



Appeal No. UA-2023-000685-NT
[2024] UKUT 312 (AAC)

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

**ON APPEAL from the DECISION of the HEAD of the TRANSPORT REGULATION
UNIT**

Dated 31 May 2023

Before:

Kenneth Mullan	Judge of the Upper Tribunal
Richard Fry	Member of the Upper Tribunal
Martin Smith	Member of the Upper Tribunal

Appellant:

Sean Convery

Attendances:

For the Appellant: The Appellant was present and was represented by Mr McNamee

For the Respondent: None

Type of hearing: Oral hearing
Date of decision: 25 September 2024

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that this appeal is ALLOWED and we have substituted our own decision for that of the Presiding Officer (PO). Our substituted decision is set out in paragraph 49 below

SUBJECT MATTER:- Revocation; loss of repute as operator an transport manager; financial standing; disqualification; procedural unfairness at a Public Inquiry

CASES REFERRED TO:- NT/2013/52 & 53 Fergal Hughes v DOENI & Perry
McKee Homes Ltd v DOENI; Bradley Fold Travel Ltd &
Peter Wright v Secretary of State for Transport [2010]
EWCA Civ. 695; Nolan Transport v VOSA & Secretary
of State for Transport (T/2011/60)

REASONS FOR DECISION

1. This is an appeal from the decision of a Presiding Officer (PO) of the Transport Regulation Unit ('TRU') dated 31 May 2023 in the following terms:
 - '1. The licence ON1113939 in the name of (the Appellant) is revoked with effect from 14th July 2023.
 2. The repute of (the Appellant) as a transport manager is lost and he is disqualified from acting as a transport manager indefinitely, with effect from 14th July 2023. As a rehabilitation measure, before acting as a transport manager again, (the Appellant) is required to secure a new Certificate of Professional Competence.
 3. (The Appellant) is disqualified from holding or applying for an Operator's Licence for 12 months with effect from 14th July 2023.'
2. The TRU is part of the Department for Infrastructure ('the Department').

Background

3. The appellant was the holder of a Standard International goods vehicle operator's licences with authorisation for 10 vehicles and 21 trailers. The licence was granted on 1 August 2012.
4. In correspondence dated 15 March 2022, the Department wrote to the Appellant and indicated that because of notification by the DVSA in Great Britain of a number of 'Most Serious Infringements' ('MSIs) and the non-notification by him to the Department of these infringements, the Department had asked for a DVA compliance audit to be undertaken. The correspondence noted that while the Appellant had a 100% first time pass rate on three vehicle tests the remainder of the compliance audit was 'extremely concerning' with unsatisfactory ratings across a number of areas. The DVA compliance audit took place on 2 February 2022. The Department stated it was considering making a direction to revoke the Appellant's operator's licence but was giving the Appellant the opportunity to make representations and/or request a public inquiry (PI).
5. In email correspondence dated 11 April 2022 the Appellant's representative made a request for a PI.
6. On 30 September 2022, the Department issued a further 'proposal to revoke' letter to the Appellant. the basis for the 'proposal to revoke' was that the Appellant had failed to comply with a request and reminders to return a completed checklist.
7. Following receipt of email correspondence from the Appellant, on 21 November 2022 the Department wrote to the Appellant confirming receipt of his completed checklist and stating that '... no further action is required of you or will be taken in relation to your licence.'
8. In correspondence to the Appellant dated 15 February 2023, the Department confirmed that a decision had been made to convene a PI and directed the Appellant to provide certain information.

The call to the Public Inquiry (PI)

9. In correspondence dated 13 April 2023 the Appellant was called to a PI to be held on 11 May 2023. In Annex 4 to the call-up letter the Department set out the following issues and evidence which it stated would be considered:

'The concerns set out below, together with the evidence and documentation you have previously provided, will be used by the Department to decide whether to take any action on your operator's licence.

The Department has been notified of a number of Most Serious Infringements attributed to your licence. It also appears that you have not informed the Department of these infringements as you are required as per the conditions of your licence. A Most Serious Infringement has the effect of the operator losing good repute which is an ongoing and mandatory requirement to hold a licence. Any loss of good repute is subject to the Department considering, by way of an administrative procedure, whether loss of good repute would be a disproportionate response.

