T/2019/047
T/2019/051
[2020] UKUT 00047 (AAC)

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

1st Appellant:	**Keith BUTE (047)**
2nd Appellant:	**Clarks Caravan & Boat Haulage Ltd (051)**
3rd Appellant:	**Martyn CLARK (051)**
4th Appellant:	**Paul CLARK (051)**
On Appeal From:	**The Traffic Commissioner (West of England Traffic Area)**
Reference:	**OH 1073895**
Public Inquiry:	**27th June 2019 Bristol**
Decision Date:	**5th July 2019**
Appeal to UTAAC:	**24th July 2019 (047) 5thAugust 2019 (051)**
Upper Tribunal Hearing:	**30th January 2020**

DECISION OF THE UPPER TRIBUNAL
ON AN APPEAL AGAINST THE TRAFFIC COMMISSIONER

Upper Tribunal Judge H.Levenson
Upper Tribunal Member G.Inch
Upper Tribunal Member J Robinson

100.13 (Traffic Commissioner Appeals: Disqualification)

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)
ON APPEALS AGAINST THE TRAFFIC COMMISSIONER FOR
THE WEST OF ENGLAND TRAFFIC AREA

Decision

1. One of these appeals succeeds to a limited extent. In respect of the 1st appellant Mr Bute (T/2019/047) we reduce the period of disqualification as a transport manager to one year from 0001 on 5th July 2019 and until he sits and passes again his transport manager CPC examination. In all other respects we confirm the decisions made by the Traffic Commissioner.

Hearing

2. We held an oral hearing of these appeals at Field House (London) on 30th January 2020. Mr Bute appeared in person and was not represented. The other appellants did not appear in person but were represented by Harry Bowyer of counsel, instructed by Bloomsbury Law. There had been a further party involved in the proceedings before the Commissioner (MDC, who held a separate operator's licence) but he was not a party to these appeals before us. We have anonymised those who feature in this case but were not parties to the appeal to us and not in a position to make their own submissions to us.

3. Mr Bute made a preliminary application to have his appeal heard separately from the other appeal because he had not been in touch with the other parties for over a year and there was some animosity between them. The presiding judge heard this application in the absence of any other party but refused it because the appeals both arose out of the same background facts. Even if the cases were separated the other parties could observe Mr Bute's appeal because this was a public hearing. It would also probably be in Mr Bute's interests to hear what Mr Bowyer had to say on behalf of his clients.

The Parties

4. The first appellant is Keith Bute. He was appealing against the decision of the Commissioner that he had lost his good repute as a transport manager and was disqualified from acting as such in any member state for a period of three years and until he sat and passed again his transport manager CPC examination. He ran a transport consultancy and training business and would act as a transport manager on new licences generally while the licence holders themselves became qualified. He met the third appellant, Martyn Clark, through a mutual acquaintance and became the transport manager on the operator's licence held by the 2nd appellant, "the limited company". His evidence was that Martyn Clark did not want to communicate with him directly and did not do so for over a year. Instead he dealt with one of the drivers, mainly through monthly texts. He had no role in assigning loads. He advised against a plan to increase the authorisation before adequate finance was in place. He had been unaware that LT had been employed as a driver. He was not aware of any agreement

with MDC. He visited the operating centre ("the yard") about once a month and usually popped into the office about once a week on the way back from another client. He was contacted in a panic in November 2018 about the DVSA involvement. On 29th January 2019 he was contacted by new consultants on behalf of the other appellants and told that his services were no longer required. He came off the licence shortly after. He accepted that he should have nipped in the bud what was going on and that he could have approached the Commissioner but did not do so. He felt that he had carried the can and been treated harshly. It was silly to make him resit the CPC when he had previously been involved in drafting materials for it, and it was unfair to impose a disqualification of more than six months.

5. The second appellant is Clarks Caravan & Boat Haulage Ltd ("the limited company"). From 2007 it held a standard international goods vehicle operator's licence authorising the use of four vehicles and four trailers from an operating centre in Lee-on-the-Solent. There was a significant history of compliance problems, most recently in December 2014 when the licence was suspended for nine days and Martyn Clark and Keith Bute were required to undertake refresher training. The limited company was appealing against the decision of the Commissioner to revoke its licence with effect from 2359 on 17th August 2019 and to disqualify it from holding or being involved in the management of an operator's licence for a period of one year with effect from 17th August 2019.

6. The third appellant is Martyn Clark. In the Commissioner's decision he is mistakenly referred to as Matthew Clark (heading before paragraph 26) and Martin Clark (on the front page and in paragraph 77). He founded the limited company with his brother (the fourth appellant) and at the relevant times was a director of the limited company. He was appealing against the decision of the Commissioner to disqualify him from holding or being involved in the management of an operator's licence for a period of one year with effect from 17th August 2019.

7. The fourth appellant is Paul Clark. He founded the limited company with his brother (the third appellant) and at the relevant times was a director of the limited company and a driver for it. He was appealing against the decision of the Commissioner to disqualify him from holding or being involved in the management of an operator's licence for a period of one year with effect from 17th August 2019. He had told a traffic examiner that his role was mainly driving and Martyn Clark acted in the director role.

