**IN THE UPPER TRIBUNAL Appeal No. UA-2021-002165-T**

**ADMINISTRATIVE APPEALS CHAMBER (formerly T/2021/08)**

**(TRAFFIC COMMISSIONER APPEALS) [2022] UKUT 00177 (AAC)**

**ON APPEAL from DECISIONS of the TRAFFIC COMMISSIONER for the South West of England Traffic Area (Traffic Commissioner K Rooney)**

Before: M Hemingway: Judge of the Upper Tribunal

S James: Member of the Upper Tribunal

D Rawsthorn: Member of the Upper Tribunal

**Appellant:** Connor Construction (South West) Ltd

**Representation**

**For the appellant:** Mr J Backhouse

**For the Secretary of State:** MrM Lewin

**Heard at:** Field House inLondon

**On:** 17 February 2022

**Date of decision:** (7 July 2022)

**DECISION OF THE UPPER TRIBUNAL**

The appeal is allowed but the Upper Tribunal declines to make any order under paragraph 17(2)(a) of Schedule 4 to the Transport Act 1985 and declines to remit under 17(2)(b).

**SUBJECT MATTER**

Undertakings

Swapping vehicles on and off a licence

Transport managers

Repute

Temporary exemptions from compliance with licensing requirements

**CASES REFERRED TO**

*Bradley Fold Travel Ltd & Anor v Secretary of State for Transport* [2010] EWCA Civ 695.

**Appeal no: UA-2021-002165-T**

**REASONS FOR DECISION**

1. The appellant company (the appellant) has appealed to the Upper Tribunal from decisions made by a Traffic Commissioner (the TC) on 23 December 2020 and from a further related decision made on 14 January 2021. On 23 December 2020 the TC refused the appellant’s application to vary the terms of its standard national goods vehicle operator’s licence; curtailed the number of vehicles authorised to be operated under the licence for a period of one month; decided the appellant lacked professional competence (albeit a period of grace was given to enable the appointment of a new or additional transport manager); decided to deny the appellant the use of what is known as the “VOL self-service system”; and decided to accept/impose (see below) undertakings to be attached to the licence. On 14 January 2021 the TC refused to grant the appellant a temporary exemption from the requirement to hold a national licence with respect to a part of its business activities.

2. The appeal was considered at a traditional face to face hearing which took place in London on 17 February 2022. The appellant was represented by Mr J Backhouse. The Secretary of State (the Upper Tribunal having joined the Secretary of State as a party on application) was represented by Mr M Lewin of Counsel. We are grateful to each of them for their helpful skeleton arguments and oral submissions.

3. This appeal raised a number of issues. It has not been necessary for us to definitively resolve all of them in order to decide this appeal. But we have, where appropriate, sought to offer views on certain of the matters raised which did not require definitive resolution.

4. By way of background, the appellant was granted a standard national goods vehicle operator’s licence (reference OH1105554) on 20 September 2011. It authorised the use of 9 vehicles and 3 trailers. Its sole director and shareholder is one Ian Webb. On a date in February 2019 Nicoleta Graves was appointed as its sole transport manager.

5. In May 2019 the Driver and Vehicle Standards Agency (DVSA) commenced a joint Vehicle Examiner and Traffic Examiner investigation into the way in which the appellant was or was not complying with its obligations under the terms of its licence. Shortly after the commencement of the investigation, in fact on 18 July 2019, the appellant sought variation of the terms of its licence by making an application to the Office of the Traffic Commissioner (OTC). In support of a request for a favourable interim decision the appellant said, “*At present, vehicles are being swopped on/off the licence daily to meet* *business needs*”. The investigation continued and Vehicle Examiner Ford found significant failings with the vehicle maintenance systems operated by the appellant. Traffic Examiner Comer found shortcomings with the drivers’ hours and tachograph systems, concluded that the appellant had more vehicles in possession than authorised; and concluded that on occasions vehicles were (according to tachograph evidence) being operated when not specified on the licence.

