

**TRAFFIC COMMISSIONER FOR SCOTLAND**

**PUBLIC PASSENGER VEHICLES ACT 1981**

**EDWARD T CLARK TRADING AS EDDIE'S MINIBUS HIRE – PM1060446**

**MARY ANN MONTAGUE – TRANSPORT MANAGER**

**EDWARD T CLARK– TRANSPORT MANAGER**

**CONJOINED WITH**

**DRIVER CONDUCT HEARINGS:-**

- (1) DARREN JOHNSTONE**
- (2) DEREK COSTELLO**
- (3) JAMES DAILLY**
- (4) ALISTAIR CURRIE**
- (5) PETER CUMMING**
- (6) HUGH BENN**
- (7) EDWARD T CLARK**

**PUBLIC INQUIRY AT EDINBURGH ON 30 NOVEMBER 2017**

**DECISION OF THE DEPUTY TRAFFIC COMMISSIONER**

**EDWARD T CLARK trading as Eddie's Minibus Hire**

1. Edward T Clark trading as Eddie's Minibus Hire has lost his good repute in terms of s.14ZA(2). Edward T Clark has lost his good repute as Transport Manager in terms of s.14ZA(3). The operator licence held by Edward T Clark will be revoked.
2. Edward T Clark is disqualified for a period of ten years in terms of section 28(1) of the Transport Act 1985.
3. Section 28(4) of the Transport Act 1985 will apply such that if Edward T Clark during the period of disqualification:
  - (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 applies; or
    - (ii) a company of which a company which holds such a licence is a subsidiary; or
  - (b) operates any such public service vehicles in partnership with a person who holds such a licence, the powers under section 17(2) of the Public Passenger Vehicles Act 1981 (revocation, suspension etc. of PSV operators' licences) shall be exercisable in relation to that licence by the Traffic Commissioner.
4. The orders for revocation and disqualification will take effect at 23:59 Sunday 29 April 2018.

Edward T Clark as Transport Manager

5. Edward T Clark has lost his reputation as a Transport Manager and it is a proportionate response to that finding that he should be disqualified from acting as such for 10 years under paragraph 17B(2) of Schedule 3 of the Public Passenger Vehicles Act 1981 from 23:59 Sunday 29 April 2018.

Mary Ann Montague as Transport Manager

6. Mary Ann Montague has lost her reputation as a Transport Manager and it is a proportionate response to that finding that she should be disqualified from acting as such for 3 years under paragraph 17B(2) of Schedule 3 of the Public Passenger Vehicles Act 1981 from 23:59 Sunday 29 April 2018. Should she wish to act as a Transport Manager thereafter she should requalify as a Transport Manager.

Darren Johnstone

7. Darren Johnstone's conduct was such as to require that his PCV licence will be suspended for 8 weeks from 23:59 Sunday 29 April 2018.

Derek Costello

8. Derek Costello's conduct was such as to require that his PCV licence will be suspended for 2 weeks from 23:59 Sunday 29 April 2018.

James Dailly

9. James Dailly's conduct was such as to require that his PCV licence will be suspended for 9 weeks from 23:59 Sunday 29 April 2018.

Alistair Currie

10. Alistair Currie's conduct was such as to require that his PCV licence will be suspended for 6 weeks from 23:59 Sunday 29 April 2018.

Peter Cumming

11. Peter Cumming's PCV licence will be suspended for 16 weeks from 23:59 Sunday 29 April 2018.

Hugh Benn

12. Hugh Benn's conduct was such as to require that his PCV licence will be suspended for 16 weeks from 23:59 Sunday 29 April 2018.

Edward T Clark

13. Edward T Clark's conduct was such as to require that his PCV licence will be suspended for 4 weeks from 23:59 Sunday 29 April 2018.

**Background**

1. Edward T Clark (Mr Clark) was a sole trader trading as Eddie's Minibus Hire. Mr Clark was born in 1970. Mr Clark holds a standard national public service vehicle operator licence – PM1060446. The licence was granted on 18 July 2006. Mr Clark has authority to operate 6 vehicles from one operating centre - Unit 23 Whin Park Industrial Estate, Prestonpans, EH32 9GN. The operating centre is shared with Bradbury Motors Ltd. At the date of the Public Inquiry Mr Clark had ceased to trade and had no vehicles in possession.
2. The nominated Transport Manager on the licence was Mary Ann Montague (Ms Montague) (born 1955).

3. Mr Clark had applied for an increase in authority from 4 to 6 vehicles on 24 July 2014. The application was granted with a condition attached that Mr Clark would provide 3 months bank statements showing access to the required level of funding by 31 August 2015. Mr Clark failed to fulfil the condition, he was allowed further time to produce bank statements, he failed to comply, and the OTC Edinburgh issued a proposal to revoke letter on 12 May 2016. Mr Clark responded on 23 May 2016 requesting a Public Inquiry
4. On 21 June 2016, DVSA Traffic Examiner Barry Wardrop encountered a 16 seat minibus NC57 BSO being driven on behalf of Mr Clark by Darren Johnstone. An analysis of Mr Johnstone's driver card revealed that he had worked for 44 consecutive days. TE Wardrop issued a driver's hours prohibition notice and immobilised the minibus.
5. Mr Clark came to collect the minibus the next day. Mr Clark's driver card and driver's sheets showed that he had not taken a regular weekly rest and he was issued with a driver's hours prohibition. TE Wardrop carried out an investigation of the operator's systems and procedures on 22 June 2016. Mr Clark told TE Wardrop that so far as the nominated Transport Manager, Ms Montague, was concerned 'Comes down about 20 hours a year if I'm lucky.' Mr Clark's systems were unsatisfactory showing significant failings in failing to download vehicle tachograph units, downloading driver cards only every couple of months, with inadequate analysis of tachograph records etc. as detailed in the Traffic Examiner Operator Report (Prod. 4) a copy of which was given to Mr Clark. TE Wardrop tried to contact Ms Montague on 22 June 2016.
6. On 24 June 2016, TE Wardrop received a telephone call from Ms Montague who said that she had stopped her duties as Transport Manager when she was diagnosed with rheumatoid arthritis. She had not spoken to Mr Clark for at least 4 years. She had not told OTC that she had ceased to be Mr Clark's Transport Manager.
7. On 14 December 2016, Mr Clark submitted a TM1 Application to add himself as a Transport Manager to the licence.
8. On 8 February 2017, Mr Clark made an online application to remove Ms Montague as Transport Manager.
9. TE Wardrop carried out an analysis of digital data, drivers' reports for vehicles, job sheets and driver's timesheets for the period 1 April to 30 June 2016. The analysis revealed a total of 94 suspected offences:-
  - 4 - Knowingly making a false record, by using a driver card in which he is not identified as the holder
  - 9 – weekly rest
  - 55 – insufficient daily rest
  - 4 – exceed daily driving of 10 hours
  - 12 – driving with no card in use
  - 3 – exceed 4 ½ hours driving
  - 7 – insufficient daily rest (GB rules)

The results of TE Wardrop's analysis are set out in his report called 'Public Inquiry Statement' dated 7 March 2017. Mr Wardrop's concerns were the basis of the decision to call the Public Inquiry and the Driver Conduct Hearings.

### **The Call to Public Inquiry and the Driver Conduct Hearing**

10. On 7 September 2017 Edward T Clark trading as Eddie's Minibus and Edward T Clark and Mary Ann Montague as Transport Managers, were called to Public Inquiry on 12 October 2017 under the Public Passenger Vehicles Act 1981. The call up letters were in similar terms and, in summary, said that based on TE Wardrop's findings, the Traffic Commissioner was concerned about whether the undertaking to observe the rules on drivers' hours and tachographs was being honoured and whether the nominated Transport Managers, Ms Montague and Mr Clark, were exercising continuous and effective management of the transport activities of the undertaking. Copies of TE Wardrop's Public Inquiry Statement were sent with the call up letters.
11. The call up letters advised the parties that Driver Conduct Hearings for Darren Johnstone, Derek Costello, James Dailly, Alistair Currie, Peter Cumming, Hugh Benn and Edward T Clark would be conjoined with the Public Inquiry.
12. On 7 September 2017 the drivers were called to attend driver conduct hearings at the same time as the Public Inquiry. The drivers were provided with copies of those parts of TE Wardrop's Public Inquiry Statement that dealt with them.

### **The Public Inquiry and Driver Conduct Hearings**

13. The Public Inquiry and Driver Conduct Hearings called for 12 October 2017 did not take place as Mr Clark was having difficulty in obtaining legal representation and further dates for the Public Inquiry and Driver Conduct Hearings were fixed for the 30 November and 1 December 2017.
14. The Public Inquiry and Driver Conduct Hearings took place at Edinburgh on 30 November 2017 before me. The second day was not required because of the efficient way in which the parties dealt with the Public Inquiry and the Driver Conduct Hearings. The following were in attendance:
  - Edward T. Clark, operator;
  - Ewan McGillivray, solicitor representing Mr Clark;
  - Darren Johnstone, driver;
  - Derek Costello, driver;
  - James Dailly, driver;
  - Alistair Currie, driver;
  - Hugh Benn, driver;
  - Barry Wardrop, Traffic Examiner, DVSA;
  - Andrew McLelland, East Lothian Council, observing.
15. Peter Cumming, driver, did not attend. He emailed the OTC Edinburgh on the day of the Public Inquiry apologising for not attending and explaining that 'It completely slipped my mind'. From the email I was satisfied that Mr Cumming

had appropriate notice of the Driver Conduct Hearing, that he understood the offences that were alleged against him and that he accepted that he had committed those offences.

16. Mary Ann Montague did not attend. Mary Montague wrote a letter dated 22 September 2017 in advance of the first date for the Public Inquiry explaining that because of her ill health she would not attend. I am satisfied that she had appropriate notice of the Public Inquiry, and that that she understood the concerns about her reputation as a Transport Manager. In her letter, she made representations that I will return to later.
17. Before evidence was heard Mr Clark's solicitor, Mr McGillivray, explained that he had emailed a letter to my office on behalf of Mr Clark on 29 November 2017. That letter set out Mr Clark's position in relation to the Public Inquiry and his Driver Conduct Hearing. In summary:-
  - Mr Clark had ceased trading as a PSV operator and accordingly did not require his operator's licence although he did wish to continue to use his PCV and LGV driver entitlements.
  - Mr Clark accepted that the offences as narrated in TE Wardrop's Public Inquiry Statement in April to June 2016 had occurred except for certain instances of driving when it was suggested that Mr Clark had driven without a card.
  - After the offences Mr Clark had obtained a Transport Manager's qualification and no further offences had been committed.
18. Mr McGillivray further explained that no finance had been produced as Mr Clark accepted that the operator's licence was going. Mr Clark was being realistic as was shown by the fact that on 6 November 2016 Mr Clark had applied to surrender the operator's licence in advance of the Public Inquiry set down for 30 November and 1 December 2016 (I note that by letter dated 21 November 2017 the Traffic Commissioner had decided it would be in the public interest to continue with the Public Inquiry to consider action beyond continuation of the operator's licence e.g. the vocational driving licence entitlements of the 7 called drivers, the reputation of the Transport Manager Mary Montague and possible disqualification of Mr Clark as an operator).
19. I decided that the best way of dealing with the Public Inquiry and the Driver Conduct Hearings was to start with the Driver Conduct Hearings and then to turn to the Public Inquiry. My decision follows that structure. I will begin by taking each driver in turn, set out the evidence relating to that driver for each possible breach, make findings in fact with reasons, and then make my decision for that driver, before dealing with the Public Inquiry. It is fair to say that so far as Mr Clark and all of the drivers are concerned TE Wardrop's report was not disputed except in so far as he identified occasions when there was possible driving without a card or falsification. I have not made formal findings in fact about the undisputed aspects of the report and have restricted findings in fact to the important areas of dispute.
20. TE Wardrop's report appears in a number of different formats. The composite document is the Public Inquiry Statement dated 7 March 2017 with 328 pages.

