



Neutral Citation Number: [2018] UKUT 0443 (AAC)

Appeal No. T/2018/48

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

**IN AN APPEAL FROM THE DECISION OF
Kevin Rooney, Traffic Commissioner for
the West of England dated 23 July 2018**

Before:

**Her Hon. Judge J Beech, Judge of the Upper Tribunal
Stuart James, Specialist Member of the Upper Tribunal
John Robinson, Specialist Member of the Upper Tribunal**

Appellant:

**BKG TRANSPORT LIMITED
WHITEPARISH TRANSPORT LIMITED
TERRY GOVER
TONY GOVER**

In attendance: Terry and Tony Gover attended as directors of both companies and on their own behalf

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

Date of hearing: 4 December 2018

Date of decision: 21 December 2018

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that the appeal be DISMISSED

SUBJECT MATTER:- Procedural unfairness; balancing exercise; proportionality

CASES REFERRED TO:- Bradley Fold Travel Ltd & Peter Wright v Secretary of State for Transport (2010) EWCA Civ. 695.

REASONS FOR DECISION

1. This is an appeal from the decision of the Traffic Commissioner for the West of England (“the TC”) made on 23 July 2018 when he revoked the operator licences of BKG Transport Limited (“BKG”) and Whiteparish Transport Limited (“Whiteparish”) with effect from 23.59 on 24 August 2018 and disqualified Terry and Tony Gover and both companies from holding or obtaining an operator’s licence for a period of two years from 24 August 2018. In addition, he found that Terry Gover had lost his good repute as a transport manager and ordered that he be disqualified from acting as such for a period of two years with a rehabilitation requirement that he sit and pass the transport manager CPC qualification. The orders were made under ss 26 to 28 of the Goods Vehicles (Licensing of Operators) Act 1995 (“the 1995 Act”).

The Background

2. The following background information is relevant to this appeal:
 - a) BKG has held a standard international operator’s licence since 1993. The directors of the company are Terry and Tony Gover. The transport manager is Terry Gover. The operating centre is situated at the Ferns, Common Road, Whiteparish, Salisbury;
 - b) BKG was called to a public inquiry in November 2011 when its operator licence was curtailed from ten vehicles to six with immediate effect as a result of maintenance shortcomings. It’s trailer authorisation of eight remained unchanged;
 - c) On 7 March 2014, BKG was called to a preliminary hearing before Deputy Traffic Commissioner (“DTC”) Dorrington as a result of an unsatisfactory maintenance investigation and a notice of shortcomings. Whilst the DTC ordered that a public inquiry be convened, the public inquiry did not take place as a result of administrative shortcomings within the Office of Traffic Commissioner (“OTC”) at the time;
 - d) In October 2017, BKG attended a meeting with the Senior Team Leader at the OTC as a result of an unsatisfactory maintenance investigation which had taken place in June 2017. A formal warning was issued;
 - e) Whiteparish has held a standard international operator’s licence since 1995 authorising six vehicles with six vehicles in possession. It’s operating centre is that of BKG. Terry and Tony Gover are the directors of the company and Terry Gover is the transport manager. Company House records show that the company is in fact dormant. Nevertheless, in August 2017, Whiteparish submitted a variation application to increase its vehicle authorisation from six to ten vehicles;

