IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER
(TRAFFIC COMMISSIONER APPEALS)

Appeal No. T/2018/67
NCN: [2020] UKUT 0144 (AAC)

ON APPEAL from a DECISION of the TRAFFIC COMMISSIONER for the North West of England

Dated:	10 September 2018
Before:	Mr M Hemingway: Judge of the Upper Tribunal Mr D Rawsthorn: Member of the Upper Tribunal Mr L Milliken: Member of the Upper Tribunal
Appellant:	Daniel Jemmett
Reference:	OCO293454
Attendances:	Mr D Josse, QC (Counsel)
Heard at:	Field House, Breams Buildings, London, EC4A 1DZ
Date of Upper Tribunal Hearing:	13 February 2020
Date of Decision:	30 March 2020

DECISION OF THE UPPER TRIBUNAL

The appeal is dismissed.

Subject matter:
Good repute: professional competence: disqualification.

Cases referred to:
Bradley Fold Travel Ltd and Anor v Secretary of State for Transport [2010] EWCA Civ 695
Midland Container Logistics Ltd and James Donlon DK Barnsley & Sons Ltd v Secretary of State for Transport [2020] UKUT 0005 (AAC).

REASONS FOR DECISION

Introduction

1. This is an appeal to the Upper Tribunal brought by Daniel Jemmett (the appellant) from a decision of a Traffic Commissioner (TC) made on 10 September 2018 following a public inquiry (PI) held on 9 August 2018. The TC decided to revoke an Operator's Licence held by the appellant, decided that he had lost his repute and decided to disqualify him from holding or obtaining an Operator's Licence for a period of eighteen months, whether as a sole trader, partner or director of a business.

The Background

2. The appellant held a Standard International Goods Vehicle Operator's Licence, which had been in force since June 1999, authorising seven vehicles and eight trailers. His father Peter Jemmett held a separate Standard National Goods Vehicle Operator's Licence which had been granted on 18 November 2015. The nominated transport manager (TM) with respect to the licence held by the appellant was one Mark Bates. Both operators had originally been called to a PI alongside a third operator one Christine Vella whose TM had been Peter Cullen prior to his resignation on 19 February 2018. However, matters concerning Christine Vella had been dealt with in advance of the PI and her Operator's Licence had been revoked. But the PI at which the cases involving Peter Jemmett and the appellant were considered, also involved the positions of Mark Bates and Peter Cullen as TM's as well as a third TM one Robert McFarland.

3. On 10 October 2017 a vehicle owned by the appellant and displaying a disc indicating it was operated by him (though it was not at that time listed on his Operator's Licence) was stopped by Vehicle Examiner Clouds. He discovered that an AdBlue emulator device was fitted to the vehicle. He investigated the matter at that time and concluded that what he had detected was "a cheat device". A follow-up investigation was then carried out by Vehicle Examiner Snelson who looked into the matter of the AdBlue device as well as a history of prohibition notices. He thought that whilst the appellant had been co-operative with him, he had been failing to comply with a statement of intent and undertakings attached to the licence. He also noted, in the course of his investigations, that the nominated TM had not been present at any stage and was recorded as having been "off sick".

4. In addition to the above matters, investigations revealed concerns regarding what was described as the "intermingling" of the two operations run by the appellant and Peter Jemmett; the lack of a TM playing an active role with respect to the appellant's operation; and a concern that the appellant had previously been operating the licence of Christine Vella as if it were his own.

5. All of the above matters were considered at the PI of 9 August 2018.

Relevant legislative provisions in brief

6. Under section 2 of the Goods Vehicles (Licensing of Operators) Act 1995 a person shall not use a goods vehicle on a road for the carriage of goods for hire, reward, or in connection with any trade or business carried on by him/ her unless that person possesses an Operator's Licence. Section 13A sets out some requirements which an operator must meet not only when a licence is sought but throughout its currency. Included is a requirement of professional competence. Schedule 3 to the above Act links a company's competence to that of its TM. Section 27 of the above Act gives a TC the power to direct revocation of a standard licence and Section 28 confers a power on a TC to order that the holder of a licence revoked under Section 27 be disqualified either indefinitely or for such period as the TC sees fit, from holding or obtaining a licence.

