



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

**Appeal No. UA-2023-001225-T
[2025] UKUT 062 (AAC)**

ON APPEAL from a DECISION of the TRAFFIC COMMISSIONER for SCOTLAND

DECISION OF THE UPPER TRIBUNAL

Before: E Mitchell, Judge of the Upper Tribunal
D Rawsthorn, Specialist Member of the Upper Tribunal
M Smith, Specialist Member of the Upper Tribunal

Appellants: (1) Mr Douglas Bain (in his capacity as the holder of an operator's licence, trading as Bain's Coaches, and in his capacity as a designated transport manager).

(2) ABC (Methlick) Ltd.

References: PM0000657 (Bain's Coaches); PM001603 (ABC (Methlick) Ltd).

Date of Commissioner's decision: 6 August 2023.

Representation: For both Appellants, Mr B O'Leary (of counsel) instructed by Merkel Law LLP.

Heard at: Employment Appeal Tribunal, 52 Melville Street, Edinburgh on 15 February 2024.

This front sheet is for the convenience of the parties and does not form part of the decision

DECISION

This appeal is **ALLOWED**. The four decisions taken by the Traffic Commissioner for Scotland on 6 August 2023 are set aside (ref's PM0000657 and PM001603) because they involved errors on points of law. Under paragraph 17(2) of Schedule 4 to the Transport Act 1985, the Upper Tribunal further orders:

(1) Subject to paragraph (2) below, the matters considered at the public inquiry hearing which preceded the Traffic Commissioner's decisions of 6 August 2023 are to be reconsidered at a fresh public inquiry hearing.

(2) Paragraph (1) above does not apply if:

(a) the Senior Traffic Commissioner is of the opinion that it is unnecessary to convene a fresh public inquiry hearing because it is no longer proposed to make any decision which, by statute, may not be made without giving effect to a request to hold a public inquiry; and

(b) the Appellants are sent written notice of that opinion within **one month** of the date on which this decision is issued.

(3) Subject to paragraph (5) below, if there is to be a fresh public inquiry hearing, the call-up letters which preceded the 2023 public inquiry hearing are to have effect, and be read as if they included amongst the matters to be addressed at the fresh inquiry hearing:

(a) the allegation made by Vehicle Examiner Mackie at the 2023 public inquiry hearing that certain documentation may have been falsified by being dated before the actual date on which the documentation was prepared; and

(b) any further matters which the Senior Traffic Commissioner, or another Traffic Commissioner authorised by the Senior Commissioner, informs the Appellants in writing, within **one month** of the date on which this decision is issued, are to be addressed at the inquiry hearing.

(4) If any further matters are notified under paragraph (3)(b) above, the Appellants may make written representations on those matters, but any such

representations must be received by the Office of the Traffic Commissioner within **one month** of the date of notification, or such shorter or longer period as the Senior Traffic Commissioner or another authorised Commissioner may determine.

- (5) Paragraphs (3) and (4) do not apply if the Senior Traffic Commissioner so decides (for example, if he decides that fresh call-up letters are called for).
- (6) If there is to be a fresh public inquiry hearing, the inquiry is to be before the Senior Traffic Commissioner, or such other Traffic Commissioner as is required to deal with the matter by the Senior Commissioner.
- (7) If there is to be a fresh public inquiry hearing, save as is necessary in order to give effect to the above paragraphs, nothing therein prejudices the exercise of any statutory functions, or any statutory rights or duties, in connection with an inquiry hearing.
- (8) In the above paragraphs, "Traffic Commissioner" includes a Deputy Traffic Commissioner.

REASONS FOR DECISION

Subject matter: revocation of standard PSV operator's licence; fairness of public inquiry proceedings.

Case law referred to: *Bryan Haulage (No. 2)* T/2002/217; *Leafy Designs Ltd* [2023] UKUT 111 (AAC).

Decisions under appeal

1. These proceedings involve appeals against the following decisions, taken by the Traffic Commissioner for Scotland following a public inquiry hearing:

- (a) revocation of an operator's licence, granted under the Public Passenger Vehicles Act 1981 (PPVA 1981), held by Douglas Bain (t/a Bains Coaches). This decision was taken under sections 17(1)(a), (1)(b), (3)(a), (3)(aa) and (3)(c) of the PPVA 1981;

- (b) revocation of an operator's licence, granted under the PPVA 1981, held by ABC Methlick Ltd (a company of which Mr Bain was director). This decision was taken under sections 17(1)(a) and (b) of the PPVA 1981;
- (c) an order disqualifying both those operators from holding an operator's licence for a period of five years;
- (d) an order disqualifying Douglas Bain from acting as a transport manager for a period of five years.

2. Subsequently, the Traffic Commissioner granted a stay on the coming into effect of those decisions pending determination of these appeal proceedings before the Upper Tribunal.

