Neutral Citation Number: [2017] UKUT 5 (AAC) **Appeal No.** T/2016/46

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER
TRAFFIC COMMISSIONER APPEALS

ON APPEAL from the DECISION of
Kevin Rooney, Traffic Commissioner
for the North East of England dated 1 August 2016

Before:

Her Honour Judge J Beech, Judge of the Upper Tribunal
George Inch, Member of the Upper Tribunal
John Robinson, Member of the Upper Tribunal

Appellants:

R & M VEHICLES LIMITED
GRAHAM HOLGATE
MICHAEL HOLGATE

Attendances:
For the Appellants: James Backhouse, solicitor with Backhouse Jones Solicitors

Heard at: Field House, 15-25 Bream's Buildings, London, EC4A 1DZ
Date of hearing: 6 December 2016
Date of decision: 6 January 2017

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that the appeal BE DISMISSED with effect from 23.59 on 17 February 2017

SUBJECT MATTER:- Proportionality of Traffic Commissioner's determination on the issues of good repute, revocation and disqualification

arising out of drivers' hours and false records offences committed by drivers, directors and Transport Manager

CASES REFERRED TO:- Priority Freight 2009/225; Bryan Haulage (No.2) 217/2002; Bradley Fold Travel Ltd & Peter Wright v Secretary of State for Transport (2010) EWCA Civ. 695.

REASONS FOR DECISION

1. This is an appeal from the decision of the Traffic Commissioner for the North East of England ("the TC") made on 1 August 2016 when he revoked the operator's licence of R & M Vehicle Services Limited ("the company") and disqualified Graham Holgate ("GH") and Michael Holgate ("MH") from applying for or holding an operator's licence for a period of three months and disqualified GH from acting as a transport manager for the same period. The orders were made under ss.26-28 of the Goods Vehicles (Licensing of Operators) Act 1995 ("the Act") and were ordered to come into effect on 10 September 2016. A stay of those decisions was granted by the TC on 30 August 2016 following an undertaking being given that Foster Tachographs would provide a monthly report on drivers' hours and tachograph compliance, with specific focus on unaccounted driving from vehicle unit ("VU") data. The report, including a succinct summary is to be sent to the Office of the Traffic Commissioner ("OTC") by the first day of each month until the appeal is concluded.

Background

2. The factual background to the appeal appears from the documents, the transcript and the TC's written decision. On 11 November 2010, the company was granted a standard national operator's licence initially authorising the use of four vehicles and two trailers. The directors of the company were/are GH and MH and GH is the transport manager and father of MH. His other son, Robert Holgate ("RH"), is part of the management team of the company but he is not a director. The company specialises in the transportation of static caravans and other abnormal loads as well as undertaking some general haulage and container work. Mr Outhwaite of Foster Tachographs Limited noted in his report (see later) that the "owners" of the company also have another operator's licence registered to R & M Leisure Homes Limited, a static caravan fabrication business. The licence is a standard international operator's licence authorising three vehicles and three trailers. MH is a director and the transport manager of that operation. The papers do not reveal who else, if anyone, is a director of that company.

3. As a result of receiving intelligence indicating that drivers employed by the company were "tampering" with tachograph equipment and committing drivers' hours offences, Traffic Examiner ("TE") Dickinson made a request that the company produce tachograph and vehicle tracking records for the period between 22 July 2013 and 23 September 2013. By that stage, the company had more than doubled its vehicle authorisation to ten vehicles and three trailers with ten vehicles in possession. TE Dickinson found that whilst GH was the nominated transport manager, Norman Northey, a CPC holder, was acting in that capacity. TE Dickinson further found that the company was not operating any system for the collection and analysis of either digital tachograph and drivers' hours data or analogue charts. In the three month period analysed, there were 5,542 kilometres missing on the face of the data/charts. However, it was impossible to ascertain the true figure for missing kilometres because of 59 false tachograph records which were in all likelihood hiding further missing kilometres.

4. GH, MH, RH and eight drivers were charged with offences of making false tachograph records. All but two drivers pleaded not guilty upon the basis that the company's own tracking information upon which the DVSA relied, was unreliable as was ANPR information (automatic number plate recognition). The first trial was that of GH on 4 December 2015. The District Judge found that the company's tracking and ANPR information was reliable and found him guilty of five offences of making a false record. All of the other Defendants then entered pleas of guilty on the first day of their respective trials to some of the offences they had been charged with following a pragmatic view being taken by the DVSA. The pleas were said to have been accepted "in the public interest". MH and RH both pleaded guilty to four offences of making a false record. The remainder of the drivers pleaded guilty to between two and six offences each. A variety of falsification methods were employed: a magnet was used to interrupt the tachograph recording; withdrawal of charts before the end of the driving period to hide drivers' hours offences; incorrect start and end locations written on charts; the alteration of charts including date changes; tampering with the tachograph clock; false names being used (including RH's name). It was the DVSA case that there was a culture within the company of creating false records.

5. In the interim, at some stage in 2014, whilst the criminal proceedings were on-going, the company made an application to increase its vehicle authorisation to twenty vehicles and thirteen trailers. The application was, rather surprisingly granted on 3 June 2014.

6. On 2 July 2014, a maintenance investigation took place which was marked as unsatisfactory. A warning letter was issued to the company on 9 September 2014 following a response to the investigation findings written by Norman Northey. The investigation was followed up on 29 June 2015 by a further investigation. That too was marked as unsatisfactory as a result of PMI frequencies being exceeded;

inadequacies in the driver defect reporting system; VOR sheets not stating a return to service date; eight PG9's having been issued within the previous twelve months (three immediate) and in particular a PG9 which had been issued to a vehicle on 4 March 2015 for no rear view mirrors and a frayed seatbelt. The PMI sheets revealed that the seatbelt had been defective on 24 December 2014 and 1 February 2015 when the vehicle had been inspected. On 9 July 2015, Norman Northey responded to the adverse report. Thereafter, between 11 July 2015 and 6 May 2016, a further three immediate and seven delayed PG9's were issued. One was "S" marked bringing the total of "S" marked PG9's issued against the company's vehicles since 5 December 2011, to three.

