IN THE UPPER TRIBUNAL **Appeal No. UA-2022-001227-T**
ADMINISTRATIVE APPEALS CHAMBER [2023] UKUT 97 (AAC)
(TRAFFIC COMMISSIONER APPEALS)

ON APPEAL from a DECISION of the TRAFFIC COMMISSIONER for the NORTHWEST of ENGLAND

Before: **M Hemingway: Judge of the Upper Tribunal**
G Roantree: Member of the Upper Tribunal
S Booth: Member of the Upper Tribunal

Appellant: **Lineage UK Transport Ltd**

Reference No: OC2023436

Representation:

For the Appellant: Mr J Backhouse (Solicitor)

For the Secretary of State: Mr F Campbell (Counsel)

Heard at: Leeds

Date of Hearing: 24 March 2023

Date of Decision: 17 April 2023

DECISION OF THE UPPER TRIBUNAL

The appeal is dismissed.

Subject matter: Proportionality; relevance of the Regulator's Code

Cases referred to: *Bradley Fold Travel Ltd and Anor v Secretary of State for Transport* [2010] EWCA Civ 695.

Andrew Murphy Transport Ltd [2022] UKUT 272 (AAC)

Thomas Muir (Haulage) Ltd [1999] SC 86

John Stuart Strachan t/a Strachan Haulage [2019] UKUT 287

Coach Hire Surrey Ltd [2020] EWCA Civ 1706

REASONS FOR DECISION

Introduction

1. This appeal to the Upper Tribunal has been brought by Lineage UK Transport Ltd (the appellant) from a decision of the Traffic Commissioner for the North-West of England, to curtail its standard national goods vehicle operator's licence (reference OC2023436) by reducing the number of vehicles and trailers authorised, from seventy vehicles and one hundred trailers to fifty-six vehicles and one hundred trailers for a period of twenty-eight days. The decision of the Traffic Commissioner ("TC") was made following a public inquiry ("PI") of 25 August 2022 and was explained in written reasons of that date. The TC made other decisions at the same time and arising out of the same proceedings, but those have not been the subject of any appeal to the Upper Tribunal.

2. The curtailment did not have any practical adverse impact upon the appellant's business and the period of the curtailment has, in any event, long since passed. But the appellant has pursued this appeal to the Upper Tribunal nonetheless and Mr Backhouse explained to us that that was because of concerns the decision will have an adverse impact upon the appellant's reputation.

3. The Secretary of State, unusually for cases in this jurisdiction, has been joined as a party to the proceedings. A request was made on behalf of the Secretary of State by his legal representatives and the Upper Tribunal acceded to that request.

4. The appeal was considered by way of an oral hearing which took place before us on 24 March 2023, at Leeds. The appellant was represented by Mr James Backhouse (we give him his full name to distinguish him from his brother Mr Jonathon Backhouse) and the Secretary of State by Mr F Campbell of Counsel. We are grateful to each of them for their clear and interesting oral submissions. In addition to what was said at the hearing we have taken into account the content of the Upper Tribunal bundle, a skeleton argument supplied on behalf of the appellant with attachments and a skeleton argument supplied on behalf of the Secretary of State, also with attachments.

Some legal provisions and other documents of relevance

5. Section 1 of the Goods Vehicles (Licencing of Operators) Act 1995, provides as follows:

> **1 -. Functions of traffic commissioners.**
> (1) A traffic commissioner shall exercise the functions conferred on him by this Act.
> (2) In the exercise of his functions under this Act a traffic commissioner shall act under the general directions of, and shall have regard to any guidance given by, the senior traffic commissioner.

6. Section 2 of the Act relevantly provides:

> **2 -. Obligation to hold operator's licence.**

> (1) Subject to subsection (2) and sections 3A and 4, no person shall use a goods vehicle on a road for the carriage of goods –
> (a) for hire or reward or,
> (b) for or in connection with any trade or business carried on by him, except under a licence issued under this Act; and in this Act such a licence is referred to as an "operator's licence".