Background

Mr Bain

3. Mr Douglas Bain was the holder of a standard international operator's licence, granted under the PPVA 1981 which authorised use of 12 vehicles (licence no. PM0000657). The business carried on under that licence had the trading name of Bains Coaches. Mr Bain was also the sole director of ABC (Methlick) Ltd, which held a standard international operator's licences authorising use of six vehicles (licence no. PM0001603). Mr Bain was the designated transport manager under both licences.

2019 public inquiry

4. The Appellants were involved in a public inquiry before a Deputy Transport Commissioner in 2019 called, at least in part, in response to reports of anti-social behaviour associated with a so-called 'party bus' service. The Deputy Traffic Commissioner did not take formal regulatory action, but his decision letter recounted Mr Bain's initial refusal to alter the party bus service, as requested by the police, but that, after a preliminary inquiry hearing, he agreed to meet the police "to take action to deal with their concerns". Following that meeting, Mr Bain agreed to make changes to the party bus service. The Commissioner's decision letter recorded:

"...Having heard evidence...and as a result of the agreement...I have decided to issue a warning to Mr Bain. I wish to make it clear to Mr Bain that if he had

not reached the agreement with Inspector Bruce I would have revoked his operator's licence.

...There is no reason why the agreement that Mr Bain reached with the police could not have been reached earlier. The reason that agreement was not reached earlier appears to me to have been Mr Bain's attitude.

...I am prepared to take Mr Bain at his word when he says that he has a genuine willingness to engage with Police and that there will not be any difficulties in his relationship with the Police in the future.

...I should make it clear to Mr Bain...that I consider good communication and co-operation between an operator and the police is an essential aspect of good repute...".

Events preceding the present public inquiry

5. The present public inquiry call-up letter informed the Appellants that reports prepared by DVSA Traffic Examiner (TE) Jarvis, and DVSA Vehicle Examiner (VE) Mackie, would "form the basis of the inquiry". The key issue, as subsequently identified in the Traffic Commissioner's reasons for her decision, was Mr Bain's co-operation with regulatory officials, including whether certain reports had been falsified (prepared after the stated date of preparation). We shall therefore set out the written evidence before the Commissioner about these matters.

6. VE Mackie's report included the following:

"During the investigation I had to visit the operator 3 times, and it was clear that some remedial action was taking place between visits.

This meant that the final outcome was undoubtedly better than it would have been [had] I been able to gather all of the information during my first visit. Bearing this in mind I have concerns that the operator was aware of shortcomings in the maintenance processes at the time.

Response was a short general statement that advice regarding shortcomings would be complied with going forward and some blame apportioned to assistant TM who no longer works for the operator."

7. TE Jarvis' report included the following:

"On 20th June 2022 I issued the company with a Section 99 request...for data and documents to establish what systems the company have in place and to investigate the driving without a card issues. The operator called on the 4th of July 2022 to request further time to submit the data requested.

The data and documents were received on 25th July but was out of date and several driver and vehicle data was missing. A further request to the operator was submitted on 20th September. As I was unable to obtain the required data an unannounced visit was carried out with VE Mackie present on 23rd September. Having discussed the issues with Mr Bain it was clear that he had limited knowledge with regards to the companies' systems and did not know how to submit the requested data to me. During the visit I spoke to Billy (William Davidson) who had some involvement with the general systems within the company, but he also did not know how to access the software used by the company to submit data. There seems to be insufficient systems in place and seemed quite erratic. As Mr Bain is the nominated Transport Manager stated on the licence, he should to some degree have insight as to how the Operating licence requirements are being managed. I explained to Mr Bain that I would send a further request by email for the digital data and further information relating to the vehicles and service runs and that the request was due by 3rd October 2022. Yet again no response to my request for the information that I have asked for.

...Driver's journeys and duties are planned by Mr Bain. Due to being unable to produce the requested data to this there is not an effective system for the downloading and analysing of both VU and driver card data. No infringement reports were issued to me when requested. I am not certain that anyone knows how to access the software being used by the company...

...A request was made to Mr Bain to send me copies of drivers CPC certificates and there has been no reply to this request.

...I had requested the operator to submit to me which drivers were currently employed by the company, and this was not received until a later date. I did not receive any digital data for the Operator Mr Douglas Bain who I believe also

carries out driving. I also requested copies of drivers CPC certificates and to date they have not been submitted to me...

SUMMARY AND CONCLUSION

Due to the lack of sufficient up to date data and lack of documents this has been a difficult case to complete. The delays with requests that were made have also hindered the timeline in being able to establish the full facts. There are signs that the Operator has little knowledge on the importance of the undertakings involving the requirements to remain compliance with the driver's rules and regulations."