7. Further and in the interim, on 25 February 2015, the DVSA commenced an investigation generated by a roadside encounter with one of the company's vehicles. At about 20.05 on that day, the vehicle was observed being driven along the westbound carriageway of the A55, Llanfairfechan, Conwy. The vehicle was travelling through a section of road works in a tunnel which was subject to a maximum width restriction of 3.2 metres. All vehicles which exceeded that width were required to travel through the road works with a police escort and no movement orders would have been issued to the company unless an escort had been arranged. The use of a police escort would have been costly to the operator. The vehicle, which was being driven by Charlie Wreathall (who was described as "cocky and arrogant"), was required to stop in a designated lay-by for wide loads prior to junction 14. The vehicle was carrying a static caravan which was 4.15 metres wide. Mr Wreathall was unable to produce any paperwork for the load or evidence that the required notifications had been given to the relevant police forces, detailing the nature of the load and the intended route. Mr Wreathall said that he had not been provided with the necessary documentation which might have demonstrated that movement orders had been applied for and granted. Enquiries revealed that Mr Wreathall had travelled through the road works earlier in the week and was aware of the restrictions. Further, the road signage made the restriction clear. TE Meechan was of the opinion that because of the nature of the tunnel, it was imperative that the width restriction be complied with as a breach could present a risk of the lives of other motorists who were at risk of colliding with the projecting load. Such an event would also cause significant disruption, not only to the road network but also disruption and a burden to the local economy and the emergency services. A detour of 40 miles, taking over an hour, would have been required which was a difficult route for large goods vehicles. She noted that at the time Mr Wreathall was stopped, the Holyhead ferry had docked two hours earlier with some 300 LGV vehicles disembarking and using the route. TE Meechan concluded that the company was not complying with its Statement of Intent with regard to the undertakings it had made when it applied for an operator's licence.

8. In TE Meechan's Public Inquiry Statement, a list of non-mechanical prohibitions revealed that between 13 April 2011 and 14 March 2016, fifteen drivers' hours and records prohibitions had been issued. Eleven of those prohibitions had been issued after the date that TE Dickinson's investigation commenced. There was also one overloading prohibition. Between 24 November 2011 and 30 September 2015, there had been the following fixed penalty notices issued to the drivers of the company's vehicles:

24 November 2011	Defective brakes;
24 November 2011	Failing to produce records;
17 April 2014	No chart or card in use;
28 June 2014	No record of other work;
9 August 2014	Insufficient daily rest;
6 October 2014	Registration plate;
8 June 2014	Rear projection of load;
13 July 2014	Failed to ensure proper use of driver card;
2 September 2015	Rear view mirror obscured;
30 September 2015	Insufficient daily rest.

9. A witness statement from TE Miller referred to a roadside encounter with one of the company's vehicles on 29 November 2013 (after the DVSA investigation had commenced). At that time the company had an authorisation of ten vehicles with ten in possession. The vehicle being driven by David Scholes (T14 RMV) was not specified on the licence. Further, a download of the VU data showed missing mileage and a daily rest offence. When Mr Scholes was interviewed, he asserted that the tachograph was faulty.

10. A witness statement from TE Freeman referred to a roadside encounter with another of the company's vehicles on 2 June 2015. Analysis of his data revealed eight kilometres of missing mileage between two charts and a daily rest offence. When interviewed, the driver asserted that he had "got stuck in the dock" and had to use another chart which he thought he had given to the officer. He said he would not do it again.

11. Then on 13 July 2015, TE Fordham had a roadside encounter with another vehicle operated by the company. The driver had inserted his digital card in slot 2. There was no card in slot 1. An offence prohibition was imposed on the driver for 11 hours (see paragraph 8 above) and a PG9 was issued for a missing mirror.

12. On 25 May 2016, the company and nine drivers were called to a public inquiry to be held on 6 July 2016. The delay in issuing the call up letters was caused by the directors and the drivers pleading not guilty to the falsification offences. The prosecutions were concluded in about March 2016. Prior to the hearing, the company submitted a report dated 18 June 2016 from Mr Outhwaite, of Foster Tachographs Limited. His report noted that fifteen vehicles across both operator's

licences were involved in the transportation of static caravans requiring notification of movement which the company did using the Esdal system. The remainder of the vehicles were engaged in mixed general haulage, container and some traction work. The nominated transport manager continued to be GH although Norman Northey had *"until recently"* dealt with the transport administration. He had now reduced his hours to part time and had withdrawn from operational matters. The day to day operations were now administered by Duane Harrison who had gained his transport manager CPC qualification on 17 November 2015. Mr Harrison had informed Mr Outhwaite that "*since taking over many roles from Norman Northey, he has been working on improving the maintenance files and records first and is now turning his attention to drivers records and hours compliance".*

13. The company accessed the DVSA operator data reports and provided Mr Outhwaite with recent copies. The Operator Compliance Risk Score dated 13 May 2016 for roadworthiness was 18.49 placing the company in the amber band and the traffic score was 51.54 placing the company in the red band. This score had been substantially influenced by the prosecutions of the drivers in "March 2016". The incidence of tachograph offences detected in roadside encounters appeared to Mr Outhwaite to have reduced considerably since mid 2015 (the DVSA schedule dated 20 May 2016 at pg 171 of the bundle shows one offence in the first half of 2016 compared to four in 2015 and nine in 2014). He noted that a large number of roadside encounters originated from vehicle defects which should have been identified by the driver. By 16 June 2016, the number of PG9's issued in the previous twelve months was eleven (three immediate and eight delayed). In the same period, nineteen vehicles had been submitted for annual test. Seventeen passed on first presentation with one PRS and one fail, which was well above the national average.

