

**Neutral Citation Number:**

**Appeal No. T/2015/64**

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

**ON APPEAL FROM THE DECISION OF  
TRAFFIC COMMISSIONER FOR SCOTLAND**

**Dated: 28 September 2015**

**Before: A Gamble, Judge of the Upper Tribunal  
A Guest, Member of the Upper Tribunal  
J Robinson, Member of the Upper Tribunal**

**Appellants: TURRIFF TRANSPORT CONSULTANTS LTD and WILLIAM WALKER**

**Attendances: Mr J McLaughlin, Solicitor of Culley and McAlpine, Solicitors  
Mr W Walker**

**Heard at: George House, 126 George Street, Edinburgh EH2 4HH  
Date of Hearing: 15 February 2016  
Date of Decision: 20 May 2016**

**DECISION OF THE UPPER TRIBUNAL**

The appeal is dismissed. The decision of the Traffic Commissioner for Scotland dated 28 September 2015 is confirmed and will take effect at 00 hours on 17 June 2016.

**SUBJECT MATTER:-** Repute. No operating centre

**CASES REFERRED TO:**

Bryan Haulage (No 2) 2002/217

Priority Freight 2009/225

*Thomas Muir (Haulage) Ltd v Secretary of State* [1998] Scot CS 13

*Bradley Fold Travel Ltd v Traffic Commissioner for the North Western Area* [2011] RTR13

**REASONS FOR DECISION**

1. This is an appeal by Turriff Traffic Consultants Ltd, the operator and Mr W Walker, its sole Director and its Transport Manager against the decision of the Traffic Commissioner dated 28 September 2015. That decision was stayed by the Traffic Commissioner on 25 November 2015.

2. The text of the Traffic Commissioner's decision is laid out as follows in paragraphs 63 – 66 of her decision:

“63. The operator's licence is revoked in terms of sections 27(1)(a) and (c); section 26(1)(a)(c)(e)(f) and section 13A(2) of the 1995 Act.

64. Turriff Transport Consultants Ltd and director Mr William Walker are disqualified for a period of 30 months from applying for or holding an operator's licence in this or any other traffic area in terms of section 28(1) of the 1995 Act and section 28(4) of the Act will apply that is if the disqualified person: (a) is a director of, or holds a controlling interest in – (i) a company which holds a licence of the kind to which the order in question applies or (ii) a company of which such a company is a subsidiary, or (b) operates any goods vehicles in partnership with a person who holds such a licence, of that company, or as the case may be; of that person, shall be liable to revocation, suspension or curtailment under section 26.

65. Mr William Walker is no longer of repute and professional competence as transport manager in terms of Schedule 3 to the 1995 Act and I direct that he be disqualified for 30 months.”

3. The Traffic Commissioner's decision was taken after a Public Inquiry which she conducted on 4 November 2014.

4. A hearing took place before us on 15 February 2016. Mr Walker attended the hearing but took no part in it. Mr J McLaughlin, Solicitor, represented both the operator and Mr Walker as an individual. He adhered to the stated grounds of appeal in his oral submissions and also lodged skeleton arguments. We are grateful to Mr McLaughlin for his contribution to the hearing.

5. The file before us contains material indicating that Mr Walker had applied on 30 September 2013 to vary the Operators Goods Vehicle Licence so as to have his home address at Shandonan, Turriff added as an operating centre. However no copy of the relevant application was on file. At the request of Upper Tribunal staff, a copy of the application was made available to us by the Traffic Commissioner's office. The application in question was withdrawn on 3 October 2014 as the Traffic Commissioner records in paragraph 3 of her decision.