8. We note that there was no indication in the call-up letter's case summary, nor in the reports of TE Jarvis and VE Mackie, that either examiner doubted the veracity of regulatory documentation prepared by the Appellants.

The public inquiry

9. Mr Bain attended the public inquiry, at which he was represented by Mr O'Leary of counsel (who also represents Mr Bain before the Upper Tribunal). VE Mackie and TE Jarvis gave oral evidence, in TE Jarvis' case remotely.

10. We set out here those passages from the transcript of the inquiry that are relevant to our determination of this appeal.

"Traffic Commissioner. "...Mr Bain, you will be aware from the call-up letter...the issues which are before me...there are concerns that you've not honoured the undertakings on your license, relating to driving and operation of vehicles, observing the rules on drivers' hours and tachographs, and keeping the vehicles. But there have also been prohibitions issued by...DVSA...the evidence...includes the report and evidence of Examiner Jarvis and the report and the evidence of Examiner Mackie. I'm also aware that you attended, I think it was a preliminary hearing in 2019 before the Deputy Traffic Commissioner, Mr Bain, in relation to the issue of busses and some complaints that we had received from the police in relation to the operation thereof [*Commissioner goes on to refer to the 2019 public inquiry and a MOT failure rate double the national average*]..."

[*TE Jarvis' evidence*]

Mr O'Leary (questioning *TE Jarvis*): ...in respect of your interaction with Mr Bain, would it be fair to say that he wasn't in any way obstructive of the investigation that you were carrying out?

TE Jarvis: ...I don't think that is fair to say. I'm not entirely sure whether he was deliberately obstructive, that he didn't know how to – uh...asking for the documents and data was quite obstructive because it was never forthcoming. But as to whether Mr Bain had deliberately done that, I can't answer that.

Mr O'Leary: There's a difference, isn't there, though, between being obstructive, and not being able to provide the data required?

TE Jarvis: But if Mr Bain had admitted to me that he was struggling to provide the data provided instead of just not providing the data, then that may have been different.

...*Mr O'Leary*: I'm just concerned by your use of the phrase obstructive. Because that, of course, is a serious allegation...there's a difference between obstruction and someone who is unable to provide the data that you want. He did give you access to the systems didn't he?

TE Jarvis: He did.

Mr O'Leary: Yeah, so that wasn't being obstructive, was it?

TE Jarvis: I don't believe I said he was being obstructive.

... *Mr O'Leary*:...you've mentioned in your evidence that documentation continued to be provided [in] dribs and drabs. Is that correct?

TE Jarvis: Yeah.

Mr O'Leary: But Mr Bain continued to engage, didn't he, with the request? It may not have been to your satisfaction, what you were getting back, but he continued to engage and provide you with data.

TE Jarvis: Eventually, yes.

[VE Mackie's evidence]

...Traffic Commissioner: ...Examiner Mackie. You attended with Examiner Jarvis at the operator's premises...Did you have a chance to look at any of the documentation that had been submitted? I don't know if there was drivers' hours information, was there?

VE Mackie: I don't think there was. But I did have a look at what was submitted and most of it was what I'd originally asked for in my first request. So, if the operator had submitted then, we probably wouldn't be here now.

...VE Mackie:...I carried out an unannounced visit on the 23rd of September, at the office premises...I did look at the maintenance documentation filed on that visit. And Mr Bain advised that the Transport Advisor Assistant girl, who was filing the paperwork etc, he was actually on a job. So, I left, saying that we would come back...at a later date. So, I carried out a second unannounced visit, on the 5th of October 2022. And the Transport Assistant was there...So, I...asked him if I could have his documentation to view. Mr Bain wasn't happy that I'd turned up unannounced...and had asked the Transport Assistant to put the documents back in the files...I left, having agreed to come back at a specified date and time to view the documentation. So, I went back for a third visit on 11th of November. I examined a further three vehicles, I reviewed the files, and then we completed the MIVR.

...Traffic Commissioner:...Examiner Mackie...You've obviously told me about the second unannounced visit...I think you've given a view...at the end of the report...

...VE Mackie: Um, well, I got the impression that there was a reason behind Mr Bain maybe not wanting me to see the files when I visited initially. And when I reviewed the files on the third attempt, some of the paperwork – generally, the paperwork completed by the mechanic at the time of the inspection was fairly grubby. And some of the records, the files, were very, very clean. And although they had been completed fully, I suspected that they may have been inserted later on. However, had I been able to view the files on the first attempt, I would have known whether that was correct or not.

...

Mr O'Leary: No questions for Vehicle Examiner Mackie.

...

Traffic Commissioner (to Mr Bain):...can you comment for me, then, on Examiner Mackie's concerns about the documentation being repaired [*UT judge's note: prepared?*] after the event?

Mr Bain: Some of them, this is a workshop, it was all just checking to see if the paperwork was there, but, it's – I've [unintelligible]. It's done.