In order to assist with that determination the DVA undertook an audit of your systems and procedures in March 2022 and concluded that all areas were unsatisfactory. More recently an assessment of material you provided to the Department indicate some improvement, but gaps still remain. The Department will consider whether you have failed to meet the undertakings of your licence including the requirement to maintain vehicles and trailers in a fit and serviceable condition at all times, and to ensure you have sufficient systems and procedures to ensure drivers' hours and tachograph rules are complied with. The Department will also make a determination whether the current operations are sufficient enough to conclude that loss of good repute would be disproportionate.

As you are the nominated transport manager this public inquiry will also consider whether you continue to meet the requirement to be of good repute to hold such a position. The Department has a requirement to disqualify a transport manager from holding such position if loss of good repute is found.

Due to the volume and type of failings outlined the Department had concern that the failing may be as a result of the absence of finances. In response to a letter from the Department, dated 15 February, you provided bank statements that fail to satisfy financial standing. The Department is therefore concerned that you do not meet the financial standing requirements for a single vehicle, let alone the volume of vehicles currently authorised by the licence.

The papers enclosed with this letter includes reports and documents that the Department intends to refer to at the public inquiry. The Department will also give consideration to any information provided to it between the issue of this letter and the public inquiry in regard to your licence. All pertinent information of this nature will be supplied to you within a reasonable timeframe before the public inquiry.'

10. The Appellant was also advised that the Department was considering taking certain regulatory action against him and his licence.
11. The PI took place on 11 May 2023. The Appellant was present, represented by Mr McNamee and accompanied by his transport consultant.

The Presiding Officer's summary decision

12. The Presiding Officer's decision is dated 31 May 2023 and was in the following terms:
 - '1. The licence ON1113939 in the name of (the Appellant) is revoked with effect from 14th July 2023.
 2. The repute of (the Appellant) as a transport manager is lost and he is disqualified from acting as a transport manager indefinitely, with effect from 14th July 2023. As a rehabilitation measure, before acting as a transport manager again, (the Appellant) is required to secure a new Certificate of Professional Competence.
 3. (The Appellant) is disqualified from holding or applying for an Operator's Licence for 12 months with effect from 14th July 2023.'
13. An appeal against the decision of the Presiding Officer was received in the office of the Administrative Appeals Chamber (AAC) of the Upper Tribunal on 9 June 2023. Included in the application was a further application of a stay of the decision of the Presiding Officer.
14. The application for a stay was refused by the Presiding Officer on 25 June 2023. The application for a stay was then reconsidered by Upper Tribunal Judge Hemingway and in a determination dated 27 June 2023 he refused it.

The PO's findings on the evidence

15. The PO disregarded the 'French' offences on the basis of when they occurred and the Appellant's denial of one of those offences. He was of the view that the number of MSIs, VSI, offences and the unsatisfactory outcome of the DVA Audit and Assessment left him in no doubt that the operator had failed to comply with the undertakings on his licence to keep vehicles fit and serviceable, to maintain proper records, to operate an effective driver defect reporting system and to observe the rules on drivers' hours and tachograph etc. records.
16. The PO found the evidence of the operator be '...unsatisfactory and his attitude to compliance lackadaisical and worrying' and gave numerous examples as a basis for this conclusion. The PO did not accept the Appellant's evidence concerning the absence of complete records for the DVA audit and, in particular, his assertion that the Examiner had refused to download documents from a 'firestick'. The PO concluded that there was sufficient evidence to support a finding that there was an absence of '... any kind of monitoring, management and auditing.' This was compounded by the conviction of the Appellant in 2022 for failing to download data. The PO gave further examples of the '... operator/transport manager's lack of genuine commitment to compliance.'
17. The PO found the operator's evidence of knowledge of the MSIs to be 'vague and unsatisfactory' and gave examples which, he asserted, corroborated such a finding. In conclusion, the PO stated:
 - 'The operator/transport manager has demonstrated neither the desire, nor the ability, to identify offences or to manage offending drivers thereby creating a culture of disregard of the rules whereby public safety is put at risk.'

