NCN: [2024] UKUT 226 (AAC)

IN THE UPPER TRIBUNAL **Appeal No. UA-2023-001108-T**
(ADMINISTRATIVE APPEALS CHAMBER)
TRAFFIC COMMISSIONER APPEALS

ON APPEAL from a DECISION of the DEPUTY TRAFFIC COMMISSIONER for Scotland

Before:	Ms L. Joanne Smith: Judge of the Upper Tribunal Mr D. Rawsthorn: Member of the Upper Tribunal Mr M. Smith: Member of the Upper Tribunal
Appellant:	John Stuart Strachan t/a Strachan Haulage
Respondent:	Traffic Commissioner for Scotland
Reference No:	OM29162
Decision under appeal:	14 July 2023
Heard at:	Employment Appeal Tribunal Building, Edinburgh
Date of Hearing:	16 April 2024
Date of Decision:	31 July 2024 (Corrected under Rule 42 of the Rules on 29 August 2024)

DECISION OF THE UPPER TRIBUNAL

The appeal is ALLOWED IN PART.

The orders of the Deputy Traffic Commissioner dated 14 July 2023 are confirmed except for the orders of disqualification from holding an operator's licence and from acting as transport manager, which are re-made, under paragraph 17(2)(a) of Schedule 4 to the Transport Act 1985, in the following terms:

> **John Stuart Strachan is disqualified from holding an operator's licence for a period of five years in terms of s.28(1) of the Goods Vehicles (Licensing of Operators) Act 1995**

John Stuart Strachan has lost his good repute as a transport manager. He is disqualified from acting as a transport manager in terms of paragraph 15 of Schedule 3 of the Goods Vehicles (Licensing of Operators) Act 1995 for a period of seven years.

The above orders are to take effect from 2359hrs on 16 September 2023, in line with the other orders of the Deputy Traffic Commissioner made on 14 July 2023.

Subject matter:

Use of unauthorised vehicles; sub-contracting to circumvent the curtailment of an operator's licence; "user" of vehicles on an operator's licence; proportionality of sanction; disqualification as operator and as transport manager; periods of disqualification.

Cases referred to:

Bradley Fold Travel Ltd & Anor v Secretary of State for Transport [2010] EWCA Civ 695. *Clarke v Edinburgh & District Tramways Co Ltd* [1919] UKHL 303; (1919) SC (HL) 35; 56 SLR 303. *Subesh & Ors v Secretary of State for the Home Department* [2004] EWCA Civ 56. *Interlink Express Parcels v Night Trunkers Ltd* [2001] EWCA CIV 360. *Thomas Muir Haulage Ltd v Secretary of State* 1998 SLT 666. *Bryan Haulage (No.2)* (T2002/217). *2009/225 Priority Freight Ltd & Paul Williams. 2016/046 R & M Vehicles Ltd, Graham Holgate and Michael Holgate*). *2009/410 Warstone Motors t/a The Green Bus Service*. *2016/026 J Campbell t/a Vision Travel*. *2014/040&41 C.G. Cargo Ltd and Sukhwiunder Singh Sandhu. 2005/426 Kuldev Singh Oakhal t/a Premier Transport Services. 2005/367 K Jaggard.*

REASONS FOR DECISION

1. This is an appeal to the Upper Tribunal brought by Mr John Stuart Strachan t/a Strachan Haulage ("the Appellant), against a decision of the Deputy Traffic Commissioner for Scotland ("the DTC"), dated 14 July 2023. The DTC revoked the Appellant's operator's licence under s.26(1)(b) of the Goods Vehicles (Licensing of Operators) Act 1995 ("the Act") (breach of licence condition),

s.27(1)(a) of the Act (operator no longer of good repute), and under s.27(1)(b) of the Act (transport manager no longer of good repute). The Appellant was disqualified from holding an operator's licence for ten years under s.28(1) of the Act and it was ordered that if he was to become a director of a company or hold a controlling interest in any company that holds an operator's licence (or subsidiary or partnership) that licence would be liable for revocation, suspension or curtailment under s.26 of the Act. It was further ordered that the Appellant, as transport manager, had lost his good repute and was disqualified indefinitely from acting as a transport manager, under paragraph 15 of Schedule 3 to the Act. The order came into force at 2359hrs on 16 September 2023.

2. The Appellant made an application to appeal the decision of the DTC which was received by the Upper Tribunal on 10 August 2023. It was in time. The Appellant applied for a stay pending the outcome of the appeal, but this was refused by the DTC on 11 August 2023. He re-applied to the Upper Tribunal for a stay, and was again refused by Upper Tribunal Judge Mitchell on 24 August 2023.

3. The appeal was considered at a hearing, at the Employment Appeal Tribunal Building in Edinburgh, on 16 April 2024. The Appellant attended and was represented by Mr J Backhouse from Backhouse Jones Solicitors. The Respondent, as is common practice, was not represented at the hearing.

Background

Compliance history

4. The Appellant was granted a Standard National Operator's Licence (the "licence") on 21 February 1996 which originally authorised eight vehicles and eight trailers. As of the date of the Public Inquiry ("PI") in this matter, the Appellant's licence authorised the use of three vehicles and four trailers. He

was the nominated transport manager on the licence at all times. His business is known as Strachan Haulage.

5. The Appellant was subject to DVSA vehicle roadworthiness and maintenance investigations in 2004 and 2005 which led to warning letters from the Office of the Traffic Commissioner ("OTC"). He subsequently attended two PIs and two Senior Team Leader ("STL") interviews in respect of his licence. The first PI took place on 14 February 2008, after receiving an "S" marked prohibition in 2007. Following this, the Appellant was issued with a formal warning with regard to maintenance. He also accepted an undertaking to sit the CPC examination, and to be responsible for safety inspections and maintenance of all vehicles and trailers through one maintenance provider. He completed his CPC qualification in January 2010.

