

Neutral Citation Number: NCN: [2016] UKUT 0159 (AAC)

Appeal No. T/2015/49

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

**ON APPEAL from the DECISION of
Nick Jones, Traffic Commissioner
for the West Midlands dated 4 May 2012**

Before:

Her Honour Judge J Beech, Judge of the Upper Tribunal
George Inch, Member of the Upper Tribunal
Andrew Guest, Member of the Upper Tribunal

Appellant:

Matthew Reynolds

and

Appellant

Secretary of State for Transport

Respondent

Attendances:

For the Appellant Tim Nesbitt of Counsel, instructed by Dyne Solicitors Limited

For the Respondent Adam Heppinstall of Counsel, instructed by the Government
Legal Department on behalf of the Department of Transport

Heard at: Field House, 15-25 Bream's Buildings, London, EC4A 1DZ

Date of hearing: 1 March 2016

Date of decision: 31 March 2016

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that this appeal be ALLOWED to the limited extent that the finding of loss of professional competence is set aside but that a finding of loss of good repute is substituted for it. The terms of the Appellant's disqualification remain unchanged.

SUBJECT MATTER: In what circumstances can Traffic Commissioners find that Transport Managers have lost their professional competence

CASES REFERRED TO: T/2014/25/26 H. Sivyer (Transport) Ltd and Simon Sivyer [2014] UKUT 0404 (AAC); T/2013/39 Ribble Valley Coaches Ltd & John Pilkington [2013] UKUT 0429 (AAC).

REASONS FOR DECISION

1. Introduction

This is an appeal against the decision of the Traffic Commissioner for the West Midlands ("TC") made on 4 May 2012 when he found that the Appellant ("Matthew Reynolds") had retained his good repute but was no longer professionally competent as a Transport Manager and disqualified him from acting as such until he had taken and passed the new Certificate of Professional Competence examinations. The TC further found that Matthew Reynolds nevertheless continued to meet the requirements of good repute.

2. The facts of this current appeal are on all fours with those upon which the Tribunal appeal of T/2014/25/26 H. Sivyer (Transport) Ltd and Simon Sivyer [2014] UKUT 0404 (AAC) ("Sivyer") was determined. In that case, the Traffic Commissioner found that whilst the Transport Manager remained of good repute, he was not practically competent or fit to fulfil the duties of a Transport Manager and that as a consequence, he had lost his professional competence. The Tribunal found that once professional competence had been demonstrated by passing or holding a relevant and recognised qualification, professional competence could not be lost. It followed that the Traffic Commissioner had no power to find that the Transport Manager had lost his professional competence despite having been found to be practically wanting. Whilst the appeal was allowed, the Tribunal did determine that (subject to full argument being heard) if a Traffic Commissioner found as a fact, that a Transport Manager was not practically competent to fulfil the duties of a Transport Manager, the appropriate finding was that he had lost his good repute.

3. By a letter dated 6 February 2015, Backhouse Jones solicitors requested that the TC review his decision that Matthew Reynolds had lost his professional competence, relying upon the Sivyer decision. The TC declined to do so as he considered himself to be *functus officio*. But in any event, the TC was of the view that even if his decision had been procedurally wrong, Matthew Reynolds should in fact have lost his good repute and that the outcome of the original hearing would have been the same: Matthew Reynolds would have been disqualified as a Transport Manager and he would have been required to pass the CPC Transport Manager qualifications again before he would be allowed to be nominated as a Transport Manager on a licence in the future.

4. Matthew Reynolds appealed. By a decision dated 29 July 2015, His Honour Michael Brodrick, Judge of the Upper Tribunal, granted Matthew Reynolds' application to appeal out of time being satisfied that Sivyer applied to the facts of the appeal. The Secretary of State for Transport ("SofS") accepted an invitation to become a party to the appeal so that the matter could be fully argued and was joined as a party.

5. Background circumstances to the TC's findings

In August 2004, Richard Reynolds and Matthew Reynolds (brothers) trading as Reynolds Transport were granted a standard national operators' licence authorising seven vehicles and five trailers with the same number of vehicles in possession. The business had originally been that of Kenneth Reynolds (father). As a result of regulatory shortcomings in the past, the licence was granted subject to an undertaking given by the partnership that Kenneth Reynolds would play no part in the management or administration of the business. Further, both partners were issued with a warning that they must "in future" comply with the law and with all of the requirements of operator licensing. Matthew Reynolds was the nominated Transport Manager on the licence.