14. Turning to driver entitlement and management, the system for the checking of driving licences and entitlement was in order. However, when drivers were recruited, there was no recorded assessment of driver knowledge or general driver assessment. The interviews were conducted by either GH or one of the traffic planners. The company had an induction document prepared "some years ago" by Mr Northey. It was "dated" and needed updating to "*include many modern systems and processes ... to include all relevant compliance matters for drivers"*. Mr Outhwaite recommended "*as a matter of urgency that the induction document be reviewed and updated and be delivered to all drivers against signature, in a training session"*.

15. All drivers had completed their CPC training and the company "*is in the process of putting all their employees through an NVQ training and assessment*". Further training "*can be identified through interaction with drivers, such as during gate checks or drivers' hours infringements. The training may be provided in-house but must be endorsed on the driver's records"*. A number of the traffic planners

held transport manager CPC qualifications and MH, Mr Harrison and a planner have attended a DVSA operator seminar. Mr Outhwaite recommended that the company enrol at least one CPC qualified transport manager who was to be closely involved in compliance on a specialised transport manager compliance course.

16. As for drivers hours, Mr Outhwaite recommended that all of the fleet be converted to digital tachographs . Mr Harrison stated that since taking over roles from Mr Northey "he *has concentrated so far on roadworthiness and maintenance of vehicles and has only recently started to turn his attention to driver hours"*. He was establishing a process whereby the drivers download their digital driver card every week, rather than previously *"when asked*". He "*wants*" this to become a driver routine. Mr Outhwaite suggested that Mr Harrison establish a procedure whereby all digital vehicle units were downloaded at a set time "*and this is his plan*". Both of those practices "*will*" make all vehicle data or all driver data available for analysis at the same time, simplifying the management of data analysis and ensuring that all data is available and is analysed. Mr Outhwaite commended his own plan to the company and stressed to Mr Harrison the importance of promptly analysing the data for periods where the vehicles have moved without a driver card inserted. In relation to the analogue records, Mr Harrison "*is improving the return process, monitoring and asking for the return of charts rather than waiting for the drivers to return them*". Mr Outhwaite recommended that analogue charts should be issued in envelopes, labelled to indicate the weeks to use them and when they must be returned.

17. The company used the Clockwatcher software by Aquarius to analyse driver hours. Infringement reports were received by email and Mr Harrison "*is now starting to sign them off with the drivers face to face*". In October 2015, a driver was identified as "pulling" his digital driver card and completing his journey without one. He was interviewed and immediately afterwards, the driver resigned. Mr Outhwaite was shown copies of letters and interview records confirming that action had been taken.

18. As for infringements, he inspected the reports for May 2016 (these were not before the TC for him to make his own assessment). He noted that the infringement level "*was above what I would have expected from that size of operator on a relatively low-pressured operation"*. Mr Outhwaite did not provide any further details of the percentage rate of infringements. He did not find any "*obviously false records*". There was no financial incentive to make false records to hide working hours. It was suggested that the most likely incentive was to get home or to a caravan park where the driver could use the facilities. He continued: "*The most frequently committed infringement was not taking legal driving breaks; that is exceeding 4 ½ hours driving without taking at least a 45 minutes break or split breaks of at least 15 and 30 minutes*". Mr Outhwaite did not provide details of the

percentage rate of these infringements. He concluded that many of the infringements were the result of poor work mode selection or poor timing of breaks by the drivers. The same could be said of the "*most committed infringement exceeding 6 hours work (RTD) without a break*".

19. A further "*substantial number of infringements relate to working for more than 10 hours a day involving night work*". Mr Outhwaite did not provide details of the percentage rate of these infringements. His inspection of the offences led him to conclude that the company "*must implement a structured training session for drivers*, *including*:

- *Stressing the requirements of the regulations and the consequences of non-compliance for drivers and operator,*
- *Stressing that the legislation is a limit not a target,*
- *The need for accurate timing of breaks, the accurate use of mode switch and the need to record the duration of the walk round check on the tachograph as "other work",*
- *Fact-to-face debriefs with each driver going through their recent and frequent offences, exploring reasons and preventative measures".*

Mr Outhwaite was subsequently informed that all the drivers would complete their NVQ training and assessment before 8 July 2016. He considered that *"this action was commendable and should significantly improve the knowledge, understanding and level of compliance of the drivers"*. However, he went on: "*I would strongly advocate a move to a more responsive drivers hours analysis system, preferably web-based, so that the operator can investigate infringements, using other available data such as maintenance records and tracking, to determine the full details of each offence and potential explanations".*

20. In his conclusion, Mr Outhwaite stated "*the operator appears to have taken some steps to improve their procedures although maybe not as robustly as would be required*. Considering some actions proposed in October 2015 (contained in a previous report which was not before the TC), a driver had been found to have made a false record and he had resigned. Whilst a number of managers had completed their transport manager CPC qualifications "*there seems to be poor appreciation of the Traffic Commissioner's expectations*". Mr Outhwaite was impressed with Mr Harrison's competence, understanding and commitment and the manner in which he carried out the driver monitoring check. Whilst the NVQ training and assessment should, he considered, help the understanding of the drivers, "*this should be backed up with face-to-face training sessions for drivers"*. That in turn should then "*lead into timely presentation to drivers of their infringements with appropriate action taken, eventually leading to discipline for frequent or recurring offences"*. He understood that the company had now signed up to a more responsive web-based analysis system.