Each driver has received a copy of the relevant part of the Public Inquiry Statement that affects them. As a result, the drivers' copies have different page numbers from the composite document. I have used the drivers' page numbers when referring to the individual drivers. Productions that relate to particular drivers are referenced using the abbreviation of the driver's name e.g. Peter Cumming production 25 is 'PC25'.

21. Evidence was given by (1) Barry Wardrop, Traffic Examiner, DVSA, (2) Darren Johnstone, (3) Derek Costello, (4) James Dailly, (5) Alistair Currie, (6) Hugh Benn and (7) Edward T Clark.

## **Introduction to the Driver Conduct Hearings**

### **Driver's hours**

22. At the risk of stating the obvious, the reason that there are rules about drivers' hours is because driving while tired is dangerous. Government statistics suggest that almost 20% of accidents on major roads are sleep related. Sleep-related accidents are more likely than others to result in a fatality or serious injury. About 40% of sleep-related accidents involve commercial vehicles ([www.think.direct.gov.uk/fatigue.html](http://www.think.direct.gov.uk/fatigue.html)).
23. There are any number of resources available to provide guidance to operators, transport managers and drivers about drivers' hours and tachographs. For example, the DVSA site [www.gov.uk/drivers-hours](http://www.gov.uk/drivers-hours) has links to:-
  - (1) 'Rules on drivers' hours and tachographs for passenger vehicles in Great Britain and Europe' [www.gov.uk/guidance/drivers-hours-passenger-vehicles](http://www.gov.uk/guidance/drivers-hours-passenger-vehicles)
  - (2) 'European Union (EU) rules on drivers' hours and working time Simplified Guidance' (updated 28 March 2017) [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/603096/simplified-guidance-eu-drivers-hours-working-time-rules.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/603096/simplified-guidance-eu-drivers-hours-working-time-rules.pdf)

Any search on the web will bring up hundreds of commercial websites providing information and guidance on 'drivers' hours and tachographs'.

24. The starting point is that if you are driving a passenger vehicle, you know, or should know that you have to obey rules about drivers' hours - either EU rules or domestic (GB) rules. Both rules have certain common features – you need to know how long you can drive before you take a break, you need to know how long you can drive for in a day, you need to take certain amounts of rest etc. Drivers who breach the rules will find themselves called to a Driver Conduct Hearing.

### ***The Driver Conduct Hearing***

25. The relevant legislation is set out in sections 110-122 of the Road Traffic Act 1988. The relevant sections for PCV licence holders include:-
  - s. 115(b) - a PCV driver's licence must be revoked or suspended if the driver's conduct is such as to make him unfit to hold such a licence.

- s. 116(2) where Traffic Commissioner determines that the holder of the licence is not fit to hold a passenger carrying vehicle driver's licence the Traffic Commissioner shall determine whether the driver's conduct is such as to require the revocation of his licence or only its suspension; and if the former, whether the holder should be disqualified under s.117(2)(a) and if so for what period.
- s.121(1) defines conduct for PCV licence holders as conduct both as a driver of a motor vehicle and in any other respect relevant to his holding a PCV driver's licence.

26. In each case I have had regard to the Statutory Document No. 6 *Vocational Driver Conduct* and, in particular, to paragraphs 40 to 53, paragraphs 68 to 87, Annexes A, B and C.

### **Barry Wardrop**

27. Barry Wardrop is a Traffic Examiner with nearly 10 years' experience. TE Wardrop confirmed that he had prepared the Public Inquiry Statement and that he had nothing to add to the Public Inquiry Statement. It was agreed that the Public Inquiry Statement would be treated as his evidence. It was agreed that parties would have the opportunity to cross-examine TE Wardrop if they wished as the proceedings went along rather than at the beginning.

### **Darren James Johnstone**

#### **Mr Johnstone's evidence**

28. Mr Johnstone gave evidence. Mr Johnstone was born on 9 March 1988. Mr Johnstone had worked as a PCV driver for Mr Clark from April to August 2016. Before working for Mr Clark, Mr Johnstone had worked for First Group for just under 9 years. Mr Johnstone had not used tachographs with First Group. He had obtained his driver's CPC in 2013/14. Mr Johnstone had moved to A & C Luxury Coaches in August 2016.

29. He did not dispute any of TE Wardrop's Statement. He did, however, have explanations for some of the 23 possible breaches identified by TE Wardrop in addition to the explanations he had provided at interview.

30. I went through the Driver Hearing Statement with Mr Johnstone.

*(1) Insufficient Daily Rest on Friday 29 April 2016, driving with no driver card, exceeding 4.5 hours driving.*

31. Mr Johnstone accepted that he had taken insufficient daily rest – having taken 8 hours 31 minutes instead of a minimum of 9 hours. He accepted that he had exceeded 4.5 hours driving by driving for 6 hours and 8 minutes.

32. Mr Johnstone accepted that he had driven without a driver card but he denied having driven without a card in order to avoid having to take a break. He suggested that it was private use by him.

*(2) Insufficient Daily Rest on Saturday 30 April 2016 and driving with no driver card*

33. Mr Johnstone accepted that he had not taken sufficient daily rest and that he had driven without a card when he was driving within scope of EU rules and a driver card should have been used. He could not explain why he had not used a card on that day.

*(3) Insufficient Daily Rest on Wednesday 11 May 2016 (GB Rules)*

34. Mr Johnstone accepted he had taken a daily rest of 6 hours 2 minutes instead of 8 hours 30 minutes. Mr Johnstone said in interview that the reason was 'That is what he [Mr Clark] had given us, our workload.'

*(4) Insufficient Daily Rest on Friday 13 May 2016*

35. Mr Johnstone accepted that he had carried out driving and other work under both the EU and GB Domestic Rules and that he had failed to take a daily rest of at least 9 hours, having taken 7 hrs 11 mins daily rest.

*5. Insufficient Daily Rest on Tuesday 17 May 2016*

36. Mr Johnstone accepted that he had carried out driving and other work under both the EU and GB Domestic Rules and that he had failed to take a daily rest of at least 9 hours, having taken 7 hrs 27 mins daily rest.

*6. Insufficient Daily Rest on Monday 23 May 2016*

37. Mr Johnstone accepted that he had carried out driving and other work under both the EU and GB Domestic Rules and that he had failed to take a daily rest of at least 9 hours, having taken 8 hrs 49 mins rest

*7. Insufficient Daily Rest on Wednesday 1 June 2016*

38. Mr Johnstone accepted that he had carried out driving and other work under both the EU and GB Domestic Rules and that he had failed to take a daily rest of at least 9 hours, having taken 7 hrs 1 min

*8. Insufficient Daily Rest on Thursday 2 June 2016*

39. Mr Johnstone accepted that he had carried out driving and other work under both the EU and GB Domestic Rules and that he had failed to take a daily rest of at least 9 hours, having taken 8 hrs 17 mins

*9. Insufficient Daily Rest on Friday 3 June 2016*

40. Mr Johnstone accepted that he had carried out driving and other work under both the EU and GB Domestic Rules and that he had failed to take a daily rest of at least 9 hours, having taken 5 hrs 27 mins.

*10. Insufficient Daily Rest and Driving without a Driver Card on Saturday 4 June 2016*

41. Mr Johnstone accepted that he had carried out driving and other work under both the EU and GB Domestic Rules and that he had failed to take a daily rest of at least 9 hours, having taken 8 hrs 21 mins.



42. Mr Johnstone could not explain why he had driven without a driver card during the period 17:06 to 01:15. He said 'it was a mystery as to what the evening use is'. He suggested that as there was no hire recorded it could be personal use.

*11. Insufficient Daily Rest on Monday 6 June 2016 (GB Rules)*

43. Mr Johnstone accepted that he had carried out driving and other work under both the GB Domestic Rules and that he had failed to take a daily rest of at least 8 hours 30 mins, having taken 7 hrs.

*12. Insufficient Daily Rest and Exceeding Daily Driving on Friday 10 June 2016*

44. Mr Johnstone accepted that he had carried out driving and other work under both the EU and GB Domestic Rules and that he had failed to take a daily rest of at least 9 hours, having taken as his longest period of rest 6 hrs 16 mins. He accepted that he had exceeded the daily driving limit of 10 hrs by driving for an accumulated driving time of 13 hrs 04 mins.

*13. Insufficient Daily Rest and Exceeding Daily Driving on Monday 13 June 2016*

45. Mr Johnstone accepted that he had carried out driving and other work under both the EU and GB Domestic Rules and that he had failed to take a daily rest of at least 9 hours. He had been on duty for 37 hrs 51 mins and the longest period of rest recorded was 5 hrs 54 mins. He accepted he had exceeded the daily driving limit of 10 hours with accumulated driving time of 13 hrs 58 mins.

*14. Insufficient Daily Rest on Friday 17 June 2016*

46. Mr Johnstone accepted that he had carried out driving and other work under both the EU and GB Domestic Rules and that he had failed to take a daily rest of at least 9 hours, having taken 6 hrs 48 mins

*15. Driving with no driver card on Saturday 18 June 2016 (EU Rules)*

47. Mr Johnstone explained that this had been driving for a play scheme for special needs and that he thought that this was within GB Rules. Mr Wardrop accepted that this was possible.

*16. Insufficient Daily Rest on Monday 20 June 2016*

48. Mr Johnstone accepted that he had carried out driving and other work under both the EU and GB Domestic Rules and that he had failed to take a daily rest of at least 9 hours, having taken 7 hours 55 mins.

*17. Insufficient Weekly Rest*

49. Mr Johnstone accepted that he had been on duty with Mr Clark for 44 consecutive days. He had felt pressurised by Mr Clark. He had asked for a day off and had been ignored.

*Driving offences*

50. Mr Johnstone also had two driving offences. The first, dated 21 September 2015, was when he was driving a van for First Bus and he had been doing 61 in a 50 mph zone and got 3 points. The second offence, dated 7 May 2016 was when he was working for Mr Clark. He had been doing a job in Tynecastle. His

mobile phone was in a holder but the police had seen him inputting information into it as a sat nav. He had been given 3 points.