7. Section 13C of the Act relevantly provides:

> **Requirements for standard and restricted licences**
> …
> (4) There must be satisfactory facilities and arrangements for maintaining the vehicles used under the licence in a fit and serviceable condition…

8. Section 26 of the Act relevantly provides:

> **26. – Revocation, suspension and curtailment of operator's licences.**
> (1) Subject to the following provisions of this section and the provisions of section 29, a traffic commissioner may direct that an operator's licence be revoked, suspended or curtailed (within the meaning given in sub-section (11)) on any of the following grounds –
> …
> (c) that during the five years ending with the date on which the direction is given there has been –
> …
> (iii) a prohibition under section 69 or 70 of the Road Traffic Act 1988 (power to prohibit driving of unfit or overloaded vehicles) of the driving of a vehicle of which the licence-holder was the owner when the prohibition was imposed;
> …
> (f) that any undertaking recorded in the licence has not been fulfilled.
> …
> (11) In this Act references to directing that an operator's licence be curtailed our references to directing (with effect for the remainder of the duration of the licence or for any shorter period) all or any of the following, that is to say –
> (a) that one or more of the vehicles specified in the licence be removed from it;…

9. Section 21 of the Legislative and Regulatory Reform Act 2006 ("the 2006 Act") provides:

> **21 Principles**
> (1) Any person exercising a regulatory function to which this section applies must have regard to the principles in subsection (2) in the exercise of the function.
> (2) Those principles are that –
> (a) regulatory activity should be carried out in a way which is transparent, accountable, proportionate and consistent;

> (b) regulatory activity should be targeted only at cases in which action is needed.
> (3) The duty in subsection (1) is subject to any other requirement affecting the exercise of the regulatory function.

10. Section 22 of the 2006 Act provides:

> **21. Code of practice**
> (1) A Minister of the Crown may issue and from time to time revise a code of practice in relation to the exercise of a regulatory function.
> (2) Any person exercising a regulatory function to which this section applies must, except in a case where subsection (3) applies, have regard to the code in determining any general policy or principles by reference to which the person exercises the function.
> (3) Any person exercising a regulatory function to which this section applies which is a function of setting standards or giving guidance generally in relation to the exercise of other regulatory functions must have regard to the code in the exercise of the function.
> (4) The duties in sub-sections (2) and (3) are subject to any other requirement affecting the exercise of the regulatory function.

11. Section 32 of the 2006 Act potentially relevantly provides:

> **32. General interpretation**
> (1)…
> (2) In this Act "*regulatory function*" means –
> (a) a function under any enactment of imposing requirements, restrictions or conditions, or setting standards or giving guidance, in relation to any activity; or
> (b) a function which relates to the securing of compliance with, or the enforcement of, requirements, restrictions, conditions, standards or guidance which under or by virtue of any enactment relate to any activity.
> (3) in subsections (2)(a) and (b) the references to a function –
> (a)…
> (b) do not include –
> (i)…
> (2) any function of conducting criminal or civil proceedings…

12. The current Regulator's Code was made pursuant to section 22(1) of the 2006 Act. The Code's opening words, mirroring some of what is said in the legislation above, are as follows:

> "This Code was laid before Parliament in accordance with section 23 of the Legislative and Regulatory Reform Act 2006 ("the Act"). Regulators whose functions are specified by order under section 24(2) of the Act **must** have regard to the code when developing policies and operational procedures that guide their regulatory activities. Regulators must equally have regard to the Code when setting standards or giving guidance which will guide the regulatory activities of other regulators. If a regulator concludes, on the basis of material evidence, that a

> specific provision of the Code is either not applicable or is outweighed by another relevant consideration, the regulator is not bound to follow that provision, but should record that decision and the reasons for it".

13. Section 4C of the Public Passenger Vehicles Act 1981 ("the 1981 Act") relevantly provides as follows:

> **4C Power of senior traffic commissioner to give guidance and directions**
>
> (1) The senior traffic commissioner may give to the traffic commissioners
> (a) guidance, or
> (b) general directions,
> as to the exercise of their functions under any enactment…
>
> (2) The guidance that may be given under sub-section 1(a) above includes guidance as to -
> (a) the meaning or operation of any enactment or instrument relevant to the functions of traffic commissioners
> (b) the circumstances in which, and the manner in which, a traffic commissioner should exercise any power to impose any sanction or penalty;
> (c) matters which a traffic commissioner should or should not take into account when exercising any function….

14. Included in the Statutory Guidance issued by the Senior Traffic Commissioner under section 4C of the 1981 Act is Statutory Document 10 which is entitled "*The Principles of Decision Making and the Concept of Proportionality"*. We shall say more about the content of that Statutory Document below.

15. We also mention, at this stage, the Guide to Maintaining Roadworthiness ("GMR") issued by the Driver and Vehicle Standards Agency ("DVSA"). In referring to that document for the first time (we shall say something more about it below) in this section of our decision, we wish to make it perfectly clear that we are not equating it to legislation nor to Statutory Guidance. We stress this because Mr Backhouse has strongly argued, in the course of these proceedings, that the TC has erred by effectively elevating its status in that way. It is simply that we have to mention it for the first time somewhere. We accept it is, as was uncontroversially we think suggested in Mr Campbell's skeleton argument, "*a guide to best practice, designed to assist operators, drivers and others to comply with the obligations imposed under legislation and the terms of their licences*". But we accept it is no more than that.

