlamp aim test.

Tachograph Calibration

All tachographs used for recording drivers' hours, whether analogue or digital, must be properly installed, calibrated and sealed. Analogue tachographs must be inspected every two years and recalibrated every six years.

Digital tachographs must be calibrated:

- every two years
- after every repair
- if the vehicle registration number changes
- if the internal clock of the tachograph is out by more than twenty minutes
- after an alteration to the circumference of the tyres.

Operators must ensure these requirements are complied with before a vehicle goes into service.

Other important dates

It is important that you carry out checks of your employees' driving licences to ensure they have the correct entitlement to drive your vehicles and to find any endorsements that may be present. Best practice suggests that you should carry out driver licence checks on a quarterly basis. It is also a good idea to record tax and insurance renewal dates on your wall planner.

Evidence of the checks being conducted should be kept.

news briefs

Mutual recognition of driving disqualifications for the UK and Republic of Ireland

The Criminal Justice and Courts Act 2015 (Commencement No.6) Order 2017 is soon to come into force. The Order gives effect to an agreement made between the UK and Ireland on 30 October 2015 on the mutual recognition of driving disqualifications in the UK and Ireland. This means that a driving disqualification imposed by Ireland on a UK resident, or a holder of a UK driving licence, will be recognised and given effect in the UK. It also applies to a driving disqualification imposed by the UK on an Irish resident, or a holder of an Irish driving licence, which will then be notified to the appropriate Irish Authority so that the disqualification may be recognised and given effect in Ireland.

In order for mutual recognition to apply, the disqualification must be for a period of at least six months. It does not currently apply to disqualifications as a result of accumulating penalty points ("totting up") or disqualifications where an appeal is outstanding.

The Order will come into force once each State has notified the other of the completion of its internal procedures to bring the legislation into force and the date of this will be notified in the London, Edinburgh and Belfast Gazettes.

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Preliminary Hearings - Putting you BACK on the Road to Compliance

For most, if not all, of you reading this, the looming spectre of Public Inquiry and the potential business-changing (or even business-ending) consequences associated with it will be all too familiar.

Not all of you, however, will be so familiar with the concept of a Preliminary Hearing… even though Traffic Commissioners held a total of 491 of these in 2015/16!

Advantages of a Preliminary Hearing

- There is no requirement to advertise a Preliminary Hearing.
- A Preliminary Hearing can be listed more quickly than a Public Inquiry.
- The Traffic Commissioner cannot take any action against your Operator's Licence other than issue a formal warning and/or record additional undertakings.
- The worst-case scenario is that you will be called to a Public Inquiry.
- The use of Preliminary Hearings ensures that operators are not called to Public Inquiry unless there is a realistic prospect of regulatory action being taken.
- The use of Preliminary Hearings reduces the pressure on, and free up, the Traffic Commissioners' resources.
- The use of Preliminary Hearings reserves the Public Inquiry arena for the "seriously and serially non-compliant".
- The use of Preliminary Hearings ensures that the most serious cases are dealt with at Public Inquiry sooner.
- The use of Preliminary Hearings enables decisions to be made more quickly.

So, what is a Preliminary Hearing?

The Traffic Commissioners' annual report for 2014/15 confirmed that 92 of the 859 goods vehicle Public Inquiries and 34 of the 252 passenger vehicle Public Inquiries held that year resulted in no action being taken against the Operator's Licence.

Senior Traffic Commissioner, Beverley Bell, reported that this was "of concern" and that the Traffic Commissioners were looking at alternative methods of disposal to divert these types of cases away from Public Inquiry to make best use of tribunal time and ensure that operators are not called to Public Inquiry unless there is a realistic prospect of regulatory action being taken. This approach is designed to achieve the Traffic Commissioners' strategic objective of targeting those operators who pose the greatest road safety and competition risks – the "seriously and serially non-compliant" – who will continue to be called to a full Public Inquiry.

A Preliminary Hearing, described by Joan Aitken, Traffic Commissioner for Scotland, as "another tool in the kitbag of regulation", is the most (and increasingly) frequently used alternative method of disposal. A Preliminary Hearing is NOT a Public Inquiry – it is a shorter, slightly less formal hearing - but it is still a hearing and Simon Evans (Deputy Traffic Commissioner who will replace Beverley Bell as the Traffic Commissioner for the North West of England from May 2017) has confirmed that "it is no less rigorous in examining the root causes of non-compliance and critically how such issues can quickly and effectively be addressed".

It is for the individual Traffic Commissioner to assess each case on its merits and decide what type of regulatory intervention is appropriate; however, Simon Evans has indicated that typical cases that might be dealt with at Preliminary Hearing (as opposed to Public Inquiry) include those matters where "operators need simple encouragement to come back into line, where education is required, straightforward undertakings can be imposed or where financial standing seems likely to be met but there have been difficulties finalising the position". Preliminary Hearings will also be used in borderline cases to enable the Traffic Commissioner to decide whether a Public Inquiry is necessary.

You will still receive a call-up letter, which will provide details and evidence (usually in the form of a DVSA Examiner's report) of the issue(s) that are of concern to the Traffic Commissioner. You will still be expected to attend the hearing and provide the Traffic Commissioner with an explanation of how any issues, shortcomings and failings have occurred and what action has already been taken to put things right…and you will still be expected to produce evidence (which will include maintenance and drivers' daily defect reporting records, evidence of your system for ensuring compliance with the drivers' hours, tachograph and working time rules and evidence of training provided to, and disciplinary action taken against, drivers and transport managers) to demonstrate compliance and provide assurances about the future.

The big difference (and advantage) of a Preliminary Hearing is that the Traffic Commissioner cannot take any action against your Operator's Licence other than issue a formal warning and/or record additional undertakings – the worst-case scenario (if the Traffic Commissioner feels that regulatory action may be necessary) is that you will be called to a Public Inquiry.

This does not, however, mean that you should underestimate the importance of dealing with a Preliminary Hearing correctly. If, at the conclusion of a Preliminary Hearing, the Traffic Commissioner decides to call you to a Public Inquiry, he or she clearly does not feel that a formal warning and/or the recording of additional undertakings on your Operator's Licence will adequately address the issues… the curtailment, suspension or revocation of your Operator's Licence is therefore a very likely outcome at the subsequent Public Inquiry (unless there is considerable improvement by the date of the Public Inquiry).

Your approach to a Preliminary Hearing, as either an operator or transport manager should therefore be no different to your approach to a Public Inquiry. Thorough preparation is key and it is vital that your HOUSE is in order by the date of the hearing – the outcome of the Preliminary Hearing will very much depend on how quickly and how comprehensively you have reacted and responded to the issues that have led to the Preliminary Hearing.

In 2015/16, 491 goods and passenger vehicle cases were called to Preliminary Hearing. A further 76 cases were dealt with by way of a Senior Team Leader interview – another alternative method of disposal, which Simon Evans suggests will be used in cases where "formal intervention is appropriate but the full panoply of neither Preliminary Hearing nor Public Inquiry is justified". In total, 567 cases were therefore diverted away from the Public Inquiry arena.

The Traffic Commissioners' annual report for 2015/16 confirmed that the number of Public Inquiries held that year that resulted in no action being taken against the Operator's Licence reduced (to 77 in goods vehicle cases and 10 in passenger vehicle cases); however, Beverley Bell again confirmed that this is still too high. Richard Turfitt, Traffic Commissioner for the East of England, also recently confirmed that "in about 95% of…preliminary hearings we have received a suitable response from the operator. They act on it and a public inquiry is not required."

It is perhaps therefore safe to assume that the trend towards the increased use of Preliminary Hearings, Senior Team Leader Interviews and other alternative methods of disposal will continue.

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Preliminary Hearings and Senior Team Leader Interviews in 2015/16

	Preliminary Hearings	Senior Team Leader Interviews	Total
East of England	60	3	63
North East of England	63	3	66
North West of England	130	31	161
London and the South East of England	114	13	127
West Midlands	7	11	18
West of England	63	10	73
Wales	2	3	5
Scotland	52	2	54
Total	491	76	567

GUEST FEATURE

The Hidden Risk in Shipping Dangerous Goods to the United States

Shippers, carriers, and logistics companies are well aware that governments around the world closely regulate the commercial transportation of dangerous goods ("DG").

