Appeal No. T/2016/26

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER (Traffic Commissioner Appeals)

ON APPEAL from the DECISION of the SCOTTISH TRAFFIC COMMISSIONER

Dated: **2 May 2016**

Before:

Mr E. Mitchell	**Judge of the Upper Tribunal**
Mr D. Rawsthorn	**Member of the Upper Tribunal**
Mr J. Robinson	**Member of the Upper Tribunal**

Appellant: **Mr J Campbell (t/a Vision Travel)**

Heard at:	George House, 126 George Street, Edinburgh
Date of hearing:	9 September 2016
Attendances:	Mr T Docherty, solicitor, of Jeffrey Aitken Solicitors, for Mr Campbell
Date of decision:	26 January 2017

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that this appeal is dismissed.

SUBJECT MATTER:-

Public passenger vehicle licence; good repute of operator and transport manager; disqualification orders.

CASES CITED:-

CG Cargo Ltd [2014] UKUT 0436 (AAC);
Crompton (t/a David Crompton Haulage) v. Department of Transport [2003] EWCA Civ 64;
Bryan Haulage (No. 2) (2002/217);
Priority Freight (2009/225);
Márton Urbán vs Vám-és Pénzügyőrség Észak-alföldi Regionális Parancsnoksága (C-210/10);
Bradley Fold Travel Ltd & Anor v Secretary of State for Transport [2010] EWCA Civ 695, [2011] RTR 13;
Subesh & ors v. Secretary of State for the Home Department [2004] EWCA Civ 56;
Assicurzioni Generali SpA v. Arab Insurance Group [2002] EWCA Civ 1642, [2003] 1 WLR 577;
Simpson v London, Midland & Scottish Railway 1930 SC 166.

REASONS FOR DECISION

Background

Events preceding the public inquiry

1. Mr Campbell was granted a standard public service vehicle operator's licence (hereafter "PSV licence") with effect from 6th March 2008. The licence was granted under the Public Passenger Vehicles Act 1981 (hereafter "the 1981 Act"). Mr Campbell ran his transport operation as a sole trader, using the trading name Vision Travel. Mr Campbell was also the operation's designated transport manager.

2. Originally, Mr Campbell's licence was subject to a condition preventing his operation from using more than eight vehicles. Following a public inquiry, held on 3 March and 13 May 2014, the Scottish Traffic Commissioner (hereafter "the

Commissioner") in her written decision issued on 10 September 2014 varied the conditions attached to Mr Campbell's licence to prevent his operation from using more than four vehicles.

3. On 24th March 2015, Mr Campbell applied to the Commissioner for his licence conditions to be varied to authorise use of ten vehicles. Having received adverse reports from the Driver and Vehicle Standards Agency (DVSA), the Commissioner called Mr Campbell to a public inquiry. Those reports alleged maintenance and driver defect reporting shortcomings and that Mr Campbell was operating more than the authorised four vehicles. That allegation was made following a DVSA investigation carried out in January 2015 which led the DVSA to conclude Mr Campbell's operation had taken on rail replacement work, in addition to his contracted school transport work, and in doing so used either eight or nine vehicles.

4. As well as Mr Campbell's application to vary the conditions attached to his licence, the inquiry call-up letters stated the Commissioner would also be considering whether to take regulatory action including disqualification orders.

The Commissioner's decisions and findings

5. The public inquiry was conducted over two days, 16th October 2015 and 8 April 2016. Mr Campbell was represented at the inquiry by Mr Docherty, solicitor, who also represented him before the Upper Tribunal.

6. On 2nd May 2016, the Commissioner made the following decisions:

(a) Mr Campbell's PSV licence was revoked;

(b) Mr Campbell was made the subject of a disqualification order under section 28 of the Transport Act 1985 preventing him from holding an operator's licence on his own account or in partnership. The Commissioner also gave a section 28(4) direction which, in summary, rendered liable to revocation the operator's licence of any company or partnership of which Mr Campbell was a director or member. The Commissioner's section 28 decisions had effect for six years;

(c) Mr Campbell was made the subject of an indefinite disqualification order under Schedule 3 to the 1981 Act preventing him from acting as a transport manager.