The Public Inquiry

21. At the hearing on 6 July 2016, Jonathon Backhouse appeared on behalf of the company, GH, MH and RH who all attended along with another seven drivers. The DVSA evidence had been agreed. Mr Backhouse made some opening submissions: the previous three years had been "hard" for the company and the directors. There had been the investigation, the prosecution and the associated business loss and now the public inquiry. There had been a lot of "soul searching". However, despite comments made in interview by various drivers, that they had been forced to commit the offences by the management of the company, the Holgate family did not accept that they had deliberately forced drivers to break the rules or that they had told them how to do so. The company accepted that it had "too much work" resulting in GH and MH driving full time. They were "flying by the seat of their pants" with no proper and effective management of the drivers. There was a "culture of getting the job done" resulting in illegality. The drivers prioritised the need to "get the job done" and there was a culture of "pushing the situation" because the company was "not well managed". The company had expanded too quickly.

22. The TC then heard from various drivers. The tenor of their evidence was that they had not received any training in relation to drivers' hours or tachographs from the company and that the drivers just followed the instructions given to them. There was continual pressure to get the job done. One driver did not even know who the transport manager was. Whilst a number asserted that they had been specifically instructed to falsify their records by named directors and managers, in cross examination by Mr Backhouse, they stepped back from that assertion, stating that there was in fact a culture of putting drivers under pressure/duress to finish the job. Some said that they committed offences in order to keep their jobs. The customers had to be kept happy. There were threats in the background to the effect that if customers were lost, then jobs would go. Some of the drivers continued to deny when giving evidence, that they had committed any offences at all despite their pleas of guilty.

23. The TC then heard from the company. In light of a maintenance investigation on 20 June 2016 which was marked as satisfactory, the TC indicated that Mr Backhouse need not go into any great detail on the issue of maintenance. Mr Backhouse acknowledged that apart from the wide load incident, the real issue was the criminal offending in 2013.

24. Graham Holgate then gave evidence. He described his working history. It was about eight years ago that he went into business with his sons. He already had a vehicle that could be used to transport caravans and they were operating a recovery business. When they set

up business together, they had two vehicles and they gradually built up from there as the available work increased. He and MH were driving full time. Whilst GH was the transport manager, he accepted that there was no management of the company at all: "I was totally out of order as transport manager". They had employed Mr Northey who had good credentials and GH thought that "he will sort it all out" but he did not. GH accepted that he should not have been driving but there was a lot of pressure and they were trying to keep everyone happy. Following the investigation, he and his sons sat down together. He maintained that since 2013, compliance had been the company's "goal" and if drivers "do wrong, they're out of the door". GH was now "fully happy with the way things are". The process had been very much a "learning experience" but they now had "everything in order". New procedures were in place for the drivers and they had been enrolled on the NVQ course. "We are a really good company". He was "frightened to death" of the hearing. They employed 90 people and he did not want to let anyone down. Over the "recent year" GH had taken more of a back seat in the management of the company and MH fulfilled the major role. If the business became pressured again, GH would not resort to illegal or non-compliant operation. He was sorry that he had falsified tachograph records and now only drove to "fill in the gaps". He now told the drivers that they had "five nines in one week". He denied that he had told any driver to falsify their records.

25. In answer to questions put by the TC, GH accepted that in 2013, whilst working as director, transport manager and driver, he did not record his work time at all. He was working six days every week and in the evenings when he returned to the operating centre. He was not "doing enough" as a transport manager. The company was growing and that is why Mr Northey was employed to stand in for GH whilst he was driving. GH was not managing either the LGV drivers or the escort vehicle drivers. The way in which the company grew "caught me out". Despite increasing the fleet to twenty vehicles, the company was managing very well as Mr Harrison had been in post since November 2015 and the company was compliant. He knew that because Mr Harrison told him about the OCRS reports and he read the information as it came through.

26. Michael Holgate then gave evidence. He described the work undertaken by the company when it was first established as vehicle transport. They then got involved in other more challenging areas such as caravan transport. The company was expanding. There was pressure on everyone and a culture developed of "getting the job done" and to keep the customer happy. He denied that he had driven beyond the permitted hours although he did do his administration during his breaks. He could not further explain his criminal offending. Then after the investigation, MH stopped driving. That was connected to the birth of his daughter. He contemplated going back to "the spanners". He told his father and brother that they should "hang up their keys" and to "do it right" which is what happened. He studied for the transport

manager CPC as did Mr Harrison because of the size of the company and the way in which MH wished to grow it. The company needed extra manpower. Mr Harrison "shone" in areas and MH had confidence in him. MH was now head of the business whilst Mr Harrison fulfilled the day to day role of booking and the service schedule. He also looked after the drivers' hours and compliance systems. The previous data collection system was that the company would wait 28 days to collect the data but that would be stretched. The drivers thought they were doing the company a favour but they weren't. They now try and get the data every week and one of the maintenance men is tasked with this. If work became pressured again, the company would not resort to the culture that existed 2013. The company had made some poor decisions. He denied that it was he who had shown one driver how to use a magnet to interfere with the tachograph recording. The driver must have "done it for his own reasons".