Traffic Commissioner: Examiner Mackie has specifically concerns about the fact that documentation has been filled in retrospectively, Mr Bain. What's your position on that?

Mr Bain: Alright.

Traffic Commissioner: You know how documentation should be filled in, because you've just told me that. You've told me how you've been doing this since 1975. So, what's your position on Examiner Mackie's concern? What have I to take from that?

Mr Bain: It's her job being right all the time.

Traffic Commissioner: I missed that, Mr Bain.

Mr Bain: It's her job being right all the time, it's, you've got to do her best to make sure it's right all the time.

Traffic Commissioner: It's her job being right all the time...

...

Traffic Commissioner:...Any re-examination, Mr O'Leary?

Mr O'Leary: No, that you [*sic*], ma'am."

Traffic Commissioner's reasons for her decisions

Evidence

11. The Commissioner's reasons for her decision included the following description of VE Mackie's evidence:

"15...in September 2022, he visited the operating centre unannounced and spoke to Mr Bain. Mr Bain advised that the assistant transport manager was out on a job and therefore the vehicle records were not available for inspection.

16. VE Mackie attended again, unannounced, on 3 October 2023 [*judge's note: 2022 may have been intended*]. The assistant transport manager was present and VE Mackie asked him if he could view the vehicle files. VE Mackie advised that Mr Bain had, however, instructed the transport assistant not to allow VE Mackie access to the files.

17. VE Mackie left, having agreed to come back on a specified date. He made a third, announced, visit on 11 November 2022 whereupon he examined 3 vehicles, reviewed the vehicle files and completed the investigation report.

18...VE Mackie noted that the maintenance documentation was not up to date or completed properly. Inspections were being carried out late. The MOT failure rate was twice the national average and safety critical defects were being identified at test, which indicated the preventative maintenance regime was poor. VE Mackie was extremely concerned that brake testing was not being carried out as it should be for many of the inspection records had no record of brake testing...

19. VE Mackie advised that several of the deficiencies found in 2022 had been highlighted during his earlier investigation, and of particular significance were the issues of record keeping and brake testing. It was of great concern to him that he had been prevented from accessing the vehicle files during his visit. He suspected that remedial action was being taken between his visits which in turn led him to believe that the operator knew things were not as they should be yet had done nothing until the DVSA visit. He also noted, when he eventually was given access to the documentation, that many of the safety inspections appeared to have been completed retrospectively.

20. VE Mackie advised that he had looked at a sample of the PMIs lodged for the inquiry. They appeared generally ok, with some minor issues. However, brake testing was still not being recorded properly despite all the advice given during the two previous inspections. It was still not possible to tell if all the vehicles were undergoing any meaningful brake testing.”

12. The Commissioner’s reasons described Mr Bain’s evidence as follows:

“23. When he got the request from TE Jarvis he was unable to get the information from the computer. He couldn’t operate the computer. He had asked a consultant, Gary Hughes, to help but Mr Hughes couldn’t download it either.

24. Mr Bain advised that he became frustrated with the emails coming back or forward from TE Jarvis and largely stopped engaging. He went to Stonebridge who had supplied him with the system for recording and analysing drivers’ hours to ask for help. He denied trying to obstruct TE Jarvis in carrying out her investigation. He admitted that he had told examiner Jarvis he was thinking of retiring but had since changed his mind. He denied that he had done so in an attempt to evade regulatory action.

25. Mr Bain admitted that no proper downloading or analysis of drivers’ hours had been done for some time. Things had slipped and he was just too busy...

27. Mr Bain denied that he had been obstructive with DVSA during their investigations. He acknowledged that the Deputy Traffic Commissioner had issued him with a warning in 2019 for failing to co-operate with police in dealing with anti-social behaviour on ‘party’ buses which he was operating, but denied that his behaviour this time was more of the same. There was ‘a right way and a wrong way’ to do things and VE Mackie should have asked him, not his employee, for documents when he visited the operating centre. He admitted telling his employee not to give the DVSA examiner documentation that he had asked for.

28. When asked about VE Mackie’s concerns in relation to the retrospective completing of maintenance documentation Mr Bain did not refute the allegations. He commented that ‘it was a job being right all the time’. He also accepted that there was no evidence before me at the inquiry of driver licence

checks being carried out or evidence to demonstrate that driver hours were now being managed effectively.”

Commissioner’s findings about Mr Bain

13. Generally, the Traffic Commissioner found Mr Bain to be an unimpressive witness. Her reasons stated:

“13. I found Mr Bain to be a reluctant and unreliable witness. He spoke under his breath during much of his evidence and had to be prompted to provide full answers to many of the questions which were put to him.”