7. All of the Commissioner's decisions took effect from 23.59 on 30 June 2016.

8. In arriving at her decisions, the Commissioner's findings included the following:

(a) she had "no hesitation" in preferring Traffic Examiner Stoner's analysis of the evidence to that put forward on Mr Campbell's behalf and which led her to conclude that Mr Campbell had operated more than the permitted four vehicles on 15 January 2015. The Examiner took into account evidence from a range of sources and tested her initial conclusions against the case put forward on Mr Campbell's after the first inquiry hearing;

(b) "I am in no doubt that Mr Campbell was not truthful at the Public Inquiry and that through poor record keeping he thwarted a true picture emerging of his operation and in particular of private hire work";

(c) "Without any doubt he was responsible for the scheduling of vehicles on the week of 14 January, including 15 January and it was he, and no one else, who took on the rail work from Network Rail even though he had established school contracts which needed day time vehicles to service";

(d) "Mr Campbell was well and truly caught out by the emergence of the call logs kept by Network Rail. His position in this case in his evidence on 16 October 2015 was of his own staff having made a mistake in putting out a 5th vehicle on 15 January and taking the rail contract when they should not have done…The evidence which came from the inquiries of Network Rail showed that it was he who took the rail work and he who was consulted throughout about vehicle availability to do the work";

(d) "the rail replacement work was not local work to the Linlithgow or Falkirk area. It was to cover taking passengers on the Glasgow / Oban route. By the time of the reconvened public inquiry, Traffic Examiner Stoner had produced a detailed report and chart. It was DVSA's position that 9 vehicles were in use on 15 January 2015 and that was calculated giving maximum benefit to the operator which she demonstrated throughout";

(e) Mr Campbell's reliance on medical conditions and appointments were "bluster to elicit sympathy and distract from his behaviour";

(f) the Commissioner did not accept "for one moment" Mr Docherty's submission that this was a case of a single day's non-compliance and that DVSA had produced no evidence to the contrary. The Network Rail call logs showed that Mr Campbell's rail replacement work was not confined to 15 January 2015; record-keeping for non-school contract work was not in line with licence undertakings; and DVSA "cannot be expected to monitor an operator's entire authorisation day after day before a Traffic Commissioner can take a view beyond finding such an isolated day";

(g) "What the Traffic Examiner found was a business which was being organised in fundamental breach of the licence undertakings – and Mr Campbell brought nothing

to the table to dislodge the Examiner's findings or to show me in a positive way that this was an isolated incident. On the contrary Mr Campbell had to admit use in excess of 5 vehicles, which is bad enough given his history, and he was untruthful and could not produce records";

(f) Mr Campbell disregarded the Commissioner's earlier decision to limit his licence authorisation to 4 vehicles (see below) which was "extremely serious".

9. In deciding what regulatory action to take, the Commissioner took the following matters into account:

(a) matters going to the operator's credit were: standards of vehicle roadworthiness had improved since the 2014 public inquiry; the Vehicle Examiner found satisfactory record-keeping in relation to vehicle inspections and forward planning; "had all else being equal [*sic*] DVSA would not have opposed an increase in vehicle authorisation to 8"; driver training had taken place as had staff training with a view to someone being appointed as a replacement transport manager; the operator met the requirement for financial standing;

(b) revoking the licence would "close the business";

(c) the Commissioner needed to ask herself whether she could trust this operator to "continue compliantly" and whether she had to put this operator out of business;

(d) her 2014 decision (see below) had been 'merciful' but it was now clear the mercy shown was misplaced and "not heeded or respected by this operator";

(e) the Commissioner had no doubt Mr Campbell could not be trusted to run a compliant operation. He was not trustworthy;

(f) Mr Campbell's operation failed to observe rules concerning drivers' hours, tachographs and record-keeping;

(g) Mr Campbell's operation offended against fair competition, by taking on rail replacement work in breach of his licence conditions.

10. The following passage from the Commissioner's reasons explain why she decided to take regulatory action that would close down this operator's business:

> "There is nothing in the positive which can counter the negatives in this case. I find myself in the position that I cannot trust a word [Mr Campbell] says. The *Priority Freight* question is answered in the negative. I go further and find it is

> right that I put this operator out of business and find that he has lost his repute".