6. In light of the above, the TC decided to call the appellant to a public inquiry (PI). Matters to be investigated at the PI included concerns the appellant possessed more vehicles than it was operating; that it had failed to comply with undertakings regarding fitness of vehicles, observance of drivers’ hours rules, the keeping of relevant records, and driver defect reporting; that it was no longer of good repute; and that it no longer had professional competence. Nicoleta Graves was also called to the same PI to permit an evaluation of her repute as transport manager.

7. The PI took place on 2 November 2020. Evidence was given by Vehicle Examiner Ford, Traffic Examiner Comer, Ian Webb, Nicoletta Graves, and one John Richards who had been appointed as the appellant’s Managing Director. The appellant was represented by Ms L Hadzik of Backhouse Jones Solicitors. Following the PI, and with the agreement of the TC, Ms Hadzik provided some further written submissions.

8. The TC set out his reasoning as to the various matters raised by the appeal, in careful and detailed written reasons of 23 December 2020. He was unimpressed by explanations which had been offered to him by Nicoletta Graves on behalf of the appellant concerning the drivers’ hours and tachograph failings and shortcomings in the relevant recording systems (see paragraphs 63-67 of the written reasons of 23 December 2020). But he accepted that the maintenance failings were capable of resolution and he considered the recent involvement of John Richards to be a positive development.

9. An issue had arisen with respect to the appellant’s use of tar sprayers and the excise duty status of such vehicles and the scope of an exemption in relation to the requirement to pay duty. The TC dealt with that by stating, in his written reasons, that he required with respect to each issue “*the following undertaking*” and then stipulated, in effect, that the appellant had to consult with HMRC and the DVLA and that a copy of the view of each body should be sent to the Office of the Traffic Commissioner (OTC) together with an indication by the appellant as to what action was being taken in light of any such views.

10. An issue had arisen with respect to the question of whether a class of vehicle known as tar sprayers, some of which were operated by the appellant, could benefit from an exemption from the need to be subject to the licensing regime at all. However, although the appellant had had a different understanding of the position at an earlier stage, it was now accepted on its behalf, that whilst there had been such an exemption in place it had been removed in September 2018 with the consequence that such vehicles had to be on a licence if operated commercially. The TC accepted, insofar as it was relevant, that there had been an absence of publicity regarding the ending of the exemption so that, whilst the appellant had operated such vehicles in breach of the licensing regime after the date of change, it had done so inadvertently such that no weight should be attached to the fact of the breach.

11. An issue had arisen as to the way in which the appellant had been using, over time, more vehicles than were specified on the licence and the legality of the manner in which it was doing so. Section 2 of the Goods Vehicles (Licensing of Operators) Act 1995 (the Act) provides, subject to exceptions which have no application in this case, that *“no person shall use a goods vehicle on a road for the carriage of goods for hire or reward or for or in connection with any trade or business carried on by him, except under a* *licence…*”. Ms Hadzik argued that since a vehicle was only being used when it was actually being driven, if it was not being so used, it was not required to appear on the licence. Thus, it was perfectly lawful to swop vehicles on and off the licence in any way which suited an operator. In practical terms such could be achieved by using a self-service online system (the VOL system) made available by the OTC. That is what the appellant had been doing. The TC disagreed with Ms Hadzik’s proffered interpretation of the legislation and made the point that such would undermine key aspects of the licensing regime regarding such as maintenance requirements, financial standing, and requirements relating to the suitability of an operating centre if an operator was permitted to effectively operate a greater number of vehicles than that specified on the licence.

12. The TC, having evaluated the above matters, went on to make the decisions set out above. In his concluding paragraph he recorded a number of undertakings including but not limited to the ones referred to above concerning tar sprayers and excise duty.

13. Following the issuing of the TC’s decision, the appellant, through Ms Hadzik, made an application for a temporary exemption from the licensing regime for the tar sprayers pending an application for increased authorisation (which was said to be in the process of being prepared) being submitted and then determined. Such an exemption may be given by a TC pursuant to powers given under section 4 of the Act, but only “*for the purpose of* *enabling an emergency to be dealt with or enabling some other special need to be met*” (see section 4(1)(a) and (b) of the Act). The TC took the view that neither of those obviously demanding requirements were met and said so in his written reasons for his decision of 14 January 2021.

