

Neutral Citation Number: [2016] UKUT 0015 (AAC)

Appeal No. T/2015/27

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER
TRAFFIC COMMISSIONER APPEALS**

**ON APPEAL FROM THE DECISION OF MISS J N AITKEN
TRAFFIC COMMISSIONER for Scotland**

Dated: 4 April 2015

Before:	A J Gamble	Judge of the Upper Tribunal
	G Inch	Member of the Upper Tribunal
	D Rawsthorn	Member of the Upper Tribunal

Appellant: Mr D Telfer t/a D T Commercials

Attendances: Mr N R Kelly, Solicitor

Heard at: George House, 126 George Street, Edinburgh EH2 4HH
Date of hearing: 20 November 2015
Date of decision: 7 January 2016

DECISION OF THE UPPER TRIBUNAL

The appeal is allowed. The decision of the Traffic Commissioner for Scotland dated 4 April 2015 is set aside. The case is remitted to a different Traffic Commissioner or Deputy Traffic Commissioner for determination afresh and at large.

Subject Matter: Natural Justice. Repute.

Cases referred to:

**Coakley and Others, re an order of the Transport Tribunal [2003] ScotCS. 315
Bradley Fold Travel Ltd and Another v Secretary of State for Transport [2010]
EWCA Civ 695.**

REASONS FOR DECISION

1. This is an appeal by Mr D Telfer who trades as D T Commercials against the decision of the Traffic Commissioner for Scotland dated 4 April 2015 refusing to grant his application for a Standard International Operating Licence with authority for one vehicle and one trailer made on 13 May 2013.

2. The hearing before us took place on 20 November 2015. The appellant was present. He was represented by Mr N R Kelly, Solicitor who made oral submissions. Mr Kelly also submitted a written note of the grounds of appeal and the arguments in support of them. We are grateful to Mr Kelly for his contribution to the hearing.

3. The Traffic Commissioner's decision followed a public inquiry which she conducted and which concluded on 13 November 2014.

4. In all the circumstances we considered it appropriate to decide this appeal on the basis of only one of the stated grounds of appeal, that appearing on paragraph 3 of the grounds of appeal laid out in Mr Kelly's Note of Argument. In that paragraph it is submitted that the Traffic Commissioner erred as follows:

"The Traffic Commissioner in her revisiting the evidence between the conclusion of the Inquiry and the decision made reference to SY55ECE. The appellant did not have the opportunity to address the Traffic Commissioner on this issue. Furthermore the Traffic Commissioner makes an error that is plainly wrong; she highlights to lack of digital tachograph records for July; having regard to the diary entries for July. It will be seen Mr Telfer was driving a lorry SY55ECE. This was a lorry equipped with an analogue tachograph. There will be no entries on Mr Telfer's digital tachograph card on the days he was driving this lorry."

5. In her decision, the Traffic Commissioner held that the appellant had not regained his repute. It was on that basis that she refused his application for a new operating licence. She puts matters thus in paragraph 54 of her decision:

"My decision is that I cannot find Mr David Telfer to have regained his repute and thus I must refuse the application."

6. The appellant's case for establishing that he had regained repute was largely that when working as a self-employed lorry driver for different operators he had been "100% compliant when working for others", as the Traffic Commissioner summarises the appellant's position in paragraph 15 of her decision. The compliance referred to is compliance with the restrictions on drivers' hours. The appellant provided documentary evidence in support of his position on this matter in the form of a handwritten diary and an F.T.A. analysis of the digital tachograph records of his driving hours which is reproduced as documents 84 – 91 of the bundle. The Traffic Commissioner found that there was an inconsistency between these two sources of documentary evidence. She puts matters thus at paragraph 53 of her decision:

"I now revert to the evidence on repute – and the diary and the F.T.A. analysis. The diary was mentioned at the first day but was not produced. Given that he had prayed it in aid of his compliance Mr Telfer had little option but to produce it. On the face of it, at first blush, it does seem to be a driver's

record of what he has been doing and I am sure a fair number of entries will be as accurate or as near as makes no difference and many such recording delays through R.T.A.s make good sense. But I am not convinced that it tells the full story – and indeed Mr Telfer said he did not use it for local work. Some pages were torn out – 9 and 10 January and also the page over which much time was spent in the Inquiry – 1 and 2 August. I have looked at the F.T.A. dates and vehicles numbers and there is not the expected consistency with the diary. Something happened that weekend of 1 and 2 August. On 31 July the diary has him in SY55ECE a Hunters Transport vehicle finishing in Caen and then ferry over and parking in Sutton. There is no record of that journey in the F.T.A. analysis. Indeed the F.T.A. only has him driving on 3 days in July whereas the diary says different. For a man who repeatedly claimed on both days of the Inquiry that he was 100% compliant, the F.T.A. analysis points otherwise and very much is not the full picture of his driving. He has not persuaded me of his 100% compliance (or what would be a practical tolerance).”