The Upper Tribunal's approach to appeals in this jurisdiction

16. The right of appeal against decisions taken under the Act is conferred and set out at paragraph section 37 of the Act. It is not in dispute that the particular decision specified above as being under challenge in these proceedings falls within section 37 of the Act such that there is a right of appeal to the Upper Tribunal.

17. Paragraph 17 of Schedule 4 to the Transport Act 1985 (as amended) provides that the Upper Tribunal "*are to have full jurisdiction to hear and determine on matters whether of law or of fact for the purpose of the exercise of their functions under an enactment relating to transport*". However, it was explained by the Court of Appeal in *Bradley Fold Travel Ltd and Anor v Secretary of State for Transport* [2010] EWCA Civ 695, that the Transport Tribunal (now embraced within the Upper Tribunal) will not be required to rehear all the evidence by conducting what would, in effect, be a new first instance hearing. Rather, it has the duty to determine matters of fact and law on the basis of the material before the TC but without having the benefit of seeing and hearing from witnesses. An appellant assumes the burden of showing the decision appealed against was wrong. In order to succeed an appellant must show that the process of reasoning and the application of the relevant law requires the adopting of a different view to that taken by the TC. The test has typically been applied by the Upper Tribunal asking itself, in a given case before it, whether the decision of the TC was "*plainly wrong*" (see a recent application of that approach in *Andrew Murphy Transport Ltd* [2022] UKUT 272 (AAC)). That is the established approach where the appeal is against findings of fact and/or against the exercise of discretion by a TC. But of course, where it is alleged that the TC has misunderstood or misapplied the law, the Upper Tribunal's task is to simply consider whether a material error of law has been shown.

18. Paragraph 17(3) of the above Schedule provides that in deciding an appeal the Upper Tribunal may not take into consideration any circumstances which did not exist at the time of the determination which is the subject of the appeal.

19. As to disposal, the Upper Tribunal has power, if allowing an appeal, to make such order as it thinks fit which includes making no order at all (in appropriate cases) or to remit the matter back to the TC for rehearing if it considers such a course to be appropriate (see paragraph 17(2) of the above Schedule).

The background circumstances

20. There was, we are told, a company called Harry Yearsley Ltd which operated in the road haulage industry for approximately sixty years. It seems that the appellant took over that business. The appellant obtained seven operator's licences in total (all of them standard national goods vehicle operator's licences, all of which were issued on 20 June 2019 and which included the above licence. Under the terms of all of those licences the appellant is authorised to operate two hundred and ninety vehicles. There are, unsurprisingly, a number of different transport managers employed by the appellant.

21. In April 2022 a prohibition was issued with respect to one of the vehicles operated under licence OC2O23436. The vehicle was found to have a defective brake when presented for annual MOT test. That resulted in an announced maintenance investigation visit which was undertaken by the DVSA on 6 May 2022. The TC was to describe the results of that investigation visit in this way;

> *"7. This led to an unannounced DVSA maintenance investigation visit to the operator's operating centre at Heywood, Lancashire on 6 May 2022. The vehicle examiners findings were mixed with 7 of the 12 question areas being marked as satisfactory and one as "mostly satisfactory". However, 3 questions were assessed as "unsatisfactory", and the prohibition was considered to merit reporting to my office.*

> *8. One of the unsatisfactory assessments related to the fact that operator had not at the time of the visit updated the licence with the name of director appointed around three weeks earlier. These were later added within the twenty-eight day period expected. I therefore disregarded that assessment.*
>
> *9. The greatest concern was that the vehicle examiner found there no arrangements for roller brake tests to be undertaken at the frequency recommended by the Guide to Maintaining Roadworthiness. He considered this contributed to the "S" marked prohibition as well as an earlier prohibition at annual test for a brake defects (these two annual tests contributed to the sum total of only three failed tests in the three years of the licences life with 97 presentations. The operator had a strong pass rate otherwise)".*

22. The TC decided to call the appellant, one now former transport manager TM Hill, and one current transport manager TM Pugh to a public inquiry ("PI").