- f) 3TC Logistics Limited (“3TC”) is a freight forwarding company which operates from the same operating centre as BKG and Whiteparish. Its directors are Thomas Gover (Tony Gover’s son) and Carlo Ward.
3. On 4 April 2017, vehicle HX05 LTV was directed into a check site. It was not displaying an operator’s licence disc. The driver gave Tony Gover’s telephone number to Traffic Examiner (“TE”) Dean who was told by Tony Gover that the vehicle was being operated by BKG and that it had just been acquired for selling on. A registered keeper check revealed that the vehicle had been registered to 3TC since 25 January 2017. A check of the driver’s analogue tacograph charts revealed that he had been driving the vehicle since 15 February 2017 which suggested that the vehicle had been used beyond the permitted period of grace of one month. A check of BKG’s operator licence appeared to reveal that it did not have a margin on its vehicle authorisation. The vehicle was eventually specified on the licence of BKG on 1 June 2017. During the roadside check, a driver’s hours prohibition was issued to the driver for failing to record periods of other work along with a mechanical prohibition which was “S” marked.
 4. On 26 July 2017, Vehicle Examiner (“VE”) Ackerman encountered vehicle registration RX12 BDO. BKG had been the registered keeper of the vehicle since 1 February 2017 but it was specified on the licence of Colin J Bale & Sons Ltd and it was liveried as “3TC Logistics”. The vehicle was not specified on the licence of BKG until 4 August 2017.
 5. On 4 October 2017, vehicle registration WU17 LVX was encountered by TE Murray and VE Hirst. The vehicle was liveried as “3TC Logistics” and was not displaying an operator’s licence disc. VE Hirst spoke to the driver’s contact, Carlo Ward, who said that the vehicle was being operated by BKG and that it was a lease vehicle which the company had operated from its initial registration. It was established that the vehicle unit had been locked to the BKG company card since 27 May 2017. It was not specified on the licence of BKG until 5 October 2017, the day following the encounter.
 6. On 31 January 2018, TE Lambert and TE Dean encountered vehicle registration WA04 NHX. When TE Lambert first approached the vehicle, it was displaying an operator’s licence disc in the name of Whiteparish. The vehicle was then directed into a parking bay. By the time that TE Dean had taken over the encounter, the vehicle was displaying an operator’s licence disc in the name of BKG and upon closer inspection, TE Dean found three discs in the display holder, two in the name of Whiteparish, one of which had expired and the BKG disc. The driver denied swapping the discs around. He stated that he was working for “*BKG, 3TC which do their collections and Whiteparish Transport, it’s all under one roof*”. He confirmed that he was paid by BKG. When asked how many vehicles BKG operated, he stated “*two vans, one 7.5t, five 18t and three artics out of the yard and there is two 3TC vehicles*”.
 7. As a result of the encounter described in paragraph 3 above, TE Dean commenced an investigation into BKG and attended the operating centre on

17 July 2017 where he met Tony Gover. He told TE Dean that he had just returned from holiday and then declined to assist with TE Dean's enquiries. He said "*why are you picking on us? Sarah Bell is looking into it as you are harassing us. We get fed up with having to dig up paperwork for you all the time*". As a result, TE Dean decided to send s.99ZA production letters to all three companies for the period 1 March to 30 May 2017 with a production date of 25 September 2017. On 21 September 2017, Tony Gover requested an extension of time as he had been unwell. An extension of time was given to 29 September 2017.

8. TE Dean made the following observations from the documents produced by BKG on that date:
 - a) A list of all vehicles operated during the period had been requested and a list of six vehicles had been produced, including HX05 LTV which was registered to 3TC. However, the drivers' reports showed that six further vehicles had been used by BKG during the period for which data was requested which were not present on the list: three were registered to BKG and three to Abacus Van Hire and in addition, there was vehicle WU17 LVX which bore the 3TC livery and which had been locked into BKG's company card during the period of data requested;
 - b) There was no evidence of periodic training for drivers as requested;
 - c) It was unclear how BKG was monitoring working time directive requirements and the records held for one driver contradicted his tachograph charts;
 - d) Vehicle insurance policy certificates were not produced as requested;
 - e) Digital data in RAW format was not produced as requested; digital tachograph printouts for drivers and vehicles were not produced as requested;
 - f) No hire agreements or subcontracting invoices were produced as requested.

As for Whiteparish, no documents were produced at all nor any explanation proffered for that failure. In respect of 3TC, TE Dean received a letter from Carlo Ward stating that no documents could be produced as the company did not operate any vehicles or employ any drivers and that any vehicles that had been owned by the company in the past may have been "*borrowed*" to another operator without a driver.

9. Having considered all of the evidence, TE Dean concluded that he could not say that there was any distinct line between BKG and Whiteparish and it appeared that BKG was operating vehicles on its curtailed licence, potentially circumventing the curtailment of the licence by utilising the capacity of Whiteparish, which might explain why Whiteparish appeared as a dormant company on the Companies House website.

10. In the interim, VE Blake had undertaken an investigation into Whiteparish as a result of the variation application submitted by Whiteparish. His report, which is dated February 2018, was marked as unsatisfactory. He had concerns about the level of control that Terry Gover had over the transport operations. By way of example, VE Blake found that two of the Whiteparish vehicles were displaying expired operator's licence discs. He noted that the maintenance of vehicles operated by BKG and Whitechurch ran "*side by side*" and that the two companies had been investigated three times in fifteen months with unsatisfactory outcomes. In the circumstances, he could not support the variation application. He proposed that the maintenance shortcomings should be dealt with by way of a warning letter.