14. The Traffic Commissioner’s reasons included a number of adverse findings regarding Mr Bain’s cooperativeness and honesty:

“37...he did not appear to accept that that his failure to keep his knowledge or skills up to date was an issue.

...39...perhaps the most serious aspect of this case was the allegations concerning Mr Bain’s failure to co-operate with, and obstruction of, DVSA officers in the course of their duties. Mr Bain directed one of his employees to withhold vital documentation from VE Mackie in the course of his investigation and failed to deny that there had been retrospective completion, and therefore falsification, of maintenance records.

40. I accept that Mr Bain’s computer illiteracy may have contributed to his failure to co-operate with TE Jarvis’ requests. However, he made no proper attempt to bring his difficulties to her attention and admitted to disengaging out of frustration instead. I also noted that documentation which had been requested by TE Jarvis without response, was later provided for PI.

41...His attitude at inquiry was one of arrogance rather than of concern for compliance and operating within the rules.

42. Affronted or not, Mr Bain chose not to co-operate DVSA officers carrying out their duties. That is a matter most serious in its own right. However, there is also evidence of falsified documents in this case, I also consider it likely Mr

Bain's failure to co-operate was also an attempt to hide his shortcomings and attempt to evade regulatory action.

43. Mr Bain knew that falsifying vital maintenance documents by post-dating them was wrong. When given the opportunity at inquiry, he failed to deny that the documents had been falsified. He is also an operator of many years' experience. On any objective view, his conduct in allowing such falsification falls to be classed as dishonest.

44. Mr Bain's actions have undoubtedly prolonged the risk to road safety that his transport operations have posed. His behaviour is entirely inconsistent with the obligation upon all operators to operate in a trustworthy manner. If I cannot trust Mr Bain to co-operate with the authorities, or to face up to and remedy shortcomings where they occur, then I cannot trust him to safely operate vehicles outwith the gaze of the regulator.

45. Moreover, Mr Bain's obstruction and failure to co-operate is nothing new. He was given a warning following public inquiry in 2019 for failing to co-operate with the police in circumstances where his party buses were involved in anti-social behaviour. I therefore consider his behaviour to amount to a course of conduct.

46. Given my finding that Mr Bain's maintenance documents had been falsified, I am unable to rely on any of the documentation produced by him for inquiry...In addition, Mr Bain's certificate of attendance at refresher CPC training was never produced so there is no evidence that he has actually undertaken much needed, and long overdue, CPD."

Why the Commissioner revoked both operator's licences

15. The Traffic Commissioner's reasons explain why both operator's licences, in her opinion, had to be revoked:

"47. In balancing, I was able to find some positives. Mr Bain was an operator of longstanding. He had hired two people – one of whom was CPC qualified – to help out following his wife's death. He had also, on occasion, sought external help to try and improve things. There had been no further MOT failures or prohibitions issued since VE Mackie's final visit in November 2022.

I also accept that the loss of his wife likely impacted on his ability to run his business.

48. Nevertheless, even balancing in the positives, I find that I am no longer able to trust Mr Bain. I simply did not believe his assurances that he is operating compliantly now. Despite a previous warning for failure to co-operate with the authorities, he has done so again in attempt to cover up his shortcomings. All the evidence points to the fact that Mr Bain simply does not believe that the rules apply to him. For those reasons, he can no longer be trusted to operate.”

16. Having referred to the Upper Tribunal’s statements in *Arnold Transport & Sons v Department of Environment, Northern Ireland* NT/2013/82 that “the Tribunal has stated on many occasions that operator’s licensing is based on trust” and, if an operator’s actions cast doubt on their regulatory trustworthiness, “their fitness to hold an operator’s licence will be called into question”, the Traffic Commissioner went on:

“50. I asked myself the question posed in 2009/225 Priority Freight: How likely is it that this operator will, in future, operate in compliance with the operator licensing regime? Mr Bain’s failures to co-operate amount to a course of conduct. He has failed to heed an earlier warning and much of his evidence was inconsistent and incredible. I therefore considered it highly unlikely that Mr Bain would comply in the future.

51...The question posed in T/2002/217 Bryan Haulage (No.2) is therefore relevant: is the conduct of this operator such that it ought to be put out of the business? In reaching my conclusion, I also had regard to the Senior Traffic Commissioner’s Document No. 10: Principles of Decision Making, in particular, Annex 3.

52. Mr Bain has clearly obtained a commercial advantage over other operators and compromised road safety by deliberately failing, for a significant period of time, to keep his vehicles in a fit and serviceable condition or to ensure that the laws on driver hours were complied with. He attempted to conceal his failures by falsifying documentation.

53. This was a bad case, then, in which dishonesty was a feature. The starting point for regulatory action was severe. I also take the view that other operators

who carry out their businesses in a compliant manner would be shocked if another operator were permitted to operate a vehicle against this background. In the circumstances of this case, it is appropriate and proportionate to answer the *Bryan Haulage* question in the affirmative.”

