NCN: [2025] UKUT 383 (AAC)
Appeal No. UA-2024-000785-NT

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

Between:

Belvoir Logistics Ltd (1) and Shane Tinnelly (2)

Appellant

- v -

Driver and Vehicle Agency (Northern Ireland)

Respondent

Before:	Ms L. Joanne Smith: Judge of the Upper Tribunal Mr D. Rawsthorn: Member of the Upper Tribunal Mr S. James: Member of the Upper Tribunal
Hearing date:	21 January 2025
Heard at:	Tribunals Hearing Centre, Royal Courts of Justice, Belfast
Representation:	
Appellant:	Mr D McNamee, Solicitor
Respondent:	Ms A Jones, BL
On appeal from:	The decision of the Presiding Officer on behalf of the Department for Infrastructure
Reference No:	ON2030342
Decision under appeal:	6 June 2024
Date of Decision:	10 November 2025

KEYWORDS: Loss of repute, revocation of licence, disqualification, procedural impropriety, bias, public inquiry procedure.

Cases referred to: *Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI* [2013] UKUT 618 AAC NT/2013/52 & 53*; 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*. R (Guardian News & Media Ltd) v City of Westminster Magistrates' Court (Article 19 intervening)* [2012] EWCA Civ 420. T/2014/51 *Michael Thomas Aylesbury t/a MT Aylesbury*. T/2010/016 & 021 *Alan Cooper Haulage & Woodhouse Furniture. R v Petkar* [2003] EWCA Crim 2668; [2004] 1 Cr. App. R. 22. *NT/2013/82 Arnold Transport & Sons Ltd v DOENI. Shawe-Lincoln v Dr Arul Chezhayan Neelakandan* [2012] EWHC 1150. *Thomas Muir (Haulage) Limited* [1999] SC 86, [1998] Scot CS 13. T/2019/54 *Bridgestep Ltd and Tom Bridge. T/2015/39 Firstline International Ltd & William Lambie v Secretary of State for Transport.* 2009/225 *Priority Freight Ltd & Paul Williams. Bryan Haulage (No.2)* (T2002/217). *2016/046 R & M Vehicles Ltd, Graham Holgate and Michael Holgate*. *Ian Russell Nicholas t/a Wigan Container Services* (2014/72). *Porter v McGill* [2001] UKHL 67. J*ohnson v Johnson* (2000) 201 CLR 488. *Helow v Secretary of State for the Home Department* 2009 SC (HL) 1. 2000/65 *AM Richardson v DETR.*

SUMMARY OF DECISION

The Upper Tribunal dismissed the appeal brought by Belvoir Logistics Ltd and Shane Tinnelly against the decision of the Presiding Officer on behalf of the Department for Infrastructure (NI), which had revoked the company's operator's licence, disqualified Mr Tinnelly indefinitely as a transport manager and disqualified both parties from holding or obtaining an operator's licence for 12 months. The Tribunal found no material error of law or procedural impropriety in the decision, concluding that the presence of Traffic Regulation Unit (TRU) staff at the public inquiry did not amount to procedural unfairness, nor did the application to exclude such persons from the PI, create bias against the Appellant. The Tribunal upheld the Presiding Officer's findings that the operator had lost good repute due to a pattern of serious regulatory breaches, including vehicle maintenance failures, driver infringements, and inadequate management oversight. Despite the operator's engagement of a transport consultant and some remedial efforts, the Upper Tribunal determined that revocation and disqualification were a proportionate and lawful response.

Please note the Summary of Decision and table of contents is included for the convenience of readers. It does not form part of the decision.

DECISION

The decision of the Upper Tribunal is to DISMISS the appeal.

The Presiding Officer's decision dated 6 June 2024 does not involve a material error of law, and is not "plainly wrong". The directions made within the decision take effect from 2359hrs on 31 December 2025. The stay decision dated 17 June 2024 ceases to apply with immediate effect.

REASONS FOR DECISION

Introduction

1. This is an appeal to the Upper Tribunal brought by Mr Shane Tinnelly ("the Appellant"), on behalf of Belvoir Logistics Ltd ("the Appellant company" or "the operator"), against a decision of the Presiding Officer ("PO") for the Department for Infrastructure for Northern Ireland ("the DfI"), dated 6 June 2024. The PO granted a stay of his decision pending the outcome of the appeal, by decision dated 17 June 2024.

2. The Upper Tribunal granted an application by the DVA to be made respondent to the appeal. The appeal was considered at an oral hearing, at the Tribunal Hearing Centre within the Royal Courts of Justice, Belfast, on 21 January 2025. The Appellant was in attendance and represented by Mr D. McNamee, solicitor. The Respondent was represented by Ms A. Jones, BL. The Head of the Transport Regulation Unit for Northern Ireland ("TRU") was present as an observer to the appeal hearing. No party took any objection to his presence.

3. Within this decision, numbers contained in square brackets "[ ]" refer to page numbers within the Upper Tribunal bundle of papers in relation to this appeal.

Factual background

4. The Appellant company holds a standard international operator's licence authorising seven vehicles and five trailers. The licence was granted in March 2020. The Appellant is the sole director and Transport Manager ("TM") of the Appellant company.

5. In August 2020, the Appellant company received a prohibition regarding a seriously under inflated tyre and an advisory warning in relation to an annual MOT pass rate of 60%, which was below the standard expected of operators. The Appellant company was later subject to a DVA audit in February 2024, following notification from the DVSA of numerous serious offences and infringements, including Most Serious Infringements ("MSIs") and fixed penalties, in relation to vehicles authorised under the licence, and drivers operating within those vehicles. Some of the incidents involved drivers failing to stop for DVSA checks. The outcome of the audit was "unsatisfactory" for 'Maintenance', 'Driver's Hours' and 'Transport Manager'. 'Weights' and 'Establishment' gained a rating of "satisfactory". The Appellant company was called to a Public Inquiry ("PI") to consider the repute of the Appellant company as licence holder, the competence and repute of the Appellant as TM and the failure to notify the DfI of convictions and penalties as required under the licence conditions. The operator and Appellant were warned, upon call-up, that if it was determined that good repute was lost, they were at risk of the licence being revoked and disqualification orders being made.

The Public Inquiry

6. The Appellant attended the PI on behalf of the Appellant company, in his position as sole Director and TM. He was represented by Mr McNamee, solicitor, and was accompanied by Mr Philip Mallon, Transport Consultant. At the outset of the PI, Mr McNamee made a procedural submission to the PO to exclude the members of the TRU staff who were present at the PI, submitting that this created procedural unfairness and demonstrated bias. The PO rejected the submission, reassuring both Mr McNamee and the Appellant that any decision made was his, and his alone (paragraph 19 of the PO's written decision). He proceeded with the PI, hearing evidence from the Appellant and his Transport Consultant in relation to the compliance and regulatory issues raised in the call-up letter [42-43]. Mr McNamee made submissions at the conclusion of proceedings, before the PO retired to make his decision.

The Presiding Officer's decision

7. On 6 June 2024, the PO signed off his written decision which comprised of 100 paragraphs over 18 pages [21-38]. He made the following directions in respect of the operation:

   (i) The operator's licence is revoked under s.24(1)(a) & (b) and ss.23(1)(b)(c) & (e) of the 2010 Act with effect from 23.59hrs on 14 July 2024.
   (ii) On a finding of loss of good repute as a transport manager, Shane Tinnelly is disqualified from acting as a transport manager indefinitely under Regulation 15 of the Goods Vehicles (Qualifications of Operators) Regulations (Northern Ireland) 2012, with effect from 23.59hrs on 14 July 2024.
   (iii) On revocation of the operator's licence, Belvoir Logistics Ltd and its sole director, Shane Tinnelly, are disqualified from holding or obtaining an operator's licence for 12 months with effect from 23.59hrs on 14 July 2024 under s.25(1) of the 2010 Act.

The appeal

8. The Appellant lodged an appeal against the decision of the PO, dated 14 June 2024. The Appellant's grounds of appeal, as submitted by his solicitor, were set out in his application and later amended. Prior to the date of the appeal hearing before the Upper Tribunal, the Appellant submitted a skeleton argument which set out his finalised submissions, and which were expanded upon during the oral hearing.