14. An appeal to the Upper Tribunal was lodged. Six grounds of appeal were advanced. They may be summarised as follows:

Ground 1-The TC had acted outside the scope of his powers in deciding the appellant could no longer have access to the VOL system. In the alternative, if there was such power, the TC’s use of it against the appellant in this case was irrational.

Ground 2-The TC had effectively “*imposed*” undertakings and he had no power to do so. Further, Section 13(2) to (6) of the Act sets out what is to be regarded as an exhaustive list of matters in respect of which undertakings may be recorded by a TC. None of the undertakings which had been set out by the TC fell within the scope of that exhaustive list.

Ground 3-The TC’s decision of 14 January 2021 to refuse a temporary exemption was irrational.

Ground 4-The TC’s decision as to the appellant’s repute was “*illogical*” because although the TC had taken the view that the transport manager had played an insufficient role, there was evidence before him that an additional transport manger was to be appointed. Thus, the better way to have dealt with matters would have been to have invited undertakings rather than, as the TC had done, making an adverse finding and then giving a period of grace for rectification.

Ground 5-The TC’s decision to refuse the variation application was “*perverse and* i*rrational*” because any relevant shortcomings which had been identified by the TC would be catered for by the appointment of a new transport manager (a matter provided for by the terms of the period of grace) and by a “*systems audit*” which had been provided for by way of an undertaking specified in the written reasons.

Ground 6-The TC had erred in law in concluding that the swapping of vehicles on and off the licence is unlawful.

15. As indicated, Mr Backhouse and Mr Lewin provided skeleton arguments prior to the hearing. Mr Backhouse, for the most part, maintained the arguments as set out in the grounds of appeal. He did, on our reading, expand the scope of ground 4 by arguing there was no legal power vested in a TC to conclude that an operator lacks professional competence on the basis of the extent or sufficiency of a transport managers role where there is a transport manager in place who has professional competence and who has good repute. The skeleton also contained fuller argument regarding ground 6. Mr Lewin’s skeleton argument contained a partial concession with respect to ground 1 in that it was argued that while there was an inherent power vested in a TC to deny the use of the VOL system to an operator, the TC had erred in this case through making the ban indefinite. An end date for the ban should have been specified. There was a concession with respect to ground 2 in that it was recognised the TC had no power to unilaterally impose undertakings upon an operator. That was, said Mr Lewin, sufficient to dispose of that ground and whilst urging us not to go on to decide the second limb of it (that is whether the range of undertakings which may be given and then accepted by a TC is circumscribed by section 13(2) to (6) of the Act) he suggested a TC did have the power to record any undertakings freely given. But all the other grounds were opposed.

16. At the hearing, Mr Backhouse explained that since a new transport manager had now been appointed, and since the number of vehicles authorised under the licence had been increased (we assume in ways which suit the appellant) many of the issues which had been in dispute before the TC had simply fallen away. Further as to the undertakings point, the concession made on behalf of the Secretary of State was sufficient to resolve that issue. Indeed, we wondered whether in light of all of this there was now a need to pursue matters before us at all, though Mr Backhouse explained that it was thought important, on reputational grounds, for the question as to whether the appellant had been doing something wrong in swapping vehicles on and off the licence in the manner in which they had via the VOL system to be resolved. He added that the Upper Tribunal was now simply being invited to quash the decision of the TC with respect to the curtailment of the licence (though the period of curtailment has expired anyway) and the “*decision*” that the swapping of vehicles on and off the licence in the way it had been done was unlawful. Mr Lewin confirmed the concessions made but continued to oppose the appellant’s other grounds of appeal.

17. Not every decision taken by a TC attracts a right of appeal to the Upper Tribunal. That is a point which is occasionally overlooked. But we have thought it important, in this case, to go back to first principles and remind ourselves as to which types of decision may be appealed against and which may not be.

