

Member Briefing Webinar – Managing Drivers’ Conduct

Questions and answers

Balancing Employment and Regulatory Risk:

Q. Can you summarise the general employment risks that are in play?

A. For a start, there are always legal risks of taking action when managing driver conduct. The particular categories of risk related to employment are:

- Rights in contract e.g. place of work, notice period
- Discrimination related rights e.g. race/disability/whistleblowing
- Unfair dismissal related rights acquired on 2 years’ service
- Employee relations risks

Employers need to ensure that they manage driver conduct fairly, as the risks of getting this wrong can be high and in a worst case scenario may end up in the employment tribunal. Defending tribunal claims is costly and can take up a considerable amount of management time and the time of your employees if they are called as witnesses at the final hearing. In addition to this, there are reputational risks to employers as employment tribunal judgments are publicly available and the press can attend hearings.

It can sometimes be tempting to rush a disciplinary process, particularly if there is strong evidence which demonstrates misconduct. However, employers should always be mindful of the risks. Usually, taking a little extra time at the outset saves money in the long run.

Q. What are the general HR risks of not taking action?

A. It can be tempting to take no action and hope that any misconduct issues will resolve themselves, however, in taking no action (and not forgetting you can take informal action, such as reminding staff of the expected standards of conduct) then you risk:

- the employee concluding (not unreasonably) that their conduct is acceptable
- the conduct in question develops into a habit
- a precedent is set
- other employees begin to display the same type of behaviour; and
- the relevant manager’s credibility and authority are damaged.

Additionally, those staff that are behaving in accordance with the expected standards can become demotivated when they see their colleagues not behaving correctly and “getting away with it”.

Q. What are the general regulatory risks in managing driver conduct?

A. When you have an issue of driver conduct you need to superimpose onto the employment and HR aspects, the context in which the Traffic Commissioner (“TC”) would view the matter.

For example, if a driver fails to spot a wheel flag indicator not pointing in the right direction, then to the average member of the public that might appear to be a minor offence. But to the TC that might well be indicative of a significant failure in the maintenance system and a “near miss” in health and safety terms. It is likely to result in an immediate prohibition and possibly a follow-up DVSA investigation.

So when the operator investigates the incident, it clearly needs to be operating fairly in the context of HR and employment law, but it also needs to bear in mind what messaging it needs to deliver to the TC.

A catastrophic incident as a result of failing to manage drivers, for example an accident caused as a consequence of an underinflated tyre that was not picked up by a driver on their first use inspection, can lead to the operator's licence as a whole being at risk. This is particularly the case where there is no system in place either to manage the process or to discipline the driver(s) if shortcomings are identified. In addition, TCs take into account the impact of any incident so whilst not determinative, if people are injured as a consequence, the danger posed by the shortcomings is crystallized to the extent that the TC can justify significant regulatory action.

The management of drivers hours regulations is a clear example of the need to manage driver conduct. Every operator should have systems in place to manage the process of analysing compliance by drivers with drivers hours rules. Even when there is a system too often there is a situation where infringements are identified to the driver but no action is taken against them. There is therefore no incentive to change behaviour and the situation escalates as there is no consequence to the driver. There can be consequences for the operator not necessarily revocation of their licence, albeit that is a risk, but also suspension and reduction of the operator's licence or even a warning which can have some reputational damage.

Q. In reference to the above question about messaging to the TC, will the TC get to hear about this?

A. Quite possibly. For a start, the prohibition may prompt a MIG investigation. There are also obligations upon an operator to report matters potentially going to their good repute within 28 days. You can have quite complicated arguments about exactly what this means but my policy is generally to over report not under report. If you fail to report something that the TC believes to be relevant, then you will also be criticised for failing to report as well as the initial offence.

It is pretty rare that a TC will complain about over-reporting albeit I have heard it commented upon. Sometimes information can be picked up by Office of the Traffic Commissioner or the DVLA through press reporting and sometimes reports are made by members of the public, so there are a number of mechanisms through which information can be brought to the attention of the TC. Disaffected former employees can also raise issues.