27. Dwane Harrison told the TC that he was the company's Fleet Manager and was hoping to become the transport manager, although he had reservations. He was confident that he would have the level of authority required to fulfil that role. He had initially worked with EYMS (a bus company) and then he became a LGV driver. As he liked "the legislation side" of driving, he moved into the company's office. At that stage, all of the Holgate family were out driving. Mr Harrison thought he could offer something but Mr Northey was then taken on. Mr Harrison became a planner. When the investigation took place, MH started to sort it out. As Mr Harrison had a high level of knowledge on drivers' hours and the working time directive, the company put him through the transport manager CPC. Then later on in 2015, Mr Harrison took over the role of changing the systems as Mr Northey slowly reduced his role. This was as a result of the unsatisfactory maintenance investigation on 29 June 2015. The directors said "this is not working". He now looked after the fleet and analysed the tachograph data. Foster Tachographs Limited had been helping him develop his systems and when they visited in October 2015, a driver was identified that had "pulled a card". He was interviewed and resigned. Mr Harrison had now followed the recommendation of Mr Outhwaite and was using a web-based analysis system. For analogue tachographs, he gave the drivers blank charts and a date by which they had to be returned. These were sent to Aquarious ClockWatcher to ensure that there were no overlaps or falsifications. As for digi-cards, Mr Northey was asking for them "when they were nearly up" but Mr Harrison now required them to be downloaded every Friday or when the driver returned to the yard. There was a computer alert if the company was missing a week. Then once a month, the VU's are downloaded although a couple may go over two months. He was speaking to drivers about the infringements sheets and asked whether they knew what they were doing. However, Mr Harrison thought that he would cover this topic later in the induction packs which was something they were doing "down the line". At present, the drivers are just advised about an infringement. He considered himself to be in

charge rather than the drivers. He was also undertaking spot checks on the driver defect reporting system, providing re-training when necessary. The drivers were responding positively to the more rigorous enforcement regime. He had not found any missing mileage apart from that resulting from the "odd road test". He also checked the tracker information. He was very comfortable with his role and if the company disagreed with his approach, he would resign.

28. Mr Harrison then dealt with the wide load incident. The company operated twelve vehicles on abnormal load work. He was a planner at the time of the incident but was not involved in the planning of this vehicle movement. The company "now" had a robust system for wide load notifications and each truck had been provided with one folder containing the notifications and another folder containing the police area replies. Notifications were undertaken on a monthly basis. One member of staff was responsible for this area and Mr Harrison needed to build his knowledge up; another member of staff was also being trained to deal with the notification procedures. The NVQ course was for the purposes of supplementing the driver CPC qualification. A number of drivers were resistant to it but all staff would be signed up to the course by the Friday following the hearing.

29. MH was then recalled to give evidence about the wide load incident. It was an unusual problem. The company had acquired a new customer with seven or eight caravan parks; he did not understand what was involved in the movement of one caravan which was in two pieces. The planner had cut corners in notifying the route to the relevant police areas because he wanted to please the customer. The driver was not told of the correct width of his load and he ignored the road signs leading up to the road works and as a result, he had been given a warning. The driver told the officers that he had wanted to get through the tunnel to get to Bangor services so that he could used the facilities, so the incident was more to do with that rather than the driver wanting to deliver to the customer. The vehicle was ultimately escorted through the road works even though the notification process had not been complied with. As a result, MH did not consider the incident to have involved any risk of danger. Systems "are" being developed further to prevent such an incident happening again. The provision of folders to drivers was instituted that day. The TC questioned MH about his view that the load did not involve a risk of danger. He accepted that the load did in fact amount to a hazard but because it had been directed into the wide load layby it was not projecting into the road thus causing a hazard. In the normal course of events, when notification procedures have not been followed, a vehicle is required to park up for two days so that the relevant notification is in place. The TC read parts of TE Meecham's report to MH who accepted that the incident was unacceptable and that the driver had been put in a difficult position. He later accepted after a short break that the vehicle, whilst in the layby, was in a dangerous position once it had been stopped.

30. Robert Holgate then gave evidence concerning his own criminal offences. He confirmed that he was not a director of the company for personal reasons.

31. Mr Backhouse in closing, submitted that GH had accepted that he had not been fulfilling his functions as transport manager and it became apparent that in fact he did not spend any time in the office. He was not "managing" at all. The company had however moved on. When considering the *Priority Freight* question, the company had solved its problems. MH had made a fundamental change in the way the company was run by the family. He had "grown-up" and the family understood that what they did was unacceptable and that they had jeopardised the business and were aware of the risks they faced. The positive changes were first of all, Mr Northey. The company had thought that he was going to be competent to run the fleet but that did not prove to be so. As a result MH and Mr Harrison obtained their CPC qualifications and Mr Harrison was impressive. He had experienced a company that was trying to recover from a very bad period of operation and had seen it all go wrong. He was confident about his control of the drivers and that he had the company's support. He was a safe, competent pair of hands and he was putting his reputation on the line.

32. As for MH, he had acknowledged as one of the wrongdoers, that the company needed someone other than a family member to manage the transport operation. They had the assistance from one of the best tachograph companies available. Fosters had gone through the company's records and whilst nine months ago "they did find some evidence" of false records, which was dealt with appropriately and promptly they had not found anything in their recent search. The wide load incident was eighteen months old and a one off. The company responded appropriately to it with the folder system. The driver was disciplined as was the planner who no longer worked for the company. The TC would consider whether revocation was required in this instance. Mr Backhouse conceded that some regulatory action had to be taken but the company had moved forwards to such a great extent evidenced by the recent satisfactory maintenance investigation, that the answer should be "no". There were no continuing drivers' hours and tachograph offences and systems were now in place. In the circumstances, the TC was asked to give the company "a chance" and if he felt able to do so, the appropriate regulatory action would be to curtail the fleet. The company could continue to be viable with a fleet of fifteen, a larger curtailment having a significant impact on their main caravan customer. Alternatively, the TC could consider a period of suspension, perhaps over a number of weekends. It was agreed that evidence of on-going contracts could be provided to the TC (which it was). Mr Backhouse then advised that in fact the company could survive with a twelve vehicle fleet. The TC reserved his decision.