6. On 4 May 2012, the partnership was called to a public inquiry for the TC to consider whether he should take regulatory action against the partnership's licence. The undisputed evidence before the TC was as follows:

- a) An unannounced maintenance and drivers hours' investigation was commenced on 25 July 2011. Whilst Matthew Reynolds was present at the operating centre when the DVSA officers arrived, he left shortly thereafter;
- b) Three drivers PG9's for drivers' hours and record offences had been issued between November 2009 and December 2010. As a result, during the visit, a drivers' hours and records request was made for the period 1 March to 31 May 2011. All analogue charts were produced save in respect of one driver who kept his charts with him. The outstanding charts arrived at the DVSA office promptly but no digital downloads of vehicle units had been carried out. They were received on 16 August 2011;
- c) 312 tachographs revealed 54 infringements (four were advisory). The drivers were interviewed and the partnership co-operated with that process. It became evident that the drivers had not received any training in the use of their digital cards or in drivers' hours and records. Four drivers (including Richard Reynolds) blamed parking issues for some of their infringements and one in three drivers (including Richard Reynolds) stated that the partnership refused to pay for secure overnight parking even when the drivers were in charge of high value loads. One driver (Brown) did not "deal" with

the partnership at all but took his instructions from Countryside Farmers, a client of the partnership;

- d) As for maintenance, Vehicle Examiner Speight found that the preventative maintenance inspection records ("PMI's") for two vehicles were missing; the forward planner did not project beyond the next PMI date and did not include any information other than the date of the last and the next PMI; there had been a change of maintenance provider which had not been notified to the TC; three PG9's had been issued out of nine roadside encounters in the previous five years. None of them were "S" marked but all of the defects may have been evident to a driver during a daily driver walk round check if one had been in operation (a verbal system existed only) or during daily operations; one PG9 had been issued for a defect which had been recorded during the previous PMI six days earlier. However, the annual test failure rate was lower than average and the age of the fleet was between two and five years;
- e) Matthews Reynolds was interviewed and accepted the infringements. He admitted that no tachograph analysis had taken place for two years apart from "brief checks". When vehicles with digital tachographs were acquired by the partnership, the office computer was incompatible with the software used to download the data and as a result, downloads had not taken place. That was being addressed. The drivers had not been trained in drivers' hours and records but neither had any of them asked for training or guidance. He averred that if any driver chose to use secure overnight parking, they would be recompensed for the cost although later in the interview he agreed that the partnership did not pay for secure overnight parking as the drivers were expected to pay for this out of their overnight allowance. He relied upon problems with traffic congestion and difficulties with overnight parking as explanations for drivers' hours infringements and referred to two instances when vehicles had been recently targeted by thieves whilst the drivers were parked up in lay-bys taking their rest. He denied that the partnership was gaining financially as a result of drivers' hours infringements. He confirmed that driver Brown was given instructions by Countryside Farmers rather than the partnership as he was sub-contracted out to that client. Matthews Reynolds was responsible for scheduling the work for the transit vans operated by the partnership (which do not fall within operator licensing) and his brother (without a CPC qualification) scheduled the large goods vehicles. They both drove but neither of them kept a record of the total number of hours they worked.
- f) It was the opinion of Traffic Examiner Yarranton that the drivers did not have an acceptable level of knowledge in relation to drivers' hours and no training had been provided. No tachgraph analysis had taken place and infringements committed by three drivers resulted from them being forced to look for suitable parking as the partnership had refused to pay for the use of secure parking. Matthew Reynolds had no control over the work of driver Brown;

- g) In respect of maintenance, the partnership's response to the findings of VE Speight was that it would appear that the missing PMI records had been shredded by mistake; the forward planner now projected all relevant information six months forward; staff changes had resulted in improvements in systems; both partners drove vehicles and so the time they spent in the office was limited; the maintenance contract with West Pennine Trucks had been sent in with the partnership's response. VE Speight noted that the response did not give any explanation for how it came to be that a vehicle was being used on the road following a PMI six days previously which had not been signed off as roadworthy and which identified the need for a new levelling valve.