18. There is a right of appeal against decisions taken under the Act in the circumstances specified at section 37 of the Act. Assuming there is a right of appeal against a decision under challenge, the Upper Tribunal has jurisdiction to hear and determine all matters whether of fact or law for the purpose of the exercise of its functions under an enactment relating to transport. It has the power to make any order it thinks fit or to remit to a TC for rehearing and determination. It may not take into consideration any circumstances which did not exist at the time of the determination which is the subject of the appeal. The ultimate question for the Upper Tribunal on an appeal is whether, on objective grounds, the TC’s decision was correct or whether reason and the law impel it to take a different view (*Bradley Fold Travel and Anor v Secretary of State for Transport* [2010] EWCA Civ 695 [40].

19. As to ground one, a bare decision to remove the access of an operator to the VOL system is not an appealable decision as specified in section 37 of the Act. We appreciate that Mr Lewin did make a concession with respect to this ground of appeal but that was, it seems, without considering that initial threshold question. Mr Backhouse, during oral argument, suggested it might be the type of decision which would be amenable to judicial review. That may or may not be so. But we are satisfied it does not, as a stand-alone decision, attract a right of appeal and we simply conclude that the matter is not before us.

20. We move on to ground 2. The TC had, in concluding his written reasons, listed five undertakings. We are grateful to Mr Backhouse for clarifying, at the hearing, that three of them had been agreed to by the appellant. The two which it is said had not been agreed (and so had been imposed) were those which related to the exemption and excise duty issue referred to above and the need to obtain the views of HMRC and the DVLA.

21. Section 13C of the Act is headed “*Requirements for standard and restricted* *licences*”. It then lists a number of requirements from subsection (2) to (6) which relate to there being satisfactory arrangements for drivers’ hours compliance, satisfactory arrangements for securing that vehicles used under the licence are not overloaded, satisfactory facilities and arrangements for maintaining vehicles in a fit and serviceable condition, an available and suitable operating centre or centres with sufficient capacity. Subsection (7) then provides a TC “*may take into account any undertakings given by the applicant (or procured by the applicant to be given) for the purposes of the application and may assume* *that those undertakings will be fulfilled*”. Mr Backhouse and Mr Lewin are effectively in agreement that this provision does not give a TC the power to impose an undertaking and that there is no other applicable legislative provision which does so. Nor do they seem to disagree about the fact that, with respect to the 2 undertakings in issue, that is what the TC was purporting to do.

22. As we say, the TC did record undertakings (including the 2 in issue) in his written reasons. But there is no confirmation that those 2 were offered or agreed to by the appellant or by Ms Hadzik. We have not been taken to anything in the transcript of the PI (which is before us) which shows that the two undertakings in issue were offered and we have not been able to find any confirmation of that for ourselves. We proceed, therefore, on the basis that those 2 undertakings were not offered and have, effectively, been imposed.

23. We accept the submissions of each representative that the legislation does not authorise a TC to record on a licence an undertaking which is not freely given. The impetus does not have to come from an operator, it is perfectly permissible for a TC to invite an undertaking and then accept and record one given in response, but one cannot be imposed. In our view this is clear from the legislation, but we would also observe that what we have decided is in line with what is stated in Senior Traffic Commissioner’s Statutory Document 10 to the effect that undertakings are legal promises given by an operator and that there is thus a distinction between conditions, which may be imposed, and undertakings, which may be sought. We accept, on the material before us, that the TC did, according to the terms of his decision, impose the 2 undertakings in issue and that he lacked the power to do so. So, we find ground 2 to be made out. But we do not need to take any action as a result of our concluding this ground is made out because it is accepted that the appellant has, in fact, now satisfactorily complied with those “*undertakings*” in any event.

24. There is then the second limb of this ground. Since the ground is made out anyway, we do not have to resolve the matter. Indeed, Mr Lewin positively urges us not to and Mr Backhouse acknowledges our doing so would be unnecessary. But we will permit ourselves some (given that this is not essential to our decision) non-binding observations.