11. Turning to the question whether Mr Campbell should be disqualified as a transport manager, the Commissioner directed herself to the legislative requirement for proportionality. She decided disqualification would not be disproportionate given Mr Campbell's central role in the operation's licensing failures and his lack of truthfulness and candour. This meant he could not be trusted with the control or management of any transport operation. The Commissioner made an indefinite order without ordering any rehabilitative measures given Mr Campbell's evidence as to his future intentions (that his son would take over the business on his return from Australia) and "presently I cannot think of any circumstances in which I would wish Mr Campbell to be any operator's transport manager. It would be too risky for that operator".

12. Finally, the Commissioner considered whether to exercise her powers of disqualification under section 28 of the Transport Act 1985. She reasoned as follows:

> "I consider that this case does merit disqualification given Mr Campbell's history in this jurisdiction and in particular the matters considered in the 2014 inquiry and now this one. He is a man who has shown disrespect for the licensing regime and for fair competition. By operating as he has done he has cocked a snook at operator licensing and the response to that and the response to that has to be to put him furth [or out] of operating for some time. I will not be so draconian as to make it life but having regard to the case law guidance in *CG Cargo Ltd*. T/2014/41 I consider that a short period would not be sufficient to mark the seriousness of this case and the view I have had to take of Mr Campbell. I will make the period 6 years and I do so very mindful indeed that he got a great chance to redeem himself in 2014 when then on the cusp of revocation and he has shown he does not have it in him to be trusted."

The 2014 public inquiries

13. An important part of the context to this case was the decision taken by the Commissioner in 2014 to limit the number of vehicles authorised to be used under Mr Campbell's licence.

14. Following public inquiry hearings on 3 March and 13 May 2014, the Commissioner decided not to revoke Mr Campbell's PSV licence. In her written decision issued on 10 September 2014 she did, however, give Mr Campbell a very clear warning as to the possible consequences should he fail to comply with the licensing scheme in the future. In making her decision the Commissioner relied on findings which included the following

> "…John Campbell deliberately failed to keep proper records of his drivers' duties. I find that he deliberately withheld from the Traffic Examiner such records that he did have which, whilst they would not have shown the full picture, might have aided her understanding. I find that John Campbell deliberately encouraged drivers to drive without a chart on occasions. I find that John Campbell deliberately failed to ensure his drivers kept a full record, especially in relation to positioning journeys and return journeys. I find that the absence of proper records was done to allow drivers on non EC work that is school contracts, to avoid recording their hours and thus to create the impression that they had available hours which otherwise should have been taken by drivers as rest or breaks. I find that the absence of record keeping was endemic to how John Campbell conducted his business. I find that there were occasions on which John Campbell's name was used in the charts of others…"

15. On that occasion, the Commissioner said she was on the cusp of revoking Mr Campbell's licence. However, the Commissioner decided to give Mr Campbell a "last chance" to run a compliant operation and issued "the severest warning short of removing his repute as an operator and transport manager." As we have already mentioned, the Commissioner also varied Mr Campbell's PSV licence conditions so that he was permitted to use four, rather than eight, vehicles. It was not submitted to ourselves that Mr Campbell appealed to the Upper Tribunal against the Commissioner's decision.

Proceedings before the Upper Tribunal

16. Mr Campbell now appeals to the Upper Tribunal against the Commissioner's decisions, relying on the following grounds of appeal.

17. The first ground is that the Commissioner erred in accepting the evidence of DVSA officials about alleged use of excess vehicles in breach of the conditions attached to Mr Campbell's licence. The Commissioner failed to make her own assessment of the evidence and improperly admitted opinion evidence from DVSA officials.

18. The second ground of appeal is that the Commissioner erred by finding (or assuming) that Mr Campbell had used vehicles in excess of his license authorisation on more than a single day. Mr Docherty's skeleton argument asserted there was no evidence on which such a finding could properly be based. At the hearing, Mr Docherty argued the Commissioner had engaged in undue speculation and failed to appreciate that the school transport work was not within the scope of the EU Drivers Hours legislation so that use of a tachograph was not required.

19. At the hearing, we pointed out to Mr Docherty that, of itself, the drawing of inferences is not impermissible. We asked him to explain how the Commissioner had gone beyond the acceptable drawing of reasonable inferences and instead engaged in unwarranted speculation. He drew our attention to paragraph 51 of the Commissioner's reasons. In that paragraph, the Commissioner relied on the Network Rail call logs, the operation's poor record-keeping, the nature of the DVSA investigation carried out on 15 January 2015 and the impracticability of the DVSA monitoring an operation's business day-after-day. The Commissioner added that "having found such an occasion [i.e. on 15 January 2015], the onus moves to the operator to show that it was an isolated occurrence" since trust is at the heart of the regulatory regime.

