

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

**ON APPEAL from the DECISION of the TRAFFIC COMMISSIONER FOR THE
SCOTTISH TRAFFIC AREA (Ms J Aitken)**

Dated: 16 February 2019

Before:

Marion Caldwell QC	Judge of the Upper Tribunal
Mr. George Inch	Member of the Upper Tribunal
Mr. Stuart James	Member of the Upper Tribunal

Appellant: John Stuart Strachan T/A Strachan Haulage

Attendance:

For the Appellant: Mr James Backhouse of Backhouse Jones Solicitors.

Heard at: George House, 126 George Street, Edinburgh.

Date of Hearing: 2 July 2019

Date of Decision: 12 September 2019

DECISION OF THE UPPER TRIBUNAL

The appeal is dismissed.

Subject Matter

Use of unauthorised vehicles. Use of unauthorised operating centres. Inadequate monitoring systems. Pooling of drivers' cards. Excess drivers' hours. Curtailment.

Cases referred to:

Biogen Inc. v. Medeva Ltd [1997] RPC 1

Bradley Fold Travel Ltd & Peter Wright –v- Secretary of State for Transport [2010] EWCA Civ. 695

Bryan Haulage (No 2) T/2002/217

Dundee Plant Company Ltd T/2013/47

Thomas Muir (Haulage) Ltd v. Secretary of State for the Environment, Transport and the Regions 1999 SC 86

Piglowska v. Piglowski 1999 1 WLR 1360

Ptarmigan Solutions Ltd t/a Bankfoot Buses T/2009/513

Priority Freight T/2009/225

Introduction

1. This is an appeal from the decision of the Traffic Commissioner for the Scottish Traffic Area given on 16 February 2019. The appeal was considered at an oral hearing at which the appellant was represented by Mr James Backhouse, Solicitor. Mr Strachan was in attendance.
2. In summary, the Traffic Commissioner curtailed the operator licence from 8 vehicles and 8 trailers to 3 vehicles and 4 trailers for a period of at least two years with effect from 23.59 on 31 March 2019. In addition, the Traffic Commissioner gave Mr. Strachan “the severest warning it is possible to give an operator or a transport manager short of a finding of loss of repute”. She directed that Mr. Strachan attend a transport manager refresher course of at least two days. An application for a stay pending the outcome of this appeal resulted in the curtailment being revised to 5 vehicles and 5 trailers.

The Relevant Legislative Provisions

3. Section 2 of the Goods Vehicles (Licensing of Operators) Act 1995 provides that no person shall use a goods vehicle on a road for the carriage of goods, for hire or reward, or in connection with any trade or business carried on by him, except under a licence issued under the Act.
4. When a standard operator’s licence application is granted, the licence states upon it the maximum number of vehicles and, where appropriate, trailers the operator is authorised to use under the licence. A vehicle not specified in an operator’s licence is not authorised to be used under that licence. The number of vehicles and trailers used at any one time may not exceed the maximum number specified in the licence (sections 5 and 6).
5. The licence also specifies the authorised operating centre or centres; operating centres are places where the vehicles are normally kept. An operator may not use any other place as an operating centre for authorised vehicles (section 7).
6. In terms of section 13A of the 1995 Act, the holder of a standard operator licence must be, in addition to some other requirements, of good repute (section 13A(2)(b) and paragraphs 1-5, 9 and 12 of schedule 3 to the 1995 Act).
7. Section 26(1) of the 1995 Act provides that the Traffic Commissioner may direct that a licence be revoked, suspended or curtailed on any of a number of grounds. Those grounds include use of a place as an operating centre which is not specified on the licence, that vehicles or drivers have been issued with prohibition notices in the past five years, that statements made when applying for the licence were either false or have not been fulfilled (such as not keeping vehicles at the sites specified in the application), that an undertaking recorded in the licence has not been fulfilled (such as observing the rules on drivers hours, tachographs and keeping proper records).
8. Section 26(11) provides that curtailment includes directing that any maximum number of vehicles and trailers specified in the licence be reduced for the remainder of the licence or for any shorter period.