25. We do not agree with Mr Backhouse’s contention that Section 13C(7), when read in conjunction with 13C(2) to (6) makes clear that the matters listed from (2) to (6) are the only matters in respect of which undertakings can be recorded against an operator’s licence. The language of the legislation permits undertakings to be recorded with respect to such matters but does not specifically exclude that with respect to others. Section 26 of the Act affords a TC broad discretion with respect to revocation, curtailment or suspension of a licence, as Mr Lewin points out, and such discretion must be exercised in accordance with the principle of proportionality (see *Crompton v Department of Transport North* *Western Area* [2003] EWCA Civ 64). The practice of TC’s accepting undertakings as to matters which may not be specified in 13C (2) to (6) is, we accept, an implicit power but it is present and is important in enabling TC’s to exercise the powers they have in a way which is proportionate and appropriately flexible. We would also make the point, insofar as it might be thought to be relevant, that the TC’s power to accept undertakings relating to matters not specified in section 13C (2) to (6) appears not to have been previously challenged. That might be because there is a general recognition on the part of most of those involved in the industry in various capacities, that there is an implicit power to accept undertakings freely given. Another observation we would make, though this may not be directly relevant to our view as to what powers a TC does actually have, is that many operator’s might be disenchanted if Mr Backhouse and Ms Hadzik were to turn out to be correct on the point, because that would to an extent at least take away the flexibility that empowers them to offer undertakings about a broad range of matters thus, in appropriate cases, enhancing their prospects of obtaining a favourable decision from a TC. Had we had to resolve this issue in order to decide this appeal, we would have concluded that the power of a TC to accept undertakings offered by an operator on a range of matters is not circumscribed in the way suggested in this ground of appeal.

26. We turn to ground 3. This too seems to be a ground which no longer cries out for resolution because matters have moved on. But we heard some argument on it and shall deal with it. We start by reminding ourselves that, in order to establish an error of law on the grounds of irrationality, a particularly high threshold has to be reached. The application made to the TC was for an exemption for 8 tar sprayers. It was pointed out in the application that whilst the TC had found that the tar sprayers were being used unlawfully, it had also been accepted that the appellant had not known what it was doing was unlawful. It was argued that there was a “*special need*” for the exemption which arose from the background to and context surrounding the legislative change and the general understanding of the appellant and indeed “*the wider industry*” (albeit erroneous) that tar sprayers were exempt. The TC concluded there was no emergency and there was no special need. Those conclusions were, in the grounds of appeal and the skeleton argument which followed, criticised as being irrational because of the findings that the appellant had only unwittingly been in breach. Further, it was explained in the skeleton argument that the DVSA Policy Unit had indicated that it had always been intended that tar sprayers would remain exempt.

27. In our judgement the arguments advanced on behalf of the appellant focus upon the wrong questions. It was accepted that there had been an erroneous understanding on its part and the TC does make that clear in his written reasons for this decision. But in considering the application for an exemption, the TC was not required to ask himself whether good reason for the previous breach had been given. He was required to look at the current situation and ask himself, amongst other things, whether there was on the evidence before him a genuine emergency to be dealt with or some other special need to be met in the particular circumstances of the case. So, he was required to take a forward-looking approach and was not looking backwards or asking whether previous failings were explainable or explicable. Further, he was right to take the view, as he obviously did, that Section 4 of the Act and the requirement for there to be an emergency or a special need meant a high threshold was set. Against that background, we are unpersuaded by some distance that the TC’s decision was irrational.

28. We move on to ground 4 but, here, we will be brief. That is because Mr Backhouse expressly stated there was really no purpose in our dealing with it given that matters had moved on. But we do say that the TC’s decision on the point was not rendered illogical, irrational or perverse simply because the ground suggests a different approach could have been taken.