51. Since he had moved to his new employer he had never had any driver rules and regulations infringements. His driver card was downloaded every day and any analogue tachographs were handed in at the end of each week. He had not attempted to hide offences by taking his card out. He had found the requirements confusing. He has done much better with better training from his new employer. He still didn't fully understand the rules and regulations but his new employers remind him and keep him on the straight and narrow. If his PCV licence was suspended it would not have any effect as he was driving taxis. He was going to go on a driver's hours refresher course and would provide details of the course within a week. On 8<sup>th</sup> December 2017, Mr Johnstone was asked by my office to provide details of the course. Mr Johnstone replied on 15 December 2017 that he had given his employer a copy of the reminder letter and his employer had spoken to a company called GTG at Newbridge, Edinburgh and they were to get back to him with a date. Mr Johnstone was sent a further reminder on 22 January 2018 and replied saying that he had not yet been notified of a date.

#### Findings in fact

52. Mr Johnstone did not dispute the facts identified by TE Wardrop. Mr Johnstone disputed that some of the apparent breaches were breaches. So far as the breaches that were accepted by Mr Johnstone I do not need to make findings in fact – the evidence that TE Wardrop relied upon and his reasoning are set out in his report.
53. Turning to the disputed breaches these are the 4 possible instances of driving without a card. Mr Johnstone accepted that he had driven without a card on all 4 occasions. Mr Johnstone accepted that on Saturday 30 April 2016 he had been in breach of EU rules.
54. Mr Johnstone denied the other 3 instances of driving without a card (*2, 10 and 15 above*) were in breach of the rules. I find that these were not breaches of the EU rules as there were occasions on which Mr Clark's vehicles were used for private use by drivers and it is possible that on these 3 occasions Mr Johnstone was driving the vehicle on a private journey.
55. I find that so far as *17* is concerned – Failure to take weekly rest, that Mr Johnstone did feel pressurised by Mr Clark, that he had asked for a day off and been ignored. Mr Johnstone was not challenged on this by Mr Clark and I have no reason to disbelieve Mr Johnstone.
56. I accept Mr Johnstone's evidence about the driving offences and about his subsequent conduct with his new employer.

### Decision and reasons

57. Mr Johnstone accepted that he had breached the rules and regulations on driver's hours on 20 occasions over a 2 ½ month period:-
  - (1) failure to use a driver card – 1
  - (2) exceeding 4.5 hours driving – 1
  - (3) insufficient daily rest (EU) – 13
  - (4) insufficient daily rest (GB) – 2
  - (5) exceed daily driving – 2
  - (6) insufficient weekly rest – 1 on duty for 44 consecutive days.
58. He accepted he also had two driving offences:-
  - (1) 21 September 2015, driving for First Bus doing 61 in a 50 mph zone - 3 points and
  - (2) 7 May 2016 when he was working for Mr Clark- his mobile phone was in a holder but the police had seen him inputting information into it as a sat nav- 3 points.
59. Mr Johnstone was breaching the rules on a regular basis. From when he started driving with Mr Clark on 18<sup>th</sup> April 2016 he breached the rules virtually every week. These were not cases of missing the time limits by a small margin because of poor planning or oversight. This is a driver who did not understand the rules and did not understand that he was driving while he was potentially not fit to do so because of tiredness.
60. On 3 June he started at 06:24 and finished at 01:39 the next day having taken 5 hours 27 minutes daily rest instead of at least 9 hours.
61. On 10 June he started at 03:52 and finished on 13:59 the next day having only taken 6 hours 16 minutes instead of 9 hours and having been on duty for 34 hours and 08 minutes.
62. Of the 13 EU daily rest offences Mr Johnstone fell short of the 9 hours minimum by between 3 and 4 hours on 2 occasions, 2 and 3 hours on 3 occasions, 1 and 2 hours on 4 occasions and less than 1 hour on 4 occasions.
63. I accept that Mr Johnstone's failures were because of ignorance of the rules and regulations. The breaches occurred in the period when he was working for Mr Clark. I accept that Mr Johnstone felt pressured by Mr Clark. Mr Johnstone had complied with the drivers' hours rules while working for First Group for 9 years before moving to Mr Clark's employment. Mr Johnstone has complied with the drivers' hours rules since leaving Mr Clark's employment. It seems to me that the failure of Mr Clark to supervise his drivers and to schedule appropriately the hours his drivers worked played a large part in Mr Johnstone's failure to comply. Nonetheless, it was Mr Johnstone's professional responsibility to comply with drivers' hours and he failed to do so. I find that Mr Johnstone's conduct does make him unfit to hold a PCV licence in terms of s.115 and that his PCV licence should be suspended. Looking at Annex A Mr Johnstone drove on one occasion without a driver card which suggests a starting point of 4 weeks suspension. The other 19 fall within 'Persistent and/or

serious and/or habitual offences' - a starting point of 4 weeks suspension increasing with the number and severity of offences.

64. I note that Mr Johnstone has said that a period of suspension of his licence would not affect him financially as he is now driving taxis. Taking into account the limited period of non-compliance, the fact that Mr Johnstone's non-compliance was due to ignorance on his part and the failures of Mr Clark, I am of the opinion that an appropriate period of suspension is in order to deter others from failing to maintain their knowledge of drivers' hours, that is 8 weeks. The period of suspension will start at 23:59 on 23:59 Sunday 29 April 2018

### **Derek William Costello**

#### **Mr Costello's evidence**

65. Mr Costello was born on 15 July 1967. Mr Costello had worked for Mr Clark for 3 years on a part-time basis. He was employed by East Lothian Council (ELC) as a driver/attendant on school contracts. Mr Clark was not aware of Mr Costello's start or finish times with ELC. Mr Costello would get a phone call from Mr Clark asking Mr Costello if he was available.
66. Mr Costello had stopped working for Mr Clark on the day of his interview with Mr Wardrop on 27 January 2017. Mr Costello brought to the Driver Conduct Hearing diaries, a letter and logbooks which Mr Wardrop examined. Mr Costello explained that his manager at ELC had brought him up to speed on drivers' hours.
67. Mr Costello accepted Mr Wardrop's findings in the Driver Conduct Statement and agreed that he had committed the 7 breaches identified by Mr Wardrop:-  
 Insufficient Daily Rest – 4  
 Insufficient Weekly Rest – 3  
 All 4 daily rest offences occurred on a Friday, when Mr Costello had finished duty with ELC and had then carried out an EU journey for Mr Clark.
- 1. Insufficient Daily Rest on Friday 29 April 2016*
68. Mr Costello had carried out driving and other work under both the EU and GB Domestic Rules with both ELC and Mr Clark. In the 24 hour period commencing at 07:15 (08:15) with driving for ELC, he had failed to take the daily rest of at least 9 hours having taken a rest of 8 hrs 44 mins. Mr Costello in interview explained that he was unaware that a daily rest period must be taken in a 24 hour period beginning at the start of his duty. Mr Costello explained that he always took at least 9 hours rest before beginning work if he was working the next day.
- 2. Insufficient Daily Rest on Friday 6 May 2016*
69. Mr Costello had carried out driving and other work under both the EU and GB Domestic Rules with both ELC and Mr Clark. In the 24 hour period commencing at 07:15 (08:15) with driving for ELC, he had failed to take the daily rest of at least 9 hours having taken a rest of 5 hrs 57 mins. Mr Costello said at the PI that this was the same misunderstanding as above.

*3. Insufficient Daily Rest on Friday 20 May 2016*

70. Mr Costello had carried out driving and other work under both the EU and GB Domestic Rules with both ELC and Mr Clark. In the 24 hour period commencing at 07:15 (08:15) with driving for ELC, he had failed to take the daily rest of at least 9 hours having taken a rest of 8 hrs 38 mins. Mr Costello said at the PI that this was the same misunderstanding as above.

*4. Insufficient Daily Rest on Friday 27 May 2016*

71. Mr Costello had carried out driving and other work under both the EU and GB Domestic Rules with both ELC and Mr Clark. In the 24 hour period commencing at 07:15 (08:15) with driving for ELC, he had failed to take the daily rest of at least 9 hours having taken a rest of 5 hrs 13 mins. Mr Costello said at the PI that this was the same misunderstanding as above.

*5. Insufficient Weekly Rest on 3 periods*

72. Mr Wardrop's analysis had shown 3 periods when Mr Costello appeared to have taken a weekly rest at the end of 6 consecutive days.

(1) 11 April to 22 April 2016

Mr Costello accepted that he had failed to take a weekly rest and had been on duty for 12 consecutive days

(2) 9 May to 28 May 2016

This was 20 consecutive days. Mr Costello said that on 13 -15 May 2016 he had been driving on a voluntary basis for East Lothian Special Needs Play scheme for a journey to Piperdam in Aviemore. He did not know if Mr Clark had been paid for this. If that had been rest then Mr Costello would have not taken a weekly rest for 13 consecutive days.

(3) 6 June to 17 June 2016.

This was 12 consecutive days. Mr Costello said that he had attended a funeral on 7 June and had not been working on that day. If that was the case, then he would not have taken a weekly rest for 10 consecutive days.

73. Mr Costello explained in interview that his failures to comply with the drivers' hours rules and regulations was because he was guilty of naivety and lack of understanding of the rules.
74. Mr Costello said that he was coping much better since he had stopped working for Mr Clark. With ELC he never had to use a tachograph. He never mixed EU and GB work now. He stuck to GB work and his manager was helping to keep him right. He had no intention of doing EU work again. Mr Costello apologised to his manager for having to attend the hearing. If Mr Costello's PCV licence was suspended he was sure that the ELC could find alternative work for him. Mr Dailly produced a reference from Kirsty Wood, the Co-ordinator of East Lothian Special Needs Play schemes.
75. Mr Wardrop commented that having looked at the paperwork produced by Mr Costello, Mr Costello seemed to have got the hang of GB work.

76. I accepted Mr Costello's evidence.

### Findings in fact

77. I find that Mr Costello breached the drivers' hours rules and regulations as set out in Mr Wardrop's report.
78. I accept that Mr Costello's failures to take appropriate daily rest were because he did not understand that the beginning of the period for daily rest was not the time when he started working for Mr Clark, but the time when he started his duty with ELC.
79. I accept that Mr Costello's failure to take weekly rest periods were because of ignorance.

### Decision and reasons

80. Mr Costello's failure to take appropriate daily rest was because he made the same error on 4 occasions. He did not take appropriate weekly rest periods because he did not know that he was supposed to. Annex A suggests a starting point of 4 weeks suspension.
81. Mr Costello had been working for Mr Clark for 3 years. During that period and certainly by the time of the investigation Mr Costello should have known when his duty started for the calculation of daily rest, and that he was required to take weekly rests. I accept that Mr Clark did not take any steps to check with Mr Costello when his duty started, nor did Mr Clark tell Mr Costello to take appropriate weekly rests. I note that since leaving Mr Clark's employment Mr Costello has complied with drivers' hours rules and I note the favourable reference from Kirsty Wood.
82. I find that Mr Costello's conduct makes him unfit to hold a PCV licence and that it should be suspended for a period of 2 weeks starting from 23:59 on Sunday 29 April 2018.