6. The Traffic Commissioner makes findings of fact as follows in paragraphs 37 – 48 of her decision:

- “37. The material facts in this case are these. This operator has held a licence in the Scottish traffic area only since 1996. Over the years there have been changes to the level of authorisation and the nominated operating centres, the position latterly being of authorisation for 5 vehicles and 7 trailers with a single operating centre located at Trailerdoc Ltd, Whitecross Industrial Estate, Linlithgow.
38. The Trailerdoc site at Whitecross is derelict and has not been used for some years. I find on balance of probabilities that at least since sometime in 2012 this operator ceased use of the sole authorised operating centre in Scotland. I think Mr Walker put a gloss on how long he had ceased to have authorised access to and actual use of that site.
39. The operator caused and allowed its vehicles and trailers to be parked and kept at unauthorised locations including near a driver’s home in Lanark and at the operator’s director/transport manager’s home at Shandonan and trailers were kept in England where the operator does not have an operator’s licence or in laybys or wherever suited the operator.
40. I find that the operator only desisted from using Shandonan temporarily as the operating centre for the vehicles following the call to Public Inquiry and that thereafter the pattern of behaviour was for drivers to park the vehicles in locations such as nearby laybys and industrial estates.
41. Mr Walker was aware that the operator did not have authority to use Shandonan as an operating centre and that he had allowed the licence to continue without there being an authorised operating centre. Even after being warned by the Central Licensing Unit in Leeds he took no steps as director or transport manager to seek an interim direction or cease use.
42. Shandonan is a dwelling house in a rural area served by a narrow access road with insufficient space to park the level of vehicles and trailers authorised on the licence. Even the operator has not sought to suggest its suitability for trailers. It is close to other private dwelling houses and the nomination of Shandonan produced representations from neighbours against its use.
43. The operator’s vehicles and trailers have been subject to immediate and delayed roadworthiness prohibitions including S marked prohibitions. Some of these prohibitions could have been avoided had there been driver walk round first use checks and defect reporting and rectification. The driver defect reporting was not robust and had fallen into disuse by the time of the Vehicle Examiner’s visit in August 2013.
44. The operator failed to ensure that all vehicles and trailers received preventative maintenance safety inspections at the stated inspection

frequencies. The operator in form of Mr Walker failed to receive safety inspection reports from provider Mr Downie despite this being an unsatisfactory arrangement highlighted by Examiner Howden in 2010. The operator failed to keep inspection records for 15 months as required by the undertakings on the licence.

45. The operator has a good pass rate at annual test for the vehicles used on the licence.
46. In recent months the operator has collated vehicle and driver records into folders and these were satisfactory to the Examiners when viewed at the Public Inquiry.
47. The operator has financial standing, achieved with ease.
48. The operator was at Public Inquiry in 2005 when assurances were given to the Deputy Traffic Commissioner. The operator received advice from Vehicle Examiner Howden in 2010 at an unsatisfactory MIG. Mr Walker gave assurances to VOSA and to the Office of the Traffic Commissioner and was warned.”

7. The most significant of the problems affecting the operation run by Mr Walker as the sole director of the operator, in the view of the Traffic Commissioner, was clearly the question of the operating centre. With admirable clarity she expresses herself thus in paragraphs 50 – 52 of her decision:

“50. Whatever I am absolutely certain that Mr Walker got into a way of working that neglected having an authorised operating centre or centres. He did what suited him, his vehicles and trailers were kept where it suited him and he did not bother to regularise the situation. He knew perfectly well what was required of him for the licence as over the years he has put operating centres on to the licence and taken others off. The PG13 form in 2010 discloses an exchange between him and VOSA over VOSA not knowing he had taken a centre off, so he could be on the ball if he chose to be. He was evasive in evidence over when he ceased using Trailerdoc’s site at Whitecross, Linlithgow and replied that he stopped using it in 2013 – I do not believe that – having regard to the photographs of that site and the whole evidence I find that it was before 2013 (which is the year when the latest VOSA investigation began) and at least 2012. He knew he had ceased using that site and that there was no access to it and it was the only site authorised on the licence.

51. I am in no doubt that this operation until the call up letter to this Inquiry operated with Shandonan as the one identifiable place where vehicles

were normally kept and Bawtry, Doncaster as the other identifiable location for trailers. The use of Shandonan is an aggravation of use of an unauthorised operating centre for such use prevented neighbours from exercising their statutory right to make representations against such use, and the neighbours there were private householders not industrial users. When neighbours did get the chance to make representations – that is when the operator made a variation application to add Shandonan to the licence – they did so. I do not have to adjudicate on their representations given that the operator withdrew the nomination – what is relevant for this decision is that the operator used an unauthorised site to the aggravation of neighbours who made representations when aware of their right to do so. It does not present as a suitable operating centre. I am not surprised that neighbours were upset by its use.

52. The parking of vehicles and trailers in unauthorised locations is a serious issue. Not having an operating centre brings a randomness and risks to the conduct of a haulage business and compliance with the licence undertakings. It also offends against fair competition for an operating centre comes with costs – whether rent to a landlord, the investment in land purchase, or fencing or whatever. So an operator which operates without one of the fundamental requirements of an operator licence can have a commercial edge over the compliant operator.”