20. The third ground of appeal is that the Commissioner acted disproportionately by imposing a six year disqualification order under section 28 of the Transport Act 1985. At the hearing, Mr Docherty argued the Commissioner was wrong to classify this as a bad case.

Legal framework

Maximum numbers of PSV vehicles

21. Section 19(1) of the Public Passenger Vehicles Act 1981 requires, rather than merely permits, a traffic commissioner, on granting a PSV operator's licence, to "attach to it one or more conditions specifying the maximum number of vehicles…which the holder of the licence may at any one time use under the licence". Contravention of such a condition is a criminal offence (section 19(7)).

22. Section 19(6)(a) gives a traffic commissioner power, on application, to vary a condition attached under section 19(1). On such an application, section 19(6) requires the applicant to give the commissioner "such information as [the Commissioner] may reasonably require for the discharge of his duties in relation to the application".

Tachograph and driver hours' rules

23. Regulation (EC) No 561/2006 contains EU-wide rules on driving times and breaks rest period for drivers engaged in the carriage of passengers by road. However, the Regulation does not apply to "carriage by road by vehicles used for the carriage of passengers on regular services where the route covered by the service in question does not exceed 50 kilometres" (article 3(a)). "Regular passenger services" is defined by Council Regulation (EEC) No 684/92, which regulates carriage of passengers by coach and bus. The definition includes "special regular services" one class of which is "carriage to and from the educational institution for school pupils and students" (article 2.1.2).

24. Driving time rules for passenger services that fall outside Regulation (EC) No 561/2006 are provided for by Part VI of the Transport Act 1968. The general rules in section 96 of the 1968 Act include that (a) a driver shall not "on any working day drive a vehicle or vehicles to which this Part of this Act applies for periods amounting in the aggregate to more than 10 hours"; and (b) after a driver has been on duty for more than five and a half hours, the driver must have a rest interval of at least half an hour.

25. While Regulation (EC) No 561/2006 is supported by a set of tachograph rules, the Transport Act 1968 does not impose record-keeping requirements. However, it is in our view clear that, in order to demonstrate compliance with the general rules in section 96 of the 1968 Act, some records should be kept of the times drivers spend on driving that falls outside Regulation (EC) No 561/2006.

Revocation of PSV licences

26. Section 17(1) of the 1981 Act requires a traffic commissioner to revoke a standard PSV operator's licence in certain cases. These include where it appears to a commissioner that (a) the licence holder no longer satisfies the section 14ZA(2) requirements to be of good repute or professionally competent, or (b) the designated transport manager no longer satisfies the section 14ZA(3) requirements to be of good repute or professionally competent.

27. Section 17(2) & (3) permits a traffic commissioner to revoke a licence on various grounds which include "that there has been a contravention of any condition attached to the licence".

Disqualification orders

28. If a traffic commissioner determines that a transport manager is no longer of good repute or professionally competent, Schedule 3(7B) to the 1981 Act requires the commissioner to "order the person to be disqualified (either indefinitely or for such period as the commissioner thinks fit) from acting as a transport manager". One effect of such an order is that "the person may not act as transport manager for any road transport undertaking" (Schedule 3(7B)(3)(a)). Schedule 3(7C)(1) gives a traffic commissioner power to cancel a disqualification order.

29. If a traffic commissioner revokes a PSV operator's licence, section 28(1) of the Transport Act 1985 permits the commissioner also to order the former licence- holder to be disqualified, indefinitely or for such period as he thinks fit, from holding or obtaining a PSV operator's licence. In conjunction with a section 28(1) order, a traffic commissioner may make a section 28(4) direction which, amongst other things,

renders an operator's licence granted to a company of which the person is a director liable to revocation under section 17(2) of the 1981 Act.

30. The Upper Tribunal's decision in *CG Cargo Ltd* [2014] UKUT 0436 (AAC) concerned an operator's disqualification order made under the Goods Vehicles (Licensing of Operators) Act 1995 but we see no reason why it should not also apply to orders under the Transport Act 1985. Indeed, Mr Docherty submitted it was applicable to PSV operator disqualification orders.