Background

9. The following is a summary of the background to this appeal taken from the decision of the Traffic Commissioner dated 16 February 2019 and other documentation within the bundle for the Traffic Commissioner and public inquiries in this case. The facts found by the Traffic Commissioner are not disputed.
10. Mr Strachan trades as Strachan Haulage. He has held a standard goods vehicle operator licence since February 1996. The licence was most recently renewed in February 2016 until 28 February 2021. As at the date of the public inquiry the authorisation was for 8 vehicles and 8 trailers. Mr Strachan has been his own transport manager since July 2010. The operating centres on the licence are listed as Pollock Scotrans, 10 Blackburn Road, Bathgate; c/o Oliphant, Lower Bathville, Armadale, EH48 2JS; and Mitsubishi, Nettlehill Road, Livingston EH54 5EQ. The vehicle inspection frequency is for 6 weekly checks by nominated external contractors.
11. In 2015, DVSA received intelligence that drivers at Strachan Haulage were pooling drivers' cards, that some drivers had two cards, that drivers were driving excessive hours and that the operator was using more vehicles than the number authorised. In November 2015, DVSA commenced an investigation into the operator. Coincidentally to the intelligence received, a Strachan Haulage vehicle, registration number DG61 XUN, was stopped for a routine roadside check on 3 October 2015. The driver was found to have exceeded the permitted driving hours and a TE160 driver hours prohibition notice was issued.
12. On 16 October 2015, Mr. Strachan applied to increase the licence authorisation from 8 vehicles to 13 and from 8 trailers to 12 and to add a new operating centre at 21 Coddington Crescent, Motherwell. On 18 May 2017 he made an application to add Coralinn House, Livingston as an operating centre and to remove the Oliphant, Lower Bathville site.
13. Traffic Examiner C. Laidlaw visited Strachan Haulage in December 2015 and found that there were no monitoring systems in place. An improvement notice was issued in January 2016.
14. A further systems check was carried out in August 2016. A retrospective review of this by TE B Wardrop assessed the systems as unsatisfactory. By December 2017 there had been some improvements, but negatives remained (paragraph 17). By August 2016, Mr Laidlaw had discovered that the operator was operating more vehicles than authorised.
15. The DVSA investigation was delayed by the fact that Mr Laidlaw, was ill for a considerable period then left DVSA in September 2017. The investigation was taken over by Mr Wardrop in December 2017.

Compliance History

16. The operator was subject to DVSA (VOSA) vehicle roadworthiness and maintenance investigations in 2004 and 2005 leading to Office of the Traffic Commissioner warning letters. A further 'S' marked prohibition in 2007 led to a call to a Public Inquiry heard by Deputy Traffic Commissioner McFarlane on 14 February 2008. The Deputy Traffic Commissioner gave a formal warning on maintenance and recorded the undertaking that Mr Strachan shall sit the CPC examination in 2008 and be responsible for safety inspections and maintenance of all vehicles and trailers via one maintenance provider.

One of the productions lodged on Mr Strachan's behalf at that Inquiry was a certificate, dated 9 February 2008, of attendance by Mr Strachan at a day course on digital tachographs. In February 2008 Mr Strachan removed himself as transport manager and put Mr Craig Kerr in place. Mr Strachan passed the national CPC examination with his certificate issued in January 2010.

17. In June 2010, a further warning letter had to be issued to the operator for an 'S' marked prohibition and adverse maintenance investigation. A further prohibition in June 2012 led to a further adverse DVSA maintenance investigation. Mr Alan Reid, as maintenance contractor at the time, knew of the defect and had ordered parts which were awaited. On 9 May 2013, the operator was issued with a final warning from the Traffic Commissioner's Office that further adverse matters might be considered at a Public Inquiry.