The PO's reasoning

18. The PO began by asking whether loss of good repute would constitute a 'disproportionate response.' He rejected Mr McNamee's submission to draw a distinction between certain offences and other MSI concluding that '... to disregard these MSIs would understate the crucial role that drivers play in the safety inspection of their vehicles/trailers and in avoiding driving with insufficient rest and breaks.' The PO addressed Mr McNamee's citation of the decision in *Thomas Muir* as authority for that regulatory action should not be a punishment. He added that *Thomas Muir* was also significant with respect to the responsibility of operators.
19. Turning to the particular circumstances of the Appellant, he noted that:

'His operation appears to have given a free rein to drivers and he has had insufficient controls and records. He was never the owner of vehicles and his records of leasing and hire were absent. Contracts for maintenance were not available for DVA inspection. I consider the absence of controls and checks to place his culpability as high, particularly coupled with the inadequate steps taken to prevent recurrence.'
20. The PO rejected Mr McNamee's submissions that the case '... was one of a "clerical nature"', that there was no danger to the public in the operation of vehicles by the operator and that the failures could not be described as severe citing the decision in *H.Sivyer* and Annex 4 of Practice Guidance Document No. 9 in support. He concluded:

'The failure of the operator/transport manager to monitor drivers, to take any disciplinary action after notification of MSIs and to continue to ignore missing mileage up to the time of the 2023 DVA audit, demonstrates a reckless disregard for road safety, provided a clear commercial advantage and encouraged driver offending. That amounts to "severe" conduct even allowing for the recent improvements.

At the very minimum, the persistent operator failures with inadequate response place the operator's conduct in the "severe to serious" category.'
21. The PO observed that the Appellant did not fit into the category of operator identified in *Arnold* who '... recognise the problem at once and take immediate and effective steps to put matters right.' In the view of the PO and based on the Appellant's awareness of a number of MSIs, a conviction and an unsatisfactory audit in 2022, his response was neither immediate nor effective.
22. Turning to positive aspects, the PO did give the appellant credit for engaging a transport consultant in early 2023 and the latter's work in getting files in order for the DVA assessment in February 2023. Further, but with some qualification, vehicle records showed that the safety inspections were being carried out in accordance with the specified time intervals, driver defect forms were of "good scope" but not wholly satisfactory, and infringement reports were 'being run and signed for' but the scale of infringements for two drivers was unacceptable. There was one successful MOT test and the Appellant had committed to attending a Transport Manager Refresher Course in July 2023. He had '... reduced his vehicles and his authorisation could be significantly curtailed as a regulatory outcome.'

23. The PO accepted a submission from Mr McNamee that the decision in *Thomas Muir* was authority for the principle that the operator should not be suspended or revoked as a punishment for past conduct and that the position should be assessed as at the date of the inquiry. He noted, however, that based on the endorsement of *Thomas Muir* in *KDL European Ltd*, he was entitled to have regard to the purpose deterrence of the operator or other persons ‘... failing to carry out their responsibilities under the Legislation ... in order to assist in achieving the purposes of the legislation’. He was also entitled to have regard to the likely impact on other operators – *Dundee Plant Company* citing *Highland Car Crushers Ltd*.
24. Referring to *Arnold Transport & Sons Ltd*, the PO observed that he had to consider whether he could trust the Appellant to run a compliant licence in the future. Conceding the positives in the case, the PO found that they fell fairly and squarely into the category of “too little, too late”. Citing several examples, the PO concluded that there was a lack of trust and that this conclusion was further evidenced by the Appellant’s responses and demeanour throughout the PI and the manner in which he had answered questions.
25. At paragraph 64, the PO observed:
- ‘The critical question in this case is; “how likely is it that this operator will, in future, operate in compliance with the operator’s licensing regime?” (Priority Freight Ltd. T/2009/225). Having regard to the long history of MSIs and offences, the inadequate response to these matters and to the unsatisfactory audit/PTR letter, and, the failure of Mr. Covery to satisfy me that his approach to compliance was genuine, positive and would be sustained, I have to answer this question in the negative. If I cannot trust him, even allowing a reduced authorisation of one or two vehicles, would still be an unacceptable road safety risk.’
26. In these circumstances the PO could not find that that loss of good repute as an operator and transport manager and revocation of the licence would be disproportionate. Accordingly, his conduct was such that he ought to be put out of business.
27. The PO concluded by determining that:
- The Appellant had lost his repute as an operator and as a transport manager
 - The Appellant was disqualified from acting as a transport manager indefinitely with effect from 14 July 2023
 - Before acting as a transport manager again, the Appellant was required to secure a new Certificate of Professional Competence
 - Financial standing evidence was insufficient for the operator’s licence requirements
 - The operator’s licence was revoked on the basis of the operator failing to meet the requirements of
 - Loss of good repute
 - Loss of transport manager’s good repute
 - Financial standing (with commentary by the PO on a Statutory Declaration)