Bridge Strikes:

This section will look at some specific examples of driver misconduct and how you might manage that situation. For a start, we are going to look at bridge and other infrastructure strikes. Mostly this involve rail bridges but that is not always the case.

Between April 1 2021 and March 31 2022 there were 1,833 bridge strikes reported across the network. Most bashed - Stonea Road bridge in Cambridgeshire - struck 33 times

Q. What are the basics that the TC would expect to be in place in a bridge strike prevention/mitigation plan?

A. In simple terms, there are three significant bridge strike prevention factors that ideally the TC would expect to see:

1. Training – bridge strike training is a necessity. The risks may be obvious and some simple advice such as “if in doubt call the Transport Manager” may alleviate most of the risks, but it is necessary to reinforce the risk of bridge strikes with training which should include periodic reminders. There are particular risks associated with new starters particularly agency drivers so it is essential they are inducted before getting behind the wheel.
2. Route planning – letting a driver of a lorry use a car sat nav to drive their own route is a recipe for disaster. Good route planning can avoid many of the risks. No route planning or assistance to the driver is not an option. Whilst with some operations, such as parcel deliveries, there can be a degree of leeway, any shortcoming in terms of route planning from the operator would need to be mitigated by other means.
3. Technological and other mitigation – depending on the technology available in the cab, tools such as geo-fencing can be programmed into sat navs for example to flag low bridges. A basic requirement is having the height of the vehicle in the cab, albeit one must be careful because depending on the load the height may vary.

Q. So, John Smith of Big Trucks comes to you and says one of his drivers has just hit a bridge, his transport lawyer has told him that he needs to take action against the driver, what are you going to advise him?

A. The basic principles of natural justice are that the employee knows the case against them, has a chance to state their case in the light of that, and there is no bias/conflict of interest in the process. So, I'd start by asking, what did the employee know? In that context:

- What training has been given?
- What information has been given?
- What route familiarisation has been given?
- What route planning information has been given?
- Was the driver at fault, or the planner, or the company?

Q. In a non operator's licence company, if you bump a vehicle into a bridge, it might not be considered gross misconduct warranting summary dismissal. How seriously can John Smith treat it?

A. This goes back to the principles of natural justice. Companies are entitled to have rules that are followed and these rules can be industry specific — but companies are not allowed to make rules up on the spot. So:

- What does the handbook say about how seriously it will be treated?
- Has the driver been told that this would = gross misconduct?

Q. In reference to the previous question, what if the company hasn't done this?

A. You are going to have a conflict between what the transport lawyers tell you you should do to protect yourself from regulatory action and what the HR department tells you you should do to protect yourself from the employment risk.

Ultimately, you need to balance which risks you want to take and which you don't. By far the better predictive method is to ensure your information and training deals with all this before the event and you don't have to make choices like this.

Q. If the transport manager comes to you and says that he needs to dismiss the driver and can you make sure that that happens. What do you say?

A. Well, first of all I would say that's not my job it's your job — but once we had cleared the air on that I would say that it would be unfair not to approach such a meeting with an open mind and no doubt you would want the letter to ensure that that at least appeared to be the case.

In fact, even the most open and shut cases can often result in a conclusion that differs from what was first anticipated after everything has been heard. I would want the transport manager to explain to me, if I did not know already, the significance to the operator's licence of the potential misconduct and how that had been communicated to the driver before the event. Effectively, I would want to know the answers to the questions discussed earlier.

One question that I would ask relates to the 2020 Senior TC letter to all HGV operators warning them that bridge strikes could result in the loss of the operator's licence. If the transport manager is telling me that a bridge strike is so serious I would ask them whether they had read the TC's letter, and what they had done about it.

Mobile Devices:

Another area that concerns TCs is the use of mobile phones and other handheld devices.

Q. Could you summarise the TC's approach to the use of mobile phones and their starting point for regulatory action?

A. The TCs look at this very seriously. The STC guidance on driver conduct gives an example of the regulatory outcome for a driver that has committed an offence involving the utilisation of a handheld device whilst driving a commercial vehicle. The starting point is that the driver will serve a 4 week suspension of their vocational licence. If the driver has committed an offence of this nature whilst driving a car a warning may be issued.

