BACKCHAT

Issue 24

ANNUAL

BACKHOUSE JONES

200 YEARS EDITION

CONTENTS

PARTNERS

Keep up-to-date with latest BHJ news

@backhousejonessolicitors
@backhousejones
Backhouse Jones

ISSUE **24**

08 | **Working TIME?**

James Lomax explores the most recent case of Federacion de Servicos de Comisiones Obreras (CCOO) v Deutsche Bank SAE where the European Court of Justice ruled that employers must keep records of hours worked in order to fulfil its obligations under the Working Time Directive.

11 | BACK **on holiday**

The holiday pay saga - workers **are** entitled to receive normal pay whilst on holiday. Read more to find out the details.

14 | **Rule BREAKER**

Is it ever acceptable to break the rules?

Jonathon Backhouse highlights the significant increase in the number of cases being investigated and prosecuted by the HSE particularly in the road transport sector.

26 | **Driving you to DISTRACTION**

Andrew Woolfall provides a reminder about drivers - their obligations and your management.

19 | **One Strike and You're OUT**

Do your systems measure up? Mark Davies considers what is expected by the Traffic Commissioners to avoid bridge strikes.

48 | **Concessionary SCHEMES**

Are you worse off? Libby Pritchard investigates the reimbursement arrangements and what happens if you are being under paid.

34 | BACK **in the BAR**

Drivers, I bet you don't think you misuse alcohol but is this true?

38 | **Cartel UPDATE**

Read the latest regarding the application lodged in July 2018 signalling the claim against European truck manufacturers found to be colluding in the 14-year price fixing cartel.

64 | **It's the LEASE we can do!**

An awareness of tenant-adverse terms in a commercial lease is invaluable in the modern business landscape. Brett Cooper explains why.

Is your law firm cutting the MUSTARD?

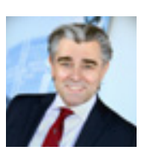
The famous 19th century German politician, Otto von Bismarck, said "laws are like sausages, it's better not to see them being made". Don't worry I am not going to talk here about Brexit but rather I am going to focus on another German contribution – the hot dog. To be precise it is a German/American invention. I can appreciate the story of the hot dog because it involves innovation which is at the forefront of everything we do here at Backhouse Jones. Indeed, our BACKUp innovation has secured us the prestigious Boutique Firm of the Year award at the 2019 Lawyer Awards.

In 1904 a German/American Antoine Feuchtwanger sold hot dogs at baseball games in New York City. He provided his customers with gloves to protect their hands whilst they ate hot frankfurters. The problem was the customers failed to return the gloves which created inefficiency and unnecessary expense. The visionary Antoine arranged for his friend, a baker, to make a long bun which effectively became an edible glove. Now that's thinking around the problem whilst placing bread around the hot dog and simultaneously placing the customer at the centre of business. That is exactly what we did when we redesigned our fee structure around a protective BACKUp monthly subscription of just £10 per vehicle per month. Antoine did away with wasteful and unnecessary gloves and we did away with the wasteful and unnecessary hourly rate.

If laws, sausages and politics are a messy business you can be sure that BACKUp will provide clear advice on your compliance obligations and undertakings whilst also steering clear of political predictions. However, in the absence of a ready salted futurologist we can't know what the future holds but those that fail to understand history are doomed to repeat it. In 1464 a trade agreement between England and Burgundy, one of England's main economic alliances at the time, was due to expire. Would you believe it the deadline in 1464 was also midnight on 31 October. Things did not go well. Cloth piled up high in London's warehouses and gathered dust whilst empty ships remained at anchor.

As autumn deepened into winter the cost to England's export trade soon became apparent. Exports plummeted. Courtesy of a couple of tournaments relations were soon patched up but the new trade deal between England and Burgundy, when eventually agreed, was massively weighted against England. It remains to be seen if realpolitik can be as efficient as a hot dog bun but in the absence of realism over emotion it makes sense for transport operators to control their costs, as they enter 2020, with their own protective glove of BACKUp.

Originally Antoine advertised his product as "red hot dachshund sausages" but this was eventually shortened to "hot dogs". If you like cutting away that which is unnecessary and you like certainty and controlling costs, then have we got a product for you! BACKUp will provide you with some certainty in the uncertainty of a post Brexit economy. Please phone me on 07710 187 211 if you want me to talk through how BACKUp can assist you just as lawyers from the 15th century advised their commercial clients how to prepare for the challenges of the 16th century. This will leave you with the really important decision of whether to add ketchup, mustard or onions to your hot dog bun. With the certainty of BACKUp you can have all three.



Ian Jones
T: 01254 828 300
E: ian.jones@backhouses.co.uk

LOOKING BACK

200 YEARS

2019 is a significant year for Backhouse Jones. Not only did the firm win Boutique Firm of the Year at the highly acclaimed Lawyer Awards in London in June, Sunday 21 July marked 200 years in law for the Backhouse family.

The truck, the trailer, the fifth wheel… and the Backhouses. As transport operators cast around for legal advice, following the introduction of the first Road Transport Act in 1930, lawyers named Backhouse were on hand to back them up. A recognisable name in the valleys of Lancashire, the name built itself a reputation.

From a line of Henrys, Harrys, Johns and Isaacs came a surname that a cross-section of truck owners could always turn to for legal advice. Burning their brand into the logistics sector, the now-named Backhouse Jones has committed itself to providing industry-specific expertise that will not cause clients to clutch caustically at their wallets.

They are as embedded as the red buses of London, the Suzie Lines on your truck and the pallets in your trailer. Regularly, the law firm is appointed to advise prominent trade associations, navigating those that represent the industry through a jungle of regulations and legislation.

“They are as embedded as the red buses of London, the Suzie Lines on your truck and the pallets in your trailer.”

A prime example is the Road Haulage Association’s ongoing Cartel Case in the Competition Appeal Tribunal. Estimated to be worth £1 billion in damages, this trade association trusts such an important piece of litigation to this firm because of the history and knowledge it possesses. That being said, they act for any client; big or small, private or public, and they do so with equal fervour for each.

By being uniquely industry-specific, clients looking to instruct Backhouse Jones do not have to spend valuable time during consultations explaining to their lawyer an O-Licence, a PG9 or an OCRS. This means you can cut into the substance of your problem quicker and work with their lawyers to find a resolution faster. Such efficiency is why they are praised for being ‘commercially minded’ in the way they apply the legal points of a problem to the circumstances.

BACK to the Future

Who are the Backhouses now? Well, the mantle has fallen to twins, James and Jonathon. Both have been hailed by Chambers & Partners as experts in the transport industry and both received accolades for their performances in Public Inquiries. Their ‘knowledge of the law’ and ‘excellent technical knowledge’ has seen them further their family reputation and assist in building a dedicated firm of lawyers, fluent in the language of logistics. Further to this, whilst their legal expertise and experience in the sector has seen them build a successful firm, so to have they been able to pass on their knowledge to a fresh set of high-rising solicitors.

It would, however, be remiss not to give credit of the firm’s success also to the twins’ business partners, Ian Jones and Andrew Woolfall. It was Ian Jones’ awareness of the needs of the industry and clear vision for creating a brand that has seen the firm offer its subscription-based legal service; the Netflix of the legal world and equally as innovative. Likewise, Andrew is recognised as another solicitor acquainted with the transport industry and accomplished when appearing in the Magistrates’ and Crown Court of England and Wales.

Roll on to 2003 and the firm commenced its “trainee” programme with Steven Meyerhoff and Mark Davies as early recruits. Both, now fellow directors, demonstrate the organic growth that the firm has experienced with market sources describing Mark as having ‘technical brilliance’ and Steven as the leading figure in the RHA’s current Cartel Case.

Observing other solicitors at the firm, ‘game keeper turned poacher’ John Heaton joined the ever-growing team in 2011 after many years prosecuting for VOSA. He brought with him tactical experience and is regarded as ‘cerebral’ with incredible knowledge.

Other notable lawyers in the regulatory arena are Scott Bell and Laura Hadzik who have begun to make their own waves in the transport industry; Laura being described as ‘clearly a very knowledgeable and talented lawyer,’ and Scott being recognised for ‘his decisive and informed approach.’ With young lawyers such as these breaking the ranks of Backhouse Jones, the firm’s past is looking to foretell its future. With a steady stream of transport-savvy lawyers available to each and every operator holding (or in some cases, not holding) an O-Licence.

What is unique about this firm, other than its heavy focus on an otherwise often-overlooked business sector, is the culture. It recognises its roots and cherishes them. The staff bear their past proudly and will greet you with a smile. Managing some of the most complex litigation from its offices in both Clitheroe and London, it is undeniable that this firm knows transport law BACKwards.

Working TIME?

We all know the importance of this for the haulage and passenger transport sectors but it's always worth reading the latest developments as a stark reminder of the responsibilities placed on both operators and drivers.

James Lomax explores the most recent case of Federacion de Servicos de Comisiones Obreras (CCOO) v Deutsche Bank SAE where the European Court of Justice ruled that employers must keep records of hours worked in order to fulfil its obligations under the Working Time Directive. ▸

▶ Continued

"In order to properly transfer the Working Time Directive into national law, a member state must require employers to keep records of hours worked."

The Facts

The CCOO (a Spanish trade union) brought a group action before the National High Court in Spain against Deutsche Bank in relation to the lack of a system for recording the time worked each day by the workers employed by Deutsche Bank. During the class action proceedings, CCOO requested a preliminary ruling and sought a declaration from the CJEU that the bank was under an obligation to record the actual daily working time of its workers.

The Court decided that if there was no requirement for employers to keep records, it would be impossible to determine "objectively and reliably, either the number of hours worked by the worker or when that work was done". The Court further went on to say that it would be excessively difficult, if not impossible in practice, for workers to ensure their compliance with the rights conferred on them by the Working Time Directive, with a view to actually benefitting from the limitation on weekly working time, as well as minimum daily and weekly rest periods provided for by that directive.

The above judgment means that, in order to properly transfer the Working Time Directive into national law, a member state must require employers to keep records of hours worked. It appears that the Working Time Regulations have therefore not properly transposed the EU Directive into UK law.

The Government will have to amend the Working Time Regulations to avoid the risk of claims against them for failure to transpose the Directive. This is of course if EU law continues to remain in force in the UK!

Commentary

As the employer, you should be keeping a record of all your employee's Working Time. Tachographs may be used as a means of recording Working Time and are often used to record most of the work in relation to drivers, however it is always important that the correct mode is selected to record the activities accurately. In some circumstances, such as warehouse work, you will be required to keep other types of records.

As you will be aware, HGV and PCV drivers are only subject to the provisions in the WTR 1998 relating to paid holiday and health checks for night workers and does not extend the provisions on breaks and rest periods to mobile workers in this sector. Drivers are primarily regulated by the Road Transport (Working Time) Directive 2002 and the Drivers Hours Regulation, the rules of which you will no doubt be familiar with.

Interestingly to note, the European Parliament has adopted its first reading position on the European Commission's proposal for a new regulation which seeks to amend the 2002 Working Time Directive on minimum requirements on maximum daily and weekly driving times, minimum breaks and daily and weekly rest periods. Keep an eye out on our future newsletters which will cover any developments in relation to this proposed amendment.

James Lomax
T: 01254 828 300
E: james.lomax@backhouses.co.uk

BACK on Holiday

The holiday pay saga - workers **are** entitled to receive normal pay whilst on holiday.

For years, holiday pay and how it is constituted has been a topic of hot debate. Heather Lunney, one of our employment lawyers, provides clarity in light of recent findings in the Flowers v East of England Ambulance Trust where the Court of Appeal clarified that voluntary overtime should be included in holiday pay if it extends for a sufficient period on a regular or recurring basis.

By way of background, the Flowers case has been through the Employment Tribunal, the Employment Appeal Tribunal and now, very recently, the Court of Appeal in determining the matter of whether voluntary overtime should be taken into account when calculating holiday pay.

Broadly, various ambulance crew worked entirely voluntary overtime and were free to choose whether or not to do it. On a holiday pay claim to the tribunal, the ambulance crew claimants argued that their voluntary overtime should count towards their 'normal' remuneration, and therefore be included in holiday pay.

The decision of the EAT held that both non-guaranteed and voluntary overtime should be taken into account by the employer when calculating the four weeks paid leave, so long as the payments are sufficiently regular and paid over a sufficient period. However, comments made by the ECJ in another case (Hein v Albert Holzkamm GmbH & Co) had called this approach into question.

The ECJ in that case made the following observations; "given its exceptional and unforeseeable nature, remuneration received for overtime does not, in principle, form part of the normal remuneration that the worker may claim in respect of the paid annual leave provided for in Article 7" (referred to above).

This was contrasted with the situation where "the obligations arising from the employment contract require the worker to work overtime on a broadly regular and predictable basis, and the corresponding pay constitutes a significant element of the total remuneration that the worker receives for his professional activity, the pay received for that overtime work should be included in the normal remuneration due under the right to paid annual leave provided for by Article 7". ▶

Holiday pay calculations

Clarification on calculating term time pay for part-time workers.

The ongoing saga of changes and fluctuations in relation to holiday pay continues with the recent decision of the Court of Appeal in *The Harpur Trust v Brazel* case. The court held that holiday entitlement for 'part-year' workers should be calculated on a pro rata basis at 12.07% of annual pay under the Working Time Regulations.

The case involved a music teacher who was permanently employed by the Trust. She worked during term-time only, on irregular hours (around 32) per week. It was decided by the EAT and upheld by the Court of Appeal that this employee was entitled to have holidays calculated on a 12-week average of hours worked, making, on her hours, holiday pay around 17.5% of annual pay, rather than 12.07% for staff working a whole year (based on 5.6/46.4 weeks). The key in this case was the fact that this individual worked irregular hours but again supplements the need to get the issue of holiday pay sorted rather than leave scope for a claim to be presented.

This is an important case particularly in the PCV sector where operators often employ workers who will work term time only to accommodate the needs of their school contracts. We recommend that you seek guidance and our employment team are available on 01254 828300.

▶ This second comment seemingly suggested that for overtime to be included in normal remuneration for the calculation of holiday pay, a worker must be required by their contract to work it, thus excluding pay for voluntary overtime. We have since been waiting for the outcome of the Court of Appeal decision in Flowers to provide some clarity in relation to these comments.

The Court of Appeal held that the ECJ was simply drawing a distinction between exceptional and unforeseeable overtime payments on the one hand, and broadly regular and predictable ones on the other.

It was confirmed that the EAT had been correct in its decision and voluntary overtime should be counted when calculating holiday pay provided it is sufficiently regular and settled for payments made in respect of it to amount to normal remuneration.

Commentary

The Tribunal in the above Flowers case had applied the case of *Dudley Metropolitan Borough Council v Willets and Others UKEAT* in making its initial decision. This case decided that the overarching principle established by ECJ case law was that holiday pay should correspond to normal remuneration so as to not discourage workers from taking annual leave.

As to whether overtime was paid over a sufficient period of time and on a regular or reoccurring bases will turn on the individual facts of each case and would be a matter for the Tribunal to decide whether the holiday pay corresponds to normal remuneration.

So, what should now be included in holiday pay under the Working Time Directive?

- Payments linked intrinsically to the performance of the tasks which the worker is required to carry out under their contract of employment
- commission
- compulsory and guaranteed overtime
- non-guaranteed overtime
- voluntary overtime, out of hours standby, call outs provided they are sufficiently regular or reoccurring to qualify as "normal"
- payments which relate to the worker's professional and personal status
- an amount to reflect the contractual results-based commission a worker ordinarily receives
- potential incentive bonus arrangements (not the same as annual discretionary bonus)

Payments which are intended "exclusively to cover occasional or ancillary costs" arising at the time the worker performs the task required by the contract are excluded from holiday pay under the Working Time Directive such as nights out or meal allowances.