- Undertakings not complied with
28. The PO also determined that disqualification as an operator was necessary for a 12-month period.

The initial grounds of appeal

29. In the application for permission to appeal, Mr McNamee set out the following initial grounds of appeal:

'Grounds of Appeal

The Operator appeals the decision of the Presiding Officer in relation to the revocation of his Operator's Licence, his loss of repute and his disqualification.

It is submitted that the Presiding Officer has erred in law in a number of fundamental matters which go to the lawfulness of his Decision.

Firstly at paragraph 64 of the Decision the Presiding Officer states "the critical question is ... having a regard to the long history of MSI's and offences, the inadequate response to these matters and to the W1 Satisfactory audit and PRT letter, and, **the failure of Mr Convery to satisfy me that his approach to compliance was genuine, positive and would be sustained ...**". It is clear that the Presiding Officer has mistakenly believed that the burden was on the Operator to satisfy him in relation to these matters. This runs contrary to the established law as regards burden of proof, *Muck It Ltd and Others -v- Secretary of State for Transport (2005) EWCA Civ 1124*, where it is clearly set out that it is not for the licence holder to undertake the burden of satisfying the Presiding Officer.

Further in relation to the finding of the lack of financial standing, the finding that the statutory declaration as provided for within the Department's own practice guidance was unsuitable for this Operator's family business was entirely without lawful basis and irrational.

The imposition of a disqualification on the Operator without asking the Operator's representatives to address him on the question of potential disqualification breaches guidelines as set out in the case *2018/072 St Mickalos Company Limited and M Timminis* and is therefore unlawful.

It is submitted that the revocation of his Operator's Licence, the finding of loss of repute and his disqualification were clearly imposed as penalties for past conduct. This clearly breaches the principles in the case law (*Robinson - v- The Secretary of State for Environment [1973] 1 WLR 1139*) and fails to assess the Operator as he is the date of the hearing. It ignores the improvements made by the Operator prior to the date of hearing. such improvement set out in Annex 4 of the Call Up letter where the Departments stated "more recently an assessment of material you provided to the Department indicates some improvement but gaps still remain". This being an acknowledge of the Department itself of significant improvement on behalf of the Operator.

In general terms and without going into the minutia of the decision, it is apparent that the Presiding Officer and his attempts to interpret facial gestures and his criticisms of the Operator and his legal representative appears to have moved him away from a proper consideration of the actual evidence. He appears to have embarked upon some form of behavioural

interpretation which it is submitted should have no place in any forensic inquiry. The conclusion he appears to draw from these observations is entirely incorrect.

Whilst accepting that a Presiding Officer may of course conduct his hearing in a manner of his own choosing, such a process must however be fair to the Operator. The refusal of the Presiding Officer to allow the Operator to present his case through his legal representative and restrict the legal representative's role to asking questions of the Operator and making submissions as to law at the end of the hearing, does not, we would submit, constitute a fair process. These restrictions it is submitted deprive the Operator of the assistance of his legal representative to firstly set out in a clear and logical manner his response to the assertions and issues of concern highlight by the Department. It deprives him of the facility of legal advice and assistance during the course of the hearing and in effect essentially deprives him of his right to legal assistance during the course of the Public Inquiry. It further deprives him of an ability to deal with the issues arising from the voluminous documentation that appears in the call up bundle, some of which is set out in an extremely technical and legalistic manner.