The TC's decision dated 1 August 2016

33. The TC found that the directors, transport manager and numerous drivers had been convicted of serious offences relating, in particular, to false records. Section 26(1)(c)(i) and (ii) had been made out. He attached "a great deal of weight to this finding". Over twenty mechanical PG9's had been issued to the company's vehicles in the previous five years. However, the most recent maintenance investigation had a generally positive outcome and roadworthiness issues appeared to have been largely addressed. Whilst the TC found that section 26(1)(c)(iii) had been made out he did not attach significant weight to his finding. Further, whilst maintenance arrangements had been strengthened, convictions had not been notified and so section 26(1)(e) was made out.

34. Ten or eleven fixed penalty notices had been issued to the drivers of the company. He was unsure whether the "traffic offence report" issued in North Wales on 25 February 2015 carried a financial penalty. The notices demonstrated that drivers' hours and tachograph infringements persisted through to September 2015 at least. This was a very high number of fixed penalty notices issued to a moderately sized fleet and indicated widespread and persistent non-compliance.

35. The drivers' hours and tachograph offending was at the most serious end of the scale, being widespread and persistent. It was notable from Mr Outhwaite's report that the company and the new transport manager (Mr Harrison) "had only recently started to turn his attention to drivers hours". The TC also noted that infringements persisted up until just before the date of the public inquiry and that Mr Outhwaite had noted in respect of the May 2016 records that "the infringement level was above what I would have expected from that size of an operator on a relatively low pressured operation". The TC was satisfied that section 26(1)(h) had been made out and he attached significant weight to his finding. He further found that convictions of the directors and the transport manager for serious false record offences amounted to a significant material change and that section 26(1)(a) had been made out. Again, he attached significant weight to this finding.

36. The TC then turned to the ***Priority Freight*** question: " is this an operator I can trust to be compliant in the future?". In the positive, the maintenance and roadworthiness issues appeared to have been turned around and the TC gave the company "much credit" for that. It indicated that Mr Harrison was a competent manager who had what it took to turn the business around. Also in the positive was the initiative of MH to "hang up his keys". GH was candid about the state of affairs in 2013 when the business was totally chaotic. The family had done the right thing in stepping back from day-to-day driving and in starting to take seriously the responsibilities of statutory directors and the statutory transport manager. Yet, the TC was concerned that the ethos of satisfying customers above all else persisted. The wide-load incident occurred because the company staff, both a planner and a

driver, were keen to please a new and sizable customer. That incident put lives at risk. Mr Backhouse fairly pointed out that the incident was eighteen months prior to the hearing and that there had been time for further change in the culture. It was all the more disappointing, then, to find from an independent auditor that drivers' hours and tachograph management had not been prioritised by the operator or transport manager for action by Mr Harrison. It was still work in progress some three years after the significant false record offences were committed. The TC was well aware of research establishing the incidence of sleep related road traffic accidents and those where tiredness had contributed to an accident.

37. The persistence of drivers' hours offending was also apparent from the fixed penalty notices issued. He went through them. He found that the directors had a deep-seated drive to prioritise commercial gain over compliance. Whilst Mr Harrison's input was real, the TC did not find that it provided sufficient comfort for him to be able to trust the company to comply in the future.

38. The TC then went onto ask himself the *Bryan Haulage* question: "are things so bad that this operator needs to be put out of business now?". In considering the proportionality of his decision, the TC took into account the additional commercial information provided to him by the company following the hearing. He noted that the company was a specialist transport operation but that there would be a significant number of competitors in the sector and same geographical area. It was highly likely that the drivers would move to those competitors and at least one had already done so. The effect of revocation would largely be to change the identity of those who would manage and profit from this transport operation. Given the significant growth of the business which had given rise to drivers, directors and the transport manager falsifying tachograph records, it was entirely appropriate and proportionate for the business to be brought to an end. GH and MH were the controlling minds of the company and they had lost their good repute as had the company. Section 27(1)(a) was made out. GH also lost his good repute as transport manager.

39. The involvement of the controlling minds of the company with false records meant that the TC had to consider disqualification. The TC did not find that the directors specifically instructed drivers to falsify records but they did place undue pressure upon them to satisfy commercial requirements and they should at the very least, have had concerns at drivers' ability to do so legally. They should have had systems in place to detect offending. Disqualification was therefore necessary and in setting the term, the TC gave credit for the decisions made by the directors to stop driving and to put Mr Harrison in a position of some control. He noted that MH was also director and transport manager of R & M Leisure Homes Limited which was to be called to a public inquiry. Having revoked the operator's licence, he disqualified MH and GH for a period of three months.

The Upper Tribunal Appeal

40. At the hearing of this appeal, Mr James Backhouse represented all three Appellants and GH and MH were in attendance. His first point was that the TC's finding that the company had been late in making improvements to its tachograph arrangements was unfair and the TC had taken Mr Outhwaite's comments out of context. Further, the TC did not put Mr Outhwaite's report to either Mr Harrison or to the Appellants. In fact, Mr Harrison told the TC in evidence that he had already started to address the issues in 2015 and Mr Backhouse was of the view that the DVSA data demonstrated a substantial reduction in the number of roadside encounters by mid 2015 which could only have taken place as a result of systems having been introduced. Further, Fosters had also been involved even in advising the company before October 2015 (although the Tribunal notes there was no evidence of that before the TC). The Tribunal put to Mr Backhouse that Mr Outhwaite's report was clear: Mr Harrison had only recently turned his attention to tachographs and drivers hours and that the inference to be drawn from that was that GH, as transport manager, had not given the issue high priority. Mr Backhouse's response was that Mr Outhwaite was not saying in his report that there were no systems in place prior to Mr Harrison taking over; the systems were described. But having grown rapidly in 2013 resulting in the problems that the company then encountered, the directors had stopped driving and had started to manage the business including providing support to Mr Northey who was acting as transport manager although not nominated. Three years later, the maintenance issues had been sorted out. The Tribunal pointed out to Mr Backhouse that there were many references in Mr Outhwaite's report to the company's future intentions to implement or improve upon the necessary systems despite three years having passed since TE Dickinson's investigation. The report did not demonstrate a culture of pro-activity, but rather the contrary. Mr Backhouse's response was that there was no minimum legal obligation imposed upon an operator as to the minimum percentage of data which was to be analysed and no minimum standard for compliance in relation to infringements although clearly such analysis had to be undertaken and infringements identified. The company's approach to the problems had been influenced by a growing understanding of the issues whilst taking advice from Fosters. The Tribunal then went through the steps that still needed to be taken as identified by Mr Outhwaite. Mr Backhouse's response was that when there was a culture of falsification, it was not easy to address the problem and yet it was evident in this case that the company had "nailed" the problem of false records although it had taken some time to do so. It was the decision of MH that drivers' hours and tachograph infringements "had to stop" and they did. The issues were being sorted out. It was commendable that the company had instructed Fosters in the first place and that the directors had disclosed Mr Outhwaite's report to the