UN standards emerging from these state-specific regimes have facilitated the international transportation of DG, helping transportation firms avoid a patchwork of potentially conflicting state regulations. Yet despite the widespread adoption of these international standards, some jurisdictions, like the United States, complicate the matter by imposing additional requirements that "sit on top of" the international standards.

For example, a UK-based shipper offering a package containing DG for air transportation to a location in the United States must comply not only with the ICAO Technical Instructions but also with a set of U.S.-specific "supplemental" rules applicable to that mode of transportation. This article describes the structure of the DG regulatory regime in the United States, identifies "tripwires" for UK-based shippers, carriers, and logistics companies that rely on international standards, and summarizes the consequences for companies that run afoul of those regulations.

The Transportation of DG in the United States

The transportation of DG in the United States, where such commodities are also known as "hazardous materials," is regulated at the federal level by the U.S. Department of Transportation ("U.S. DOT"). The U.S. Hazardous Materials Regulations ("HMRs") set forth an exhaustive classification system for DG—there are 9 different "classes" and several more "subclasses," with Class 1 (explosives) being the most dangerous and Class 9 (miscellaneous) being the least. These classes are in addition to those materials deemed "forbidden" for certain modes of transportation, and those that do not fall in classes but are nonetheless regulated ("other regulated material" or "ORM-D"). The HMRs prescribe detailed shipment-preparation requirements to ensure the safe transportation of DG regardless of the mode. These include packaging, marking, labeling, placarding, and shipping-paper requirements. Apart from these general regulations, the HMRs also impose mode-specific requirements for transportation by rail, aircraft, vessel and truck.

Given the pervasive scope of the HMRs, any business that prepares, offers, accepts, or transports shipments containing DG in commerce must administer training to its workers covering at least four topics: general-awareness, function-specific (based on what functions the worker performs), safety, and security-awareness. Generally speaking, the U.S. DOT does not prescribe the content of the training that must be administered, leaving it to businesses to identify the functions performed by the worker at issue and ensure that he or she is appropriately trained. Any violation of the HMRs, including failure to appropriately train any given worker, can result in the imposition of a civil penalty of up to $77,114 USD per occurrence (subject to inflation-based adjustments).

Responsibility for enforcement is allocated across different federal agencies:

U.S. Federal Agency	Mode
Pipeline and Hazardous Materials Safety Administration	Pipeline
Federal Motor Carrier Safety Administration	Surface
Federal Railroad Administration	Railroad
Federal Aviation Administration	Air
U.S. Coast Guard	Ocean

For international shipments transiting the United States, the U.S. DOT allows companies to comply with international standards *in lieu* of the HMRs. As one example, an air carrier transporting DG can elect to comply with the ICAO Technical Instructions instead of the HMRs. However, as noted, such "alternative compliance" is complicated by the fact that the U.S. DOT requires compliance with *supplemental* regulations if a company elects to comply with international standards.

The Supplemental Regulations

The supplemental regulations can be divided into two categories: those applicable whenever international standards are used, regardless of the mode of transportation, and those that are mode-specific. The general supplemental regulations make clear that commodities not classified as DG (or those exempt in certain quantities) under international standards must nonetheless be transported in compliance with the HMRs if the HMRs do not have parallel treatment of the commodity. Conversely, any commodities not regulated as DG under the HMRs that are regulated under international standards must be transported in compliance with international standards. In other words, under U.S. law, it is likely that the most stringent set of regulations will apply, regardless of the mode at issue.

There are also mode-specific supplemental regulations. This is not the proper venue for an in-depth discussion of those regulations, but they can sneak up on unsuspecting businesses. For example, with respect to air transportation, the HMRs feature a special provision, not found in the ICAO Technical Instructions, requiring use of a metal receptacle as an intermediate packaging for certain materials. In addition, there are supplemental regulations for air transportation applicable to shipments of lithium metal batteries.

To help businesses navigate these tripwires, the ICAO Technical Instructions identify many of the supplemental regulations in a listing of "State Variations". Plus, over the last few years, the U.S. DOT has been working to bring the HMRs into closer alignment with international standards. That said, the goal of complete "harmonization" remains elusive. For example, U.S. DOT amended the HMRs to incorporate the latest version of the ICOA Technical Instructions in late March of 2017, but this was three months *after* they went into effect in other jurisdictions, creating significant confusion in the interim.

Consequences

The U.S. DOT has jurisdiction to assess civil penalties for violation of the HMRs when foreign-based businesses ship DG into (or through) the United States. Those penalties can be significant. For example, a review of press releases from the FAA shows that the agency regularly proposes large civil penalties against foreign shippers of DG into the United States, including those based in Europe (in one case over $162,000 USD). In another recent case, the FAA proposed a $72,000 USD penalty against a South Korea-based shipper for failing to comply with the HMRs when it offered a shipment for air transport to Canada. Even though the shipment did not have a U.S.-based origin or destination, the shipper was subject to the FAA's jurisdiction because the shipment was sorted at a facility in the United States. UK-based shippers, carriers, and logistics companies should consider the potential applicability of the HMRs in structuring their international-shipping operations, not only to ensure compliance with U.S. law but also to prepare for the defense of enforcement actions when innocent mistakes in the transportation of DG shipments inevitably occur.

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Be Aware of Hidden Agency Fees when Recruiting Temporary Drivers!

Employing temporary drivers through employment agencies is something all companies operating in the transport industry must do, especially given the shortage of drivers within the industry.

Something that is occurring more frequently is the scenario where companies are entering into contracts with more than one recruitment agency for the supply of temporary drivers. This is understandable and indeed imperative for companies to operate, after all vehicles are not going to drive themselves. However, what is occurring more frequently is where the same driver is being supplied to companies, often for a few days or weeks work, by different agencies at different times. It may not immediately occur to you that this is an issue, but in order to know whether it is or not, it is strongly advised that you read the terms and conditions of any recruitment agency you are contracted to.

Generally, a recruitment agency will have a clause preventing a driver who has been supplied by them being reengaged either permanently or temporarily with the company without their consent. This restriction generally comes with a time limit, usually 6 months. If the driver is reengaged through either direct employment or another agency a lot of recruitment agencies are seeking to enforce this term and impose a fine, which is often thousands of pounds.

It is arguable that the intention of this term is to prevent a company offering full time employment to a temporary driver in a bid to avoid high agency fees, and furthermore enforcement of this term is oppressive and an unfair term of the contract. However, this is a grey area as there is no leading case law on this point so if a company finds itself on the receiving end of a claim of this nature it has to defend itself, or pay the fees - either way this is an expense any business can do without.

In order to avoid this scenario, it is recommended that you take the following steps as a preventative measure:

Be in the driver's seat

1. As with any commercial arrangement it is important to review the contract/ terms and conditions before entering into the agreement. Prior to entering into a contract with a recruitment agent you should seek clarification on this particular term (and any others that you may have issue with) and get them to agree, in writing, that this term only applies to your direct employment of drivers within the specified period, on a permanent basis. Pre-contract discussions are when your business has the bargaining power to ensure the terms are favourable, they want your business so it is best to raise this point before you sign on the dotted line.
2. Review the terms and conditions of any existing Contracts and if any of them have a term of this nature, ask the recruitment agencies to confirm, in writing, that it only applies to drivers directly taken on, on a permanent basis.

   If they will not agree to this, consider whether you need to keep a business relationship with that agency, the recruitment market is competitive and overpopulated and recruitment agencies need to be competitive in both the price and service offered.