The Public Inquiry and the Traffic Commissioner's decision

7. Of those called to the PI, the Appellant, Peter Jemmett, Robert McFarland and Peter Cullen were in attendance. Mark Bates did not attend even though his repute was in issue. Vehicle examiner Snelson was in attendance and gave oral evidence. Vehicle examiner Clouds gave evidence via a telephone link. The appellant and Peter Jemmett were represented by the same solicitor who, as we understand it, is from a firm of solicitors well-versed in traffic law.

8. There is a transcript of what was said at the PI in the papers before us. We have read the contents with care. After the PI had taken place the TC reserved his decision. The terms of the decision, with respect to the Appellant, are set out above. His reasoning is explained in his written reasons of 10 September 2018.

9. As to matters which had led to the appellant being called to a PI the TC said this:

> "**Regarding DJ**
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> viii. That on 10 October 2017 a vehicle, VX10 BHN, owned by him and displaying a DJ disc but not then listed on the DJ licence, was stopped by Vehicle Examiner (VE) Clouds. The VE discovered that an AdBlue emulator device was fitted to the vehicle. A delayed "S" marked prohibition had been issued in respect of the tractor unit. The VE had noted on his physical examination that the AdBlue tank was ¾ full, yet the relevant gauge showed exactly ¼ of a tank. The driver had told him the AdBlue gauge never moved. The VE had concluded that because of these matters, representing typical "tell-tale" signs of the fitting of a so-called "cheat device" to interfere with the emissions control system that he should seek out such a device. He went on to find that fuse No. 357 (that which powers and protects emission control systems) was absent. He gave evidence that the absence of warning signals or engine de-rating also indicated the fitting of a device, as, when he had then removed fuse No. 6 which he said would, *in an unaffected vehicle*, lead to an audible warning and to the AdBlue gauge dropping to zero, neither had happened. He then found such a device hidden behind an instrument panel. He said that due to a shortage of time at the end of his shift, he had not photographed it. When put to him, he did not accept the argument put that what he had seen might have been a tracker device and not a cheat device;
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> ix. VE Snelson had initially been deputed to carry out a follow-up investigation of DJ's licence compliance, following another of DJ's vehicles, AY58 BLX receiving an earlier "S" marked immediate prohibition on 06 July 2017 for a steering component being found to have failed. His visit in October 2017 however, also included an initial consideration of the circumstances of the unlawful AdBlue device being fitted. Both DJ and PJ had been present and a formal interview had been conducted with DJ, who claimed only to have found out about the AdBlue prohibition when the prohibition notice had arrived in the post. He denied that the vehicle was being operated under the DJ licence at the time of issue of the prohibition, it having been removed on 26 September 2017 from his licence, when it was added to the licence of the aforementioned Christine Vella. He claimed it had been loaned by him to that operator and that it must then have been used by a casual driver. It was denied by DJ that he had fitted the AdBlue device on the vehicle, which had though previously undergone major repairs, including the fitting of a replacement engine from a younger vehicle. It was admitted that the vehicle had suffered emissions control system problems.

x. It was said that vehicle had been sold for export on 23 September 2017, which was before the stop, although it had not then been collected for that purpose. I was told the vehicle had since gone to the new buyer but before DJ had any opportunity to investigate the device found, or to remove it and to present the vehicle for clearance of the S marked prohibition;

xi. In the first of his two Public Inquiry statements VE Snelson concluded that the operator had maintenance systems in place but reflected other concerns about the nature of the prohibitions issued, about proper display of operator's licence discs and the sale of the vehicle at a time when a prohibition was still in force. Whilst he found the operator cooperative, he judged that he was failing to comply with the statement of intent and undertakings attached to the licence;

xii. VE Snelson's further statement took in to account the issue of the third in a series of "S" marked prohibitions on 29 March 2018, which concerned a trailer, number C136432. DJ was engaged in traction-only work for a third party, which owned the trailer. It was accepted that the driver had not carried out any walk-round check and had failed to notice the absence of an MOT plate displayed on the trailer: its MOT had expired some 3 months' earlier. The driver had since been dismissed by DJ;

xiii. The operator was advised during the VE's investigation about the need for quarterly rolling road brake tests and the implementation of a written wheel re-torque system;

xiv. VE Snelson had noted that the nominated TM, Mark Bates, had not been present at any stage and recorded being told he was "off sick";

xv. TE Chisholm had however recorded a "mostly satisfactory" TEOR, when she had visited on 3 November 2017."