### **James Donald W Dailly**

#### Mr Dailly's evidence

83. James Donald W Dailly (born 20 July 1985) had been employed with Mr Clark from 2012 to 2016 on a full time basis. He had finished with Mr Clark on 12 May 2016 and then started working fulltime for East Lothian Council as a bus driver driving 33 seaters. He did continue to drive for Mr Clark helping out with East Lothian Young Carers.
84. Mr Dailly had worked for Lothian Buses from 2008 until 2012. He had not had any tachograph training before he started with Mr Clark. Mr Clark had given him some training on tachograph training. Mr Dailly had done his CPC in 2014 and had covered drivers' hours.

85. Mr Dailly did not dispute TE Wardrop's findings in the Driver Hearing Statement although Mr Dailly did dispute some of Mr Wardrop's conclusions. I went through the Statement with Mr Dailly.

*1. Knowingly make a false record and Insufficient Daily Rest on Saturday 2 April 2016*

86. TE Wardrop's investigations showed that Mr Dailly inserted his driver card at 08:29 and carried out an EU journey until he removed his driver card at 19:17. There had been driving without a card at the start of the day between 07:35 and 08:24, and at the end of the day between 19:17 and 00:11.
87. There were 3 small periods of driving without a card between 07:35 and 08:24 of 6, 7 and 7 minutes that were consistent with picking up passengers before Mr Dailly inserted his card and drove for a continuous period of 1 hour 26 minutes covering 82 km stopping at 09:57. There was then a return journey of 85.8 km from 13:45 to 15:15. After a break of 1 hour 55 minutes Mr Dailly made 3 short journeys of 8, 8 and 6 minutes that were consistent with picking up passengers before driving for 55 minutes covering 52.5 km. Mr Dailly's card was withdrawn at 19:7 just before a series of short journeys of 3.3 km, 0.7 km and 4 km between 19:19 and 22:35. There were then two journeys of 34.5 km and 10.6 km totalling 51.1 km with a gap of 2 minutes in between that were consistent with a return journey. TE Wardrop concluded that there were 4 separate periods of driving which could be considered as 2 separate hires. Mr Dailly had recorded 3 of those periods on his driver card and had failed to record the 4<sup>th</sup>. TE Wardrop considered that Mr Dailly may have driven without a card to disguise a daily rest offence – in the 24 hours commencing 07:35 he only took a rest of 7 hours 24 minutes instead of 9 hours.
88. At interview Mr Dailly's position was that he could not say if he was driving or not for the unrecorded journeys. He said that while driving with Mr Clark he had never changed with another driver. When asked if he had carried out driving with no card because if he did use his card it would show a daily rest offence his reply was 'I cannae comment. I see where you are getting that from.'
89. At the Public Inquiry he said that he did not have a diary for that period so he could not say what the job was, why the card was removed or if it was him that was driving without the card. He did not recall ever taking his tachograph card out and then continuing to work under EU rules. He said that he would not have done this knowingly.

*2. Insufficient Daily Rest on Monday 25 April 2016 (GB Rules)*

90. TE Wardrop's analysis showed that Mr Dailly had failed to take a daily rest of at least 8 hours 30 minutes and had taken a daily rest of 7 hours 16 minutes.
91. Mr Dailly accepted that he had failed to take the appropriate daily rest. He didn't know why this had happened.

*3. Knowingly Make a False Record, Insufficient Daily Rest and exceed Daily Driving Limit on Friday 29 April 2016*

92. TE Wardrop analysed the data which showed that Mr Dailly had inserted his driver card at 08:29 and carried out driving and other work, under both EU and GB Rules until he removed his card at 21:53. On 30 April 2016, Mr Dailly inserted his card at 10:07 and carried out driving and other work under EU Rules until 22:05.
93. The data also revealed 2 periods of driving without a card- the first at the start of the day between 06:29 and 07:55, and the second on 30 April 2016 between 02:42 and 04:53.
94. Mr Dailly explained at the Public Inquiry that the first period of driving without a driver card was a school run. He maintained the position that he had taken in the interview that he was not sure if the second period of driving without a driver card was him or not. He thought it might be personal use or it might be another driver. TE Wardrop accepted that the first period might be a school run.
95. TE Wardrop explained that he thought that Mr Dailly might have been the driver for the second period because the Driver Report (JD50) stated that the odometer reading filled out by Mr Dailly at the end of Friday 29 April - 158830 was the same as the odometer reading filled out by Mr Dailly for the start of Saturday 30 April – 158830. TE Wardrop thought that driving without a card looked like a run out and a run back with picking up and dropping off passengers. Analysis of the driver card in isolation would show that Mr Dailly had taken a daily rest of 12 hours 14 minutes. If the vehicle data was looked at as well and if Mr Dailly had done the driving without a card then Mr Dailly would have failed to take a daily rest of at least 9 hours, he would have been on duty for a combined period of 39 hours 37 minutes and had exceeded the daily driving limit of 10 hours by 14 hours 8 minutes. The longest period of rest in that combined period was 5 hours 14 minutes. Mr Wardrop suspected that Mr Dailly had withdrawn his card to conceal these breaches. At interview Mr Dailly accepted that he was the driver. TE Wardrop asked Mr Dailly if he had deliberately left his card out and Mr Dailly denied it. When he was asked why he left it out he stated 'I cannae answer that for you. Whether I forgot, I don't know.'
96. Mr Dailly said at the Public Inquiry that he had filled out the odometer readings. He accepted the odometer reading at the end of Friday 29 was filled in by him. Mr Dailly stated that he had put in the odometer start figure in for whoever was using the bus next. He suggested that the driving on Saturday 30 was either another driver or him driving the vehicle for personal use visiting friends.

*4. Insufficient Daily Rest on Saturday 11 June 2016 (EU Rules)*

97. Mr Dailly accepted that he had failed to take a daily rest of 9 hours and had only taken 8 hours 22 minutes. He stated that he got mixed up between GB and EU Rules.



*5. Insufficient Weekly Rest on 2 occasions*

98. Mr Dailly accepted that he had failed to take a weekly rest (a) at the end of 6 consecutive days – (b) at the end of 10 consecutive days , and (c) at the end of 12 consecutive days.
99. Mr Dailly explained that from 31 May 2016 he had been in full time employment with ELC. He had found mixing EU and GB Rules work difficult. He was much more educated about drivers' hours. He made sure that his paperwork was filled out at the end of each day. He was only working under domestic rules. He had received in house training on drivers' ours that would be finished by November. If his PCV licence was suspended he hoped that he would get other work with ELC. Mr Dailly produced a reference from Helen Wilson, which I have considered.

Findings in fact

*1. Knowingly make a false record and Insufficient Daily Rest on Saturday 2 April 2016*

100. I find that Mr Dailly did drive without a card in breach of EU rules. I did not find Mr Dailly's denials convincing. In contrast I found TE Wardrop's analysis of the data to be convincing. I have considered whether or not I can be satisfied on the balance of probabilities that Mr Dailly deliberately drove without a card in order to disguise a daily rest offence. I am satisfied that Mr Dailly did 'pull his card' in order to conceal the daily rest offence. The tachograph data report JD47 shows Mr Dailly has his card in for a journey out at 08:31 of 82 km and a journey back at 13:45 of 85.8 km ending at 15:15. There is a period of other work until 17:10. There are then 3 short journeys and a journey out at 17:43 of 52.5 km lasting 55 minutes. After a 39 minute rest period Mr Dailly's card is withdrawn. There is driving of 3.3 km and 0.7 km (a total of 4 km) and 4 km without a card between 19:19 and 19:47 followed by a 2 hour 48 minute rest. At 22:35 I believe that Mr Dailly drove a return journey of 51.1 km (split into 34.5 and 10.6 km) without a card in order to disguise the daily rest offence.

*2. Knowingly Make a False Record, Insufficient Daily Rest and exceed Daily Driving Limit on Friday 29 April 2016*

101. I find that Mr Dailly did drive without a card in breach of EU Rules on 30 April 2016 between 02:42 and 04:53. I accept that the first period of driving at the start of the day on 29 April 2016 may have been a school run. I find that the second period of driving from 02:42 on 30 April was not personal use - I find it unlikely that Mr Dailly was using the vehicle to visit friends between 02:42 and 04:53. I find it more probable than not that, given Mr Dailly accepted that the driver report form JD50 was completed by him and that the odometer readings were continuous, Mr Dailly stopped driving on 29 April and then started driving again without a card at 06:29 on 30 April. I did not find Mr Dailly's denials convincing. Mr Dailly had a motive for deliberately leaving his card out – it concealed a failure to take a daily rest of at least 9 hours, that he had been on duty for a combined period of 39 hours 37 minutes, that he had exceeded the daily driving limit of 10 hours by driving for 14 hours 08 minutes, and that the longest period of rest was 5 hours 14 minutes. I am satisfied that the driving without a card was a deliberate attempt by Mr Dailly to make a false record.

102. Mr Dailly accepted that he took insufficient daily rest on 11 June 2016 and failed to take a weekly rest on 2 occasions. So far as these are concerned I do not find the failure on 11 June 2016 (only 38 minutes short) to be deliberate. I am prepared to accept that the failure to take weekly rest on 2 occasions was due to carelessness rather than deliberate.

#### Decision and reasons

103. Mr Dailly knowingly made false records on 2 April 2016 concealing that he had taken insufficient daily rest on 2 April 2016 (only 7 hours 16 mins), and on 29 April 2016 concealing that he took insufficient daily rest only 5 hours 14 mins instead of 9 hours and that he had exceeded the daily driving limit of 10 hours by 4 hours 8 minutes. The other breaches - insufficient daily rest on 11 June 2016 (only 8 hours 22 mins), and failing to take a weekly rest on 2 occasions I accept were not deliberate.
104. Mr Dailly committed two offences of deliberate falsification. I am satisfied that he is not fit to hold a PCV licence in terms of s.115 and that his PCV licence should be suspended.
105. Statutory Document No.6 suggests a starting point of 4 weeks suspension per offence for deliberate falsification. Taking into account the other breaches were due to carelessness and that since he has moved to ELC he had not had any difficulties with drivers' hours and his records are now detailed and acceptable. I am of the view that a period of 9 weeks suspension is appropriate. The period of suspension will start at 23:59 on Sunday 29 April 2018.

### **Alastair John Currie**

#### Mr Currie's evidence

106. Alastair John Currie (born 28 June 1966) had been employed on a part time basis by Mr Clark from October 2015 until Mr Clark ceased trading. Mr Currie's full time employment is with the Inland Revenue. He started driving for Mr Clark because Mr Clark is a friend of his and he knew Mr Clark was struggling for drivers. Mr Currie offered to get his PCV licence to help Mr Clark. Mr Currie stated that the PCV did not cover EU and GB rules just drivers' breaks. He had not realised until he had spoken to Mr Wardrop at the airport when he went to pick up Darren Johnstone on 21 June 2016 that there might be problems with drivers' hours.
107. Mr Currie accepted that TE Wardrop had attempted to arrange to interview Mr Currie as set out in the Driver Hearing Statement. Mr Currie had spoken to TE Wardrop and declined to be interviewed stating that 'there was no much more that he could add, other than he stated it had been naivety on his part.' Mr Currie accepted most of TE Wardrop's evidence. I went through the Statement with Mr Currie.