6. The Appellant was involved in a STL interview on 10 June 2010 after which he was issued another formal warning due to an "S" marked prohibition and adverse maintenance investigation. In June 2012, a further prohibition led to a an adverse DVSA maintenance investigation. This led to a second STL interview on 9 May 2013, after which the Appellant was issued with a final warning regarding maintenance and informed that further adverse matters might be considered at a PI.

7. A second PI took place on 21 August 2018 following allegations that the Appellant had been operating in excess of his authorisation, and that drivers were working excessive hours, pooling their driver's cards and had more than one card each. On 18 February 2019, the Traffic Commissioner determined that between 2015 and 2018 the allegations were made out, and the Appellant's operator's licence was curtailed from eight vehicles and eight trailers to the current authorisation of three vehicles and four trailers. The Appellant was prohibited from applying for a variation of his licence to increase the authorisation for a period of two years. He was issued with the "severest warning" given to an operator or transport manager. The Appellant appealed that decision, and a stay was put in place pending the outcome of the appeal.

The appeal was dismissed by the Upper Tribunal on 12 September 2019, with the Upper Tribunal directing that the curtailment of the Appellant's licence would commence from 24 October 2019.

8. It should be noted that this second PI (in August 2018) was joined with a PI for Forth and Clyde Logistics Ltd (OM2051303) whose directors, Mr and Mrs Reid, were issued with a severe warning about the need to cooperate with the Driver and Vehicle Standards Agency (the "DVSA"). It was also joined with a PI for Mr Philip John Bett (OM2016859) and his transport manager, Liam Scott McLaughlin, all of whom are involved in the current matter before the Upper Tribunal.

9. In relation to this appeal, the Appellant was called to a PI (his third) by letter dated 26 January 2023, in respect of his role as both operator and transport manager. It was alleged that there was a licence borrowing/lending arrangement involving the Appellant, Mr Bett and Forth & Clyde Logistics, which provided a front for the Appellant to operate more vehicles than he was authorised on his own licence. There were also concerns regarding the Appellant's maintenance arrangements (brake testing, driver defect reporting, maintenance arrangements not as declared, maintenance facilities not acceptable, and inspection frequency could not be demonstrated). The PI took place on 23 and 24 May 2023, and was joined with the connected PIs for Mr Bett (OM2016859), Mr McLaughlin (transport manager for Mr Bett), and Forth & Clyde Logistics Ltd (OM2015303). Only the Appellant and investigators from the DVSA attended the PI; neither Mr Bett, Mr McLaughlin nor any representative from Forth & Clyde Logistics attended.

The DVSA evidence at the Public Inquiry

10. This matter came to the DVSA's attention following a routine roadside encounter on 12 September 2021 at the M74 Beattock DVSA check site. On this occasion, vehicle GN18 OUF was stopped displaying a disc in the name of "Philip John

Bett t/a Streamlink". The driver told the DVSA examiner that his boss was Mr Bett, who was subcontracted by Strachan Haulage. The driver stated that all the work was allocated by "Stuart Strachan" (the Appellant) and the driver had little involvement with Mr Bett. It was established that the vehicle was on Mr Bett's operator's licence but was registered to Strachan Haulage, and was parked at the Appellant's operating centre.

11. Of note, the Appellant applied to increase the authorisation on his licence on 22 September 2021, shortly after this roadside encounter, from three vehicles and four trailers to ten vehicles and 15 trailers. A maintenance investigation was carried out in light of the application but this was returned as "unsatisfactory" hence he withdrew his application on 18 November 2021. The withdrawal was not accepted due to the investigation which was then ongoing following the roadside encounter.

12. On 2 December 2021, DVSA investigators attended Mr Bett's first operating centre at the premises of "Streamline Shipping". The DVSA investigator spoke to the Health and Safety Coordinator for Streamline Shipping. The investigator was told that Mr Bett was not known there either in his own name or that of "Streamlink", and that Mr McLaughlin was employed by "Streamline Shipping". Mr Bett's current operating centre in Cumbernauld was visited on the same day. The DVSA investigator spoke with the transport manager of another operator who shared the site. He was again told that Mr Bett was not known there either in his own name or in the trading name of "Streamlink".

13. On the same day, Mr McLaughlin told the DVSA via phone call, that he had never fulfilled his role as transport manager for Mr Bett as Mr Bett had not operated any vehicles. He had met with someone called "Stuart" in 2018 and spoke to him on a regular basis. In interview with the DVSA on 10 January 2022, Mr McLaughlin confirmed that he was employed by "Streamline Shipping" but had never met Mr Bett. He had spoken with "Stuart" in 2018 and said the business between Mr Bett and the Appellant had not been set up.

14. Mr Bett was invited for interview with the DVSA on 17 December 2021, but he could not attend on that date. A few days later, he told the DVSA that he had sold his business to the Appellant about one year previous. An interview took place on 17 January 2022, when Mr Bett arrived at the DVSA with the Appellant, asking for him to be present in the interview. This was not permitted given the risk of conflict. Mr Bett declined to be interviewed without legal advice.

15. Mr Bett later emailed a statement, dated 17 February 2022, stating that he sourced work for his business through contacts, and then sub-contracted the work out. He thought his business arrangements were acceptable but then realised they were not. He agreed to sell his business a year previous in return for shares in a limited company, but this had not yet happened. He had recently appointed the Appellant as his transport manager and had changed his business practices: he was employing his drivers directly and had issued them with written contracts of employment; there were hire agreements in place for the vehicles he used belonging to the Appellant; he was paying for fuel and maintenance; he was making arrangements for brake tests, forward planning, driver defect reporting and tachograph analysis; he had provided internal training for all drivers; and he had given written tests to all drivers on EU drivers hours and working time rules.

16. On 31 May 2022, Mr Bett applied to surrender his operator's licence. This was not accepted due to the outstanding investigation.