It is also important to note that the prevailing view of the Courts is that the rules discussed above only apply to the four weeks (20 days) leave covered under the Working Time Directive, and not the remaining 1.6 weeks (8 days) afforded by the national legislation (Working Time Regulations 1998). It is up to you as the employer to decide which leave is taken and when.

Heather Lunney
T: 01254 828 300
E: heather.lunney@backhouses.co.uk

Rule BREAKER

Is it ever acceptable to break the rules?

Over the last two years, we have seen a significant increase in the number of cases being investigated and prosecuted by the Health & Safety Executive (HSE) particularly in the road transport sector.

Many of these cases are either caused by inadequate systems, inadequate implementation of systems or unilateral decisions to by-pass, ignore or overrule the systems.

Systems

The policies, risk assessments, method statements and tools and equipment provided under your H&S obligations are the first step to addressing health and safety in the workplace.

'Off-the-shelf' standardised H&S products from web based/CD type systems, which are all too common in every sector, are highly unlikely to enable you to meet your obligations as a transport operator. Road transport is a high-risk sector and as such, will always require significant elements of bespoke health and safety protocols.

Even worse, having 'off-the-shelf' products within your business, identifies to the HSE that you are aware that you require procedures but failure to properly implement them effectively proves that you have committed the offence – even without an incident or accident occurring.

Most modern businesses will have heard of risk assessments and somewhere, the organisation will have a folder full of them. The purpose of a risk assessment is to identify how serious a risk is of accident or injury and then identify mitigating measures that can reduce the hazard or remove it altogether so that the person exposed to the risk no longer risking their personal health and safety when carrying out those activities.

If risk assessments are sitting in a folder which no one ever reads, looks or acts on them, they are quite frankly useless. Furthermore, if you are using an off-the-shelf product or something designed several years earlier, then the bespoke elements of your specific operation will not have been taken into account and therefore the mitigating factors may in fact increase the risk or be totally irrelevant.

"If risk assessments are sitting in a folder which no one ever reads, looks or acts on them, they are quite frankly useless."

A risk assessment, and for specifically high-risk tasks, a method statement, is a working document that all people involved in the activity should be fully aware of and be involved in the review and continuing development of it. ▶

"The main difficulty with dynamic risk assessments being relied upon is either that the individual making that assessment is, in reality, not equipped, trained, experienced enough to in fact do the job properly."

▶ It is not uncommon that the operatives themselves can establish a safer, more straightforward way of managing the task, but their method is not in accordance with the risk assessment/method statement and therefore may in fact cause you to cause an offence. Where frequent, simple dialogue and review processes take place, the documents can be amended accordingly hence ensuring ongoing compliance management in this area.

The main issue in most health and safety cases is one of culture and training. It may be that four years ago, when an employee started, he or she was provided with an information book which they confirmed they had read.

When/if a health and safety issue does occur, the business will seek to rely on this declaration from the employee in order to defend the case.

In reality, we all know it is highly likely that many employees will not have read that document and that enforcement of health and safety, culturally, must come from the top. A simple example of this is marked walkways. In most modern transport operations, there will be an attempt to separate the large and dangerous vehicles from pedestrians either with physical barriers or with marked walkways, painted lines on the road.

It is also equally common in the many sites I have visited over the years that everybody completely ignores those markings because they are taking you on a securities route and it may be raining or just inconvenient – humans are fundamentally lazy!

Therefore, any organisation seeking to develop a health and safety culture should absolutely insist that something as simple as following the footpaths is adhered to at all times and should empower employees from the top right to the bottom of the organisation to identify a failure to follow this simple rule and respond by reminding people of their obligations.

Once employees understand that they will be held to account, properly, for failing to meet the simple health and safety obligations, this should enable a culture where they start to follow the more complex processes and procedures that at the moment are probably gathering dust in an office.

Finally, there will be circumstances, that for whatever reason, jobs have to be done that may require an alternative plan to ensure health and safety to that which is contained within your current policy, risk assessments and so forth.

It is a misnomer to think that you cannot have an alternative plan; that you cannot change the systems for a very specific set of circumstances. But, as with any safety-related system, it is extremely important that if you are seeking to by-pass your safety processes and procedures, maybe even no longer use the safety ensuring equipment that should be used, that you plan meticulously before the work is commenced and satisfy yourself that the safety of the individuals concerned is not being compromised by this unique task.

This type of process is often referred to as a dynamic risk assessment. Most of the time, even for dynamic risk assessments, a written record of the assessment can still be made including what the perceived risks are and what mitigating features are being proposed to alleviate them. It is also sensible to explain why the standard process and procedure is not suitable.

The main difficulty with dynamic risk assessments being relied upon is either that the individual making that assessment is, in reality, not equipped, trained, experienced enough to in fact do the job properly or, the decision is made quickly with oral dialogue and no proper time is spent identifying all the relevant risks and the effectiveness of the mitigating measures proposed.

The health and safety obligations on modern transport operators are very high and the penalties can quickly run into the millions. In other words, they can put you out of business. In these circumstances, and the obvious fact that this sector is being looked at more closely by the HSE, it is perhaps time to root and branch review whether your current system is up to the task in hand.

Jonathon Backhouse
T: 01254 828 300
E: jonathon.backhouse@backhouses.co.uk

NEWS BRIEFS

ACAS provides useful guidance on Age Discrimination

Many of you are no doubt aware that under the Equality Act 2010 it is unlawful for an employer to directly or indirectly discriminate against its employees because of their age, their perceived age or the age of person with whom they are associated. In the transport sector, this tends to manifest in the mistreatment of drivers who are deemed a potential liability as a consequence of their age.

There are also instances where age discrimination can occur between employees in the form of harassment and victimization. For example, referring to younger employees as 'snowflake' or being given menial tasks as a consequence of their age, or referring to older employees to as 'past it' and have their thoughts and opinions ignored can leave you liable to a claim for harassment due to so-called 'banter' between wok colleagues.

Likewise subjecting an employee to a detriment because they have, for example, complained about alleged discrimination can also be unlawful.

ACAS Guidance

ACAS has recently published guidance to assist employers in understanding how age discrimination can happen, how it can be prevented and how different treatment because of age can be allowed in limited circumstances.

The five most prominent areas where discrimination can occur are (1) recruitment; (2) training and promotion; (3) performance management; (4) managing under-performance; and (5) retirement.

As there is now no fixed retirement age, the latter area is often a problematic area for the industry in general when considering the older driver.

The guidance includes sections on key considerations for employers to reduce the chance of age discrimination occurring and the top ten myths relating to age.

When Age Discrimination may be lawful

The Guidance also refers to certain instances where a mistreatment of individuals justified by their age may be allowed. These are as outlined below:

- Where the need for certain types of discrimination because of age can be lawfully justified – for example if it is able of objective justification as it is a 'proportionate means of achieving a legitimate aim'.

- Pay and any extra benefits and perks linked to certain periods of time with the employer. However, this is only permitted up to five years of employment.

- Where being a particular age or within a particular age range, or not a particular age, is a legal requirement of the job, e.g. driver age being over the legal requirement. This is likely in only very limited circumstances. In law, this is known as an 'occupational requirement'.

- Some circumstances in redundancy. For example, deciding to keep staff who have been with the employer for longer, and making redundant staff with less time with the firm. This is likely to discriminate against younger employees. However, it could be allowed if the employer can prove a lawful business reason in the circumstances - for instance, keeping the most experienced staff who are fully trained and skilled as they are essential to the future of the restructured company.

The guidance can be found at www.acas.org.uk/agediscrimiation and is well worth a read for any employer. For further advice on the subject, contact our Employment Department at Backhouse Jones on 01254 828300.

One Strike and You're OUT

"An average of five bridge strikes happen each day across the UK and the majority involve commercial vehicles."

Bridge strikes have always been something to be avoided for obvious reasons.

They have now taken on a greater level of importance for commercial vehicle operators for two reasons; one, the Traffic Commissioners have started to call Public Inquiries where an operator has been involved in a bridge strike incident and two, buoyed by recent successes in Court, Network Rail are actively seeking to recover all costs from the operator, including compensation they are obliged to pay train companies for delays to services. It goes without saying the costs of a bridge strike are significant.

The Traffic Commissioners have started to call Public Inquiries where an operator has been involved in a bridge strike incident. Even operators who have a blemish free record find they are also brought to the Inquiry room, with both their repute and that of their Transport Manager(s) being called into question, where the only issue before the Commissioner is the bridge strike itself. Furthermore, drivers are being called to driver conduct hearings and licences suspended for as long as twelve weeks.

It is noteworthy that for an offence of falsifying a tachograph, the starting point in the Traffic Commissioners Guidelines is a 28-day period of suspension. So why is it that bridge strikes have suddenly achieved this elevated status – above the level of an offence for dishonesty?

According to data from Network Rail an average of five bridge strikes happen each day across the UK and the majority involve commercial vehicles. The total cost to the UK taxpayer is put at £23million a year.

Network Rail launched a campaign in 2018 – Lorries Can't Limbo - to raise awareness, and through its research found that 43% of lorry drivers admit to not checking their vehicle height before embarking on a journey, while more than half report not taking low bridges into account. In light of their findings, guidance has been issued to both operators and drivers seeking to raise awareness and set out best practice for avoiding bridge strikes.

The guidance can be found at https://www.gov.uk/government/publications/prevention-of-bridge-strikes-good-practice-guide.

However, Network Rail have gone further still. They have implemented a process which identifies the operator and notifies the relevant Traffic Commissioner immediately after a bridge strike occurs.

The upshot is a letter to the operator requiring an explanation of the incident and a Public Inquiry. In response to the letter operators are expected to lay out in full their systems. This is where you want to be able to confirm that you have implemented the Network Rail guidance and drivers have been trained on those systems.

Furthermore, operators are expected to submit a copy of their report into the incident. Commissioners are criticising operators if the report is lacking, particularly if it does not set out a list of recommended improvements to be implemented to avoid further incidents. We strongly advise operators to review their policies now and update them to comply with the Network Rail guidance. The guidance for drivers should be issued and form part of a training session where the drivers sign to confirm they have received the guidance and understand its contents.

The main features of the guidance are:

- Route planning to ensure low bridges are avoided;
- Avoid using sat nav systems that are not specific for commercial vehicles ▶

- ▶ Ensure the correct height is displayed for the vehicle combination on the in-cab height indicator. A way of ensuring this is done is by adding a check of the height indicators to a documented gate house check that you should be undertaking of a selection of vehicles before they leave the operating centre. Note, that it is an offence for a vehicle over three metres not to display the correct maximum height on the in the cab indicators.

- Ensure that the trailer height (when connected to the fifth wheel) is displayed on the trailer headboard.

- Ensure that height readings are given in feet and meters or provide drivers with a metric/imperial conversion chart. An error in conversion is often the reason that height indicators are set incorrectly. Traffic Commissioners are unlikely to be sympathetic where an incident has occurred for this reason.

- Routes are expected to be assessed, particularly around known delivery points or operating centres. The risk of bridge strikes should be assessed based on the height and width of the vehicle, and its load or equipment. The traffic planners are central to ensuring routes are appropriate for the size of the vehicle and hazards and identifying hazards along the route.

PSV operators should be informing the Traffic Commissioner of a bridge strike incident in accordance with section 20(1) of the Public Passenger Vehicles Act 1981 on the basis that it is an incident that "may affect the safety of occupants of the vehicle or of persons using the road." However, whilst there is no similar provision for HGV operators, Traffic Commissioners have stated that they consider a bridge strike to be something which HGV operators should be notifying and criticising operators when a notification has not been provided.

Often bridge strikes occur due to deviations from the expected route, usually due to road works or closures. The way you deal with diversions will be scrutinised by the Traffic Commissioner. It is important to have a policy in place that drivers must contact the planners if they have to go off route.

In our experience, very few operators are going further than training drivers to be aware of their vehicle height and set the in-cab indicators accordingly. No checks are being done to ensure the indicators reflect the actual height of the vehicle and this breeds complacency. Also ask yourself the question, how do the drivers get from point A to B? Are the sat nav systems or phone apps they use HGV specific? This is a common own goal and one that is deeply embarrassing when it is uncovered as being the reason for the incident.

"It is an offence for a vehicle over three metres not to display the correct maximum height on the in the cab indicators."

Mark Davies
T: 01254 828 300
E: mark.davies@backhouses.co.uk

All Party Parliamentary Group for the

Road Passenger Transport Industry

YOUR VOICE IN PARLIAMENT

The Group that undertakes research and provides thought leadership on a wide variety of industry specific topics.

The APPG for the Road Transport Industry has relaunched and is calling out to all PCV operators who may be interested in joining a group which is industry specific and actively engaged in development for the sector.

Launched with a raison d'etre to "consider and raise awareness of matters relating to the UK Road Passenger Industry including topics that could potentially expand or limit the future success of this critical public and social service" the APPG's Group Secretary, Paul Sainthouse, stresses there has never been a more "important time to join".

Paul goes on to say that "it is critical that the Road Transport sector engages with Parliamentarians and legislators in respect of challenges the industry faces and to propagate the understanding of the social and environmental benefits that can be drawn from the services this industry provides".

Annual membership will entitle you to attend and participate in the Group's Parliamentary functions.

Through regular Parliamentary interactions, the Group provides members with the opportunity to engage with a wide range of industry experts and interact with members of both Houses in a manner that promotes and raises awareness of the Road Passenger Transport sector.

For further details, please contact Paul Sainthouse, Group Secretary 07778 819 557.

www.appg-transport.uk

Where do you STAND?

Scott Bell discusses some of the issues surrounding financial standing.

The shifting sands of the finance world seems almost a mirror image of the shifting sands of the Traffic Commissioners Office at present as to what is and what is not acceptable as evidence of financial standing to hold an Operator Licence.

There also seems to be a difference between what the Traffic Commissioner will accept as evidence for an application for a licence and what is acceptable as evidence in order to continue holding that licence.

In order to hold an Operator Licence the holder must be able to demonstrate sufficient financial standing. The obligation is a continuing one and if the Operator feels that for whatever reason they do not continue to hold financial standing, they must inform the Traffic Commissioner.

How much is required

The current financial standing rates were set from the 1 January 2019 and are

- £8,000 for the first vehicle and £4,450 for each additional vehicle for applicants for, and holders of, standard national/international operators licences.

- £3,100 for the first vehicle and £1,700 for each additional vehicle for applicants for, and holders of, restricted operator licences.

When is it necessary to demonstrate financial standing?

An applicant for, or holder of, an Operator's licence must be able to demonstrate, to the satisfaction of the Traffic Commissioners, that they are of the appropriate financial standing upon application for a new Operator's licence or a variation to an existing Operator's licence, upon being called to appear at Public Inquiry, at the five-yearly review stage of the Operator's licence and on a continuous basis.

Why is it necessary?

The logic behind the requirement to be of the appropriate financial standing is to ensure that the operator has sufficient financial resources available to maintain its vehicles in a fit and roadworthy condition (thereby safeguarding road safety) and compete fairly with other operators.

What does financial standing actually mean and how can applicants and operators satisfy the requirements?

The key test is whether the applicant for, or holder of, the Operator's licence can demonstrate that it has "available" capital and reserves equal to the required sum.

"Available" is defined as "capable of being used, at one's disposal, within one's reach, obtainable or easy to get".