Be proactive rather than reactive

3. If you find your business in a situation where a driver is sent by a recruitment agency who has been previously sent by another recruitment agency within the past 6-12 months, review the terms and conditions of the contracts for both recruitment agencies. Potentially there will be a clause which requires you to notify the second agency about the initial period of employment (with the other agency). Where notification is made to the second agency they will most likely contact the other agency to make sure that they preserve their position on fees. Potentially this could extinguish a potential claim against your business. However, this is by no means guaranteed and it is advisable for you to hold the fee until it is agreed which agency it should be paid to and get this agreement in writing from both recruitment agencies.
4. In reality, we appreciate it is difficult to keep a track of which drivers have been sent and by which recruitment agencies, but if at all possible have a system in place so you are able to input a temporary driver's details into a database which will confirm if they have been referred to you before, and if they have when and by which recruitment agency. This will help you identify if this issue may occur, and if you need to take any of the above steps.

If all else fails, and you do find yourself on the receiving end of a letter from a recruitment agency demanding fees, a strongly worded letter rebutting the claim may be enough to make them drop the claim but this cannot be guaranteed.

If in doubt or unsure of any of the above, seek legal guidance on the options available to you.

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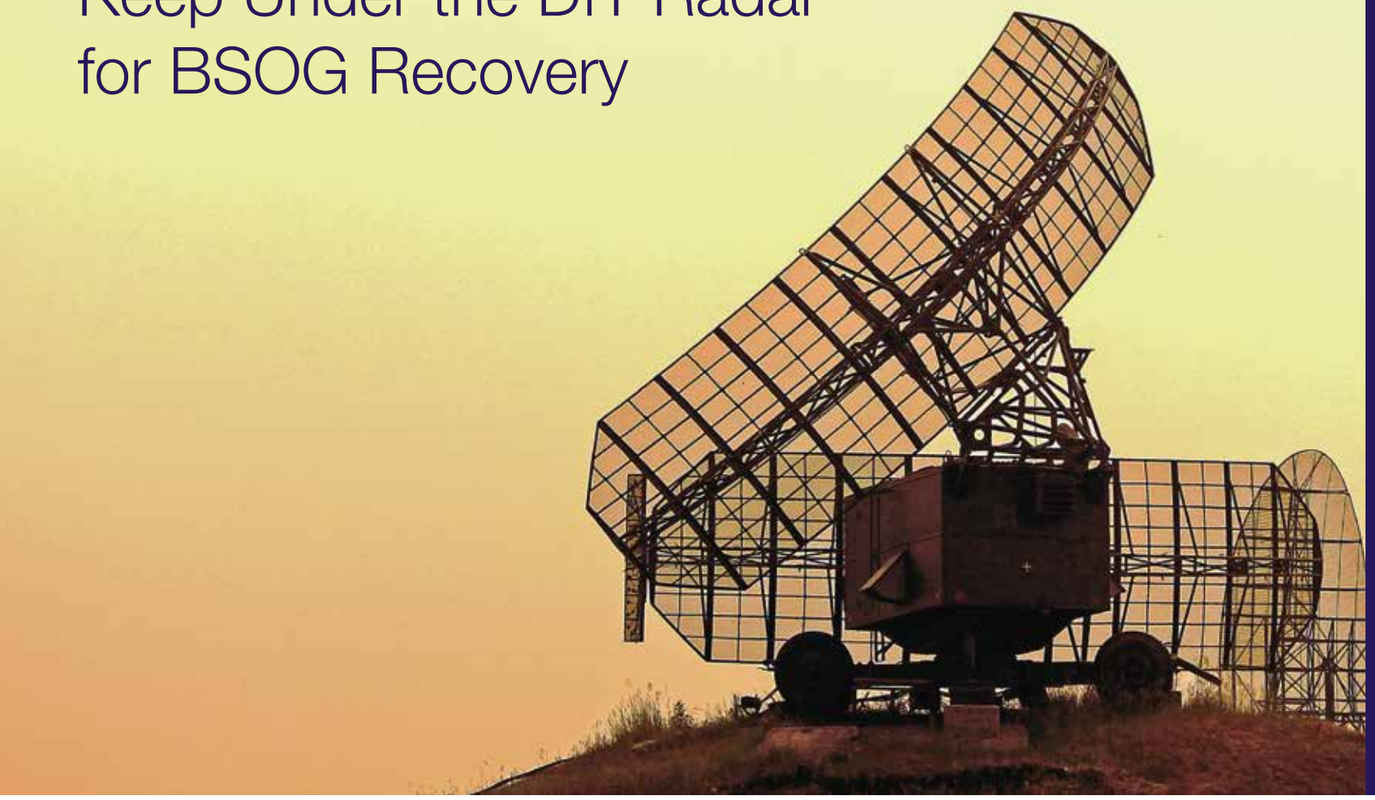
Keep Under the DfT Radar for BSOG Recovery



The Bus Service Operators Grant ("BSOG") is a grant paid to operators of eligible bus services to assist in recovering fuel costs and is based on the operator's annual fuel consumption.

In September 2015 the Department for Transport ("DfT") sent a standard letter out to many operators who serve schools and other establishments, such as commuter services, to say it has come to the attention of the DfT that a number of operators have been mistakenly claiming BSOG for services which the DfT consider to be closed to members of the public.

This led to a high number of investigations by DfT into services run by operators, and has resulted in many operators being advised by DfT that they are no longer eligible for the BSOG grant and have to repay the grant received, in some cases going back up to 6 years.

The reality for many operators is that if the BSOG grant is stopped and the operator has to repay the grant monies received, the business is no longer viable.

It is often the case that the reasoning for the DfT making the decision is based on a limited investigation into the operator, where something as simple as inaccurate fare rates being on the operators website has led to the DfT making the decision.

If the DfT decide to make this decision it can be challenged, however this can take a number of months, incur legal fees and during this time, the grant is suspended so, for some operators, can have a major impact on cash flow and the sustainability of the business during that time.

As a starting point it is recommended that you review the "conditions of eligibility "which are annexed to the claim form for the BSOG grant to ensure the services still meet the requirements for claiming the grant.

The following checklist may also be useful in ensuring the DfT do not come knocking at your door:

1. Submit the claim for the grant on time, something as small as this being late has led to operators being investigated.

2. Keep an accurate record of waybills and make sure they evidence fares paid by members of the public and if there are any discrepancies, such as an irregular sum paid for a fare, have an explanation for this.

3. Ensure your website is up-to-date and makes it clear that services (if applicable) are open to the public as well as the school/commuters, and provides details of times of the services, and the stopping places.

4. Review the relevant website which displays details of open services, such as Travelline, and ensure that details of your services are advertised (if relevant).

5. Make sure that fare rates provided on your website are accurate and up-to-date.

6. Double check drivers are aware that the services are open to the public as well as the school/commuters.

7. Ensure that the services do not have any signs which give the impression they are closed, if in doubt a sign simply saying "also open to the public" will prevent this.

If you are too late and you receive the dreaded letter from BSOG, a factual letter providing evidence to counteract their assertions that the services are closed may be enough to resolve the dispute but take care when drafting the response and ensure you cooperate with DfT to reach a resolution.

If in doubt or unsure of any of the above, seek legal guidance on the options available to you.

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Review of the Introduction of Employment Tribunal Fees

The Government has now published its "Review of the introduction of fees in the Employment Tribunal".

Currently, any employee wishing to bring a claim against its employer or former employer will be expected to pay fees to the Employment Tribunal, subject to a remission scheme.

The fees currently, depending on the class of claim brought, are broadly:

- Issue fee £160 (type A claims) and £250 (type B claims)

- Hearing fee £230 (type A claims) and £950 (type b claims)

The majority of claims, such as unfair dismissal, discrimination will fall in the type B category.

The Government has found that "the original objectives [of the fee system] have broadly been met" and that "while there is clear evidence that ET fees have discouraged people from bringing claims, there is no conclusive evidence that they have been prevented from doing so".

However, "the review highlights some matters of concern that cannot be ignored" and "the Government has decided to take action to address these concerns."

The Government has prepared a consultation document (which closed on 14 March 2017) which sets out a proposal for widening access to the fee remission scheme by raising the income level at which claimants can receive fee remission.