9. There are three key grounds of appeal identified by the Appellant which can be summarised as follows:

(i) The PO erred in law by allowing a procedural irregularity in his decision to refuse to exclude unnamed members of the TRU staff from the PI or to at least make an enquiry as to the purpose of their presence there and their role in the hearing.

(ii) The PO erred in law and in fact in making his decision, by taking various matters into account and discounting various matters, some of which were factually incorrect.

(iii) The PO's decision to find against the operator was biased by virtue of the application to exclude the TRU staff from the public inquiry.

In relation to his second ground of appeal, the Appellant identifies a number of specific issues within particular paragraphs of the PO's decision. These are considered within the analysis for this ground.

10. The DVA, represented by Ms Jones, submitted a skeleton argument in response, which reflects the oral arguments she presented on the day of the appeal hearing.

The Approach of the Upper Tribunal

11. As to the approach which the Upper Tribunal must take on an appeal such as this, it was said, in the case of *Fergal Hughes v DOENI* & *Perry McKee Homes Ltd v DOENI* [2013] UKUT 618 AAC, NT/2013/52 & 53, at paragraph 8:

"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 or 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.'

12. At paragraph 4, the Upper Tribunal 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."

13. The task of the Upper Tribunal, therefore, when considering an appeal from a decision of Presiding Officer on behalf of the DfI in Northern Ireland, is to review the information which was before the PO, along with the decision based on that information. 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). 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 PO on behalf of the DfI) was "plainly wrong".

ANALYSIS

Ground of appeal (i) - Procedural irregularity

14. The primary ground of appeal asserts that the PO erred in law in his refusal of the application to exclude the unnamed members of the TRU from the PI and/or to make an enquiry as to the purpose of their presence or role in the proceedings. This, the Appellant submits, gave an impression of impropriety to the decision of the PO, which amounts to a procedural irregularity that should result in the decision of the PO being set aside.

The facts

15. The PO set out, in paragraphs 9-19 of his written decision, the circumstances of the application. The Appellant's solicitor relied upon his experience at a PI the previous week, before a different decision maker, and as a result of a discussion that took place in a second PI, the previous day, between the PI clerk (a member of the TRU) and the same PO. Mr McNamee suggested that the conduct of a member of TRU staff getting

involved in the hearing the previous day suggested that the decision of the PO was biased as it appeared that the TRU staff had involved themselves in the decision making.

16. On this basis, the PO determined that Mr McNamee's concerns had arisen in advance of the hearing that day and should therefore have been detailed in a written application prior to the PI. He found it to be "unacceptable" that the application was made without notice and without written authorities, citing *Ian Russell Nicholas t/a Wigan Container Services* (2014/72), which states that an allegation of bias must (a) be set out in detail so that everyone knows what the Appellant seeks to prove, and (b) should be supported by an Affidavit, so that the Appellant is committed on oath, to the details within the allegation.

17. The PO nevertheless considered the application. In relation to the PI the previous week, which took place before a different PO, he found Mr McNamee's concern to be a matter for those proceedings and not one he could deal with. In relation to the PI the previous day, over which he presided, the PO stated that towards the end of that PI, he heard from a prospective TM, who proposed to work a number of hours under one licence and an equivalent number of hours under a different licence. The PI clerk for that hearing (a member of TRU staff) had checked the database and found that the TM had proposed to work on the same day of the week for both operators, which could have resulted in an administrative refusal of the application, despite her evidence that she had sufficient days available to cover both roles. As this was a matter which arose spontaneously during the PI, due to the TM's evidence, the PO raised it with the TM openly in the PI, allowing Mr McNamee an opportunity to raise objections or seek an adjournment if required. He considered the conduct of the member of the TRU staff who was present as an observer at the PI for Belvoir Logistics Ltd, to be "professional, helpful and entirely appropriate" (paragraph 15 of the PO's written decision).

18. The PO concluded that the allegation of bias was weak, stating that his contact with the TRU staff member (the PI clerk) the previous day had been no more than necessary for the administration of the hearings. Of the three members of TRU staff present to observe, he had not seen two before coming into the hearing and had a fleeting social conversation with the third (paragraph 17 of the PO's written decision). He stated that as TRU staff are involved in the processing of cases, there is a benefit to them observing the PI, for example, as part of their training/continuing development/induction and, in the case of a senior member of TRU staff, to understand how to conduct a PI or an "in-chambers" hearing. The PO ultimately dismissed Mr McNamee's application and proceeded with the hearing, providing Mr McNamee and his client with a "firm assurance" that he alone made the decision at the conclusion of the PI (see paragraph 19 of the PO's written decision).

The submissions

19. Mr McNamee explains that he made his application on the morning of the PI when he realised that three members of the TRU were sitting in to observe the PI "for training purposes" but he noted that one of those "training", had been the PI clerk the day before. The activity at the two previous PIs, had raised his concerns. In the first, he asserted that a member of the TRU staff was typing constantly throughout the PI. The PI clerk, also a member of the TRU, was passing notes to the PO and providing him with information to question the Appellant on. In the second, the previous day, the PO rose to make his decision but returned to question a party to the case about material that had not been disclosed within the hearing bundle and had presumably been provided by TRU staff after the PO had retired to make his decision (regarding the proposed TM's working hours). The Appellant in that case did not have the opportunity to consider the new material prior to being questioned on it which felt like something of an ambush.

20. Consequently, upon hearing that there were to be three members of the TRU staff observing the current PI for training purposes, Mr McNamee sought either the identity of the TRU observers along with an explanation of their role, or sought to have them excluded in order to gain the transparency and clarity required to secure open justice. He took the view that the behaviour of the TRU staff in the aforementioned PIs gave rise to concerns that the TRU staff were present at the Appellant's PI to scrutinise the evidence provided by the operator, and to make submissions to the PO on the evidence given, in private and without the presence of the operator or his legal representative to comment upon them. He submitted that the layout in the PI hearing room also clouded the rules of open justice, as the TRU staff members sat on the same bench as the PO (albeit at the end of the bench), which made it unclear to the operator as to who exactly was making the decision. He suggests that this arrangement gave an appearance of undue influence.

21. Ms Jones, on behalf of the Respondent, submits that it is certainly not appropriate for anyone to approach a decision maker in a hearing and influence their decision, but there was no suggestion of this having happened in the present case. She submitted that everything was considered before the PO and discussed in the PI. The TRU staff were sitting at some distance from the PO and there was no communication between them that could not be openly observed. The TRU staff were present at the PI to observe for training purposes and sometimes this involves one clerk observing another, but there was no engagement with the PO, no interaction between them and no interference amongst them. As nothing had happened in this case to cause alarm, there was nothing for the PO to consider. He gave a clear assurance that he was the decision maker in the matter. Ms Jones submits that no error of law occurred.

22. Mr McNamee accepts that nothing had happened in this particular case but his objection was the appearance of impropriety that arose from the presence of the TRU staff in light of the activity in the previous two PIs.

The Legal Position

23. The DfI is one of eight government departments within the Northern Ireland Executive, which amongst other things, has responsibility for road transport. As a Department, it implements the 2010 Act, the primary source of legislation that regulates the transport industry. The TRU is part of the DfI with responsibility for the licensing and regulation of goods vehicle operators in Northern Ireland under the 2010 Act. Alongside the DVA (DVSA in Great Britain) that has the power to stop, inspect and take enforcement action against vehicles and operators, the TRU acts to advise, investigate and if necessary, take regulatory action against operators and transport managers who do not ensure compliance with the strict regulatory requirements.

24. Section 32(1) of the 2010 Act provides that the DfI shall hold inquiries as it thinks necessary for the proper exercise of its functions under the 2010 Act. Section 32(3) provides that, subject to any provision made by regulations, "*any inquiry held by the Department for the purposes of [the 2010 Act] or [Regulation (EC) No. 1071/2009] shall be held in public*." The TRU has the authority to call an operator or transport manager to a PI, or to a more informal "in-chambers" meeting in order to hear evidence and consider submissions on a regulatory issue, before making a decision, for example, to grant or refuse a licence application, or to take regulatory action against an existing licence holder.

25. Regulation 18 and Schedule 3 of the Goods Vehicles (Licensing of Operators) Regulations (Northern Ireland) 2012 make further provision for the arrangements of a PI. These provisions outline: the notice procedure prior to an inquiry (paragraphs 1 and 5); those who are entitled to admission to an inquiry (paragraph 2); those who are entitled to appear at an inquiry (paragraph 3); and the procedure at the inquiry, including the rights of any person who appears or who is present at an inquiry (paragraph 4).