The Traffic Commissioner will therefore consider how much money the applicant or operator can access, how quickly and where from. ▶

▶ Evidence to be taken into account
Concentrating on existing operator licences, typically the evidence the Traffic Commissioner can take into account is set out in the Senior Traffic Commissioner Statutory Guidance No 2 available on the gov.uk website. As a general rule of thumb, the evidence of financial standing must be in the operators name and not held by any 3rd party.

Primarily, Operators are entitled to rely on their annual accounts provided that they are certified by a properly accredited person and if those accounts show capital and reserves over the financial standing figure. Usually certification of those accounts is provided by an auditor and such certification is generally mandatory for companies with a turnover exceeding £10.2m but an operator can choose to have their accounts certified if they wish.

More recently, we have seen a move from the Traffic Commissioners to not accept the submission of certified annual accounts and that they still want to check the cash reserves. Whilst we do not agree with this approach from the Traffic Commissioner as we do not believe that the Traffic Commissioner has such a discretion in these scenarios, Operators need to be aware that this maybe the approach that the Traffic Commissioner takes with them.

If the Operator does not submit certified annual accounts, the UK has exercised it right under the EC 1071/2009 to allow derogations for additional evidence of financial standing to be accepted.

We suspect that all operators are aware that cash in the bank, available overdrafts and unused availability on invoice factoring facilities can be used as evidence of financial standing, providing that these accounts are in the Company name. The Traffic Commissioner will check these accounts over the last 3 months and take an average availability to ensure that financial standing is shown.

However, other traditional routes to showing financial standing seem to be fading from acceptability by the Traffic Commissioners.

Historically, a number of operators would seek to show financial standing by way of the availability of a working capital loan facility. These appear in the Statutory Documents to be an acceptable method of showing financial standing but over the previous 12 months, the Traffic Commissioners at Public Inquiry have required Operators to draw down those funds from the loan facility to show that they are “truly available”. This has been met with often quizzical looks from the Operators as to why they would need to draw down such figures simply to show the Traffic Commissioners it can be done.

Another method of showing financial standing was by the use of unused credit cards in the Operators name. Now however, if the vast majority of the financial standing is being demonstrated by reference to credit card availability, the Traffic Commissioner tend to refuse to accept this as evidence. This is done on the basis that credit card APR’s are often high and an expensive form of borrowing and therefore the Traffic Commissioner can question as to whether such funds are truly available as they are likely not to be used.

We have seen a similar story with Operator Licences held by sole traders or partnerships in which personal funds held in ISAs/Building Society accounts were previously acceptable but are now not so reliable sources. Finally, we have seen a departure from Traffic Commissioners to allow a 3rd party to give a statutory declaration for money being available for existing Operators.

What to do

Essentially, if you are reading this article and thinking how are we going to demonstrate financial standing if asked, it is worth looking at the sources of finance that you have available and compare on how reliable that source will be in light of the above.

As before, there is an obligation on an operator to inform the Traffic Commissioner if they fail to meet financial standing and if so request a period of grace to continue operating whilst matters are resolved. When requesting the period of grace, you will need to identify the measures that you are taking to ensure that financial standing will be met in the future.

We have a number of experienced personnel at Backhouse Jones who can quickly determine with you, what will and wont be accepted as evidence and also undertake the financial averaging calculation from your records to check. If you would like us to review this for you please contact on the details below.

Scott Bell
T: 01254 828 300
E: scott.bell@backhouses.co.uk

NEWS BRIEFS

How to improve your customers’ understanding of your terms and conditions

The Department for Business, Energy and Industrial Strategy (BEIS) has released guidance on how businesses can help to improve their customers’ understanding of their contractual terms, conditions and privacy policies online (T&Cs). The guidance can be found at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/818341/improving-consumer-understanding-contractual-terms-privacy-policies.pdf.

The guidance relates to contracts between businesses and consumers so will be particularly helpful for those who generally carry out work for individuals, such as removers, however some of the principles can be applied to business to business contracts, particularly when dealing with smaller businesses who may be less likely to ensure that they have read and understood your T&Cs before agreeing to enter into a contract.

A very small proportion of consumers properly read or understand T&Cs before entering into a contract. Ensuring your customers understand your T&Cs can help to avoid a range of negative outcomes such as complaints or disputes which, in turn, protects business reputation.

One of the intended objectives of T&Cs is to ensure that customers are adequately informed and following the above guidance may help business to achieve this. To discuss any aspect of your terms and conditions, please call a member of the Commercial or Dispute Resolution team on 01254 828300.

New guidance on reducing the risk of your vehicle being used as a weapon

The use of vehicles as a weapon to injure and kill people has become a real threat. Consequently, operators and drivers of commercial vehicles need to act and adopt a responsible approach to security.

The Department for Transport has recently published guidance on how to reduce the risk of your vehicles being used as a weapon.

The aim of the guidance is to help prevent acts of terrorism and other crime.

The guidance outlines the steps you can take to help keep the public and your business safe from attack and covers:

- vehicle security – including checking vehicles and what to do if a vehicle is taken;
- security culture – including pre-employment checks for staff and drivers; and
- site security – including vehicle access and operating centres.

It also contains a top 10 list of actions for commercial vehicle drivers.

Please call a member of the regulatory team for more information on 01254 828300 or you can find more information here: https://www.gov.uk/government/publications/security-guidance-for-goods-vehicle-operators-and-drivers/countering-vehicle-as-a-weapon-best-practice-guidance-for-goods-vehicle-operators-and-drivers.

Driving you to DISTRACTION

Drivers - their obligations and your management

Driver management is a key issue for fleet engineers, transport managers and operators. Drivers are considered to be the "front line" for a business. They are the employees that the customers and the public see the most. However, they are also considered to be the 'front line' in compliance by the likes of the DVSA and Traffic Commissioners.

Drivers have many duties placed upon them by law and also what is considered to be "best practice". These range from the standard of their driving, time management (in terms of compliance with drivers' hours rules and tachograph legislation and for PSV drivers, their punctuality) and vehicle safety. The latter can be broken down into issues concerning load security and vehicle condition. Whilst all of these duties are themselves important, this article is going to look at the issues surrounding vehicle condition. ▶

"More serious offences, such as "aiding and abetting" the driving a vehicle in a dangerous condition do require the authorities to show some culpability on the operator's behalf."

▶ The traffic commissioners and the DVSA both take the view that drivers are the "front line" in an operator's maintenance systems and when drivers fail, the consequences can be wide and numerous.

If a driver is found to be in charge of a defective vehicle and the police or DVSA feel that the driver should have known about the issue, then it is likely that he or she will receive a fixed penalty notice or face prosecution before the courts. Depending upon the nature of the defect, the fixed penalty or prosecution may or may not lead to penalty points. Issues such as bulbs or lights are generally non-endorsable.

However more serious items such as brakes or steering defects do carry discretionary disqualification or, failing that penalty points. Where a vehicle is considered to be in a "dangerous condition" the best a driver can expect is three points or a short ban.

Ultimately the driver could be prosecuted for dangerous driving. This involves a mandatory one-year disqualification and a requirement to re-sit the driving test. If a vehicle defect leads to a fatal accident then the driver can be prosecuted for "causing death by dangerous driving" or manslaughter. Here, the usual penalty is a term of imprisonment which ordinarily starts at two years.

In addition to being prosecuted, a driver may also be called before the Traffic Commissioner for a "driver conduct hearing". Here the traffic commissioner can take regulatory action against the vocational driving licence which can see its suspension or even revocation.

Even though a driver may be responsible for a defect or be to blame for the use of the vehicle on the road in that condition through failing to report a problem, a vehicle operator can also face numerous consequences. Inevitably, a prohibition notice will be issued. Where the DVSA are of the opinion that the driver should have known about the defect then it is likely that the prohibition will be "S" marked to indicate a significant failure of the maintenance system. This is reflective of the point made earlier, namely that the DVSA and traffic commissioners take the view that the driver is an integral part of the maintenance system.

An "S" marked prohibition notice will invariably lead to the operator being visited by vehicle examiners and a maintenance investigation being conducted. In some traffic areas, public inquiries are called solely on the basis that an "S" marked prohibition has been issued regardless of what is found on the maintenance investigation and what might otherwise be compliant systems and procedures.

Operators will also, often, face prosecution as a result of the driver's failings. Many "construction and use" offences and low level allegations of "dangerous condition" are 'strict liability' offences. This means that all the prosecuting authority has to show is that the driver was employed by the operator and using the vehicle in the course of that work. It does not matter whether the operator knew about the defect.

More serious offences, such as "aiding and abetting" the driving a vehicle in a dangerous condition do require the authorities to show some culpability on the operator's behalf.

This will generally be in the shape of a failure to adhere to best practice or a direct instruction to a driver but a lack of systems or procedures may be sufficient. Fatal accidents can see operators being prosecuted for causing death by dangerous driving, corporate manslaughter or health and safety breaches. It should also be noted that individual directors and managers can be prosecuted in such circumstances.

Just as drivers can face driver conduct hearings, operators are also frequently called before the Traffic Commissioners for public inquiry hearings as a result of drivers failing to conduct thorough first use inspections or follow defect reporting procedures.

In fact, it is one of the most frequently raised issues at a public inquiry. The commissioners will often rely upon the issuing of prohibition notices or adverse maintenance reports as evidence of failure. These all lead to breaches of the undertakings given when the operator's licence is granted.

Operators give specific undertakings which include:

- Having systems to ensure the laws relating to the driving and operation of vehicles used under the licence are observed;
- Vehicles being kept in a fit in serviceable condition and;
- Drivers reporting promptly any defects or symptoms of defects that could prevent the safe operation of vehicles, and that any defects are recorded in writing

Were the traffic commissioner takes the view that these undertakings have been breached, it is not unusual to see an operator's licence being curtailed so that the number of authorised vehicles are reduced to what the commissioner believes is a number which the operator can properly manage or, for the licence to be suspended to enable the operator to have all vehicles and drivers off the road so as to give them proper training and instruction.

Given the consequences of drivers failing to comply with their obligations in terms of walk round checks and defect reporting, there are several things that fleet engineers, transport managers and operators can do to try and ensure compliance.

The first of these starts with having a system which is easy to understand and use. The system should require drivers to undertake first use inspections and to record their findings either electronically or on paper. Advances in technology have seen new applications developed for mobile phones and other devices such as iPads. ▶

"When the driver fails to ring the transport manager, the TM knows the driver has not done a proper inspection!"

▶ These will assist the driver in conducting a daily check and then deliver the reports electronically to the operator. Alternatively simple duplicate books can be used. There must, though, be a system for ensuring the driver properly records his findings and report any defects that may arise either at the start or during the course of the working day.

Having devised a proper system, all staff should be trained in how it works and what is expected of them. This is where driver CPC training can play an important role. Given that there are no mandatory or prescribed modules in the DCPC, operators are strongly recommended to include defect reporting within the training undertaken by their staff.

Once training has been delivered, regular "audits" should take place to ensure drivers are doing what is expected of them. All preventative maintenance inspection sheets should be thoroughly reviewed. If vehicle technicians find defects which drivers should have reported, a check should be made against driver defect sheets.

If the driver has failed to identify the defect then an inquiry should be held. Consideration should be given as to retraining the driver or taking disciplinary action. Time and again the writer sees instances were PMI sheets show defects such as blown bulbs, worn tyres or damage to the vehicle which a driver should have spotted and reported. Drivers will often try and say that these defects arose on the day of the inspection but close analysis of the PMI sheets show that similar issues arise every time the vehicle goes to the garage.

Leaving aside any explanation along the lines that there must be a mystical force field around the garage which causes such defects to occur, the only plausible explanation for such recurring items is that the drivers are failing to properly conduct thorough checks and report their findings. DVSA officials and traffic commissioners frequently look for such failings when examining an operator's records.

This is why vehicle technicians, fleet engineers, transport managers or operators must thoroughly review the PMI sheets and act on the information they contain.

In addition to reviewing the maintenance records, it is also considered to be "best practice" to conduct actual audits of the driver's inspection. This should not be simply observing a driver perform his morning check (when he will invariably do a thorough examination, knowing he's being watched), but instead a secondary inspection of the vehicle after the driver has completed his own paperwork.

This should be done before the vehicle leaves the operating centre. In fact, it is a well-known strategy of some operators to deliberately place defects on a vehicle - although this is a "high risk" and the strictest of controls must be in place to ensure those vehicles do not end up on the public highway without the defects being rectified.

Other operators have been known to place notes around the vehicle requiring the driver to contact the transport manager. When the driver fails to ring the transport manager, the TM knows the driver has not done a proper inspection! Audits should be done on a sample selection of the fleet on a random basis – depending on the numbers operated, checking one or two vehicles a week may be sufficient to check the drivers and drive home the message that there is a need for compliance. Again, if shortcomings are found they must be acted upon.

While some might think that the obligations and duties placed on drivers are self-evident, they should always be properly explained and operators should have thorough and effective systems for ensuring compliance. The failure, by these front-line staff, to ensure vehicles are in a safe condition can have far reaching consequences whether it be the results of an incident, its subsequent prosecution or the appearance before the Traffic Commissioner. B

Andrew Woolfall
T: 01254 828 300
E: andrew.woolfall@backhouses.co.uk

NEWS BRIEFS

Are motorways SMARTER than you?

Smart motorways have been active in the UK for a while now and it is critical that drivers are aware of how to use them safely.

New technology on sections of the motorway network has enabled Highways England to monitor and manage busy roads, helping traffic to flow more smoothly.

Hard shoulder use

One feature of smart motorways is the ability to open the hard shoulder during busy periods so that more vehicles can travel with ease temporarily.

The hard shoulder is identifiable by a solid white unbroken line. If the hard shoulder is open for use it will be clearly indicated with a speed limit displayed above it.

If there is no speed limit above the hard shoulder or it is marked with a red X, the hard shoulder should not be driven in and is for emergency use only.

If you are caught driving in a lane closed by a red X, you could receive a fixed penalty of up to £100 and three points. Beware, a HGV driver was given five penalty points and a £655 fine when his car blocked a police car on the hard shoulder.

If you break down, wherever possible, try to get your vehicle to a designated emergency area. These are marked with an SOS telephone sign and provide better protection than other areas of the hard shoulder.

The Highway Code says you mustn't drive on the hard shoulder except in an emergency or if directed to do so by the police, traffic offers in uniform or by signs.

Variable speed limits

Variable speed limits can be set at busy times or to manage a hazard or incident.

A speed limit displayed inside a red circle is legally enforceable. If you go over the speed limit, you could receive a fine and points on your licence.

When the variable speed limit no longer applies the national speed limit sign will be displayed. If no speed limits are displayed, then the national speed limit applies.

Keep left

When you're driving along a motorway you should keep left unless you're overtaking, no matter how many lanes a motorway has. It's a simple rule of the Highway Code, but one which some drivers don't always follow.