DVSA Performance reports

18. DVSA Performance reports, copied in the Inquiry brief, showed for the 5 years to 6 July 2018 that 5 roadworthiness prohibitions had been issued, including an 'S' marked on 3 October 2015. Two Traffic Examiner prohibitions were issued on 3 October 2015 for insufficient weekly rest. The annual test history for 5 years was 23 passes, 3 PRS fails, 3 fails; and for 2 years was 9 passes, 1 PRS fail. These reports are not comprehensive and only capture the vehicles which were specified at the point of test.

The Public Inquiry

19. The public inquiry was held at Edinburgh on 21 August 2018. Mr Strachan was in attendance and was represented by his solicitor. Evidence was heard from Mr. Strachan; Mr Alan Reid, an employee of Strachan Haulage with responsibility for maintenance and compliance; and Mr. B Wardrop, DVSA traffic examiner.
20. There was a considerable amount of detailed factual evidence presented in this case by DVSA. As the Traffic Commissioner's findings are not contentious, it is not necessary to summarise the evidence as this is narrated in the Traffic Commissioner's findings and reasoning which are summarised below (the decision is at pages 497 to 511).

The Traffic Commissioner's findings in fact and reasoning

21. In summary, the Traffic Commissioner found that the intelligence that DVSA had received that the appellant was operating more vehicles than authorised, that drivers were working excessive hours, that drivers were pooling their driver's cards and that drivers were in possession of more than one driver card was correct.
22. On 4 December 2015 Examiner Laidlaw requested documents including tachograph data for August to October 2015. There was discussion between the Examiner and Mr Strachan regarding the format of the data. After the request of 4 December 2015, but before any compliance with the request, all of Mr Strachan's vehicles were sent to MAN to have the old tachograph units replaced. The old units were destroyed. Mr Strachan said he had changed them from 1st to 2nd generation tachographs.

23. On his visit of 21 December 2017, Examiner Wardrop noted from the company card that the first downloading was on 7 December 2015, that is 3 days after Examiner Laidlaw's letter. The company card was issued on 20 February 2013. The Traffic Commissioner found that between that date and 7 December 2015 there had been no vehicle unit downloadings. Examiner Wardrop's analysis revealed "huge failings" by the operator. For 16 vehicles operated between April 2013 and December 2015 there were no downloads at all.

24. The Traffic Commissioner found that as at 2015 Mr. Strachan was a non-compliant operator, and stated:

He did not have systems in place to comply with the driver's hours and tachograph regulations. He was not downloading digital tachographs when he should have been. I find that it was not a coincidence that all 10 of his vehicles had their tachograph units replaced immediately DVSA took an interest in his driver's hours compliance. He said he did it to upgrade to better equipment. That certainly was a useful outcome but the timing beyond doubt was to remove any chance of DVSA's Examiner having access to the data needed to analyse drivers' hours. The operator could not show that analysis pre-dated the change of tachographs and that fortifies me in my conclusion (paragraph 78).

25. In November 2017 because of the DVSA investigation, Strachan Haulage engaged a transport consultant, Mr Michael Gray. The Traffic Commissioner found that the hiring of the consultant was a device to hide what was going on below the surface. The consultant's analysis, she found, was superficial and confined to infringement reports, with no cross checking of driver's identities or other documentation. His analysis was limited to what was downloaded by Mr. Strachan and by what was put into Tachomaster to be analysed.

26. The Traffic Commissioner found that at various times during 2015, 2016 and 2017 Strachan Haulage was operating more vehicles than authorised:

In 2015 and 2016 Traffic Examiner Laidlaw found that Mr Strachan was operating more than 8 vehicles. Mr Strachan was registered keeper of more than 8 vehicles from August 2015. Traffic Examiner Wardrop analysed downloaded data from 2016 to November 2017. During 3 periods more than 8 vehicles were operated: March to June 2016, 19 days; March to May 2017, 34 days; and September to November 2017, 61 days (paragraph 72).