The public inquiry

11. The public inquiry commenced on 4 June 2018. Tony and Terry Gover and Carlo Ward attended and the companies and the directors were represented by Laura Hadzik, solicitor of Backhouse Jones.
12. By way of introduction, Ms Hadzik outlined the circumstances of both companies. They had been in existence for over thirty years and were linked by common directors, transport manager and operating centre. As at the date of the hearing, BKG had six vehicles in possession (it's maximum authorisation) and Whiteparish had three (leaving a margin of three). It was accepted that that there was no clear separation between BKG and Whiteparish and as a result, the directors had decided to simplify their operations. The variation application submitted by Whiteparish was withdrawn and the TC was informed that BKG had made a new application to increase its vehicle authorisation to twelve vehicles which would have the effect of amalgamating the vehicle authorisations of the two companies. As for 3TC, the company was a freight forwarder which subcontracted its work to BKG and others. It was accepted that two vehicles had been liveried as 3TC and that one vehicle had been registered to 3TC "*in error*" by Thomas Gover who had acquired the vehicle. 3TC had never operated any vehicles.
13. VE Blake was then called. He confirmed that having perused the maintenance records produced that morning for both companies, he could find little fault with them save that tyre tread depth and roller brake testing results were not recorded. A transport manager who was spending twenty to twenty five hours a week (the hours declared by Terry Gover in his TM1 form for Whitechurch) should have noticed the errors. VE Blake concluded that there was no separation between BKG and Whitechurch as the maintenance records were filed together and all of the records were in the name of BKG and that during the previous three visits to the operating centre, the same problems were found. The PMI records were kept at Tony Gover's home and it had been "*quite tricky*" gaining access to all of the vehicle records. He had never met Terry Gover during the maintenance investigations despite the DVSA visits having been pre-arranged. It was possible that Terry Gover had been at the operating centre earlier on the morning of his last visit and that he

had left prior to his arrival. He accepted that he had been told by Tony Gover that Terry Gover had left because he was not feeling well.

14. TE Dean was then called and adopted his public inquiry statements. He had been unable to complete a Traffic Examiner Operator's Report because he had not been provided with the documentation required in the s.99ZA letters. As for the encounter with vehicle HX05 LTV on 4 April 2017, he elaborated on his public inquiry statement. The vehicle was in fact displaying a tax disc for an unrelated vehicle which belonged to Colin Highman & Partners and VE Dean suspected that there had been an intent to deceive in displaying the disc but he did not pursue it. There was also a large crack in its windscreen. When advised of this, Tony Gover had stated on the telephone "*I don't drive the thing but that isn't a problem*". The driver did not have his driver defect report book with him and he told VE Dean that he did not use one. It was therefore impossible to say whether the cracked windscreen had been reported prior to 4 April 2017. It was put to VE Dean that on 4 April 2017, there were only four vehicles specified on the BKG licence and that the company had evidence to show that the OTC had been notified by a fax and a telephone call of the specification of vehicle HX05 LTV on the licence. Indeed, this was the case for each of the vehicles that had been stopped. The TC then expressed his concern that this information had not been produced by BKG prior to the hearing and as a result, called a brief adjournment for the OTC records to be checked. It transpired that on 4 April 2017, only four vehicles were specified on the licence. However, VE Dean was satisfied that the vehicle encountered on that day was being operated by BKG and that had been so since early February 2017 and that the Whiteparish operator's licence had the maximum of six vehicles specified on it. VE Dean denied that it could be assumed that the reason why the vehicle was not specified on the licence on 4 April 2017 was because of an error on the part of the Central Licensing Unit ("CLU"). Having considered the documents handed to the TC by Ms Hadzik, he concluded that in the absence of any confirmation receipt to go with the fax, he could not draw any conclusions based upon the documents.
15. Ms Hadzik accepted on behalf of BKG that vehicles HX05 LTV, RX12 BDO and WU17 LVX were not specified on the BKG licence when they were stopped and that they had all been in possession for more than one month. TE Dean accepted that if the CLU had been notified of the vehicles at the time of the encounters, then HX05 would have been the fifth vehicle specified and the remaining two would have been the sixth at the time of stopping. Ms Hadzik then indicated that since the beginning of 2018, BKG had specified every vehicle via the VOL system and TE Dean accepted that was better than using faxes.
16. Terry Gover then gave evidence. He explained that BKG had been in operation for thirty seven years. His father started the company and Terry Gover became transport manager (an entitlement he held through grandfather rights). Whiteparish was incorporated when BKG was awarded a contract for transporting fireworks which fell within the ADR provisions. They now sub-

contracted that work to other operators. The directors now wanted to operate the Whiteparish vehicles on the BKG licence.