Background

8. There was no significant challenge to the factual findings made by the Commissioner (as contrasted with the conclusions to be drawn from them).
On 12th October 2018 a DVSA traffic examiner "encountered" vehicle V8EXC at the roadside being driven by LT, who said that he worked for MDC. The vehicle was found to be overloaded by more than five tonnes. On 15th November 2018 a different DVSA traffic examiner encountered the same vehicle, again being driven by LT who said that he was working for "Clarks". However, the operator's licence disc in the window was that of MDC. A fuel card showed Clarks as paying for the fuel. Analysis showed a number of drivers' hours offences. Later that day Martyn Clark told the

vehicle examiner that an arrangement was in place with MDC in relation to the work and the vehicle but that the limited company was paying for the vehicle's running, upkeep and fuel. LT stated under caution that he regarded MDC as just another driver and that "Martyn" was his boss. Subsequently LT was convicted and fined in relation to drivers' hours and overloading offences. Further tachograph analysis identified offences in relation to Paul Clark, who was subsequently convicted and fined in respect of them.

9. According to the Commissioner, the second vehicle examiner "found management systems to be basic and there was no record of driver debriefing of infringements found". MDC told the examiner that he had not been using his own operating centre for about a year, instead parking at the limited company's operating centre (paragraph 6 of the Commissioner's decision).

10. This all led to a call of the parties to a public inquiry in the appropriate terms. MDC told the Commissioner that his own business had run into financial trouble and he had sold his trucks and leased two spare vehicles from the limited company, which he left covered by the company's insurance. He drove one vehicle and LT drove the other. The limited company also paid the tax and the drivers, the company's maintenance provider also looked after these two vehicles and work was contracted through the limited company. The overloading incident was in respect of a contract with the limited company.

11. Martyn Clark told the Commissioner that hiring the vehicles had been MDC's idea. There were two spare vehicles because they were updating the fleet. Mostly he would deal with MDC but sometimes would directly contact LT, as he had when one of the drivers' hours offences was committed.

The Commissioner's Findings

12. Proceeding on the basis that the hire arrangement between MDC and the limited company was already in place, although "fundamentally deficient and unlawful", the Commissioner found that LT was a servant of the limited company on 20th October 2018, on 15th November 2018 "and, again, more likely than not, on every day in between and before and after" (paragraph 34). He was displaying a disc in the name of MDC and that led to the conclusion that the limited company was "loaning" (by which he meant "borrowing") a disc and licence authority to operate more vehicles than authorised. This finding was strengthened by the fact that there had been an intention to apply to increase its own authority. The use of MDC's licence "circumvented the due process and provided Clarks with a clear and unfair commercial advantage over compliant operators" (paragraph 36). The hire agreement did not include a price for the hire, there was no cross-invoicing or reconciliation of costs, it was unlikely that MDC would not have his own insurance if he was actually operating the vehicle in his own business (paragraph 38). The Commissioner concluded that "the hiring arrangement is a sham" and that "I am in no doubt that [MDC] was actually working as a servant of Clarks and, separately, lending his licence authority". It followed that the limited company was operating six vehicles, fifty percent over authority (paragraph 39).

13. The Commissioner also found that there were serious deficiencies in the arrangements for maintaining vehicles in a fit and serviceable condition. There were no proper facilities for under vehicle inspections. Although there had been no prohibitions from the end of 2015 until March 2018 there was then a bad year with prohibitions for tyres, seat belts, exhaust system, horn and ABS. Maintenance documentation was average to poor (paragraphs 41 to 44). There were also problems with the management of drivers' hours (although there had been a recent improvement) and a lack of real management of infringements.

14. The Commissioner took the view that the maintenance, overloading and drivers' hours matters would not of themselves lead to a finding of loss of good repute, although they did provide "a backdrop of a culture of non-compliance" (paragraph 65). However, the company and its directors could not be trusted to comply and operating through "a sham hiring arrangement" went to the "heart of trust" (paragraph 67). The sham hiring agreement was "a reckless and deliberate act" categorised as "severe" (see below for the significance of this label).

Mr Bute

15. The Commissioner concluded that Mr Bute had allowed "a careless culture of non-compliance to fester" and had taken no action to address the lack of co-operation (paragraph 60). He had no idea that the business was operating six vehicles, did not know that LT was an employee, knew nothing of the overloading incident until some time later, was transport manager in name only and did not provide continuous and effective management. It followed that his good repute was forfeit. That being the case he had to be disqualified (paragraph 62). Although some of the detailed findings have been disputed, Mr Bute has not really challenged the conclusion as to his loss of repute and we are satisfied that the Commissioner was justified in reaching that conclusion. In terms of the period of disqualification, we conclude that, taking account of the appropriate share of the blame, it was disproportionate to impose a period of three years when the periods of disqualification imposed on the other appellants were for one year.

