IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER
TRAFFIC COMMISSIONER APPEALS **Case No. T/2019/70**

ON APPEAL from the DECISION of the TRAFFIC COMMISSIONER FOR THE WEST MIDLANDS TRAFFIC AREA (Mr Nick Denton)

Dated: 16 October 2019

Before:

C.G. Ward	Judge of the Upper Tribunal
Mr. D. Rawsthorn	Member of the Upper Tribunal
Mr. A. Guest	Member of the Upper Tribunal

Appellant:	**William James Burnett t/a Bearwood Coaches** **William James Burnett**

Attendance:

For the Appellant:	Mr Tim Nesbitt QC

Heard at:	Field House, London EC4
Date of Hearing:	20 December 2019
Date of Decision:	20 December 2019

DECISION OF THE UPPER TRIBUNAL

The appeal is allowed.

The decision of the Traffic Commissioner dated 16 October 2019 is set aside.

The matter is remitted to a different Traffic Commissioner to hold a Public Inquiry and consider afresh.

The appeal was heard by the Upper Tribunal on an expedited basis with a view to providing clarity of outcome before the Traffic Commissioner's decision was due to come into effect at 0001 on 21 December 2019 and before the commencement of

the new school term in early January 2020. Reasons for the decision will follow at a later date.

C.G.Ward
Judge of the Upper Tribunal
Date: 20 December 2019

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Date of Hearing:	**20 December 2019**
Date of Decision:	**20 December 2019**
Date of Reasons:	**3 January 2020**

REASONS FOR DECISION OF THE UPPER TRIBUNAL

This appeal was heard on an expedited basis. By a decision dated 20 December 2019, the appeal was allowed, the decision of the Traffic Commissioner dated 16 October 2019 set aside, and the matter remitted to a different Traffic Commissioner to hold a Public Inquiry and consider afresh. The decision indicated that reasons would follow, and this document now provides those reasons.

Subject Matter

Public passenger vehicles; financial standing; loss of repute; proportionality; adequacy of reasons

Cases referred to:

217/2002 *Bryan Haulage Limited*
David Crompton Haulage v Department of Transport [2003] EWCA Civ 64
T/2020/52 and 53 *Shaun Andrew Taylor*
104/2007 *Steven Lloyd t/a London Skips*

REASONS

Introduction

1. This is an appeal from the decision of the Traffic Commissioner for the West Midlands Traffic Area taken on 16 October 2019 and communicated by letter dated 18 October.

The Decision

2. In a decision given following a public inquiry, the Traffic Commissioner ruled that:

> a. Mr Burnett had lost his good repute as transport manager and was disqualified from acting as such for an indefinite period, but could regain his repute by retaking and passing the transport manager CPC examination; and
>
> b. Mr Burnett as operator lacked financial standing and a transport manager of good repute and the operator's licence was revoked. The date for revocation was subsequently varied so as to be 0001 hours on 21 December 2019.

The previous history

3. The operator had been in business for some 30 years and had held a standard public service vehicle operator's licence since (at any rate) 1993. Beyond a public inquiry in 1992, the reasons for which were not in evidence, there was no evidence of any significant regulatory action against him during the intervening period. In 2018 he had applied to vary his licence, which had previously provided for 40 vehicles, to 60 vehicles. There had been a maintenance investigation carried out by DVSA on 16 March 2018 resulting in a notice of shortcomings. The Traffic Commissioner (the same one as decided the present case) decided to hold a Public Inquiry. Its stated purpose was (p123):

> "..to investigate these apparent shortcomings and to give you the opportunity to explain what you are doing to improve compliance with the rules and the fulfilment of the undertakings that were given at the time the licence was applied for and show evidence to support this. The traffic commissioner will then decide whether they can trust you to comply in the future, whether any action against your public service vehicle operator's licence is needed and, if so, what form that action might take. The traffic commissioner will also consider whether your application should be granted in full or in part."

4. By a letter dated 20 July 2018 (p134) Mr Burnett was informed of the following decision. I set it out in full, together with details of what ensued, as it provides valuable context for understanding the subsequent decision which is the subject of the present appeal.

> "The decision on the operator's requested increase from 40 to 60 vehicles is held in abeyance pending provision by the operator of an action plan which will set out what the operator intends to do:
>
> > (a) to make sure that only drivers with a full D1 licence (no 101 restriction) and CPC can drive vehicles with more than eight passenger seats;
> > (b) to improve record keeping of reported vehicle defects and rectification of those defects;
> > (c) to improve both the quality of the regular safety inspection records and the organisation and retention of those records;
> > (d) concerning regular checking of driver entitlement.
>
> If I am satisfied with the action plan, I am likely to [approve] the requested increase, although with the warning that the operator must do much better in future to make and keep records of vehicle maintenance, driver (or mechanic) checks of vehicles and checking of driver entitlement. I am also likely to request DVSA to conduct a follow-up visit or desk-based exercise in the autumn to check that the action plan is being put into effect.
>
> If I am not satisfied with the action plan, or such a plan fails to reach me by close of business on 31 July, I will refuse the requested increase at that point.
>
> The good repute of transport manager William Burnett is retained, but he is warned that he should not be so dismissive of the need to keep accurate records which could, under certain circumstances, be of considerable assistance to him and in any case are a requirement of holding the licence.
>
> If the prohibition record of the business had been less good, I would not have been prepared to overlook the lacunae in record keeping or to agree the increase. The operator should be in no doubt that it must improve its record keeping practices, whether or not the increase is granted."