7. The Public Inquiry

The public inquiry was scheduled to take place on 14 February 2012. Matthew Reynolds was called up separately in his capacity as the nominated Transport Manager. However, as a result of medical evidence confirming that Matthew Reynolds was suffering from shingles, the hearing was postponed to 4 May 2012.

8. At the public inquiry, TE Yarranton and VE Speight attended to give evidence and Richard and Matthew Reynolds were present and represented by Mrs Howard, a Transport Consultant. She began by informing the TC that driver Brown had been made redundant in December 2011 and that the OCRS score of the partnership had improved from red (unroadworthiness) and green (traffic) to amber and green 01 respectively.
9. TE Yarranton summarised his report. The TC expressed the view that the partnership's failure to pay for secure parking "sounded like an abdication of responsibility"; he noted that neither partner was complying with the requirements of the Working Time Directive as they did not keep any record of their duties as partners and Transport Manager in addition to their drivers' hours and that the partnership had gained financially by the drivers' hours infringements as the partnership avoided payment for secure parking and had condoned bad practices as a result of failing to undertake any independent analysis of drivers' hours for two years. The partnership had therefore operated with a competitive advantage.
10. In cross examination, TE Yarranton confirmed that he had seen recent drivers' hours reports which included Working Time Directive details produced at the hearing generated by Shropshire Tacho Services which was now analysing the partnership's data. It appeared that infringements were reducing in number and that the drivers were having their infringements explained to them. TE Yarranton confirmed that what was needed was a system of training and corrective action but he also noted that reports relating to Richard and Matthew Reynolds were limited to their drivers' hours only and did not include

their other duties. There was therefore a continuing failure to comply with the Working Time Directive as far as they were concerned.

11. VE Speight then summarised his report. He confirmed that the partners had been helpful during his investigation. He had not been shown any maintenance agreements when he had visited the operating centre. He had “slight reservations” about the new written daily driver defect reporting system which had been introduced since his first visit. He was concerned that the PMI records were highlighting defects which should have been recorded on previous driver defect reports but were not. He considered that more work needed to be done on the system including random audits undertaken by one partner on a weekly basis. The PMI records produced at the hearing all appeared to be in order.
12. Richard Reynolds then gave evidence. He described the partnership’s business as general haulage, bulk tipper and flat bed work with some loads of high value. The partners understood the seriousness of their position and he was very disappointed that they had let their standards slip. Mathew Reynolds had been under a lot of stress for a number of reasons and he had suffered from shingles. His partner was now assisting in the office. Richard Reynolds drove Mondays to Fridays driving an average of 48 hours and he was responsible for organising the large goods vehicles. He worked a maximum of 60 hours a week. He now kept a diary of all of his non-driving hours but he did not provide this to Shropshire Tacho Services along with his driving data. Most of the office work was undertaken by Mathew Reynolds. He denied that there was any restriction on where drivers could park. They would be reimbursed if they paid for secure parking. He agreed that driver Brown had been controlled by Country Farmers and did not consider that such an arrangement was unusual and he had had no concerns about it. Richard Reynolds had thought about sitting the CPC examinations and he recognised that the business would benefit from some additional support and he would consider appointing a part time Transport Manager. He described the regulatory deficiencies of the partnership as “unintentional and a misunderstanding”. Reference was made to a fixed penalty notice he had incurred for using a mobile phone whilst driving which the TC then asked him about. Richard Reynolds confirmed that the partnership had no written driver policy about the use of mobile phones whilst driving. The drivers did not have contracts of employment although that was being addressed. He described the drivers who worked for Countryside Farmers as “self controlling” and that they were assumed to know the rules. The partnership paid for the drivers to undertake their driver CPC training and ADR training. Richard Reynolds concluded by agreeing with the TC that the problem with the partnership had been a lack of understanding of the skills required to be a Transport Manager and that both partners were willing and able to appoint a part time Transport Manager for 20 hours a week.