17. The Commissioner’s reasons then turned to Mr Bain’s good repute as transport manager:

“53...It is appropriate to find that Mr Bain has lost his repute as an operator. He is also a transport manager and given the findings of dereliction of duty and dishonesty in this case, it is not possible to separate his actions as such from that as operator. I refer to the case of *Alistair Walter T/2017/55*. Consequently, I also consider it proportionate to find that Mr Bain has lost his repute as a transport manager.”

18. Having found that Mr Bain had lost his good repute as a transport manager, the Traffic Commissioner was required to make an order disqualifying him from acting as a transport manager (paragraph 7B of Schedule 3 to PPVA 1981). The Commissioner also made an order under section 28 of the Transport Act 1985 disqualifying Mr Bain from holding or obtaining an operator’s licence. Both orders were for five years. The Commissioner’s reasons explained why this period of disqualification was considered justified:

“58...a period of disqualification is necessary to meet the objectives of the operator licensing regime. Acknowledging that this is a serious case involving dishonesty which strikes at the heart of the licensing regime, but giving credit for the positives that I was able to find, I have decided to disqualify Mr Bain from holding an operator licence for a period of five years.

59. Mr Bain has lost his repute as a transport manager. I must therefore disqualify him from acting as such. I see no reason to depart from the period of disqualification ordered in relation to his capacity as an operator.”

Grounds of appeal, and arguments in support

Ground 1

19. The Appellants argue that the Traffic Commissioner's finding that Mr Bain had acted dishonestly, by falsifying vehicle maintenance documents, was based on an inaccurate and unjustified interpretation of the evidence. Mr Bain did not at any stage accept that he falsified documents, nor did the Commissioner put the question directly to Mr Bain. The finding of dishonesty was integral to all decisions taken and the Commissioner's flawed approach undermined each decision.

20. The dishonesty finding arose, argue the Appellants, from VE Mackie's 'suspicion', first voiced at the public inquiry, that, since some paperwork appeared cleaner than others, it must have been post-dated that is marked as completed on an earlier date than the actual date of completion. However, no specific examples of such suspicious paperwork were identified or brought to the Traffic Commissioner's attention. VE Mackie's suspicion or impression that certain paperwork was 'too clean' was an insufficient evidential basis for such a damaging finding as dishonesty.

21. The dishonesty finding was mainly based on Mr Bain's supposed failure to deny in oral evidence that documents had been falsified. However, the public inquiry transcript demonstrates that Mr Bain was never asked directly whether he falsified, or allowed to be falsified, documents. The Appellants submit that it is clear that Mr Bain did not accept falsifying, or allowing falsification of, documents. Moreover, the Traffic Commissioner failed to make her own inquiries into the documentation considered 'too clean' by VE Mackie. Some four months elapsed between the public inquiry hearing and the Commissioner's decision, which meant there was ample time available in which the Commissioner could, and should, have investigated the documentation considered suspicious by VE Mackie.

22. The Traffic Commissioner asked Mr Bain a very general question and his response ('it's her job to be right all the time') was an insufficient basis for an inference to be legitimately drawn that Mr Bain failed to deny, or accepted, the allegation of dishonesty. The Commissioner could, and should, have asked Mr Bain these direct questions: (1) did you falsify documentation by completing reports after the stated date of completion? (2) if not, did you allow someone else to do so?

23. The Traffic Commissioner relied on the falsification finding to conclude that none of Mr Bain's evidence could be considered reliable (see paragraph 46 of the Commissioner's reasons). In those circumstances, it was incumbent on the Commissioner to have clearly and unambiguously asked Mr Bain whether he had falsified, or allowed falsification of, documents. Simply asking Mr Bain to comment on VE Mackie's concerns, or state his position regarding those concerns, was insufficient because it did not give him the opportunity 'to explicitly refute the allegation'.

24. The Appellants argue that the Traffic Commissioner's approach was inconsistent with the Upper Tribunal's design in *Leafy Designs Ltd* [2023] UKUT 111 (AAC), in which the Tribunal said:

"25...we accept that, generally speaking, there normally has to be an evaluation as to the substance, nature and degree of any dishonesty before a properly informed decision as to regulatory action may be taken. But where matters are straightforward that need not be a lengthy evaluation and need not generate a lengthy written explanation. It will depend on the circumstances."

Ground 2 – flawed obstructive course of conduct finding

25. The Appellants accept that the Traffic Commissioner was entitled to find that Mr Bain's dealings with VE Mackie were 'obstructive'. However, it was not open to the Commissioner to find that this was part of a course of conduct.