For all of the above reasons and those to be set out at the oral hearing of this appeal, the Appellant states that this Decision should be quashed.

The oral hearing before the Upper Tribunal

30. The oral hearing took place on 20 February 2024. The Appellant was present and was represented by Mr McNamee.
31. Mr McNamee set out in more detail his concerns about the fairness of the PI. While he accepted that the PO was entitled to conduct the PI in the manner which he thought was appropriate, he submitted that the approach adopted by the PO had changed the tenor of the PI from inquisitorial (which it should have been) to adversarial. He asserted, in general terms, that he was impeded in his ability to provide input and information to the PI, and raise his clients concerns which was necessary for a fair hearing and a fair decision. Further, the PO's approach had the effect of switching the burden of proof from the Appellant to the Department.
32. More specifically, Mr McNamee submitted that the PO had focused on what had been a light-hearted response by the Appellant and him to discussions about aspects of the evidence and drew adverse inferences from that which questioned the Appellant's credibility and formed the part of the basis that the Appellant could not be trusted. He noted that the Appellant's setup was unusual in that the vehicles which he operated were leased from a company in Scotland and were worked in England. All the documentation relating to their maintenance was, accordingly, based in England. In order to facilitate the conduct of the compliance audit the required documentation was download to a 'pen' drive which was not accepted by the examiner. The documentation was eventually provided in paper format to the Department. Mr McNamee conceded that it would have been more appropriate for the Appellant to have applied for an operator's licence in England.
33. In a similar way, the PO had referred to the Appellant's behaviour at the PO when he had turned to Mr McNamee during questioning. Mr McNamee referred to a serious accident which had been sustained by the Appellant in his farming work which had impacted on his ability to hear, and this was the reason why he turned to him. Mr McNamee submitted that the PO did not

seem to accept that the Appellant's accident was as significant as had been submitted. Mr McNamee provide us with a copy of a medical report outlining the details of the accident and the impact which it had.

34. Mr McNamee submitted that there had been failings on the part of the Appellant. He had endeavoured to contextualise the MSIs in the context of the unusual nature of the Appellant's operation but had been prevented from doing so. He noted that the Department had accepted that there had been improvements. The Appellant had engaged a transport consultant who was now involved in the Appellant's operations. He has also reserved a place on a transport manager's course.
35. Turning to the issue of financial standing, Mr McNamee submitted that the Appellant did satisfy this statutory requirement. He had produced evidence by way of a statutory declaration which had been drafted by the Department but which the PO refused to accept. He submitted that the Appellant was asset rich.
36. Mr McNamee submitted that the PO's conclusions that the Appellant had lost his repute as an operator and as a transport manager, that he was disqualified from acting as a transport manager indefinitely, that his operator's licence was revoked and that disqualification as an operator was necessary for a 12-month period were wholly disproportionate. Curtailment of his operator's licence or suspension for a short period was a more appropriate outcome.

General principles on the operation of the Act and Regulations

37. At paragraphs 10 to 13 of the decision in NT/2013/82 Arnold Transport & Sons Ltd v DOENI, the Upper Tribunal set out the following general principles in the operation of the legislative provisions in Great Britain and Northern Ireland:

'Some General Principles

10. An operator's licence can only be granted if the applicant satisfies the Department that the relevant requirements, set out in s. 12 of the 2010 Act as amended, have been met. [The expression Department is used in the legislation but for the purposes of the decisions required to be taken under the legislation it is the Head of the TRU who takes them]. The relevant requirements are now set out in Paragraph 17(5) of the Goods Vehicles (Qualifications of Operators) Regulations (Northern Ireland) 2012, ("the Qualifications Regulations), which substitutes a new s.12 and adds ss. 12A-12E to the 2010 Act. The Qualifications Regulations also contain important provisions in relation to Good Repute, Professional Competence and Transport Managers.
11. The grant of an operator's licence does not mean that an operator can then proceed on the basis that the requirements that must be met in order to obtain a licence can thereafter be disregarded. In our view it is clear both from the terms of the 2010 Act and from Regulation 1071/2009 that these are continuing obligations, which an operator is expected to meet throughout the life of the licence. It is implicit in the terms of s. 23, which gives the Department power to revoke, suspend or curtail an operator's licence, that this can take place at any time and for any reasonable cause, including