Q. Let's look at a case study ...

I'm the boss of **Innovation Logistics Limited**. I've issued AI driven wearable cameras to my drivers. This means that as the driver walks round the vehicle doing their first use checks the camera scans and assesses the item as roadworthy or otherwise. The AI bot also assesses braking performance as the driver slows to leave the yard.

One of my drivers left the yard on Monday. Apparently the brake testing sensor mounting bracket had broken and thus he was holding it in his hand while exiting the yard and assessing the brakes.

The DVSA pulled my driver over and issued him a prohibition for using a mobile device while driving.

My policy is to initiate a disciplinary investigation when all prohibitions are received. Do I have any particular considerations in this investigation and if there is a sanction how serious should it be?

A. The TCs take a dim view of handheld mobile devices.

You can use devices with hands-free access, as long as you do not hold them at any time during usage. Hands-free access means using, for example:

- a Bluetooth headset
- voice command
- a dashboard holder or mat
- a windscreen mount
- a built-in sat nav

Here, it seems that the system itself was compliant because it provided for use without requiring the device to be held. However, it appeared the system broke down here and the focus of my investigation would be why the system broke down.

For example, had the driver previously reported that the unit was broken? If so, you will remember that there must be no conflict of interest in a disciplinary process and here you might say that there was a conflict because if the driver had reported it and the company had done nothing the driver was effectively being required to break the rules. In these circumstances, it would be more difficult to impose a disciplinary sanction.

So my advice to you as the boss of Innovation Logistics Limited would be to ensure that the investigation covered not just the driver's behaviour leaving the yard but also a review all maintenance documentation including first use checks and the previous Periodic Maintenance Inspection form as well as relevant training documents.

Q. Case study continued:

I'm still the boss of **Innovation Logistics Limited**. I've been told that on the last Periodic Maintenance Inspection ("PMI") the vehicle was signed off as roadworthy. There was no box on the PMI form to ensure that the AI first use check system was operational. This is left up to the driver to report on the daily first use form itself. The driver says that he reported it several times in the last month but it had not been rectified at the previous PMI so he considered that its continued use was acceptable.

How do I take forward my investigation, can I discipline anybody and if so how hard?

A. Well this has now become a bit of a mess hasn't it. If the driver has genuinely tried to report this and they've been effectively ignored, it's going to be a bit tricky to issue a disciplinary sanction, especially a serious one.

You might think about going after the fitter to whom the problem was reported at PMI and who did nothing. You might say that even though there was no box on the form, it was obvious that a separate note should be made that the defect system wasn't working. But if there isn't a box on the form, the fitter has real wriggle room. Similarly the person authorised to sign the vehicle off as roadworthy. They might say, it's not on the form and the vehicle itself was fine – not their job!

That leads you to going after the person responsible for the system itself, which might be you!

Q. Case study continued pt 2:

So, still at **Innovation Logistics Limited** we've come to the end of the investigation process and we have decided that due to the failings in the form that we cannot discipline anyone because ultimately it was me (as the boss) who had the responsibility to design the form. Do I still need to tell the TC anything?

A. Some TCs are keen in principle to move away from paper based first use checks but that just means you have to be all over the tech, and yes, I would advise that the system be upgraded and you tell the TC about the failure and the good news story that now comes with it.

Q. Case study continued pt 3:

If I rewrote the findings and blamed it on the driver, would that make a difference?

A. I would seriously advise against this. It's one thing getting maintenance wrong but if the TC can't trust you, you're toast. Some TCs can quite easily interpret even an honest mistake as dishonesty and you certainly don't want to give extra ammunition for that.

Substance Abuse:

This section will pick up the problem of drinks/drugs use and testing.

Since the launch of mandatory roadside drug testing by local police forces across the UK, initial results suggest that in some regions there is a 56% rate of positive test results. While much of this data is likely to be based on for-cause testing as opposed to random testing, the fact remains that drug-driving is fairly widespread.