31. In CG Cargo the Upper Tribunal said:

> "12. The tribunal decision in [*David Finch t/a David Finch Haulage* [2010] UKUT 284 (AAC)] pre-dates the issue of the Senior Traffic Commissioner's Statutory Documents. The Traffic Commissioner was right to refer to the Statutory Documents and, in particular, to Document No 10. Here the Senior Traffic Commissioner states:
>
> > "74. Taking account of the guidance from the Upper Tribunal that each case must be looked at on its merits, Traffic Commissioners may wish to use as a starting point for a first public inquiry consideration of a disqualification period of between 1 and 3 years, but serious cases, where, for example, the operator deliberately puts life at risk and/or knowingly operates unsafe vehicles or allows drivers to falsify records, may merit disqualification of between 5 to 10 years or in certain cases for an indefinite period. It is always open to a disqualified person to make application for removal or reduction of the order. Unless there are exceptional circumstances, a disqualification of less than two years will not normally be reduced, and disqualification for longer or indefinite periods will not normally be reviewed, until half the period or 5 years of the disqualification have elapsed as applies."
>
> 13. In addition, the Statutory Document indicates that Traffic Commissioners will consider conduct generally in the context of a regulatory starting point ranging from 'Low' at the bottom end, up to 'Severe' at the top end:

CONDUCT	**REGULATORY STARTING POINT**
Any conduct designed to strike at the relationship of trust between traffic commissioners and operators	SEVERE
Deliberate acts or omissions that compromise road safety and/or result in the operator gaining a commercial advantage	SEVERE to SERIOUS
Any conduct designed to mislead an	SEVERE to SERIOUS

enforcement agency or the Office of the Traffic Commissioner	

14. It is clear to us that the Senior Traffic Commissioner, following appropriate consultation with colleagues and the industries, has decided that there can be severe cases where, instead of an indefinite disqualification, a fixed term disqualification of 5 to 10 years is justified. Therefore, in the light of the Statutory Document, we consider that the decision in David Finch should not now be relied upon to criticise fixed term disqualifications of more than three years if, at a first public inquiry, the facts are such as to put the case into one or more of the categories referred to."

Proportionality

31. The requirement for proportionate regulatory action is built into the licensing scheme, by a combination of legislative and case law requirements.

32. The legislative requirement for proportionality concerns transport manager disqualification orders. Schedule 7B(1) to the 1981 Act requires a traffic commissioner, in determining whether a person who is a transport manager is of good repute or professionally competent, to 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.

33. More generally, case law establishes the requirement for proportionate regulatory action. While the case law precedents mainly concern licensing of operators which transport goods, they are in our view equally applicable to PSV operators given the structural similarities between the two licensing regimes.

34. The Court of Appeal in *Crompton (t/a David Crompton Haulage) v. Department of Transport* [2003] EWCA Civ 64, [2003] RTR 34 held:

> "if loss of repute is found the inevitable sanction is revocation…There must therefore be a relationship of proportionality between the finding and the sanction, and that relationship has a direct bearing on the approach to be adopted in any set of circumstances to the question of whether or not the individual has lost his repute."

35. In response to *Crompton* the Transport Tribunal (the predecessor to the Upper Tribunal) revisited its approach to determinations of good repute. In *Bryan Haulage (No. 2*) (2002/217), it held:

> "[T]he question is not whether the conduct is so serious as to amount to a loss of repute but whether it is so serious as to require revocation. Put simply, the question becomes 'is the conduct such that the operator ought to be put out of business?' On appeal, the Tribunal must consider not only the details of cases but also the overall result."

36. In *Priority Freight* (2009/225) the Transport Tribunal said:

> "In our view before answering the 'Bryan Haulage question' it will often be helpful to pose a preliminary question, namely: how likely is it that this operator will, in future, operate in compliance with the operator's licensing regime? If the evidence demonstrates that it is unlikely then that will, of course, tend to support a conclusion that the operator ought to be put out of business. If the evidence demonstrates that the operator is very likely to be compliant in the future then that conclusion may indicate that it is not a case where the operator ought to be put out of business."

37. The approach required by the case law also accords with the law of the European Union. In the road transport case of *Márton Urbán vs Vám-és Pénzügyőrség Észak-alföldi Regionális Parancsnoksága* (C-210/10) the Court of Justice of the European Union held:

> "24…the measures imposing penalties permitted under national legislation must not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (see, to that effect, Joined Cases C-379/08 and C-380/08 *ERG and Others* [2010] ECR I-2007, paragraph 86)."