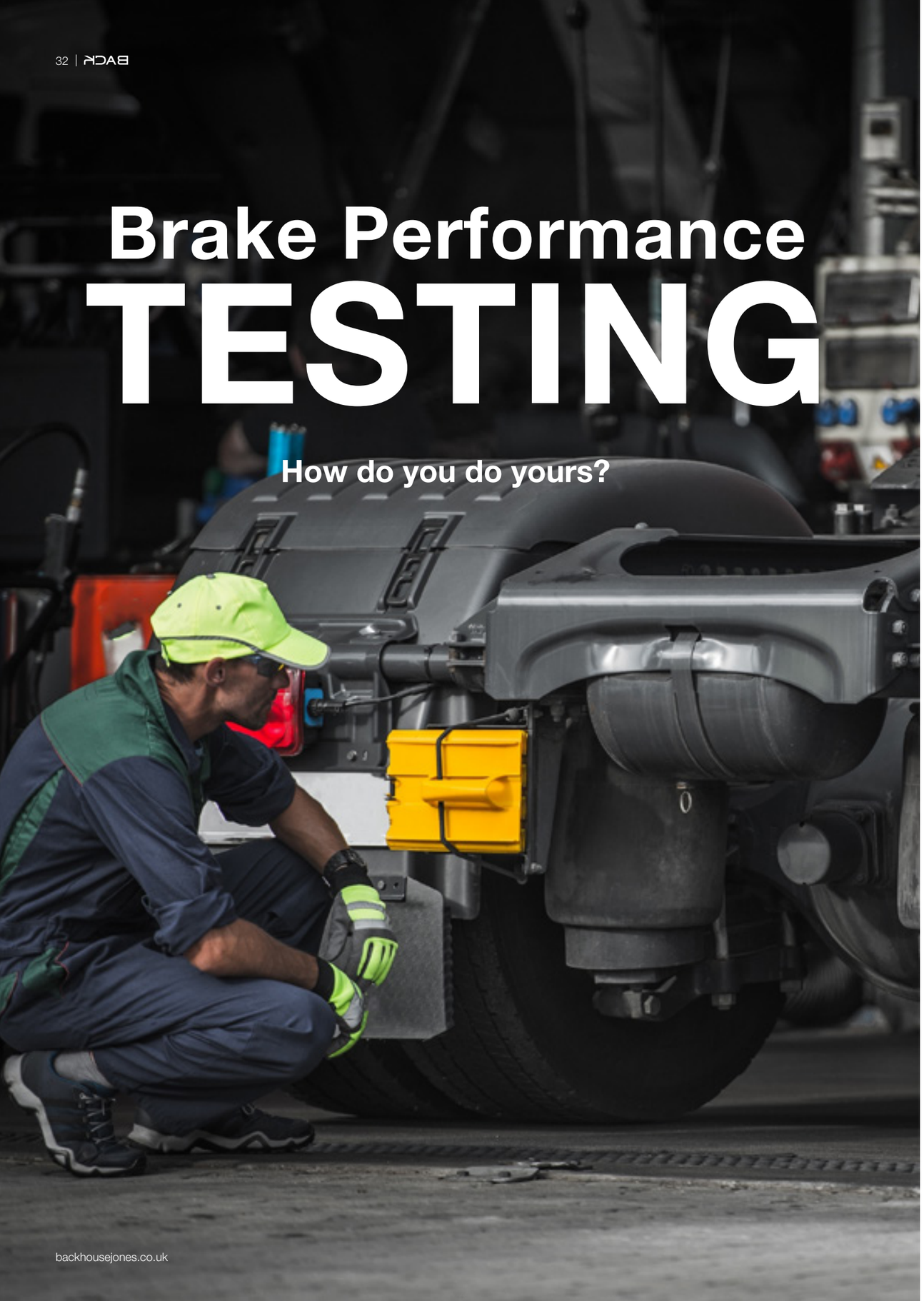
The other lanes may only be used for overtaking slower-moving vehicles. Once you're past them, you should return to the left-hand lane.

Following this rule helps the traffic flow and avoids frustration with "lane-hoggers".

If you want further information or if you fall foul of any of these rules and need some on the scene advice, please contact a member of our regulatory team on 01254 828300.

Brake Performance TESTING

How do you do yours?



The Traffic Commissioners and the DVSA have recently issued separate warnings to operators of the need to improve their approach to brake performance testing.

Brake performance testing is a key part of an operator's maintenance regime and should happen at every safety inspection; however, the Traffic Commissioners have said that poor brake testing, or the complete absence of it, is appearing far too frequently during investigations by enforcement officers.

The latest edition of the DVSA's Guide to Maintaining Roadworthiness ("the Guide") makes it clear that a metered assessment of vehicle and trailer brake performance must take place at every safety inspection. The Guide strongly advises that a calibrated roller brake tester is used at every inspection to measure individual brake performance and overall braking efficiencies, but it is also acceptable to use an approved and calibrated decelerometer to test vehicles without trailers to measure overall brake efficiencies. It is also recommended best practice to test vehicles and trailers in a laden condition to get meaningful results.

The Guide adds that, if you can't carry out a brake test during a safety inspection, the vehicle's braking performance must be assessed using a road test. This needs to be carried out under controlled and safe conditions and the safety inspection record should state that the brake performance was assessed by a road test. The Guide does, however, state that a road test method to assess the brake performance for all planned safety inspections will usually be inadequate.

Where deficiencies in brake performance are identified, either during use of the vehicle or trailer or at the safety inspection, a measured brake efficiency test must be carried out. The efficiency test must confirm the brakes are performing satisfactorily before the vehicle or trailer can be considered as roadworthy.

The results of all brake performance tests must be recorded; however, the Traffic Commissioners and the DVSA have indicated that they are frequently dealing with cases where there is too little information recorded on safety inspection records in relation to brake performance testing to offer any meaningful assessment and, in other cases, no information in relation to brake performance testing is recorded at all.

Recent examples include:

- missing brake figures on safety inspection records.
- 'not applicable' written in the brake test section of the safety inspection record.
- the brake testing section of safety inspection records being left blank.

You should always try and obtain a printout of the brake test from either the roller brake tester or decelerometer and attach this to the corresponding safety inspection record. If you are unable to obtain a printout, the results should be recorded on the safety inspection record instead.

Failure to carry out and/or document periodic brake testing correctly, or at all, will result in an unsatisfactory DVSA maintenance investigation, which is likely to lead a public inquiry at which the Traffic Commissioner will consider taking regulatory action again the Operator's Licence.

The operator and driver could also face criminal prosecution if a vehicle is driven with brakes that are not in good and efficient working order.

The consequences of not meeting the minimum standards for brake performance can be even more devastating if this results in a collision, a tragic example of which occurred in Bath when a 32-tonne tipper vehicle killed four people when its brakes failed on a steep hill. The DVSA's investigation found that on five out of thirteen safety inspection records, the brake test section had been left blank and, on the other records, the comments were too limited for anyone to understand what they meant.

The company director and mechanic both received prison sentences of over seven years and five years respectively and the Traffic Commissioner revoked the Operator's Licence and disqualified the company's directors for two years. Operators are therefore urged to carry out an urgent review of their brake testing regime.

This should include an analysis of safety inspection records over the last 15 months to ensure that the type of brake test being carried out and the information being recorded in relation to brake performance testing is sufficient.

If you would like further information or any advice, please contact a member of the regulatory team.

James Backhouse
T: 01254 828 300
E: james.backhouse@backhouses.co.uk

BACK in the BAR

Drivers, I bet you don't think you misuse alcohol but is this true?

How much alcohol is apparently safe?

The UK Chief Medical Officer advises that it is safest not to drink more than 14 units of alcohol a week. The guidance goes on to explain that 14 units can be 6 pints of 4% beer, 6 glasses of 13% wine or 14 small (25 millimetres) glasses of 14% spirits.

What about for drivers?

TThe DVLA Medical Group uses this bench mark as the level at which for driving licence purposes, alcohol misuse is taking place. A surprising number of people do not know what the Government and DVLA recommended alcohol consumption limit is.

You may think that a statement such as "I just drink socially - you know - a pint or two most nights that is all" would not be a problem, but it becomes a problem because of the medical advice stated above.

How do DVLA obtain information?

Of course, the DVLA must have evidence of alcohol consumption. The evidence it relies on can come from a variety of sources. They may rely on convictions for alcohol related offences. Reports from medical practitioners may go to them. Information may also be received from employers or from concerned friends or family members.

What happens if I exceed these levels?

If DVLA receives evidence of persistent alcohol misuse and/or evidence of unexplained abnormal blood alcohol marks, they follow their published guidelines. A Group 1 (car and motorcycles) licence will be revoked or refused (if being applied for) until after a minimum of 6 months "controlled drinking" or "abstinence", along with evidence of normalisation of blood parameters.

The minimum period of action for Group 2 (bus and lorry) licence will be 12 months.

Drivers should of course always be truthful in making statements about their alcohol consumption. It is an offence carrying £1000.00 fine to make an untruthful statement. But experience has shown that drivers can, to their detriment, sometimes make casual and inaccurate statements about their own alcohol consumption, overestimating it.

Drivers would be well advised to think carefully about how they fill in self declaration forms and about statements made to doctors in the course of medical examinations. The statements should of course be truthful and accurate. If, on reading this article, a driver is becoming aware for the first time of the current safe consumption guidance, they can now if necessary moderate their consumption, and advise DVLA accordingly when making declarations about their consumption levels. ▶

▶ Continued

The legal and moral position is that drivers are expected to take responsibility for his/her fitness when they get behind the wheel both on specific occasions and generally. The serious consequences if these obligations are breached demonstrate what the position is. Drivers convicted of alcohol related driving offences particularly where serious injury or death is caused can expect long custodial sentences.

What can I do about it?

Drivers should always ask themselves the question "am I fit to drive?" Drivers should avoid exposing themselves to a risk either on a single occasion or systematically of driving when unfit by reason of alcohol consumption. If the safe drinking limits are news to you, act now to moderate your consumption, or abstain. Any current statements you make will then be truthful.

Action by the DVLA

If the DVLA come into possession of evidence which persuades them that a driver is currently unfit to hold a driving licence because of alcohol misuse will write to the driver with a letter revoking the driving licence. The revocation will be designed to take effect within a very few days after the expected date of delivery of the letter. Such a decision by the DVLA can be challenged but it is not a quick process. The driver is entitled to ask for sight of the evidential basis for the decision- the first letter will simply say that grounds exist to believe alcohol misuse has happened and that a driver is not currently fit. DVLA say they require evidence of abstinence from alcohol or of safe consumption limits for a period of six months before considering reinstating the licence.

Appeals

To mount a challenge is expensive in terms of legal and expert medical evidence. The DVLA decision can be appealed to a driver's local Magistrates Court. Such appeals are rare and the Court fees just to make the application exceeds £700 if the appeal is contested which is generally inevitable. A driver's own Solicitors legal fees, and those of DVLA are in addition.

The listing of an Appeal is likely to take a minimum of a number of weeks and even a successful appeal will not necessarily result in recovery of costs. This is because of the High Court decision in Bradford MDC v Booth the Court held that while the Court had a discretion to make a costs order as it thinks just and reasonable, such an order may or may not be in favour of the winner of the appeal.

The Court that said where there has been a successful challenge to an administrative decision by a regulatory authority acting honestly, reasonably, properly and on grounds that reasonably appear to be sound, in exercise of its public duty, the Court should consider in addition for any other relevant factors or circumstance both the: -

a) Financial prejudice for the particular complainant in the particular circumstances if an order for costs is not made in his favour:

b) They need to encourage public authorities to make and stand by honest, reasonable and apparently sound administrative decisions made in the public interest without fear of exposure to undue financial prejudice if the decision is successfully challenged.

In the case of appeals in this field matter is further complicated by the fact that the Court is being asked to adjudicate on the correctness of the decision at the time it was made, as well as at the time of the appeal.
By the time the appeal is heard the past decision may be of academic interest because time will have further passed, and an appellant will generally have been seeking to be abstinent or able to demonstrate drinking at a level which is acceptable to the DVLA.

The availability of appeal is therefore likely to be of limited interest and a driver who finds that his licence has been revoked will be more concerned to gather evidence to the effect that he is currently fit and persuading the DVLA of that. He is likely to be able to do this by undergoing regular medical examinations and blood tests and keeping a person diary about his alcohol consumption and lifestyle habits.

It has to be remembered that the DVLA acting as agent for the state, on behalf of the Secretary of State for Transport acting in the general public interest and as gate keepers of safe driving. They are bound to act and do act where reasonable and persuasive evidence of medical and fitness to drive comes into their possession.

John Heaton
T: 01254 828 300
E: john.heaton@backhouses.co.uk

NEWS BRIEFS

Home Office Updates – Guidance on Preventing Illegal Working

The Home Office has replaced the Code of Practice (last issued in May 2014) in relation to preventing illegal working. This guidance sets out the prescribed checks that you as employers should carry out to help prevent the risk of you being subjected to a civil penalty if one of your employees is found to be working in the UK illegally.

Immigration (Restriction on Employment) (Code of Practice and Miscellaneous Amendments) Order 2018

The Code has been updated to reflect the above Order, which provides that employers may establish a statutory excuse against liability for an illegal working civil penalty by conducting an online right to work check, by using the Home Office online right to work checking service. So, what does this mean for you and your business?

As you are probably aware, it is unlawful for you to employ someone who does not have the right to reside and the appropriate right to work in the UK, or who is working in breach of their conditions of stay under the Immigration Act 2016. In order for you to comply with your obligation, you are required to carry out right to work checks on all prospective employees before the employment starts, conduct follow up checks on any employees with a time-limited permission to live and work in the UK, keep records of all checks carried out and not to employ anyone you know or have reasonable cause to believe is an illegal worker.

You should note that different regimes apply where employment started before 16 May 2014, as different legislation was in place.

These checks are simple yet extremely important, as an immigration officer can issue a notice of liability to pay a civil penalty, if you employ an individual aged 16 or over who is subject to immigration control or who is not entitled to undertake the work for which they are employed because they have not been granted a UK immigration permission (or the permission is invalid, revoked, cancelled or expired).

The maximum penalty is £20,000 for each illegal worker. If you are issued with such a notice of liability to pay a civil penalty, you will be required to provide the immigration officer with documents to evidence that employee's right to undertake the work.

If you receive a civil penalty, you will have 28 days to either pay up, object to the penalty or lodge an appeal. You may object the penalty on the following grounds:

1. You are not liable to pay the penalty;

2. You need not pay because you have established a statutory excuse; or

3. The amount of penalty is too high.

You will be excused from paying a civil penalty if you can show that you complied with any prescribed requirements in relation to the employment of the individual found to be working illegally. Up until very recently, you would be able to establish a statutory excuse if you firstly obtained the employees original documents as prescribed by the Home Office, checked that these documents relating to the individual were original, valid and unchanged, and that a safe copy of these documents are kept for follow up checks.

However, the Home Office has introduced a new online right to work checking service (launched 28 January 2019) as an alternative to requesting and retaining right to work documents from the individual. This will enable you to check a prospective employee's right to work online. Provided you receive a positive confirmation upon carrying out such checks, you will establish a statutory excuse to a civil penalty for illegal working.

Commentary

This Home Office update makes it much simpler for you as employers to identify and confirm your prospective employees have the correct right to work in the UK. The service is a step taken to modernise the immigration system and will provide you with greater security when checking migrants' status. It avoids the risk of you being presented with fraudulent or forged documents at the checking and recruitment stage, then being stung later down the line if you are found to be liable to pay a civil penalty.

Cartel UPDATE

The Road Haulage Association (RHA) continues to pursue a damages claim on behalf of road haulage operators against the European truck manufacturers for serious competition law infringements in what is one of the largest truck actions of its kind in Europe.

The European truck manufacturers, including MAN, DAF, Iveco, Daimler and Volvo/Renault admitted that they had engaged in anti-competitive behaviour between January 1997 and January 2011. In July 2016 the European Commission confirmed its findings following an investigation that spanned 5 years and issued a collective fine of €2.9 billion to the manufacturers.