17. The DVSA believed, from the evidence before them, that the Appellant had persuaded Mr Bett to make an application for a licence as the Appellant thought he would either lose his licence or it would be curtailed after his first PI on 21 August 2018. Mr Bett's licence application was made only 22 days after that PI, following which, the Appellant's licence was severely curtailed. No vehicle were specified on Mr Bett's licence until 14 October 2021, just days before the Appellant's curtailment took effect after the Upper Tribunal refused his appeal, and the vehicles specified were registered to the Appellant's haulage business. The vehicles were parked at one of the Appellant's operating centres. Mr Bett

and Mr McLaughlin were not known at either of Mr Bett's operating centres and the vehicles were being downloaded by the Appellant's employee. Safety inspections were paid for by the Appellant, who was also carrying out in house safety inspections. Drivers wages, fuel and maintenance was being paid by the Appellant. The DVSA evidence suggested that the Appellant's vehicles had been used on Mr Bett's licence between 25 May 2021 and 20 January 2022

The Appellant's case at the Public Inquiry

18. The Appellant was represented at the PI by Mr Dunbar, and it was accepted (in written submissions) on his behalf, that the brake testing arrangements and defect reporting systems needed improvement. He mitigated his maintenance failings with a submission that he had better than average pass rates at annual testing and in relation to prohibitions. Additionally the Appellant had taken steps to improve matters between the date of the DVSA investigation and the PI. It was agreed that maintenance issues were not the main concern at this PI.

19. In relation to the allegation of using vehicles in excess of his authorisation, the Appellant explained that after his curtailment, he had intended to enter into a sub-contracting arrangement with Mr Bett whereby Mr Bett hired the Appellant's vehicles and the Appellant sub-contacted work to him. The Appellant demonstrated that he had rented vehicles to, and entered into subcontracting arrangements with, other operators, one of which was Forth & Clyde Logistics who were joined in the PI. The arrangement with Mr Bett did not take place as planned as Mr Bett had been unable to open a bank account for his business and had health issues. Consequently the Appellant found himself "acting as a bank" for Mr Bett and later became Transport Manager for Mr Bett. The Appellant stated at the PI that he paid the drivers and financed the fuel and maintenance of the vehicles on Mr Bett's licence. He stated that he did not invoice Mr Bett for that financing, nor did Mr Bett invoice the Appellant for any sub-contracted work. The Appellant's case concluded with the submission that

he had not operated more vehicles than authorised on his licence, and he had not breached the non-transferable licence condition.

The decision of the DTC

20. The DTC accepted at the outset that the arrangement between the Appellant and Forth & Clyde Logistics was a genuine sub-contracting arrangement and determined that there was no issue of fronting in that regard. The issue to be determined was therefore the nature of the business relationship between Mr Bett and Mr Strachan.

21. The DTC firstly considered the issue of who was the "user" of the vehicles. Mr Bett's written statement suggested that he sourced work through his contacts and then sub-contracted that work out but this was contradicted by the evidence of the Appellant, who attended the PI, and who stated that he provided the work contracts for Mr Bett. The DTC preferred the "straightforward" evidence of the Appellant on this issue. The Appellant had accepted that he paid the drivers and financed the fuel and maintenance of the vehicles. The DTC concluded that the Appellant was the "user" of the vehicles on Mr Bett's licence and was therefore using the vehicles (his vehicles) unlawfully, contrary to s.2 of the Act, as he was not the authorised "user" under the terms of the operator's licence. The DTC was unclear as to what part Mr Bett had to play in the arrangement at all. The finding that the Appellant was unlawfully using the vehicles on Mr Bett's licence thereby meant that the Appellant was using more vehicles than he was authorised to under his own licence, in contravention of s.6 of the Act.

22. The DTC concluded that the Appellant had been using the vehicles unlawfully for over three years. This was based on an inference drawn from the DVSA evidence, that the vehicles must have been used before and after the key dates (outlined at paragraph 19 above), from around 2018 when the Appellant's licence was originally curtailed, until 2021 when the roadside encounter took place.

23. Moving to the nature of the arrangement, the DTC accepted that:

> *"…there was nothing to prevent [the Appellant] from entering into subcontracting arrangements to carry out work that he could not do because he did not have enough authorised vehicles providing it was a genuine subcontracting arrangement. [The Appellant] could have leased vehicles to Mr Bett and then subcontracted work to Mr Bett. I accept that the arrangement with Forth and Clyde Logistics was a genuine subcontracting arrangement"*
>
> [paragraph 46 of the DTC's written decision]

24. The DTC compared the relevant dates. The Appellant's PI, following which his licence was curtailed, took place on 21 August 2018. This decision was appealed by the Appellant, and he was granted a stay of the curtailment decision. On 12 September 2018, Mr Bett obtained an operator's licence, but he did not specify any vehicles on the licence at this point. On 12 September 2019 (one year later), the Appellant's appeal was dismissed by the Upper Tribunal, who determined that the curtailment of his operator's licence would run from 24 October 2019. Just ten days before the curtailment took effect, Mr Bett specified the vehicles for his licence, and they were all registered to the Appellant's haulage business.

25. The DTC concluded that these dates were not a coincidence. He believed that there was no genuine desire on the part of Mr Bett to start a haulage business but rather, he applied for a licence with a view to helping the Appellant get beyond the problems created by the curtailment of the Appellant's operator's licence. He reasoned that although the intention to set up a sub-contracting arrangement may have initially been a genuine one, the Appellant knew that the intention had not materialised; he was paying for drivers wages, maintenance, fuel etc, yet no money was moving into or out of Mr Bett's hands. The DTC did not believe the Appellant's account that he was paying for Mr Bett's maintenance, wages etc to help set Mr Bett up in business. He concluded that

this arrangement was a deliberate attempt to circumvent the regulations, by Mr Bett obtaining a licence, and then lending discs to the Appellant so that the Appellant could operate more vehicles than he was authorised to under his own licence.