17. Terry Gover told the TC that he had recently attended a transport manager refresher course and he was responsible for overseeing all vehicle operations. Carlo Ward ran the transport side on a day to day basis and it was proposed that he would sit his transport manager CPC in September 2018. He would then be added to the BKG licence as a transport manager. Terry Gover confirmed that whilst the results were not recorded, all vehicles underwent roller brake testing and tyre depths were checked.
18. It was Tony Gover's responsibility to add and remove vehicles from the licence and he had done so for the last thirty seven years. The system they had always used was notification by fax which was followed up with a telephone call. He believed that when TE Dean had visited the operating centre, he had been shown the faxes that Tony Gover had sent to the CLU. They now dealt with vehicle specification on-line. On the day of TE Dean's visit, Terry Gover had been at the office from 8.00am and had left at 9.00 or 9.30am, having assumed that TE Dean was not going to attend. Terry Gover would be happy for the TC to order an FTA audit for six months hence. He had never seen a section 99AZ letter addressed to Whiteparish despite the fact that the recorded delivery notification was signed by Carlo Ward. There had not been any reason why the documentation would not have been sent because it was the same as that for BKG. He had been unaware that the documentation provided in respect of BKG was incomplete. In respect of the RAW drivers' hours data, he did not think that they had any. He had assumed that the correct list of vehicles had been sent. The insurance policies were definitely in the box as were the driver card downloads. When asked what a driver download was, Terry Gover accepted that he did not know what one was. As for hire agreements, BKG did not enter into many of those because BKG and Whiteparish were both owned by Terry and Tony Gover. BKG did not hire vehicles from 3TC as the vehicles liveried as 3TC were in fact owned by BKG. He could not say why BKG had not produced the digital data requested. The vehicle maintenance records were kept at Tony Gover's house for safety despite the fact that the address of the establishment was the operating centre.
19. It was put to Terry Gover by the TC that vehicle WV17 LVX had been locked into the BKG company card since 27 May 2017. It was then stopped on 4th October 2017 and so it followed that the vehicle had been on the road without an operator's licence disc for four and a half months. Terry Gover considered that BKG was at fault because they had not chased the disc from the CLU. He also accepted that vehicle RX12 BDO had been without an operator's licence disc for six months. It was put to Terry Gover that when RX12 was stopped, the vehicle would have been the seventh in possession for BKG. He nodded his head but did not answer.
20. Tony Gover told the TC that it was his job to specify vehicles. The system he had always used was to write the changes on a piece of paper and then fax it to the CLU. He would then follow the fax up with a telephone call and he

would also post a notification of the change. He had always specified vehicles in this way and once he had notified the CLU he would chase the discs. On the occasions that the TC was considering, the chasing of discs must have slipped his mind.

21. Tony Gover accepted that he should have been more polite to TE Dean when he visited the operating centre but said that the CLU had told him that examiners should always announce their visits. Tony Gover had complained to the OTC about TE Dean's visit but had then calmed down. He did not have any involvement in collating the BKG documentation in response to the section 99ZA letter apart from the maintenance records as he was the director who was responsible for maintenance. He had not received any operator licence training because he was not the holder of the licence although he had arranged to attend a course on 6 June 2018. As for being in possession of seven vehicles, he had telephoned the CLU and he had been told that it was fine to specify the vehicles he had. The TC then went through his calculation which led to the conclusion that seven vehicles had been operated by BKG. Tony Gover stated that HX05 LTV (the vehicle registered to 3TC) was in fact used for storage and was not used very often. He then clarified his evidence by stating that vehicle was not used.
22. The TC asked Tony Gover when he had started to use the VOL service to specify vehicles. Mr Gover's response was that he started using it in the early part of 2018. The TC then produced a history of the company's on-line access to the VOL service which revealed that Tony Gover had been specifying and removing vehicles from the licence using the VOL service since 2011. The TC asked Mr Gover whether he had been lying to him about the method he used for specifying vehicles. Mr Gover's answer was that he had been lying. The TC then gave the directors and Ms Hadzik time to consider the VOL print out and then adjourned the hearing to another date so that a full history of VOL access could be provided to BKG along with a further call up letter.
23. The date of the reconvened hearing was 21 June 2018 at 3.00pm, the date being fixed to take account of Tony Gover's availability. On 12 June 2018, Backhouse Jones wrote to the TC requesting an adjournment. Ms Hadzik was unavailable as a result of personal circumstances and Tony Gover had been admitted to hospital. The working diagnosis was set out in the letter; it is unnecessary for the Tribunal to include that personal information in this decision. The TC refused the application. He was aware of Ms Hadzik's personal circumstances and was "*genuinely sympathetic*" towards her position but another representative could, with the benefit of a transcript, continue with the hearing. The TC was mindful of the new evidence heard at the previous hearing which pointed towards a finding that the operator had lied at the public inquiry and that more vehicles had been operated than were authorised. There were two directors of both companies. If the operator intended to argue that one director was unable to represent the interests of the companies, then it followed that one director was incapable of properly managing the transport operations and it therefore may be in order to suspend the licences. The TC indicated that until evidence of illness was

provided, he would not consider an adjournment to allow Tony Gover to attend.