5. An action plan was supplied and a letter dated 25 July 2018 (p133) informed the operator of the Traffic Commissioner's decision that:

> "Having seen the operator's action plan, I am content to grant the increase to 60 vehicles. I will be asking DVSA to check later in the year on his performance against the action plan."

6. DVSA carried out a desk-based assessment on 10 January 2019 (p55). It found "unsatisfactory" all aspects of Driver Defect Reporting, the fact that inspections were not always being signed off as roadworthy and the arrangements for inspection/maintenance reports to be reviewed to assess the effectiveness of Driver Defect Reporting. It found "Satisfactory" the inspections at the agreed 8-weekly

interval. Overall, though, the Vehicle Examiner (p61) expressed concerns "about the operator's knowledge with regard to maintenance and the completion of records" in respects which he went on to specify. He noted a number of MOT fails which he considered indicated:

> "poor MOT preparation and maintenance standards. The operator should be able to demonstrate that vehicles are being operated well above the minimum standard."

As a result, a full maintenance investigation was recommended.

7. On 30 April 2019 VE Austin Jones conducted an unannounced inspection, with follow-up visits on 2 and 10 May. A PG13 was issued for the following shortcomings:

> No formal provision for drivers to report defects in writing
> No record of driver walkaround checks
> Preventative maintenance record not available for all vehicles operated
> Ineffective forward planning (planners not displayed – not all vehicles detailed)
> Shortcomings not remedied from previous investigation (March 2018)
> Sample check of MOT indicates 38% final fail rate (12 months combined).

Advice and guidance were also given on a number of other aspects of maintenance systems and the associated documentation.

8. This report led to the calling of the Public Inquiry for stated purposes which were the same as those of the 2018 Inquiry (see[3] above), save that on this occasion there was no application for a variation to be considered.

The Public Inquiry

9. The Public Inquiry was held on 18 September 2019. Mr Burnett attended, accompanied by his representative in those proceedings, Mr Carless. Mr Khan, his General Manager, also attended and gave evidence, as did Vehicle Examiner Austin Jones.

Relevant legislative provisions

10. Section 14ZA of the Public Passenger Vehicles Act 1981 ("the Act") provides (so far as material):

> "14ZA.— Requirements for standard licences
>
> (1) The requirements of this section are set out in subsections (2) and (3).
> (2) The first requirement is that the traffic commissioner is satisfied that the applicant—
> …
> (b) is of good repute (as determined in accordance with paragraph 1 of Schedule 3),

> (c) has appropriate financial standing (as determined in accordance with Article 7 of the 2009 Regulation), and
> (d) … .
>
> .
>
> (3) The second requirement is that the traffic commissioner is satisfied that the applicant has designated a transport manager in accordance with Article 4 of the 2009 Regulation who—
> (a) is of good repute (as determined in accordance with paragraph 1 of Schedule 3),
> … ."

11. Section 17 of the Act provides (so far as relevant):

"(1) A traffic commissioner must revoke a standard licence if it appears to the commissioner at any time that—
(a) the holder no longer satisfies the requirements of section 14ZA(2), or
(b) the transport manager designated in accordance with Article 4 of the 2009 Regulation no longer satisfies the requirements of section 14ZA(3).
… ."

The appeal to the Upper Tribunal

12. Mr Nesbitt QC clarified the discrepancy which had arisen between different versions of the written Grounds of Appeal: the Grounds relied on were those (p295) submitted with Mr Burnett's appeal form dated 14 November 2019 with the addition of Ground 2A which appeared at p319 which had been submitted in connection with an application for a stay. The further Grounds within the latter did not form part of his case. He indicated that of the Grounds thus far "in play" he relied, as constituting Grounds of Appeal, only on Grounds 1, 2, 2A, 3, 4, 7 and 8. However, as regards the Grounds no longer relied upon, he did not withdraw the observations made as part of them, even if they were no longer to constitute Grounds in their own right. I consider below each of the surviving Grounds in turn.