> *"42…The fact remains that Mr Strachan was the "user" of the vehicles on Mr Bett's licence, not Mr Bett.*
>
> *43. The difficulty for Mr Strachan is that was not authorised to use these vehicles under s.2(1) – Mr Bett was. The difficulty for Mr Bett was that he was not using these vehicles – Mr Strachan was. I am satisfied that Mr Bett lent his operator discs to Mr Strachan so that Mr Strachan could use more vehicles than he was authorised to. On any view of the evidence Mr Strachan was using vehicles in excess of the maximum number on his operator's licence in contravention of s.6 of the Goods Vehicles (Licensing of Operators) Act 1995."*
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> [paragraphs 42 and 43 of the DTC's decision]

26. These findings brought the Appellant's repute, both as an operator and as a transport manager, into question. The Appellant's solicitor submitted, at the PI, that his repute was not affected as this was a genuine sub-contracting arrangement that had gone wrong through no fault of the Appellant's. In light of the DTC's findings and conclusion that this was a deliberate, unlawful attempt to circumvent the curtailment of the Appellant's operator's licence, he determined that the Appellant had lost his good repute as an operator and therefore also as a transport manager. The DTC made the orders set out in paragraph 1 above.

Grounds of appeal

27. The appellant's appeal to the Upper Tribunal indicated his disagreement with the DTC questioning his repute, imposing a "lengthy" disqualification and misinterpreting his intentions and circumstances. He requested a

"comprehensive review… to ensure a fair evaluation of the case." In particular, the Appellant sought a review of his associations with Streamlink, and with Mr Bett.

28. Mr Backhouse, on behalf of the Appellant, provided a skeleton argument prior to the appeal, within which he set out detailed grounds of appeal, and upon which he expanded at the appeal hearing. The main grounds of appeal are as follows:

    i) The DTC was plainly wrong to determine that the Appellant was gaining a competitive advantage by misuse of Mr Bett's licence
    ii) The DTC was plainly wrong on the evidence and in law to determine that the Appellant intended from the start of his relationship Mr Philip Bett's licence, to misuse the licence held by Mr Bett and plainly wrong to determine the linked fact that the Appellant owned "Streamlink" prior to the licence being obtained by Mr Bett
    iii) The DTC was wrong on the evidence to consider revocation of the licence as the only option available to him and did not, in the decision, give adequate consideration to the other options available.
    iv) The DTC did not hear representations from the Appellant over the decision to disqualify him as a transport manager and as a holder of a licence, nor as to the period of those disqualifications. This was procedurally unfair.
    v) The DTC was wrong to impose a holder disqualification at all, but in any event the period of ten years was plainly excessive, there was no consideration in the decision as to why this was the appropriate period and again no representations were permitted from the Appellant.

The appeal hearing

29. Mr Backhouse presented the submissions on behalf of the Appellant at the appeal hearing. It was agreed by all parties that the sub-contracting of vehicles and of work arrangements is lawful per se. The Appellant had set up a sub-

contracting arrangement with Forth & Clyde Logistics in mid-2022. It was accepted that the arrangement between the Appellant and Forth & Clyde Logistics was a conventional sub-contracting arrangement, and it was submitted that this was the intention for the arrangement between the Appellant and Mr Bett. This intention was frustrated when Mr Bett struggled with his bank account and his health, which meant that in order for the sub-contracting arrangements between them to work, the Appellant had to effectively become Mr Bett's bank and take charge of some arrangements. This, it was submitted, was the reason why the Appellant was paying the drivers, paying for maintenance and repairs. It was conceded on behalf of the Appellant, at the hearing, that the relationship between he and Mr Bett was not a conventional one. However, it was submitted that this was not done to unlawfully circumvent any rules, but rather to benefit both businesses.

30. The Appellant submitted that the DTC was plainly wrong to find that the "user" of the vehicles, who must hold the operator's licence, was the Appellant in this case. The Appellant relied on the Court of Appeal judgement in *Interlink Express Parcels v Night Trunkers Ltd* [2001] EWCA CIV 360 ("*Night Trunkers*") to make his point. It was decided by the Court of Appeal that the drivers employed by Night Trunkers were the "servants" of parcel delivery company, Interlink, while driving Interlink's vehicles. Although Night Trunkers employed the drivers, paid wages and managed discipline etc., Interlink had overall control of the operation and were therefore the "user" of the vehicles on the Interlink licence. It was submitted in the current case, that while the Appellant may have been providing the finance and some other assistance for the arrangement between he and Mr Bett, Mr Bett still had residual control over the drivers, therefore Mr Bett, as "the person for whom the driver was servant or agent", was the "user" of the vehicles on his licence, in accordance with sections 2 and 58 of the Act. If Mr Bett was found to be the "user", by applying the principles in *Night Trunkers*, the arrangement was a lawful circumvention of the curtailment and that would bring an end to the matter. The Appellant submitted that the DTC did not consider the test in *Night Trunkers* at the PI, and this made his

conclusion, that the Appellant was the "user" of the vehicles on the licence, "plainly wrong".

31. In the event, that the Upper Tribunal did not find in the Appellant's favour on this point, then Mr Backhouse submitted that the disposals remained to be considered. In this regard, it was submitted that the Appellant had not been given the opportunity to make representations on these potential disposals at the PI and such a procedural irregularity made the disposal decisions of the DTC "plainly wrong". The Appellant's main argument was that the focus of the DTC's decision was based on the notion that the parties had set up their business arrangement for a negative purpose, to unlawfully circumvent the curtailment. By using the term circumvention in that negative sense, the DTC, it was submitted, misdirected himself as to the severity of the issue before him, which in turn led to the disproportionate disposals. It was reiterated that the Appellant had intended to create an entirely typical sub-contracting arrangement between he and Mr Bett but circumstances frustrated these efforts. To support his submission that the arrangement was a genuine one, the Appellant highlighted the fact that he had another, more conventional, sub-contracting arrangement in place with Forth & Clyde Logistics. He pointed out that Mr Bett had applied for his licence before the Appellant's licence was actually curtailed. Additionally, the Appellant cooperated fully with the investigation, and was responsible for offering up all the evidence that the DTC then used to find against him. He also highlighted the fact that circumventing a curtailment, for example through sub-contracting, is perfectly legal.