She then goes on to say in paragraphs 53 – 54:

- “53. In this case I am faced with a transport manager who allowed all of this to happen. So I am looking at Mr Walker’s professional competence and repute as transport manager as well as sole director and owner of the operator business. To knowingly operate without an authorised operating centre since 2012 goes straight to repute. So does failure to subject vehicles and trailers to regular safety inspections and to keep proper records of such for 15 months. Mr Walker was on notice from the MIG of 2010 that his company’s record keeping, inspections and defect reporting were not in compliance with the licence and undertakings; he gave warm words to VOSA and my Office and it appears that if he did heed the advice it was not for long for in 2013 we find a very similar picture with Mr Downie again getting the blame for there being no records and worse the Examiner could not be sure at all that trailers were being inspected as required. Some records were available but there were significant gaps. It is not a surprise given this that the operator has a roadworthiness prohibition rate that is unfavourable.
54. The worst of all this is that if he decides things have to be right then he can make them right – annual test pass rates for the vehicles are good

and for the Public Inquiry he produced nice files of records. Mr Walker is an intelligent active individual so I am in no doubt that the deficiencies exposed by this Public Inquiry have been because he chose to go about his business in his own way, to suit himself, as a law unto himself.”

8. The Traffic Commissioner directs herself on the applicable law in paragraph 55 of her decision as follows:

“55. I have to decide what to do about all this. There are three cases which have to be in the mind of a Traffic Commissioner – the Bryan Haulage case with its question of do I need to put this operator out of business; is that proportionate; the Priority Freight case with its question of can I trust this operator to be compliant in future; and for me in Scotland the Court of Session case of Thomas Muir with its considerations of the integrity of the regulatory regime and deterrence by another name. I have to conduct a balancing act – weighing the positive against the negative. Here the positives are that Mr Walker appears to have been polite and co-operative in any discourse with DVSA Examiners; the vehicle test pass rate is good; he has made variation applications to nominate other operating centres though has withdrawn two of those nominations and did not make any interim requests until the Public Inquiry; he has shown that if he applies himself he can keep records; he has produced a letter of consent from Mr Jamieson of Ardlethen Quarry (albeit undated); the Traffic Examiner’s consideration of drivers hours compliance did not reveal a repetition of the matters considered at the Public Inquiry in 2006 so there is better drivers hours compliance than before; the tachograph seal prohibition was not sinister but maintenance repair related. Against those positives are all the adverse matters reported by the Examiners in their unchallenged evidence. This also is not the first time at Public Inquiry and there has been a Warning Letter between then and now.”

9. She goes on to apply that law to the facts of the case as she found them to be in paragraphs 56 – 57, 59 and 61 of her decision as follows:

“56. The fundamental question is can I trust Mr Walker – and I have to have a doubt about that given his history and the catalogue of non-compliance. He will do as he pleases in relation to where these vehicles and trailers are kept. I do not believe he will sustain a robust driver defect reporting system and that prohibitions will arise again though maybe not so many given newer trailers. I could find that he has lost his repute and professional competence as a transport manager given the deficiencies found in this case and having made that finding I would have to disqualify him. He is intelligent, he knows what he has to do so this is not a case of a need for refresher training, it is all down to attitude to compliance.

57. Mr Walker is the sole director and so essentially I am considering him when considering operator repute. I do consider that it would be

appropriate and proportionate to put him out of business given that I cannot trust him to be compliant. Thus I should revoke this licence on grounds of loss of repute; breach of the licence undertakings; use of unauthorised operating centres; material change; prohibitions; and loss of professional competence for it is he who has been transport manager all along and it would not be possible to in any way separate his repute as controller of this operation as owner/director and as transport manager. In this case repute and professional competence are indivisible.

59. Thus I am going to revoke this licence as there can be no other decision given all the findings and even allowing for those positives which are identified and I do so on loss of repute, professional competence, breach of the licence undertakings, material change, prohibitions and use of unauthorised operating centres. Professional competence is lost by virtue of Mr Walker's loss of repute whether as director or transport manager for he was the sole controlling force in all of this. Disqualification is needed if only to put temptation to resume operation on the shelf.

61. I have decided that it is appropriate to use the power of disqualification for if I do not, that leaves the company and director Mr Walker free to apply for another licence here in Scotland or elsewhere. I need to secure fair competition and also respect for the purposes and statutory requirements of operator licensing. Overwhelmingly operator licensing is about the prevention of harms, it should be pro-active in securing and husbanding compliance. A person who cannot be trusted cannot expect to get back in straightaway. I will put a 30 months period on the company, on Mr Walker's disqualification as a director and as a transport manager. I see no reason in the circumstances of this case to direct a different period for operator and director or transport manager disqualifications and thus they are all 30 months. Why that period – well it goes some way to reflect the period during which Mr Walker allowed his business to descend into a serial non compliance despite previous warnings and action to bring him to good sense and fair operating. It rights the balance.”