26. Paragraph 2(1) of Schedule 3 to the Goods Vehicles (Licensing of Operators) Regulations (Northern Ireland) 2012 (the "Licensing Regulations") reiterates that "*an inquiry shall be held in public*", subject to certain circumstances as set out in paragraph 2(2):

> *"2(2) The Department may direct that the whole or any part of an inquiry be held in private if it is satisfied that by reason of –*
> *(a) the likelihood of disclosure of intimate personal or financial circumstances; (b) the likelihood of disclosure of commercially sensitive information or information obtained in confidence; or*
> *(c) exceptional circumstances not falling within sub-paragraphs (a) or (b), it is just and reasonable for it to do so."*

27. The principle of a public hearing is clearly repeated in the DfI's "Guide to Public Inquiries: Goods Vehicle Operator Licensing" (V4.0) at paragraph 7.3:

> *"The Inquiry is open to members of the public and any other interested parties. The Presiding Officer will consider, on request, whether to hear certain sensitive evidence in private session, e.g. financial information or private medical information."*

28. Further guidance on the PI process is contained within "*TRU Practice Guidance (Statutory Document No 9) – Principles of Decision Making and the Concept of Proportionality*". Paragraph 94 outlines the role of the PI clerk:

> *"The role of a public inquiry clerk (caseworker) is to provide administrative support to the Department to allow it to carry out its statutory duties in relation to public inquiries. They are not responsible for identifying which operators/applicants should be called to public inquiries nor are they responsible for the decisions taken at public inquiries but will assist the Department with general enquiries. If a caseworker is in any doubt as to the presiding officer's intentions, they should make the appropriate enquiries of that presiding officer." (Version 2.0 Updated February 2024)*

Analysis

29. The Appellant's application to the PO at the outset of the PI was to exclude the three members of the TRU on the basis that they had no function in the PI (see the PI transcript [38]). In written and oral submissions, the Appellant's assertion is that the application was to either identify the members of the TRU staff present, or ascertain their role, with a view to potentially excluding them from the PI.

30. Within the PI, the PO orally determined as follows:

> *"I am not excluding members of the TRU from observing public inquiries. I do hear what you say about the potential role that they might have and I can only give my assurance that no member of the TRU is going to have any input to my decision. The only member of the TRU I will communicate with about this case is my public inquiry clerk and if there's any matters that come up in the course of the evidence that he wishes to inform me of (unclear) or with regards to information that he has as a clerk who has conducted this case, he will give them to me, if it's relevant I will raise it publicly and give you every opportunity to comment on it."*

(PI transcript [86-87])

<u>Identity and role</u>

31. If the TRU staff members were not to be excluded, Mr McNamee (at the PI) requested disclosure of their identity and an explanation of their role. We note from the transcript of the PI, that at the outset, the PI clerk stated that there were members of the TRU present in the hearing:

> "*Also observing the inquiry this morning is a number of TRU staff."*
>
> (PI transcript [73])

32. Within this single sentence, the PI clerk had informed those present that members of the TRU staff were present to "observe" the PI hearing. While their individual identities were not disclosed, the Appellant had been made aware of the reason for their attendance. The PO also stated, in dealing with Mr McNamee's application, that their role was acting as observers. Although present within their paid employment, members of the TRU are entitled to observe a PI in the same way that a member of the general public is entitled to observe for their own personal reasons. The role required no further explanation. The dictionary defines observing as noticing, watching, taking a note. To observe a PI is therefore to watch and to take no part in proceedings. Neither a member of the public nor an observing member of TRU staff plays a part in proceedings. The PO made the role of the TRU staff clear during the PI hearing, and this aspect of his response to the application cannot be criticised.

33. Mr McNamee asserts in this appeal, that as well as stating the role and providing the assurance that they would play no part in the PO's decision, the PO should have identified the members of the TRU staff present. He states that this would ensure both transparency and clarity. However, a member of staff from the TRU who is attending a PI as an observer is just like any other member of the public who is entitled to attend a PI as an observer i.e., to watch and take no part in proceedings. Neither an observing TRU staff member nor a member of the public are entitled to approach the decision maker or influence the decision in any way. No member of the public is required to give their name when attending a public court or tribunal hearing to observe proceedings, hence there should be no need for an observing member of the TRU staff, also playing no part in proceedings, to provide their name either. We do not find that the PO was "plainly wrong" not to disclose the identity of the three observing TRU staff members in this case.

Exclusion

34. It is a legal requirement that the PI takes the form of a public hearing unless certain exceptions apply, hence a person cannot be excluded from a PI hearing without good reason. This follows the common law principle of open justice which requires courts and tribunals to conduct their business publicly unless this would result in injustice. Open justice is an important safeguard against judicial bias and procedural unfairness. As the hearing is open to public scrutiny, it ensures decision makers are accountable

and maintains public confidence in the administration of justice, hence there is a strong presumption in favour of openness (*R (Guardian News & Media Ltd) v City of Westminster Magistrates' Court (Article 19 intervening)* [2012] EWCA Civ 420). To preserve privacy in certain matters, such as when intimate personal, financial or commercially sensitive information is being discussed during a PI, the PO can make a determination to hold the hearing, or part of it, in private (paragraph 2(2)(a) and (b) of Schedule 3 to the Licensing Regulations). No such matter was raised in this case.

35. Equally, in "exceptional circumstances" where it is "just" and "reasonable" to do so, a PO can direct that all or part of the inquiry should be held in private (paragraph 2(2)(c) of Schedule 3 to the Licensing Regulations). This provision allows for some judicial discretion as to the reason to hold an inquiry in private and requires the decision maker to balance the public interest for open justice against the individual interest for confidentiality, privacy and/or fairness. The Upper Tribunal in T/2014/51 *Michael Thomas Aylesbury t/a MT Aylesbury*, approving the decision in T/2010/016 & 021 *Alan Cooper Haulage & Woodhouse Furniture,* highlighted that the main dictionary definition of 'exceptional' is 'unusual' hence, "[*i]t follows that whether or not the circumstances in an individual case are exceptional is a question of judgment, fairness and common-sense, which will depend on the facts of that particular case*" (at paragraph 17). Nothing had occurred in this case that could be described as "exceptional". Members of the TRU staff were present to observe proceedings. Bearing in mind that the TRU are involved in the regulation of operators, there is nothing exceptional about such observers hearing the ordinary details of the regulatory matters to be discussed in this PI. No representations were made to suggest that there was an exceptional reason as to why members of the TRU staff could not hear the matters to be discussed such that it was just and reasonable to exclude them from the hearing. We find that none of the exceptions in paragraph 2(2) of Schedule 3 to the Licencing Regulations would have assisted the PO, or the Appellant, in this case.

36. Equally, the PO (on behalf of the DfI) may require any person appearing or present at a PI who, in his/her opinion is behaving in a disruptive manner, to leave the inquiry, and may refuse to permit that person to return, under paragraph 4(6) of Schedule 3 to the Licencing Regulations. As a matter of fact, no such disruptive behaviour had been displayed by the members of the TRU, nor was it suggested to have taken place. As this is a public hearing, and as none of the exceptions provided for in the Licencing Regulations applied in the circumstances of this case, we find that the PO's decision not to exclude the TRU staff members was not "plainly wrong".

The Inquiry Layout

37. Mr McNamee continues that given the "quasi-judicial" nature of a PI and the role of the decision maker, there should be no perception of impropriety in PI proceedings. With this submission, we agree. It is one of the basic principles of public and administrative

law with which any public body decision maker must adhere. Indeed, the DfI's published guidance states the same in its "Guide to Public Inquiries: Goods Vehicle Operator Licensing" V4.0 (at page 10):

> *"The Departmental officials are acting in a judicial capacity when conducting a public inquiry. That means that they have to ensure that, like any other tribunal, the proceedings are fair and free from interference or bias."*

38. Mr McNamee continued that the TRU staff members sitting on the same table as the decision maker gives rise to a perception of impropriety. With this we tend to agree. To maintain public and operator confidence in the system, it is important to keep a clear delineation between the TRU staff members, who prepare the case and call the operator to the inquiry, and the decision maker, who makes the regulatory decision following the PI, on behalf of the DfI. Both the decision maker and the TRU staff operate within and on behalf of the DfI, albeit with different roles. Only the decision maker should sit at the table (akin to a judicial "bench"), along with the clerk of the PI, who is of course a member of the TRU but present in an administrative capacity only. Observers play no part in proceedings and have no reason to sit near the decision maker. An observing member of the public would not sit on the same table as the decision maker. Staff of the TRU who are present to observe an inquiry, which they are entitled to do, should not sit at the same table as the decision maker. Observers of a PI should not give the perception that they can or might interact or get involved in a PI.