The Statutory Guidance

16. Subject to certain limitations in relation to Wales and Scotland, section 4C of the Public Passenger Vehicles Act 1981 empowers the Senior Traffic Commissioner to give to the Commissioners guidance or general directions as to the exercise of their functions under any enactment. Such guidance is set out in a series of documents referred to as "Statutory Documents" and Statutory Document No 10 deals with "The Principles of Decision Making & The Concept of Proportionality". At the time of the Commissioner's decision in this case the version in force was that of November 2018 and Annex 4 dealt with "Suggested Starting Points for Consideration of Regulatory Action". The Commissioner referred to this annex in his decision (paragraph 68) and his application of it was challenged in the grounds of appeal advanced by Mr Bowyer. The introduction to the annex reads as follows:

> "Each case must be dealt with on its own facts. In determining how to dispose of most cases the traffic commissioners will not only consider the alleged

> infringements but also the potential impact on the operator. A case may involve many variables including different variations of alleged breaches, negative and positive features. What appears on the face of the papers to be very serious may not in fact warrant severe regulatory action. As a result, whilst the following guidance can provide for consistency in approach by suggesting starting points for regulatory action this Annex cannot be used to predict the outcome of a public inquiry or give rise to a legitimate explanation. The presiding traffic commissioner retains absolute discretion to move up or down from the suggested starting points.

17. Four categories of case are then suggested.

> severe: deliberate or reckless act(s) that compromised road safety and/or gave the operator a clear commercial advantage and/or causing or permitting driver offending and/or any attempt by the operator to conceal offences or failings. This might result in revocation with or without detailed consideration of disqualification, suspension for an extended time period, or significant indefinite curtailment;
>
> severe to serious: persistent operator licence failures with inadequate response or previous public inquiry history. If not severe this might result in revocation with consideration of disqualification or suspension for up to 28 days or significant time limited curtailment;
>
> serious to moderate: two or more negative features and some positive features. If not serious this might result in suspension for up to 14 days or curtailment that does not materially affect the transport operation;
>
> moderate to low: limited negative feature(s) and several positive features. If not moderate this might result in a formal warning that attendance at a further public inquiry will be likely to lead to regulatory action.

There are also non-exhaustive lengthy lists of positive and negative features that might be taken into account.

18. We make two general points. The first is to emphasise that the annex contains suggestions but is not a set of legally binding provisions. The second is that even where the statutory documents are binding on Commissioners, they are not binding on the Upper Tribunal (although some of the sources for the guidance might be).

The Commissioner's Conclusions

19. In paragraph 69 of his decision the Commissioner stated:

> "I judge the sham hiring agreement as a reckless and deliberate act which points towards a categorisation of "severe". I categorise the transport manager position in exactly the same way. Further, and as a direct result, there has been a persistent failure to analyse tachograph records such that drivers hours offences went unmanaged. Management of maintenance has been poor. The

> transport management arrangements have been the subject of a previous public inquiry. This is an operator who appears to struggle to learn."

20. The Commissioner acknowledged that maintenance is taking place, there is (unladen) brake testing, and there was now involvement of a new consultancy. However, the operator "has exhibited a severe level of untrustworthiness" (paragraph 70). In paragraph 72 he stated, "Having found that I cannot trust this operator, I do find that the behaviour is such that this is an operator that needs to be put out of business". In paragraph 73 he concluded that while this was the operator's third public enquiry, it is the first time that severe action had been taken "so I keep the disqualification at the lower level" (paragraph 73). We are surprised that the Commissioner regarded this latter point as a reason for mitigating the penalty.

The Grounds

21. Mr Bowyer grouped his submissions into three grounds of appeal. The first was that the Commissioner incorrectly applied the guidance in Annex 4 and it was plainly wrong to categorise the case as "severe" in view of the positive factors. There was also a suggestion in this ground that road safety was not at stake. Mr Bowyer seems to have overlooked the issues of the overweight vehicle and the tachograph offences, as well as the dishonesty and attempted deception. The use of vehicles in excess of authorisation also gave the appellants an unfair financial advantage. We find nothing wrong with the Commissioner's findings and conclusions here.

22. The second argument was that in view of the improving situation the Commissioner incorrectly applied the Priority Freight question relating to future trust. In our view the Commissioner was entitled to find that he could not trust the operator for the future and there is nothing in Mr Bowyer's argument to persuade us otherwise.

23. The third argument was that the Commissioner had disqualified his clients without giving them an opportunity to make submissions on the disqualification or its length. There is nothing in either the transcript or the written decision to show that Mr Bowyer was wrong on this point, and we proceed on the basis that he was correct. However, this did not depend on further factual evidence and was a matter that the Upper Tribunal itself could remedy. Mr Bowyer was invited to address us on the matter. He suggested that this should not be done in the absence of his clients and further instructions but, in our view, it was a matter to which he must have given consideration and he did address us on the matter. In essence he argued that the case was not bad enough to warrant disqualification in addition to revocation. We disagree and find that the one year disqualification was the least that the Commissioner could properly have imposed.

Conclusions

24. For the above reasons we make the orders indicated in paragraph1 above.

H. Levenson
Judge of the Upper Tribunal
13th February 2020