Gilders Transport Ltd – OH0154121, OD1048385 and OG1050687

RECONVENED PUBLIC INQUIRY HEARD IN BRISTOL ON

22 MARCH 2018

DECISION

The Goods Vehicles (Licensing of Operators) Act 1995 (the "Act")

Pursuant to findings under Sections 26(1)(c)(i) and (ii) and Section 26(1)(f), licence OH0154121 is curtailed to 25 vehicles with effect from 30 June 2018 until 28 July 2018, and thereafter to 27 vehicles for an indefinite period

The operator can apply to have the curtailment lifted by demonstrating established compliance with the drivers hours rules for a sustained period during its busiest time of the year, that is from August through to December.

Pursuant to Section 17 of the Act, the applicant operator having failed to satisfy Section 13C(2) in relation to the size of fleet requested to be operated, the variation application is refused.

BACKGROUND

1. Gilders Transport Ltd is the holder of three standard international operators licences authorising thirty-three vehicles and thirty trailers in the West of England, six vehicles and six trailers in the West Midlands and three vehicles and three trailers in Wales. There is no margin on the licence.

2. I held a public inquiry on 2 May 2017 and, on 19 June 2017, I made the following decisions:

> Pursuant to a finding of loss of repute as a transport manager under Schedule 3 of the Act, Shaun Grantham Gilder is disqualified from acting as such immediately and for a period of three years.
>
> The operator has a period of grace until 18 July 2017 to establish professional competence. Failing that, the licence is revoked from that date.
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> Pursuant to a finding under Sections 26(1)(c)(i) and (ii) and Section 26(1)(f), licence OH0154121 is curtailed to 25 vehicles with effect from 18 July 2017 for an indefinite period not less than six months from that date. The operator can request that he curtailment order is spread across the licence held with an overall reduction in authority of eight vehicles.
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> Pursuant to Section 17 of the Act, the applicant operator having failed to satisfy Section 13A(2)(d) and 13A(3) in relation to the size of fleet requested to be operated, the variation application is refused.

3. The third and fourth of these decisions were appealed to the Upper Tribunal[1]. The case was remitted back to me *"to enable the TC to provide proper reasons for his decision in respect of regulatory action and to provide clarity in respect of his approach"*. My remit is, therefore, narrow. I am not asked to review my findings of fact although the Upper Tribunal decision comments *"But we must make clear that upon review of all of the evidence, our conclusions about the company's failings are less favourable than those of the TC"* and goes on *"we accept that upon his findings of fact, that it would be difficult for him to impose more serious regulatory action and that, in all likelihood, that would be unfair".*

4. Therefore I adopt the findings of fact from my decision on 19 June. This decision must be read in combination with that document. I do not repeat those findings here.

5. To assist in the determination, I issued directions on 6 February 2018 (Appendix 1) and convened an oral hearing on 22 March 2018. Those directions set out the scope of the hearing as the remitted decision along with

[1] *T/2017/45 Gilders Transport Limited*

additional evidence in the form of monthly audit reports that the operator was required to produce under the terms of my Stay decision.

6. Prior to the hearing, I received a bundle of documents from the operator:

    a. Transport Operator Compliance Report, February 2018, Transport Law Solutions
    b. Addendum Report to the Transport Operator Compliance Report, 19 March 2018, Transport Law Solutions
    c. Operator's response to my directions, dated 16 March 2018
    d. Witness statement: Grantham Gordon Gilder
    e. Witness statement: Catherine Gilder

THE ORAL HEARING

7. Gordon Gilder, Judith Gilder, Catherine Gilder and Samantha Shea attended for the operator represented by Mark Laprell of Counsel instructed by Mark Hammond, Langley Wellington LLP Solicitors. Also present were David Collins and Neil Lever of Transport Law Solutions, transport consultants.

8. Mr Laprell told me that the issue that caused disquiet with the Upper Tribunal had been my approach to professional competence, the requirement for which was met in law by having a qualified transport manager. He went on to submit that this was an unusual hearing. The case had been remitted and I should also take in to account matters since the last public inquiry. It was almost a new hearing.

The relevant evidence arising from the evidence and audit reports of David Collins and Neil Lever of Transport Law Solutions

9. Neil Lever told me that Catherine Gilder had got a considerable grip on the drivers hours matters. There was lots of activity in place that had needed consolidation. It was accepted that the infringement figures in the monthly audit reports from Foster Tachographs were too high. I was referred to "DVSA policy" in relation to Earned Recognition where a 4% infringement rate was considered acceptable. I had to correct Mr Lever on that. It is within my knowledge that the DVSA Earned Recognition trigger values relate to unmitigated infringements; the figures reported by Fosters were post-mitigation.