TC when the directors were aware of its contents. However, the TC should have borne in mind that Mr Outhwaite's standards were high. His report contained recommendations for improvement in the maintenance systems, yet the TC found that the maintenance arrangements were satisfactory. He should have approached the issue of drivers' hours and tachographs in the same way. The TC should also have taken into account that there is no requirement on operators to analyse all data, yet this company was doing so and that the infringements which were being identified were the result of poor mode switch use. Whilst Mr Outhwaite's report indicated that there was more work to be done on drivers' hours and tachographs, it was not fair to say that the company had not done anything, particularly when they had identified a false chart in October 2015. Mr Northey, who had been employed since 2012, did make improvements and did work with the directors prior to stepping back from operational matters and reducing his work to part time. It was challenging for a small family business to work to a plan and implement improvements but they nevertheless managed to do so by mid 2015. In addition, they had taken the "unusual course" of enrolling all of the drivers on an NVQ level 2 course and that too was to be commended as it demonstrated a positive, on-going commitment and represented an appropriate management response. Whilst Mr Outhwaite remained concerned about the inadequacies in the company's systems (including training), his recommendations would not necessarily be followed because of deficiencies in the systems he was recommending, for example, a web based analysis system did not identify when a vehicle was double manned.

41. Mr Backhouse's next point was that the TC's approach to the issue of the wide load was wrong as were the conclusions he drew from it. The company undertook between 50 and 100 abnormal load movements a week requiring "thousands of notifications each year" and the incident was eighteen months old. Whilst the notification procedure had not been followed, the driver was also in the wrong for wanting to get to the services and the seriousness of the incident was the result of the driver's decision. Further, the planner who had been responsible for planning the journey without following the required procedures was no longer working with the company. There were now two employees responsible for notifications of abnormal loads. On this particular occasion, a mistake had been made. It was "staggeringly disproportionate" to conclude that there was a continuing culture of putting the customer first. In fact the opposite was true. Since the incident the systems had been improved. It was not open to the TC to "lump different parts of the evidence together" indicating a culture of putting customers first. If this was the culture that existed in relation to the movement of abnormal loads, then the police and the TC would have seen many more of this type of offence committed by the company.

42. Mr Backhouse's third point was that during the course of the hearing, the option of curtailment had been explored by way of regulatory action. The TC did not mention curtailment in his decision or state why it was not appropriate in this case. At the time of the hearing, whilst the operation was not perfect and there was still a lot of work to do, the company had moved a long way and was still working hard on the systems. In those circumstances, the TC should have assessed the company as being one which was likely to be compliant in the future and could have curtailed the licence. Mr Backhouse asked this Tribunal to allow this appeal upon the basis that a significant curtailment with strict conditions and undertakings would have been the proportionate regulatory action in this case.

The Tribunal's Decision

43. Our starting point is that within three years of being granted an operator's licence the company had become manifestly non-compliant with the conditions and undertakings recorded on its licence. GH, the person principally responsible for ensuring compliance, not only by reason of being the nominated transport manager but also as the director with a leading role in the company, failed to discharge any of the obligations and responsibilities those roles imposed upon him. There was no evidence before the TC that he had done anything to demonstrate that he was a competent transport manager. Rather, he abdicated his responsibilities as transport manager to Mr Northey without nominating him to fulfil that statutory role. Mr Northey was in post from 2012 until the end of 2015, only stepping down to take on part time duties. Whilst Mr Northey was purporting to fulfil the role of transport manager, those to whom he was answerable (GH as transport manager and director and MH as director) had created a culture within the company of falsification of tachographs and drivers' hours offences. The irresistible inference is that their own misconduct and the undue pressure which they placed upon the drivers was driven by a wish to gain a competitive advantage over other operators undertaking abnormal load work by ensuring that satisfying their customers was given priority over regulatory compliance. It is doubtful whether the planners within the company were having any regard to the rules on drivers hours when planning journeys and it is doubtful that Mr Northey was in a position to do anything other than turn a blind eye to what was going on, if he was not in fact, complicit in the unlawful way the vehicles were being operated. It is plain and obvious that the reason why there were no systems in place was because all of those with managerial functions within the company were well aware that the operation was not compliant, not only by reason of their own misconduct as drivers but also by reason of the way that the journeys were scheduled and the misconduct of the employed drivers who were pressured into driving unlawfully.

44. When consideration is being given to the ***Priority Freight*** question, it is often instructive to consider how an operator reacts to something like a DVSA investigation. In this instance, both directors of the company (and the transport manager) and RH knew that they had personally committed criminal offences and so had their drivers. The directors' reaction to the investigation and subsequent charges was to deny wrongdoing and to take issue with the reliability of the company's own tracking system. This stance and that of their drivers did not and does not indicate that the directors wished to take immediate and effective steps to put matters right. Rather, they required the DVSA to prove its case with GH being found guilty at the end of 2015 and with other drivers ultimately being dealt with in 2016. The delay did, at the very least, give the company an opportunity to attempt to become compliant. However, there was no documentary evidence before the TC that the company had taken any meaningful steps between 2013 and the end of 2015 to put the company's house in order although there had been a gradual reduction in false charts and infringements from the end of 2014.