27. She rejected Mr. Strachan's explanation that his use of more vehicles than authorised on his licence had been due to the delays in the DVSA investigation and his belief that his variation application would be granted. She found that he had been using more vehicles than authorised even before he applied for an increase in authorisation and before the DVSA investigation had started. She found that he had blatantly put extra vehicles on the road in 2015 when he gained extra work (paragraph 79). She further pointed out that an operator is not entitled to assume an application for increased authorisation made it lawful for the operator to use more vehicles than authorised before the variation was granted; this was made clear in the acknowledgement letters from Leeds (paragraphs 72, 73, 79 and 80.) Further, once her office became aware that Mr Strachan was subject to an enforcement investigation, the variations could not be granted (paragraph 80).

28. The Traffic Commissioner found that drivers had been working excessive hours and not taking rest breaks. The Traffic Commissioner found that one of the Strachan Haulage drivers, Mr Lasota, had been using Mr. Strachan's driver card in addition to his own. Mr. Lasota and driver Sobczyk had been using the cards of other drivers to extend their driving hours. Driver Sieczka, she found, had been using Mr Reid's card. This occurred in 2016 and 2017. The Traffic Commissioner rejected Mr Strachan's evidence that he had been unaware of this. She found that Mr Strachan, as traffic manager and the person who obtained and organised the work, was aware of this. She found that it was inconceivable that he did not know that drivers' hours rules were being stretched to get work done (paragraphs 83, 84 and 85).
29. While the Traffic Commissioner makes no specific finding about the use of unauthorised sites as operating centres, she had evidence from Mr Wardrop and Mr Strachan that the Coralinn House and Coddington Crescent sites had been in use as "operating centres" for some time (paragraphs 16, 31, 38 and 40). This is evidence which she appears to have accepted. It was also conceded in the closing submissions at the public inquiry (paragraph 64).
30. The Traffic Commissioner acknowledged that the DVSA investigations had not gone smoothly. Examiner Laidlaw had been thwarted in his initial dealings by the absence of data and the need to start again. Nor had Examiner Laidlaw's absence from work assisted. However, in the course of that investigation from late 2015 to 2018 she found that what was being uncovered was not a compliant business but one which did not have credible systems for ensuring compliance with the Working Time Directive and with the drivers' hours and tachograph rules. The business, she found, was serially non-compliant and Mr Strachan, by his own admission, an incompetent operator and transport manager (paragraphs 81 and 82).
31. In considering her disposal, the Traffic Commissioner carried out a balancing exercise by identifying and weighing positive and negative features.
32. On the positive side was the appointment of the traffic consultant. Although his analysis was limited, it was better than nothing and had resulted in infringement reports being printed out, which drivers and Mr Strachan had to sign. Some drivers had received written warnings. Another positive was that the proposed new operating centres were suitable. While it had taken some regulatory action and effort to get the maintenance systems in order, that appeared to have been achieved and that was also a positive. Mr. Strachan had been candid in admitting that he was operating more than the number of vehicles authorised. He was civil to the DVSA Examiners; while he had not provided information requested by Mr Laidlaw, he had not frustrated Mr Wardrop when he took over the investigation in 2017. Another positive was the length of time Mr Strachan had been in the business, albeit his record was not unblemished.
33. On the negative side, the Traffic Commissioner found that Mr Strachan had not been of assistance to her when she asked what the impact of regulatory action would be on the business; he was vague. She was "mistrustful" of his evidence (paragraph 91). Regarding the evidence of Mr Strachan that Mr. Reid was shortly to be put through the CPC examination, she doubted there could be a genuine expectation that he would pass as he would be taking the examination without sufficient time to study. She noted that her office had not been informed that he had passed the CPC examination

(paragraph 90). Mr Strachan had shown no remorse or contrition for the wrongs of his business. She stated:

He seemed to think it was okay to be lacking in knowledge, that somehow DVSA would sort that out for him and tell him where he was wrong; that it was okay to operate in excess whilst Leeds went through the motions of the 9 weeks processing; that it really had nothing to do with him that some of his drivers were using other persons' cards including his own; that his own card could get into the hands of others. Drivers sense the culture of an operation. It is trite experience in the haulage industry that if the operator and/ or transport manager (in this case, one and same) do not bother to do downloads or check data, then drivers can take that as a signal that it is acceptable to push the limits (paragraph 92).