To conclude

39. At the outset of the PI, when the application was made to identify or exclude the TRU staff members, proceedings had just formally commenced. No evidence had been heard. Nothing had happened within the proceedings to give grounds for the exclusion of anyone who was observing, regardless of whether this was a member of the general public or a member of the TRU staff. Mr McNamee's concerns, arising from what took place in two earlier PIs, were not matters to be considered within this PI, were not matters that were known to anyone else within the PI, and were not matters that had caused any procedural impropriety in this particular case. No procedural irregularity had in fact taken place.

40. For these same reasons, it cannot be said that there was a perception of bias as a result of members of the TRU attending to observe this PI. The test for apparent bias is set out in the case of *Porter v McGill* [2001] UKHL 67: "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the [inquiry] was biased." We take the view that a fair-minded observer of this case, even with knowledge of what had taken place in the two inquiries previously, could not conclude that there was a real possibility of bias in the present

case, as nothing untoward had taken place. Indeed, by Mr McNamee raising the issue at the point he did, and by the PO making it very clear when dealing with this application, that he would not be communicating with anyone other than the PI clerk in relation to this case, any possible perception of bias was definitively dispelled.

41. However, had such a firm assurance not been given by the PO, the fact that the TRU staff were sitting on the same bench as the decision maker may have given a fair-minded and informed observer cause for concern. The TRU gathers information relating to an operator on a regulatory matter and decides whether to call an operator to a PI (or "in-chambers" hearing). It is usually the Head of the TRU, on behalf of the DfI, who makes the ultimate decision after a PI has taken place; in this case the PO was acting on behalf of the DfI. An observing member of the TRU sitting on the same bench as the representative of the TRU who makes the decision, risks creating the impression that the TRU staff member might be involved in the decision in some way. They are physically, and administratively, too close. As highlighted by the PO in his in-hearing ruling, the only member of the TRU that the PO has any reason to converse with in the usual running of an inquiry, is the PI clerk, whose role is to administratively co-ordinate the hearing. The administrative role amounts to just that – dealing with matters such as checking the identity of those appearing at the inquiry, collecting any documentation the operator (or others) brings to the inquiry and giving it to the decision maker, announcing the case, and recording proceedings. An observing member of the TRU has no need to sit on the same table, or anywhere in the close vicinity of the decision maker and they should not do so. By creating such a physical separation between the decision maker and observing members of the TRU, who do not and should not play any part in proceedings, any suggestion that they can or have influenced the decision maker is more easily avoided.

42. Mr McNamee's prudent representation of his client, in bringing his concerns to the attention of the PO at the outset of this hearing, prevented anything untoward from potentially taking place later in this case. Indeed it prevented any perception of impropriety from the outset. We understand the reason for the last-minute nature of his application and make no criticism of the application being raised in the manner that it did. As a matter of fact, no member of the TRU present in this PI said or did anything that gave rise to any actual or perceived procedural impropriety. The PO gave his firm assurance that he was the sole decision maker. In the absence of anything having taken place, we find that the PO was not "plainly wrong" to determine as he did on this application, and this ground of appeal does not succeed.

Ground of appeal (ii) - Legal and factual errors within the decision

43. Mr McNamee outlines a number of specific paragraphs within the PO's written decision, the contents of which he considers amount to errors of law. Either individually, or collectively, he submits that these errors are such as to make the decision of the PO "plainly wrong". We deal with each matter he has raised in turn.

Paragraph 52 – "no comment"

44. On 26 October 2022, the Appellant was stopped while driving one of the operator's vehicles. The vehicle was displaying non-conforming registration plates, was being driven with excess weight and the tachograph showed that insufficient daily rest had been taken. The Appellant was questioned by the DVSA about these infringements while under caution and his reply to all questions put to him was "no" or "no comment". In respect of this behaviour, the PO stated that this, "*of course, is his legal entitlement, but not indicative of an open commitment to working with the enforcement authorities*" (paragraph 52 of the PO's written decision).

45. Mr McNamee, on behalf of the Appellant, submits that the PO erred in law to draw an inference from the Appellant's decision to exercise his right to silence when questioned under caution on this occasion. He submits that as the Appellant was entitled to say nothing to the DVSA officers, the PO should have ignored that evidence. He highlights that the Appellant had given the information to the DVSA officer prior to caution. Ms Jones, on behalf of the Respondent, submits that this is a minor point which has been taken out of context. She submits that the issue of concern to the PO was the list of infringements that occurred on this date (non-conforming plates, excess weight, excess authority) and not the fact that the Appellant said "no comment" in his DVSA interview.

46. We find that the PO accepted that the Appellant was entitled to remain silent when questioned by the DVSA. Given the words of the caution, which is stated before the start of any questioning, this is indeed the Appellant's legal right. From this silence, however, the PO considered that it demonstrated disrespect for the regulations. In a criminal law context, where the caution features, "*the usual inference which the jury are invited to draw is that at the time of the interview the defendant had no answer to the allegations being made against him or none that would stand up to questioning. In other words, his subsequent defence is a late fabrication or one which has been tailored to fit the prosecution case*" (*R v Petkar* [2003] EWCA Crim 2668; [2004] 1 Cr. App. R. 22. The PO did not consider that the Appellant's silence indicated he had no (plausible) answer to the questions or that his answers in the PI suggested fabrication, but rather that it did not indicate an open commitment to working with the enforcement authorities. Given that the regulatory regime for operator's licencing is heavily based on trust (*NT/2013/82 Arnold Transport & Sons Ltd v DOENI*), the PO's inference reflected the position that the Appellant's behaviour was not what would be expected of a trusted operator who was open to working with the authorities. The fact that the Appellant gave the answers to the DVSA officer prior to the interview under caution is unlikely to impact upon the PO's inference. Having given the answers before caution, it seems non-sensical not to have given the same answers under caution. This, in our

view, only serves to add to the suggestion that the Appellant was reluctant to work with the authorities.

47. The evidence of the DVSA stop on 26 October 2022 was relevant to the issues before the PO at this PI, including the activity of the Appellant. He was entitled to hear it. He was also entitled to draw an inference from the Appellant's behaviour. It is a common law principle of evidence within civil proceedings that an inference may be drawn from a party's failure to respond to an allegation or from a party's failure to give evidence. Whether it is appropriate to draw an inference and if so, the nature of the inference that can be drawn, will depend upon the facts of the case at hand (*Shawe-Lincoln v Dr Arul Chezhayan Neelakandan* [2012] EWHC 1150, at paragraph 82). The adverse inference drawn by the PO in this case, was incidental to the more serious regulatory infringements that had taken place. These infringements fell within a number of instances which cumulatively demonstrated to the PO that the Appellant could not be trusted to comply with the regulatory regime, and the PO considered that the Appellant's failure to engage with the enforcement authorities added to his conclusion. We do not find any error of law in the PO having drawn an inference from the Appellant's behaviour following this stop. We find this to be a rational inference to be drawn in the circumstances of this case.

Paragraph 61 – failing to stop (21 October 2023)

48. At paragraph 30-33 of the written decision, the PO set out the facts of an incident that took place on 21 October 2023, when one of the operator's drivers failed to stop for a DVSA enforcement officer. The officer considered the evasive driving to be dangerous in nature as it caused a serious risk of an accident taking place. The PO referred to this incident as a "most serious" instance of avoiding the enforcement authorities (paragraph 32 of the PO's written decision), yet the operator failed to take formal action against the driver, who was clearly breaching the operator's employment policies by behaving in this manner. When this was put to the operator in the PI, the Appellant stated that he had verbally addressed the matter with the driver, reminding him that he had to stop for the DVSA or the police when requested. He stated that he also questioned why the driver had not told him, as TM, about what had happened. He accepted that he had not made a written record of the incident after he became aware of it.