24. Immediately prior to the hearing being reconvened at 3p.m. on 21 June 2018, a number of photographs of Tony Gover's leg were sent to the OTC along with some clinical contact sheets. The first, dated 15 June 2018, noted that Tony Gover was feeling better although he was advised to rest. A review appointment was made on 21 June 2018. The second, dated 19 June 2018, noted that Tony Gover was feeling well and that he was advised to continue with his medication. His next review was booked for 9.00am on 21 June 2018. The third, dated 21 June 2018 (the date of the reconvened hearing) noted that Tony Gover was feeling well in himself and that he was able to weight bear and walk for a long distance. The documentation provided to the TC did not establish that Tony Gover was medically unfit to attend the reconvened public inquiry.

25. At the outset of the reconvened hearing, Ms Hadzik confirmed that the company had not produced any evidence from either a consultant or a doctor stating that Tony Gover was unable to attend the hearing by reason of him being medically unfit to do so. The outcome of the review that morning was that Tony Gover should rest and keep his leg elevated. She did not renew the application for an adjournment to allow Tony Gover to attend although she did state that his absence left BKG in some difficulties because neither Terry Gover or Carlo Ward who were attending on behalf of the companies could deal with the issue of the use of the VOL system. Ms Hadzik accepted that Tony Gover could have provided a witness statement to deal with the documentation produced by the TC at the last hearing, however, the company hoped that it had identified a way forward. Ms Hadzik accepted on behalf of the company that on 27 May 2017, BKG had seven vehicles in possession although it was denied that seven vehicles had been operated at any one time. Vehicle HX05 LTV had been the subject of a Vehicle Off Road notice which had been within the box of documents produced pursuant to the section 99ZA letter. The document concerned was a PMI record dated 10 April 2017 which recorded that the vehicle was off the road from that date following an MOT on that date. TE Dean accepted that this was the case but noted that the vehicle was not specified on the licence when it was used on 4 April 2017 and that it did not become specified until 1 June 2017. There was no analogue data produced for this vehicle by BKG although it was clear that the vehicle had been used when it was supposed to be parked in the yard for storage. TE Dean relied upon VE Blake's maintenance investigation report arising from his visit on 16 June 2017 to the operating centre (and referred to in paragraph 2(d) above) during which he had noted the odometer reading of the vehicle was 881,300 kms which was 5,300 kms more than the odometer reading taken on 4 April 2017 (876,012 kms). It followed that, contrary to the company's position that the vehicle was not used, it had been.

26. The TC then asked for the identity of the operator of the vehicles. Terry Gover confirmed that BKG was the employer of all of the drivers and that

Whiteparish did not have any employees.. It had always been that way. The problem was that the position had only recently become apparent.

27. In her closing submissions, Ms Hadzik accepted that Tony Gover had “*got himself into a bit of a pickle*” whilst giving evidence during the first hearing. It was nevertheless the case that his preferred method of changing vehicles was by fax and that his evidence was that he had used this method with the vehicles identified by the enforcement officers but those notifications had been missed by the CLU (the TC expressed doubt that the CLU would have missed faxes sent by the company). Ms Hadzik submitted that in any event it was the intention of the company that Tony Gover stood down as a director of BKG because of his ill health and that Carlo Ward and Thomas Gover would be appointed directors in his place. The company offered an undertaking that Tony Gover would not play any role in the management of BKG. That succession plan had already commenced and it would be escalated with Carlo Ward to be added as a transport manager once he had obtained his CPC. The company had also taken on another office member, Dave Ruis, who was a driver. It was hoped that he too would obtain his CPC. Ms Hadzik asked the TC to accept that Tony Gover had not lied to him during the first hearing nor was he trying to mislead the TC. He had panicked under pressure and had not explained himself properly. She asked the TC to allow the companies to amalgamate their fleets by increasing the BKG authorisation to twelve although the company did not intend operating more than nine vehicles. She asked the TC to step back from revocation as that would be a disproportionate response in all of the circumstances.

The Traffic Commissioner’s decision

28. The TC found first of all, that BKG had operated more vehicles than authorised in two respects:
- a) By operating seven vehicles on its own licence in and around 27 May 2018. In coming to that determination, the TC found that vehicle WU17 LVX had been used between 10 April 2017 and 27 May 2017. Six vehicles had already been specified as in possession at that time. The operator contended that WU17 LVX whilst specified, was only used for storage in the yard at this time. The TC rejected BKG’s assertion and relied upon the DVSA evidence that the vehicle had covered 5,300kms in the ten-week period between 4 April and 16 June 2017 and the type of vehicle was such that it would have been used for more local runs;
 - b) By unlawfully using the Whiteparish licence in order to operate vehicles in excess of its own authorisation. Whiteparish did not have any employees and it did not even employ a transport manager. This was in breach of s.6 of the 1995 Act.
29. Secondly, he found that prohibitions had been issued on 4 April 2017 which were in addition to four previous mechanical prohibitions and an overloading

conviction. As for Whiteparish, five mechanical prohibitions, three drivers' hours prohibitions and two overloading prohibitions had been issued. It followed that s.26(1)(c)(iii) was made out along with s.26(10)(f) in relation to both licences.