34. The Traffic Commissioner considered that on the facts of this case, it fell within the category of severe in the Senior Traffic Commissioner's Guidance Document No. 10 and thus revocation and disqualification were open to the Traffic Commissioner. However, she held back from this, apparently on the basis of the weight to be given to the length of time Mr Strachan had been in the haulage business. She commented however, that the relationship of trust between Mr. Strachan and the Traffic Commissioner hung by a gossamer thread. Instead, she imposed a curtailment on the licence. She recognised that the curtailment might take the business to the brink of survival. However, she considered that he had been responsible for serious breaches of the licence undertakings and reputable operation. She commented, under reference to *Dundee Plant Ltd T/2013/47* that if the business did not survive "so be it" (paragraph 94).
35. The Traffic Commissioner imposed a curtailment of the licence to three vehicles and four trailers for a period of at least two years; no increase in authorisation to be applied for earlier than the expiry of two years; and any application for an increase to be made by way of variation. She stated (with some minor corrections):

95. My reasoning for such a reduction in authorisation and to a level which will cause financial grief to Mr Strachan is that this is a severe case given the lack of systems, the drivers hours offending, the use of others' cards and that the imperilling of others' safety through risk of driver fatigue cannot be readily excused and forgiven. Mr Strachan allowed the rest of us to be at risk. He now has to pay the price for that. He also has to pay the price of offending against fair competition - he will have undercut others to get the MoD, Mitsubishi, Lidl and Tesco work. He will have undercut good decent, honest, caring operators whose drivers were not pooling their cards or using others' cards or slicing their breaks or rest. He has been doing this since at least 2015 and from 2015 operated with excess authorisation – and for that reason the curtailment cannot be in weeks or months but has to be measured in years to, as I have put it in other decisions, "re-calibrate" fair competition. He went maverick in 2015 when he put more vehicles on the road as a non-compliant operator. Now I show him the consequences of such and by the level of the curtailment I am giving more than a nod to fair competition. I am acting to release his work to the honest compliant market.

96. Technically I am allowing Mr Strachan to retain his repute as transport manager given the indivisibility of repute and that loss of repute has to be a proportionate finding. I am doing this because I can, but I direct that he attends a transport manager refresher course of at least two full days duration and that by 31 May 2109 with evidence of attendance submitted without any delay or reminder to the Office of the

Traffic Commissioner in Edinburgh. If need be, he should travel to England for such. If he does not go on such a course, he can expect to be recalled to Public Inquiry.

Appeal to the Upper Tribunal

The role of the Upper Tribunal in an appeal from a decision of a Traffic Commissioner

36. Paragraph 17(1) of Schedule 4 to the Transport Act 1985 provides:

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

37. The following principles are drawn from the decision of the Court of Appeal in the case of *Bradley Fold Travel Ltd & Peter Wright –v- Secretary of State for Transport* [2010] EWCA Civ. 695:

The Tribunal is not required to rehear all the evidence by conducting what would, in effect, be a new first instance hearing. Instead it has the duty to hear and determine matters of both fact and law on the basis of the material before the Traffic Commissioner but without having the benefit of seeing and hearing the witnesses.

The Appellant ‘assumes the burden’ of showing that the decision appealed from is wrong.

In order to succeed the Appellant must show not merely that there are grounds for preferring a different view but that there are objective grounds upon which the Tribunal ought to conclude that the different view is the right one. Put another way it is not enough that the Tribunal might prefer a different view; the Appellant must show that the process of reasoning and the application of the relevant law require the Tribunal to adopt a different view.