All Claimant's now need to go through ACAS Early Conciliation before they are able to lodge their claims and the fees kick in. It is thought that a number of claims are being resolved without the need to issue proceedings, although it is accepted that between 3,000 and 8,000 people did not resolve their dispute through ACAS but did not then bring a claim however it is unknown whether this is genuinely because they couldn't afford the fees, or perhaps were not aware of the fee remission scheme.

Government intends to raise awareness of the fee remission scheme and to make it simpler to apply.

The new gross monthly income threshold for a single person with no children would be £1,250, which roughly corresponds to the income of a person on the NLW working 40 hours per week. There would be corresponding increases in the income level for those with children and couples.

The judicial review challenge to the fees regime brought by the trade union UNISON, which was rejected by the High Court and the Court of Appeal is was due to be heard by the Supreme Court on 27 and 28 March 2017.

GUEST FEATURE

Health and Safety: Not just another cross to bear, but good business sense!

In addition to the widely known legal and moral obligations, which employers have relating to health and safety, have you ever thought of the business benefits of adopting and following a comprehensive and cohesive health and safety policy for your business? After all, in most businesses, the staff are the main asset, so what could be more important than keeping them safe?

A serious workplace injury or death changes lives forever – for families, friends, communities, and co-workers alike. Human loss and suffering is immeasurable.

Occupational injuries and illnesses can provoke major crises for the families in which they occur. The tragic after effects of an accident cannot be overestimated.

In addition to the immeasurable emotional trauma, there is the cost. In 2013 / 14 the Health and Safety Executive estimated the cost of injuries and ill health in the workplace to be £14.3 billion and in 2015 / 16 there were 144 workplace fatalities.

Finally, there is also the good business sense which good health and safety at work brings. Good health and safety at work often means a happy workforce which in turn can lead to:

- A reduction in the number of working days lost due to illness and injury.
- Staff retention.
- Motivated workers, thereby boosting productivity.
- A better reputation for your business.
- Less chance of legal action.
- Potentially lower insurance premiums.

Taking care of your staff makes them more inclined to look after your business's interests. They will feel safer, more confident and valued. It makes good business sense to get equipped with the knowledge and skills to improve safety at work.

The Health and Safety Executive advocate a system of Plan, Do, Check, Act. This means planning and applying good basic safety management incorporating monitoring and safety audit reviews.

Following this guidance and advice will go a long way to ensure good and effective well applied safety compliance standards for your business and will assist in the avoidance of incidents and accidents with the potential for criminal or civil litigation.

If you would like to talk this through with someone with experience outside the business, Rawlings Safety & Training Consultancy Services Ltd are Backhouse Jones' Health & Safety Consultancy partner and able to do this with you.

They offer a Health and Safety support service which covers a range of operators from those who have excellent health and safety systems but want to update; to those who have little or none and don't know where to start. This includes a full health and safety compliance audit on your premises, with a comprehensive compliance safety audit report and action plan. An extensive Safety Management System, 24/7 telephone support service and monthly update e-newsletters are also available.

Please feel free to call us and have a chat. The importance of health and safety management compliance for any business cannot be underestimated.

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RCS Rawlings Safety & Training Consultancy Services Limited

BACK to Business

Backhouse Jones are pleased to announce the arrival of Brett Cooper, who joins to head up the firm's Corporate and Commercial team.

Brett's many years of experience in commercial, corporate, property and construction law means his expertise is wide-ranging. He advises on commercial contracts, mergers and acquisitions, business re-organisations and shareholder arrangements on the commercial and corporate side and leases, site development and site acquisition on the property and construction side.

He has an in-depth understanding of how the road regulatory regime has an impact on these types of work, which is key for businesses which have transport at the heart of them.

Having also been involved in his own family business, Brett has first-hand experience of what it is like to be at the coal face. From this, Brett has developed a down-to-earth and empathetic approach, whilst also retaining a commercial outlook.

Are you concerned about one of your trading contracts? Is your lease about to expire or rent due to be reviewed? Is someone using your land to informally park their vehicle? Need to chat through a potential acquisition or disposal but not sure where to go? We have got your BACK.

Why not give Brett a call on a no-obligation basis and have a chat on 01254 828300 or email him at brett.cooper@backhouses.co.uk.

Shareholders Agreement – Critical or Not?

All unions, like all empires, have their day. Britain's global empire has gone, to be replaced by a commonwealth. The disintegration of England's island union began when Ireland departed a century ago. The Scottish may or may not be progressing in the same direction.

All business partnerships start out with good intentions. Each of them will vary in form, but they will all have one thing in common – the ability to go horribly wrong. In newly formed companies, optimism is high and everyone is getting on. As a result, shareholders often do not see the need for such an agreement, especially when money may be tight. They consider it to be an unnecessary expense and rely on the closeness of the relationship that they have with their business partner to solve any future issues. Many people also find it embarrassing at the start to discuss contentious worst case scenarios.

However disputes between shareholders do arise, for many different reasons and cannot always be ended simply and amicably. Such disputes can be extremely disruptive to a business and in circumstances where there is a deadlock can result in bringing the business to a complete standstill through the inability to make decisions. Anticipating such issues at an early stage can save significant time and money when they ultimately occur in the future.

Shareholders agreements are critical because they provide a method for:

- Resolving shareholder disputes. By providing a structure for parties to work within, not only can disputes be resolved quickly and effectively, but conflict can often be prevented before it begins;

- Preventing the personal circumstances of a shareholder affecting the company or the other shareholders. In many companies the individual shareholders are critical to the business. If such an individual were to die, then his or her family members could become your fellow shareholder, even though they may not know much about the business or have any interest in it. Worst still, your fellow shareholder could leave his or her shares to a third party that you don't like! In such circumstances relationships are likely to deteriorate which will ultimately have an adverse effect on your business. Furthermore if a shareholder gets divorced, then their former spouse may turn up at board meetings and cause problems out of spite. A shareholders agreement can prevent this by providing a buyout option - you can even arrange insurance to pay for the buyout, preventing such an event from impacting upon the cashflow of the business.

- Preventing you from being in business with someone who you have not approved, without any say whatsoever. Without a shareholders agreement in place, your business partners are free to sell their shares to any third party without the need to consult you, at whatever price they want. A shareholders agreement can give you the right of first refusal over your business partners shares, together with a mechanism to review the price if you believe the price which the third party are wanting to pay is too high, so that you will never pay more than the fair market value. Alternatively, if you are quite happy with the price your business partner has negotiated for their shares, you can block the sale unless the buyer agrees to purchase your shares at the same price, allowing you to exit the business also;

- Dealing with critical illness. If your business partner was to suffer with a critical or mental illness such as a heart attack, stroke or nervous breakdown, then you may find yourself in a vulnerable position. You may be willing to fill in for your business partner, but for how long and what happens if it becomes a long term issue? Are you willing to carry out all of the work for only part of the profits? A properly drafted shareholders agreement can prevent this by providing a buyout option and, like with death of a shareholder, you can arrange insurance to finance the buyout, preventing such an event from impacting upon the cashflow of the business.

- Defining the powers of the shareholders and creating procedures and limits within which the company can operate. Without some form of agreement in place shareholders are able to enter into contracts and other commitments on behalf of the company without any proper consideration of the effects that they may have, or without consultation with you, which could spell disaster for the company and the other shareholders.

- Incorporating suitable protections to ensure that directors/shareholders do not set up in competition, entice away key employees and unfairly use the company's confidential information.

If you are currently a shareholder of a company and do not have an agreement in place between you and your fellow business partners, we would recommend that you discuss your situation with us. It does help to identify possible issues and problems before they arise, and before business relationships become strained in the event of a conflict. The same applies for a partnership arrangement.

Remember to think about the future of your business. Don't leave it to chance!

Brief Encounter

Brett Cooper

Ian Jones gets to know our newest recruit, Brett Cooper. Brett joins BHJ as Head of Corporate and gives readers an insight into what makes him tick.

What is the first news/historical event you can recall?