7. We consider the Traffic Commissioner’s analysis of the relevant evidence regarding the appellant’s journey’s in vehicle SY55ECE is flawed in two respects. Thus we accept the appellant’s ground of appeal narrated in paragraph 4.

8. Firstly, it is the case that those journeys are recorded in the diary entries but not in the F.T.A. analysis of the digital tachograph records. That was ascertained by the Traffic Commissioner by a close consideration of the relevant documentary evidence which she conducted after the public inquiry had concluded. She did so without putting the apparent discrepancy to the appellant either by inviting him to make written submissions upon it or by reconvening the public inquiry when he could have given an oral explanation of his view as to the apparent discrepancy between the diary entries and the analysis of the digital tachograph records. Thus it is correct to submit as Mr Kelly puts it in the grounds of appeal referred to in paragraph 4 that the Traffic Commissioner thus deprived the appellant of “an opportunity to address (her) on this issue”. In our opinion, the failure by the Traffic Commissioner to allow the appellant to comment either in writing or orally on the apparent discrepancy between the two sources of evidence denied him the procedural fairness he was entitled to receive from her as a quasi judicial decision maker exercising regulatory powers. That procedural fairness stems from the rules of natural justice at common law and also from the appellant’s convention rights under article 6(1) of the European Convention in Human Rights, incorporated into United Kingdom law by the Human Rights Act 1998 section 1(1)(a). It is only necessary to deal with this aspect of the case at common law. In so doing we follow the decision of the Extra Division of the Inner House of the Court of Session in *Coakley and Others, re an order of the Transport Tribunal* [2003] ScotCS 315 which binds us. The circumstances of that case were closely analogous to this one. The Traffic Commissioner’s decision was based to a large degree on information which he had ascertained after the conclusion of a public inquiry. The Extra Division held that they were “not satisfied” that the affected parties had been “given a proper opportunity to react to that material, which was plainly important in the Traffic Commissioner’s decision”. The Extra Division then went on to say “In these circumstances the conclusion which we have reached is that the principles of natural justice were breached by the Traffic Commissioner’s proceedings. In particular, we are not satisfied that the first and second named appellants had an effective opportunity to disabuse the Traffic Commissioner of the unfavourable impressions which he had formed, based upon the information concerned”. See paragraph 12 of the decision of the Extra Division. The Extra

Division then went on to hold in paragraph 13 of their decision that the Traffic Tribunal (our statutory predecessors) had erred in law refusing an appeal from the Traffic Commissioner's decision and in so doing holding that there had been "no unfairness in what occurred" before the Traffic Commissioner". We hold that the failure on the part of the Traffic Commissioner in this case to comply with the principles of natural justice at common law renders her decision erroneous in law. We exercise our discretion in the appellant's favour and set the Traffic Commissioner's decision aside on that ground.

9. Secondly, however, and in any event, the failure by the Traffic Commissioner to put the result of her consideration of the contents of the diary and those of the F.T.A. analysis of the digital tachograph records to the appellant led her into a highly material error of fact on which her decision indeed to a large degree turns. Vehicle SY55ECE, unlike other lorries driven on different occasions by the appellant e.g. vehicle FX09ONZ was not equipped to process digitalised driver's cards. That lorry was not equipped with a digital tachograph but rather with an analogue tachograph. An analogue tachograph only produces paper charts. Crucially the F.T.A. analysis was only of digital tachograph records relating therefore only to those lorries which were equipped with a digital tachograph. No doubt all of this could have been clarified and explained if the Traffic Commissioner had given the appellant a proper opportunity whether in writing or orally to comment on the apparent discrepancy between the two forms of records in this case. However given that she did not afford such an opportunity to the appellant her finding of fact on the apparent discrepancy was in our view "plainly wrong". Thus following the decision of the Court of Appeal in *Bradley Fold Travel Limited and Another v Secretary of State for Transport* [2010] EWCA Civ 695 we also consider it appropriate to set the Traffic Commissioner's decision aside on the ground discussed in this paragraph.

10. Given our approach in the preceding paragraphs it is unnecessary for us to deal with any of the other grounds of appeal stated on the appellant's behalf.

11. Given that we have allowed the appeal and set aside the Traffic Commissioner's decision the question of disposal arises. We do not accept the submission made by Mr Kelly in his Note of Argument that we should grant the operator's licence sought to the appellant. Rather, we consider it appropriate that the case be reheard after another public inquiry conducted by a different Traffic Commissioner or Deputy Traffic Commissioner. We thus remit the case for such a public inquiry to be held. The new Traffic Commissioner or Deputy Traffic Commissioner conducting that inquiry should decide all matters entirely afresh and at large without in any way being bound by the decision of the Traffic Commissioner which we have set aside.

(Signed)
A J GAMBLE
Judge of the Upper Tribunal
Date: 7 January 2016