10. As to relevant findings applicable to the appellant the TC said this:

"**Findings**

14. My findings, on the evidence both written and oral, about matters in contention as well as those not disputed are conveniently set out in the following paragraphs.

The businesses of PJ and DJ and the TM arrangements

15. In the light of the written evidence and that given by PJ and DJ, I found that it was accepted by them that there was a significant "blurring" of the activities of the two businesses, and that this "cross-over" was also reflected in the day-to-day operation of the licences. This was in the sense that PJ and DJ had active roles in each other's licence. It was accepted by them that drivers and others might well be confused as to whom they worked for, or reported to. TJ Hughes was DJ's main client but PJ stated that this client might well think he was running the business. Some work was carried out interchangeably and without any necessary cross-invoicing in place. Vehicles would be loaned without being added to the other licence, there being no formal loan agreement, or any charge levied. There were shared offices and email addresses and PJ covered for the personal circumstances that made it more difficult for DJ to deal with administrative matters: he was paid for this. Sometimes the post received for the DJ business might have to wait up to a week before it might be looked at by PJ. DJ accepted that his conduct of his business was "rather informal", although he said that in recent times things were changing with the assistance of Angela Brough.

16. I found that this major intermingling of operations went far beyond a description of the sort of support that father and son would likely offer to each other, when each was engaged in a similar field of activity. I am prepared to accept that this situation was probably not a deliberately contrived arrangement but one more likely to have grown over time. It will however have included unlawful operation, since it will not have been possible to determine who was operating a vehicle on a particular day, or to have clarity about the control of drivers. Such a state of affairs (as it developed) ought to have prompted the sort of application for the union of these businesses into a single enterprise (or a proper separation) as is now before me, but well before the threat of these proceedings. The fact this was not done goes directly to the repute of both licence holders and to the repute of their transport managers, who must have been aware, or ought to have been aware of the fact.

17. Angela Brough, a TM CPC holder, had been assisting DJ informally, since Mark Bates had "disappeared" from the role of TM, apparently due to his health issues. DJ admitted that Mark Bates had ceased to attend and act in his role before Christmas 2017 but that even before then he had been struggling to carry it out. I was told he had "not been interested for 12 to 18 months" but this had never been notified to my office as a material change affecting professional competence and repute.

18. Neither had Mark Bates himself notified the material change caused by his absence, nor had this hearing prompted such report. There has been and there is now no professional competence in the business. These findings go directly to repute."

11. And then:

"**The AdBlue device**

21. DJ denied fitting, or being responsible for the fitting of the AdBlue cheat device. It was put on his behalf that VE Clouds might have mistaken the device he saw for a tracker. DJ had produced physical evidence at the hearing. That is both an AdBlue tank and a tracker device with its associated wiring. The tank had been removed from what was described as a "sister vehicle" of VX10 BHN. DJ sought to contend that it would have been impossible for VE Clouds to estimate how much AdBlue was contained in it by shining his torch into the filler nozzle (as he had suggested). VE Clouds, an experienced VE, did not accept that contention.

22. I preferred the evidence of VE Clouds to that offered by DJ. I judge that the physical evidence before me (such as it was, since it was not based on the vehicle in question, but a tank from another vehicle) that the VE was mistaken or wrong about the filled level of the tank, as utterly unconvincing and unpersuasive. Further, I was satisfied that VE Clouds, who had identified over 40 such cheat devices since the fitting of these system modifications to vehicles had become relatively commonplace, was more likely to have been correct in his assessment of the level of AdBlue.

23. Neither am I satisfied that the VE would have mistaken a cheat device for a tracker.

24. It was further argued for DJ that there was no evidence as would justify the recording of an S marked prohibition for the vehicle, in the absence of an emissions test outcome demonstrating that the device fitted was in fact overriding the emissions control system. The VE accepted that no such test had been undertaken. I do however find it more likely than not that on the evidence before me that the fuses had been removed and made inactive on the vehicle's emissions control system. The emissions control system had therefore been modified unlawfully and the AdBlue system had been overridden. Whilst it is not possible to say to what extent the fitting of this device made this vehicle more polluting with NOx particulates than it would otherwise have been, if the AdBlue system had been operative, I am satisfied it will have had such an adverse effect.