matters covered by the requirements of s. 12 as amended. It is explicit in s. 24, which provides that a standard licence shall be revoked if at any time it appears that the licence-holder is no longer (i) of good repute, (ii) of appropriate financial standing or, (iii) professionally competent. The underlining, in each case is ours. First, we wish to stress that once it appears that the licence-holder is no longer of good repute, or of appropriate financial standing or professionally competent the licence must be revoked because the Act makes it clear that there is no room for any exercise of discretion. Second, the use of the expression 'at any time' makes the continuing nature of the obligations crystal clear.

12. The Tribunal has stated on many occasions that operator's licensing is based on trust. Since it is impossible to police every operator and every vehicle at all times the Department in Northern Ireland, (and Traffic Commissioners in GB), must feel able to trust operators to comply with all relevant parts of the operator's licensing regime. In addition other operators must be able to trust their competitors to comply, otherwise they will no longer compete on a level playing field. In our view this reflects the general public interest in ensuring that Heavy Goods Vehicles are properly maintained and safely driven. Unfair competition is against the public interest because it encourages operators to cut corners in order to remain in business. Cutting corners all too easily leads to compromising safe operation.

13. It is important that operators understand that if their actions cast doubt on whether they can be trusted to comply with the regulatory regime they are likely to be called to a Public Inquiry at which their fitness to hold an operator's licence will be called into question. It will become clear, in due course, that fitness to hold an operator's licence is an essential element of good repute. It is also important for operators to understand that the Head of the TRU is clearly alive to the old saying that: "*actions speak louder than words*", (see paragraph 2(xxix) above). We agree that this is a helpful and appropriate approach. The attitude of an operator when something goes wrong can be very instructive. Some recognise the problem at once and take immediate and effective steps to put matters right. Others only recognise the problem when it is set out in a call-up letter and begin to put matters right in the period before the Public Inquiry takes place. A third group leave it even later and come to the Public Inquiry with promises of action in the future. A fourth group bury their heads in the sand and wait to be told what to do during the Public Inquiry. It will be for the Head of the TRU to assess the position on the facts of each individual case. However it seems clear that prompt and effective action is likely to be given greater weight than untested promises to put matters right in the future.'

The proper approach on appeal to the Upper Tribunal

38. In NT/2013/52 & 53 Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI, the Upper Tribunal said the following, at paragraph 8 of its decision, on the proper approach on appeal to the Upper Tribunal:

‘There is a right of appeal to the Upper Tribunal against decisions by the Head of the TRU in the circumstances set out in s. 35 of the 2010 Act. Leave to appeal is not required. At the hearing of an appeal the Tribunal is entitled to hear and determine matters of both fact and law. However it is important to remember that the appeal is not the equivalent of a Crown Court hearing an appeal against conviction from a Magistrates Court, where the case, effectively, begins all over again. Instead an appeal hearing will take the form of a review of the material placed before the Head of the TRU, together with a transcript of any public inquiry, which has taken place. For a detailed explanation of the role of the Tribunal when hearing this type of appeal see paragraphs 34-40 of the decision of the Court of Appeal (Civil Division) in Bradley Fold Travel Ltd & Peter Wright v Secretary of State for Transport [2010] EWCA Civ. 695. Two other points emerge from these paragraphs. First, the Appellant assumes the burden of showing that the decision under appeal is wrong. Second, in order to succeed the Appellant must show that: “*the process of reasoning and the application of the relevant law require the Tribunal to adopt a different view*”. The Tribunal sometimes uses the expression “*plainly wrong*” as a shorthand description of this test.’