13. Matthew Reynolds then gave evidence which took the format of a conversation with the TC (and led by the TC). The TC accepted the explanation that the missing PMI records had been shredded and he noted that the partnership's prohibition rate "was not the worst" and that the vehicles were three to five years old. Matthew Reynolds apologised for his failure to notify the TC of the change in maintenance contractor. The TC expressed "astonishment" that the partnership had operated a verbal driver defect reporting system but reassured the partners that he did not consider them to be "rogues". He indicated that he wanted the partnership to give the following undertakings: maintenance audits to be undertaken by an independent consultant within six months of the hearing and annually thereafter with reports acted upon, retained for at least two years and with copies to be sent to the Office of the Traffic Commissioner ("OTC"); a nil driver daily defect reporting system with reports showing rectification and all reports to be retained for at least two years; random audits of at least one driver each week to ensure that the walk round checks were correctly undertaken, the findings to be recorded and made available to DVSA staff or the OTC upon request; all tachographs to be independently analysed on at least a monthly basis and acted upon with all reports retained for at least two years. The undertakings were agreed.
14. The TC went on to indicate that he considered that the drivers' hours and training failings were systemic and were the responsibility of Matthew Reynolds and that as Transport Manager it was his responsibility to ensure that parking was considered when journeys were planned. The TC did not consider that Matthew Reynolds was "ideally suited" to be a Transport Manager although he did not question his integrity. He was simply "not the best person" to undertake the role. He acknowledged that Matthew Reynolds had passed a CPC qualification and that he was not making an adverse finding against his reputation "as such" but it was his "professional competence" that was in issue. Matthew Reynolds would be rehabilitated once he had passed the new CPC qualification and that the partnership would be given a period of grace to appoint a new Transport Manager with minimum hours of 20 hours per week. Matthew Reynolds indicated: "no that's fine". Finally, the TC determined that a short period of suspension of the licence over a weekend was appropriate to allow the partnership to catch up with driver training (the timing of the suspension was ultimately agreed). Mrs Howard requested that the TC step back from a finding of loss of competence and to consider instead that Matthew Reynolds simply needed to attend a refresher course on Transport Manager duties. The TC declined to take that course, finding that as there had not been any analysis of drivers' hours for two years, it was clear that Matthew Reynolds had not been undertaking his role properly and that it was not a case of him having simply "taken his eye off the ball".
15. In his oral decision at the conclusion of the hearing, the TC summarised the position:

“The Transport Manager has said that he is content to cease being a Transport Manager for health reasons and so on. I believe that the evidence that has been given the failings which were identified are ones which do come down to the Transport Manager. They are more ones of skills than of knowledge but I believe that if he tells me that he is content to cease being a Transport Manager to take the pressure off him so he can have a better quality of life and still work in the business as an Operator and as a driver, then actually I want to make sure that he is motivated that he actually takes the full CPC exam again. I am not making an adverse finding over repute because I want to make it clear that I do not question his integrity.....”

The TC then confirmed the undertakings set out in paragraph 13 above.

16. The appeal to the Upper Tribunal

At the hearing of this appeal, both Mr Nesbitt and Mr Heppinstall provided skeleton arguments together with an agreed bundle of authorities for which we were grateful. It was common ground that the decision of Sivyer was correctly determined and that as a result, the TC’s finding that Matthew Reynolds had lost his professional competence should not be upheld by the Tribunal.

17. The starting point is Regulation (EC) No 1071 which is described in its title as “establishing common rules concerning the conditions to be complied with to pursue the occupation of road transport operator” (“the Regulation”). By Article 288 of the Treaty on the Functioning of the European Union (C 326/1), a regulation is binding in its entirety and directly applicable in all Member States. Be that as it may, a significant number of amendments were made to The Goods Vehicles (Licensing of Operators) Act 1995 (“the 1995 Act”) as a result of the Regulation, via the Road Transport Operator Regulations 2011/2632.

18. Article 3 of the Regulation establishes the four conditions that must be met before an undertaking may become a road transport operator:

“Undertakings engaged in the occupation of road transport operator shall:

- (a) Have an effective and stable establishment in a Member State;*
- (b) Be of good repute;*
- (c) Have appropriate financial standing; and*
- (d) Have the requisite professional competence.”*

By Article 4 of the Regulation:

“An undertaking which engages in the occupation of road transport operator shall designate at least one natural person, the transport

manager, who satisfies the requirements set out in Article 3(1)(b) and (d) and who

- a) Effectively and continuously manages the transport activities of the undertaking...”*

It follows that a designated Transport Manager for a road transport operation must be of good repute and “professionally competent”. The provisions of both Articles were reflected in amendments to the 1995 Act (see section 13A).