The European Commission determined that the manufacturers had engaged in anti-competitive activities such as: -

- Aligning their gross list prices at the start of the cartel;
- Increasing gross (and sometimes net) list prices;
- Agreeing the costs that truck purchasers should be charged for emissions technologies (Euro III, IV, V and VI); and
- Delaying the introduction of those technologies.

Scania were also investigated by the European Commission but did not admit their involvement. In July 2017 they were also found to have engaged in those activities and fined €880 million. Scania appealed the decision to the European Courts with the matter still awaiting determination.

The RHA seek to bring a collective claim on behalf of truck operators who between 17 January 1997 and the present day purchased or leased, for road haulage operations, new or pre-owned trucks (over 6 tonnes) either (a) registered in the UK, or (b) registered in another EEA member state provided the operating company belongs to a group of companies who also purchased or leased in the UK. The action is industry wide and is open to both members and non-members of the RHA, with currently over 10,500 operators having signed up to the legal action and a further 1,300 operators who are in the process of signing up.

The RHA, advised by Backhouse Jones, have appeared before the Competition Appeal Tribunal (Tribunal) on several occasions since lodging the application for a collective proceedings order in July 2018. The RHA's application was listed for determination between 3 to 7 June 2019 however, the Tribunal postponed certain elements of the RHA's application because of developments in another, unrelated collective claim – a £14 billion collective claim on behalf of consumers against Mastercard. ▶

"Cases such as this tend to take time and it will be several years before the conclusion of the matter."

▶ The Tribunal had rejected a collective claim against Mastercard last year, but the Tribunal's decision was overturned by the Court of Appeal in April 2019.

Mastercard have sought permission to appeal the Court of Appeal's decision to the Supreme Court and because the appeal may relate to the standard of test that the Tribunal should apply when determining applications for a collective proceedings order, the Tribunal decided it should await the decision of the Supreme Court before continuing with elements of RHA's claim.

The RHA's application hearing was therefore re-listed to take place in December 2019 however Backhouse Jones has recently discovered that the Supreme Court have granted Mastercard permission to appeal the Court of Appeal's decision which may therefore lead to further delays to the RHA's collective action.

However, a hearing did take place between 4 and 6 June 2019 where Backhouse Jones represented the RHA in responding to arguments raised by the truck manufacturers in relation to the RHA's funding arrangements.

These hearings are common in the collective proceedings regime and form part of the natural determination of an application. Indeed, the Tribunal must be content that it would be just and reasonable for the RHA to be appointed class representative on behalf of truck operators and this includes examining the detail of the funding arrangements to ensure that the RHA would act in the best interests of truck operators.

The truck manufacturers, the RHA and UKTC (a competing applicant to bring collective proceedings in relation to the truck cartel) all presented their respective arguments to the Tribunal during the hearing. It is expected that the Tribunal will provide its judgment in the coming months.

Both the RHA and Backhouse Jones remain confident in the RHA's prospects of successfully obtaining a collective proceedings order. Cases such as this tend to take time and it will be several years before the conclusion of the matter however, the RHA will continue to pursue the action and push to have the claim dealt with and decided at the earliest opportunity.

Commenting on the developments in the case, Steven Meyerhoff, Director at Backhouse Jones (legal representatives for the RHA) added: "Although the Tribunal's decision may delay the timing of the case, it does not in any way affect the RHA's vigorous pursuit of obtaining large sums of compensation for truck operators who purchased or leased trucks, with a gross vehicle weight over 6 tonnes, from 1997 to the present day.

The Court of Appeal judgment in the Mastercard proceedings, which lowered the bar for collective actions, was favourable to the RHA. However, the RHA submitted its application based on the higher test originally established by the Tribunal and so is content that it satisfies the test for a collective claim even if the Supreme Court disagrees with the Court of Appeal."

You can sign up to the RHA's collective claim by visiting its dedicated website www.truckcartellegalaction.com.

The website also includes additional news about the claim and answers for frequently asked questions which will help you understand whether you are eligible to join the claim and the benefits of doing so.

Steven Meyerhoff
T: 01254 828 300
E: steven.meyerhoff@backhouses.co.uk

James Lomax
T: 01254 828 300
E: james.lomax@backhouses.co.uk

Making Changes?

Don't do it BACK to Front!

It's every operator's worst nightmare – being told in the big, bold text of a letter from the Office of the Traffic Commissioner that "you have no authority to operate vehicles". Sadly, this continues to be an all too common reality for operators who have made changes to their business structure but have, often unwittingly, put the cart before the horse.

The key starting point is that an Operator's Licence is not transferrable. It is specific to the entity (be that a sole trader, partnership, limited liability partnership or limited company) to which it is issued and cannot be 'used' by any other entity – even where the individual(s) involved are the same.

The Operator's Licence must be held by the entity that is actually operating the vehicles and, if that entity changes at any time, a new Operator's Licence is required. The existing Operator's Licence cannot be 'used' by the new entity (as it does not transfer) and there is no authority for the new entity to operate any vehicles until an interim, or the full, grant of a new Operator's Licence to that entity has been made.

It is therefore vital that any changes to an operator's business structure are handled carefully to ensure that a valid Operator's Licence, held by the correct entity, is in place by the date of the relevant change. If this is not managed correctly, there will be a period – post-change – when no Operator's Licence is in force and there is no authority to operate vehicles.

This might sound straightforward, yet the Operator's Licence is frequently overlooked by operators (and by those advising them in connection with changes to their business structure) resulting in the Operator's Licence being held by one entity when the vehicles are being operated by another. In many cases, this situation continues for months or years (in some cases, even decades) with the individuals involved blissfully ignorant of the fact that they have no authority to operate vehicles and are doing so illegally!

Consequently, 'change of entity' features at Public Inquiry with frightening regularity – in many cases being the sole reason for the Public Inquiry. ▶

"The limited company cannot 'use' the previous sole trader/partnership Operator's Licence and an application for a new Operator's Licence in the name of the limited company is required."

▶ When does a change of entity occur?

Some of the most common scenarios that give rise to a 'change of entity' are:

Incorporation – the Operator's Licence is held by an individual (as a sole trader) or two of more individuals (trading in partnership) and that business is transferred into a limited company. The person/people in charge of running the limited company are often the same individual(s) that were running the previous sole trader/partnership business, but the establishment of the limited company has created a completely new and separate entity that must have its own Operator's Licence. The limited company cannot 'use' the previous sole trader/partnership Operator's Licence and an application for a new Operator's Licence in the name of the limited company is required.

Resignation or Death of a Partner – the Operator's Licence is held by two or more individuals trading in partnership. Unless specifically provided for in a written partnership agreement, where a partner leaves the business (for example, as a result of resignation or death), the partnership terminates and a new entity is formed, which must have its own Operator's Licence. Again, the new entity cannot 'use' the previous partnership Operator's Licence and an application for a new Operator's Licence must be made.

Insolvency - the Operator's Licence is held by a limited company but, due to severe financial difficulties, that company enters administration (or liquidation). The business is taken over by a separate entity (very often, through a pre-pack administration) but the Operator's Licence is not an asset that transfers in the administration. The purchasing business will therefore need to apply for its own Operator's Licence or, if it already holds an Operator's Licence, apply to vary that to accommodate any increase to its fleet (or other changes) arising from the 'pre-pack'.

Group Restructure – the Operator's Licence is held by one limited company within a group of companies but, at some point, due to restructuring, the company that holds the licence ceases to trade and the operation of vehicles is transferred to another company within the group. That company must apply for its own Operator's Licence and cannot 'use' the existing Operator's Licence.

Asset Sale – the Operator's Licence is held by a limited company. A separate entity purchases the assets of that business, but the Operator's Licence is not an asset that transfers as part of the sale. The purchasing business will therefore need to apply for its own Operator's Licence or, if it already holds an Operator's Licence, apply to vary that to accommodate any increase to its fleet (or other changes) arising from the asset purchase.

Although there are numerous situations that give rise to a 'change of entity', the implications of that change are the same – the new entity cannot use the existing Operator's Licence, an application for a new Operator's Licence by the new entity is required and there is no authority for the new entity to operate vehicles until that application has been granted.

When are 'change of entity' issues highlighted?

Regrettably, in many cases, a 'change of entity' only comes to light retrospectively – frequently long after the change has already taken place (meaning that there has already been a period of unlawful operation of vehicles by the new entity).

This is commonly as a result of an application to make changes to the existing Operator's Licence (or at the five-yearly continuation of the Operator's Licence), where a document that has been submitted – such as a bank statement – in the name of the new (and therefore wrong!) entity triggers alarm bells at Central Licensing Unit.

It may also come to light during a roadside encounter of an operator's vehicle(s) - when the DVSA Examiner asks the driver who he/she is working for and is given the name of an entity that does not match the name displayed on the Operator's Licence disc – or during a DVSA investigation - where, for example, the name of the 'operator' on maintenance records or tachograph analysis reports does not match the name of the Operator's Licence holder.

It is also an issue that consistently becomes apparent during preparations for a Public Inquiry to which the operator has been called for entirely non-entity related matters. In these circumstances, in addition to the failings to be addressed at the Public Inquiry, the operator also then needs to deal with the change of entity and the issues flowing from that – namely, the period of unlawful operation of vehicles by the new entity and the steps taken to regularise the position both in the short and long term.

What are the implications of doing it BACK to front?

Failing to correctly deal with the Operator's Licence where there is a 'change of entity' is an alarmingly common occurrence and one that is considered by many to be simply an 'administrative error' or 'oversight'; however, it is an incredibly serious matter and is viewed as such by the DVSA and Traffic Commissioners. Operators should not therefore underestimate the importance of ensuring that the Operator's Licence is held by the correct entity.

Where there has been a failure to manage the Operator's Licence correctly in connection with a change of entity, the new entity has no authority to operate vehicles (as it does not hold the Operator's Licence). Any operation of vehicles by the new entity is therefore unlawful, constituting a criminal offence and putting the new entity at risk of prosecution. The use of the 'old' entity's Operator's Licence also constitutes criminal offences of lending/borrowing the Operator's Licence and using vehicle discs with intent to deceive. Further, the vehicles risk being impounded (as they are being operated unlawfully) and the fleet insurance is often invalid. All of this – if brought to the attention of the Traffic Commissioner - forms a basis for the 'good repute' of the operator (and, potentially, its transport manager(s)) to be questioned and can ultimately affect the Traffic Commissioner's decision whether to grant a new Operator's Licence to the new entity.

Get your HOUSE in order

Where a 'change of entity' has been identified retrospectively, it is not simply a case of 'business as usual'!

The new entity must stop operating immediately and submit an urgent application for a new Operator's Licence. It must then wait until either an interim, or the full, grant of that application has been made before it can lawfully re-commence operating.

This process can, however, take weeks – or even months – and the application will normally be determined at a Public Inquiry where the individual(s) concerned will have to attempt to persuade the Traffic Commissioner that they can be trusted to operate compliantly in the future.

Inevitably, the inability to operate vehicles pending determination of the new application will have devastating repercussions for any business that is reliant upon the operation of vehicles under an Operator's Licence.

BACK to basics

Changing your business structure does not have to result in disruption to your business activities. If changes are handled correctly from the outset, the potential (yet very real) issues detailed above are entirely avoidable! Our advice is to keep your HOUSE in order - ensure that any changes to your business structure are planned for sufficiently far in advance and that the Operator's Licence is addressed at the very earliest possible stages - to avoid the unintended consequences of doing things BACK to front!

Laura Hadzik
T: 01254 828 300
E: laura.hadzik@backhouses.co.uk

Brief Encounter

Barry Prior

Celebrating 50 years in Law.

It is, without question, an incredible achievement and testament to Barry Prior's tireless legal commitment towards the transport industry that he is celebrating 50 years on the Law Society roll as a Solicitor. Coupled with a significant win of "Boutique Firm of the Year" at the highly acclaimed Lawyer Awards in June together with a celebration of 200 years of 'Backhouse' history in July, 2019 is turning out be quite a momentous year for Backhouse Jones.

10 years ago, then editor of Route One Magazine, Mike Morgan, interviewed Barry at a mutually convenient restaurant in Covent Garden marvelling at his 40 years in the industry. Fast forward 10 years and Barry is still as engaged and in tune with the sector as ever before.

It may be a conundrum that has confused many; why, once you've reached a certain age and stage in your career do you want to carry on? But the frank reality is that Barry's passion for road transport is clear for all to see and he still enjoys monitoring the legal implications that it brings, despite being a part-time consultant no longer required to appear in front of the Traffic Commissioners providing a robust defence.

Looking RDAB on Barry's career, his companionship with all things transport started early. In fact, for a while, it seemed as though the aviation route would determine his career until a U-turn in the mid 1970's with the collapse of the East African Community resulting in a change of focus towards the road transport sector. This followed a significant period of time as an equity partner with Wedlake Saint where Barry's involvement began with the CPT and in later years a relationship with the FTA was forged.

As with any business partnership dynamics can alter and soon after resigning from Wedlake Saint in 2005, Barry received an interesting call from James Backhouse and Ian Jones. And as say, the rest is history.

RDABGROUND

TO BARRY'S LEGAL CAREER

1966

- Joined Bulcraig and Davis as Articled Clerk 1966.
- During articles, Barry worked for BAR, Pickfords Ltd conducting "C" licence work for Southern British Road Services Ltd.

1969

- Barry officially qualified June 1969 and became part of the litigation team at Bulcraig & Davis. A short while later, he was asked if he would take on a new transport client; the former Parcels Division of BR called National Carriers Ltd under the guise of road regulatory work. However, a visit to the BR Legal Department at Euston was followed by a taxi back, surrounded by personal injury files as BR was self-insured! In Barry's own words, "there followed a steep learning curve". The first case fought and won turned out to be a BR case wrongly transferred to the firm!

1972

- In 1972 Barry was made a salaried partner of Bulcraig & Davis where he continued doing mixed litigation work. Significant clients included Air India and East African Airways.

1974

- In 1974 Barry was made an equity partner and reflects back on the time when he found himself in charge of the London Office of East African Airways when the East African Community collapsed, laughing saying "at least I was entrusted with keys of the office when the manager and staff, all Ugandans, made a hasty departure!" He then found himself in the odd position of having acted for the airline company then being instructed by the Administrators appointed by the court.

1985

- Further work prevailed and following the deaths of four partners in three years at Bulcraig & Davis, Barry joined Wedlake Saint as a partner in 1985. The litigation team grew although with their involvement with the National Freight Company (as it had become), they did not take on other road haulage companies as clients due to a conflict of interest! As an alternative, they joined the trade association for the bus and coach industry which eventually became the CPT.
- As time passed, the National Freight Company (NFC) became Exel Logistics and as the rules regarding conflict of interest became more relaxed, Exel management suggested they joined the Freight Transport Association (FTA). Barry subsequently became a member of the Operations Committee of both the CPT and FTA.

2005

- Through the CPT, a friendship of mutual trust and respect subsequently arose between Barry and James, Ian and Jonathon which led to the interesting call that Barry received from Backhouse Jones in 2005!

IR35

Does IR35 make as much sense as a message from Mars? If you use agency workers, read on to find out how this might affect your business - written in Human.

What is IR35?

IR35 is a piece of tax legislation that aims to combat tax avoidance that can occur when a worker supplies their services to a customer through an intermediary (often a limited company) when ordinarily they would be an employee of that customer.

When will any proposed changes come into effect?

Changes are due to take effect in relation to IR35 - Rules for off-payroll working from April 2020 to allow businesses to prepare.

How will this affect me as an operator?

There will be an impact on the HGV and PCV sectors as these industries traditionally rely on agency drivers. IR35 will change how these are treated and the obligations on operators.