The Public Inquiry and the Traffic Commissioner's Decision

23. The PI, as indicated, took place on 25 August 2022. Evidence was given by its Chief Operating Officer Mr Timothy Moran, its Director of Transport UK Mr William Maycock; and Transport Managers Hill and Pugh. The appellant was represented (as before us) by James Backhouse. The TC referred to the documentary evidence and summarised the oral evidence in this way:

> *"17. Prior to the hearing I received documentary evidence from the operator together with a written report prepared by its solicitors.* ***[I also received evidence of financial standing which I considered to be satisfactory for the purposes of today's hearing, when the relevant undertaking recorded above was also considered]***
>
> *18. The sample vehicle files contained evidence that some changes had been made to the roller brake testing regime, but it was accepted by the operator that this remained a work in progress.*
>
> *19. I heard evidence from Ms Hill, Ms Pugh, Mr Maycock, and Mr Moran. Mr Maycock is a named Transport Manager on the North-East licence and acts as the operator's lead Transport Manager and Mr Moran.*
>
> *20. It was accepted that roller brake testing was only being undertaken at annual test (and as part of the pre-test inspection). For some unknown reason the vehicle that was the subject of the "S" mark prohibition was not the subject of a roller brake test before it was presented for annual test.*

21. The operator's maintenance and compliance procedures had effectively been carried over from the previous licence holder when the business was acquired by the operator's parent company in 2018.

22. Although Mr Maycock, Ms Hill and Ms Pugh had worked for the business for some time, they all first took their CPC qualification in 2018 and have only acted as transport managers since that point. All three witnesses asserted that they had not been trained on brake testing requirement as part of their CPC training. They had also been mentored by former transport managers within the business who had not highlighted that issue.

23. The witnesses clearly did not have much awareness of the Guide to Maintaining Roadworthiness (GTMR) and specifically the brake testing guidance prior to the DVSA visit in May 2022 and their attendance at subsequent training courses.

24. It was accepted that the previous approach to brake testing was common across all the operator's licences and not restricted to the North- West licence. Mr Moran as Chief Operating Officer described this as a "blind spot".

25. It was highlighted that the operator's high MoT pass rate and lack of enforcement action following encounters together with their Green/ Green OCRS rating led to the belief that their systems were fully compliant and effective. Its previous internal audit processes had also been suspended due to the impact of pandemic.

26. The operator has already tried to address the roller brake testing issue by acquiring a portable brake tester for its Heywood operating centre. Unfortunately, this produced some anomalous results, so the operator has now invested in a rolling road facility for Heywood which is being installed in September 2022. Action is also being taken to ensure the other licences adopt the brake testing approach recommended by the Guide to Maintaining Roadworthiness".

24. The TC went on to make these findings:

"*Findings of fact*

27. I find that the operator did not have a process to ensure that vehicles were roller brake tested with the frequency recommended by the Guide to Maintaining Roadworthiness. This directly led to the "S" mark prohibition that was issued in April 2022.

28. It follows that I find the grounds for regulatory action in Section 26(1)(c)(iii) (prohibitions) and Section 26(1)(f) (failure to honour the undertaking to keep vehicles and trailers fit and serviceable) are satisfied.

> *29. I further find that failure ought to have been prevented by a competent Transport Manager as part of their duty to ensure that vehicles and trailers are kept in a fit and roadworthy condition. As Transport Managers named on one of the operator's licences concerned, it calls into question whether Ms Hill and Ms Pugh continue to meet the requirement to be of good repute for the purposes of Schedule 3 of the Act. I add that the same question could be asked of the other Transport Managers employed by the operator but who were not called to the public inquiry".*

25. And having made his findings the TC went on to analyse the issues and explain his decision on curtailment (see above) in this way:

> "*Relevant considerations and decision*
>
> *30. Having reached the findings set out above, I have considered what (if any) regulatory action is required. I have balanced the positive and negative features of the case as guided by Statutory Document 10. I have also taken account of the closing submissions made by Mr Backhouse who invited me to determine that no such action was required.*
>
> *31. The finding in relation to the previous brake testing approach, leads me to conclude that the operator did not have fully effective management control and contribute to road safety critical defects on a vehicle resulting in an "S" marked prohibition at MOT. Those are negative features.*
>
> *32. I balance this with the fact that the operator's management control and systems in all other regards appear to be compliant and effective. It properly refers to its strong MoT pass rate and absence of other enforcement history.*
>
> *33. I also treat as positive that some changes have already been made to ensure future compliance and the plans for future development reassure me those changes will be sufficient and effective.*
>
> *34. Finally, as far as the operator is concerned, I also take account of the disruption that the pandemic caused to its internal auditing process.*
>
> *35. The assessment of brake performance is a basic competent for ensuring the safety and roadworthiness of large goods vehicles. This is behind the revisions to the GRMR and DVSA guidance that was issued in December 2020 and has since been widely publicised within the industry. A competent operator should ensure it has effective systems in place to ensure roadworthiness checks to the required standard. It should also have effective processes in place to identify and disseminate changes in guidance on maintenance standards.*

36. I acknowledge the many positives of this operator's compliance but the previous approach to brake testing was a huge black spot that should have been identified and addressed much sooner. For that reason, I consider that regulatory action in the moderate category is required to serve as a marker for the future expectation of compliance.