30. Whiteparish had allowed its licence to be used by BKG and BKG had operated more vehicles than authorised. S.26(1)(h) was made out.
31. Tony Gover appeared to largely run the operation. He had been rude to TE Dean and had failed to co-operate with his investigation. He had also lied to the TC about his use of the VOL system to specify vehicles. His account about using faxes to do so was one which had been fabricated in advance of the public inquiry for the sole purpose of misleading the TC. He then failed to attend the second hearing without any supporting medical evidence of his inability to do so and that failure demonstrated that he wished to avoid further scrutiny. He was not a man in whom the TC could have confidence. There were positives in the maintenance improvements that the TC had heard about in evidence, but his concerns were more fundamental. Tony Gover was "*simply totally untrustworthy*".
32. As for Terry Gover, his role in the operation concerned the TC. He had never met VE Blake having failed to attend any of the three pre-arranged maintenance investigations. He had told the TC that in relation to the response to the s.99ZA letter sent to BKG, he had assumed that all of the information that was required had been delivered in a box to the DVSA's Poole office. It was not. More serious still, was the failure to respond to the s.99ZA letter sent to Whiteparish. Terry Gover stated that he was unaware that this letter had been received even though it had been signed for by "WARD", which the TC took to be Carlo Ward who was now offered to the TC as a "*clean director and transport manager*". The TC found that it was more likely than not that Terry Gover had actual knowledge of the production letter sent to Whiteparish or in the alternative, as director and transport manager, he was reckless in not making reasonable enquiries and having in place effective systems for "*knowing*".
33. Further, Terry Gover had supported the fabricated story given to the TC by his brother in relation to the way in which vehicles were specified on the licence. As transport manager, he was required to ensure that the licence was properly managed and by failing to respond to the production letter addressed to Whiteparish, his good reputation was forfeited as transport manager. His position was worsened by the failure to produce tachograph data and other information for BKG and by the lies told and supported at the public inquiry.
34. When undertaking the balancing exercise, the TC categorised all of the above save for the maintenance improvements as negative features. He found the operator's conduct was deliberate and reckless and there had been a wilful failure to provide fundamental drivers' hours information and raw data and an attempt to deceive. The starting point for action was "*severe*". In answer to the Priority Freight question, the TC found that it was "*very unlikely*" that BKG could be trusted to run in compliance with the regulatory regime in the future.

As for the Bryan Haulage question, he was satisfied that the two companies should be put out of business. He did not know how many vehicles had been operated and the operators had refused to allow their drivers' hours compliance to be assessed. Those who evaded proper scrutiny had no place within the licensing regime; they posed a road safety risk and it was unfair on all those operators who worked hard to cooperate and comply. The two directors and the two companies had lost their good repute.

35. As for disqualification, the TC's balancing exercise considered the same matters as considered for revocation of the licences: "*The lack of anything approaching honesty on the part of these operators and their directors and transport manager mean that it is necessary for them to have a period of reflection before any attempt to re-enter the industry. In the positive, this is not a case where operators have deliberately put life at risk and I take account of this in setting the disqualification period.*" The TC then went on to make the order set out in paragraph 1 above.
36. The Appeal
37. At the hearing of the appeal, Tony and Terry Gover attended and represented themselves and BKG. They accepted that whilst the appeal included Whiteparish as an Appellant, they "*did not need it*" and so the appeal was withdrawn.
38. The Govers' relied upon the grounds of appeal previously filed by Backhouse Jones and agreed that the twenty four paragraphs contained in that document, could in fact be distilled into four grounds of appeal. The first was that the TC had erred in failing to adjourn the hearing of 21 June 2018 in the absence of Tony Gover and that the TC, in finding that Tony Gover was expected to be fully well by 21 June 2018 had misunderstood or misdirected himself as to the content of the clinical contact notes produced by BKG. The TC should have adjourned the hearing, particularly in view of the TC's determination that Tony Gover had misled him and had lied. The Govers' added to this ground by stating that the reason for appealing the TC's decision was that Tony Gover could not attend the second hearing because he was in agonising pain and unfit to do so and whilst he had attended a review appointment at 9.00am on the morning of 21 June 2018, he could not have travelled to Bristol for the adjourned hearing scheduled for 3pm that afternoon. Whilst the contact notes recorded his appointment as lasting less than an hour, Tony Gover maintained that he did not leave hospital until 11.45am.
39. The Tribunal asked the Govers' to consider the email sent by the TC in response to the written application for an adjournment dated 12 June 2018 which stated that he would not consider an adjournment in the absence of medical evidence. We asked why Tony Gover did not provide such evidence to the TC. Tony Gover maintained that he could have obtained such evidence from a medical professional but Backhouse Jones did not ask him to do so. Neither was he asked to provide a witness statement to be relied upon in his absence.