19. Professional competence is dealt with in Article 8 of the Regulation.

“Conditions relating to the requirement of professional competence

*1. In order to satisfy the requirement laid down in Article 3(1)(d), the person or persons concerned shall possess knowledge corresponding to the level provided for in Part I of Annex I in the subjects listed therein. **That knowledge shall be demonstrated by means of a compulsory written examination** (our emphasis) which, if a Member State so decides, may be supplemented by an oral examination. Those examinations shall be organised in accordance with Part II of Annex I. To this end, Member States may decide to impose training prior to the examination.*

...

6. Member States may require persons who possess a certificate of professional competence, but who have not managed a road haulage undertaking or a road passenger transport undertaking in the last 5 years, to undertake retraining in order to update their knowledge regarding the current developments of the legislation referred to in Part I of Annex I.”

It follows that professional competence is acquired by the passing of a recognised examination and the provisions of Article 8 are reflected in amendments to Schedule 3 of the 1995 Act (see paragraphs 7 to 14 of that Schedule).

20. By Article 10 of the Regulation, Member States are required to oversee the implementation of the Regulation and in particular:

“1. Each Member State shall designate one or more competent authorities to ensure the correct implementation of this Regulation. Those competent authorities shall be empowered to:

....

- (c) declare a natural person to be unfit to manage the transport activities of an undertaking in the capacity of transport manager ...”*

21. Declarations of unfitness in respect of Transport Managers are dealt with in Article 14 of the Regulation:

- “1. Where a transport manager loses good repute in accordance with Article 6, the competent authority shall declare that transport manager unfit to manage the transport activities of an undertaking.*
- 2. Unless and until a rehabilitation measure is taken in accordance with the relevant provisions of national law, the certificate of professional competence, referred to in Article 8(8), of the transport manager declared to be unfit, shall no longer be valid in any Member State.”*

It follows, that a declaration of unfitness arises out of a Traffic Commissioner’s finding that a Transport Manager is no longer of good repute. There is no empowering provision relating to declarations of loss of professional competence and as a result, the only power that a TC has in respect of Transport Managers is that provided under Article 10 which is to find that they are no longer fit to manage a transport undertaking by reason of loss of repute.

22. Good repute is dealt with in Article 6 of the Regulation:

- “1. Subject to paragraph 2 of this Article, Member States shall determine the conditions to be met by undertakings and transport managers in order to satisfy the requirement of good repute laid down in Article 3(1)(b).*

*In determining whether an undertaking has satisfied that requirement, Member States **shall consider the conduct** (our emphasis) of the undertaking, **its transport managers** (our emphasis) and any other relevant person as may be determined by the Member State. Any reference in this Article to convictions, penalties or infringements shall include convictions, penalties or infringements of the undertaking itself, its transport managers and any other relevant person as may be determined by the Member State.*

The conditions referred to in the first subparagraph shall include at least the following:

- (a) that there be no compelling grounds for doubting the good repute of the transport manager or the transport undertaking, such as convictions or penalties for any serious infringement of national rules in force in the fields of:*
 - (i) commercial law;*
 - (ii) insolvency law;*
 - (iii) pay and employment conditions in the profession;*
 - (iv) road traffic;*
 - (v) professional liability;*
 - (vi) trafficking in human beings or drugs; and*

(b) that the transport manager or the transport undertaking have not in one or more Member States been convicted of a serious criminal offence or incurred a penalty for a serious infringement of Community rules relating in particular to:

- (i) the driving time and rest periods of drivers, working time and the installation and use of recording equipment;*
- (ii) the maximum weights and dimensions of commercial vehicles used in international traffic;*
- (iii) the initial qualification and continuous training of drivers;*
- (iv) the roadworthiness of commercial vehicles, including the compulsory technical inspection of motor vehicles;*

(2) For the purposes of point (b) of the third subparagraph of point 1

(a) where the transport manager or the transport undertaking has in one or more Member States been convicted of a serious criminal offence or incurred a penalty for one of the most serious infringements of Community rules, as set out in Annex IV, the competent authority of the Member State of establishment shall carry out in an appropriate and timely manner a duly completed administrative procedure...