At paragraph 4, the Upper Tribunal had stated:

‘It is apparent that many of the provisions of the 2010 Act and the Regulations made under that Act are in identical terms to provisions found in the Goods Vehicles (Licensing of Operators) Act 1995, (“the 1995 Act”), and in the Regulations made under that Act. The 1995 Act and the Regulations made under it, govern the operation of goods vehicles in Great Britain. The provisional conclusion which we draw, (because the point has not been argued), is that this was a deliberate choice on the part of the Northern Ireland Assembly to ensure that there is a common standard for the operation of goods vehicles throughout the United Kingdom. It follows that decisions on the meaning of a section in the 1995 Act or a paragraph in the Regulations, made under that Act, are highly relevant to the interpretation of an identical provision in the Northern Ireland legislation and vice versa.’

Analysis

Procedural aspects

39. This concerns the handling of the PI.
40. We have no doubt that the PO was determined that the PI would be conducted according to his terms – see the exchanges at 18-19, 26-38, 50, 76 308-314 and 351-356 of the transcript of the PI.
41. The PO also took issue with what he determined was a somewhat offhand attitude by the Appellant and Mr McNamee during the consideration of evidence relating to odometer readings – see the exchanges at 285-291. It is clear that the PO took this into account in his decision – see paragraphs 61 and 62.
42. Further, the PO took issue with what he determined was the manner in which the Appellant turned to Mr McNamee when he was asked questions. He was informed about the Appellant’s accident but dismissed this as a plausible reason for the Appellant’s actions during the PI – see paragraph 63 of his decision.

43. We are of the view that there is a strong case for a determination that the way the PI was conducted was unfair. This is principally related to the PO's determination that he would not permit Mr McNamee to direct the questioning and/or make initial submissions on the issues arising. We are also concerned about the manner in which the PO dismissed the issue about the Appellant turning to Mr McNamee and the implication that there was a degree of collusion between them.
44. The usual response where there is a determination that the conduct of a PI was unfair is to allow the appeal and remit the case for a new PI. We pause here because we are not recommending that approach. That is because we are of the view that the appeal should be allowed on a more substantive issue.

Substantive issue

45. In summary, we have determined that the PO's conclusions that the Appellant had lost his repute as an operator and as a transport manager, that he was disqualified from acting as a transport manager indefinitely, that his operator's licence was revoked and that disqualification as an operator was necessary for a 12-month period were disproportionate.
46. We have here is no doubt that there is a poor history here, involving a number MSIs, the non-notification by the Appellant to the Department of these infringements, a VSI, other offences and the unsatisfactory outcome unsatisfactory outcome of the DVA compliance audit.
47. The Department has argued that when alerted to these matters and the initial PTR correspondence, the Appellant was slow to react. Against that, the Appellant's representative requested a PI and it took some time for this to be arranged. The Appellant has employed a transport consultant, had booked to attend a transport manager's course and there is evidence that the operation has improved. He accepts that his operation is unusual and that he should have applied for an operator's licence in England. He has had a serious accident. The examiner at the compliance audit refused to accept required documentation on a 'pen' or 'fire' stick but this has not been accepted. Subsequently, the documentation was provided to the Department. He now has only one vehicle and appears to be content with that limited operation. He has, in our view, supplied sufficient evidence that he satisfied the financial standing requirement. He has been without an operator's licence since 31 May 2023 and, accordingly, the 12-month period of disqualification from holding or applying for a licence set out in the PO's decision has been served.
48. We have concluded that a more appropriate disposal is appropriate, and we set that out below.

Our substituted decision

49. Our substituted decision is as follows:

The decision of the PO is set aside.

The Appellant's repute as an operator and as a transport manager is restored

Before acting as a transport manager again, the Appellant is required to secure a new Certificate of Professional Competence (CPC)

The Appellant's Standard International goods vehicle operator's licence is restored subject to the following conditions:

Before operating again, the Appellant is to employ a new Transport Manager and is to supply the name of the new TM to the Head of the TRU for his approval.

The Appellant's licence is curtailed to authorisation for 3 vehicles and 3 trailers.



**Kenneth Mullan, Judge of the Upper Tribunal,
25 September 2024**