10. I was told that the company approach to managing hours had changed at the beginning of the year (that is 2018). There were now more trailer swaps. Drivers did not go all the way to Rungis. Scheduling was now based on an 8 hour driving day and 12 hour spread-over. Driving off the card was now well managed. He had uncovered an issue with failing to record placement journeys and another with office staff who performed "rescue" journeys who did not record their office activities as other work. This had now been addressed. Drivers were not recording daily walkround checks. This was an own-goal. Only 68% of walkround checks were recorded with adequate time for an inspection to be conducted.

11. Mr Lever told me that he was concerned at the effect on the business of Gordon Gilder. He had a strong persona. He would not support Gordon Gilder becoming a transport manager.

12. There had been further training – a 2-day transport manager refresher by Transport Law Solutions. It had been a lively event with much discussion in relation to Article 12 exemptions, placement journeys and ferry crossings. Ongoing, it was proposed that they conduct monthly visits and the operator would offer an undertaking for periodic audits. Use of a digital walkround check app would eradicate the issue with drivers failing to record walkround checks.

13. David Collins told me that the company had a 97% first time pass rate. Trucks looked well-kept. The operator used a workshop onsite and another workshop was being finalised. No roller brake tests had been undertaken in 12 - 18 months. The company had its own roller brake tester but the calibration had lapsed and it had fallen in to disuse. This had been remedied immediately by the operator, who had been unaware that the equipment had not been used. Certain vehicles for which maintenance was outsourced had been brake tested, but these were a minority. Technicians were booked on an IRTEC accreditation in April/May.

The evidence of Catherine Gilder, transport manager

14. Catherine Gilder had found the last year as transport manager a steep learning curve. The responsibility had been more extensive than she had realised. She had been very concerned at the continuing 5-7% infringement levels. Infringements had peaked in December but January saw the corner turned. It was a combination of training and discipline. It had been a battle and she was starting to win. The average age of drivers was 58. The rules were complex and she had provided drivers with scenarios to help them understand.

15. The increasing offending rate had identified that scheduling was an issue. The planners had to expect less from drivers and not plan to the maximum. They were doing that now. January's reduction had been sustained through February. Drivers had misunderstood the Article 12 exemption – claiming it when they "needed to park". They now needed a complete and genuine reason and this had to be supported by evidence. She had a lot more experience now than she had last June. With hindsight, she would have involved Transport Law Solutions earlier, probably November.

16. The plan was to recruit a new transport manager as fleet engineer but Ms Gilder would retain an overview and cross-check. In relation to drivers failing to record a daily walkround check, the company had been told by a DVSA officer that 5 minutes was enough and, against that figure, the drivers were 95% compliant. Gordon Gilder's role within the business would be confined to that of a director.

Closing submissions

17. Mr Laprell submitted that this was a curious form of an inquiry. The Upper Tribunal had invited me to reconsider the decision and the reasons. Catherine Gilder had been very frank about her exercise of continuous and effective control. She was patently honest and had done her level best.

18. There was much background but I should concentrate on where we are now. The offending was some years ago. The curtailment could have been a smaller number and a shorter period. It would appear to fall in to the "moderate" category when considering Annexe 3 of STC Statutory Document 10. That would indicate action that did not impact the transport operation such as curtailing the margin. There was no margin in this case. That was where curtailment or suspension was the only sanction. In this case, and recognising that the Upper Tribunal has said that removal of Shaun Gilder in itself is not sufficient regulatory action, in considering a sanction I was considering an additional sanction.

19. The operator had fundamentally changed since last June. I should judge the operator as they are now. These were not unusual failings. There was no suggestion of continuing false records. There was an effective disciplinary process – Catherine Gilder was the least popular person in the business. The operator had demonstrated an ability to bring down infringement rates. The vehicles appeared to pass muster.

20. The roller brake testing issue was a systemic failure that was now corrected. There were no relevant MoT fails nor PG9s. The vehicles were properly maintained, even if the the paperwork wasn't perfect. There were not serious concerns on maintenance.