37. I determine that my concern about the situation can be reflected by curtailment of the operator's authority from 70 vehicles to 56 vehicles for 28 days, this being equivalent to a 20% reduction. The curtailment will take effect from 23:45 hours tonight and will remain effective until 23:45 hours on Thursday 22 September 2022.

38. I accept the undertakings offered by the operator as recorded above.

39. I determine that no further action should be taken against Ms Hill and Ms Pugh as transport managers. It is the responsibility of transport managers to ensure that operator's vehicles are kept fit and roadworthy including effective brake testing. Even if a transport manager has joined an existing business or shares their duties with other qualified persons, each individual transport manager has a personal responsibility for compliance. A transport manager is expected to question and challenge any procedures or systems that they consider to be non-compliant or ineffective.

40. The failure to ensure that an operator's vehicles were brake tested at the recommended frequency would usually result in a transport manager's repute being marked as at least tarnished if not lost. However, in the particular circumstances of this case, I determine it would be unfair to single out Ms Hill and Ms Pugh for regulatory action.

41. They accepted the processes they inherited from the former licence and post holders. That was with some justification given most of their indicators of compliance appeared to be in good order. I take note that their approach was no different to the other 8 transport managers within the business including those in more senior and supervisory roles to them. I am also satisfied that the call to public inquiry, in itself, will ensure that neither Ms Hill not [sic] Ms Pugh will find themselves in such a position in future. For that reason, I do not consider that a formal warning is necessary.

42. I record that Ms Hill and Ms Pugh's good repute and professional competence is intact. I remind them (as I do Mr Maycock) that attendance at a CPC refresher course is desirable 5 years after their first qualification in 2018".

26. The appellant appealed to the Upper Tribunal. In what constitutes a preamble to the grounds of appeal this was given by way of an explanation as to the appellant's motive for appealing:

> *"10. Although the order only temporarily impacted part of the margin of their authorisation, the order is significantly reputationally damaging to the Appellant and represents a severe (in the eyes of any third party looking at the Appellant's compliance) implied criticism of them which is incompatible with the evidence-based reality*".

27. As we have understood the position the curtailment, in fact, had no practical adverse impact upon the appellant's business at all but, in making that point, we are simply clarifying our understanding of the position and are not seeking to criticise the appellant for pursuing the appeal.

The grounds of appeal to the Upper Tribunal

28. The appellant pursued five grounds of appeal. To some degree we think they overlap. But we would summarise them as follows:

> Ground 1 – the TC fell into error through deciding serious regulatory action was required. In the circumstances the decision went beyond "*the margin of appreciation which the Upper Tribunal use to approach exercises of discretion, to the point where it was plainly unfair and wrong"*.
>
> Ground 2 – the TC wrongly treated the appellant's failure to have rolling road brake testing undertaken four times a year, as recommended in the GMR, as amounting to a failure to comply with a mandatory obligation.
>
> Ground 3 – the TC fell into error through taking a decision which amounted to or was intended to constitute a punishment for the prohibition. Further, in so doing, the TC breached the "*binding statutory Regulator's Code*".
>
> Ground 4 – the TC erred (if we understand the argument correctly) in imposing a sanction which was not going to, was not intended to and which did not have any adverse operational impact, in circumstances where, had such action potentially had an impact, it would not have been imposed. The ground also criticises the TC for failing to consider "*the reputational impact for the Appellant*" and, by implication, for failing to take into account the appellant's "*excellent record prior to this prohibition".*
>
> Ground 5 – the TC failed to properly undertake a balancing exercise with respect to the proportionality of the sanction imposed. Further, the basis for the taking of regulatory action was unclear and there was no proper need for any "*marker*" to be set down.

The Hearing

29. Mr Backhouse largely relied upon the content of his skeleton argument in which he had set out and explained his various grounds of appeal. His oral submissions were primarily

focused upon Ground 3 and what he argued was the significance of the Regulator's Code. The provisions of that Code, argued Mr Backhouse, applied to each individual TC when he/she was performing a regulatory function. The importance of the Code was underpinned by statute. But even leaving the Code aside, there had been no basis for the TC to take regulatory action in this case. It had not even been necessary to convene a PI. The appellant had an excellent record in terms of regulatory compliance. Even if it was generally permissible to impose a regulatory sanction in order to send a "signal" to this and other Operators, such was not needed here. The decision to do so had been plainly wrong. The appellant had suffered reputational damage as a result. Mr Backhouse was also critical of Mr Campbell for as we understand it, being inappropriately partisan in seeking to persuade us, in his skeleton argument, that the grounds of appeal lacked merit. We shall look at that criticism briefly below.