25. I do not however find that the evidence supports the contention that DJ fitted the AdBlue device, although I do find he failed to have in place arrangements *at that time* that would allow him to check consumption of AdBlue, and therefore to provide a warning that there had been some interference with the emissions control system. I find it to be inherently unlikely that the device was fitted *after* the removal of the vehicle from the DJ licence and its addition to the Christine Vella licence. I infer that the device was fitted during DJ's ownership of the vehicle. The "S" marked prohibition stands recorded against the DJ licence. I was not told of any attempt to have it instead attached to the Christine Vella licence.

26. I further find him to be culpable in that he failed adequately (or at all) to manage and control the loaning arrangements for the vehicle, at a time when, on his own evidence, the vehicle had already been sold for export. This failure is directly linked to the said vehicle being passed on with the unlawful device still fitted to it, which is entirely unacceptable.

27. PJ claimed there was no link between his business and the business of Christine Vella, either practically or in any family sense. It was said by him that Mark Vella ran that operation (as was also claimed by DJ). PJ denied any part in the recruitment of Peter Cullen as the TM for the Christine Vella licence, which had been alleged by Peter Cullen.

28. DJ agreed he had loaned vehicles to Mark Vella but had stated in evidence that he had no role in his appointment of Peter Cullen, nor specifically in paying him to act as TM on the Christine Vella licence. Bank statements held on the licensing system which had been located by me when reviewing his financial standing, and which were produced to him during the hearing, showed that monies had been paid from DJ's bank account to Peter Cullen. They were marked as follows:

> *"Peter Cullen – ref CPC" on 14 November 2014,*
> *"Peter Cullen – ref Perfect" on 12 December 2014.*

These were shown to DJ. DJ only then offered that from time to time over a period that Mark Vella had asked (DJ) to pay Peter Cullen sums of £100 for his services, as a matter of convenience for Mark Vella. He said that this would have happened on "8 or 9 occasions".

29. A letter dated 7 August 2018 purporting to be written from an address in Malta by Mark Vella was produced by DJ and PJ. The letter referred to his business relationship with DJ and included the following statements:

> *"[…] I began to hire my trucks from him (DJ). It made business sense as we both benefited from the deal";*
>
> and
>
> *"I hired Peter Cullen myself as a transport manager on behalf of my mother Christine Vella who was the operator of the licence";*

30. Peter Cullen gave evidence that it was PJ and DJ whom he had had contact with about his appointment as TM for Christine Vella. He said he had never met Christine Vella (or Mark Vella) and had believed that he was working for the Jemmetts and not for her. In support of that contention, he produced an original business card with the legend "Perfect Solutions – Logistics Specialists", which was in the name of DJ and with DJ's contact details on it. He said he recalled the arrangement made for him to receive £100 per month for his services, which had continued to be made since he was taken on in October 2013. The business card carried the address Minerva House, Pendlebury Road, Swinton, Manchester very close to where the meeting was said (by him) to have been held, at Bridge Street, Pendlebury, Swinton.

31. I find that the evidence of Peter Cullen is credible, it is supported by documentary evidence and I accept it. He appreciates that his repute is at risk, since he had previously admitted he was not actually carrying out the TM role but taking the money. Whilst he wishes to protect his repute, he had little to gain from being other than open and honest about the circumstances of his appointment. The evidence shows he has been paid for his role by DJ, and DJ admitted other payments beyond those listed on the bank statements on file. The specific entries in the bank account of DJ to "Perfect" (DJ's trading name) and to "CPC" do not support the contention that he was making payments for another person (Mark Vella) and that Mark Vella would be reimbursing him for the transaction. I find that it is more likely than not that DJ was probably operating the licence of Christine Vella, as if his own. It is not possible to describe the extent of his particular role in this arrangement but consistent with my earlier findings on an intermingling of activity as far as the licences of DJ and PJ were concerned, I conclude that similar circumstances are more likely than not the have existed in respect of the Christine Vella licence."