The procedure shall determine whether, due to specific circumstances, the loss of good repute would constitute a disproportionate response in the individual case.

...

(b) The Commission shall draw up a list of categories, types and degrees of seriousness of serious infringements of Community rules which, in addition to those set out in Annex IV, may lead to the loss of good repute."

Annexe IV of the Regulation sets out a list of "Most serious infringements" such as exceeding the maximum 6-day or fortnightly driving time limits by margins of 25% or more. It is clear from the wording of Article 6 and Annexe IV of the Regulation that the TC's consideration of a Transport Manager's fitness to be a Transport Manager by reason of loss of good repute is not limited to those matters set out in the Article and the Annexe.

23. Discussion

As the Tribunal has already observed, there is no provision within the Regulation for a Traffic Commissioner to find that a Transport Manager is no longer professionally competent. However, for some reason which cannot be ascertained, paragraphs 15 and 16 of Schedule 3 of 1995 Act introduced the concept of loss of professional competence in this way:

“15 (1) A traffic commissioner shall not in any proceedings under this Act or under the 2009 Regulation make a finding that a transport manager is not of good repute or is not professionally competent unless the commissioner is satisfied that the transport manager has been served with a notice—...

16.— Determinations in respect of transport managers

(1) In proceedings under this Act or the 2009 Regulation for determining whether a person who is a transport manager is of good repute or professionally competent, a traffic commissioner must consider whether a finding that the person was no longer of good repute or (as the case may be) professionally competent would constitute a disproportionate response.

(2) If the commissioner determines that the person is no longer of good repute or (as the case may be) professionally competent, the commissioner must order the person to be disqualified (either indefinitely or for such period as the commissioner thinks fit) from acting as a transport manager ...” (our emphasis)

It is agreed that there is nothing before the Tribunal to explain why the wording “or (as the case may be) not professionally competent” came to be included in the above paragraphs of Schedule 3, as the Regulation cannot be interpreted or construed so as to empower Traffic Commissioners to make a finding of loss of professional competence if they hold a valid CPC qualification. It is agreed that it can be inferred that the wording was introduced into paragraphs 15 and 16 of Schedule 3 as a result of either a misunderstanding of the provisions of the Regulation itself or as a result of a drafting error. Whatever the reason, it is agreed that insofar as paragraphs 15 and 16 of Schedule 3 purport to empower Traffic Commissioners to make a finding of loss of professional competence, then it should be disregarded.

24. That is not to say that Traffic Commissioners do not have any authority to make findings concerning a Transport Manager’s professional competence. There will be instances when it will be open to Traffic Commissioners to make a finding that a purported Transport Manager does not in fact hold a valid certificate of professional competence because, for example, it is forged or it was not the holder who took the examination or that it has been suspended as a result of a finding of loss of good repute elsewhere. In such instances, it would be difficult to envisage circumstances in which such a finding would amount to a “disproportionate response”. In summary, we are satisfied that bearing in mind the definition of professional competence set out in Article 8 of the Regulation which is repeated in paragraph 13(1) of Schedule 3 of the 1995 Act, it is not open to a Traffic Commissioner to find loss of professional competence unless there is a finding that the Transport Manager has never been professionally competent or that there has been a previous declaration that the Transport Manager was unfit by

reason of a loss of good repute and has already had their certificate of professional competence suspended.