38. The grounds of appeal are at pages 729-735. Mr Backhouse kindly provided a skeleton argument upon which he expanded at the Upper Tribunal hearing. The skeleton argument stated that the factual background as set out in the Traffic Commissioner’s decision and grounds of appeal was not contentious. The core grounds of appeal were as follows:

(i) *The Traffic Commissioner did not weigh up the positive and negative features of the appellant’s position. The substantive criticisms of the operation were old (between six and two years old (2013 – 2017)) by the date of the decision (16 February 2019). At the date of the decision, the appellant was broadly compliant and had been for a considerable period of time --- since August 2017 when they sought assistance from the consultant in relation to the tachograph compliance.*

(ii) *The age of the case generally (entirely through no fault of the appellant) means that the balancing act and the approach to the Bryan Haulage (No 2) (T/2002/217)/Priority Freight (T/2009/225) questions should have been answered much more favourably.*

- (iii) *The delay in dealing with the appellant's applications, many years, was a significant relevant factor to two of the Traffic Commissioner's central criticisms— use of extra vehicles and use of unauthorised operating centres – and this delay put abnormal pressure on the appellant— this should have been taken into account.*
39. On grounds (i) and (ii), he submitted that there were several positive features to which the Traffic Commissioner had failed to give sufficient weight or consideration. These included the finding that the maintenance systems were in good order; that Mr. Reid had been effective on the maintenance side, that he had been given additional responsibilities by the appellant, that he had been appointed Compliance Officer and submitted for the transport manager CPC; and that the DVSA investigation had found positive elements such as that between August 2016 and December 2017 there had been improvements, including that driver licences were checked 6 monthly. Further, he submitted, the Traffic Commissioner had placed too much weight on the historic position and not enough on the recent maintenance and tachograph compliance statistics which were a more accurate reflection of Mr Strachan's current attitude to compliance. In contrast, he submitted, she gave detailed consideration to the negative features.
40. On ground (iii), Mr. Backhouse submitted that the Traffic Commissioner should have recognised the adverse impact that the DVSA timescale and the Office of the Traffic Commissioner application process timescale had had on the appellant's business. In terms of EU1071/2009, article 11, the time limit for the examination of an application should not exceed 3 months. He accepted that it was common for applications to take longer to be dealt with in the UK. In this case it had taken over two years to come to public inquiry which was far too long. This had had a negative impact on the operator that the Traffic Commissioner should have taken into account. He had to curtail his business and stop using the unauthorised vehicles.
41. He submitted that the Traffic Commissioner had answered the *Bryan Haulage* question in the appellant's favour and not revoked his licence. The Traffic Commissioner must therefore have accepted that he would be compliant in the future. Mr Backhouse did not dispute the principle that the Traffic Commissioner was then entitled to take action against the licence, but the regulatory action should not be punishment. It should be done to secure the objectives of the regulatory system. The curtailment imposed by the Traffic Commissioner did not serve the regulatory regime. If she wanted to give him a nudge to ensure compliance a typical nudge would have been of the order of a 4 to 6 months curtailment. The curtailment to 3 vehicles and 4 trailers for two years was too severe. A curtailment to 5 vehicles and 5 trailers for 6 months would have been severe but more appropriate in the present case. This would allow him to demonstrate compliance before making an application for an increase.

Discussion and decision

42. In considering the grounds of appeal, we remind ourselves of the task of the Upper Tribunal and the principles set out at paragraphs 36 and 37 above. The first instance decision is taken to be correct until the contrary is shown by objective grounds upon which the Upper Tribunal ought to conclude that a different view is the right one (*Subesh & Ors v Secretary of State for the Home Department* [2004] EWCA Civ 56, paragraph 44).

43. It must be borne in mind that the Traffic Commissioner has had the considerable advantage of seeing, hearing and assessing the witnesses. As was stated by Lord Hoffman in *Piglowska v. Piglowski* (1999 1WLR 1360):

First, the appellate court must bear in mind the advantage which the first instance judge had in seeing the parties and the other witnesses. This is well understood on questions of credibility and findings of primary fact. But it goes further than that. It applies also to the judge's evaluation of those facts. If I may quote what I said in Biogen Inc. v Medeva Ltd [1997] RPC 1:

"The need for appellate caution in reversing the trial judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."