49. The PO took the view that the driver's behaviour constituted "gross misconduct" under the operator's employment policies which would have justified dismissal, yet the driver continued to work for the operator and continued to infringe the regulations after this date. The PO did not accept the operator's evidence regarding this incident, finding the "operator's failure to follow his own policies, or any reasonable driver management procedures, wholly unacceptable" (paragraph 33 of the PO's written decision). He went on to find that the operator's account of making it clear to the driver verbally, that

he should stop for a VOSA car or police vehicle to be "wholly inadequate and unconvincing" (paragraph 61 of the PO's written decision).

50. Mr McNamee submits that the PO erred in law by finding that the operator's account of the driver's behaviour was "unconvincing". He submits that the Appellant, during the PI was reciting the driver's explanation of what had happened. He explains that the driver came before the criminal court in relation to this incident, and the operator gave evidence in the criminal proceedings to say that if the court found against him, the driver would be dismissed. Ms Jones submits that the PO is entitled to assess the Appellant's evidence in the manner he has done.

51. From reading the transcript of the PI [98-99], the Appellant states the name of the driver and clearly states what the driver told him about the incident. He goes on to say that he spoke to the driver about it "and made him aware that there is a thing that if a VOSA car or any enforcement vehicle come in front of him he has to follow procedure and stop…" (paragraph 30 of the PI transcript [99]). The driver told the operator that as the enforcement vehicle's lights were off, he did not think he had to stop so he drove on. The Appellant accepted that he had taken no further action against the driver, and he had not made a record of the incident having happened or of the discussion he had with the driver.

52. At paragraph 60 of the PO's written decision, he states that the evasion of the DVSA stop "highlights the absence of proper procedures". He found that the operator's account of making it clear to the driver that he had to stop for a VOSA car, or any other vehicle, was inadequate and unconvincing. He does not state that the explanation as to why the driver did not stop was unconvincing - just the Appellant's reaction to it. Therefore, whether the PO misunderstood the explanation for failing to stop was from the driver or the Appellant makes no difference. It was the failure of the Appellant to follow the operator's own disciplinary procedures, and therefore to manage its drivers, that was of concern to the PO. We agree with Ms Jones that the PO was entitled to assess the evidence of the Appellant in the manner that he did, this being within the range of rational responses to that evidence. We find no error of law in this aspect of the PO's decision.

Paragraphs 28 and 84 – removal of the padlock and the TM's good repute

53. At paragraph 84 of the written decision, the PO lists eleven instances which he found to demonstrate that the Appellant, as transport manager for the operator, failed to provide continuous and effective management of the transport operations. It was on the basis of these eleven listed "failures" that the PO found that the Appellant, as transport manager, had lost his good repute. Mr McNamee takes issue with one of the eleven matters listed, namely "allowing the removal of a DVSA detention padlock

and the return of a prohibited vehicle into his use without any explanation or investigation" (bullet point 3 in paragraph 84 of the PO's written decision).

54. This instance relates to an incident that took place on 7 June 2022, when another one of the operator's drivers failed to stop for DVSA officers due to the vehicle displaying non-conforming registration plates. It was found that the driver had been untruthful about when he had started driving that day, had driven without inserting his driver's tachograph card, had not recorded his weekly rest and the speed limiter was defective such that speeds of up to 80mph were recorded. The vehicle was found to have exposed cords on the offside front tyre, a missing brake drum and emissions faults. In order to enforce the rest periods and speed limiter defect, the DVSA immobilised the vehicle with a cable and padlock.

55. On the morning of 8 June 2022, the padlock was severed, and the trailer was removed from the vehicle. The operator denied knowledge of the padlock being cut and provided no explanation as to how this occurred. The Appellant stated during the PI that the padlock was not removed under his instruction and he was unaware of who in fact had removed the padlock [94].

56. At paragraph 28 of the PO's written decision he states:

> "*The offending is then further aggravated by the driver absconding and the padlock being cut on the morning of 8th June 2022 to enable the removal of the trailer. Whilst the operator denied any knowledge of the padlock being cut and the trailer being removed, he has provided no explanation as to how this occurred."*

At paragraph 29 of the PO's written decision he continues:

> *"[i]t is hard to see how, with only one employed driver other than himself, normal time and pay records, invoices for agency/casual drivers, electronic vehicle download/driver's hours records, the operator could not have identified who removed the trailer from the DVSA enforcement site and delivered the load to the customer. In any event, the ultimate responsibility rests with the operator for the lawful and safe operation of his vehicles and compliance with the enforcement authorities*."

57. Mr McNamee submits that the PO was wrong to criticise the operator for the actions of a driver, particularly as the DVSA took no action on it. He contends that the PO was wrong to make such findings against the operator, akin to criminal damage, simply because he had provided no explanation for the removal of the padlock. Ms Jones submits that the operator had explained to the PO during the PI that he did not instruct any of his drivers to remove the padlock (see transcript of the PI [94]) and the PO was entitled to make the findings at paragraph 28 and at paragraph 84.

58. The decision of the DVSA not to take any further action on the removal of the padlock does not fetter the discretion of the PO to make a finding based on what had taken place. It was a matter of fact that the padlock had been unlawfully removed from a detained vehicle which was the property of the operator, and this was one of the matters for the PO to consider as part of the PI brief. It is a regulatory requirement that a TM must ensure the effective and continuous management of the operator's transport service (Regulation 13A of the Goods Vehicles (Qualifications of Operators) Regulations (Northern Ireland) 2012, which necessarily requires the TM to manage the drivers working for the operator. If a driver under the control of an operator breaches the regulations, it naturally reflects poorly upon the operator.

59. While the Appellant states that he did not know about and/or authorise the removal of the padlock, the PO gives adequate reasons as to why that evidence was not accepted. We note that during the PI, the Appellant stated that he did not know who had removed the padlock and he had made no enquiries as to who had done it. Given that this is a serious matter, it would naturally be of concern to the PO that the TM showed no interest in what had happened. He reasoned, at paragraph 29 of his written decision, that "*it was in the operator's financial interest to secure the delivery of the load of food which he was contracted to deliver to Sainsburys*" on the day that the vehicle was padlocked and the trailer secured. He makes no reference to an actual incentive having been given, despite Mr McNamee's submissions to the contrary. He continues that having only two drivers, with pay records, invoices and driver's hours records would allow the operator to establish who had removed the padlock. The PO was entitled to reject the evidence of the Appellant, having given adequate reasons for doing so, and to make the findings at paragraph 28 and 29.

Paragraph 78 – employment status and driver's offences

60. Mr McNamee raises a connected point concerning paragraph 78 of the PO's written decision, where it states that, "*[I]t is simply not good enough for the operator to dismiss the catalogue of offences, prohibitions and infringements by drivers acting on behalf of the operator company as "driver offences*". This finding relates to the many infringements that took place as a result of driver conduct, which the Appellant suggested in the PI, could not be his responsibility. Mr McNamee states that there is a difference between responsibility and culpability (*Thomas Muir (Haulage) Limited* [1999] SC 86, [1998] Scot CS 13) and therefore the operator should not be held accountable for the behaviour of the drivers. For example, if the driver does not insert his driver's tachograph card, or stop for a DVSA officer, that is something that the operator has no control of in the moment and should not therefore be penalised for.