32. It was suggested on behalf of the Appellant, that there were other options available to the DTC such as further curtailment of the licence, suspension of the licence and prohibition from the Appellant's vehicles being specified on other licences. Even if revocation was the only option for the DTC, it was submitted that the ten year duration of the disqualification as operator was excessive. The DTC could have, it was submitted, revoked the Appellant's licence, disqualified

him as a licence holder for a shorter period of time, thereafter permitting a fresh licence to be applied for.

33. It was accepted on behalf of the Appellant that disqualification as a transport manager was appropriate in the circumstances, as something of a "middle ground", which would require the Appellant to employ a different transport manager, and have an independent person assist with the operation, before continuing his operation. It was submitted however, that the indefinite disqualification as transport manager was entirely unreasonable, and a much shorter disqualification would have sufficed.

34. The Appellant concluded with a submission that failing to hear representations on the disposal of the case amounted to a fundamental procedural unfairness which was "fatal to that element of the DTC's decision" and rendered it "plainly wrong". It was submitted that the Upper Tribunal should either remit the matter to be re-determined by a different TC, or should remake the decision, substituting the revocation for a suspension for the licence for a period of one month, while removing the disqualification from holding a licence, thus allowing the Appellant to continue operating after the one month period and when an alternative transport manager was appointed.

The Law

35. As to the approach which the Upper Tribunal must take on an appeal such as this, Paragraph 17(1) of Schedule 4 to the Transport Act 1985 provides:

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

36. Paragraph 17(3) of that Schedule provides that 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.

37. The task of the Upper Tribunal, therefore, when considering an appeal from a decision of a Traffic Commissioner is to review the material which was before the Traffic Commissioner; the Upper Tribunal will only allow an appeal if the appellant has shown that "the process of reasoning and the application of the relevant law require the tribunal to take a different view" (*Bradley Fold Travel Limited and Peter Wright* v. *Secretary of State for Transport* [2010] EWCA Civ 695, [2011] R.T.R. 13, at paragraphs 30-40). In essence therefore the approach of the Upper Tribunal is as stated by Lord Shaw of Dunfermline in *Clarke v Edinburgh & District Tramways Co Ltd* 1919 SC (HL) 35, 36-37, that an appellate court should only intervene if it is satisfied that the judge (in this case, the decision of the Traffic Commissioner) was "plainly wrong".

Discussion and decision of the Upper Tribunal

38. We were reminded of the principles involved in determining the case before us. In short, the decision of the DTC is taken to be correct unless the contrary is shown, by objective grounds, upon which the Upper Tribunal ought to conclude that a different view is the right one (*Subesh & Ors v Secretary of State for the Home Department* [2004] EWCA Civ 56, para 44). The DTC had the considerable advantage of seeing, hearing and assessing the evidence before him, and that decision should not readily be overturned.

The "user" of the vehicles

39. The DTC considered who was the "user" of the vehicles. This was important as sections 2(1) and 58(2), when read together, state that anyone who wishes to "use" a vehicle for hire or reward, requires an operator's licence under the Act.

> ***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".*

58 *General interpretation.*

> *(2) 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.*

Under these provisions, the driver is deemed to be the user of the vehicles where he/she owns or hires the vehicle, and in any other case, the user is the person for whom the driver is "servant" or "agent".

40. The concept of "user", and particularly the word "servant", in relation to sections 2 and 58 of the Act, was interpreted in the Court of Appeal judgement in *Interlink Express Parcels v Night Trunkers Ltd* [2001] EWCA CIV 360. Interlink Express Parcels ("Interlink") provided a UK wide parcel delivery service with one main depot and various franchisees at numerous sub-depots around the country. The Interlink goods vehicles collected parcels from each sub-depot, took them to the main depot where they were sorted, and then took them onwards to the nearest sub-depot to the delivery point, before being delivered to the final destination. Interlink had an operator's licence with specified vehicles to transport the parcels. It used its own drivers in the vehicles, for the most part, but also used drivers supplied by Night Trunkers (and other agencies) where necessary. The allegation in this case was that the contract between the parties

was void because the person from whom the driver was servant (said to be Night Trunkers) was not the person who held the operator's licence (Interlink). The case highlights that defining the "user" is not a straightforward matter, and the relationship of "servant" in the context of the s.2(1) provisions, allows for control between parties to be complex, with the non-licence holding entity being able to instruct drivers day to day while the licence holding entity held, in essence, a residual power to control the operation overall. It was held that the paramount test to determine the "user" of the vehicles was that of "control over the relevant activity" and "issues as to payment of wages, engagement, dismissal and discipline, while relevant, were subsidiary to that" (see paragraphs 54 and 60 of *Night Trunkers*).

41. The DTC found that the user of the vehicles on Mr Bett's licence was the Appellant, therefore also finding that the Appellant was unlawfully using vehicles beyond that authorised under his own licence. Mr Backhouse submits that the DTC reached a conclusion that was plainly wrong in this regard, as he did not apply the principles in the case of *Night Trunkers*.

42. The evidence before the DTC, which was not disputed at the appeal hearing, was that the Appellant was effectively financing the arrangement between he and Mr Bett. He was paying the drivers, fuelling the vehicles and paying for maintenance. The vehicles on Mr Bett's licence were registered to the Appellant's business and they were generally parked at the Appellant's operating centre. The Appellant became transport manager for Mr Bett later in the arrangement. These are the typical activities of an operator in control of an operation. The evidence did not give any indication of what Mr Bett's involvement was in the arrangement. At the appeal, it was said that Mr Bett's poor health had further complicated the arrangement between he and the Appellant, which means that he would have struggled to effectively control the operation in any event. It is agreed that no reference was made to the case of *Night Trunkers* in the DTC's decision but even had he done so, we considered that on the evidence before him, the DTC would have reached the same

conclusion. The panel concluded that the DTC was entitled, on the evidence before him, to find that the Appellant was the unlawful user of the vehicles on Mr Bett's licence in contravention of s.2 of the Act, and was therefore using more vehicles than he was authorised to under his own licence, in contravention of s.6 of the Act.