Q. How does the general law view this?

A. The same drug driving laws that apply to car drivers also apply to drivers of HGVs. These laws state that it is illegal to drive if an individual is unfit to drive because of illegal drugs in their system, or if the level of legal drugs in their system is above a particular cut-off.

It is not just illegal drugs that are included in this legislation. Drivers can also be penalised if they drive while using certain prescription medications

The penalty for a drug-driving conviction is severe, and may include:

- An unlimited fine
- A driving ban of a minimum of one year
- Up to six months in prison
- A criminal record

For an HGV driver, this could spell the end of their career - as well as having serious implications for their chances of success in another field.

There is currently no legislation that states that HGV drivers must be tested by their employers. However, increasingly, HGV, logistics and transport companies are setting up their own drug and alcohol testing programmes. E.g.

- Random drug and alcohol testing
- Pre-employment drug and alcohol screening
- For-cause drug and alcohol screening
- Post-incident drug and alcohol testing
- Abstinence monitoring

Q. So we've heard about the risks of drink/drug driving and the law enforcement attitudes, but there is no obligation on employers to do this, or employees to submit to it — so how can you implement it?

A. The use and application of such tests should be justified, necessary and proportionate. Employers should undertake and document an impact assessment, given the intrusive nature of testing.

Usually, safety is the only likely ground that will justify the use of information from drug and alcohol testing. Clearly that is going to apply to operation of vocationally driven vehicles, albeit it is unlikely that you could apply a policy to non-safety critical staff.

You need a substance misuse policy which will set out the standards required, for testing, and for support and potential sanctions.

Section 4.4 of the Information Commissioner's [Employment Practices Code](#) makes good practice recommendations with respect to the collection and handling of information derived from drug and alcohol testing.

Q. So can you use your policy to make someone comply with a substance test?

A. No, but assuming you have set out clearly in your policy what the sanctions are for breach then it is likely that a significant disciplinary sanction up to dismissal would be appropriate for failure to submit to one.

There are usually more difficulties involved not in drivers *refusing* a test but in drivers attempting to explain positive readings with a legitimate explanation, such as legitimate medical use.

Q. What does the TC expect a company to be doing?

A. All employers have legal obligations, for example under the Health and Safety at Work Act 1974, to maintain a safe workplace. Knowingly to allow controlled drugs to be illegally supplied or used on your premises is also an offence. But this is the same for all companies.

The TC expects companies with operator's licences to do what we have described above. They must do an impact assessment and implement suitable substance abuse testing. They must also implement sanctions in appropriate cases. Failure to have proper systems to deal with substance abuse would go to good repute.

Further, a TC would expect an operator to report to it a substance test failure which is likely to lead to a driver vocational conduct hearing.

Driver Vocational Conduct Hearings:

This section will discuss how to deal with a driver vocational hearing in front of the TC.

Q. If an operator's driver is up before the TC, what support would you advise the operator to provide?

A. If the driver is up on a conduct charge that does not or could not reflect negatively on the operator then I think the operator has a fairly simple choice: it could assist the driver for example by sending along an operational manager or

paying for some legal support. The company would be also well advised to liaise with the driver's trade union representative.

However, in most cases the conduct of the driver is linked to some alleged conduct of the operator. In some of the examples we have described above, the driver could allege a lack of training or a unsuitable system. In these cases the drivers of vocational hearing might get called at the same time as the operator's Public Inquiry or Preliminary Hearing. The company needs to be very clear that there is no conflict of interest between itself and the driver. A conflict of interest can make life very difficult for a legal representative who may be required to step back entirely from the matter. This is a waste of time and money. It can also reflect badly on the operator.

Of course, it is sometimes in the interests of the operator to have the driver tell a consistent story so as not to damage the operator's interests. Thus, it can become a judgement call as to whether to attempt to align the driver to the operator's case or to throw them to the winds.

Stone King responses to questions asked during the webinar

General conduct management:

Q. I have used the below statement in STC Statutory Document No 6 Vocational Driver Conduct para 54: "Drivers are expected to fully acquaint themselves with the relevant legislation before undertaking employment as a professional driver. Drivers cannot evade their personal responsibility by stating that they bowed to their employer's orders on issues related to their obligations under the regulations." Does this help?