12. Having reviewed the evidence and background and having reached relevant factual findings, the TC then set out and justified his decision concerning the appellant in this way:

> "51. In respect of **the licence of Daniel Jemmett**, I make findings in accordance with Section 26(1)(b), (c) (iii), (ca), (e), (f) and (h) of the Act.
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> 52. I further find in accordance with Section 27 that there is a lack of professional competence. There has been no active TM on the DJ licence for an extended period, and no attempt until the recent assistance form [sic] Angela Brough to put things right, or any attempt to notify that state of affairs

and do something about it. Mark Bates has remained the TM even at the date of the Public Inquiry. It is of course beholden on operators to notify such material change, to appoint a suitable replacement and a failure to do so prejudices trust and confidence.

53. In reaching conclusions about whether DJ's good repute is maintained, I have again sought to balance the positives and negatives.

54. The negatives referred to in my findings in paragraphs 15 to 38 much outweigh any positives that may be offered up for DJ. Trust is further undermined by the record of non-compliance reflected in an Amber/ Amber Operator Compliance Risk Score (OCRS), which emphasises the issue of 3 "S" marked prohibitions in an 8-month period, together with a sub-standard MOT pass rate.

55. I struggle to describe many positives to the credit of DJ. He was however straightforward (except and critically in relation to the position of Peter Cullen) at the hearing. The most concerning aspects of the operation of this licence have indeed come in recent time; Mr Davies' description of the licence being hitherto largely off the radar is not inaccurate.

56. The belated application for a new licence, but with which DJ is directly concerned, in part demonstrates the acceptance that this licence is not appropriately continued and represents some level of positive acknowledgement of this state of affairs.

57. I conclude that his repute has been lost, since when I ask myself the Priority Freight question, I conclude I cannot be satisfied that this operator will be compliant in the future. My trust and confidence that the operator will comply with the requirements contained in undertakings under the licence has been fatally undermined.

58. So much so that when I ask myself the Bryan Haulage question: Is the conduct of this operator such that it ought to be put out of the business? I conclude that it is appropriate and proportionate to answer that question in the affirmative, given the findings made in the balancing exercise undertaken. I find repute is lost. The prohibitions bring into question road safety, the manner in which the licence has been operated undermines the principles of fair competition in the business, and the involvement of DJ in the sham TM arrangements undermines the principles and standards of the licensing regime.

58. This operator's licence will be revoked with effect from 23:59 hours on 19 October 2018. This short period during which the licence may be continued in order to allow an orderly closedown of the business.

60. I have gone on to ask myself whether this is a case where disqualification should follow: I conclude that such a direction is appropriate and that his exclusion from the industry as a sole trader, partner or director is necessary. The evidence before me demonstrates he is not an appropriate appointee as the director of a haulage business. The period of disqualification is set at 18 months."

The Appellant's Appeal to the Upper Tribunal

13. Brief written grounds of appeal were set out in completed form UT12. What was said was supplemented in a document headed "Updated Grounds of Appeal" and then in a further document headed "Amended/ Perfected Grounds of Appeal". Essentially, what was contended may be summarised as follows:

> Ground 1 – The appellant has dyslexia. The TC was aware of that but made no allowance for it in his assessment of the veracity of the appellant's evidence and in relation to his decision generally.
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> Ground 2 – The TC's findings concerning the AdBlue issue were unreasonable ones. That is because the TC failed to consider attaching less or no weight to the evidence of Vehicle Examiner Clouds on the basis that that evidence was given via telephone link rather than by way of personal attendance at the PI; because the TC failed to have regard to an apparent indication given by vehicle examiner Snelson that the appellant's protestations of innocence (or aspects of them) might be correct; and, again, because of the failure to make an allowance with respect to the Appellant's dyslexia.
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> Ground 3 – The TC had, on at least two occasions when explaining his decision, effectively reversed the burden of proof to the disadvantage of the appellant.
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> Ground 4 – The TC acted unfairly and in breach of proper procedures by dealing with Peter Cullen's case along with that of the Appellant's or in allowing the evidence of Peter Cullen to be heard as part of the Appellant's PI.
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> Ground 5 – The TC erred in approaching the assessment of Peter Cullen's evidence from the perspective that "he had little to gain from being other than open and honest about the circumstances of his appointment". In fact, Peter Cullen had everything to gain in trying to protect his repute by apportioning blame in the direction of the Appellant.
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> Ground 6 – The TC's ultimate conclusions regarding loss of repute, lack of professional competence, disqualification and revocation were unfair and/ or unreasonable.