I have vague memories of the Hillsborough disaster but the first vivid memories I have are the death of Princess Diana. I am the same age as Prince William so I remember thinking how awful I would feel if my mother died as a 16 year old boy.

What is the book you most wish you'd written?

I am going to throw a curveball here and answer what is the film I most wish I'd directed - and that perhaps gives you more of an indication of me. The film I most wish I had directed would be Heat by Michael Mann - most notably for the restaurant scene between Robert De Niro and Al Pacino, their first scene acting opposite on another - hard to believe people had to wait until 1995 for that.

One bit of advice you'd give your younger self?

No matter how confident you think other people are, and no matter how nervous you might feel, you will soon come to realise that everyone else is just winging it!

What is your favourite saying or quotation?

By failing to prepare, you are preparing to fail - Benjamin Franklin

Where do you want to be buried/have your ashes scattered?

I have never once given this consideration, and I suppose the obvious reason being that at the time I will not really be bothered. I do know that I would prefer to be cremated so feel free therefore to scatter my ashes anywhere.

If you were given £1m to spend on other people, what would you spend it on and why?

I would use some of it to pay of the mortgages of close family so they have some security for the future and the rest I would donate to a number of smaller cancer and animal welfare charities, as they all do sterling work and quite often miss out on large donations.

The talent you wish you had?

I have always wanted to be in a band but sadly I could never quite grasp playing the guitar well enough. If I had the time I would love to take up the drums.

The best and worst present you've ever received

The best: My dad's much coveted Tag Heuer when I qualified as a solicitor The worst: Again from my dad, a hideous fancy dress costume for my stag weekend which I had to wear the entire time - I am not going to reveal what it was!

What have you changed your mind about?

Everything.

What is the biggest problem of all?

The overuse of the earth's finite resources - as a graduate in Biology this is something I am acutely aware of, especially with a growing population it will only exacerbate all other global issues such as war, famine and poverty. Advances in renewable energy, electric vehicles and other technologies are a good way of redressing some of this balance, but I fear more needs to be done.

Are things getting better or worse?

I hope better, but I fear worse.

How do you keep the flame of hope for a better world burning brightly in dark times?

Try to do something positive every day, and influence one other person to do the same.

Self Employed….Or Not?

The hot topic at present for both employment and tax purposes is the status of your driver and in particular the 'self-employed'. Just because someone classes themselves as self-employed, does not always mean that they are in fact self-employed.

Establishing the employment status of an individual is important for; -

1. tax law purposes in order that the individual is paid properly, i.e. through PAYE or not as the case may be; and

2. employment law purposes in order that the employment rights of the individual and obligations of the Company are properly identified.

Further, and rather confusingly, an individual may be found by an Employment Tribunal to be an employee for the purposes of establishing employment rights BUT still be classed as self-employed by HMRC for tax purposes.

Therefore, just because you think a driver is self-employed, with no employment rights, this may not turn out to be the case if they subsequently challenge this by bringing a claim in the Employment Tribunal. An Operator can find itself liable in the Employment Tribunal, even if HMRC finds that an individual is self-employed and therefore we deal with both the tax and the employment law aspects of self-employment too.

There have been numerous cases in the Courts recently regarding self-employed status.

January 2017 saw the Employment Tribunal consider the employment status in the case of *Dewhurst v City Sprint UK Ltd.* Ms Dewhurst was a bicycle courier providing services to City Sprint UK Ltd. The terms of the written contract under which she provided these services were such that Ms Dewhurst was a 'contractor' rather than a worker or employee and that City Sprint was not obliged to provide her with any work and she was not obliged to accept it, she could in theory arrange for another person to do any work provided to her and if she did not work, she was not paid.

However, Ms Dewhurst felt that this contract did not reflect the true working relationship on the basis that she had to wear uniform, follow directions and in reality had to work when she was asked to do so. Her view was that she was not a true contractor and on this basis was entitled to those rights afforded to workers under the Employment Rights Act 1996; including the right to National Minimum Wage, the statutory minimum of paid holidays, rest breaks and the right not to be discriminated against.

The Employment Tribunal in this case looked behind the written contract and considered the reality of the working relationship between her and City Sprint, deciding that she was in fact a worker rather than a contractor or self-employed. It is not clear whether City Sprint will appeal this decision.

Driver status from the Tax Tribunal….

The First Tier Tax Tribunal ('FTTT') assessed employment in RS Dhillon and GP Dhillon Partnership v HMRC which is a further example of HMRCs clampdown on self-employed drivers. Dhillon were a partnership providing haulage services to the construction industry. The partnership engaged drivers on an informal self-employed basis with the following arrangements:

- They had no written contracts
- They received induction training and were required to have a certain level of competence but had no further specific supervision by the partnership but interacted with the customer
- They were contacted the evening before a job by telephone
- They could refuse a job and there was no guarantee of any work
- They were paid a fixed amount per day
- In limited circumstances they could provide a substitute
- They used the partnership's vehicles

HMRC assessed that the drivers were employees of the partnership. The partnership argued that they were contractors.

- The FTTT concluded that the drivers were employees during each individual contract.

In reaching its decision the FTTT considered a number of factors from guidance in previous case such as Control, Mutuality of Obligation, Substitution, whether the drivers were in business on their own account and provisions of the contract.

The key factors were the degree of control exercised, and the fact that the drivers were not in business on their own account. Whilst they were not controlled by the partnership they were controlled by the customer. In addition there could be no finding that they were in business on their own account. The Partnership provided the vehicles, the main equipment required, and the drivers were paid fixed daily rates and assumed no financial risk.

However, the FTTT stated that the application of a checklist type approach from guidance set out in relevant case law should be avoided as it does not always produce a clear result. They suggested that the better approach is to look at the relationship between the parties as a whole. In this case the reality was that the partnership dictated the terms of the relationship and there was no good evidence that the drivers were running their own businesses.

They concluded that the drivers amounted to day labourers on short term contracts. The FTTT made clear that in borderline cases they would take into account the intentions of the parties which would be confirmed in the contract.

The FTTT in this case were only concerned with the tax status of the employees, however a finding of employment status also has significant implications since employees enjoy a number of rights and protections which the self-employed do not.

The question that the FTTT considered was if the drivers were employees or independent contractors under tax legislation and therefore, the possibility of the drivers being 'workers' was not an option for tax purposes. The FTTT emphasised the need to make "an informed, considered, qualitative appreciation of the whole picture" and ensure to avoid a "check-list" approach to the indicators of employment status.

February 2017 saw another case regarding self-employed status this time in the Court of Appeal case of Pimlico Plumbers & Charlie Mullins v Gary Smith. This case concerned a plumber, Mr Smith, engaged by Pimilico Plumbers ostensibly as an independent contractor, who was responsible for his own tax and NI, supplied his own equipment, provided his own insurance and was personally liable for his own work. Mr Smith was of the view that he was not in a true self-employed relationship but that he was an employee and that Pimlico Plumbers should, as a minimum, pay him holiday pay and make reasonable adjustments to consider his disability.

The basis for this assertion was that Mr smith was obliged to personally provide the services to Pimlico Plumbers and he was not able to transfer work assigned to other operatives.

The Employment Tribunal at first instance decided that Mr Smith was neither self-employed nor an employee but in fact a worker. Pimlico Plumbers appealed to the Employment Appeal Tribunal (EAT). The appeal was dismissed and the EAT agreed that Mr Smith was a worker. Pimlico Plumbers appealed the ruling to the Court of Appeal (CA) and the judgment was released earlier this month.

The CA dismissed the further appeal of Pimlico Plumbers, deciding again that Mr Smith was a worker and entitled to those rights afforded to workers, including holiday pay. When handing down the judgment, the judges stated that, as with every case, it was very fact sensitive, and also offered the opinion that this case was not entirely straightforward. A key quote from the judgment was the comment that the case "puts a spotlight on a business model under which operatives are intended to appear to clients of the business as working for the business, but at the same time the business itself seeks to maintain that... there is a legal relationship of... independent contractor rather than employer and employee or worker."