25. How the Tribunal's findings affect Matthew Reynolds

It was submitted on behalf of Matthew Reynolds that given the TC's findings in relation to his good repute and that four years have passed since the public inquiry, it would be difficult for the Tribunal to substitute a finding that Matthew Reynolds had lost his good repute. Since the public inquiry, the partnership has complied with the undertakings set out in paragraph 13 above and the audits conducted by the Road Haulage Association were "broadly good". If the proper approach to this issue had been appreciated at the time of the public inquiry, then the submissions made and the TC's consideration of the issues would have been appropriately nuanced and it may well have been that the TC would have stepped back from a finding of loss of repute as such a finding would have been in stark contradiction to the comments and findings of the TC at the time. It was not inevitable that a finding of loss of good repute would have been made as the TC's instinct was not to make such a determination and he may have accepted further undertakings from the partnership such as Matthew Reynolds attending a refresher Transport Manager's course. The fairer course would be to remit the matter to the TC for him to determine the up to date position. Mr Nesbitt assured the Tribunal that if we were to remit the matter back to the TC, then Matthew Reynolds did not intend to immediately resume his role as Transport Manager. In the alternative, it was submitted that the Tribunal should simply allow the appeal and that should Matthew Reynolds be nominated as a Transport Manager in the future, then his suitability could be scrutinised at that stage.

26. In response, Mr Heppinstall confirmed that the SofS was "disinterested" in the outcome of the appeal but he helpfully reminded the Tribunal that it was open to it to simply "re-badge" the TC's findings by exercising the Tribunal's powers provided under paragraphs 17(1) – (3) of Schedule 4 of the Transport Act 1985 and substitute the appropriate order for that of the TC's. The case of T2013/39 Ribble Valley Coaches Ltd & John Pilkington (2013) UKUT 0429 (AAC) was referred to.

27. We agree with Mr Heppinstall's submissions. In the TC's decision dated 30 June 2015 in which he concluded that he was *functus officio* in relation to the re-opening of his decision, he nevertheless made it clear that if the case of Sivyer was rightly decided then the ultimate outcome of the public inquiry would have been the same, namely, that as a result of a finding of loss of good repute, Matthews Reynolds would have been disqualified until he had passed the new CPC examination. We are satisfied that the ultimate consequence of the TC's findings at the public inquiry, namely, disqualification until Matthew Reynolds re-sat the CPC examination was not disproportionate. The operational aspects of the partnership over which Matthew Reynolds was required to have effective

and continuous management were “a shambles”. He allowed his brother, who was not a CPC holder, to schedule the large goods vehicles whilst he himself scheduled the transit vehicles. He had no control at all over one driver (Brown) and did not ensure that the drivers felt able to park in secure areas in the knowledge that they would be reimbursed for the cost. Rather, drivers’ hours offences were committed by drivers, including his brother, in order to find free parking which would provide them with some level of security. The drivers did not have contracts of employment and therefore were not subject to any formal disciplinary regime. They did not receive any drivers’ hours training or training in the use of digital tachographs and drivers’ cards. The data from the digital tachographs was not downloaded and therefore not analysed. Indeed no analysis either of digital or analogue tachograph data was undertaken for two years. Even at the date of the public inquiry, whilst an outside agency had begun to undertake drivers’ hours analysis, the partners did not provide the agency with the information necessary for their own hours to be properly analysed whether for the purposes of the drivers’ hours rules (which must include an analysis of “other work”) or the Working Time Directive. At the time the DVSA officers attended the operating centre, there was no written daily driver defect reporting system. The partnership failed to have any systems or rules in place, even basic ones such as the use of mobile phones whilst driving. Whilst the wording of paragraphs 15 and 16 of Schedule 3 of the 1995 Act misled the TC as to his powers to find loss of professional competence, his findings concerning the regulatory shortcomings of the partnership which directly reflected on Matthew Reynolds as a Transport Manager, cannot be criticised and we are satisfied that at the time of the public inquiry, he was not practically competent to discharge his duties as Transport Manager and he was not doing so. Such a finding, even when the Transport Manager can otherwise be found to be a man of integrity will nevertheless have the consequence that he will be declared to be unfit to be a Transport Manager by reason of loss of good repute.

28. There is no evidence before the Tribunal that Matthew Reynolds has re-sat and passed the CPC examination and we are satisfied that unless and until he does so, he is not fit to be a Transport Manager and his disqualification should continue, despite the passage of time. In the circumstances, it is inappropriate and indeed disproportionate to find that this matter should be remitted back to the TC. We therefore substitute a finding of unfitness by reason of loss of good repute for the TC’s finding of loss of professional competence with the order of disqualification remaining in its present terms and to that limited extent, the appeal is allowed.



Her Honour Judge J Beech
31 March 2016