A. Drivers are expected to be aware of their legal obligations. If they aren't, the TC may disapprove. However, the operator still has an obligation to properly train them. Also, an employment tribunal will expect drivers to have been told all relevant rules and possible sanctions.

Q. What would be considered an unacceptable level of driver infringements, both repeated and varied, that should trigger more serious actions from management?

A. This really depends on the facts and circumstances (e.g. what the infringements are, what training the driver has received, have previous infringements been managed properly, is there any mitigating evidence etc.). We would not suggest applying a blanket approach, but a failure to follow reasonable management instructions and repeated instances of misconduct is a serious matter, and it may, therefore, be appropriate to deal with this type of misconduct more firmly and issue a harsher sanction, e.g. a final written warning.

Q. Where do you stand on reopening an investigation that was done wrong the first time around? For context, a manager decided that no further action was needed after pressure was applied from a union representative, but this turned out to be the wrong decision. The incident was a bridge strike.

A. In our view, re-opening an investigation is risky from an employment law perspective, and could render any disciplinary action subsequently taken against the employee unfair. You may be able to re-open the investigation if further information has come to light that the company was not previously made aware of, but if the manager has decided to take no further action because of pressure from the union representative, this is unlikely to be a good enough reason to re-open the investigation. It may be prudent to offer that manager training on managing disciplinary hearings etc. to limit the risk of this recurring in the future. If this is something that you wish to report to the TC, you may wish to explain any firming up of the internal policy.

Q. If it is not possible to re-open a past case, would it be possible to open a new one and then reference an old case(s)?

A. In some cases, yes. For example, this is what happens in a continued misconduct case, i.e. where someone is taken through a series of increasing sanctions. At each stage, the fact of the previous warning is relied upon when issuing an increased sanction on the new offence.

Q. Can a handbook be then treated as part of the contract?

A. You can incorporate the staff handbook into an employee's contract. If you do this, this should be explicitly stated in the contract and, preferably, the handbook as well. However, we would not recommend incorporating the whole handbook, as this is likely to incorporate into the contract policies that are not usually incorporated, such as disciplinary and grievance procedures.

Q. What would be the outcome if the driver refuses to sign a bridge strike declaration?

A. This question relates to a driver refusing to sign a declaration that they had received bridge strike information. While you could treat the refusal as a disciplinary matter, I would probably advise simply to formally record that the driver had received the information and refused to sign for it. Then, if there is a subsequent issue, proceed on the basis that the driver was aware of the instruction.

Q. Where can I find the TC's letter of September 2020?

A. The link is [here](#).

Q. Would a standard comprehensive first use check sheet for all UK transport help drivers cover all checks and do you think this would prevent a lot of the mistakes?

A. It could in theory, but there are different types of vehicles (some quite specialist) that require different first use processes and forms.

Q. Have you a matrix of the "typical types of behaviours" that may be considered misconduct and the best approach to dealing with each? We could be faced with any kind of behaviour within the scope of a driver's daily activity, hence specifically asking for typical examples, though not all, as I appreciate the list is endless?

A. The ACAS Guide [here](#) has some examples within the model policy they have, which include examples of offences and how they are normally regarded. For example, some actions that are normally regarded as gross misconduct include:

- theft or fraud;
- physical violence or bullying;
- deliberate and serious damage to property;
- serious incapability at work brought on by alcohol or illegal drugs;
- causing loss, damage or injury through serious negligence;
- a serious breach of health and safety rules;
- a serious breach of confidence.

Q. We have multiple sites across the country. If one site dismisses a driver for, say, three accidents and one site just gives a final written warning for the same accidents, can the first driver appeal on the grounds that this is unfair?

A. A company's policy should apply to all of its sites. If you are applying different standards to your drivers who work at different sites, there is a risk that disciplinary sanctions shall be deemed as unfair. Furthermore, this could increase the prospects of a driver arguing that the company has subjected them to a harsher disciplinary sanction than their colleague because of a protected characteristic, such as race or disability.