Given that this decision has been made at such a high level it will be binding on future cases coming before of the Employment Tribunal.

Comment….

Although these cases all turned on their own facts, they all demonstrate a reluctance of the Courts, as well as the HMRC, to agree, when challenged, that individual contractors are providing services on a self-employed basis.

One main difficulty for transport operators is how to understand the difference between a true contractor and a worker or employee. The current lack of legal clarity on this issue is a real difficulty but in general terms, (1) HMRC has previously indicated that owner-drivers are more likely to be self-employed and (2) the Employment Tribunal has indicated that, to be given effect, the contractual documents must reflect the reality of a contractor's relationship with a business. In short, the actual way in which the relationship works will be examined and not just the paperwork which purports to set out the framework of that relationship.

As such, not only is drafting of the contracts of key importance, but businesses should properly examine the way in which services will be provided in practice to ensure that this is mirrored in the contract and that the relationship functions in the way it was intended.

Case law concerning Drivers in particular suggests the main factors that determine the driver's employment status are as follows:

- If an agreement exists to provide the driver's own work or skill in the performance of service for the Operator and in addition there is mutuality of obligation to supply and accept work then this suggests the driver is an employee

- If there is control of the Operator over the driver i.e. controls what, how, where and when work is done then this suggests the driver is an employee

- If the driver is able to substitute himself with an alternative driver, this would suggest he is self-employed. If he must provide services himself, this indicates he is employed.

Further case law has looked at whether a person is "in business on his own account" which is another test as to whether an individual is genuinely self-employed. The following elements might help point towards self employed status:

- supplies own equipment (HGVs etc)

- can hire helpers, subcontract work out or seek outside assistance (additional drivers)

- takes a degree of Financial risk

- has a degree of responsibility for investment and management

- has an opportunity for profiting from sound management

    - i.e. quotes on a job-by-job basis. can make more profit by more efficient working, or may incur loss if doesn't run on time for example, or if required to rectify defects/errors in own time.

Operators can use these bullet points when reviewing current and incoming individuals' employment status. In March 2017 HMRC published a new online employment status tool which is useful for employers to use and can be found at www.gov.uk/guidance/check-employment-status-for-tax.

It is essential for Operators to establish the employment status of all individuals providing services purportedly on a self-employed basis, not only for tax purposes but to ensure that they are fully aware of potential liabilities in employment law terms.

If you require advice on true self-employment, please do not hesitate to contact the Employment Team at Backhouse Jones.

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Type 2 Diabetes can be Considered a Disability

The Employment Appeal Tribunal ('EAT') in *Taylor v Ladbrokes Betting & Gaming Ltd* held that a former employee who had been diagnosed with type 2 diabetes, could be deemed disabled under the Equality Act 2010 (EqA 2010).

Under the EqA 2010, a person has a disability if they have a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.

Mr Taylor suffered from type 2 diabetes and was dismissed by Ladbrokes Betting and Gaming Ltd in November 2013. He brought claims of unfair dismissal and disability discrimination. The first question for the Employment Tribunal ('ET') to determine at a Preliminary Hearing was whether Mr Taylor's condition amounted to a disability in accordance with the legal definition. The ET decided that he did not.

Written medical evidence was provided by a Consultant with a special interest in diabetes and the ET found that Mr Taylor's diabetes was controlled by medication. The ET also found that the principal purpose of the medication was to prevent type 2 diabetes "from progressing to the serious and debilitating condition of type 1 diabetes".

Finally, they also concluded that the condition could be easily controlled through lifestyle, diet and exercise, although it was thought that Mr Taylor had not taken basic steps in this regard which might reasonably have been expected of him.

When considering the progressive nature of the condition, the ET took the view that there was only a small possibility of the condition progressing, particularly if Mr Taylor followed the advice about lifestyle, diet and exercise. As such, it determined that a progressive condition was not established and concluded that his condition did not fall within the definition of the EqA 2010 and as such they could not make a finding that Mr Taylor was a disabled person.

Mr Taylor appealed on the following grounds:

- The ET had misinterpreted the EqA 2010 Guidance regarding progressive conditions.
- The conclusion that there was only a "small possibility" of progression was not supported by medical evidence.
- The effect of lifestyle choices such as diet and exercise should have been disregarded under the EqA 2010 Guidance.
- There was inadequate evidence to support the conclusion that in the absence of medication, Mr Taylor's condition would not suffer any deterioration.

The EAT allowed the appeal and referred the case back to the ET on the basis that the EqA 2010 Guidance exists to ensure that an employee whose condition is progressive and which may, in future, have a substantial adverse effect on their day to day activities as a result of the deterioration of their condition, is to be deemed as suffering from a disability before they have got to that stage.

This decision demonstrates the importance of the factors which need to be considered when conceding or not as the case may be, disability. It is important to consider the likely effect of the condition in the future, rather than only at the point in time when you are determining the discrimination claim.

Therefore, the more background information that is available regarding an employee's lifestyle and how they go about maintaining the condition, will be key in determining questions such as this.

It is important to ask the right questions of medical experts when referrals to Occupational Health or the employees own GP are being made during employment, which can then be referenced as part of the medical evidence considered at the ET if required.

In this case, the failure of the expert to properly consider the future prognosis meant that the issue of disability was left uncertain. Having a better understanding of a condition from an earlier stage may not be as costly when facing a discrimination claim as the understanding of a condition and prognosis is understood by all parties.

Finally, it should not be assumed that sufferers of type 2 diabetes will automatically be protected from disability discrimination under the EqA 2010. As with each case, it will be fact specific but something which should certainly be considered in detail when dealing with such cases.

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Holiday Pay – Some Clarity, but in Whose Favour?

You may recall that in previous editions we have reported on the case of Lock v British Gas Trading Ltd which dealt with the issue of whether holiday pay should include commission. In October last year, the Court of Appeal upheld the Employment Appeal Tribunal's decision that the Working Time Regulations 1998 could be interpreted in accordance with the requirements of EU law to ensure that contractual results-based commission be taken into account for the purposes of calculating holiday pay, for 4 of the 5.6 weeks statutory entitlement.

Supreme Court Decision

British Gas sought leave to appeal the decision to the Supreme Court however this month, the Supreme Court refused permission. This essentially means that we have a settled decision which confirms that in principle commission should be included in the calculation of holiday pay. Of course, we already have a binding decision from the case of Bear Scotland that guaranteed and non-guaranteed overtime should be taken into account in calculations of holiday pay.

The issue of whether Mr Lock was underpaid and by how much will now revert back to the Employment Tribunal for determination. The ET is set to deal with this issue this month. It is hoped that some clarity will therefore be provided as to the appropriate reference period and how to calculate holiday pay for those earning commission.

What about Voluntary Overtime?

There is still some ambiguity in respect of truly voluntary overtime which is overtime that workers are not contractually obligated to perform. The position on whether this should be included in the calculation of holiday pay remains unclear as there is not to date any binding court decision.

At this time therefore we can only be guided by the cases that have gone before the Employment Tribunal, all of which to date have indicated that there is no reason why voluntary overtime should not also be included. Whilst the decisions are not binding, they are persuasive on future cases. Therefore, while we cannot say with 100% certainty that voluntarily overtime should be included in the holiday pay calculation, the trend is certainly leaning towards this being so. If an employee's 'normal remuneration' includes an element of voluntary overtime on a regular basis this should be reflected in the payments received when they take holiday.

Comment

"Normal remuneration" is a key consideration for employers when determining whether to include voluntary overtime in your calculations of overtime.

If your employees have a realistic expectation that they will do overtime every week or month and in fact do that overtime, then you should give serious consideration to including it. The key is to look at the regularity. At this stage the advice is that it should only apply to the 4 weeks' statutory leave under the Working Time Directive and not the additional 1.6 weeks under UK Law. However, it is probable that may be subject to challenge at a later stage.

The effect of Brexit will mean that the government will technically be able to change the law so that it does not comply with EU requirements. However, the indication from the Prime Minister is that workers' rights will not be diminished and as such, this being such a hot topic alongside Brexit, it is unlikely that this position will change.