The appellate role of the Upper Tribunal

38. Section 50(4) of the 1981 Act confers a right of appeal to the Upper Tribunal against a traffic commissioner's revocation of a licence. Paragraph 14(1) of Schedule 4 to the Transport Act 1985 provides:

> "…the Upper Tribunal are to have full jurisdiction to hear and determine all matters (whether of law or of fact) for the purpose of the exercise of any of their functions under an enactment relating to transport".

39. So far as matters of fact are concerned, the Upper Tribunal's jurisdiction was examined by the Court of Appeal in *Bradley Fold Travel Ltd & Anor v Secretary of State for Transport* [2010] EWCA Civ 695, [2011] RTR 13. The Court applied

Subesh & ors v. Secretary of State for the Home Department [2004] EWCA Civ 56, [2004] INLR 417 where Woolf LJ held:

> "44…The first instance decision is taken to be correct until the contrary is shown…An appellant, if he is to succeed, must persuade the appeal court or tribunal not merely that a different view of the facts from that taken below is reasonable and possible, but that there are objective grounds upon which the court ought to conclude that a different view is the right one...The true distinction is between the case where the appeal court might *prefer* a different view (perhaps on marginal grounds) and one where it concludes that the process of reasoning, and the application of the relevant law, *require* it to adopt a different view. The burden which an appellant assumes is to show that the case falls within this latter category."

40. Part of the rationale for this was that the "material before the [Tribunal] will consist only of the documents placed before the…Commissioner and the transcript of the evidence; the Tribunal will not have the advantage that the…Commissioner had of seeing the parties and the witnesses, hearing them give evidence and assessing their credibility both from the words spoken but also the manner in which the evidence was given".

41. The Court of Appeal also drew a distinction between 'primary facts' and other findings of fact. The Court referred to Clarke LJ in *Assicurzioni Generali SpA v. Arab Insurance Group* [2002] EWCA Civ 1642, [2003] 1 WLR 577:

> "16. Some conclusions of fact are…not conclusions of primary fact…They involve an assessment of a number of different factors which have to be weighed against each other. This is sometimes called an evaluation of the facts and is often a matter of degree upon which different judges can legitimately differ. Such cases may be closely analogous to the exercise of a discretion and, in my opinion, appellate courts should approach them in a similar way."

Primary facts and the drawing of inferences

42. In principle, a fact-finding tribunal is permitted to draw reasonable inferences from primary facts. This has been recognised by the Court of Session for many years.

43. In *Simpson v London, Midland & Scottish Railway* 1930 SC 166 the Inner House of the Court of Session considered findings made by an arbitrator acting under the Workmen's Compensation Act 1925. A railway guard was last seen boarding the unoccupied compartment of a train at Glasgow Central Station, bound for Gourock where he was to take charge of a Glasgow-bound train. The guard did not arrive at Gourock, his lifeless body being found in Bishopton tunnel. No defect was found in

the train compartment's window or door. The arbitrator found that the guard, being "a steady man of cheerful disposition, with no domestic or financial worries", must have fallen from the compartment window by "pure accident" in the course of his employment. On those findings, the guard's widow was entitled to a compensation payment of £600. The question of law certified for the Court was whether the arbitrator was entitled to find the guard must have died as the result of an accident.

44. In the opinion of the Court (Lord Clyde, Lord President):

> "It is plain – when the proof of a disputed fact is in question – that, if the evidence is so scanty and so poor as to give rise to nothing better than surmise or conjecture, the fact cannot be held to be proved in law. For on surmise or conjecture, more or less probable in itself, is neither better nor worse than any other, where proof is concerned. On the other hand, the evidence – little and poor though it be – may be sufficiently circumstantial to afford ground on which a reasonable judge or jury may make an inference of fact from the little that is established; and this inference may be enough to prove, or negative, the disputed fact. If, in the present case, it can be said that the learned arbitrator reasonably drew from the circumstances above summarised the inference that the workman met his death by accident arising out of his employment, the claimants must succeed. For it is enough that the inference is such as a reasonable arbitrator might draw, however little another equally reasonable arbitrator might agree with it".

45. The railway company's case succeeded. In the Court's opinion, there were no facts found that could warrant, as a reasonable inference, that the guard met his death through an accident in this course of and arising out of his employment.