Operators might think they are hiring a self-employed driver who would normally be responsible for their own income tax and national insurance contributions. However, often a slightly more complicated structure will be being used by the driver whereby they will offer their services through a Personal Service Company (PSC) and an umbrella company known as Managed Service Company (MSC).

The reason they do this is because it can be more favorable to them from a tax and national insurance perspective.

Why is paying someone through a PSC or a MSC an issue?

For the HMRC, this is an issue because it means that normally less tax and national insurance is being paid by the worker. Whilst this is not illegal, the impact on businesses is acknowledged by the government to be significant. Consequently, the HMRC are keen to close this loophole. This was done in the public sector some years ago and the purpose of IR35 is to extend this to the private sector.

How will this affect me if I use drivers in this way?

It is proposed that workers through their own PSC will fall within these rules:

- the party paying the worker's PSC (the 'fee-payer') is treated as an employer for the purposes of Income Tax and Class 1 National Insurance contributions;
- the amount paid to the worker's intermediary for the worker's services is deemed to be a payment of employment income, or of earnings for Class 1 National Insurance contributions for that worker;
- the party paying the worker's intermediary (the 'fee-payer') is liable for secondary Class 1 National Insurance contributions and must deduct tax and National Insurance contributions from the payments they make to the worker's intermediary in respect of the services of the worker;
- the person deemed to be the employer for tax purposes is obliged to remit payments to HMRC and to send HMRC information about the payments using Real Time Information (RTI).

Although this is yet to be tested in court and there may be some grey areas, the above proposals appear to broaden the definition of "employment" as it is defined in current law. The legislation will effectively curtail the present position and this type of working meaning that instead of the individual choosing their own status the onus will shift on to the hirer or engager of the service – the operator.

The operator will also have more obligations and liabilities regarding income tax and national insurance contributions as detailed above. It may even be correct to say that these drivers will be treated as employees for income tax and national insurance purposes.

What can I do about it?

If you think you might be affected by IR35 and are not clear about how this may affect your business, give a member of our employment team a call on 01254 828300 for more advice.

Concessionary SCHEMES

Are you worse off?

As all PSV operators are no doubt aware, since 2001 a mandatory bus concession for older and disabled people has been in place. In addition, Travel Concession Authorities (TCA) are also able to offer discretionary concessionary travel schemes.

The legislation that governs the schemes include the Transport Act 1985 (**"1985 act"**), Transport Act 2000 (**"2000 act"**), the Mandatory Travel Concession (England) Regulations 2011 (**"2011 Regs"**) and the Travel Concession Schemes Regulations 1986 (as amended) (**"1986 Regs"**).

TCA'S are required to implement the mandatory travel concessions which guarantees free off-peak local bus travel to eligible older and disabled people. In addition to the mandatory bus concession, TCA's are also able to offer discretionary concessionary travel schemes.

In order to oblige operators to provide travel concessions in accordance with the scheme, The TCA may serve in writing, a participation notice upon any prospective operator.

In exchange for operators carrying concessionary passengers, TCAs are obliged to reimburse operators in accordance with the legislation and ensure operators are financially no better and no worse off as a result of their participation in the scheme.

You may well have received these notices before, along with the arrangement for the scheme, and been unhappy with the content especially if the level of reimbursement you received for previous years has made your business worse off. You probably just filed it away on the assumption 'its like it or lump it' and there is not much you can do to challenge it.

However, there are numerous steps you can take to challenge the scheme and recover monies if you believe your business has been underpaid.

What if I don't agree with the reimbursement arrangements proposed?

If you disagree with the reimbursement arrangements offered you can apply to the Secretary of State (SoS) for cancellation, variation or modification of the arrangements.

There are two ways in which you can appeal. The 1985 act allows operators to appeal against being compelled to participate in a scheme through a participation notice which has been served on the operator by the TCA, and the SoS may decide to release the operator or direct that changes must be made to the reimbursement arrangements. The 2000 act allows operators to challenge the reimbursement arrangements in respect of the provision of the mandatory element of the concessionary scheme.

Whether appealing under the 2000 act or the 1985 act, appeals are limited to situations in which you can satisfy one or both of the following grounds:

- That there are special reasons why your participation in the scheme in question in respect of the service or any of the services to which the notice applies would be inappropriate; and
- That any provision of the scheme or reimbursement arrangements are inappropriate for application in relation to operators other than operators voluntarily participating in the scheme.

Examples of special reasons why reimbursement arrangements may be argued to be inappropriate include circumstances such as demographic characteristics of the area you service, or because of the nature of particular routes you offer.

Before submitting an appeal, you should properly consider their grounds for appeal and attempt to reach a resolution with the TCA, only if this is unsuccessful should an appeal be lodged with the SoS.

It is important that you act quickly, as any appeal under the 1985 act must be made within 56 days beginning with the date of the participation notice. Similarly, 2000 act appeals must be made within 56 days of from the date the arrangements or variations come into effect. Further, before an application is lodged with the SoS, you must give notice in writing of your intention to do so to the TCA which has to be served within a specific time frame before the Appeal is lodged.

Once the Appeal is logged with the SoS it generally takes around 3-6 months for it to be reviewed and for you to receive a decision, this may seem like a long time to wait however if the scheme is threatening the profitability of your business then it is better to take this approach that be in a worse off position. Furthermore, if the SoS upholds the Appeal he can also award compensation for the losses incurred as a result of participating in the scheme year in question.

What if I am being underpaid?

The time period for challenging arrangements generally begins in April as this is when the new scheme year begins, so you may be in a position where you are currently being underpaid with no option to challenge the arrangement. You still have the right to make a civil claim against the TCA for breach of the legislation which has resulted in your company being worse off. A civil claim can look to recover up to 6 years of underpayments (subject to what was agreed in terms of settlement for each scheme year).

If you think that your local TCA is not meeting the requirement for you to be no better and no worse off, take action and protect your business, either by challenging or looking to recover monies. Our dispute resolution team is here to help.

Libby Pritchard
T: 01254 828 300
E: libby.pritchard@backhouses.co.uk

Keep the FAITH

Religious individuals often shape their schedule around their devotion to their faith.

So, what happens when the workplace interjects with this commitment?

The Employment Appeal Tribunal (EAT) in The City of Oxford Bus Services Limited t/a Oxford Bus Company v Harvey held that when considering if a rule is justified in an indirect discrimination case, a tribunal should not focus on the particular application of the rule on the Claimant, rather than the justification for the rule in general.

By way of background the Claimant was newly employed by Oxford Bus Company as a bus driver and was a Seventh Day Adventist. In order to observe the Sabbath, he asked not to work between sunset on Friday and sunset on Saturday. After the Claimant received his first roster, he raised issue as he was scheduled to work between sunsets on Friday and Saturday. As the Claimant was contracted to work 5 out of 7 days a week, the Respondent requested that he completed and submitted a flexible working request, albeit, he did not have sufficient service to make such a request.

Although he submitted this form, the Claimant did not sign and complete some of the boxes. Having already made an exception for the Claimant in making this application, the Respondent was not prepared to consider an application which was not properly completed. Thereafter, the Claimant continued to be allocated shifts that conflicted with his beliefs.

The Claimant submitted a further request, again not correctly completed. The Respondent decided to consider the application and made efforts to accommodate his request. ▶

▶ A temporary role which did not involve working Friday to Saturday was offered to him, which was accepted. By this time, the Claimant had commenced Tribunal proceedings for indirect discrimination.

The Tribunal noted that the Respondent had said his preferred hours could be accommodated, however, issues may arise if more drivers asked for the same facility which would render any such arrangement unsuitable. The Respondent argued that where a person gets preferential treatment without justification there is disharmony. Of course, it was the claimant's case that there would be justification because the treatment sought was on the basis of a protected characteristic, namely religion or belief.

In the first instance, the Tribunal found in favour of the Claimant and ruled that 'the provision, criterion or practice' (PCP) requiring bus drivers to work 5 days out of 7 put the claimant at a particular disadvantage and was not justified. The Tribunal found that there was insufficient evidence to support one of the legitimate aims relied upon by the Respondent of 'maintaining a harmonious workforce'.

The Respondent appealed and contended that the Tribunal's reasoning demonstrates that it failed to correctly apply the test for justification. It had accepted that the Respondent had demonstrated a legitimate aim, but, when assessing if the PCP was a proportionate means of achieving that aim, the Tribunal had focussed on whether such a request could have been accommodated, rather than whether this was a proportionate means of achieving its aim.

The EAT overturned the decision. It found that the Tribunal had focussed wrongly, on the particular application of the rule on the Claimant rather than the justification for the rule in general. Whilst the Tribunal had recognised that the Respondent's issues arose not from granting the claimant's request, but from many such requests, it had failed to balance the Respondent's aims with the potentially discriminatory impact of the rule. Given the assessment required on the question of objective justification, the EAT decided that the matter must be remitted to the ET.

Commentary

The outcome of this case is obviously yet to be determined by the Tribunal. However, having recognised that any real issues to the Respondent arose not from granting the request for the Claimant, but from granting many such requests, it will be interesting to see whether the Tribunal will follow this point through second time around. Even if the Tribunal was sceptical about the real extent of this as an issue within the Respondent's operation, it must still carry out the balancing exercise in terms of the rule, not merely its application to the Claimant.

The failure to carry out this exercise and focusing the question on the individual application of the rule essentially took away the Respondent's ability to have a rule or PCP at all. We understand that it can be tricky for employers looking to apply certain procedures, criterions or practices which are both in the interests of the smooth running of their operations as well as being fair to all employees. If you need guidance in relation to the above, please speak with a member of our Employment team to consider all bases before applying the PCP to try and prevent such claims arising.

"The Respondent argued that where a person gets preferential treatment without justification there is disharmony."

Laura Smith
T: 01254 828 300
E: laura.smith@backhouses.co.uk

NEWS BRIEFS

Put Your Phone Away!

Using a mobile phone whilst driving can be very dangerous for the driver, other road users and pedestrians.

Any professional driver caught using a handheld device whilst driving will receive 6 penalty points on their licence and a fine of up to £2,500 (HGV and PSV drivers caught using their mobile twice or accruing 12 points on their licence will face the magistrates' court). They will also be referred to the Traffic Commissioner and are likely to receive a suspension from professional driving.

In addition to this, the operator licence holder may also face action from a Traffic Commissioner if one of their drivers is caught using a handheld device whilst driving to speak to their employer or customers.

It is therefore important that employers provide drivers with training and have a policy in place on mobile phone use whilst driving. Our employment solicitors specialise in advising operators on such matters and providing this sort of training.

In a recent case, one HGV driver received a three month ban for filming traffic on his mobile phone whilst driving.

Despite the driver claiming that his actions had not been dangerous, the Traffic Commissioner decided that his conduct had fallen seriously below the required standards for a professional driver.

The Commissioner deemed that the appropriate action to be taken against the driver for the offence was to take away his vocational entitlement and disqualify him for three months. At the end of his disqualification, the driver will have to reapply for his vocational licence if he wants to drive professionally again.

If one of your drivers have been caught using a mobile phone whilst at the wheel, please call us on 01254 828 300 and ask for a member of our Employment or Regulatory team. Alternatively, you can email us at regulatory@backhouses.co.uk.

Driver CPC

9 September 2019 saw the deadline pass for the driver CPC training. If a lorry, bus or coach driver has not completed the required training it is now illegal for them to drive professionally and if they do so, both the driver and operator of the vehicle could be fined up to £1,000.

All professional drivers must do 35 hours of periodic training every 5 years to keep their Driver Certificate of Professional Competence (CPC). If a driver misses the deadline, they must ensure they complete the 35 hours of training before they drive professionally and must also be aware that failure to do so could result in termination of their employment.

Drivers can check how much training they have done on the GOV.UK website https://www.gov.uk/check-your-driver-cpc-periodic-training-hours. Employers can also use this service to check their employee's record by first asking the employee to log on and create a temporary password.

If you need assistance, please call us on 01254 828 300 and ask for a member of our Employment or Regulatory team.

The Office ROMANCE

All employers want their employees to get along but what happens when they really get along?

Whether it is friendships or romantic encounters, interactions between employees can affect productivity and the company dynamic as a whole. Stephanie Walkerdine explores the issues and highlights the warning signs that operators need to be aware of.

Given the amount of time that employees spend with each other in the workplace it is likely if not inevitable that some personal or intimate relationships develop. In the majority of cases, personal relationships are normal and will not present a problem but at the same time, operators need to be alive to the possible compliance repercussions that can take place if personal liaisons escalate out of control.

Traditionally, workplace relationships have been frowned upon with the view that they evoke distractions which are detrimental to productivity. In addition, relationships whether intimate or not can induce a gossip culture amongst co-workers.

However, recent research has found that workplace friendships can actually be healthy for both employees and the company. In today's economy, people spend greater times at work and the line between home and work is thinner than ever. In fact, contrary to popular belief, it is now the opinion that employees are happier when they have friends at work which in turn makes it is easier to get through the day and ultimately leads to increased productivity and a decreased staff turnover.

Although much trickier, a workplace relationship can be viewed in a similar way. Employers should ensure that all employees are familiar with the company's stance on workplace relationships and that operational managers are fully equipped to understand and know how to address issues in one or more of the following ways:-

- A Workplace Relationship Policy. In light of the potential implications, we suggest a well written and informative Personal Relationships at Work policy is put in place to inform employees of the balance between their rights to a private life and the Company's right to protect its interests.
- Provide training. Consider offering courses for managers and supervisors focusing on romantic relationships between their employees.
- Grievance and Anti-harassment Policy's. There can be a thin line between workplace romance and possible sexual harassment so all employees should be made aware that inappropriate and unwanted conduct of a sexual nature is not acceptable. This can also be an issue when relationships fail.
- Employers may want to include a guideline in their policy that requires employees to inform management of any close personal relationships between colleagues so that they can review the situation in relation to possible interference with their work. In such circumstances, employers may find it necessary to explore the possibility of one party being moved to a different area of work or location.

Be aware that the dismissal of an employee simply for having a personal relationship at work is likely to be unfair, as well as possible discrimination on the grounds of sex.

Such situations should be handled with care and sensitivity in the interests of all concerned and employers should ensure that any approach or actions are not unfair or discriminatory. Please speak to a member of the employment team if you require further advice.

"Traditionally, workplace relationships have been frowned upon with the view that they evoke distractions which are detrimental to productivity."

Stephanie Walkerdine
T: 01254 828 300
E: stephanie.walkerdine@backhouses.co.uk

Hiding in the BACK

Sadly, it's an all too familiar sight, watching the news and hearing report on the increasing numbers of clandestine entrants attempting to gain access to the UK. However, have you ever wondered about the implications of clandestine entrants for both the driver of a vehicle and the operator?

Kelly Heyworth, one of our dispute resolution solicitors, explores the issues and highlights audit prevention measures that your business can take out in order to limit the risks.

By way of background, a clandestine entrant is someone who has arrived in the UK concealed in a vehicle, ship or aircraft or someone who has passed, or attempted to pass, through UK immigration control concealed in a vehicle. The operator of a vehicle found to have been used to conceal a clandestine entrant, and the driver of that vehicle, are likely to be guilty of an offence, regardless of whether they knew that the clandestine entrant was in the vehicle, and can be fined up to £2,000 for each clandestine entrant. Fines are imposed on both the company and the driver with the company being jointly and severally liable for the driver's penalty.