*1. Insufficient Daily Rest on Saturday 9 April 2016*

108. Mr Wardrop's investigation showed that Mr Currie had begun driving under EU rules at 06:30 and that he had failed to take a daily rest of at least 9 hours, only taking a rest of 4 hours 49 minutes.
109. At the Public Inquiry Mr Currie's initial position was that he had not failed to take a daily rest. He said that the reason that he had not put his card in at 06:30 was because he had been playing golf at the Royal Musselburgh Golf Club and he had driven the bus from his home in Prestonpans, played golf for about 4 hours 30 minutes.
110. It is within my knowledge and can be seen from any map that the journey from Prestonpans to the Royal Musselburgh Golf Course is a distance of less than 3 miles and would take under 10 minutes. I referred Mr Currie to the control report at AC56. This shows a short period of driving at 06:30, a period of other work of approximately the same length, a shorter period of driving and a period of other work before a period of driving from 07:00 to approximately 07:45, a short period of other work and then another period of driving of about 45 minutes before a break. There is then a period of other work from 09:00 to just before 14:00 interrupted by two short periods of driving just after 09:00. I suggested that this did not fit with Mr Currie's story of driving to Royal Musselburgh Golf Course and then playing golf. Mr Currie said that he may have done a quick run in the morning and then played golf from 09:00.

*2. Insufficient Daily Rest on Friday 15 April 2016*

111. Mr Wardrop's analysis of Mr Currie's timesheets and driver card showed that Mr Currie failed to take a daily rest of at least 9 hours, only taking 8 hours 22 minutes.
112. Mr Currie's explanation was that he was confused and did not realise that working for the Inland Revenue counted as other work.

*3. Insufficient Daily Rest on Friday 13 May 2016*

113. Mr Wardrop's analysis showed a failure to take a daily rest of at least 9 hours, taking only 6 hours 6 minutes. Of the rest period 5 hours 50 minutes was recorded on his driver card while he was on duty with the Inland Revenue.
114. Mr Currie again said that he thought that because he was sitting working at the Inland Revenue and not driving he was clear to drive.

*4. Insufficient Daily Rest on Friday 20 May 2016*

115. Mr Wardrop's analysis showed a failure to take a daily rest of at least 9 hours, taking only 7 hours 33 minutes. A period of rest of 8 hours 56 minutes was recorded on Mr Currie's driver card between 07:16 and 16:11 (BST). Mr Currie was on duty with the Inland Revenue between those times. Mr Currie did not dispute this.

*5. Insufficient Daily Rest on Saturday 21 May 2016*

116. Mr Wardrop's analysis showed a failure to take a daily rest of at least 9 hours only managing 7 hours 52 minutes. Mr Currie said he was doing short journeys and had gone home in between. He explained that he didn't feel tired.

*6. Insufficient Daily Rest on Tuesday 14 June 2016*

117. Mr Wardrop's analysis showed a failure to take a daily rest of at least 9 hours only managing 7 hours 12 minutes.
118. Mr Currie explained that he had been working for the Inland Revenue and had started with Mr Clark at 16:29 (BST) and then finished at 01:18 (BST). He had then started working at the Inland Revenue at 08:30.

*7. Insufficient Weekly Rest*

119. Mr Currie failed to take a weekly rest at the end of 6 consecutive days, being on duty from 1 June to 10 June 2016 – 9 consecutive days.

*8. Insufficient Weekly Rest*

120. Mr Currie failed to take a regular weekly rest of at least 45 hours in 2 consecutive weeks in the period 5 June to 20 June 2016.
121. Mr Currie said that he was still doing a few driving jobs for ACs after Mr Clark relinquished his operator's licence. He had a CPC course on drivers' hours scheduled for the start of January 2018 and would decide after that if he would keep up driving. If his PCV licence was suspended he would lose out financially, he had done the driving to pay for holidays and golf trips. His work with AC's was very ad hoc. He was confident he understood drivers' hours now. He explained that Mr Clark had gone through the Transport Manager's course and when Mr Clark had done that they had both got up to speed on drivers' hours and the records required.

Findings in fact

*1. Insufficient Daily Rest on Saturday 9 April 2016*

122. I find that Mr Currie did breach the requirement to take a daily rest.
123. I did not accept Mr Currie's account that on Saturday 9 April 2016 he had not breached the drivers' hours rules because he had put in his card at 06.30 and drove to the Royal Musselburgh Golf Course and played golf for about 4 ½ hours. This account is contradicted by the control report at A56.
124. So far as the other incidents are concerned Mr Currie did not dispute them. I find that Mr Currie did not realise that working for the Inland Revenue counted as other work.

Decision and reasons

125. I find that Mr Currie's conduct makes him unfit to hold a PCV licence in terms of s.115 and that his PCV licence should be suspended. Annex A suggests a starting point of 4 weeks. All of the offences except for the one on Saturday 9

April 2016 were due to ignorance on Mr Currie's part. I do not know what Mr Currie's motives for committing the offence on Saturday 9 April 2016. I was not impressed by, and did not believe, his story that he was playing golf in the morning. I formed the impression that Mr Currie was trying to mislead me rather than that he was confused about what had happened. In the circumstances I find that an appropriate period of suspension is 6 weeks starting at 23:59 on Sunday 29 April 2018.

## **Hugh Benn**

### **Mr Benn's evidence**

126. Mr Benn, born 12 September 1964, was a PCV driver who was employed full time by Mr Clark for 9 years until September 2016. Mr Benn had driven for First Bus for about 17 years, then for AC's before moving to Mr Clark.

127. Mr Benn accepted TE Wardrop's report but offered explanations of some of the apparent breaches. I went through the Report with Mr Benn.

#### *1. Insufficient Daily Rest 8 April 2016*

128. Mr Benn accepted that he had failed to take a daily rest of at least 9 hours only managing 7 hours 29 minutes

#### *2. Insufficient Daily Rest on Friday 29 April, Failure to Use Driver Card, and Exceeding 4 ½ hours driving without taking the required break or breaks*

129. TE Wardrop identified a period of driving without a card from 02:50 to 12:11 in vehicle SF10 GZA. The block of driving from 02:50 until 04:28 could be contrasted with the later driving which could be school runs. It was TE Wardrop's view that the block from 02:50 to 04:28 was an EU journey for which Mr Benn should have used a driver card. The driver report for the vehicle stated that Mr Benn was the driver.

130. Mr Benn had inserted his card in vehicle N77 EDS from 16:58. TE Wardrop thought that it appeared probable that he had been driving that vehicle before without a card carrying out school runs starting at 15:29. If this was correct he had driven for a period of 5 hours 49 minutes without a proper break (3 breaks of 5, 3, 3 and 2 minutes).

131. Mr Benn said that he did not know what the first block of driving was. It could have been him taking his mum and dad to the airport. It is within general knowledge that the journey from Tranent to Edinburgh Airport is approximately 30 km. Such a journey does not match the tachograph data report.

132. So far as the driving from 16:58 was concerned, Mr Benn did not know if he had been doing school runs or not.

#### *3. Insufficient Daily Rest on Saturday 30 April 2016 and Exceeding the Daily Driving Limit*

133. TE Wardrop found that the driver report for vehicle N77 EDS revealed that Mr Benn had entered a start odometer of 417770 (HB108). This matched the start

odometer reading on the Tachograph data report (HB109) at 05:43. Mr Benn had not recorded the start of his day on his driver card as 05:43. He finished at 22:50. TE Wardrop concluded that Mr Benn had failed to take a daily rest of at least 9 hours only managing 6 hours 53 minutes, and he had exceeded the daily driving limit of 10 hours by driving for 10 hours 25 minutes.

134. Mr Benn's position at the Public Inquiry was 'I don't have a clue, I don't have records'.

*4. Failure to Use a Driver Card and Exceeding 4 ½ hours driving without taking the required break or breaks on Sunday 1 May 2016*

135. Mr Wardrop's analysis was the driver report (HB108) for N77 EDS showed that Mr Benn had entered a start odometer of 418459 kms. This was the start odometer reading on the tachograph report (HB110). This showed Mr Benn was the driver at 07:29. Mr Benn had driven continuously for 52 minutes covering 73.6 km without a driver card.
136. Mr Benn's first suggestion was that he might have taken his wife to work. When I suggested this was unlikely on a Sunday he said he could have gone shopping. When I drew his attention to the distance covered of 73.6 km he conceded it could have been a job. He said he would have put a card in if it was a job. He must have just made a mistake.

*5. Insufficient Daily Rest on Thursday 12 May 2016*

137. Mr Benn had failed to take a daily rest of at least 9 hours having taken 8 hours 19 minutes. Mr Benn accepted this but said that he did not know that he was supposed to be taking 9 hours.

*6. Insufficient Daily Rest on Thursday 19 May 2016 and Failure to Use his Driver Card*

138. Mr Wardrop's analysis showed that Mr Benn failed to take a daily rest of at least 9 hours and had taken a rest of 7 hours 58 minutes. The driver report for vehicle NL10 BPF stated that Mr Benn was the driver (HB114) and that Mr Benn had stated that he was not using a tachograph. There had been driving without a card from 03:02 (HB113). The first period of driving had been from 03:03 to 04:38. There was driving without a card from 10:10 until 19:04. The second period could have been school runs etc. not requiring a tachograph.
139. Mr Benn said that he could have been doing anything. Mr Benn explained that he threw out the sheets when he got new ones, no one had told him to keep the old ones.

*7. Insufficient Daily Rest on Saturday 21 May 2016 and Failure to Use a Driver Card*

140. Driving had started at 02:42 BST (HB115). Mr Benn accepted that it looked like he had picked passengers up and taken them to Glasgow Airport and then returned. He could not explain why he had not inserted his driver card. He had failed to take a daily rest of at least 9 hours and had taken a rest of 7 hours 7 minutes.

*8. Insufficient Daily Rest on Saturday 28 May 2016*

141. Mr Benn had failed to take a daily rest of at least 9 hours and had taken a rest of 6 hours 48 minutes. Mr Benn suggested that some of that could have been driving the vehicle for personal use e.g. picking up his wife. He understood now that was not acceptable.

*9. Insufficient Daily Rest on Wednesday 1 June 2017 (GB rules)*

142. Mr Benn had failed to take a daily rest of at least 8 hours 30 minutes, taking only 7 hours 21 minutes. Mr Benn then started duty later in the day at 22:58. Mr Benn accepted this.
143. Mr Benn now drives minibuses and buses for AC's Taxis and Minibuses. He didn't know the rules and Mr Clark had not known them either. He knew the rules now and put tachographs in for everything. He produced a reference from Robert Campbell, Transport Manager of AC's Taxis and Minibuses demonstrating compliance with the drivers' hours rules and regulations.
144. The effect of suspension would be that he would not have any money. He could not work for ACs.