14. Before us, Mr Josse explained that Peter Jemmett had now been granted a new Operator's Licence. As to the issues surrounding the appellant's dyslexia, the TC ought to have noted the fact he has dyslexia in his written reasons and ought to have explained "what he made of it". If he had thought the dyslexia made no difference he should have said so and should have said why he thought that. The transcript suggests that, at one point, the TC had been guilty of "unfortunate sarcasm" with respect to the appellant's dyslexia and the impact it had upon him. Mr Josse accepted that there had been no request made of the TC for him to make any reasonable adjustments in consequence of the appellant's dyslexia and accepted that it had not been raised by his representative at the PI.

15. With respect to the AdBlue point, whilst Mr Josse did not seek to rely upon very much or anything contained in the decision of the Upper Tribunal in Midland Container Logistics Ltd and James Donlan DK Barnsley and Sons Ltd v Secretary of State for Transport [2020] UKUT 0005 (AAC). Rather, he argued that the TC had simply got matters "wrong factually". The key witness regarding these issues had been Traffic Examiner Clouds. Giving evidence by way of a telephone link is unsatisfactory but the TC did not acknowledge that in his reasoning. He should have expressly considered whether the evidence, in consequence of its having been given by way of a telephone link, should carry less weight and should have specifically explained his reasoning on the point. Mr Josse,

though, accepted that no objection had been made to traffic examiner Clouds giving his evidence by way of a telephone link.

16. As to other matters, it was right to say that the TC had effectively reversed the burden of proof. The TC had failed to reach a clear view with respect to whether or not the appellant had been dishonest with respect to the AdBlue emulator device. It had been essential for such a finding to be made. The appellant had had a good compliance record for a number of years. That was not considered by the TC when arriving at his ultimate conclusions. Other than that what Mr Josse had to say did not go beyond or significantly beyond what had been said in writing.

Why we have decided to dismiss this appeal

17. 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".

18. The Upper Tribunal's jurisdiction was examined by the Court of Appeal in Bradley Fold Travel Ltd and Anor v Secretary of State for Transport [2010] EWCA Civ 695. The court applied Subesh and ors v Secretary of State for the Home Department [2004] EWCA Civ 56, where Woolf LJ held:

> "44….The first instance decision is taken to be correct until the contrary is shown…An Appellant, if he is to succeed, must persuade the appeal court or tribunal not merely that a different view of the facts from that taken below is reasonable and possible, but that there are objective grounds upon which the court ought to conclude that a different view is the right one…The true distinction is between the case where the appeal court might prefer a different view (perhaps on marginal grounds) and one where it concludes that the process of reasoning, and the application of the relevant law, require it to adopt a different view. The burden which an Appellant assumes is to show that the case falls within this latter category."

19. That is the approach which we have followed in deciding this appeal.

20. As to what we have called Ground 1, we accept the appellant has dyslexia. That is a condition capable of impacting upon individuals in a surprisingly large range of ways. We accept that there will be cases where it will be appropriate or necessary for a TC to make reasonable adjustments in order to ensure fairness at a PI where issues are raised regarding compliance with the regulatory regime by someone who has the condition. But here, the appellant had competent legal representation at the PI. As Mr Josse acknowledges, no request for the making of any form of adjustment was made either prior to or at the outset or at any point during the PI. We have not been told, with any degree of precision, how the appellant says the PI process was unfair as a result of his dyslexia. We have not been told, at any stage, what information the appellant might have given had adjustments been made which he did not, in fact, give. We have not been told, with any degree of precision, how his oral evidence at the PI might have differed had any adjustments been made. We are not able to detect for ourselves anything in the PI transcript which suggests the appellant's participation at the PI was adversely impacted. We think that if there had been any need for adjustments such would have been raised, on the appellant's behalf, by his competent representative. We note that, before us, Mr Josse suggested that the solicitor might have had a difficult task and (we think this is the suggestion) might have been compromised by his having to represent both the appellant and his brother. But we do not see that for ourselves. As to the reference to "unfortunate sarcasm" that rests upon a short exchange between the TC and the appellant. We shall set it out. This is what is recorded as having been said:

> "Q. Scrapped or exported?
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> A. They, they took the yellow bit because there were a what do you call it, an exporter or dealer, so I assume they just take…get to take the yellow bit. Obviously paperwork's not my strong point.
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> Q. Mmmm. Well it may not be your strong point but also I need to remember if I am writing to you I need to give an extra week because you might not be opening it?
>
> A. Yeah. E-mails I tend to do straight away. I tend to read them of cos my computer reads em. And then sometimes if I get a lot of stuff through it takes me a bit to get through it cos obviously its not –
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> Q. Well I understand all of that and I take that into account but I would have thought that if you do have those problems you would want important letters to you opened immediately, would you not?
>
> A. I suppose so but I just…I always open my own letters so…"

21. Mr Josse, before us, stood by his written assertion that such represented a sarcastic tone on the part of the TC. We are not able to agree with that. In our view the TC was simply acknowledging what the appellant himself had said to the effect that paperwork was not his strong point and recognising that a consequence might be a delay in responding to mail coupled with a suggestion that, in such circumstances, it might be appropriate for him to have arrangements in place so that important letters are opened and dealt with promptly. So, we have to disagree with Mr Josse about that. For all of the above reasons we conclude that what we have called Ground 1 does not have force.

22. As to what we have called Ground 2, we note that Mr Josse suggested, in oral submissions, that the TC's findings regarding the AdBlue issue were of pivotal importance in the sense that, had he not resolved such matters against the appellant, it was inconceivable that he would have revoked and disqualified even if he had thought some lesser form of sanction would be appropriate. We do not agree with that suggestion. There were, putting everything together, a number of negative findings from the appellant's perspective, regarding a number of aspects of his operations. There was, for example, the intermingling of his operation and that of his brother which the TC said in unchallenged findings "went far beyond the description of the sort of support that father and son would likely offer to each other, when each was engaged in a similar field of activity". There was, very importantly in our judgment, the finding that there was no professional competence because there had not been, for some considerable time, an active TM. There had been, again importantly in our judgment, the adverse findings to the effect that the appellant was "probably operating the licence of Christine Vella, as his own". Indeed, in looking at the part of the TC's reasoning regarding how he had come to his decisions on revocation and disqualification, it is the lack of an active TM (paragraph 52 of the written reasons) and the prohibitions during a short period of time coupled with a substandard MOT pass rate (paragraph 54) which are highlighted. In our view, therefore, the negative AdBlue findings did not play a significant role in the TC's reasoning as to his ultimate conclusions and, indeed, we would go so far as to suggest that his conclusions would have been the same even if he had resolved those AdBlue matters in the appellant's favour.

23. In these circumstances it is not necessary for us to say any more about Ground 2 but we will do so. One of the major points taken in this regard was that the evidence of vehicle examiner Clouds had been given via a telephone link. It is significant, in our view, that the Appellant's representative did not object to evidence being given in that way. We would accept, speaking generally, that face-to-face evidence is to be preferred but there does not appear to have been any difficulty with respect to the giving of evidence in this way. There is no explanation as to why, for example, cross-examination of Traffic Examiner Clouds (which was conducted by the appellant's competent representative at the

PI) might have been in any sense unsatisfactory or ineffective simply because of the mode of communication. There is nothing we can detect in the transcript which suggests that the giving of evidence by this means was inhibited in any way. There is nothing to suggest, in looking at the practicalities, that traffic examiner Clouds was unable to hear what was being asked of him or that what he said could not properly and adequately be heard by the participants at the PI. As to what seems to be presented as something of a concession on the AdBlue issue said to have been made by Vehicle Examiner Snelson, we do not, for ourselves, detect anything more than a suggestion on his part that looking inside AdBlue tanks might not, of itself, adequately underpin adverse findings. That is a rather limited observation. The criticism is that the TC did not factor this part of Vehicle Examiner Snelson's evidence into his reasoning as set out in his written reasons. But we cannot see that he was required to address each and every aspect of the evidence which he received and we cannot see that that particular item of evidence, of itself, was so significant as to demand reference to it and an analysis of it in the written reasons. We have already dealt with the dyslexia point which was also raised with respect to this ground. As to dishonesty, the TC did not say, in terms, that he was finding the appellant to have been dishonest. He could have gone on to consider that more if he had wanted to though we do not accept, as Mr Josse seemed to suggest, that what was said in the Midland Container Logistics case effectively imposes a duty upon a TC to decide definitively whether there has or has not been dishonesty in circumstances where an emulator has been fitted and found. The point the TC was making in this case was really that the presence of the emulator in his vehicle indicated a failure to put arrangements in place which would enable him to check the consumption of AdBlue and therefore to provide him with an indication that there had or might have been interference with the emissions control system (paragraph 25 of the written reasons). We find this ground of appeal not to be made out.