26. The Traffic Commissioner's 'course of conduct' finding relied on Mr Bain's appearance at a public inquiry in 2019. However, argue the Appellants, there was no evidence before the present public inquiry as to the reasons for the 2019 public inquiry call-up nor whether the Commissioner who dealt with that inquiry made a finding of obstructiveness. Moreover, the circumstances of the 2019 written warning were very different to those of the present public inquiry.

27. In relation to Mr Bain's dealings with TE Jarvis, the Appellants submit that it was not open to the Traffic Commissioner to find that Mr Bain had been obstructive. The evidence showed that the interaction between the two was unproductive because of Mr Bain's lack of familiarity with the software package used, Mr Bain gave TE Jarvis access to his software and did supply, albeit late in the day, the information requested (see TE Jarvis' oral evidence at the inquiry hearing).

28. Absent what the Appellants submit was a flawed finding of obstructiveness, the Traffic Commissioner would have been far more likely to answer the *Priority Freight* (2009/225) question in the Appellants' favour ("how likely is it that this operator will, in future, operate in compliance with the operator's licensing regime?"). That likelihood would have been further enhanced had the Commissioner given sufficient weight to the positive factors acknowledged in paragraph 47 of her reasons, namely the death of Mr Bain's wife, Mr Bain's hiring of two assistants including one who was CPC qualified, Mr Bain having sought external help from transport consultants and the absence of further MOT failures or vehicle prohibitions since November 2022.

Ground 3 – selective reliance on TE Jarvis' evidence

29. At the hearing of this appeal, Mr O'Leary conceded that, if Grounds 1 and 2 failed, the remaining Grounds would face an uphill struggle.

30. TE Jarvis gave oral evidence that, had the information that was before the present public inquiry been supplied earlier, it was unlikely that the Appellants would have been called to an inquiry. This aspect of TE Jarvis' evidence was not acknowledged in the Traffic Commissioner's reasons. It should have been because it was clearly material to the balancing exercise undertaken by the Commissioner.

Ground 4 – failure to take into account material evidence

31. The Appellants argue that the Traffic Commissioner failed to take into account that Mr Bain had accepted that he needed to undertake further professional training and had made a booking to undertake that training on 15th and 16th May 2023. That was clearly a factor in the Appellants' favour, they submit, and should have been considered in the balancing exercise, in particular when answering the *Priory Freight* question.

32. The Appellants further submit that the Upper Tribunal should admit new evidence, namely Mr Bain's successful completion of his CPC refresher course. The Appellants argue that this evidence meets the *Ladd v Marshall* [1954] 1WLR 1489 test for admission of fresh evidence on appeal because it was not available at the time of the Public Inquiry, it would probably have had an important influence on the result of the case, and it is plainly credible.

Ground 5 – Traffic Commissioner’s weighing exercise

33. The Appellants argue that it was not open to the Traffic Commissioner to find that Mr Bain had acted dishonestly nor that he had engaged in a course of conduct of obstructive behaviour. Those flawed findings were the Commissioner’s principal justification for categorising these cases as ‘severe’ and answering the *Bryan Haulage* and *Priority Freight* questions adversely to the Appellants.

34. The Traffic Commissioner should have categorised these cases as ‘serious’ rather than ‘severe’ and given proper weight to those matters that went to the Appellants’ credit: Mr Bain’s long experience as an operator of good standing, genuine attempts to rectify most recent regulatory concerns and no evidenced regulatory contraventions since November 2022. Had the Commissioner approached these cases properly, argue the Appellants, revocation and disqualification were not inevitable.

Determination of appeal

Ground 1

35. We have not found the determination of Ground 1 straightforward, in particular because Mr Bain’s counsel at the public inquiry hearing decided not to cross-examine VE Mackie about the suspiciously ‘clean’ reports nor to address the issue in closing submissions at the inquiry. Nevertheless, we decide that Ground 1 is made out and that the Traffic Commissioner’s dishonesty finding was flawed by errors of law.

36. The public inquiry call-up letter and associated documentation contained no indication that VE Mackie thought that maintenance documents looked suspiciously ‘clean’ (as if prepared after the ostensible date of preparation). The issue therefore arose for the first time during oral evidence given at the public inquiry hearing. That did not, as a matter of principle, prevent the Traffic Commissioner from making findings on the issue. However, the fact that Mr Bain could not have come to the public inquiry prepared to deal with the allegation that he had fabricated maintenance reports had a bearing on what was necessary to ensure that any such findings were made fairly. In this case, we decide that the procedure whereby the Commissioner found that Mr Bain had acted dishonestly was unfair, for the following reasons:

(a) VE Mackie's oral evidence was that "generally, the paperwork completed by the mechanic at the time of the inspection was fairly grubby. And some of the records, the files, were very, very clean. I suspected that they may have been inserted later on. However, had I been able to view the files on the first attempt, I would have known whether that was correct or not". If the records were suspiciously clean, as compared to other 'fairly grubby' records, we do not understand why VE Mackie's written report, within the public inquiry call-up brief, failed to articulate these suspicions;