21. It was my jurisdiction today, despite what the Upper Tribunal had said. Curtailment would have serious impacts on the commercial side of the business. Suspension would finish it. A 20% curtailment would be highly damaging to the business. It is not right to assess the ability of Catherine Gilder to maintain continuous and effective control taking a view of her as she was in 2017.

22. Catherine Gilder had realised that scheduling was at the heart of the problem. Action had been taken in November and December and this fed through to the January improvement. There would be monthly checks by Transport Law Solutions. Audits could be available. Mr Laprell questioned the appropriateness of the Upper Tribunal's comments. The Upper Tribunal didn't know what had happened. A sanction would be a pure penalty. It was not necessary to achieve compliance. Shaun Gilder had gone. I should now be satisfied with Catherine Gilder as transport manager. The operator would be content with a condition that TLS report every 3 months.

23. The operator's busiest period was August until the end of the year. A curtailment of four vehicles for three months would be just about manageable. August was a busy period with sheep sales. Evidence of this could be provided.

24. I closed the hearing and reserved my decision.

FINDINGS OF FACT

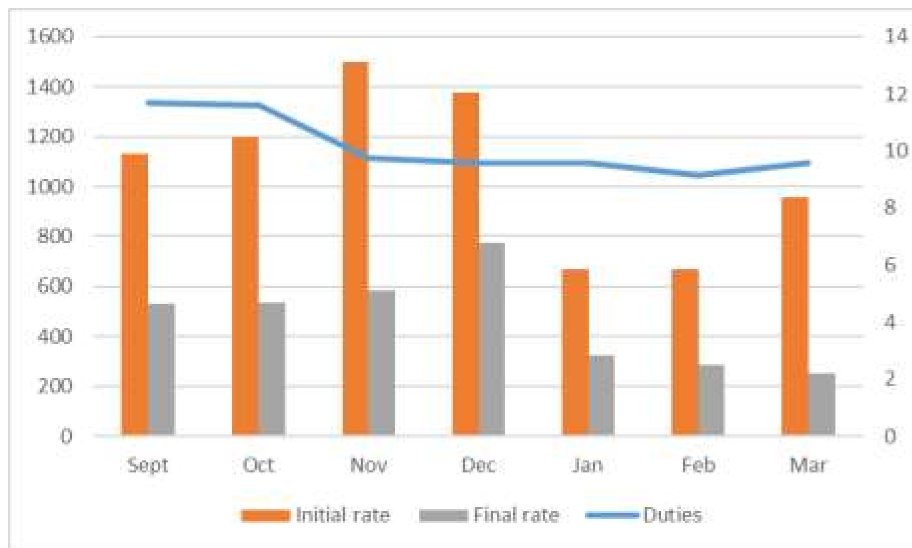
25. As earlier indicated, I adopt my findings of fact from the public inquiry. Those relevant now are that:

    a. Drivers have been convicted of serious offences relating, in particular, to falsification of tachograph records. Section 26(1)(c)(i) and (ii) are made out
    b. A relatively small number of mechanical prohibitions has been issued to vehicles operated under authority of the licence in the past five years. Section 26(1)(c)(iii) is made out.
    c. Convictions have not been notified. Section 26(1)(e) is made out.
    d. The drivers hours and tachograph offending was widespread and, at times, serious. Section 26(1)(f) of the Act is made out.
    e. [I need not to repeat my previous findings in relation to professional competence as it was at the day of the public inquiry in 2017; they are not the subject of this decision]

26. The matter of roller brake testing emerged immediately prior to the latest hearing. I am not aware of any related maintenance shortcomings. I am assured and I accept that the issue has been addressed. However, it remains a concern, in particular, in relation to the ability of the transport managers to continuously and effectively manage the transport operation. In noting that, I note also that which I was told in private session about the operator's fleet engineer. On balance, I make nothing further of this point.

27. The continuing drivers hours matters throughout 2017 are of serious concern. I have carefully reviewed each audit report provided from Foster tachographs. Allowing for matters to settle down following the public inquiry, I have reproduced the findings in graphical format below. The left axis and the line graph indicates the number of shifts in a given month. The bar graph and the right hand axis are the infringement and offence rates in percent. The orange bar indicates the un-mitigated infringement rate. The grey bar indicates the final offending rate, accepting all the mitigations put forward by the report's author, bar one[2]. There are others that are worthy of argument but, as they are included each month, that argument is unnecessary merely to allow a month-by-month comparison to be made. Note that I have included the March figures. That report was not available to the hearing but its findings are generally favourable to the operator and their inclusion without operator comment does not generate any unfairness.