If a clandestine entrant is found in a vehicle, there are only two defences available to the operator/driver of that vehicle. The first is if the operator and/or driver of the vehicle that was used to conceal the clandestine entrant was acting under duress. Secondly, there will be a defence if it can be shown that all of the following have been satisfied:

1. The operator/driver did not know and had no reasonable grounds for suspecting, that a clandestine entrant was, or might be, concealed in the vehicle;

2. An effective system for preventing the carriage of clandestine entrants was in operation in relation to the transporter; and

3. That on the occasion in question, the person or persons responsible for operating that system did so properly.

Therefore, in order to have a defence in the event that a clandestine entrant is found in one of their vehicles, operators must ensure that they have an effective system in place.

Documentation

Operators of both HGVs and PCVs that are entering the UK must ensure that their vehicles carry a document that details the system in place to prevent clandestine entrants arriving on their vehicles so that it can be produced to an immigration officer on demand, if needed.

A report detailing the checks that have been carried out must also be carried on the vehicle. If possible, this report should be endorsed by a third party who has witnessed the checks being carried out or who has completed the checks themselves. An endorsed report will have more evidential value in the event that a clandestine entrant is found onboard a vehicle. ▶

▶ Even if an operator contracts with someone else to carry out the required checks of the vehicle, the operator and/or driver will still remain liable in the event that an unauthorised person is found onboard the vehicle. It is therefore important that operators can be satisfied that the checks are being performed correctly.

Checks and security

For HGVs, at the time of final loading, the operator or driver of the vehicle must check it to ensure that there are no unauthorised persons on the vehicle and it must then be locked, sealed or otherwise made secure. If someone else is conducting the checks, operators must obtain written confirmation from that person that the checks have been properly conducted and that there were no unauthorised persons present on the vehicle.

Operators and/or drivers should make a note. Any tilt cords and straps that are used must be undamaged, pass through all fastening points, made taut and secured. Spare security devices should be carried on the vehicle.

Any seals used must be distinguished by a number from a series that is unique to the operator or driver and must be recorded in documentation on the vehicle. This is so that the number can be checked to ensure that seals have not been removed and replaced by an unauthorised person.

For PCVs, the vehicle must be kept locked when unattended and any compartments must be kept locked when not being accessed to prevent any unauthorised entry. The operator or driver must supervise when passengers are boarding or alighting and when items are being loaded or unloaded to ensure that no unauthorised persons gain entry to the vehicle.

If the operator or driver suspects that someone may have entered the vehicle, they must contact the local authority, police or border force.

Driver Training

As part of an effective system and in order to be satisfied that the Code will be complied with by their drivers, operators must provide driver training on how to prevent clandestine entrants. Operators should develop a checklist that drivers can use during their journey to ensure that they have performed the required checks.

Drivers should be made aware that it is not just the operator who can be fined if a clandestine entrant is found onboard the vehicle and that individual drivers can also be liable to pay the £2,000 penalty per clandestine entrant. Drivers should be encouraged to personally check the vehicle and to supervise loading so that they can be satisfied that there are no unauthorised persons in the vehicle before it is secured. After every stop on the journey, drivers should carry out an additional check and note this down on the checklist.

Operators must regularly check that drivers are following their instructions and refresher training should be given periodically.

Brexit*

The effect of Brexit on transport companies that travel in and out of Europe remains uncertain. A lot will depend on the deal (if any) that the UK makes with the EU. Operators may see increased costs of exporting and importing to and from the EU, particularly if there is a 'hard Brexit'. It also seems likely that operators will face additional customs checks and there have been concerns that this may result in delays when crossing the border. However, it has been reported that the companies behind the port in Calais and the Eurotunnel have already started to plan for Brexit and they expect little, if any, increased delay.

It was UK law, rather than EU-originating law, which created the penalties for clandestine entrants and therefore the penalties, and the guidance set out above, are unlikely to change following the UK's exit from the EU.

Border Force have a Civil Penalty Accreditation Scheme ('the Scheme') for operators that are able to demonstrate that they have an effective system in place for preventing clandestine entrants. If a member of the Scheme is found with clandestine entrants on its vehicles, the member may avoid a fine, provided that it can be shown that they were operating in accordance with the effective systems they have adopted.

Backhouse Jones frequently deal with operators that have incurred penalties as a result of clandestine entrants being found on their vehicles. Even with the uncertainty around Brexit, it is unlikely that the Scheme will be removed, therefore Backhouse Jones are now offering a package to help operators to become accredited. Becoming accredited will not only assist operators in reducing the potential for clandestine entrants to be found on a vehicle but also increase the protection for drivers operating the vehicles cross borders. In the event that clandestine entrants are found on their vehicles whilst operating within the accredited scheme, the exposure to potential fines being imposed by Border Force is substantially reduced.

As part of the package, Backhouse Jones will review the operator's current systems to prevent clandestine entrants, offer guidance on how to improve these systems to the standard expected by Border Force and help operators to complete the application form to become accredited. Backhouse Jones are offering this service for operators from £999 plus VAT, or from £750 plus VAT if we have filed a notice of objection to a penalty for your business in the last 12 months (less than half of the penalty for one clandestine entrant).

**Please note Brexit information applicable at the time of this publication going to print (August 2019)*

Kelly Heyworth
T: 01254 828 300
E: kelly.heyworth@backhouses.co.uk

NEWS BRIEFS

Are you in tune with the mental health of your employees?

Millions of working days are lost due to work related stress, depression and anxiety each year.

According to the Labour Force Survey, 15.4 million working days were lost to work related stress, depression and anxiety in 2017/18.

Stress, depression and anxiety was cited for 44% if all work-related ill health cases and 57% of all working days lost due to ill health.

The main factors causing work-related stress, depression or anxiety were stated as: workload pressures (including tight deadlines); too much responsibility; and lack of managerial support.

In the PSV and the HGV sectors, it is critical that operators are attuned to the mental health of their employees and aware of the pressures they are put under at work and at home. They should also be looking out for tiredness and changes in behaviour and seek advice from a medical professional if in doubt. We also advise operators to review their employment contracts to ensure they contain the provisions to allow for this.

If you would like further advice on this matter, please contact a member of our employment team on 01254 828300.

Don’t hold OUT

If you have taken stock of our previous commentary in earlier issues of Backchat, you will be acutely aware of our strong recommendations to incorporate your transport business.

There is no good reason in this litigious landscape to put your home and family assets at risk. The burden of filing annual accounts and a confirmation statement should not be seen as a barrier to transferring your businesses into a limited company.

Assuming you have incorporated or are in the process of incorporating your transport business into a limited company, this article may be of further interest to you. In this article we are going to be looking at the benefits of introducing a holding company into the mix to provide more security, more flexibility and more tax efficiency to your business.

Depending on the size and structure of your business, a holding company can provide some real advantages, including:

- reducing risk;
- protecting assets;
- providing centralised corporate control; and
- offering a flexible structure for growth.

So, what is a Holding Company?

A holding company is a company created to buy and own the shares of other companies. These other companies are known as the subsidiaries of the holding company. The holding company usually doesn’t produce goods or services or take part in daily operations of the business. Instead, it often owns assets that its subsidiary companies use.

Business owners usually consider setting up a holding company and one or more subsidiaries to help structure their business as it grows. This is because the holding company can provide greater safeguards against risks and streamline operations for a business that’s still growing and diversifying.

What are the benefits of a Holding Company?

Some say that seven is the magic number hence we have set out seven advantages of introducing a holding company into your corporate structure and explained briefly how this could help your business: -

1. Protect Assets

A holding company can hold the valuable assets of a business. These assets may include:

- property, including your Operating Centre, Warehouse or Bus/Coach Depot;
- intellectual property;
- licences and authorisations; and
- equipment.

The subsidiary company then takes on the daily operations of the business and its trading responsibilities. The valuable assets held by the holding company are therefore protected from creditors and other liabilities that the operating company might incur. If you are a HGV business, you could even look at the possibility of placing one of you businesses most valuable assets, the Operators Licence, in the ownership of the Holding Company.

2. Reduce Risk

Where a holding company holds the valuable assets and is an entity separate from the operating company, the risk of losing those assets is minimised if the operating company performs poorly or becomes insolvent.

For example, if an operating company faces insolvency, the holding company may lose money too. However, they generally can’t be pursued legally for the responsibilities of the operating company. However, in some circumstances, the holding company can still be found liable for the actions of the operating company’s directors if they were aware of the poor performance.

3. Tax Efficiency

A holding company can be set up to efficiently manage the tax that the group as a whole has to pay. The main benefit is to enable it to safeguard retained profits. Other examples include the ability to pass dividends to the holding company tax free and to sell shares in the trading company without having to pay capital gains tax. There are however stringent conditions that apply to the types of reliefs and exemptions referred to above, and these constitute a specialist area of tax advice. For this reason, none of the above should be undertaken without expert advice from professionals.

4. Central Control

Usually, the management of the holding company and the subsidiary company is controlled by the directors of the holding company. This provides a cohesive and centralised management structure that allows the holding company to maximise its performance and growth.

For example, the holding company directors may introduce a debt-structuring procedure that benefits all operating companies. A holding company may also help individual operating companies gain more favourable financing terms then if those companies were standing on their own.

5. Concentrate Property Assets

As the central holder of property assets, the holding company can deal with those assets for the benefit of the group as a whole. Subsequently, trading companies do not need to take the risk and time to do so.

6. Flexibility for Growth, Development and Diversification

Having the valuable assets held by the holding company allows the group to:

- diversify more efficiently;
- invest in new ventures; and
- exit ventures if needed.

The operating companies can take these steps without risk to the holding company and the wider group’s assets. A holding company gives greater power to the group and subsidiaries to invest in larger projects.

7. Succession Planning

A holding company, with a centralised board of directors, can ensure continuity of the business when key people from the operating companies leave.

Key Takeaways

- Setting up a holding company can help your business grow while minimising some of the risks that come with this growth. You can gain benefits in:
  - the operation of your company;
  - tax efficiency; and
  - financial advantages.

Separating property assets and using the buying power of a larger group can help a business grow in a more creatively and flexibly.

If you have any questions about holding companies please do not hesitate to contact Brett Cooper on 01254 828300 or brett.ccoper@backhouses.co.uk

Brett Cooper
T: 01254 828 300
E: brett.cooper@backhouses.co.uk

The Watchdog That's All-BARK and All-BITE

"This should raise the alarm for any business still dragging their feet in relation to GDPR, because you may find the ICO on your doorstep sooner than you think."

In June 2018, the company, British Airways, became aware that it was the subject of a complex cyber-attack. Online traffic was diverted away from the BA website and through to a false site, where customer details were scraped from the web and retained by fraudsters. Approximately 500,000 customers had their personal data stolen and abused, inclusive of credit card details, names and addresses.

The incident itself was only brought to the attention of the government watchdog appointed to handle such matters, the Information Commissioner's Office (ICO), in September 2018.

The incident itself comes after the introduction of the Data Protection Act 2018 into the law of the United Kingdom. This, in turn, granting applicability to the General Data Protection Regulation (Regulation (EU) 2016/679) which imposes at a European level more onerous and stringent requirements and responsibilities upon big businesses.

Further to this, the framework offers more in the realms of punishments and sanctions where companies are found to have failed to prevent an information breach or failed to have the appropriate policies and practices in place to combat attacks such as that suffered by BA.

Thus, this incident at BA has been the first opportunity the ICO has had to flex its new muscles under the fresh legislation…and it hasn't let it slip through its fingers.

On 8 July 2019, the ICO published its intention to fine BA a total of £183.39 million. This in itself is an undeniably large figure to hit a company with, however the fine has split opinion to some extent. There are those that point out that this figure is only 1.5% of BA's annual turnover, whilst the new GDPR legislation both in the UK and at the level of the European Union allows the ICO to fine a company 4% of its annual turnover, or £17 million – which ever is greater and appropriate.

Regardless of one's opinion, the fine and published intention show that the ICO are taking GDPR seriously. This fine has shot the previous record fine imposed by the ICO out of the water, this being the fine which amounted to £500,000.00 slapped onto Facebook following the Cambridge Analytica scandal in 2016. If anything, published intentions such as this should raise the alarm for any business still dragging their feet in relation to GDPR, because you may find the ICO on your doorstep sooner than you think.

Another lesson that might be best taken from this decision is the importance of cyber-security in modern business.

The thriving information age has seen business and companies hoping to operate online possess large quantities of sensitive and commercial information. This, naturally, makes them prime targets for those seeking to use the internet malevolently. A thorough review of internet and online security would be well-advised in the midst of a gradually-growing, hostile online environment targeting businesses holding consumer data.

For any legal advice on your own data protection procedures, policies and practices, Backhouse Jones can provide quality, informed guidance on how best to avoid an adverse ICO decision, or how best to mitigate the damage should you find yourself under investigation. For such services call 01254 828300 and speak to Brett Cooper or Jo Dawson-Gerrard.

It's the LEASE we can do!

backhousejones.co.uk

An awareness of tenant-adverse terms in a commercial lease is invaluable in the modern business landscape. It allows you to avoid complex and expensive litigation, the cost of a feud between your business and your landlord and can see you wriggle out of onerous and pricey obligations under a property agreement.

It is an awareness that comes naturally to some, but which escapes others. For those who think that their understanding of terms in a lease could do with a tune up, we have written the below article. If, however, you want iron-clad, industry-specific knowledge, we recommend you instruct us directly in a matter.

"You want your lease to provide flexibility to move on, not tie you in to a long-standing contractual agreement which is no longer suitable."

Commercial Leases

How Long is Too Long?

Commercial leases can vary widely in terms of their length. The length of time appropriate for your business will be dependent on a variety of factors such as:

1. The nature of your business
2. Expansion plans
3. How long you have been in business
4. The purposes for which you wish to use the land.

This list, however, is not exhaustive and certain bespoke circumstances may cause for some serious consideration regarding the length of the lease. An example of how such variables can impact on the correct length of a lease for your business would be if you were a new company or entity just starting out, such as a haulier or coach operator with three vehicles, renting a premise to use as an Operating Centre. If you expand to housing ten or fifteen vehicles, you want your lease to provide flexibility to move on, not tie you in to a long-standing contractual agreement which is no longer suitable. Therefore, a short-term lease would be more appropriate.

Time is Money

Be wary of the landlord who demands both a rent deposit and a personal guarantee from you as part of the commercial lease. One of the two may be appropriate but including both as requirements under a lease is far too onerous.