61. It was indeed noted in the *Thomas Muir* case, by the First Division (the first instance decision maker), that there may be cases where the fault of an infringement is wholly attributable to the driver, or where it is wholly that of the operator and on some occasions, both are at fault. The Court of Session, dealing with a subsequent appeal

against the revocation decision of the Traffic Commissioner, stated that when addressing whether to impose a direction under s.26(1) of the Goods Vehicles (Licensing of Operators) Act 1995 (the equivalent of s.23 of the 2010 Act) [our underlining]:

> "*it is the conviction, the prohibition or the non-fulfilment of the undertaking which forms the basis for the direction. In order words, it is in envisaged by the section that each of these by itself should be sufficient to justify the making of the direction. The section does not require the traffic commissioner, either expressly or by necessary implication, to determine "the degree of culpability" in order to enable him to act on any of these grounds. Whether the past conduct of the operator is blameworthy is not the determining or critical factor… Further we disagree with the implication… that the licensing authority could not reach a proper determination without distinguishing between fault on the part of the driver and fault on the part of the operator. This appears to suggest that the operator is not responsible when the driver is at fault. It is important, in our view, to observe a clear distinction between questions of responsibility and questions of culpability. It was correctly maintained on behalf of the respondent that the operator cannot avoid responsibility for a conviction for prohibition by seeking to lay the blame on the driver or on those by whom his vehicles have been maintained. Doing so would provide no answer to proceedings taken in respect of them. A prohibition qualifies as a prohibition for the purposes of Section 26(1) whether it arises from the fault of the operator or from that of someone else for whom the operator is responsible*."
>
> (no paragraph reference)

62. In line with the approach taken in *Thomas Muir*, the PO in this case determined:

> "*The operator/transport manager has a statutory responsibility to manage the conduct and performance of drivers acting on behalf of the operator company and to plan/monitor their hours*." (paragraph 78 of the PO's written decision)

63. The finding of the PO follows the precedent set by *Thomas Muir*, namely that the operator cannot hide behind the behaviour of its drivers in order to avoid action being taken against it. It is correct that an operator, primarily through its TM, of which this Appellant is both, must ensure compliance with the legislation in order to continue to hold the operator's licence, and this means it must manage the conduct of the drivers who work for the operator in order that they do not, deliberately or otherwise, breach the rules and thus jeopardise the licence holder's position. While the Appellant tried to say that many of the infringements were the fault of the driver(s) during his PI, the PO was entitled to reject that attempt to protect his position in light of the regulatory responsibilities, supported by case authorities, to operate in a safe and compliant manner. We find no error in the PO's approach at paragraph 78 of the written decision.

64. On a similar point, Mr McNamee criticises the PO's conclusion that not having the drivers on the PAYE payroll limited the operator's control over them. Indeed, as paragraph 78 of his written decision, the PO states, *"[p]erhaps the key to the failure to [manage the drivers] is the fact that despite the involvement of experienced transport consultants since June/July 2023, as at the date of the PI, only 2/7 drivers are PAYE employees and therefore under the direct control of the operator, and one of those drivers is the operator/director himself."* This point was considered in T/2019/54 *Bridgestep Ltd and Tom Bridge*, when the Upper Tribunal determined that self-employed drivers caused the operator and TM not to have continuous and effective management of the transport operation, which in that case was done to save money (e.g. no requirement to pay Employers National Insurance Contributions, Employers Pension Contributions or remit the income tax deducted from the employee's wage). Given that only two of seven drivers were employed by the operator in the present case, and one of those was the Appellant, the conclusion drawn by the PO was entirely within range of rational responses to that evidence and is not in error of law.

Paragraph 57 - Number plates

65. A number of the operator's infringements related to its vehicles being driven on the roads with non-conforming and/or obscured number plates. The PO found, at paragraph 57 of his written decision, that "*the most plausible reason for the continuing use of obscured/reflective plates is to seek to circumvent the operator licensing/enforcement authorities*." Mr McNamee, on behalf of the operator, states that the PO erred in this finding as he reached the worst possible conclusion. He explained, on behalf of the Appellant, that the registration plates for the vehicles were made in Northern Ireland, where they are acceptable. While they may not be acceptable in England where the infringements took place, the PO was nonetheless mistaken in his finding. Furthermore, he argues that as the vehicles were detected, the licence plates were not, in fact, "undetectable".

66. The PO based his finding about the registration plates on the evidence of one particular DVSA Traffic Examiner who had informed the operator personally, on 26 October 2022, that the licence plates were made "*in a way that rendered the characters less easily distinguishable and therefore likely to be misread or missed completely by ANPR or other law enforcement devices*" (paragraph 51 of the PO's written decision). The operator gave assurances that the number plates would be changed for compliance purposes, however, further number plate infringements took place during 2023 - four more are noted in the table of maintenance related infringements at paragraph 22 of the PO's written decision. The PO found this to demonstrate a lack of genuine desire to conform with the regulations (paragraph 51 of the PO's written decision). Although Mr McNamee submits that the non-conforming plates were still detected, it is a fact that they are non-conforming, and it will never be

known if the vehicles had passed electronic enforcement measures (ANPR) but not been detected. This was the concern of the DVSA officer.

67. Ultimately, the PO had evidence of the operator having been warned regarding the number plate infringements, and the Appellant provided his explanation, during the PI, that he had changed them for compliance purposes. Nevertheless, registration plate offences continued to exist after this assertion. The PO was entitled to reject the Appellant's evidence. His finding as to why the number plates had not been changed was within the range of reasonable responses to the evidence before him, albeit at the extreme end of the scale. The PO reasons this finding on the basis that "*if the operator had a genuine desire to 'remove all issues of impropriety', he would have acted on the October 2022 offences and ensured all registration plates were compliant*" (paragraph 51). We are not empowered to interfere with findings of fact in the absence of an error of law. This finding is not perverse or irrational; it is founded on the evidence and adequately reasoned. We therefore find no such error.

Paragraphs 81 and 83 – loss of repute

68. Mr McNamee submits that the PO's finding that the operator was unlikely to comply with the regulations in the future was perverse, as the evidence showed that he was engaged to change. He points to the operator's engagement of a transport consultant, a voluntary meeting with the DVSA which was instigated by the operator, and his attainment of all recommendations arising from the audit. He submits that the PO gave no consideration to the fact that the infringements that took place following the engagement of a transport consultant, were much less serious in nature than those prior to his engagement (no "Most Serious Infringements"). Consequently, he argues that the PO's decision to revoke the licence based on loss of repute was a punishment for past behaviour which is "plainly wrong".

69. Ms Jones submits, on behalf of the Respondent, that the infringement history for the operator was poor with a number of compliance issues taking place even after the involvement of the transport consultant. She submits that it would have been perverse for the PO to have ignored the compliance history, as it was relevant to the question to be determined by the PO. In support of her submission, she cites the case of T/2014/59 *Randolph Transport Ltd & Catherine Tottenham*, where at paragraph 12, the Upper Tribunal stated, "*[A]lthough repute must be considered as at the date of the decision, that does not mean that the past becomes irrelevant. In many cases, the present is simply the culmination of past events*". She states that the actions of the operator in both the past and the present can be taken into account in determining whether the operator could be trusted to comply with the regulatory regime in the future, and therefore whether repute had been lost. The cumulative effect of the compliance issues demonstrated to the PO that it was appropriate to find loss of repute.

The Law

70. When a decision maker finds that the operator has lost its good repute, revocation of the licence is the mandatory outcome (s.24(1)(a) of the 2010 Act), which ultimately results in putting the operator out of business. For this reason, the proportionality of the finding (and the outcome) must be considered. Hence, to justify a finding of loss of repute, the matters found proven against the operator must be such that revocation of the licence is a proportionate regulatory response (see *T/2015/39 Firstline International Ltd & William Lambie v Secretary of State for Transport*). 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 a matter of fact and degree for the PO to determine according to the facts of the case before him.

71. Proportionality requires consideration of two questions: (1) "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 *Priority Freight* question"), and (2) "Is the conduct such that the operator ought to be put out of business?" (*Bryan Haulage (No.2)* (T2002/217)). The *Priority Freight* question is ultimately a question of trust, which is established by balancing the negative factors with the positive factors in respect of an operator's conduct. The less likely it is that an operator is considered to be able to comply with the regulations in the future, the more likely a revocation (and possibly 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*).

Analysis

72. The full breakdown of infringements is set out in paragraphs 22 to 42 of the PO's written decision. The DVA audit in February 2024 was prompted by the number of negative encounters with the enforcement authorities during 2021- (January) 2024. According to a table produced by the PO at paragraph 22 of his written decision, this comprised three maintenance and/or driver's hours/traffic incidents/infringements in 2021, seven in 2022, seven in 2023 and two in January 2024. The PO also discussed the details of an incident that took place on 21 October 2023 involving a driver who had 21 infringements on his records between November 2023 and January 2024, and a range of tachograph and rest/break infringements noted on the DVA audit, some of which involved driving without a driver's tachograph card inserted and all of which were inadequately recorded. The PO evaluated the repute of the operator at paragraphs 45 – 83 of his decision; having found "*the catalogue of offences, for an operator with only 7 vehicles, exceptionally poor and the seriousness and repetition of the offences*

demonstrate[d] a culture of non-compliance" (paragraph 23 of the PO's written decision).