Findings in fact

*1. Insufficient Daily Rest 8 April 2016*

145. Mr Benn accepted that he had failed to take a daily rest of at least 9 hours only managing 7 hours 29 minutes

*2. Insufficient Daily Rest on Friday 29 April, Failure to Use Driver Card, and Exceeding 4 ½ hours driving without taking the required break or breaks*

146. I find that Mr Benn had failed to use a driver card. So far as the other matters are concerned I do not find them proved.

*3. Insufficient Daily Rest on Saturday 30 April 2016 and Exceeding the Daily Driving Limit*

147. I find that Mr Benn had failed to take a daily rest of at least 9 hours only managing 6 hours 53 minutes, and he had exceeded the daily driving limit of 10 hours by driving for 10 hours 25 minutes.

*4. Failure to Use a Driver Card and Exceeding 4 ½ hours driving without taking the required break or breaks on Sunday 1 May 2016*

148. I find that Mr Benn failed to use a driver card and exceeded 4 ½ hour driving on Sunday 1 May 2016

*5. Insufficient Daily Rest on Thursday 12 May 2016*

149. Mr Benn accepted this but said that he did not know that he was supposed to be taking 9 hours.

*6. Insufficient Daily Rest on Thursday 19 May 2016 and Failure to Use his Driver Card*

150. I find that Mr Benn failed to take a daily rest of at least 9 hours and had taken a rest of 7 hours 58 minutes.

*7. Insufficient Daily Rest on Saturday 21 May 2016 and Failure to Use a Driver Card*

151. I find that Mr Benn had picked passengers up and taken them to Glasgow Airport and then returned and that he should have inserted his driver card. He failed to take a daily rest of at least 9 hours and had taken a rest of 7 hours 7 minutes.

*8. Insufficient Daily Rest on Saturday 28 May 2016*

152. I find that Mr Benn had failed to take a daily rest of at least 9 hours and had taken a rest of 6 hours 48 minutes.

*9. Insufficient Daily Rest on Wednesday 1 June 2017 (GB rules)*

153. Mr Benn accepted that he had failed to take a daily rest of at least 8 hours 30 minutes, taking only 7 hours 21 minutes.

Reasons and Decision

154. Mr Benn accepted a number of the offences. So far as the other offences are concerned I found Mr Wardrop's analysis of the data and the inferences that he drew to be convincing. In contrast I did not find Mr Benn's explanations convincing.
155. So far as 2. was concerned Mr Benn's explanation that he might have been taking his parents to Edinburgh Airport did not match the tachograph data.
156. Mr Wardrop's interpretation of the data for 3. was convincing. Mr Benn did not have any explanation. I accepted Mr Wardrop's interpretation.
157. Mr Benn eventually came to accept that in 4. he had failed to put a card in.
158. 5. was accepted by Mr Benn.
159. 6. the paper trail supports Mr Wardrop.
160. 7. Mr Benn accepted at the Public Inquiry that it looked like he had picked passengers up and taken them to Glasgow Airport and then returned and I found that this is indeed what happened.
161. 8. Mr Benn accepted this.
162. 9. Mr Benn accepted this.
163. I have found that Mr Benn drove without a card on 4 occasions. On all of these occasions, the effect of driving without a card was to conceal breaches of the drivers' hours. I find that Mr Benn deliberately drove without a card in order to



conceal other breaches. I find that Mr Benn's conduct does make him unfit to hold a PCV licence in terms of s.115 and that his PCV licence should be suspended. The starting point in Annex A is 4 week's suspension per offence.

164. Taking into account Mr Benn's personal circumstances I am prepared to reduce what would otherwise be a suspension of 20 weeks to 16 weeks starting at 23:59 Sunday 29 April 2018.

### **Peter Douglas Cumming**

165. Mr Cumming, born 12 September 1964, did not attend the Public Inquiry. Mr Cumming emailed this office on the day of the Public Inquiry apologising for not attending and explaining that 'It completely slipped my mind'. He said that he had stopped working for Mr Clark a month before the Public Inquiry. He understood the offences alleged in the Driver Hearing Statement. He had not thought that he had been breaking the law at the time. He was allowed to use the minibuses for personal use.

166. I take from Mr Cumming's email that he accepted TE Wardrop's evidence and conclusions in the Driver Hearing Statement. The following is extracted from the Statement.

167. Mr Cumming had been employed by Mr Clark as a full time driver. Mr Cumming had passed his D1 test on 23 October 2013. He had not asked to have the entitlement put on his licence for some reason. TE Wardrop had advised his employer of this on 8 March 2017. Mr Cumming had contacted the DVLA to have the entitlement added to his licence and he was issued with the appropriate licence on 29 March 2017.

#### *1. Insufficient Daily Rest on Saturday 2<sup>nd</sup> April 2016*

168. Mr Cumming had failed to take a daily rest of 9 hours and had taken a rest of 8 hours 28 minutes

#### *2. Insufficient Daily Rest on Saturday 23<sup>rd</sup> April 2016*

169. Mr Cumming had failed to take a daily rest of 9 hours, and had taken a rest of 8 hours 19 minutes

#### *3. Insufficient Daily Rest on Friday 29<sup>th</sup> April 2016 (GB Rules)*

170. Mr Cumming had failed to take a daily reset of at least 8 hours 30 minutes and had taken a rest of 5 hours 43 minutes.

#### *4. Insufficient Daily Rest on Saturday 30<sup>th</sup> April 2016*

171. Mr Cumming had failed to take a daily rest of at least 9 hours and had taken a rest of 6 hours 38 minutes

#### *5. Insufficient Daily rest on Tuesday 3<sup>rd</sup> May 2016*

172. Mr Cumming had failed to take a daily rest of at least 9 hours and had taken a rest of 8 hours 17 minutes

*6. Insufficient Daily Rest on Monday 9<sup>th</sup> May 2016 (GB Rules)*

173. Mr Cumming had failed to take a daily rest of at least 8 hours 30 minutes and had taken a rest of 7 hours 38 minutes

*7. Insufficient Daily Rest on Saturday 14<sup>th</sup> May 2016*

174. Mr Cumming had failed to take a daily rest of at least 9 hours and had taken a rest of 8 hours 3 minutes

*8. Insufficient Daily Rest on Tuesday 17<sup>th</sup> May 2016 (GB Rules)*

175. Mr Cumming had failed to take a daily rest of at least 8 hours 30 minutes and had taken a rest of 5 hours 55 minutes.

*9. Insufficient Daily Rest on Wednesday 25<sup>th</sup> May 2016*

176. Mr Cumming failed to take a daily rest of at least 9 hours and took a rest of 7 hours 33 minutes.

*10. Insufficient Daily Rest on Friday 27<sup>th</sup> May 2016*

177. Mr Cumming failed to take a daily rest of at least 9 hours and took a rest of 6 hours 48 minutes

*11 Insufficient Daily Rest on Saturday 28<sup>th</sup> May 2016*

178. Mr Cumming failed to take a daily rest of at least 9 hours and took a rest of 7 hours 19 minutes.

*12. Insufficient Daily Rest on Sunday 29<sup>th</sup> May 2016*

179. Mr Cumming failed to take a daily rest of at least 9 hours and took a rest of 7 hours 10 minutes

*13. Insufficient Daily Rest on Tuesday 31<sup>st</sup> May 2016*

180. In a 24 hour period commencing at 01:30 Mr Cumming failed to take a daily rest of at least 9 hours and took a rest of 5 hours 38 minutes.

*14. Insufficient Daily Rest on Friday 3<sup>rd</sup> June 2016*

181. In a 24 hour period commencing at 01:22 Mr Cumming failed to take a daily rest of at least 9 hours and took a rest of 7 hours 42 minutes.

*15. Insufficient Daily Rest on Saturday 4<sup>th</sup> June 2016*

182. In a 24 hour period commencing at 11:38 Mr Cumming failed to take a daily rest of at least 9 hours and took a rest of 8 hours 40 minutes.

*16. Insufficient Daily Rest on Saturday 11<sup>th</sup> June 2016*

183. In a 24 hour period commencing at 09:54 Mr Cumming failed to take a daily rest of at least 9 hours and took a rest of 8 hours 19 minutes.

*17. Insufficient Daily Rest between Monday 13<sup>th</sup> and Wednesday 15<sup>th</sup> June 2016 and failure to use his driver card*

184. Over three days commencing at 06:29 on Monday and ending at 06:24 on Wednesday, Mr Cumming was on duty for 47 hours 55 minutes without taking a daily rest of at least 9 hours. He managed at best a rest period of 7 hours 11

minutes. Mr Cumming drove without his card from 02:21 to 02:54 on 14<sup>th</sup> June 2016.

185. Mr Cumming in his email of 30 November 2017 suggested that this was for personal use.

*18. Insufficient Daily Rest on Tuesday 21<sup>st</sup> June 2016*

186. In a 24 hour period commencing at 02:46 Mr Cumming failed to take a daily rest of at least 9 hours and took a rest of at most 6 hours 28 minutes.

*19. Insufficient Daily Rest on Thursday 30<sup>th</sup> June 2016*

187. In a 24 hour period commencing at 06:28 Mr Cumming failed to take a daily rest of at least 9 hours and took a rest of 7 hours 57 minutes.

*20. Insufficient Weekly Rest*

188. Mr Cumming failed to take a weekly rest at the end of 6 consecutive days (starting on 28<sup>th</sup> April 2016). He took a rest after 9 consecutive days.
189. Mr Wardrop tried unsuccessfully to arrange to interview Mr Cumming. Mr Wardrop arranged with Mr Clark to interview Mr Cumming on 24<sup>th</sup> January 2017. Mr Clark sent Mr Wardrop a text message on 23<sup>rd</sup> January 2017 saying that Mr Cumming had decided he would rather not be interviewed at that time, he had been advised not to comment on the allegations made against him and he would like to cancel the interview.
190. Mr Cumming did not dispute Mr Wardrop's report other than to suggest that the driving without a card 17. was personal use. Reluctantly, I am prepared to accept that this may have been the case. I do not, therefore need to make any findings in fact.

### Reasons and Decision

191. Taking the daily and weekly rest offences together, of the 3 GB failures to take 8 hours 30 minutes daily rest Mr Cumming took less than 6 hours rest on 2 occasions and less than 8 hours rest on 1 occasion. Of the 16 EU failures to take 9 hours rest Mr Cumming took less than 6 hours daily rest on 1 occasion, less than 7 hours daily rest on 3 occasions, less than 8 hours rest on 6 occasions and less than 9 hours rest on 6 occasions.
192. I find that Mr Cumming's conduct does make him unfit to hold a PCV licence in terms of s.115 and that his PCV licence should be suspended. Annex A suggests a starting point of 4 weeks suspension increasing with the number and seriousness of offences. Mr Cumming was not 'just missing' the required daily rest by a matter of minutes. The majority of the offences were a failure by over an hour and the worst was taking 5 hours 38 minutes instead of 9 hours.
193. Mr Cumming's explanation in the email of 30 November 2017 was that that he did not know he was breaking the law. He did not offer any mitigation other than saying that he was trying to move on and had found a new job driving for a nursing home taking residents out and about.