(b) the Commissioner asked Mr Bain three questions about VE Mackie's suspicions. However, his answers left, in our view, some doubt as to whether he had understood the allegation made. The first question is described in the transcript as a request for comment on "documentation being repaired after the event". The Commissioner may in fact have said 'prepared' but Mr Bain's response suggested that he might have misunderstood. He said, "this is a workshop, it was all just checking to see of the paperwork was there". Mr Bain then answered "alright" when asked for his 'position' on VE Mackie's concerns that documentation had been filled in retrospectively. The question was effectively repeated, and Mr Bain replied, "it's her job being right all the time" (which the Commissioner's reasons recounted as 'it's a job being right all the time');

(c) Mr Bain's answers to the Commissioner's questions left, in our judgment, reasonable doubt as to whether he understood what he was being asked to address. For that reason, we do not think it is safe to assume that his counsel's conduct of Mr Bain's case at the inquiry hearing (in particular, declining to re-examine VE Mackie) amounted to a concession that Mr Bain accepted that VE Mackie's suspicions were well-founded;

(d) since this was an issue that arose at the inquiry hearing, we consider that a direct question should have been asked before the Commissioner could fairly make, and rely on, a finding that Mr Bain did not refute VE Mackie's allegation, something along the lines of, 'Did you, or someone acting under your instruction, date maintenance documents before the date on which they were actually completed?' We consider that fairness required such a direct question because the stakes were so high for Mr Bain. His business (his livelihood), which he had developed over many years, was at risk and this is why fairness required that Mr Bain was not left in any doubt that he was being asked to confirm or deny that he had falsified maintenance documentation;

(e) there is no indication in the Commissioner's reasons that she carried out her own comparison of the suspiciously clean documents against the 'fairly grubby' ones referred to in VE Mackie's evidence.

37. The finding that Mr Bain failed to deny falsification of maintenance records was one of two matters which the Traffic Commissioner's reasons said exemplified 'the most serious aspect of this case'. We cannot therefore be satisfied that, absent that finding, the Commissioner would have made the same decisions. In other words, the unfairness referred to above cannot be considered immaterial. There is a real possibility that, absent the finding that Mr Bain failed to deny falsification of maintenance records and acted dishonestly, the Commissioner would not have answered 'yes' to the *Bryan Haulage (No. 2)* question (T/2002/217): was the operator's conduct such that it ought to be put out of business?

38. The argument made by reference to *Leafy Designs* is inconsistent with the Appellants' principal Ground 1 argument. *Leafy Designs* is predicted on a legitimate finding of dishonesty, yet the Appellants deny there was any dishonesty as found by the Traffic Commissioner.

39. Ground 1 is made out and this appeal therefore succeeds. We set aside the Traffic Commissioner's decisions.

Grounds 2 to 5

40. It is not necessary for us to determine the remaining grounds of appeal and, since the matters addressed at the 2023 public inquiry may very well be re-addressed at a fresh public inquiry, it is preferable that we do not express our views on the merits of the remaining grounds of appeal.

Disposal

41. The four decisions taken by the Traffic Commissioner, as described at the start of these reasons, are set aside. However, Mr Bain, through his counsel, accepts that his operations raised genuine regulatory concerns (for example, his Ground 2 arguments conceded that it was open to the Commissioner to have found that Mr Bain was obstructive in his dealings with VE Mackie). For this reason, we do not simply set aside the Commissioner's decisions and leave it at that.

42. Our order disposing of this appeal presumes that there will be a fresh public inquiry hearing. However, the Upper Tribunal should respect the regulatory expertise of the Traffic Commissioners and, accordingly, our order reserves power to the Senior Traffic Commissioner to decide not to convene a fresh public inquiry hearing if his view is that, at the present time, regulatory action is not considered necessary. If there is to be a fresh public inquiry hearing, our order requires the call-up letters that preceded the 2023 public inquiry to be read as if they included, amongst the matters to be addressed, (a) VE Mackie's allegation that certain maintenance documents were falsified by being dated before the actual date of completion and (b) any further matters which a Traffic Commissioner notifies the Appellant in writing will be addressed at the inquiry hearing. But, again, we reserve power to the Senior Commissioner to instead decide that fresh call-up letters are required.

43. Finally, we apologise for the delay in giving this decision. As we understand the Appellants were informed, the judge has been absent from his duties while recovering from serious injuries sustained in an accident shortly after the hearing of this appeal.

**E Mitchell,
Judge of the Upper Tribunal
Authorised for issue on 14
January 2025**

Given under section 50(4) and
(5) of the Public Passenger
Vehicles Act 1981.