If you are in any doubt as to your obligations for pay in relation to holidays, please speak to a member of the Employment Team for further advice.

Does a Mobility Clause Always Allow an Employer to Move the Workforce?

No said the Employment Appeal Tribunal (EAT) in the recent case of Kellogg Brown & Root (UK) Ltd v (1) Fitton and (2) Ewer.

This case involved an employer (Kellogg) with several offices, one of which was closing. Kellogg sought to move employees from the office which was closing to another of the Company's offices. The employees all had mobility clauses in their contracts of employment. Furthermore, Kellogg proposed that for six months after the move, employees would receive compensation and a reduction in core hours for those having to travel on the M25 as part of their commute to the different office.

Some employees who could not commit to the additional commuting time due to caring or other responsibilities were made redundant by Kellogg. However, Mr Fitton and Mr Ewer were instructed to comply with the instruction to move offices in accordance with the mobility clause in their employment contracts and were not offered redundancy.

Mr Fitton had been employed by Kellogg for 11 years and objected to the move on the basis that he did not own a car and it would take him two hours to commute to the new location using public transport. Mr Ewer had been employed for 25 years and was approaching retirement; he objected to increasing his commute from 18 miles to 47 miles each way on the basis that this would increase his stress levels at a time in his life when he would like to decrease them.

Both employees were dismissed when they refused to move.

The Employment Tribunal at first instance decided that both employees had been unfairly dismissed and that the real reason for dismissal was redundancy.

On appeal, the EAT overturned the decision that the real reason for dismissal was redundancy and decided that the reason for dismissal was in fact failure to follow a reasonable instruction. However, the decision of the Employment Tribunal that both dismissals were unfair was upheld.

The EAT went on to state that there was no valid contractual clause obliging Mr Fitton and Mr Ewer to relocate; the clause was simply too vague. Furthermore, the EAT decided that, in this case, the instruction to transfer their employment to a location which was so much more difficult for them to travel to was unreasonable in all the circumstances.

This case serves as a stark warning to employers seeking to rely on imprecise and uncertain mobility clauses in their contracts of employment. When signing contracts of employment, employees should have full knowledge of where they may be required to work in the future. If a mobility clause is not specific, it runs the risk of being unenforceable.

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April 2017 Rate Changes

1 April 2017

National Minimum Wage and National Living Wage.

Historically, the National Minimum wage rates have increased in October every year. However, they increased in April 2016 when the national living wage was brought in, to £7.20 per hour. National Minimum Wage did not increase again in October 2016 but remained at £7.20.

The rates have now been aligned and will now subsequently rise in April of each year.

On **1 April 2017** the rates increased as follows:

- Workers over 25 - increased to £7.50 (previously £7.20)
- Workers aged 21 to 24 - increased to £7.05 (previously £6.95)
- Workers aged 18 to 20 - increased to £5.60 (previously £5.50)
- Workers aged 16 to 17 - increased to £4.05 (previously £4.00)
- Apprentice rates increased to £3.50 (previously £3.40)

2 April 2017

Statutory Maternity, Paternity, Adoption and Shared Parental Leave rates have increased to: £140.98 (previously £139.58)

6 April 2017

Statutory Sick Pay has increased to £89.45 (previously £88.45)

Apprentice Levy: Employers with an annual payroll of more than £3 million will be required to pay a 0.5% levy on their total pay bill starting on 6 April 2017.

New Compensation Limits in the Employment Tribunal will come into effect:

- Weekly pay rate capped at £489 (previously £479)
- The Unfair Dismissal award capped at £80,541 (previously £78.962)
- The guarantee payment for lay off periods is now be £27 per day (previously £26)

National Minimum Wage – Are you Paying Correctly?

The National Minimum Wage (NMW) is a minimum hourly rate of pay set by government which applies, with some exceptions, to all workers. The employer is under the obligation to pay the NMW, and there are no exclusions for smaller employers.

The NMW increases periodically and has increased to £7.50 from £7.20 as noted above.

There are different rates of NMW for five categories of worker:

- **National living wage.** This rate applies to workers aged 25 and over (National Minimum Wage (Amendment) Regulations 2016). The national living wage was introduced on 1 April 2016.
- **Standard adult rate.** This rate applies to workers aged between 21 and 24 inclusive.
- **Development rate.** This rate applies to workers aged between 18 and 20 inclusive.
- **Young workers rate.** This rate applies to workers aged under 18 but above the compulsory school age (16 years old) who are not apprentices.
- **Apprenticeship rate.** This rate applies to apprentices under 19 years of age, and those aged 19 and over who are in the first year of their apprenticeship.

The increases must be observed as failure to do so can result in Employment Tribunal claims for underpayment of wages with adverse findings against the business. Many employers, particularly smaller businesses, can miss the increase and be paying less than NMW, however, more recently, HMRC are clamping down across the board and examples are being made which serves to act as a warning that businesses need to get their house in order.

The Department of Business, Energy and Industrial Strategy (BEIS) has published a list of employers failing to pay the NMW. The list names 359 employers who between them underpaid 15,513 workers to the tune of £994,685. The associated penalties amounted to approximately £800,000. Companies such as Debenhams and Subway feature in the list.

The procedure overriding matters such as this begins with a list being compiled by HMRC, on behalf of BEIS. However, it is important to know that HMRC's investigations can be prompted by an individual complaining to ACAS that they have not been paid the NMW who then refer the complaint to HMRC. This can include your employees.

Case Example

Argos has been ordered to pay 37,000 former and current staff backpay amounting to £2.4m, after a HMRC investigation revealed its failure to pay staff the NMW. According to the investigation, Argos had insisted on carrying out staff security checks outside of working hours and had scheduled staff briefings before workers began their shifts, time which staff hadn't been paid for and when included in the calculation brought the overall hourly rate below the minimum rate.

HMRC has also fined the company £1.5m for the underpayment, however the amount is expected to decrease to £800,000 due to Argos's pledge to pay the fine within the discounted 14-day period.

Argos advised that it had responded quickly to the findings, highlighting plans to raise wages for the lowest-paid Argos staff over the age of 25 to £7.66 an hour as well as other measures.

The findings come following attempts made by the government to "name and shame" companies that have similarly failed to pay their workers the NMW.

HMRC recently published factsheets for employers explaining its powers to make NMW checks and how to carry out a self-review.

Comment

If you have any doubts as to whether you are currently making the correct payments in line with NMW, or indeed you have doubts that you have, in the past, paid wages incorrectly, a self-review is advised. Employees can make a claim for unlawful deductions from wages up to 3 months following the last incorrect payment and employers ought to be mindful of this. Remember, the changing rates for NMW will apply to different reference periods.

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news briefs

Tim Blackmore OBE and Simon Evans appointed as new traffic commissioners.

Two new traffic commissioners have been appointed by Transport Secretary Chris Grayling. Tim Blackmore OBE and Simon Evans will be traffic commissioners for the North East and the North West respectively and will take up their new roles from May 2017.

Colonel Tim Blackmore currently heads the British Forces Post Office and was commissioned into the Royal Corps of Transport in 1992. He is a fellow of the Chartered Institute of Transport and Logistics and the Chartered Management Institute.

Simon Evans is currently a Deputy Traffic Commissioner for the North West of England and Independent Member (Chair) of the Parole Board for England and Wales. He was previously a Fee Paid Judge on the Social Entitlement Chamber and a Lay Member (Chair) of the Nursing and Midwifery Council's Fitness to Practice Panel.

Tim Blackmore will fill the post vacated by Kevin Rooney, who took over as the Traffic Commissioner for the West of England from October 2016. Simon Evans will replace Beverley Bell when she steps down in May 2017. She will also vacate her role as the Senior Traffic Commissioner at that time. Her replacement is yet to be appointed.