10. In the stated grounds of appeal Mr McLaughlin “submitted that in making the determination the Commissioner at paragraph 55 of the decision approached the decision by reference to the appropriate legal test.” We consider that that important concession was rightly made by him. In our view, the Traffic Commissioner did not misdirect herself on the applicable law. Essentially, with the one exception discussed in paragraph 12 below, Mr McLaughlin also accepted the tribunal's findings of fact. That was consistent with the approach he took on behalf of the operator and Mr Walker at the Public Inquiry. See paragraph 8 of the Traffic Commissioner's decision. His main contention was that the Traffic Commissioner's decision was inappropriate and disproportionate both in regard to the operator and in regard to Mr Walker as an individual. He fully accepted that the facts taken account of by the Traffic

Commissioner especially including the lack of an operating centre were ones which she was fully entitled to have regard to. Indeed Mr McLaughlin went on to concede that the Traffic Commissioner “was entitled to take regulatory action” and indeed went so far as to submit that “it was inevitable that the Commissioner would decide to take regulatory action”. His position on the disposal of the appeal was that suspension or curtailment would have been sufficient sanctions rather than those chosen by the Traffic Commissioner and that we should substitute suspension or curtailment for her decision.

11. The one factual finding disputed by Mr McLaughlin on behalf of his clients relates to the date when the operator ceased to use the operating centre at Trailerdoc, Whitecross, Linlithgow. Was it June/July 2013 as Mr Walker asserted or 2012 as the Traffic Commissioner found? In the written grounds of appeal Mr McLaughlin “submitted that there was insufficient evidence to justify the Commissioner determining that the operator had ceased using the operating centre at Trailerdoc during 2012”.

12. The relevant finding is in paragraph 38 of the Traffic Commissioner’s decision, cited in paragraph 6 above. The evidential basis for that finding is laid out thus in paragraph 22 of the Traffic Commissioner’s decision:

“22. On 11 October 2014 Traffic Examiner Wardrop and Vehicle Examiner Montgomery attended at the address of Trailerdoc Linlithgow. That found that the Whitecross Industrial Estate was no longer used by any business, the site being derelict and the road access now rubble. It was their opinion that the site had been in that state for a considerable period of time (photos in brief).”

However it appears to us that even if Mr Walker’s assertion is correct the position remains that for a period for some fifteen months the operator was operating without an operating centre. Thus even if we were to find that the Traffic Commissioner did not have a sufficient evidential basis for her conclusion on the date on which the operator ceased to use Trailerdoc (and we do not necessarily so find) that would have been an immaterial error as the operator still operated for a significant period of time without an operating centre. So far as the suggestion in the stated grounds of appeal that the problem of the lack of an operating centre was cleared up by the application to use Shandonan as such is concerned, we would simply state that the application in question was withdrawn before the Public Inquiry took place as we note having regard to the relevant finding of the Traffic Commissioner in paragraph 5 above. To summarise therefore we consider that even if Mr Walker’s position were to be accepted in this matter the lack of an operating centre continued for a significant period.

13. We have given this case very anxious consideration, especially given that the operator has held a standard international goods vehicle operator’s licence since



1996 and also because of the effects of the Traffic Commissioner's decision on the operator, Mr Walker personally and their employees. However the question before us is not what decision we may have reached ourselves had we been sitting as Traffic Commissioners. Rather it is whether we consider that reason and the law impel us to take a different view from the Traffic Commissioner. That that is the test to be applied by the Upper Tribunal on appeal from the Traffic Commissioner is established by paragraph 40 of the judgement of *Lord Justice Levenson in Bradley Fold Travel Limited v Traffic Commissioner for the North Western area* [2011] RTR13. The alternative formulation of the applicable test often used by the Upper Tribunal is whether the Traffic Commissioner's decision was plainly wrong.

14. We cannot hold that the test laid down in *Bradley Fold* has been met. We are not satisfied that the operator and Mr Walker have shown us that the Traffic Commissioner's decision was one which we could set aside as being plainly wrong. We consider that the Traffic Commissioners carrying out of what Mr McLaughlin in the stated grounds of appeal calls "the balancing act" cannot be so stigmatised. We reach that conclusion especially having regard to a careful analysis of paragraphs 52 – 53, 57, 59 and 61 of the Traffic Commissioner's decision, cited above. These paragraphs indicate that she took appropriate account of the positives in the case but, on balance, found as she was fully entitled to do and as she clearly explains especially in paragraphs 52 – 53 that the negative features outweighed them. That is especially true in regard to the question of the operating centre which as we state in paragraph 7 above was clearly in the view of the Traffic Commissioner the most significant issue in the case against the operator and Mr Walker.

15. Accordingly for the reasons given in detail above the appeal is dismissed. The Traffic Commissioner's decision of 28 September 2015 is confirmed. It will take effect from midnight 17 June 2016, four weeks from the date of this decision.

(Signed)  
A J GAMBLE  
Judge of the Upper Tribunal  
Date: 20 May 2016