[2] The author seeks to rely on DVSA's Enforcement Sanctions Policy to discount any offences between 6 and 15 minutes. To do so, is to fly in the face of what that guide says which is that such leniency is to be extended in "isolated cases" of offending. There is nothing isolated about any of the offending of Gilders drivers.



28. The operator's interpretation of the reduction in offending is that it is due to the interventions made by Catherine Gilder with the support of Transport Law Solutions. That may be the case. Another interpretation is that compliance is worse when the operator is busy, and I am told that August through to Christmas is the operator's busiest period. Whilst the compliance improvement is welcome, it is still insufficient. The February data, the latest available at the hearing, identified 9 daily rest offences and 31 daily driving offences. This does not align with the stated policy of planning for an 8-hour driving day and 12 hour spread-over. There is clearly more to do. The March data show no significant change on that infringement pattern.

29. What improvement there is, is not yet sufficiently established to show a clear change in behaviour. Interventions such as working to a 12 hour spread-over and 8 hour driving period will be far more difficult to sustain when operations become more pressed. My findings in relation to the operator's drivers hours compliance performance, based on the balance of probabilities, are as follows:

    a. Following the public inquiry, Catherine Gilder's focus was, quite rightly, on falsifications. The effect of that was to almost eradicate falsifications but the excess driving appeared then as driving time and rest period infringements and, ultimately, offences.

    b. A significant core of drivers had been resistant to change and driving time and rest period compliance got worse as the year progressed.

    c. Interventions were made and these have contributed to the reduction in offending since the turn of the year.

    d. The reduced pressure following the Christmas rush has also contributed to the reduction in offending since the turn of the year.

    e. There is insufficient information to know whether the improvement will be sustained when the operator returns to its busy period.

CONSIDERATION

30. Mr Laprell urges me to consider the company as at the date of the second hearing. He urges me to, in effect, hear the case afresh and take account of the company's performance over the past year alone. Whilst I agree that the current position is "curious" from a procedural point of view, I do not find myself able to simply ignore the findings of fact that I made last year. I also cannot go behind the decision of the Upper Tribunal and its opinion in relation to the status of the action taken against former transport manager Shaun Gilder relative to regulatory action against the company. The Upper Tribunal said *"We do not agree that the disqualification of Shaun Gilder is sufficient regulatory action in the circumstances of this case, not least because, in all likelihood, he has and will continue to be the Operations Manager for the company and has and will continue to fulfil many if not all of the roles he had fulfilled prior to the public inquiry. His disqualification in the context of a tight knit, family company will have little practical impact particularly as it had already been accepted that two additional transport managers were required to operate the fleet"*. I fully accept that analysis now as indeed it was my own last year.

31. I am tasked by the appellate body in very simple terms. I must, to use the words of Her Honour Judge Beech *"sort this matter out by way of clarification or otherwise".* I am not tasked with starting again afresh, nor am I in any way directed to set aside my previous findings of fact. My approach, then, is to review the reasons for my previous decision, take in to account the operator's performance over the past year and come to a conclusion.

32. It is clear from paragraph 23 of the Appeal decision that the Upper Tribunal took a less positive view of the company than did I. Accepting that the Upper Tribunal had access to a transcript of the hearing, it did not, though, have the benefit of hearing directly from the drivers nor from DVSA who were represented at the public inquiry. For that reason, some difference of opinion is understandable.

33. At the hearing on 3 May 2017, the company's solicitor, Mr Hammond, asked the company's lead witness, Shaun Gilder, *"are things better?". This was in relation to driver's hours compliance.* Mr Gilder answered, as transport manager and the company's "chief operating officer", *"Yes. The, the compliance, in my opinion, is, is excellent. It's carried out by Catherine that has a full understanding of the system and compliance. It's backed up with the passing of her operator CPC.".* It is clear from the monthly audits that I required as part of my Stay decision that compliance then and for many months after was far from excellent. The analysis for September to December indicated an average of 140 apparent infringements every month. That infringement rate only came down following the appeal decision and the realisation that the company would have to come back to a further hearing. Had I not required the audits as a condition of granting the Stay, I am in absolutely no doubt that the offending would have continued, and most likely at a higher rate.