44. These factors are relevant to the present case and the impression the Traffic Commissioner formed and the weight she attached to the positive and negative factors she had identified. At many points in her decision, the Traffic Commissioner rejected the evidence and explanations given by Mr. Strachan and she gave cogent reasons why that was so. She clearly did not consider that he was being entirely candid in his evidence to the public inquiry. Further, she found that he showed no remorse or contrition for the wrongs of his business. While the Traffic Commissioner had drawn back from revocation, her trust in Mr Shearer was slight.
45. It is plain to see in the decision that the Traffic Commissioner did indeed carry out a balancing exercise and weighed the positive features in the balance against the negative features (paragraphs 86 to 94). The Traffic Commissioner acknowledged that there had been an improvement in the maintenance systems which she found to be in good order. She noted, however, that it had taken some regulatory action and effort to prompt this improvement. Mr Reid had played his part in that improvement, she found. She recorded that he had been appointed compliance officer only a week before the public inquiry, for which he was receiving no additional wage (paragraph 60). She queried how genuine the expectation could be that he would pass the CPC examination when he was being presented with so little time for tuition or study. It may easily be inferred from this that the Traffic Commissioner had considered this and, not unreasonably, was sceptical about Mr. Reid's elevation and potential promotion to transport manager. She also noted the improvements brought about by the appointment of Mr Gray; albeit she considered these to be superficial and limited (see paragraph 25 above). Indeed, when Mr. Strachan was interviewed by Mr. Wardrop on 11 April 2018, Mr Strachan was unable to produce a Working Time report which, Mr. Wardrop considered, meant there was no system (page 501, paragraph 32). As regards, the compliance statistics, we understood that Mr Backhouse accepted that these related only to the authorised vehicles and not the unauthorised vehicles, which were being used up until May 2017. Weighing against the positive features was the

fact that, as the Traffic Commissioner found, the appellant had persistently flouted the regulatory regime in terms of exceeding the number of vehicles he was permitted to use (even on his own evidence, Mr Strachan stated that use of unauthorised vehicles had continued until May 2017 (page 714, paragraph 44)), had continued to use unauthorised operating centres and had been aware of drivers working excessive hours and pooling cards in 2016 and 2017.

46. Mr. Backhouse argued that the Traffic Commissioner failed to take into account the adverse impact the length of time the DVSA investigation had had on the appellant's business. The Traffic Commissioner found that Mr. Strachan was partly responsible for the delay in that he frustrated the inquiry by taking action which meant that pre-existing records were destroyed. It was unfortunate that there was a delay caused by the illness of the Traffic Examiner followed by his departure from DVSA. However, when the investigation resumed, continued failings were uncovered. Nothing had been done by the appellant in the interim to rectify many failings, as was incumbent upon him under the 1995 Act. Use of unauthorised vehicles and operating centres continued and drivers were breaching the driver hours rules and regulations, with Mr Strachan's knowledge. As the Traffic Commissioner correctly pointed out, once her office became aware of the unlawful operation and ongoing investigation, the variation applications could not be granted. Given that use of unauthorised vehicles continued and excessive driver's hours were being worked, it is questionable what adverse impact any delay had on the business. When Mr Strachan was asked what effect regulatory action would have on the business, the Traffic Commissioner found him to be unforthcoming.
47. Regarding the reference to Article 11 of Regulation (EC) 1071/2009, this appears to relate to applications for licences rather than variations. In any event, as we have held, there were valid reasons for the timescale in this case.
48. We therefore do not agree that the Traffic Commissioner had not considered the positive features and attached proper weight to them. She clearly did. The weight to be attached to these features is really a matter for her (*Ptarmigan Solutions Ltd t/a Bankfoot Buses T/2009/513* and cases cited at paragraph 43) as she saw and heard the witnesses give their evidence. Based on the Traffic Commissioner's findings in fact and reasoning, we do not agree that she was plainly wrong in the positive and negative features which she identified or on the weight which she attached to these features.
49. Regarding the curtailment under section 26(1) and (11) to 3 vehicles and 4 trailers for a period of two years, Mr. Backhouse argued that regulatory action should not be punishment but exercised to achieve the aims of the regulatory regime. He argued that the curtailment in this case was more akin to punishment and would not achieve the aims of the regulatory regime.
50. The Traffic Commissioner considered this to be a severe case given the lack of systems (until improved as a result of regulatory action), tachograph failures, drivers' hours offending, use of others' cards and imperilling others' safety through driver fatigue. Further, she noted that Mr Strachan had been able to undercut competitors and offend against fair competition since 2015. Added to which, Mr Strachan showed no remorse for the wrongs of his business. She felt these breaches could not be excused lightly and that the situation required to be recalibrated.