40. Our starting point on this ground of appeal is that our jurisdiction is one of review and it is our function to consider the decision of the TC upon the basis of the evidence that he had before him. We are in no doubt that his decision to refuse the application to adjourn the second hearing in the absence of any medical evidence as to Tony Gover's fitness to attend was plainly right. The TC had adjourned the first hearing because Tony Gover had admitted to lying to him and in fairness, he wanted to provide Tony Gover and his brother with an opportunity to consider the full history of VOL use that the TC had produced at the first hearing. The evidence of untruthfulness placed Tony Gover in an extremely serious position. It was inevitable that the TC would be suspicious of an application to adjourn on medical grounds without any medical evidence in support. He did however, properly highlight that he would consider such an application with appropriate evidence in support in his email of 12 June 2018. What is striking about this aspect of the case is that when the hearing of 21 June 2018 commenced, whilst the TC was provided with the clinical contact notes and a number of photographs to support those notes, there was no renewed application to adjourn the hearing so that Tony Gover could attend. Rather, it was accepted that the appropriate medical evidence had not been obtained and it was submitted that BKG had "*found a way forward*". In all of the circumstances, it is unsustainable to argue that the TC should have adjourned the hearing of 21 June 2018 either upon the basis of the application made on 12 June 2018 or at the outset of the hearing of 21 June 2018 when the application had not been renewed. We therefore reject this ground of appeal.
41. Grounds two and three concern the balancing exercise that the TC undertook prior to determining that the Govers' and the companies had lost their good repute and that revocation was a proportionate response. The first criticism was that the TC had failed to take account of the long history of regulatory compliance of both companies. Terry Gover told the Tribunal that with regard to Whiteparish, as the licence was no longer needed, he and his brother were "*happy*" for the licence to remain revoked. However, the position was different with BKG. It had been running for 34 years with "*hardly any problems*" in relation to compliance. He had been in transport for 45 years and in that time BKG had serviced a number of blue-chip companies such as Interserve and P&O Cruises. It was wrong for the TC to simply take away his good repute in view of that background. He and Tony Gover had operated their transport operation as they best could and they had employed young people in their warehouse and ensured that all employees attended all the relevant courses. He characterised the TC's decision as being "*a little unfair for such trivial issues*". In answer to questions about the failure of Whitechurch to produce any documents in answer to the s.99ZA letter, Terry Gover stated that the failure was not important as they had made the decision to close the company in any event. The main objective was to keep BKG operating and he recognised that there were grounds for revoking the licence of Whiteparish. He accepted that he was transport manager for Whiteparish. Terry Gover was taken through the case summary included in the appeal papers (summarised in paragraphs 2 and 3 above). Terry and Tony Gover then accepted that the operating history of both companies had not been

unblemished. As for BKG using the operator's licence of Whiteparish, both directors thought that this was appropriate because both companies were "*under one hat*". In hindsight, BKG should have applied to increase its authorisation prior to the DVSA investigations taking place thus making the Whiteparish licence superfluous. Terry Gover had to accept however, that had BKG applied for an increase in authorisation, it was unlikely that such an application would have been successful against the background of the curtailment in 2011 and the unsatisfactory maintenance investigations. As for the TC's conclusion that BKG had operated seven vehicles during the relevant period, both directors insisted that this was not the case as vehicle HX05 LTV was used for storage and had only been used on two or three occasions during the relevant period, although the directors accepted that the vehicle should have been specified on the BKG licence prior to that use. The Tribunal took the directors through the evidence of TE Dean and the reference he made to the findings of VE Blake in his maintenance investigation in June 2017 (a copy of which was not included in the public inquiry papers). Terry Gover did not accept that the vehicle had travelled 5,300kms between 10th April 2017 and VE Blake's examination of the vehicle on 16 June 2017. VE Blake must have incorrectly recorded the odometer reading of the vehicle during his investigation.