Revocation of the operator's licence

43. With the findings of unlawful use of vehicles and use in excess of authorisation having been made, the DTC moved to consider the disposal of the case. Section 26 of the Act provides that a traffic commissioner may direct that an operator's licence be revoked, suspended or curtailed on any of the grounds listed within s.26(1). Section 27 provides specific grounds under which an operator's licence can be revoked: if the licence holder no longer satisfies one of the requirements to hold a licence under s.13A of the Act (s.27(1)(a)); and/or if the designated transport manager no longer satisfies one of the requirements to act as transport manager, as set out in paragraph 14A(1) and (2), or (1) and (3) of Schedule 3 to the Act. A traffic commissioner must give written notice to an operator that he is considering a direction to revoke the operator's licence (s.27(2)), and must state the grounds under which he is considering such a direction (s.27(3)). He must invite written representations regarding revocation from the operator (s.27(3)(a)) which must, unless expressly provided for otherwise, be received within 21 days of the date of notice (s.27(3)(b)).

44. The power to revoke an operator's licence should be exercised so as "to achieve the objectives of the system" depending on the seriousness of the case before the traffic commissioner, rather than as punishment for regulatory infringements (*Thomas Muir Haulage Ltd v Secretary of State* 1998 SLT 666). It is therefore a matter of fact and degree for the DTC to determine according to the facts of the case before him. The decision to revoke a licence first requires consideration of the question, "Is the conduct such that the operator ought to be put out of business?" (*Bryan Haulage (No.2)* (T2002/217)). A preliminary

question to this is “How likely is it that this operator will, in the future, operate in compliance with the operator’s licensing regime?” (*2009/225 Priority Freight Ltd & Paul Williams*). The less likely an operator is considered to be to comply with the regulations in the future, the more likely a revocation (and disqualification) are to follow. If a traffic commissioner answers these questions appropriately, then he need not explain why another option was unavailable, as revocation may be inevitable from that reasoning (*2016/046 R & M Vehicles Ltd, Graham Holgate and Michael Holgate*).

45. In the present case, the DTC revoked the Appellant’s licence due to a number of consequential adverse findings: that the Appellant had breached the licence condition not to transfer a licence between operators (s.26(1)(b)); that the operator was no longer of good repute, due to the unlawful and use of vehicles in excess of authorisation (s.27(1)(a)); and that the transport manager (also the Appellant) was no longer of good repute, for knowingly allowing the unlawful use and use in excess of authorisation to persist (s.27(1)(b)). The notice requirements within s.27 were met within the call up letter dated 26 January 2023. Written representations and evidence in support of the Appellant’s case, was provided prior to the PI, by way of a document and enclosures prepared by the Appellant’s solicitor, Mr Dunbar, and sent by email dated 26 February 2023. This document included representations on the possible disposals in the case.

46. The DTC, in his decision, explained how his findings relating to the unlawful use of the vehicles on Mr Bett’s licence lead to a determination that the Appellant’s repute both as operator and as transport manager was lost. The Appellant did not take issue with these findings, or that he had breached a condition of his licence. It was submitted that the DTC was plainly wrong to revoke the licence, as he had focussed on circumvention of a licence curtailment as being unlawful when this is not necessarily the case. Had he not done so, he would have realised that revocation of the licence was not the inevitable outcome in this case (see paragraphs 31 and 32 above).

47. It was agreed by all parties, including the DTC, that sub-contracting is a lawful circumvention of a curtailment on an operator's licence, however, the DTC did not accept the Appellant's evidence that he had genuinely intended a subcontracting arrangement with Mr Bett from the outset. This was based on the facts of the case, as found by the DTC, coupled with the coincidence of key dates:

> *"I do not accept that Mr Strachan had a genuine intention to subcontract work to Mr Bett. Mr Bett's licence was granted on 5 December 2018 shortly after Mr Strachan was at his first PI on 21 August 2018. No vehicles were specified on Mr Bett's licence until 14 October 2-019. I do not accept that it is a coincidence that shortly after Mr Stachan learned that his appeal against the curtailment of his licence on or about 12 September 2019 and that his licence would be severely curtailed to 3 vehicles and 4 trailers from 24 October 2019, vehicles owned by Mr Strachan were specified on Mr Bett's licence."*
>
> [paragraph 49 of the DTC's decision]

48. We find that, on the basis of the evidence before him, the DTC was entitled to find that the Appellant did not have the intention to create a lawful sub-contracting arrangement from the outset. Regardless of whether it was intended from the outset, we find that once the arrangement started to operate outside any intended parameters, and the Appellant knew this to be the case, then compliance with the regulatory system was at risk regardless. The DTC considered this alternative (see paragraph 47 of his decision) which indicates that he was not swayed by whether the arrangement was intended from the start or not. We therefore dismiss ground (ii) as submitted by the Appellant's skeleton argument, for the reasons above. We note that the DTC did not make a finding that the Appellant owned "Streamlink" before Mr Bett had obtained his licence, so the second element of ground (ii) is not made out either.

49. The DTC applied the tests in *Priority Freight* and *Bryan Haulage* in making his decision to revoke the Appellant's licence as a result of these findings. The compliance history of the Appellant featured in this aspect of his decision. He weighed the positives against the negatives, finding that the negatives outweighed the positives in favour of revocation. Notably, in weighing the positives and negatives, he referred to the submissions of Mr Dunbar therefore it cannot be said that the Appellant was not given the opportunity to make representations with regard to the outcome of the PI, or that those representations were not considered. The aspect of ground (iv), relating to the making of representations about the disposal in the case, is therefore dismissed.