The Secretary of State has also appointed 4 new deputy traffic commissioners:

- Mark Hinchliffe as Deputy Traffic Commissioner for the North East of England
- Jayne Salt as Deputy Traffic Commissioner for the North West of England
- Laura Thomas as Deputy Traffic Commissioner for the East of England
- Hugh Olson in Scotland

Insurance Act 2015

The Insurance Act 2015 ('the Act') came into force on 12 August 2016, it fundamentally changes the way both commercial and consumer insurance contracts operate in the UK. The Act affects all renewals and new policies, together with any changes made on policies already in force after that date.

The Act rebalances the rights and remedies between the insured party and the insurer, making it more likely that claims will be paid in full. As this is new legislation, we cannot be certain as to how the Courts will interpret the Act, therefore this article is intended to provide guidance as to how we consider you may realise the benefits.

Duty of Fair Representation

When disclosing information to your insurers before taking out an insurance policy, there is a new requirement called the Duty of Fair Representation. To comply with this duty, you must disclose "every material circumstance which the insured knows or ought to know" or failing that, provide disclosure which gives the insurer sufficient information to put it on notice that it needs to make further enquiries to reveal those material circumstances.

Information would be material if it would influence the judgement of an insurer when determining whether to insure and, if so, on what terms. In order to discover and disclose material circumstances, you are obliged to conduct a reasonable search of the information available to you.

A reasonable search will encompass all areas of the business that are covered by the relevant insurance policy. For large businesses this could become complex and so we recommend that you agree the scope of your search with your insurer; this is can be done direct or through your broker.

When disclosing information, you are deemed to have knowledge of matters which you suspected and matters of which you would have had knowledge, if you had not deliberately refrained from confirming them or enquiring about them. This means that you cannot turn a blind eye in your search and the information must be presented in a reasonably clear and accessible way.

Remedies for the breach of the Duty of Fair Representation

If a breach of the duty to make a fair representation was deliberate or reckless then the position remains the same as previously: the insurer is entitled to void the policy and can keep the premium.

If the breach is not deliberate or reckless, there are broadly three remedies available to the insurer:

1. Avoidance

To be able to avoid the policy, the insurer must show that if you had made a fair representation of the risk, they would not have been prepared to provide a policy at all. This would have to be proven by evidence from the underwriter and the insurer would have to return the premium.

2. Variation of the terms

Where, in the absence of a breach, the insurer would have agreed to the policy but on different terms, the contract will be treated as if it had been written on those terms. This could have an effect on losses that the insurance company has already paid and therefore you may have to reimburse the insurer for those losses.

3. Reduction of the claim

Where it is found that there was a breach of duty and the insurer would have entered into the contract, but for a higher premium, then the insurer is entitled to reduce the claim settlement proportionately. This remedy can be used either on a standalone basis or alongside the variation of terms.

Warranties

Compliance with all terms in your policy is the best way to ensure you have full protection under your insurance policy. The below only becomes relevant where you have failed to do so.

A warranty is a term of a policy which, if breached, discharges the insurer's liability to you from the moment of the breach. If you later remedy the breach the insurer will then be liable for subsequent claims.

There may be situations where a warranty cannot be remedied. For example, if you have a policy covering the delivery of goods in which you warrant that the goods will be stored in refrigerated units at all times, and during transit the goods are not kept refrigerated, causing them to become damaged, but are then later moved to refrigeration units, then it is unlikely that the insurer would be liable because the damage caused by the breach cannot be remedied.

The Act will prevent an insurer from relying on your breach of a term of a policy if that breach is entirely unconnected with the actual loss you suffer. For example, it is unlikely that the insurer can rely on breach of a fire alarm warranty where loss is caused by flood.

Contracting out

In business contracts, the parties are free to exclude any part of the Act, except those relating to basis clauses (see below). In order to do this, there are two conditions which the insurer would have to overcome:

- The insurer must take sufficient steps to draw the term to your attention before the contract is concluded; and
- The term must be drafted so that it is clear and unambiguous as to its effect. This means that the insurer has to explain the effect of the term.

Basis Clauses

A term which states that the facts stated in the proposal form the basis of the contract will no longer be of any effect. The parties cannot contract out of this provision which is good for you as it reduces the risk of any misrepresentation before the contract is entered into.

Conclusion

To reap the benefits of the Act, you will need to consider how you currently compile the information you provide for insurance purposes and whether this aligns with the detail and scope needed to comply with a reasonable search.

Evidencing how you have decided that the scope constitutes a reasonable search, and how you achieved it, will mitigate the potential for insurers to question whether you have complied with your duty of fair representation.

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Personal Injury Claims Reforms

The Government has recently announced the results of its consultation on the reform of personal injury claims. The aim of the consultation was to discourage people from making minor, exaggerated or fraudulent whiplash claims. The high number and costs of these claims contributed to the high price of motor insurance for drivers.

The small claims limit will be increased from £1,000 to £5,000 for all road traffic accident (RTA) personal injury claims. For all other personal injury claims, i.e. employers' liability and public liability, the small claims limit will rise from £1,000 to £2,000 in line with inflation.

Whiplash claims

The government will also introduce a tariff system for soft tissue injury (whiplash) claims, the figures cover claims for physical, as well as psychological, injury. The figures are below.

Injury duration (months)	2015 average payment for PSLA – uplifted to take account of JCG uplift (industry data)	Judicial College Guideline (JCG) amounts (13th edition) Published September 2015	New Tariff amounts
0-3	£1,750	A few hundred pounds to £2,050	£225
4-6	£2,150	£2,050 to £3,630	£450
7-9	£2,600	£2,050 to £3,630	£765
10-12	£3,100	£2,050 to £3,630	£1,190
13-15	£3,500	£3,630 to £6,600	£1,820
16-18	£3,950	£3,630 to £6,600	£2,660
19-24	£4,500	£3,630 to £6,600	£3,725

The new tariff amounts mean that every RTA claim for whiplash injury, of a duration of two years or less, will fall within the small claims track limit where costs are not recoverable. Claims for whiplash of over two years duration could still be dealt with in the fast track if the value is over £5,000.

The reforms are dealt with in the Prisons and Courts Bill which was published and made before parliament last month.

The Bill states that whiplash injury means injury, or set of injuries, of the neck, or neck and upper torso, and the person who suffers the injury must have been using, or have been carried in or on, a motor vehicle other than a motorcycle.

Therefore, pedestrians and motorcyclists are not covered by these provisions and are not subject to the new tariff system.

Ban of pre-medical offers to settle

The Prison and Courts Bill bans a person from offering, making or accepting an offer to settle a whiplash claim before seeing any appropriate medical evidence of the injury.

The Bill, and other changes, are due to come into force on 1 October 2018. One major advantage of these reforms will be lower insurance premiums for motorists as insurers will see a reduction in the amount they pay out in claims.

However, the changes represent a huge disadvantage to victims of RTAs who make genuine claims for whiplash injuries as arguably they will no longer receive proper compensation for their losses.

Reduction to the damages discount rate

When a Claimant receives a lump sum designed to cover future loss of earnings, care and treatment it is usual for the Claimant to invest this and receive a return on it. As a Claimant should not be over or under compensated, the court applied a discount rate which reflects the expected rate of return of the investment. Since 2001 the discount applied to a claimant's damages was 2.5%, however the Lord Chancellor has announced that this rate is to be reduced to -0.75% to the disapproval of the representatives of the UK liability insurance industry.

It is argued that this change had to be brought about as innocent victims were being hugely undercompensated as 2.5% was grossly out of step with the real return achievable on their investments.

In the past the higher damages rate has meant that victims have had to go without necessary treatments or take serious risks with their damages in the investment market in attempt to get back the return on their investment that was discounted initially.

This rate adjustment will cost insurers, the government and ultimately the tax payer in tax and the insured in raised premiums to account for the deficit which will appear as a result of the reduction. In practical terms, it means that Claimant lawyers will need to recalculate any amount of future losses, amend any schedule of loss and carefully consider whether any current Part 36 offer will sufficiently compensate the client in light of the reduced discount. Defendant insurers may also have to reconsider Part 36 offers, and reserves they hold on file, as these are likely to be too low.

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