30. Mr Campbell said he accepted the GMR was not legally binding but suggested the TC had not treated it as such. The TC had, in principle, been entitled to take regulatory action and that entitlement had been triggered by the prohibition and the breach of undertakings (section 26 of the Act). The TC had found there to have been significant concerns relating to brake checks, a matter of considerable importance, and with respect to a wholesale lack of training around the issue. The argument based upon the 2006 Act and the Code is "novel". Mr Campbell suggested that was probably because it was obviously unpersuasive. Even if the Code has some degree of application in cases such as this it really adds nothing to the analysis. It is well established through caselaw that deterrence is a legitimate consideration when a TC is contemplating regulatory action. Such action does not have to be reserved for the worst type of Operator. Those who gave oral evidence on behalf of the appellant at the PI had effectively acknowledged significant failings. Ms Hill had made it plain that appropriate training had not been offered and Mr Moran had accepted there had been a "blind spot" with respect to brake testing. It had been appropriate and within discretion for the TC to "put down a marker" even if the sanction selected did not have a practical adverse impact upon the appellant. Mr Campbell had not been partisan. The purpose of the Secretary of State in becoming involved in this case had been to assist the Upper Tribunal. But in doing that, it had been necessary to engage with the facts of the case.

31. Mr Backhouse, by way of reply to Mr Campbell's points, contended the decision of the TC had been disproportionate, that it or aspects of it had not been rational, and that a warning (which would not have constituted regulatory action) would have been an appropriate course.

Our analysis

32. We start by repeating our gratitude to each representative. It is unusual in a traffic case for the Secretary of State to be an active participant. As indicated, we joined the Secretary of State upon application and we have considered the participation of the Secretary of State to be appropriate and, as it has turned out, helpful. When the Secretary of State does become involved in a case such as this it is primarily though not necessarily exclusively for the purpose of assisting the Upper Tribunal with points of principle. Mr Campbell has made clear in his skeleton argument that such was the purpose in this case. But we accept that function or purpose might sometimes lead to the Secretary of State having to engage with the facts of a case and/or the merits of specific arguments which have been advanced. So, insofar as it might be thought relevant, we do not accept the criticism which Mr Backhouse has made of the approach taken on behalf of the Secretary of State in this case and we do not find that

approach to have been inappropriately partisan. But we do not ourselves criticise Mr Backhouse for raising the issue.

33. Mr Campbell has suggested, in his skeleton argument and again in his oral submissions, that the grounds of appeal mischaracterise the decision of the TC through wrongly asserting or implying that the sole failing identified was a single issue of concern regarding an isolated omission to carry out pre-MOT break testing. We will simply say that in deciding this appeal and in evaluating the strength of the grounds, we have in mind what the TC had to say in the written reasons of 25 August 2022 and that includes the content of paragraph 9, paragraphs 21-24, paragraphs 27-29, paragraph 32 and paragraph 36 (see above).

34. We now come on to consider each of the five grounds of appeal. We have already observed that there is an element of overlap in the content of the grounds but that was probably inevitable given the similarity of some of the arguments which have been advanced. It may mean, though, that there is a risk of repetition in what we have to say below.

35. As to ground 1, we would accept, as Mr Backhouse has argued, that in many respects the appellant has a good regulatory history, has been open about previous failings (the oral evidence at the PI was very frank), and has sought to rectify matters speedily once relevant failings were realised. But we do not detect any failure on the part of the TC to appreciate those points (see for example what the TC had to say at paragraphs 26, 32, 33 and 36 of the written reasons). Frankness of the witnesses was not specifically remarked upon in the above passages but the TC, having received that evidence, was clearly aware of it. We do not accept that the failings were insignificant or as limited in scope as Mr Backhouse seems to argue at certain points. The TC properly identified a lack of training and awareness as to brake testing requirements within the appellant company and an absence of satisfactory brake testing systems. Such was properly based upon the DVSA maintenance investigation findings and the oral evidence which had been given to the TC. We have already touched upon that oral evidence, but we stress that Mr Maycock, Ms Pugh and Ms Hill, all of whom had acted as a transport manager for the appellant at various times, had not had training on brake testing procedures (paragraph 22 of the written reasons). They were largely unaware of the relevant content of the GMR about which we shall say more below (paragraph 23 of the written reasons). There was the acknowledgement by Mr Moran (who is properly to be regarded as quite a senior officer within the appellant company), that there was, in this area, a "blind spot" with respect to brake testing. We cannot see, notwithstanding the other favourable factors, any viable argument to suggest that the TC's assessment of the brake testing failings to be "a huge black spot that should have been identified and addressed much sooner" was in any sense unreasonable or misplaced. We accept the truth of Mr Campbell's general observation to the effect that brake testing procedures are of particular importance from the point of view of road safety. The particular sanction imposed was a measured one. The TC did not end up categorising the failings as being within the "serious" range as set out in Annex 4 to Statutory Document Number 10 (see above) but rather within the moderate range. That does not seem to us to be an inappropriate end point to reach with respect to categorisation.