25. As to what we have called Ground 3, Mr Josse argues that the TC effectively reversed the burden of proof to the appellant's detriment. He has in mind paragraphs 22 and 23 of the TC's written reasons. We do not, however, detect any effective reversal of the burden of proof for ourselves. The paragraphs referred to address an aspect of the AdBlue issue. The TC was explaining that he preferred the evidence of Vehicle Examiner Clouds to that offered by the appellant on a discrete issue as to whether the device spotted in the relevant vehicle was a cheat device or, as the appellant had argued, something more benign. Simply saying that the traffic examiner's evidence was preferred on the point does not amount to reversing the burden of proof. Nor does his observation that evidence provided by the appellant as to the nature of the device was unconvincing and unpersuasive. We reject that ground of appeal.

26. We shall take what we have called Ground 4 and what we have called Ground 5 together as they both involve the situation of Peter Cullen. We do not agree that there was unfairness in the TC dealing with Peter Cullen's case and the appellant's case together. Indeed, since they were interlinked insofar as there was a reason to think there might have been an appropriate link between the appellant's business and the licence of the individual who had employed Peter Cullen as transport manager, it made practical sense to deal with the matters together. It has not really been explained to us how any unfairness had arisen or why there might have been any unfairness in doing things this way in the first place. It was perhaps unfortunate for the appellant that Peter Cullen gave evidence at the PI because that evidence was one amongst a number of things which damaged his case. But that does not begin to indicate any form of procedural unfairness. In terms of the TC's analysis of Peter Cullen's evidence, he offered what is in our view a careful explanation as to why he preferred Peter Cullen's explanation to that given by the appellant regarding payments of £100 per month from the appellant to Peter Cullen. The relevant part of the written reasons is the passage from paragraph 27 to 32. It is set out above. The TC, of course, had the opportunity of hearing the oral evidence of each of them on the point, something which we have not had. Mr Josse says that the TC was simply wrong in suggesting that Peter Cullen had "little to gain" from being honest about how he had come to be appointed as TM in relation to the licence in the name of Christine Vella. Indeed, Mr Josse suggests that the opposite was the case and that Peter Cullen, as he puts it, "had everything to gain in trying to protect his repute by placing the responsibility for what had happened on the appellant". Possibly, on

one view, what the TC had to say went slightly too far. But Peter Cullen's credibility was damaged, in any event, by his not having carried out the role of TM on that licence. He had acknowledged his failing in that regard. As such, whether he had been appointed by Christine Vella or whether he had been appointed by the appellant was not a matter of real significance with respect to his already significantly damaged credibility. That is, we think, the point the TC was making and it is, viewed from that perspective, a fair one. We do not consider this ground to be made out.

27. Ground 6 is really a general assertion regarding unfairness and the proportionality of the decisions taken by the TC with respect to the appellant. But, in our judgment, none of the TC's findings which underpinned his conclusions can be said to be plainly wrong. He carried out the balancing exercise required when considering revocation. Against the background, and the factual findings, it cannot realistically be contended that either the decision to revoke or the decision to disqualify could be said to be unreasonable, unfair or disproportionate. So, again, we reject this ground of appeal.

28. In light of the above we do not detect any misdirection or misapplication of the law. We do not detect any procedural unfairness. We cannot see that the TC made findings of fact which were plainly wrong or that, having made those findings, he was plainly wrong with respect to his decision to revoke the licence and his decision to disqualify the appellant. There is nothing in the material before us nor in any argument put to us which impels us to reach a different conclusion.

29. There is a final point to make. It has taken a long time for this appeal to be concluded. That is largely because matters were stayed for some considerable time pending a decision in the Midland Container Logistics case cited above.

Conclusion

29. This appeal to the Upper Tribunal is dismissed.

Signed

M R Hemingway
Judge of the Upper Tribunal

Dated: **30 March 2020**