194. I am concerned that Mr Cumming breached the drivers' hours rules twenty times between 2<sup>nd</sup> April and 30<sup>th</sup> June 2016. I am also concerned by the fact that the Driver Conduct Hearing slipped Mr Cumming's mind. His decision not to be interviewed by Mr Wardrop did not impress me. In all the circumstances it appears to me that a period of 16 weeks suspension starting at 23:59 on Sunday 29 April 2018 is appropriate.

### **Edward T Clark**

195. Mr Clark, born, 23 March 1970, had started the business in August 2006 when he took over the business of an operator in Wallyford who was retiring. He had started with 3 minibuses. He had received a quick demonstration from the seller how to use the analogue tachographs. Mr Clark passed his driver's CPC in 2013 and covered driver's hours. In April 2016, Mr Clark was still sketchy on the difference between GB and EU driver's rules and regulations.

#### *1. Driving without a Driver Card Saturday 9 April 2016*

196. TE Wardrop's analysis showed driving without a card between 03:55 and 05:24.
197. Mr Clark stated at the Public Inquiry that he had done a favour for a friend and had taken his friend and his family to the airport.

#### *2. Knowingly making a False Record and Insufficient Daily Rest on Saturday 21 May 2016*

198. TE Wardrop's analysis suggested that Mr Clark had failed to take a daily rest of at least 9 hours and took only 5 hours 47 minutes. There was driving without a card between 22:40 and 01:32.
199. Mr Clark accepted that he had driven without a card. He explained that he had been picking up his daughter from her boyfriend's house west of Edinburgh. He had not realised that personal use would count against the rest period.

#### *3. Insufficient Daily Rest on Friday 3 June 2017*

200. Mr Clark accepted that in the 24 hour period commencing at 03:27, he failed to take a daily rest of at least 9 hours and he had taken a rest of 8 hours 06 minutes.

#### *4. Insufficient Daily Rest on Tuesday 7<sup>th</sup> June 2016 and failure to use his driver card*

201. TE Wardrop's analysis showed that in the 24 hour period commencing at 06:29 Mr Clark had failed to take a daily rest of at least 9 hours and he had taken a rest of 4 hours 43 minutes. There was driving without a card between 06:30 and 07:49 and between 14:15 and 02:40. Some of this could be driving under GB rules, however, TE Wardrop considered that the final part of driving between 01:11 and 02:40 was an EU journey and a driver card should have been used.
202. Mr Clark thought that he was the driver that day. He had no recollection of why he was driving without a card – perhaps it was personal use.

*5. Insufficient Daily Rest on Friday 10<sup>th</sup> June 2016*

203. TE Wardrop's analysis showed that in the 24 hour period commencing at 01:43 Mr Clark failed to take a daily rest of at least 9 hours, he had taken a rest of 6 hours 58 minutes.
204. Mr Clark explained that he had used the vehicle for personal use and had not understood that personal use did not count as rest.

*6. Knowingly make a false record and Insufficient Daily Rest on Saturday 11<sup>th</sup> June 2016*

205. TE Wardrop's analysis showed that in the 24 hour period commencing 09:19 Mr Clark had failed to take a daily rest of at least 9 hours and had taken at best a rest of 6 hours 29 minutes.
206. There had been driving without a card between 22:58 and 04:02 in the middle of two periods of driving by Mr Clark.
207. The driver report form stated that Mr Clark was the driver of NL10 BPF, that the start odometer reading was 166773 kms and the end reading was 167024 kms, that D Costello drove on 12 June 2016 with a start odometer reading of 167024 kms and The digital data revealed that this was not accurate as it stated an end odometer reading for Mr Clark of 167153 kms – a discrepancy of 129 kms. TE Wardrop was concerned that it might have been a deliberate act to deceive.
208. Mr Clark stated in interview that the original driver reports may have got wet and been a mess and have been rewritten – that the discrepancy was a mistake. At the Public Inquiry Mr Clark said that some of the driving may have been personal use.

*7. Insufficient Daily Rest and failure to use a driver card on Saturday 18<sup>th</sup> June 2016*

209. TE Wardrop's analysis showed that in the 24 hour period commencing 06:43 Mr Clark had failed to take a daily rest of at least 9 hours and had taken at best a rest of 3 hours 11 minutes.
210. There had been driving without a card between 17:51 and 04:26 for driving that appeared to be under EU rules.
211. Mr Clark stated that it was personal use. The earlier driving was going shopping and the latter driving was dropping his daughter at a night club.

Findings in fact

212. I do not need to make findings in fact as I accept Mr Clark's explanations that when he was driving without a driver card this was for personal use.
213. That leaves 6 failures to take daily rest that Mr Clark accepted.

### Reasons and Decision

214. Of the 6 failures to take daily rest, the worst was taking 3 hours 11 minutes and the 'best' was 8 hours and 6 minutes.
215. While I accept Mr Clark's evidence that he did not understand drivers' hours and the offences were through ignorance rather than deliberate, the fact remains that Mr Clark should have known better. I take account of mitigating factors that were advanced on his behalf by Mr McGillivray. I take into account the fact that Mr Clark has lost his business and his livelihood and that he may have to rely on his PCV entitlement to provide him with income. In the circumstances, I order that his PCV entitlement should be suspended for 4 weeks with effect from 23:59 on Sunday 29 April 2018.

### **Edward T Clark T/A Eddie's Minibus Hire – PM1060446 Public Inquiry**

216. After dealing with the matters contained in the brief relating to Mr Clark as a driver, we moved on to deal with the matters contained in the brief for the Public Inquiry.
217. There were no issues about maintenance. Mr Clark did not offer any evidence about finance as he had given up the business and his vehicles. He accepted that his operator's licence would have to go. The issues in the Public Inquiry that remained related to the Transport Managers and to Mr Clark as operator.

### Mr Clark's evidence

#### The interview

218. TE Wardrop interviewed Mr Clark on Thursday 19 January 2017. Mr Clark explained that he had reduced his vehicles from 6 to 3. He was asked when Mary Montague stopped being his Transport Manager, he replied 'No Comment'. He was asked about Mary Montague claiming that she had no communication with Mr Clark for about 4 years and agreed that this could be correct. Mr Clark said that he had sat the Transport Manager CPC in September, he had got the results in December and had applied to Leeds to be nominated at the Transport Manager. Mr Clark said that he used vehicles for personal use as did his drivers. Mr Clark said that he and his drivers were totally compliant now.
219. His solicitor had sent a letter dated 29 November 2017 on his instructions. The letter said that he regretted operating without the meaningful involvement of a Transport Manager to ensure compliance with the relevant legislation and that he regretted the offences that he had committed as a driver. When he had taken over the business in 2006 he had taken on the Transport Manager, Mary Montague, as well. The extent of the guidance that he received from Mary Montague was that she simply told him that if he was ever in need of any assistance, he should make contact with her. The agreement was that he would pay her by providing her with transport when she needed it. He last did this in 2014 when he provided her with transport in connection with a family funeral.

220. He accepted that there had not been anyone fulfilling the role of Transport Manager for 10 years. He accepted that he had completed documents for the Office of the Traffic Commissioner such as (1) the application for an increase in the number of authorised vehicles dated 10 July 2014 where he stated that he had an external transport manager and signed a declaration that the statement that he had an external transport manager was true and (2) on 6 June 2016 he completed a Licence Checklist where he declared that Mary Montague was his transport manager.
221. I put to Mr Clark the letter that my office had received from Mary Montague dated 22 September 2017. In that letter Mary Montague stated that:-  
 "...I can confirm I agreed to be the Licence Holders nominated Transport Manager for at least two years, in order to help him set up his business and give him time to achieve his CPC.  
 During the phone call from Wardrop, whereby I stated I had ceased to be the Transport Manager at least 4 years ago – was inaccurate. I put this down to the fact I was 'put on the spot' and was quite perturbed by what I was hearing. I would like to correct this inaccuracy. I was diagnosed with Rheumatoid Arthritis in 2008 and told E Clark a short time after this I could no longer continue to be his Transport Manager due to my continuing poor health..."
222. Mr Clark said that he did not recall her telling him in 2008 that she was not going to continue to be his Transport Manager.

#### Mr Clark since the investigation

223. Mr Clark explained that after the interview with TE Wardrop it was obvious that the records were not good. He phoned to get on a Transport Manager course as Ms Montague was a Transport Manager only in name. He sat the course in September 2016 and had passed it. Mr Costello and Mr Dailly had stopped driving for him and he got rid of a couple of buses and then got down to 3 buses. He had introduced new systems since he got his Transport Manager qualification.
224. He wanted to surrender his operator's licence. He had got rid of his buses. He did not have any finance. He had given up his operating centre.
225. The business operated reasonably successfully from 2006 to 2016 as evidenced by:-
- (i) the handful of offences committed by his drivers prior to the April – June 2016; and
  - (ii) none of the drivers were involved in any accidents during the entire period he operated the business.
226. He found running a PSV business burdensome in recent years. The difficulties began in 2014 when he increased his complement of vehicles from 3 to 4 and

then in 2016 from 4 to 6. This directly led to the April – June 2016 offences being committed.

227. He was under pressure at this time as a close family member had been undergoing treatment for cancer.
228. There was a supportive character reference dated 23 November 2017 from the Co-ordinator of the East Lothian Special Needs Play Scheme.
229. He continued to attend CPD for drivers.
230. It was said on his behalf:-  
'...our client has wisely decided not to continue to use his operator's licence. This is a role to which he is probably best not suited, although we would submit that part of the blame here must lie with Mary Ann Montague too for the reasons stated. We would submit finally that our client would be well able to continue to serve the public as a driver, provided he did so under the auspices of a responsible operator such as Lothian Buses.'
231. Mr Clark said that he wanted to hold onto his reputation as a Transport Manager but accepted that he was going to lose his operator's licence. He felt that being a Transport Manager was different from being an operator. He had obtained the qualification and had run the business well since. If he lost his reputation as a Transport Manager it would have no immediate financial consequences but it would restrict his options in the future.
232. There was very little disputed evidence. In general terms I accepted Mr Clark's evidence except for the evidence about Mary Montague's involvement in the business. It is convenient to deal with that now.

### **Mary Ann Montague**

233. Mary Montague wrote a letter dated 22 September 2017 in advance of the adjourned Public Inquiry. In summary, she had agreed to be Mr Clark's Transport Manager for at least two years, in order to help him set up his business and to give him time to achieve his CPC. She had told Mr Clark a short time after she was diagnosed with rheumatoid arthritis in 2008 that she could no longer be his Transport Manager because of her continuing poor health. She pointed out that the operator had a responsibility to notify the traffic commissioner when she ceased to be the Transport Manager. She had no knowledge that Mr Clark was continuing to hold her out as his Transport Manager after 2008. She had no intention of being involved in the industry in the future. Due to her ill health, she would not attend the Public Inquiry.