73. The PO asked the *Priority Freight* question, correctly noting that as it is impossible to police every operator and every vehicle at all times, the DfI and other operators must trust an operator to comply, to ensure safety and fair competition. He concluded that he did not trust this operator as despite, for example, promising to change his non-conforming licence plates following a personal warning on 26 October 2022 from a DVSA Traffic Examiner, he continued to infringe licence plate rules. The Appellant's own conduct as driver on that same date, demonstrated a similar "disrespect" for the regulations, and his lack of cooperation with the authorities ("no comment" when interviewed under caution) did not indicate a commitment to work in co-operation with the enforcement agencies. He also noted four separate drivers' hours infringements while the Appellant, as operator and transport manager, was driving. Some infringements had an element of dishonesty (inoperative speed limiter, modified emissions control equipment, non-conforming registration plates - the latter he reasoned was to avoid detection). Three separate drivers had failed to stop for enforcement authorities and two remained employed by the operator. Previous promises to comply had not been followed through and the lack of employment contracts for drivers did not allow for effective control over their activity. Their breaches of employment policy (the policy had not been signed or implemented), upon which no action was taken other than being spoken to (and no record was kept), indicated a lack of control over the drivers such that the same drivers were able to repeat the infringements, including tachograph recording infringements and rest breaks. He balanced these negatives against the six positives listed at paragraph 75 of his written decision, including engagement with the DVSA, as well as the separate positive point that the operator had engaged the services of a transport consultant in June/July 2023, in order to improve compliance, and that consultant had given evidence in support of the operator at the PI. However, the PO noted that the infringements had continued after his engagement.

74. We pause at this point to deal with a related submission from Mr McNamee that the PO miscalculated the drivers' hours infringements, highlighting that some arose from tachograph errors. For example, a rest-break infringement was noted on 12 December, but the tachograph demonstrated that the vehicle was not moving hence, he submitted, the driver had to be resting. The PO (and similarly the Upper Tribunal specialist panel members) queried this with Mr McNamee, stating that just because the vehicle was not moving does not mean that the driver was not doing other work. We find that the tachograph must be correctly working and used, with the mode switch appropriately set, so as to record and demonstrate the work (driving or other work), breaks and/or rest being undertaken by the driver as a matter of fact, hence this point does not take the appeal any further.

75. Returning again to loss of repute, at paragraph 81 of his written decision, the PO states that "*Mr McNamee correctly stated that repute has to be considered as at the date of the public inquiry but that does not mean that the past is irrelevant. As stated in the case of Randolph Transport Ltd and Catherine Tottenham (UT/2014/59), 'In many cases, the present is simply the culmination of past events*.'" The culmination of past events referred to here, relates to the past compliance issues which were clearly taken into account by the PO when determining that the operator had lost its good repute.

76. The PO concluded that it was "entirely appropriate and proportionate in the circumstances of this case" (paragraph 80 of the PO's written decision) that the operator should lose its good repute as he found it "highly unlikely" that the operator would operate in compliance with the regulations in the future (paragraph 83). The PO heard evidence from the operator who gave assurances that the regulations would be complied with in the future, and he also heard from the transport consultant who was engaged by the operator in order to help secure that compliance. The PO credited the operator's engagement of a transport consultant and put this in his list of positives to be considered (paragraph 74). He also gave credit to the operator for the voluntary meeting arranged with the DVSA in England (paragraph 89) but he did "*not see it in any way as restricting [his] responsibility to determine whether the assurances given by [the operator] can be relied upon in the context of his past behaviour, or as fettering [his] ability to exercise regulatory powers*" (paragraph 89 of the written decision). The PO reasoned that despite the engagement of the transport consultant, and the attendance at the DVSA meeting, the operator continued to breach the regulations. Indeed, we note some five further compliance issues occurring after the transport consultant was brought on board. While Mr McNamee submits that these infringements were less serious than the earlier ones, they are infringements nonetheless.

77. The PO went on to consider the *Bryan Haulage* question at paragraphs 86 and 87 of his written decision, stating that the nature of the conduct he had described in detail throughout paragraphs 45-83, was "severe", in line with the Department's Practice Guidance Document no 9 "The Principles of Decision Making and the Format of Decisions". He concluded that the conduct was such that the operator ought to be put out of business.

78. We find that the PO considered and applied the relevant law to his determination in respect of loss of repute and revocation of the operator's licence. He was entitled to make the findings and conclusions he did, based on the evidence before him. He set out the detail of the infringements at length, breaking the incidents down into specific detail, thus providing more than adequate reasons to justify his determinations in relation to both the *Priority Freight* and the *Bryan Haulage* questions. While Mr McNamee submits that the PO placed too much weight on the past events, and the most recent infringements were not MSIs, it is fair to say that the compliance issues

persisted for a considerable period of time, even after the engagement of a transport consultant, whose role is dedicated to ensuring compliance. Consequently, it is difficult for us to conclude that the PO was "plainly wrong" to say that the operator was unlikely to comply in the future, even when he had professional expertise supporting his operational practice. The persistence of the infringements, the resulting findings and the reasons given, collectively demonstrate that the PO was not punishing the operator for past events, but rather upholding his finding of loss of repute (and therefore the revocation of the licence) in order to uphold safety and fair competition, in other words to maintain the objectives of the system. We cannot find the PO to be "plainly wrong" to conclude that despite any engagement to make changes, they have not happened and therefore the Appellant cannot be trusted to comply in the future. The PO's decision, while a difficult one for the operator, was grounded on firm findings of fact based upon the evidence before him, and supported with adequate reasons hence his decision that the operator had lost its good repute cannot be said to be made in error of law.

Practice Guidance Document No. 9 – choice of regulatory action

79. Mr McNamee highlights that the PO makes reference to "*TRU Practice Guidance Document No 9 (Principles of Decision Making and the Concept of Proportionality)*" near the end of the PI (paragraph 162 of the PI transcript [159]), and in doing so, he indicated that the conduct came within the "severe to serious" category where the starting point for regulatory action was revocation, suspension, and/or significant time limited curtailment. Mr McNamee submits that while the PO stated the options available to him during the PI, it did not appear that he was considering revocation of the licence. He submits that the PO erred in law by failing to make enquiries as to the consequences of the revocation of the licence.

80. It is noted from the transcript of the PI, that the PO sought representations from Mr McNamee on a number of occasions towards the end of the hearing. Mr McNamee commenced his closing submissions at paragraph 115 [150] and at paragraph 142, the PO asked, "*And you'll deal with the consequences of various (unclear) regulatory action please Mr McNamee?"* [155]. At paragraph 154, the PO asked for representations on the Appellant's repute as TM "*just to make sure it's properly addressed*" [157]. The PO also queries, "*And the consequences of suspension (unclear)?*" at paragraph 158 [158]. Before retiring, he stated (paragraph 162 of the PI transcript [160]):

> "*I asked you to address me on it, I've said that in the context of the practice guidance document number nine which I referred you to yesterday and the number of offences in the past would clearly come within at least the (unclear) severe to serious category where the starting point for regulatory action is, as contained in annexe four, which is revocation, suspension, significant time*

> *limited curtailment. I'm not going to push the point even more than I, I've referred to on a couple of occasions and if those are your submissions, I'll retire to consider these submissions*."

The call-up letter set out the regulatory issues to be discussed at the PI and stated that revocation of the licence was a possibility. The PO made sufficient enquiries from the operator at the PI in relation to the regulatory issues and in relation to the eventual result. We do not agree that the PO did not make his options clear. He sought representations on the regulatory outcomes including the more serious ones.

81. As highlighted above, where a traffic commissioner answers the *Priority Freight* (trust) and the *Bryan Haulage* (conduct that warrants being put out of business) questions appropriately, then he need not explain why other options were unavailable, as revocation may be inevitable from that reasoning (*2016/046 R & M Vehicles Ltd, Graham Holgate and Michael Holgate*). Again, as highlighted, the PO spent a significant portion of his decision outlining the conduct of the operator, the reasons why he found that conduct to be serious and why he considered it to put safety and fair competition at risk. He answered the *Priority Freight* and *Bryan Haulage* questions with sufficient findings and adequate reasons to justify his conclusions. As revocation of the licence was the inevitable (mandatory) outcome arising from the loss of repute, and as the PO had answered the two questions in full, he did not need to consider the other options. The PO's decision regarding his choice of regulatory action is not made in error of law.