29. As to ground 5, on our reading, the TC was declining to grant the variation application because of clearly evidenced concerns regarding the lack of proper compliance with drivers’ hours requirements, the failure to keep proper associated records, the concern that such amounted to “*a major road-safety concern*” and ongoing long-term failings regarding tyre pressure and wheel torque concerns (see paragraph 97 of the TC’s written reasons). The TC regarded those failings as dictating a starting point for his assessment as “*severe to serious*” and the grounds have not expressly challenged that assessment. The TC considered *“the current systems are not adequate to ensure that drivers hours and* *tachograph rules will be complied with nor are the current transport manager arrangements* satisfactory”. In our view such matters of themselves and without the TC’s further concern about swapping vehicles on and off the licence, were quite comfortably sufficient to underpin the decision to refuse the variation application. The only real point of substance made in support of this ground is that the appointment of another transport manager and the systems audit required as a result of an undertaking freely given, would have resulted in improvement. But, although this was not explicitly stated, it may well be that the TC was of the view any such changes should be allowed to bed in so that improvement could then be demonstrated at a future time before the variation could properly be granted. If so, it is an approach which would have been fair, sensible and appropriate. But anyway, the decision not to grant the variation is, we think, far removed from perversity or irrationality.

30. That brings us on to ground 6. Most of the time at the hearing was taken up with this ground. But there is no appeal against a bare decision to the effect that an operator has been acting unlawfully in swapping different vehicles on and off the licence. There is a right of appeal against a refusal to vary the terms of a licence and it might have been thought that the issue would have been relevant to that and, therefore, one which the Upper Tribunal was required to determine. But we have already concluded that the refusal to vary was justifiable on other grounds and that the TC did not err in refusing given the concerns we have referred to at paragraph 29 above. So, strictly speaking, this is another matter which we do not now need to determine in order to resolve the appeal. But again, we shall make our observations so that our own view is clear.

31. We have set out the relevant part of Section 2 of the Act above (see paragraph 11). It follows from that wording that a goods vehicle may only be used for the specified commercial purposes if that use is authorised under the terms of a licence. Section 6(1)(a) of the Act provides that a licence “*shall specify a* *maximum number for motor vehicles*”. Those sections when read in combination, strongly point to a position whereby an operator may generally use, in the course of those specified commercial activities, only the number of goods vehicles authorised.

32. The appellant, in this case, was routinely and as a business practice, using more vehicles in the operation of its business than it was seemingly authorised to do under the licence but was using the VOL system to swap vehicles on and off the licence so that, at any given time, no more than 9 (the number authorised to be used under the terms of the licence) were actually on the licence. Ms Hadzik had sought to justify this practice before the TC by arguing, in effect, that whilst the term “*use*” as it appears in section 2 of the Act is not defined, using a vehicle within the meaning contemplated by section 2 simply means driving it on the road. So, if an operator has a commercial vehicle which is not being driven for the above commercial purposes it is not at any given time when it is not being used in that way, being used within the meaning of section 2 of the Act and does not need to be specified on the licence. That being so, swapping vehicles on and off was perfectly lawful so long as no more than 9 were being used in the narrow way Ms Hadzik argued the legislation should be interpreted. In other words, the operator could have as large a fleet of vehicles as it wanted and that did not matter so long as only 9 were being driven for commercial purposes at any given time and that it was those 9 which were, as a consequence of diligent and frequent use of the VOL system, specified on the licence. Ms Hadzik saw support for her interpretation in the content of section 58(2) of the Act which provides: “*For the purposes of this Act, the driver of a vehicle, if it belongs to him or is in his possession under an agreement for hire, hire purchase or loan, and in any other case the person whose servant or agent the driver is, shall be deemed to be the person using the vehicle; and references to using a vehicle shall be construed accordingly*”. Mr Backhouse also sought to persuade us that the provision supported the narrow interpretation which had been unsuccessfully urged upon the TC.

33. We do not consider the TC to have erred in law in rejecting the contentions put to him on behalf of the appellant. We set out our reasons below.

34. Firstly, section 2 contemplates use of a goods vehicle for the carriage of goods for hire or reward or for or in connection with any trade or business carried on by an operator. If such a vehicle has been removed from the licence temporarily but is still an integral part of the business, it does not cease to be used in the business.