Why we dismiss this appeal

Grounds 1 and 2

46. These grounds are, in our view, closely linked so we shall deal with them together.

47. We start by examining how Mr Campbell put his case to the Commissioner that what happened on 15 January 2015 could only be considered an isolated occurrence.

48. On 15th January 2015, DVSA officials carried out an investigation, in response to "intelligence" received that very same day, into whether Mr Campbell was operating more vehicles than authorised by the conditions attached to his licence. The nature of the intelligence is not described in any of the documents within the Commissioner's

file but it seems safe to assume some sort of allegation was made that Mr Campbell's operation was using more than the permitted four vehicles.

49. The five DVSA Traffic Examiners who took part in the investigation reported observing five vehicles at various schools or colleges on the afternoon of 15 January 2015. Separately, the running boards for three other vehicles, completed on headed paper for the First Rail company were checked, as were tachograph records. These 3 vehicles had different registration numbers from the five observed by the Examiners. This led DVSA Traffic Examiner Stoner to conclude they had been used on rail replacement work on 15 January 2015: one was in use between 8.01 – 10.51 and 14.21 – 18.26; another between 05.01 – 09.06 and 10.17-13.07; and the third between 05.01 – 09.06 and 10.17 – 13.07.

50. On 27 May 2015 Mr Campbell was interviewed under caution by DVSA Traffic Examiners (the transcript of the interview begins at p.46 of the Traffic Commissioner's bundle of papers). He informed the Examiners that his undertaking used four vehicles to service his school transport contracts. Mr Campbell accepted that vehicles W100 FFC, OWW618 and R858 SRY had been in use on 15 January 2015. None of these vehicles were observed at the schools and colleges for which Mr Campbell provided a transport service. The interviewer then put it to Mr Campbell that, on 15 January 2015, his operation was using more vehicles than authorised by his licence. To this, Mr Campbell replied "no comment". The same answer was given to subsequent questions including "Is it your intention to answer no comment to any questions I ask from here on in?"

51. The DVSA papers for the public inquiry also alleged a ninth vehicle had been in use on 15 January 2015, a private hire contract taking school children to and from the National Portrait Gallery in Edinburgh. However, the only evidence obtained about this, from the school itself, was an invoice for the hire (p.182 of the Commissioner's papers).

52. Mr Docherty, who represented Mr Campbell before the Commissioner, averred at the first public inquiry that, had Mr Campbell's business operated in breach of his licence on any day apart from 15th January 2015, the DVSA would have supplied evidence of that. In the absence of such evidence, a finding that, on other days, Mr Campbell's business operated more than its four licensed vehicles would be unjustified speculation.

53. The Commissioner's reasons record that, at the first inquiry hearing, Mr Campbell gave parole evidence that he was "incapacitated" during the week of 15th January 2015. The rail replacement work "had been taken on when he wasn't there" without his knowledge and "there was shouting and bawling when he came back". An inexperienced employee thought the rail replacement work could be done without

contravening Mr Campbell's operator's licence but he was wrong. Mr Campbell admitted in his evidence at the first public inquiry that his operation used five vehicles on the afternoon of 15 January 2015 but denied having operated eight. At the second inquiry hearing, Mr Campbell said his undertaking was able to do school transport and rail replacement work on this day using only five vehicles because, for most of the day, the work did not overlap.

54. After the first inquiry hearing, DVSA officials carried out further investigations and informed the Commissioner that Network Rail supplied them with telephone logs for 14 and 15 January 2015. These are summarised from p. 184 of the Office of Traffic Commissioners (OTC) papers and they state that Network Rail staff had conversations with Mr Campbell on a number of occasions about the 15th January 2015 rail replacement work. DVSA Traffic Examiner Stoner also provided an addendum report which contained a detailed analysis of Mr Campbell's vehicles' movements which was said to refute his claims and to show that nine vehicles were operated on 15th January 2015.

55. Between the two inquiry hearings, Mr Docherty supplied a written submission (p.207). This accepted that five vehicles were used on 15 January 2015 but only as a result of a replacement vehicle having been sent out when it was realised the operation's contracts could not be performed, as had been anticipated, with four vehicles. To conclude otherwise would be unjustified speculation. Mr Campbell's operation had long-standing arrangements to do rail replacement work. He was able to perform such work alongside his school transport work by using the same vehicles for different kinds of work at different times of the day.