34. I must have regard to the Senior Traffic Commissioner's Statutory Guidance and follow his Directions, unless I find legal grounds for not doing so. In

coming to my decision, the relevant document is Number 10, Paragraph 26 of that document points me towards the helpful guidance given by the Scottish Court of Session in _Thomas Muir (Haulage) Limited v The Secretary of State for the Environment, Transport and the Regions [1998] Scot CS 13 (25 September, 1998); [1999] SC 86; [1999] SLT 666; (on appeal from 1997 J1)_, in particular, the following:

> "*The underlying purpose for the power provided by Section 26(1)* [a discretionary power] *can only be stated in very broad terms, namely that it is intended to be used, so far as may be appropriate, to achieve the objectives of the system. The proper question is whether in that context the direction is appropriate in the public interest. The objectives of the system plainly include the operator's adherence to the various requirements of section 13(5). In the case of prohibition and conviction it is plain that the protection of the public is a very important consideration.*
>
> *On the other hand, it does not follow that a traffic commissioner is prevented from taking into account, where appropriate, some considerations of a disciplinary nature and doing so in particular for the purpose of deterring the operator or other persons from failing to carry out their responsibilities under the legislation. However, taking such considerations into account would not be for the purpose of punishment per se, but in order to assist in the achievement of the purpose of the legislation.*

35. It is clear from the operator's performance following the Stay grant that no improvement in compliance was achieved. With regulatory action on hold, no improvement was achieved, **despite the operator being required to report performance to the regulator**. Without that oversight, which I am sure put considerable pressure on the transport manager to change behaviours, I am in no doubt that performance would have been even worse. It is clear to me that both the company and its drivers need to understand that such ongoing dangerous criminality will not be tolerated. For that reason, and to achieve the purpose of the legislation, regulatory action is required now.

36. Of course, the falsifications committed in such a widespread manner across the operator's business would, had the operator been prosecuted, have been "Most Serious Infringements" in relation to Article 6(2)(a) of EU Regulation 1071/2009. Had that been the case, the starting point would be loss of good repute and revocation. Against that backdrop, I am surprised by Mr Laprell's suggestion that the conduct falls within the "moderate" category. I now conduct a balancing exercise with reference to Annex 3 of STC Statutory Document No. 10.

37. There are positive features to this operator. Despite the lack of roller brake testing, roadworthiness appears generally sound. The operator has, this time round, taken appropriate advice and appears to be getting a grip on the non-compliance. I believe Catherine Gilder is genuinely committed to achieving compliance and that falsification by regular drivers is largely eradicated and is certainly not tolerated by her.

38. In the negative, the operator's systems at the time of the DVSA investigation were so poor that it warrants categorising the operator as reckless. The operator's behaviour in relation to the third-party driver card was reckless. The offending was to such a degree that drivers must have driven whilst tired and road safety was put at risk. The offending was extremely persistent. The operator did not eradicate the underlying problem. From the evidence of the Foster audits, all that occurred was that the ongoing drivers hours offending morphed from false records to blatant abuse of the drivers hours rules. It took until the appeal was remitted for any real action on the root cause – journey planning – was put in place and Catherine Gilder was far from authoritative in stating her commitment that planners had really bought-in to the changes needed. There had been no systems to identify falsifications – the company had not even picked up that a third party driver's card was being used in its vehicle. Driver Treharne was allowed to manage himself. The changes made at the time of the 2017 inquiry were clearly ineffective. The operator failed to provide the driver card of driver Heydon to DVSA, lying about its whereabouts.

39. In 2017, I found that I could trust the operator to be compliant in the future. The Foster evidence is that I was wrong. The operator could not, at that point be trusted. Has anything changed now? Without significant regulatory action to bring the wider management team and drivers to their senses, I fear not.

40. My assessment of the operator's conduct is that it was reckless, it compromised road safety, it provided a clear competitive advantage, it permitted driver offending, it concealed the evidence (Heydon's driver card). All bar the last of those apply equally to the operator in the period following the last public inquiry as they do to the conduct that led to the hearing in the first place. I have no hesitation in finding the regulatory starting point as being "severe". The starting point is somewhere between revocation with detailed consideration of disqualification and a significant indefinite curtailment that materially affects the transport operation.

41. In reaching my decision in 2017, I intended to take significant regulatory action that did not impact on the livestock business. I have seen the recent submissions that demonstrate that impacting on the livestock business may have wider consequences, although it is challenging to accept that there is **no** excess capacity at all, and therefore no competition at all within that sector.