36. Both representatives took the view (though possibly only by implication in the case of Mr Backhouse) that the "plainly wrong" approach is to be taken by the Upper Tribunal when dealing with a challenge to the exercise of discretion by a TC. We think that must be right. For the above reasons we are some distance away from a conclusion that the TC, in this case, has reached an outcome which was disproportionate or otherwise plainly wrong. It was an

outcome which we feel was properly justified and which has been concisely but more than adequately explained. We reject this ground of appeal.

37. We shall be relatively brief with respect to ground 2. We have already explained what the GMR is (see above). Nobody has suggested to us that, since it is issued by the DVSA as a guide to good practice, it is not a document of importance or that the guidance contained within it is not an important tool which may be utilised by an Operator to ensure or inform as to compliance with required safety standards concerning the operation of a commercial vehicle's brakes. We agree with Mr Backhouse when he says it should not be elevated to the status of legislation and that it should not be read as containing or imposing statutory requirements. But we disagree with him when he asserts that the TC has done so and has, thereby, erred in law. The TC, at no point in his reasoning, says anything specific to suggest he has elevated the status of the GMR or has mistakenly thought it has some legal significance which it does not have. The TC did treat its content as informing as to what might normally be expected of an Operator in this area but that was entirely permissible. Ultimately, the TC resolved matters against the appellant not because guidance in the GMR had not been complied with but because it did not "ensure it has effective systems in place to ensure roadworthiness checks to the required standard". It is simply that the content of the GMR permissibly informed alongside other evidence, as to the issue of effective systems. We reject this ground of appeal.

38. Ground 3 involves the Regulator's Code. We remind ourselves (see above) that section 21 of the 2006 Act states that "any person exercising a regulatory function" must have regard the principle that "regulatory activities should be targeted only at cases where action is needed". In essence, Mr Backhouse says individual TC's are caught by the provisions of the 2006 Act and that, in this case, the regulatory action taken was punitive, because otherwise there was no justification for it, and in consequence, was not targeted at a case where action was needed.

39. We can dispose of this ground without undertaking any meaningful consideration of the potential relevance of the Code and the associated provisions contained within the 2006 Act. That is because we do not, in any event, consider the regulatory sanction to have been intended to be punitive or to have been actually punitive. We consider the sanction to have been one which was directed towards a case where action was needed. That being so, it does not matter whether, as Mr Backhouse says, the Code and the 2006 Act adds something additional to what is contained within the caselaw and the Senior Traffic Commissioner's Statutory Guidance or whether, as Mr Campbell says, they do not. But we shall go on to explain why we prefer the argument of Mr Campbell anyway. But first we point out that the TC did not, at any stage, assert that he was imposing a regulatory sanction because he thought there was a need to punish the appellant. We think that, unless the TC was being disingenuous in seeking to hide the real purpose for his deciding as he did, he would have said he was imposing a sanction as punishment. We would observe that it has not been argued that the TC has been disingenuous, and we cannot detect any basis on our own scrutiny for concluding that he has. There is no such indication whatsoever in the material before us. In fact, the TC, having referred to a number of considerations weighing against and in favour of the appellant specifically indicated why it was that he had decided a regulatory sanction was appropriate and why he had decided the one he had selected was appropriate. He said, "I consider that regulatory action in the moderate category is required to serve as a marker for the future expectation of compliance". That seems to us to be a pretty clear indication that the TC was not intending to impose a sanction as a punishment. Mr Backhouse's position in response to that would, we think, be to assert that it amounted to a punishment because there was no other

rationale for the imposition of the sanction and conceivably, though Mr Backhouse has not argued this at all, that the TC might have been subconsciously seeking to impose a punishment. We would dismiss the latter possibility immediately because, as we say, the TC has clearly said why he is imposing a sanction. As to whether it amounts to a punishment even if not intended to be one, we have had regard to caselaw. In *Thomas Muir (Haulage) Ltd* [1999] SC 86 it was said that a TC was not "*prevented from taking into account, where appropriate, some considerations of a disciplinary nature and doing so in particular for the purpose of deterring the operator or other persons from failing to carry out their responsibilities the legislation. However, taking such considerations into account would not be for the purpose of punishment per se but in order to assist in the achievement of the purpose of the legislation*". In *John Stuart Strachan t/a Strachan Haulage* [2019] UKUT 287 (AAC) it was said that "*One of the aims of the regime is deterrence both for the appellant and for operators as a whole, who might be tempted to flout the system*". This general approach was recently approved by the Court of Appeal in *Coach Hire Surrey Ltd* [2020] EWCA Civ 1706.