### **The dispute between Mr Clark and Mary Montague**

234. Mary Montague said in her letter that she had told Mr Clark in 2008 that she could no longer be his Transport Manager because of her poor health due to rheumatoid arthritis.



235. Mr Clark said that he could not recall Mary Montague telling him this.
236. It seems to me to be more probable than not that Mary Montague did tell Mr Clark in 2008 that she could no longer be his Transport Manager because of her poor health. Mr Clark has not tell the truth about Mary Montague on other occasions, for example, when he completed a Licence Checklist on 6 June 2016 he declared that she was his transport manager. Mr Clark did not suggest that Mary Montague did not have rheumatoid arthritis in 2008. It appears to me to be more likely than not that Mary Montague would tell Mr Clark that she was no longer able to act as his transport manager once she had been diagnosed with rheumatoid arthritis.
237. The dispute is to some extent academic in that Mr Clark did not suggest that Mary Montague had ever played any significant role in his business. It appeared to me that Mr Clark had been acting as his own transport manager from the very beginning. There was no evidence that Mary Montague had ever had a genuine link to Mr Clark's business. She was not employed by Mr Clark. She was not paid by Mr Clark. There was no written contract between them. The fact remains that Mary Montague was a Transport Manager in name only. She allowed Mr Clark to use her name to enable him to obtain an operator's licence and to retain the operator's licence when, if the true state of affairs had been known – that Mr Clark did not have a Transport Manager exercising continuous and effective management of the transport activities of his business, he would not have had an operator's licence.

#### Mr Clark's repute as an operator

238. The main issue in the Public Inquiry is whether Mr Clark remains of good repute as an operator. In looking at repute I should consider adherence to the rules relating to drivers' hours as this is fundamental to road safety. Furthermore, a licence is issued to an operator on trust that an operator will comply with its requirements. Abuse of that trust may lead to a loss of repute.

#### Adherence to the rules relating to drivers' hours

239. Mr Clark did not dispute any of the evidence relating to the drivers at the Driver Conduct Hearing (other than that relating to him). There was no attempt made in submissions to dispute that there had been significant failures to comply with the rules relating to driver's hours.
240. I was surprised that Mr Clark attempted to blame Mary Montague for Mr Clark's failure to operate without a transport manager. I do not understand why she is to blame for the fact that Mr Clark chose to operate his business on his own without being qualified to act as a transport manager.
241. In the three months between 1 April and 30 June 2016 Mr Clark and his drivers breached the rules relating to drivers' hours on nearly 100 occasions and, on many occasions, there were multiple breaches. On any view, Mr Clark, as operator, failed to ensure that there was adherence to the rules relating to

drivers' hours on a massive scale. These breaches meant that tired drivers were driving members of the public and putting lives of passengers, and other road users at risk.

#### Abuse of trust

242. Mr Clark operated his business without a transport manager since the beginning – 18 July 2006. Mary Montague was a transport manager in name only. For over 10 years Mr Clark deceived the Office of the Traffic Commissioner by pretending that he had a transport manager when he did not. Mr Clark made false declarations. Mr Clark pretended to TE Wardrop that Mary Montague was still acting as his transport manager when TE Wardrop interviewed Mr Clark on 22<sup>nd</sup> June 2016.

#### Findings regarding breaches of the legislation

243. Mr Clark has lost his good repute in terms of s.14ZA(2). I also find that has lost his good repute as Transport Manager in terms of s.14ZA(3) – see below. Mr Clark does not have financial standing. Mr Clark does not have a stable establishment. I therefore revoke the operator's licence.
244. I consider it appropriate to disqualify Mr Clark for a period of 10 years in terms of section 28(1) of the Transport Act 1985. I also order that section 28(4) of the Transport Act 1985 will apply such that if Mr Clark during the period of disqualification (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 applies; or (ii) a company of which a company which holds such a licence is a subsidiary; or (b) operates any such public service vehicles in partnership with a person who holds such a licence, the powers under section 17(2) of the Public Passenger Vehicles Act 1981 (revocation, suspension etc. of PSV operators' licences) shall be exercisable in relation to that licence by the Traffic Commissioner.

#### Edward T Clark as Transport Manager

245. For the reasons set out below I find that Mr Clark has lost his good repute as Transport Manager in terms of s.14ZA(3). I consider that it is a proportionate response to disqualify him from acting as such for 10 years under paragraph 17B(2) of Schedule 3 of the Public Passenger Vehicles Act 1981.

#### Mary Montague as Transport Manager

246. So far as Mary Montague as Transport Manager is concerned, I find that she has lost her repute as a Transport Manager by allowing her name to be used to enable Mr Clark to obtain an operator's licence when he was not entitled to have an operator's licence. In these circumstances, I find that it is a proportionate response to disqualify her from acting as such for 3 years

## **Reasoning**

247. I have considered the guidance issued by the Senior Traffic Commissioner, in particular Statutory Documents Nos 1, 3 and 10. I am, of course, aware that the Statutory Guidance is 'guidance' and it is my duty to interpret the legislation and to apply the legislation in light of the case law. I remind myself of the observations of the Inner House of the Court of Session in the case of *Thomas Muir* 1999 SC 86.
248. Before making any finding on whether or not Mr Clark has lost his reputation as operator I need to ask myself the following questions:-
249. How likely is it that this operator will, in the future, operate in compliance with the operator's licensing regime? – the question set out in the case of *Priority Freight Ltd v Paul Williams* 2009/225;
250. Is the conduct such that the operator ought to be put out of business? – the question set out in *Bryan Haulage (No.2)* 2002/217;
251. In answering the *Bryan Haulage* question, I am required to carry out a balancing exercise – to identify the factors that are in the operator's favour and those factors that weigh against the operator. This involves a three stage process:-  
(first) the identification of all the relevant factors  
(second) an assessment of each factor, and  
(third) my conclusion – why one factor or group of factors outweighs another or others.
252. The Priority Freight question

The Transport Tribunal made it clear that trust is one of the foundation stones of operating licencing - 2006/277 *Michael James Fenlon t/a County Skips*:

*'It has been said on many occasions that trust is one of the foundation stones of operator licensing. Traffic Commissioners must be able to trust operators to comply with all the relevant laws, rules and regulations because it would be a physical and financial impossibility to police every aspect of the licensing system all day and every day. In addition, operators must be able to trust other operators to observe the relevant laws, rules and regulations. If trust between operators breaks down and some operators believe that others are obtaining an unfair commercial advantage by ignoring laws, rules or regulations then standards will inevitably slip and the public will suffer.'*

In this case, Mr Clark has breached that trust. It follows that when asking myself the Priority Freight question- How likely is it that this operator will, in the future, operate in compliance with the operator's licensing regime- my answer is it is unlikely that Mr Clark will operate in compliance with the regulatory regime.

253. The Bryan Haulage question – is the conduct such that Mr Clark ought to be put out of business?

In Mr Clark's favour are:-

- Mr Clark has operated a business for over 10 years without serious issues about the maintenance of his vehicles.
- There is no evidence that there were breaches of the rules relating to drivers' hours outwith the period of 1 April to 30 June 2016

Against Mr Clark are:-

- The breaches of rules relating to drivers' hours in the period 1 April to 30 June 2016 were numerous.
- Mr Clark's passengers and members of the public were put at risk by tired drivers on the road.
- It is reasonable to infer that the drivers that Mr Clark had before 1 April 2016, which included Mr Clark, Mr Costello, Mr Dailly, Mr Benn and Mr Cumming, as they all claimed that their breaches of the drivers' hours rules were due to ignorance, were just as ignorant before 1 April 2016 and were, therefore committing similar breaches of the rules before 1 April 2016.

Turning to the Bryan Haulage question- is the conduct such that the operator ought to be put out of business? My answer is that it is necessary for Mr Clark to be put out of business. A lesser sanction such as a warning or curtailment or suspension of the licence would be inadequate. I therefore find it proportionate in this case to find that Mr Clark has lost his reputation as an operator.

254. Having found a loss of reputation it follows that the operator's licence has to be revoked. I therefore order revocation of this licence on grounds of loss of reputation under section 17(1) of the Public Passenger Vehicles Act 1981.
255. Having revoked the licence I also have to decide whether to make a disqualification order against Mr Clark in terms of section 28(1) of the Transport Act 1985. I have had regard to the Upper Tribunal's observations in *C G Cargo Ltd v Sandhu* [2014] UKUT 0436 (AAC) and to Statutory Document 10 and in particular paragraphs 92 to 94. Having considered all the circumstances set out above I have reached the view that it is appropriate and proportionate to order disqualification to make clear to Mr Clark and to the wider transport industry how seriously his conduct is viewed. I view this as a serious case. I note that paragraph 93 suggests a starting point of between 5 and 10 years disqualification. I am of the opinion that Mr Clark should be disqualified for a period of 10 years.
256. I also order that section 28(4) of the Transport Act 1985 will apply such that if Mr Clark during the period of disqualification (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 applies; or (ii) a company of which a company which holds such a licence is a subsidiary; or (b) operates any such public service vehicles in partnership with a person who holds such a licence, the powers under section 17(2) of the Public Passenger Vehicles Act 1981 (revocation, suspension etc.

of PSV operators' licences) shall be exercisable in relation to that licence by the Traffic Commissioner.

Edward T Clark as Transport Manager

257. A Transport Manager must be of good repute. So far as Mr Clark as Transport Manager is concerned, in addition to the reasons set out concerning his acting as an operator above, I find Mr Clark also failed to have effective and continuous management of the transport activities under the licence. In these circumstances it is a proportionate response to my findings in this case that he should lose his repute as a Transport Manager. I find that that Mr Clark should be disqualified from acting as a Transport Manager for 10 years. I have considered whether to direct any rehabilitative measures that Mr Clark should fulfil before he can regain his repute as a Transport Manager. Mr Clark's ignorance of the role and responsibilities of a Transport Manager was cured by him qualifying as a Transport Manager after the DVSA investigation into his business. The period of disqualification should serve to make Mr Clark reflect on his behaviour. I do not order any other rehabilitative measures.

Mary Montague as Transport Manager

258. A Transport Manager must be of good repute. Ms Montague failed to have effective and continuous management of the transport activities under the licence. Ms Montague allowed Mr Clark to use her name as Transport Manager to obtain and retain an operator's licence that he was not entitled to. In these circumstances it is a proportionate response to my findings in this case that she should lose her repute as a Transport Manager. I find that that Ms Montague should be disqualified from acting as a Transport Manager for 3 years. I have considered whether to direct any rehabilitative measures that Ms Montague should fulfil before she can regain his repute as a Transport Manager. I note that it is some considerable time since Ms Montague has acted as a Transport Manager. In the circumstances, I order that should she wish to act as a Transport Manager after her period of disqualification she should requalify as a Transport Manager as her knowledge is considerably out of date.

Hugh J Olson  
Deputy Traffic Commissioner for Scotland

3 April 2018