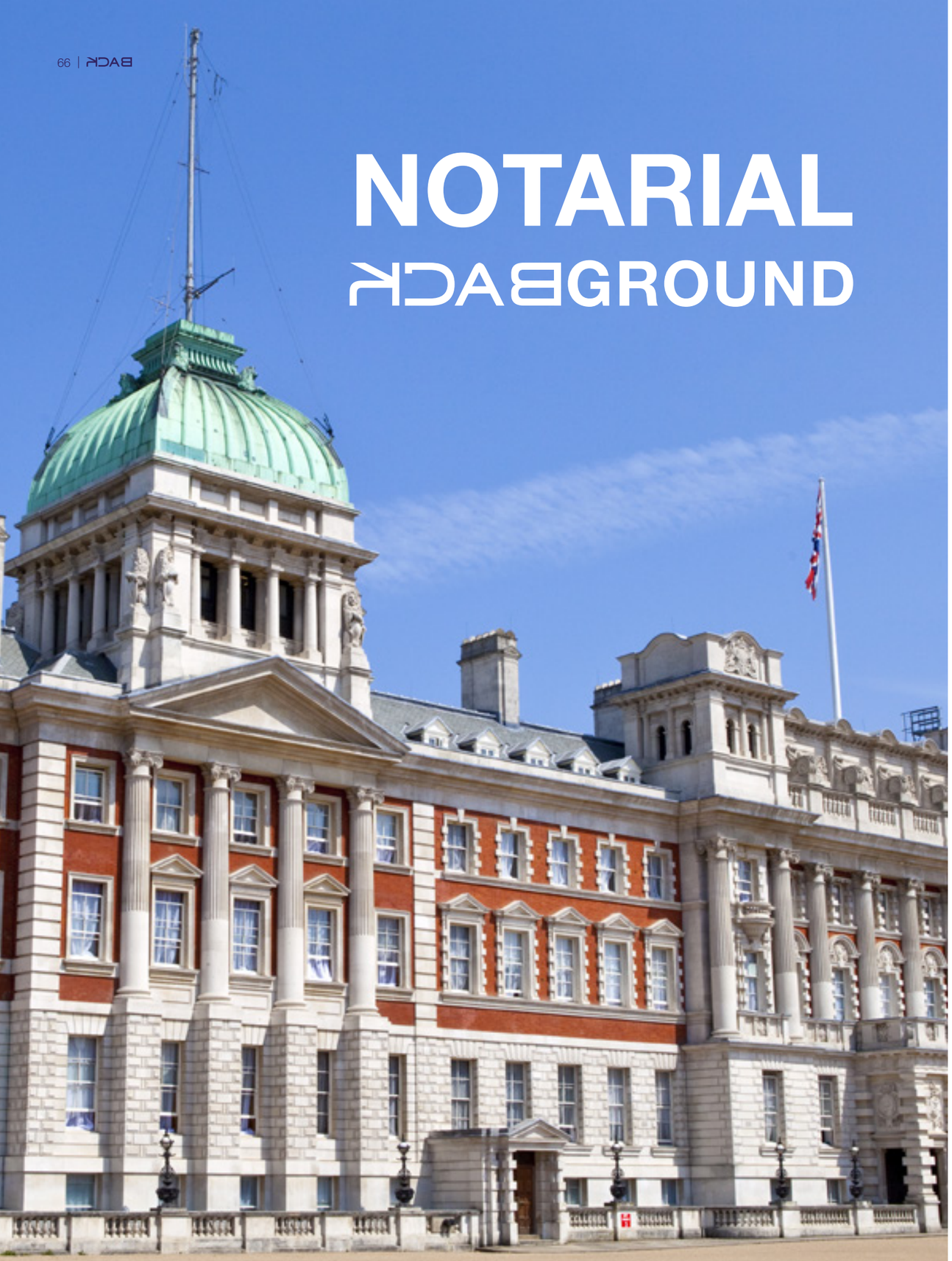
From the perspective of a tenant, it may be more favourable that you pay a one-off, upfront rent deposit, instead of providing a lengthier guarantee that may bite later and put your personal assets (such as your home) at risk. Another scenario that may impact on the figures involved in a commercial lease is where the agreement provides for rent reviews.

Tenants sometimes reject a review of a rent, where at the time of review the landlord is in breach of his obligations to maintain the property or cover some form of expense. In order to compromise in such an instance, it may be worth allowing for such a review in the contract, on the proviso that a landlord cannot benefit from a rent review, increasing the amount of rent, where the tenant has notified them that they are in repeated breach of their obligations and have failed to remedy this within a reasonable time.

It is also common to see a provision in a lease stating that the effect on rent of improvements made by the tenant will be ignored on review. This means that the landlord will not pay credence on review of the rent to the fact that the tenant has incurred expenditure in trying to improve the property.

For all further queries, please contact a member of our company commercial team or speak with Brett Cooper.

Brett Cooper
T: 01254 828 300
E: brett.cooper@backhouses.co.uk



NOTARIAL BACKGROUND

A notary public forms the oldest branch of the United Kingdom legal system, but in truth, many people will only find out what a notary does when and if the time to require one arises. By way of BACKground, the origins can be traced as far back as Roman times where the word notary comes from the Latin word 'Nota' which was a system of shorthand used by Tullius Tiro, the clerk to the Roman Statesman, Cicero.

Notaries were originally scribes or copiers, but developed into a learned profession, respected for their knowledge of technical matters. In later years, notaries were often attached to the court and prepared deeds and other legal documents which were then sealed under the seal of the court and therefore rendered "public acts". Years later, notaries were granted the right to use their own official seals to give their acts "public" status.

Since 1279, the pope Nicholas III delegated the power, or faculty, to appoint notaries to the Archbishop of Canterbury. In the very earliest records notaries feature in matters concerning the business of the monarch with foreign countries and in the workings of the Church. Henry VIII's break with Rome is an obvious landmark in history of notaries in this country, as the Ecclesiastical Licences Act 1533 created the Court of Faculties and, the system of regulation of notaries that persists to this day. Notaries were very much involved in Henry's marital business.

The President of the Court of Faculties is a Judge of the High Court and is known as the Master of the Faculties. The Courts and Legal Services Act 1990 expressly preserved the jurisdiction of the Court of Faculties over notaries and, in particular, the powers of the Master of the Faculties to make rules for the education and training of notaries.

As of 1 November 1999, all notaries may practise anywhere in England and Wales. This has led to a dramatic increase in the number of notaries practising in Central London. Notaries are appointed by the Archbishop of Canterbury and they are also a qualified Lawyer.

Claire McKie, one of Backhouse Jones' experienced solicitors and a qualified notary public provides a whistle-stop tour of the types of jobs she can engages with on a day-to-day basis: -

A notary public is a person who can serve as an official witness to the execution (signing) of and an almost limitless array of legal documents such as deeds, powers-of-attorney, for foreign and international business. A notary's main functions are to administer oaths and affirmations, take affidavits and statutory declarations, witness and authenticate the execution of certain classes of documents, take acknowledgments of deeds and other conveyances, perform certain other official acts depending on the jurisdiction and create a record of that document signed in their presence. The records in known as a notarial act. A notary may also certify documents to be true copies of the original. The documents are used in foreign Jurisdictions.

Often, once the Notarial act is completed, the recipient in the receiving Jurisdiction has to decide whether to accept it or not. In some jurisdictions the notarial act will be accepted without further authentication, in other jurisdictions, the recipient will require authentication of the status of a Notary and this is most commonly dealt with by a certificate known as an Apostille which is issued by the Foreign and Commonwealth Office.

Typical areas of assistance regarding authentication and certification of signatures, authority and capacity relating to documents for use abroad and to give a document a legal status include: -

- Lost passports and share certificates.
- Notarisation of company documents.
- Parent and child travel permissions.
- Property and trade mark documents.
- Witnessing powers of attorney.
- Affidavits, statutory declarations and sworn statements.
- Apostille, legalisation and certification service.
- Declarations of single status when getting married.
- Liaison with the Foreign and Commonwealth Office.

If you would like to discuss any of the above in further detail with Claire, please contact her by telephoning the office on 01254 828 300 or email claire.mckienotary@backhouses.co.uk

Claire McKie
T: 01254 828 300
E: claire.mckienotary@backhouses.co.uk

When should you suspend an employee during a disciplinary investigation?

When faced with a disciplinary complaint against an employee, an employer's first reaction is often to take what may be perceived as the fair approach and suspend the employee until an investigation has been carried out. Suspension is appropriate if the allegations against the employee involve gross misconduct, where if they were upheld, the employer would be entitled to dismiss the employee without notice. An employer would also be justified in suspending an employee where there has been a breakdown in the relationship between the employee and employer, and the employer has lost trust in the employee.

However, suspending as an automatic rule of thumb may not always be the safest way to proceed and the risks involved in automatically suspending employees subject to disciplinary proceedings as a "knee-jerk reaction", without giving sufficient thought to the matter, has been highlighted in a recent Court of Appeal case *Lambeth B C v Agoreyo.*

In this case, a teacher was suspended following several alleged incidents with children in her class. She resigned the same day and the Court of Appeal overturned the High Court's decision to find that there was no breach of the implied term of mutual trust and confidence.

Suspending an employee will not automatically give rise to a claim and the case clarifies the test employers should apply when deciding to suspend.

The Court of Appeal confirmed an employee can only be suspended lawfully where there is "reasonable and proper cause" to do so.

The CA went on to emphasise that suspension must be assessed on a case by case basis: it is highly fact-sensitive question as to whether an employer has reasonable and proper cause to suspend.

The Court's decision certainly should not be read as permitting a "suspend first and ask questions later" approach to workplace investigations, and suspension should not be a default response to misconduct allegations against an employee. A careful balancing act should be conducted, considering the needs of the investigation (such as independence) and the interests of the employee.

For example, employers should consider:

1. What initial evidence is available in relation to the allegations?

2. Is the suspension necessary?

3. Is there another, less extreme way of achieving the same objective?

4. What effect the suspension may have on the employee?

An employer that has considered all the above is less likely to be at risk of allegations of having made a knee-jerk reaction, and breached trust and confidence in their employment relationships.

It is also worth pointing out that if suspension is unlawful, it can give rise to a constructive dismissal if the employee resigns and can also make the employer liable for any psychiatric harm which arises from the suspension. The Courts recognise that being suspended from work can have a severe reputational and psychological impact on an employee.

Recover your money BACK.

The Classic English proverb "don't cry over spilt milk" is an idiom that has been used throughout the ages to imply that there is no point in worrying about something that has already happened or things that cannot be undone.

"Where a vehicle is deemed unroadworthy it can sometimes attract unwanted attention from the DVSA."

How highly you value your milk however is a subjective matter. Take a scenario where a vehicle has been involved in a Road Traffic Accident (RTA) but has only suffered cosmetic damage. When the vehicle arrives back into the yard, with a fresh scrape or dent, the first issue to tackle is liability. In many cases, Backhouse Jones are instructed by self-insured operators to defend against a claim where the operator's employee/vehicle is to blame for the RTA.

In other examples, an operator will instruct Backhouse Jones to act in order to recover monies from the other side where a RTA has occurred at no fault of the Company. Both are key areas of expertise within the Insurance Litigation team at Backhouse Jones.

The question for the readers of this article to ask themselves is, what action would I take?

Haulage and PCV sectors are dependent on strict timelines and in many cases, operate a narrow profit margin. Time is money and it is often the case that an operator will see one of their vehicles with a new bump but consider the time required to investigate or get the insurers involved to be too onerous and costly. In other words, they let it go. In other cases, the vehicle may be unroadworthy and it is left in the yard, waiting for an engineer to assess the situation and schedule the repairs; this again brings rise to a loss of use claim.

Fundamentally, every bump and knock incurred collectively brings down the value of an operator's fleet. In addition, depending on the situation, where a vehicle is deemed unroadworthy it can sometimes attract unwanted attention from the DVSA which naturally causes further ramifications in terms of the operator's O-Licence.

How can Backhouse Jones' recoveries team assist?

Knowledgeable, experienced and robust, Backhouse Jones' recoveries team acts for several large PCV and HGV companies, handling low level repair costs to multi-million-pound claims in addition to dealing with claims to recover monies for damage repairs, loss of use, hire fees and other litigation costs.

Typically, the seasoned team with a pragmatic approach, will recover in the region of 92% of repair costs.

A recent case saw Backhouse Jones' solicitor, Claire Mckie, instructed to act on behalf of an international PCV operator. The claim was brought as a result of a none-fault crash in France.

The crash rendered the coach unroadworthy, leaving the operator to organise the hire of a replacement coach to accommodate the passengers together with a recovery vehicle to transport the damaged vehicle back to the UK. After delays with the impounding of the vehicle and repairs (at no fault of the operator), Backhouse Jones were instructed to help recover losses being suffered by the operator.

Although presented with issues involving insurance companies and jurisdiction, the case was settled in favour of the client operator resulting in a six-figure sum recovery.

Accidents do happen, however the choice to instruct Backhouse Jones and recover your companies' losses is in your hands. For a discussion about how Backhouse Jones can assist you in your insurance litigation and recovery matters please call 01254 828 300.

Alexa Hornsby
T: 01254 828 300
E: alexa.hornsby@backhouses.co.uk

GUEST FEATURE

Themis Skills Academies work: for employers and individuals alike.

Innovative Skills Academies, founded by Themis, the Apprenticeship and Business Training Provider arm of Burnley College, are filling vital skills gaps and business development needs in industries across East Lancashire.

With a training model anchored on the diverse needs of employers in a variety of industries that struggle to recruit staff with the skills, knowledge and work ethic needed to succeed, the Themis Skills Academies are revolutionising the way training is delivered.

Motivated individuals seeking a career change or keen to return to employment after a break are equipped to secure permanent roles with leading local employers, with the confidence, basic skills and understanding of how they can play a part in the region's industrial success story.

Launched two years ago with the successful Textile Academy, which trains sewing machinists to secure the growth of the area's thriving furniture sector, there are now Skills Academies for Manufacturing and Warehousing, as well as Upholstery and Tiling/ Plastering. Each Academy runs along similar lines, in close liaison with employers, to ensure future employees fit seamlessly into the workforce and make an impact immediately. ▶

▶ At the end of each eight-week Skills Academy programme, employers can be confident that their new recruits have:

- The basic skills needed in their specific sector
- Practical experience and knowledge that meets their particular requirements
- A sound knowledge of Health and Safety in relation to their sector
- A good time-keeping record
- The commitment and enthusiasm to see their business succeed.

Simon Jordan, Chief Executive of Themis, said: “Themis is proud to be playing its part in the ensuring the success of the region’s business community by providing the vital skills needed in industry.

“It’s a win-win situation: employers recruit expertly-trained individuals with the skills, knowledge and commitment to succeed and those seeking a fresh start in a new career are provided with the experience and opportunities they need to step into employment.

“Our Skills Academies are growing each year and are constantly evolving through the input of Employers. Together, Themis and Employers are driving the training agenda and creating the skilled and motivated workforce of the future.”

Warehousing

Warehousing is a vital operation in a wide variety of sectors, requiring a workforce with both skills and motivation. The Warehousing Academy is training individuals as warehousing specialists, with the adaptable skills and knowledge to succeed in diverse warehousing environments.

The training programme is led by highly-experienced experts who have led warehouse functions for national Employers across the UK.

Academy recruits gain two nationally-recognised qualifications in warehousing and employability, as well as a Fork Lift Truck Licence.

Manufacturing

Finding individuals with manufacturing skills and a great work ethic can often be a challenge for Employers and involves a lengthy recruitment process. The Manufacturing Academy is solving these problems by training individuals in the key skills that will make them invaluable members of the workforce.

Experts with extensive experience in managing manufacturing operations for a range of national Employers train Manufacturing Academy recruits in the essential skills they need.

Academy recruits gain two nationally-recognised qualifications on the programme and are equipped with the skills to join an existing team – or form the bedrock of a new team - manufacturing goods, following specifications, carrying out quality control checks, completing paperwork and keen to develop their skills still further.

“Finding individuals with manufacturing skills and a great work ethic can often be a challenge for Employers and involves a lengthy recruitment process.”

Location Details

Themis Skills Academies are based at the £100 million Burnley College Campus, in the heart of Burnley, and within a bespoke industry training facility on Vision Park, in Whittle Way, opposite the College.

Contact Details

Want to find out more? View our industry-standard facilities, talk to our Trainers and professional Themis team, who are committed to providing you, as an Employer, with the skilled and motivated individuals you need to fill skill gaps within your sector.

Contact Chantelle Allen on c.allen@burnley.ac.uk or call on 01282 733547.

BACKHOUSE JONES

01254 828 300
marketing@backhouses.co.uk
backhousejones.co.uk

Backhouse Jones

The Printworks
Hey Road
Clitheroe, Lancashire
BB7 9WD

22 Greencoat Place
London
SW1P 1PR