50. The DTC also considered what other compliant operators may think and reasoned that they may be tempted not to bother complying with the regulations if they found out that the Appellant had not been complying. The DTC considered the effect of revocation on the Appellant and found that revocation was not a disproportionate response in the circumstances of this case; the Appellant had said to the DTC that he intended to retire after the PI. The DTC further determined that the Appellant had been unlawfully using the vehicles on Mr Bett's licence for over three years, on inferences drawn from the proximity of the key dates(see paragraph 19 above). Traffic Commissioners are entitled to draw inferences from primary facts in this manner (see *2016/026 J Campbell t/a Vision Travel*) and no criticism can be made of the inferences drawn in this case. The length of the unlawful conduct added further seriousness to the case and was an additional factor taken into account by the DTC in making his decision to revoke the Appellant's licence.

51. The DTC made a finding that the Appellant had gained a commercial advantage from operating more vehicles than he should have and that he had broken the relationship of trust which lies at the heart of the licencing system, both factors which added to the decision to revoke his licence (see paragraph 56 of the DTC's decision). It was submitted that the DTC was plainly wrong to find that the Appellant had gained any commercial advantage in this arrangement. This

submission is not made out. Every useable vehicle within a haulage business has the capability of adding revenue to the business. The Appellant was using more vehicles than he was authorised to in an unlawful manner. That brings a commercial advantage, regardless of whether more revenue is actually generated. Furthermore, operating in a manner that is not compliant with the regulations also brings a commercial advantage over those operators who do comply. Ground (i) is therefore dismissed.

52. We find that the DTC, in deciding to revoke the Appellant's licence, properly applied the correct legal tests and weighed the positives and negatives in the case. We find, given the facts found coupled with the Appellant's poor compliance history, particularly with repeated failings both in relation to using more vehicles than authorised and in relation to maintenance of vehicles, that the DTC was entitled to reach the conclusion that he did, and his reasons explained why this was the case.. Revocation of an operator's licence is not disproportionate where, in the absence of any objective justification, there have been long term, sustained, repetitive deficiencies (*2009/410 Warstone Motors t/a The Green Bus Service*). We do not find that any negative connotation of circumventing the licence curtailment swayed his decision. The facts speak for themselves and as was the position in *2016/046 R & M Vehicles Ltd, Graham Holgate and Michael Holgate*, his conclusions in relation to the *Priority Freight* and *Bryan Haulage* questions explain why no other disposal option was suitable in this case. This was not the first or second PI, but the third. The Appellant had been subject to other options previously but had found himself at a third PI for similar allegations as the first, and had been curtailed following the second. For the reasons above, we dismiss ground (iii) as raised by Mr Backhouse in his skeleton argument.

Disqualification from holding an operator's licence

53. Section 28 of the Act gives a traffic commissioner the discretion to disqualify "any person who was the holder of a licence" from holding or obtaining a licence either indefinitely or for such period as he thinks fit. The power can only be

exercised after a direction that the licence is to be revoked under s.26 or s.27 of the Act. Where a direction is made to disqualify under s.28(1) of the Act, s.28(4) provides that the traffic commissioner may also direct that the licence of any company or person for which the operator is a director or holds a controlling interest (for a specified period), such licence will be liable to revocation, suspension or curtailment under s.26.

54. In this case, the Appellant was disqualified from holding an operator's licence for ten years under s.28(1) of the Act and it was ordered that if he was to become a director of a company or hold a controlling interest in any company that holds an operator's licence (or subsidiary or partnership) that operator's licence would be eligible for revocation, suspension or curtailment under s.26 of the Act. In making his decision, the DTC used the same reasoning as he used in relation to the decision to revoke the Appellant's licence. In revoking the Appellant's licence, the DTC was effectively preventing the Appellant from operating at that time. It would have been possible for the Appellant, if he only had his licence revoked, to apply for a fresh licence. He would not be able to operate until that fresh licence was granted, and would be permitted to operate only in accordance with any conditions on that fresh licence. By adding a disqualification "order" to the revocation, the DTC was ensuring that not only would the Appellant have to cease to operate, but that he would not be able to operate for the period of time that the disqualification order persisted.

55. "Statutory Document No. 10 The Principles of Decision Making and The Concept of Proportionality" provides guidance for traffic commissioners, and Annex 3 set out starting points for consideration in regulatory action. Applying those guidelines, both positive and negative features exits in this case. On the basis of the facts found by the DTC, the case falls squarely into the "severe" starting point due to "deliberate acts that gave the operator a clear commercial advantage" coupled with "persistent operator licence failures with inadequate response" and "previous public enquiry history". A "severe" response, according to Annex 3, is revocation with detailed consideration of disqualification. This was the outcome in this case:

> *"… because of the serious nature of [the Appellant's] conduct he should be disqualified from holding an operator's licence for a period of 10 years"*
> [paragraph 60 of the DTC's decision]

56. It is a failing on the part of the DTC that he did not give more specific reasons as to why he decided to disqualify the Appellant, but by following the guidance stated above, the DTC would have arrived at the same conclusion i.e., that disqualification should be imposed. He refers to "serious conduct" and there is sufficient detail in the DTC's decision to understand what that conduct comprises and why he considers it to be serious. It is common practice, in the event of a significant breach of the regulatory framework, for a traffic commissioner to disqualify an operator from holding a licence for a period of time. This is no exception. The suggestion within ground (v), that the DTC was plainly wrong to impose a disqualification in this case, is therefore dismissed.

Disqualification from acting as a transport manager

57. To hold a standard operator's licence, it is necessary for the operator to appoint a transport manager who meets the requirements in paragraph 14A(1) and (2) of Schedule 3 to the Act. That person can be the operator himself (s.13A(3)(a)(ii) of the Act). One of those requirements is that the transport manager is of good repute (paragraph 14A(1)(b) of Schedule 3 to the Act). If the transport manager's repute is in question, a traffic commissioner cannot find that repute is lost unless the transport manager has been served with a notice stating the allegations against him, the fact that his good repute is in issue, that he can make representations and that he can have an inquiry to determine the matter (paragraph 15(1) of Schedule 3 to the Act). Paragraph 16 of Schedule 3 to the Act deals with the position if such a finding is made:

> *"16.(1) In proceedings under this Act or the 2009 Regulations for determining whether a person who is a transport manager is of good repute or professionally competent, a traffic commissioner must, in*