40. The TC did not expressly refer to any of those cases. But he could hardly have been unaware of them as a TC. Further, the above approach is set out in Statutory Document Number 10. We have set out above some legislation concerning the purpose of the Statutory Guidance and would add, here, that the purpose of the Guidance is explained in an introduction to it as "to provide information as to the way in which the Senior Traffic Commissioner believes that traffic commissioners should interpret the law relating to the application of the Statutory Documents" albeit with the caveat that the Guidance may be subject to decisions of the higher courts.

41. So, putting matters into context and having regard to the above, we think it becomes very clear that what the TC was actually doing was performing his statutory function, as guided by caselaw which binds him and as guided by the Statutory Guidance, in reaching an outcome which entirely permissibly contained an element of deterrence. That was his intention and that, in our firm view, was what he actually achieved. There was a purpose behind the sanction other than punishment, and this was, in that context, a case where action was needed. That disposes of ground 3. But we do, as indicated, have a little more to say about it.

42. Mr Backhouse accepts, as he put it in his skeleton argument, that "Statutory Document 10 is capable of being read as compliant with the Code/2006 Act". We think it is entirely so compliant. We would point out that we have not been taken to any provision in the Code which is different to, in conflict with, or is absent and so potentially supplemental, from what is said in the Guidance, nor is different to what is said in the caselaw to which we have referred. Put another way, we have not been taken to anything in the Code or the associated legislation which would be capable of adding to what the TC's duties were in considering and deciding the case which was before him. The best that has been argued is that the use of a punitive sanction was prohibited but, as we have explained, there was not a punitive sanction in this case and the Guidance and caselaw would prohibit that anyway, entirely independently of the Code and the associated legislation. Indeed, even if the Code is capable of having application when individual regulatory decisions are being taken (which we doubt) we see in general terms no real scope for any reason to think anything said therein does or is capable of meaningfully adding to the considerations which the law relating specifically to regulation of heavy goods vehicles and public passenger vehicles, the caselaw and the Statutory Guidance, requires to be taken account of at the time such decisions are being made. We suspect that is

why, at least in our experience, no argument based upon the content of the Code has been pursued in any other traffic case since the introduction of it.

43. As to ground 4, we have to say we find very little force in it. The rationale for the sanction was to send a signal, in this case we think primarily to the appellant though the TC might also have had other Operators in mind, that the failings had been of some significance and ought not to be repeated. That was justifiable. It was also a sanction of the type specifically referred to in Statutory Document 10 as being justified even absent any practical adverse impact. It is said as an additional component of this ground that the TC failed to have regard to "the reputational impact for the Appellant" and that such included "the negative impact on the Appellant's trust in the regulatory regime". We see no basis at all for the contention that the TC had any obligation to have regard to the claimed reputational damage and no basis was specified in argument. The argument about trust in the regime is again not something which the TC was required to have regard to either. We reject this ground.

44. As to ground 5, we have already explained the basis for the taking of regulatory action by the TC. That basis was not unclear. The TC carried out a balancing exercise in which he identified the points which went in favour, and which weighed against the appellant (paragraphs 30-37 of the written reasons). It is clear from the wording of paragraph 30 of the written reasons ("I have considered what (if any) regulatory action is required") that the TC did consider the possibility of not taking any action at all, despite its being suggested that he had not. The exercise performed by the TC was very much in line with what was required. Mr Backhouse seemed to suggest that, after listing the relevant considerations in favour and against the appellant there ought to have been a further section evaluating their relative weight and then explaining why in light of those considerations regulatory action was needed. Perhaps a little more could have been said but it is clear that the TC was accepting that despite the otherwise favourable points relating to the appellant, the failure in not having appropriate brake testing systems were sufficiently serious for the reaching of the threshold for regulatory action which would go beyond a simple warning. A proper consideration as to proportionality was obviously undertaken and we reject this final ground of appeal.

45. The appeal is dismissed.

M Hemingway
S Booth
G Roantree
Dated: 17 April 2023