Ground of appeal (iii) - Bias

82. The third substantive ground of appeal raised by the Appellant relates to a concern that the application to identify and/or exclude the TRU staff upset the PO, such that he was no longer impartial towards the Appellant, and consequently found against him. In support of this ground, Mr McNamee brings to our attention, a number of pieces of evidence.

83. In the first instance, he relies upon the affidavit of Mr P. Mallon, the transport consultant engaged by the Appellant company to aid the operator's regulatory compliance. We admitted this written evidence, as it is required where an allegation of bias is made (see *Ian Russell Nicholas t/a Wigan Container Services* (2014/72)). Mr Mallon comments that:

> *"[p]erhaps the application by the legal representative of the Operator has prejudiced the Presiding Officer against the Operator. In my mind I can find no other explanation for his decision which in experience could not be justified when one considers how the Public Inquiry ran. No indication was given by the Presiding Officer that revocation was in any way considered to be an appropriate outcome and, in my experience, where a Presiding Officer is contemplating revocation such an enquiry is*

normally made… In my experience of Public Inquiries Operators who have personally been responsible for much more serious infringements than the present Operator have not had their licence revoked."

84. Mr McNamee suggests that if Mr Mallon, a transport consultant with many years of experience, considers that the decision to revoke the Appellant's licence was unexpected, then the only explanation can be prejudice against the Appellant. He submits that while there is no affidavit from the PO by way of reply, his consent to the stay application indicates that he considered the impact of revocation on the operator for the first time at that point. Mr McNamee highlights, that the PO stated during the PI that he was "pleased to hear [the operator is] seeking to change things" (paragraph 151 of the PI transcript [92]), therefore Mr Mallon's surprise at the revocation decision is understandable.

85. Mr McNamee also highlights that the operator had implemented all recommendations identified in the February 2024 audit and this was brought to the attention of the PO during the PI. He states that the PO gave no indication that he was likely to find against the Appellant in the manner that he did as he asked no questions regarding the impact of revocation or disqualification on the operator. Mr McNamee submits that he was not allowed to speak during the PI and gives an example of being prevented from commenting on the evidence at paragraphs 71 and 72 of the PI transcript [102]. He compares this to the case of *Sean Convery* [2024] UKUT 312 (AAC), an appeal allowed on the basis of procedural unfairness, in part because the solicitor representing the operator was not permitted to make initial submissions or to direct the questioning.

86. In response, Ms Jones concedes that this allegation of bias was correctly presented although she queried the relevance of the lack of affidavit from the Appellant. She reminded the panel of the test for bias in *Porter v Magill* [2001] UKHL 67, submitting that a fair minded and informed observer would not consider there to be bias evidenced in this case. She submits that Mr Mallon simply disagrees with the PO's findings but this in itself does not prove bias. As the PO found that the operator had lost repute, revocation was a mandatory outcome. She highlights that the PO dealt with the application to exclude the TRU staff members and simply moved on. She cites the case of *Central Haulage Limited* [2024] UKUT 22 (AAC), in support of her submission that there was no "real possibility" of bias in this case.

The law

87. An operator is entitled to a fair and independent public inquiry which is free from bias. The law recognises "actual bias", where a judge has a clear interest in the outcome of the case, and "apparent bias", where the judge's conduct or behaviour raises suspicion that they have not decided the case in an impartial manner. As identified by the Respondent and previously highlighted in this decision (see paragraph 40), the most

commonly cited test for apparent bias is whether "*a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility… that the tribunal was biased*" (*Porter v Magill* [2002] AC 357 at 102). It is an objective test dependent upon the facts and circumstances of the case. Matters such as the comments and reasoning of the PO, as well as their behaviour and/or demeanour during the PI itself are most likely to evidence any suggestion of bias. The "fair minded and informed observer" was considered in *Johnson v Johnson* (2000) 201 CLR 488 as "neither complacent nor unduly sensitive or suspicious" (per Kirby, J at paragraph 53). According to Lord Hope in *Helow v Secretary of State for the Home Department* 2009 SC (HL) 1, he/she is "*the sort of person who always reserves judgement on every point until she has seen and fully understood both sides of the argument*" (paragraph 2).

Analysis

88. Mr McNamee does not suggest that this is a case of actual bias. Instead, this is a question of apparent bias; objectively, would the fair minded and informed observer conclude there was a real possibility that the mind of the PO was prejudiced against the Appellant because of the application made by Mr McNamee at the outset of the PI? The PO is a professional decision maker, who can be assumed to have integrity and to approach his decisions objectively and with an open mind (2000/65 *AM Richardson v DETR*). That must be the starting point. Having read the transcript of the hearing and the decision itself, it is fair to say that the PO was firm when dealing with the application to exclude the members of the TRU, and we note that he did bring Mr McNamee's submissions to a conclusion. However, the submissions were starting to drift off point, and the PO had a lengthy PI to conduct. He was obliged to manage the time allocated for the hearing. He considered Mr McNamee's submissions, gave adequate reasons for his findings and his ultimate conclusion on the matter. We have already determined that this conclusion was not made in error of law.

89. After the application, the PO moved on with the PI comprehensively, efficiently and professionally. There is no suggestion that his tone of voice or his choice of words was in any way disrespectful or demonstrated prejudice towards the Appellant or his solicitor. He went through all the regulatory concerns in turn, took evidence from the operator (the Appellant) and from the transport consultant. There is no indication within the transcript that suggests the PO was angry, upset or frustrated by the Appellant or his solicitor. When Mr McNamee was conducting the examination of his client, the PO allowed this to continue largely unfettered. The occasion Mr McNamee highlights was a valid interruption on the part of the PO who again, was managing time and keeping matters relevant to the issues in the case. Mr McNamee was, however, permitted to make lengthy closing submissions without undue interruption.

90. We acknowledge the points raised by Mr McNamee and the surprise expressed by Mr Mallon in his affidavit, in respect of the final outcome decision which found against the Appellant and the Appellant company. However, simply finding against the Appellant is not evidence of bias per se. We also note the comments made by both that the PO did not seek submissions on the impact of revocation on the operator. However, having read the transcript, it is clear that he did seek such representations during Mr McNamee's closing submissions (see the detail at paragraph 81 of this decision).

91. The PO made sufficient findings, based on the evidence of regulatory non-compliance, which was before him in the PI, and gave adequate reasons as to why he reached the conclusions that he did. He applied the appropriate legislation and case law to the facts that he found. The evidence before him was sufficient to underpin his conclusions such that it cannot be said that his conclusions were perverse or irrational. The PO does not give any indication in his words within the transcript or within his written decision, that the application to exclude the TRU members had influenced his outcome decision in any way or that it caused him to act in a biased manner against the Appellant. Having dealt with the application, he makes no mention of it afterwards, nor does his demeanour change. We do not consider that the facts and circumstances of this case would cause a fair minded and informed observer to consider that there was a real possibility that PO was biased against the Appellant or his solicitor. This ground of appeal is dismissed.

Conclusion

92. Removing ourselves from the minutia and looking at the PO's decision as a whole, we find that he was entitled to determine as he did in this case. His decision was based on findings of fact that were founded upon the evidence before him; evidence of a significant number of persistent regulatory breaches stretching over a considerable period of time from shortly after the grant of the operator's licence. In correctly applying the relevant legal principles, he adequately reasoned the rational conclusions he reached, having taken account of the positive aspects of the case and the improvements made by the operator. Despite the positives, we find that the decision made by the Presiding Officer in this case, was reached lawfully and fairly and was not "plainly wrong". This appeal is dismissed.

93. We apologise for the delay in issuing this decision, partly due to the need for the panel to meet on several occasions to determine the many issues raised. We thank the parties for their assistance both prior to and at the oral hearing of this appeal, and for their patience while awaiting this decision.

Ms L. Joanne Smith
Judge of the Upper Tribunal

Mr D Rawsthorn

Member of the Upper Tribunal

Mr S James
Member of the Upper Tribunal

(Authorised for issue on)
10 November 2025