> *accordance with paragraph 5(2) (if applicable), consider whether a finding that the person was no longer of good repute or (as the case may be) professionally competent would constitute a disproportionate response.*
>
> *(2) If the commissioner determines that the person is no longer of good repute or (as the case may be) professionally competent, the traffic commissioner must order the person to be disqualified (either indefinitely or for such period as the commissioner thinks fit) from acting as a transport manager."* [my underlining]

58. In this case, the DTC found that the Appellant had lost his good repute as transport manager, on the basis (amongst other things) that he had allowed the unlawful use of vehicles on another operator's licence to continue for three years. The Appellant was disqualified from acting as transport manager indefinitely, under paragraph 16(2) of Schedule 3 to the Act. The DTC followed the requirements set out in paragraph 15 of Schedule 3 to the Act in making his determination with regard to good repute. He did not consider his finding to constitute a disproportionate response. It is not in issue that the good repute of the Appellant as transport manager was lost, and this finding meant that the DTC was bound by law to disqualify him from acting as such in the future.

Duration of the disqualifications

59. Moving to the second aspect of grounds of appeal (iv) and (v), it is submitted on behalf of the Appellant that no representations were heard or taken into account in relation to the duration of the disqualifications, and that both periods of disqualification were excessive. Section 28(1) of the Act allows for disqualification from holding or obtaining an operator's licence to be ordered either indefinitely or for such period as the traffic commissioner sees fit. The same duration applies in respect of a disqualification from acting as a transport manager under paragraph 16(2) of Schedule 3 to the Act. Determination of the correct period of disqualification depends upon the facts of each individual case

(*2014/040&41 C.G. Cargo Ltd and Sukhwinder Singh Sandhu*). There should be an assessment of the evidence and submissions as to the effect of any order in setting the appropriate length of the order (*2005/426 Kuldev Singh Oakhal t/a Premier Transport Services*). Starting points for the period of disqualification are set out in the traffic commissioner's guidance within "Statutory Document No.10: The Principles of Decision Making and the Concept of Proportionality" at paragraph 108. This states as follows: a mandatory minimum disqualification of 1 year disqualification for a transport manager under paragraph 17 of Schedule 3 to the Act; 1-3 years disqualification for an operator's first PI; 5-10 years disqualification in serious cases where there are, for example, persistent failures with inadequate responses, or previous PI history; indefinite disqualification in severe cases where an operator deliberately puts life at risk, knowingly operates unsafe vehicles and/or allows drivers to falsify records. In some cases it may be appropriate having indicated a view on the evidence, to seek written representations at the end of a hearing before deciding on whether disqualification (and the period) is appropriate (*2005/367 K Jaggard*).

60. In this case, the Appellant was disqualified from holding an operator's licence for ten years and he was disqualified from acting as a transport manager indefinitely:

> *"I reached the view that because of the serious nature of [the Appellant's] conduct he should be disqualified from holding an operator's licence for a period of 10 years."*
>
> [para 60 of the DTC's decision]

> *"So far as [the Appellant's] status as a transport manager is concerned… I have concluded that because of [the Appellant's] deliberate attempt to circumvent the licensing regime, there is no appropriate rehabilitation measure. [The Appellant's] disqualification is, therefore, indefinite, subject to [the Appellant's] right to seek the cancellation or variation of this order in terms of paragraph 17 of Schedule 3."*
>
> [para 62 of the DTC's decision]

61. The Appellant submitted at the appeal hearing, that the length of the disqualifications were excessive. We find that the DTC failed to conduct a proper assessment of the overall impact of the orders made in making his decision as to the duration of the disqualifications. There were insufficient reasons given for the choice of both periods of disqualification. There was no balancing exercise between the objectives of the legislation and the significant infringement on the Appellant's rights. The Appellant stated at the PI that he intended to retire if he was to have his licence revoked, and that comment appears to have been the basis for which the DTC determined the lengthy periods of disqualification. When taken together, the revocation of his operator's licence, coupled with the lengthy periods of disqualification as both a licence holder and as a transport manager have effectively compelled the Appellant's retirement, rather than allowing a period of time, while the disqualifications apply, for the Appellant to reflect on this matter and to consider his options going forward. These orders will have had a significant impact on the Appellant financially, both immediately and for the foreseeable future. These are not issues that appear to have concerned the DTC in making his decision as to the length of the disqualifications. Furthermore, it does not appear that representations were sought from the Appellant as to the length of any disqualifications. If they were sought, there is little in the DTC's decision to suggest that any such representations were taken into account in determining the appropriate length of time. We find this to amount to a procedural irregularity. For these reasons, we find that the duration of both the orders for disqualification are plainly wrong. The second parts of grounds (iv) and (v) are therefore allowed.

62. Under s.12(2)(b) of the Tribunals Courts and Enforcement Act 2007, the Upper Tribunal is entitled to remit a decision of the traffic commissioner for redetermination or to remake that decision. We find that having sufficient findings of fact before us, and having heard representations at the appeal hearing with respect of the duration of the disqualifications, we are in a position

to re-make the orders. Having taken into account all the circumstances presented to us, and balancing the purpose of the legislation against the infringement on the Appellant's rights as operator, we re-make the orders for disqualification as set out at pages 1 and 2 of this decision.

Conclusion

63. We find, overall, that for the reasons outlined above, the decisions of the DTC dated 14 July 2023 are correct save for the duration of the periods of disqualification from holding an operator's licence and from acting as transport manager. We therefore allow the appeal on those limited grounds.

64. In accordance with paragraph 17(2)(a) of Schedule 4 to the Transport Act 1985, and in light of the fact that we have sufficient findings of fact and heard representations regarding the duration of the disqualifications at the appeal hearing, we re-make the disqualification orders as set out on the front page of this decision.

L. Joanne Smith
Judge of the Upper Tribunal

Mr D. Rawsthorn
Member of the Upper Tribunal

Mr M. Smith
Member of the Upper Tribunal

(Authorised for issue on)
29 August 2024