56. On 25 February 2016, the OTC wrote to Mr Docherty informing him that he should contact the OTC if he wished to listen to the Network Rail recordings.

57. Before the second inquiry, Mr Docherty averred:

(a) five vehicles were in use on 15 January 2015 but that only occurred because Mr Campbell was away from work that week and staff had, without his authority, operated more vehicles than the undertaking was licensed to operate;

(b) Mr Campbell's operation had long-standing arrangements to do rail replacement work. He was able to perform such work alongside his school transport work by using the same vehicles for different kinds of work at different times of the day;

(c) had the events of 15 January 2015 been more than an isolated occurrence, DVSA would have supplied supporting evidence

58. At the second inquiry hearing, Mr Campbell denied he had knowingly tried to deceive the Commissioner at the first hearing about his involvement in arranging rail replacement work for 15th January 2015. He said he would have been contacted on his mobile phone at home by rail staff and also suggested it could not be proven that a voice heard during a call to his operating centre was in fact him. However, there is no indication in the papers that Mr Campbell took up the Commissioner's offer to listen to the tape recordings himself.

59. Mr Campbell's five-vehicle position was maintained at the second public inquiry hearing. He conceded that one of the vehicles was operated without an operator's disc but only because it was sent out to assist a vehicle with operating problems due to water having mixing with its diesel fuel.

60. The Commissioner's reasons state she had "no hesitation" in preferring Traffic Examiner Stoner's "assessment" of the numbers of vehicles being used on 15th January 2015. The Commissioner was impressed by Examiner Stoner's forensic approach involving her analysing and comparing a number of sources of evidence (see para. 47 of the Commissioners' reasons). The Commissioner also said she had "no doubt" Mr Campbell had not been truthful when giving evidence at the inquiry (about his involvement in arranging rail replacement work), his poor record keeping "had thwarted a true picture emerging of his operation" and relied on the absence of cogent evidence supplied by Mr Campbell in support of his claims.

61. We reject both grounds of appeal.

62. The Commissioner did not unthinkingly accept the DVSA case that eight or nine vehicles were used on 15 January 2015. Her reasons clearly demonstrate that she assessed both cases put to her and she gave cogent reasons for preferring the DVSA case. We also reject the argument that the Commissioner wrongly relied on the Traffic Examiner's opinion evidence. She agreed with the analysis made by the Traffic Examiner which, in our view, was a dispassionate evaluation of the primary facts found. It did not incorporate any opinion of the part of the Examiner about Mr Campbell's character.

63. We also reject the argument that the Commissioner engaged in unwarranted speculation in finding that the events of 15 January 2015 were unlikely to be an isolated incident of non-compliance. We would not hold that, as a general rule, any proven instance of non-compliance puts the onus on the operator to show that a breach was not persistent. In this case, however, the background findings made concerning Mr Campbell's character, his lack of co-operation during the DVSA investigation, as well as the findings made in the 2014 inquiry, lead us to conclude that the Commissioner was not "plainly wrong" to make the findings she did. We do

not accept that the Commissioner drew unreasonable inferences from the primary facts.

64. We also reject the argument that the Commissioner failed to appreciate that the operation's school transport work was not within the scope of the EU Drivers Hours legislation so that use of a tachograph was not required. The Commissioner's reasons simply do not demonstrate such an error. We have no doubt that this experienced Commissioner was well aware which PSV work attracted tachograph obligations and which did not.

Ground 3

65. This ground really falls away as a result of the failure of grounds 1 and 2. The Commissioner's findings as to the numbers of vehicles used on 15 January 2015, and that this was not an isolated occurrence, stand. This was also a case where an operator had recently been given a "last chance" to run a compliant operation. Taken together, these considerations mean it cannot seriously be argued that the Commissioner wrongly categorised this as a case justifying a six year disqualification order under section 28 of the 1985 Act. We do not accept that the Commissioner's decision was inconsistent with the guidance given by the Upper Tribunal in *CG Cargo*.

Conclusion

66. This appeal is dismissed.

67. The Upper Tribunal apologises for the delay in giving its decision in this case, caused by the illness of the Judge resulting in an extended period of sick leave absence after the hearing.

Mr E. Mitchell, Judge of the Upper Tribunal,
26 January 2017
(signed on original)