45. Any operator wishing to demonstrate an intention to be compliant in the future would have, at the very least, replaced the transport manager. It is surprising to say the least and instructive, that at the date of the public inquiry, GH remained as transport manager yet with convictions for falsification of tachograph records and who, on his own admission had failed to fulfil his role in any material respect. Indeed, there was not even an application before the TC to nominate Mr Harrison who was considered to be the answer to the company's remaining compliance issues. The TC did not refer to this aspect of the case in his decision but it does support his concerns about future compliance and we find it is instructive as to the way the company reacted and continued to react to the discovery of its wrongdoing in 2013 and the subsequent convictions and it is instructive as to the company's attitude to compliance.

46. So, all the same personnel who had held senior managerial positions in 2013 remained in post. The TC was told that it was hoped that Mr Northey might be able to sort things out once the investigation had taken place and GH expressed disappointment that Mr Northey had essentially, let the company down in that regard. His approach to Mr Northey's role was disingenuous to say the least. It was GH's ultimate responsibility as transport manager to sort the problems out and it was unlikely that Mr Northey would do so bearing in mind that he had been in charge when criminality was taking place and that he would require considerable direction and supervision from above. There was no evidence before the TC as to the directions given to Mr Northey or (the Tribunal repeats) the steps the company had taken prior to October 2015 which were aimed at mending a very broken operation, apart from bare assertions in oral evidence. Rather, the company applied to double the size of its fleet within six months of the investigation. That action is again instructive of the attitude of the directors who clearly

prioritised expansion and commercial gain over compliance. A company wishing to demonstrate to the TC that it could be trusted in the future, would have put all of its systems in order prior to making such an application. This, the company did not do either in relation to maintenance or drivers' hours and tachographs. A large number of mechanical and non-mechanical PG9's continued to be issued to the company's vehicles and drivers and two maintenance investigations in 2014 and 2015 were marked as unsatisfactory. The TC was correct to give credit to the company for having made substantial improvements in the maintenance systems by June 2016, such improvements no doubt being the result of Mr Harrison's work. The same could not be said of the systems in relation to drivers' hours and tachographs. The TC was perfectly entitled to draw from the adverse findings of Mr Outhwaite, indeed it would have been remiss of him not to do so. Whilst the TC should have raised the report when he questioned the directors and Mr Harrison, the fact that he did not do so, cannot alter the final position. Mr Outhwaite found that the systems were wanting despite the passage of nearly three years and when, according to Mr Backhouse, Fosters Tachographs had been advising the company from before October 2015. There was no proper driver assessment; there was urgent need for an induction document; the system of downloading data was wanting although Mr Harrison made improvements to it between the date of Mr Outhwaite's report and the public inquiry; infringements were higher than would be expected although the report was silent when it came to detail and the company did not provide that information at the public inquiry; there was a need for structured driver training over and above the "unusual" course the company had taken to enrol the drivers onto an NVQ (this Tribunal as presently constituted has never had a case where an NVQ course had been preferred to face to face training of drivers by an operator on the subject of drivers hours and tachographs). The TC did not mention the NVQ training of the drivers when he undertook his balancing exercise but in all likelihood his omission was the result of the findings of Mr Outhwaite and his recommendations of the steps that were needed to be taken despite the NVQ training. A passage from Mr Outhwaite's report summarises the position: *"the operator appears to have taken some steps to improve their procedures although maybe not as robustly as would be required".* His conclusion, about three weeks before a public inquiry which the company must have been anticipating for at least two years, is again instructive when consideration is given to the ***Priority Freight*** question. In all the circumstances, the TC was entitled to conclude that the company, to use an everyday phrase "had done too little too late" and that the company could not be trusted.

47. Turning then to the wide load incident, the TC was entitled to take it into account when considering the ***Priority Freight*** question. Whilst it might have been overstating the position to find that the driver was keen to please a new and sizable customer as well as the planner wishing to do so, the bottom line was that a planner put a customer's priorities before compliance with the notification requirements which

are there to prevent or reduce the risk of really serious harm being caused by abnormal loads. The TC was entitled to take this incident into account despite its age and we are satisfied that even if he had not, the outcome of the public inquiry would have been precisely the same, such was the seriousness of the company's failings in this case.

48. Finally, we do not consider that the TC was in error in either failing to mention curtailment at all or giving reasons why curtailment was not an option in this case. Once the TC had answered the *Priority Freight* and the *Bryan Haulage* questions in the way that he did, he did not then need to explain why curtailment was not an option. Revocation was inevitable once the second question was answered in the negative. And for the avoidance of doubt, the Tribunal is of the view that this was a serious case and it cannot be said that the TC's approach to it was in error. Further, the TC's approach to the issue of disqualification of GH and MH was lenient to the say the least. An order of indefinite disqualification in the case of GH could not have been open to criticism and in the case of MH a long period of disqualification, if not an indefinite order could not have been open to criticism.

49. To conclude, we are satisfied that the TC's decision is not plainly wrong in any respect and that neither the facts or the law applicable in this case should impel the Tribunal to allow these appeals as per the test in *Bradley Fold Travel Ltd & Peter Wright v Secretary of State for Transport (2010) EWCA Civ. 695*. The appeals are dismissed and the orders of revocation and disqualification come into effect at 23.59 on 17 February 2017.

Her Honour Judge J Beech
6 January 2017