42. We are satisfied that there is nothing in this point. Tony and Terry Gover appear to have little understanding of the seriousness of the adverse compliance findings relating to maintenance shortcomings and the operation of unauthorised vehicles. Their lack of appreciation of BKG's position may result from their uninformed view that they were entitled to operate Whiteparish vehicles on the BKG licence as they owned both companies. However, Terry Gover at the very least, as transport manager, should have been aware of the position. Further, to describe the compliance failings of both companies as "*trivial*" again demonstrates the lack of understanding of the importance of regulatory compliance. This was a bad case of blatant unauthorised use of vehicles owned by one limited company by another and we are satisfied that the TC was entitled to conclude that the position was serious and that the starting point for regulatory action was "*severe*". As for the use of vehicle HX05 LTV, the TC clearly took the view that the odometer reading taken by VE Blake on 16 June 2017 was likely to be correct and it was not seriously challenged during the course of the second hearing. The evidence pointed to the use of seven vehicles during the relevant period but even if the TC was wrong about that, the unlawful use of Whiteparish vehicles was so serious that such use justified the ultimate determinations of the TC in any event.
43. The second criticism of the TC's balancing exercise was that he failed to take account of the fact that BKG had already embarked upon a restructuring programme and consolidation of the two companies along with new directors and transport managers with Tony Gover taking a back seat. The decision to amalgamate the two operator's licences had followed legal advice but in any event, BKG was now proposing to reduce the total fleet to six vehicles and it followed that no amalgamation was required. Even if the application to increase the BKG licence had been unsuccessful, the Whiteparish licence

would have been surrendered and the transport operation would have used sub-contractors. The changes proposed should have been sufficient to cause the TC to stand back from finding a loss of repute of the company and the inevitable revocation of the licence.

44. Whilst the Tribunal accepts that the TC did not make any reference to the proposed re-structuring of the two companies when undertaking his balancing exercise, that failure is unsurprising against the background of this case and in any event, the proposals did not withstand close scrutiny. At the heart of the reorganisation was Terry Gover who would remain as a director and a transport manager. The TC's finding that he had lost his good repute as a result of the regulatory failings of both companies and his support of Tony Gover's untruthful account about the specification of vehicles by fax is unassailable. In the course of the appeal hearing, Terry Gover accepted he had lied to the TC about that. In addition, as part of the restructuring plan, Carlo Ward was to become a director along with Thomas Gover who had registered a vehicle as belonging to 3TC (and which was liveried as such) in "error". Carlo Ward had signed for the s.99ZA letter addressed to Whiteparish which, according to Terry Gover had not been put before him as transport manager for Whiteparish. Those features of the evidence do not instil confidence that the proposed restructuring would result in a fresh, compliant approach to the operation of LGVs in the future. We are satisfied that had the TC included the proposed restructuring in his balancing exercise, his final determinations would have been the same.
45. The fourth ground of appeal concerned the overall proportionality of the TC's determinations. Both directors accepted that they had lied to the TC about the specification of vehicles although Tony Gover stated that he had not done so intentionally. He had not understood the importance of the issue. As for Terry Gover he stated that he accepted that he was "*getting too old*" which was why the directors were "*getting young people in*". The livelihood of thirty people was at stake but that most of them had already been laid off. Tony Gover apologised for what he had done and both directors were "*gutted*" by the result.
46. We have no hesitation in finding that the TC's determinations on the issue of loss of good repute and the inevitable revocation of the licences flowing from are not open to criticism, neither is the implicit rejection of the re-structuring proposals put forward by BKG. It is difficult to envisage any circumstances in which the good repute of company directors and transport managers will be retained once it is accepted that lies have been told to the TC (or indeed to DVSA enforcement officers). The regulatory position of transport operations is based upon trust and the premeditated fabrication of an account to avoid adverse findings involving directors and a transport manager so fundamentally undermines that trust that it is inevitable that a significant and serious regulatory response will result. It is suggested in the grounds of appeal that the TC erred in failing to consider any alternative regulatory action short of revocation. We disagree. Loss of repute was inevitable and the TC answered the Priority Freight and the Bryan Haulage questions in the only way he could

in the circumstances. The period of disqualification of two years also cannot be categorised as disproportionate.

47. It follows that we are satisfied that the TC's approach to the issues of good repute, revocation and disqualification was neither plainly wrong nor disproportionate. Further, we are not satisfied that this is a case where either the law or the facts impel us to interfere with the TC's decision as per the Court of Appeal decision in *Bradley Fold Travel Ltd & Peter Wright v Secretary of State for Transport (2010) EWCA Civ. 695*. The appeal is dismissed.

A handwritten signature in black ink, appearing to read 'Judge Beech', written in a cursive style.

**Her Honour Judge Beech
21 December 2018**