51. One of the aims of the regime is deterrence, both for the appellant and for operators as a whole, who might be tempted to flout the system. This was pointed out in the Full Bench decision of the Inner House of the Court of Session in *Thomas Muir (Haulage) Ltd v. Secretary of State for the Environment, Transport and the Regions* 1999 SC 86, where the Lord Justice-Clerk (Cullen) in delivering the opinion of the court stated (at page 92):

We can see no justification for treating the direction under [sec 26\(1\)](#) in the same way as if it were a punishment administered by a criminal court and hence arrived at by reference to the full range of considerations which such a court would take into account. This appears to us to involve a confusion in roles. When Parliament intends to invoke the criminal law, it does so expressly by enacting provisions which define the offence and its penal consequences.

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. This is in addition to the obvious consideration that a direction may be used to provide direct protection to the public against dangers arising from the failure to comply with the basis on which the licence was granted. Whether or not such disciplinary considerations come into play must depend upon the circumstances of the individual case.

52. An example of this, in practice is *Dundee Plant Company Ltd* T/2013/47 in which the Tribunal referred to the “*real dilemma*” which faced the Traffic Commissioner when considering the interests of the operator on the one hand and the public interest in fair and consistent regulation on the other. The Tribunal concluded that the Traffic Commissioner was right to take into account the following passage quoted by the Traffic Commissioner and taken from an unreported decision on an application for a stay:

Other operators with knowledge of this case may be tempted to say to themselves – ‘this operator appears to be getting away with it so why should we bother to incur expenditure of time, trouble and money to run a compliant operation?’ In my view, it only needs one or two other operators to adopt this approach in response to this case to lead to greater and greater numbers doing so in future. If that happens there is a real risk that the operators’ licensing system, which has made a significant contribution to road safety, will be fatally undermined.

53. It seems to us that these are precisely the considerations that the Traffic Commissioner had in mind when she imposed the curtailment under section 26. We are unable to hold that the Traffic Commissioner was plainly wrong or reached a plainly wrong result in the curtailment imposed, which was proportionate in the circumstances of this case.

54. Mr Backhouse pointed out that the purported ban on making an application for an increase within the two-year period of the curtailment was not within the power of the Traffic Commissioner. We agree. However, the practical effect of the two-year curtailment is that should the operator apply for an increase before the elapse of two years from the effective date of the curtailment, the application is unlikely to be granted.

Decision

55. The appeal is dismissed.
56. An application for a stay pending the outcome of this appeal resulted in the curtailment being revised to 5 vehicles and 5 trailers. The appellant would have been aware that in the event the appeal was unsuccessful, the original curtailment imposed by the Traffic Commissioner was likely to be given effect, without taking account of the period of partial curtailment. That is what we have decided is just in the present case. To do otherwise, would allow the appellant to benefit from a period of partial curtailment thus shortening and reducing the original curtailment imposed by the Traffic Commissioner.
57. With effect from 23.59 on 24 October 2019, the operator licence held by John Stuart Strachan is curtailed in terms of section 26 of the 1995 Act to three vehicles and four trailers and that for a period of at least two years.

MARION CALDWELL QC
Judge of the Upper Tribunal
Date: 12 September 2019