Q. Was the sleep apnoea disclosed before employment commenced?

A. This relates to an example given in the webinar about a new employee falling asleep in training and being dismissed. He alleged he was disabled due to sleep apnoea. The condition was not disclosed prior to employment. However, given the employee fell asleep in training, the employer was arguably on notice of the disability and thus had a duty to make reasonable adjustments. The employer settled the claim.

Substance abuse:

Q. As an employer, can we demand a list of all medication that drivers take regularly?

A. You need to ensure that you have a lawful basis to request such information and that you are able to rely on one of the conditions under the UK GDPR/Data Protection Act 2018, as this information will constitute special category data because it relates to the driver's health. In our view, it is unlikely to be lawful to request a list of *all* medication a driver takes, but you may be able to lawfully request a list of medication that may affect safety.

Q. Do we have to include random D&A testing in new employee contracts?

A. We would recommend including this in a substance misuse policy to ensure that drivers have been made aware.

We also recommend ensuring that your privacy notice covers this processing of personal data. It is advisable to undertake and document an impact assessment given the intrusive nature of testing. For further guidance, please see section 4.4 of the ICO Employment Practices Code [here](#).

Q. Is it best to use an outside company for drug and alcohol testing instead of trying to do it in house?

A. We would recommend engaging an external contractor to carry out the drug testing. This should limit the risk of a driver alleging bias or procedural unfairness if this case were to proceed to a disciplinary hearing.

Q. Would you still potentially suspend someone if they declared they took over the counter medication (codeine for example) following a positive test, awaiting lab results?

A. It rather depends on what the reason was and what its effect was on their ability to drive. For example, if they had a genuine health need that did not impact driving then there would appear to be no reason to suspend.

Mobile devices:

Q. If we employ a new driver with endorsements on their licence, such as a mobile phone offence, is the drivers' new employer required to notify the OTC?

A. If the driver holds a vocational licence, they should already have reported it. If they have not, you should. If they have not previously held a vocational licence, the application should bring the matter to light, but I would tend to report anyway.

Q. How would you advise dealing with a driver who was watching his cradled device whilst driving?

A. This is an issue of conduct. The severity would determine the sanction. For example, was the driver watching a 5 second You Tube clip while shunting in an empty yard, or did they watch Fight Club in the middle lane of the M6?

Q. Can a mobile device be touched if it's in a cradle?

A. Yes. The updated regulations indicate that one must not drive a motor vehicle while using a handheld device. However, you may take the view that any unnecessary distraction should be minimised.

Q. Where it was said that a driver can touch a mobile when it is in a cradle, is that not classed as interacting with a mobile device and prohibited under the last regulatory change? If they are allowed to touch the screen to interact, would that extend to the use of a Bartech for recording bins not out etc.?

A. We do not believe so, as it is not hand-held at the time. There is no bar on touching screens, it is on holding devices.

Q. What about in-cab "work scheduling" tablets – as in those that contain a list of roads/properties being visited (bin in this for bin collections) – on which the driver logs, by exception, incidences such as "bins not present, contaminated bins, side waste". Are they okay to use while the vehicle is stationary but the engine on?

A. It depends whether it is a handheld device. Presumably, most work of that nature is undertaken by teams, so someone other than the driver can undertake the task.

Q. What about using an Apple watch while driving?

A. If it is being used to communicate, then it's a question of whether its hand-held whilst on the wrist. We don't know of any case law on this but in principle, it would be a distraction so we would discourage it.

Q. If a driver uses a mobile phone while stationary in a traffic jam with the engine switched off, where does that stand in terms of legality.

A. The GOV.UK website provides guidance which indicates that the law still applies if you are stopped at traffic lights, queuing in traffic, supervising a learner driver, or driving a car which turns off the engine when you stop moving.

Q. If the driver has been prosecuted, do you have to tell the TC anyway?

A. Yes, for offences that relate to "conduct as a driver of a motor vehicle" as far as HGV drivers are concerned. Different rules apply for PCV drivers.

Q. Is a prolonged conversation, even on Bluetooth, classed as a distraction? Would you take into account distraction if using a mobile phone in a cradle?

A. It could be, depending on whether it meant the driver was "driving without due care and attention".

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