42. Information supplied by the operator indicates the following split of work between operations by vehicle and trailer type

	Vehicles	Trailers
Livestock	18	15
Refrigerated	19	29
Low loader/general	8	15

43. I have absolutely no doubt that excess capacity exists within the chilled distribution sector, including the transport of hanging meat. I see many such hauliers. The same is true of low loaders and plainly for the general haulage (the operator identifies 5 flat or curtainside trailers but not which vehicles pull them). There is nothing to stop the operator outsourcing those commitments

or withdrawing from that sector. I acknowledge that there are synergies between the livestock and hanging meat business operations. I do not know why the operator has identified 18 livestock vehicles with 15 trailers. There are two rigid vehicles specified across the three licences which I will assume are livestock, which gives 17 livestock vehicles. The total fleet across livestock and refrigerated meat is a maximum of 36. It is therefore my assessment that the operator will have a viable ongoing business with 36 vehicles and can operate with fewer for a short period. Whether or not the operator chooses to withdraw from the low-loader work or make some other split is obviously a matter for the company. The guidance indicates that the curtailment is indefinite. By indefinite, I take it to mean either that it will never come to an end, or that it is impossible to say now when it will come to an end. It can and will only come to an end when the operator is able to demonstrate that it can deliver near 100% compliance with the drivers hours rules during the busiest part of its year.

44. On this analysis, the action I took last year is fully justified. I would be minded to make the same decision again. However, to do so would not acknowledge the improvements that appear to have been made by Catherine Gilder and the intervention of Transport Law Solutions. Whilst I find it necessary to send a strong message across the company by a significant curtailment for a short period, that curtailment need not stay in place at that level indefinitely. I fully understand that my decision will put some drivers out of work, or at least, no longer working for this operator. The drivers must have known that was an inevitable outcome of their continuing rampant offending in 2014 and 2017.

DECISION

45. Pursuant to findings under Sections 26(1)(c)(i) and (ii) and Section 26(1)(f), licence OH0154121 is curtailed to 25 vehicles with effect from 30 June 2018 until 28 July 2018, and thereafter to 27 vehicles for an indefinite period. As the matters are drivers hours rather than maintenance-related, there is no curtailment of the trailer fleet. The operator can request that the curtailment order is spread across the licences held with an overall reduction in authority of eight vehicles in July and six vehicles thereafter.

46. The operator can apply to have the curtailment lifted by demonstrating established compliance with the drivers hours rules for a sustained period during its busiest time of the year, that is from August through to December.

47. Pursuant to Section 17 of the Act, the applicant operator having failed to satisfy Section 13C(2) in relation to the size of fleet requested to be operated, the variation application is refused.

Kevin Rooney
Traffic Commissioner for the West of England
25 May 2018

APPENDIX 1

DIRECTIONS OF THE TRAFFIC COMMISSIONER

Context

1. The Upper Tribunal (UT) has allowed the appeal against my decision of 19 June 2017 and remitted it back to me for further consideration and to provide reasons for the decision taken. The UT agrees that regulatory action additional to the disqualification of Shaun Gilder was required. I am to consider the extent of that regulatory action.

2. Prior to receiving the UT's appeal decision, I had already made the decision to recall the company to consider the Stay. This is in the context of the monthly drivers hours and tachograph audits showing continuing significant breaches at an unacceptable level. The operator was put on notice of my concern in early December and provided a break-down of all infringements greater than 5 minutes. The latest report shows no improvement.

3. The company has argued at public inquiry that the experience of the transport management team is not relevant in determining professional competence.

4. The company is invited to make submissions on all these matters and will be recalled to a hearing to do so at which it may call relevant witnesses. In that context, I make the following directions:

Directions

5. The company is to provide, seven days ahead of the reconvened hearing:

a. Submissions on the appropriate extent of regulatory action based on Annex 3 to the Senior traffic Commissioner's Statutory Document No. 10

b. Submissions in relation to action taken to prevent any recurrence of drivers hours offences, other than those to which an Article 12 exemption can properly be justified

c. Submissions in relation to the position taken at the UT hearing in relation to professional competence provided by an inexperienced transport manager. Any such submissions are, as a minimum, to have regard to the UT decision in T/2015/58 Angus Smales trading as Angus Smales Eventing.

d. Statements from any witnesses it intends to call.

Kevin Rooney
Traffic Commissioner
6 February 2018