35. Secondly, section 58(2) does not assist the appellant. As to that, we agree with Mr Lewin that the provision is concerned with the identification of the natural or legal person to whom the legal duty to hold an operator’s licence as set out in section 2 of the Act applies. It does not serve as to inform as to the meaning of “*use*” for section 2 purposes.

36. Thirdly, if the interpretation urged upon us by Mr Backhouse were to be correct, it would jar with other provisions contained within the same Act and undermine the effect of those provisions which are directed towards the creation of an effective regulatory regime. By way of illustration, the number of vehicles authorised under a licence links directly to the calculation in relation to and the assessment of the financial standing requirement. The financial standing requirement is there to ensure that an operator has the financial wherewithal to effectively maintain and keep safe the vehicles which it is using in the business. If the definition of use was as narrow as suggested on behalf of the appellant that would render the requirement ineffective for that purpose. There is a need for an operating centre to be suitable. If vehicles were only being used in the business in the narrow sense suggested on behalf of the appellant, then the assessment of suitability would in some cases be based upon a significantly lower number of vehicles than are being realistically operated in the business and which would need to be parked at the operating centre. Again, that would undermine an aspect of the regulatory regime.

37. Fourthly, section 5(1) of the Act sets out a general rule, albeit subject to narrow exceptions, that the vehicles authorised to be used under an operator’s licence are any motor vehicle in the lawful possession of the licence holder, whether specified in the licence or not, and any trailer in the lawful possession of the licence holder. That being so, it follows that a vehicle remains authorised on the licence whilst it remains in the possession of the operator whether or not an application has been made to “*de-specify*” it in the way this operator was doing. That runs counter to the argument for the narrow construction.

38. In light of the above we accept the argument of Mr Lewin to the effect that a vehicle which is utilised as a commercial vehicle for the purposes of the business which an operator runs under a licence, is being used for the carriage of goods for hire or reward or in connection with any trade or business carried on by the operator even if that vehicle is not actually being physically driven for such purposes at any specific point in time. We reject the narrow interpretation advanced on behalf of the appellant in that regard. Further, we emphatically reject the notion that the near continuous specifying and de-specifying of vehicles is an appropriate way for an operator to conduct its business. Being in possession of a fleet of vehicles considerably in excess of the licence authorisation and then drawing down vehicles to use as and when required, as pointed out above, undermines at least two of the core requirements of the regulatory regime, namely those which relate to financial standing and operating centres. An operator which conducts its business in this way, absent exceptionally thorough oversight, runs the risk of using on a public highway a vehicle not specified on the licence and/or using one beyond the specified interval of its periodic maintenance inspection.

39. There is a one-month period (see section 24(6) of the Act) before the limitation starts to bite but, thereafter, an operator may only use (in the wider sense) vehicles which have been specified in the licence. Of course, relevant applications to specify additional vehicles and to de-specify vehicles may be made to the OTC (either by using the VOL system or otherwise) for approval.

40. So, we are unconvinced with respect to the bulk of the arguments which have been advanced on behalf of the appellant. But we have accepted that ground two is made out and we allow the appeal on that sole basis.

41. Having allowed the appeal we must consider what if anything we should do in consequence. We may make such order as we think fit (Paragraph 17(2) of the Transport Act 1985) or remit. We do not, in the circumstances described above and bearing in mind that matters have now moved on as explained to us by Mr Backhouse, see the need to make any order nor to remit. Whilst the above provision gives us “*power*” to make an order it does not compel us to do so even where we have found a ground of appeal to be made out. That being so, we make no order and we do not remit.

42. We do find ourselves wondering whether this appeal has, in truth, been anything more than an academic exercise. But nevertheless, we have determined it.

**M Hemingway**

**Judge of the Upper Tribunal**

**S James**

**Member of the Upper Tribunal**

**D Rawsthorn**

**Member of the Upper Tribunal**

**Authorised for issue on 7 July 2022**