Ground 1 Misunderstanding of the financial evidence

13. Strangely, and without explanation, although the call-up letter referred to the need to show available finance of £159,300, at the hearing Mr Burnett was required to show £270,550. Mr Nesbitt accepts that £270,550 was the correct figure. The complaint is that the evidence demonstrated that Mr Burnett could meet the higher figure and the Traffic Commissioner was plainly wrong to hold otherwise. It is submitted that the procedure followed at the Public Inquiry may have contributed to the mistake. Only if the primary contention is not accepted could there be any question of whether there was material unfairness by reason of the increase in the amount stated to be required.

14. The financial evidence included:

> (a) statements for an account *****006 with Lloyds in the name of "Mr Burnett, WJB Transport" covering the period from 30 April 2019 to 30 July 2019. The

> account balance had been averaged over the 3-month period by two different caseworkers: the lower figure thus arrived at was £101,594.50; and
>
> (b) statements for an account *****660 with TSB in the name of Mr Burnett. These need to be described in a little detail. There was a statement headed "Detail of last operations (Mini statement) Printed on 08/08/2019". It showed that from 10 April 2019 there had been a balance of £220,100.08. There was then a statement dated 28 August 2019 expressed to cover the period 8 August 2019 to 28 August 2019 and indicating that the balance throughout that period had remained at £220,100.08, with no money going in or out.

15. The Traffic Commissioner expressed his reasons for finding that the financial standing requirement was not met as follows:

> "The operator has provided bank statements for an HSBC account[1] showing average available funds of approximately £102,000 over the 3-month period 1 May to 30 July 2019. A further statement from a TSB account shows that £220,000 was available over the 20-day period between 8 and 28 August 2019. The operator needs to show financial standing of £270,550 for the 60 vehicles it is authorised for. Because the two bank accounts show average balances over different periods, not overlapping at all, and neither balance sufficient to demonstrate financial standing, it has failed to do this. I note that this is entirely in keeping with the operator's disorganised approach to any form of paperwork. I am therefore unable to conclude that the operator has the required financial standing."

16. From the above it is clear to the Panel that the Traffic Commissioner failed to heed the apparent significance of the 8 August TSB statement in covering – through mention of the "last operations" – the period from 10 April 2019 to 8 August 2019. Indeed, the Traffic Commissioner does not refer to that statement at all. The period covered by the Lloyds statements[2] falls within that period. On the evidence before us, Mr Burnett comfortably satisfied the requirement of financial standing at all material times and the Traffic Commissioner's decision was plainly wrong. The Panel does also accept Mr Nesbitt's submission that the error, as well as going to the heart of financial standing appears to have contributed to the Traffic Commissioner's perception of Mr Burnett's disorganisation where paperwork was concerned but do not consider further the materiality of this latter aspect, as Mr Burnett's case succeeds without it.

17. Whilst of course it was the Traffic Commissioner's responsibility to deal correctly with the evidence before him, we have to say that neither Mr Burnett nor Mr Carless appears to have helped Mr Burnett's cause in this regard. It is apparent from the Transcript of the Public Inquiry that the Traffic Commissioner at that point was under the impression that he did have a statement for the TSB account down to April 2019, but no further. When he pressed Mr Burnett as to why (as he believed) no more up

[1] This reference to an HSBC account appears to have been a mistake. There were, additionally, statements for an HSBC account in evidence, for reasons which are not obvious. Those statements were from 2018 and did not relate to the account averaged by the Traffic Commissioner's staff which, as noted, was a Lloyd's account.

[2] Mistakenly termed the "HSBC account" by the Traffic Commissioner

to date statement had been submitted, neither Mr Burnett nor Mr Carless explained that what they had submitted was in fact a statement going beyond April 2019. Rather, Mr Burnett said that he had given the material ("the whole information") to Mr Carless who in turn indicated first (from the presence of the material on the file, correctly) that he had passed it to the Traffic Commissioner's representative on an earlier occasion but then (and incorrectly) indicated that the complete data had not been supplied due to "a breakdown in communication", offering to provide them within seven days. The Traffic Commissioner did not accept the truthfulness of Mr Burnett's explanation, resulting in Mr Burnett, under pressure and having to be told by Mr Carless to calm down, saying that he did not know the material had not been put in. In fact, it appears that it had been.

18. This regrettable generation of more heat than light might have been avoided (or at any rate its consequences mitigated) if the Traffic Commissioner had later gone back, if necessary in closed session, to examine what the financial material did actually show. The Traffic Commissioner indicated (p162B) that the Inquiry would "park the subject of finance for the moment depending on how we can get on with the rest of the issues." However, it was never returned to.

Ground 2 – Misunderstanding that the operator had previously been curtailed from 60 to 40 vehicles

19. The transcript of the Public Inquiry shows that at the outset, the Traffic Commissioner recorded that he had met the operator in 2018 following an unsatisfactory maintenance investigation. He stated that as a result of that:

> "I curtailed the licence to 40 vehicles and assurances were given about better future performance. Now there was an audit later on which appeared to show an improvement and at that point I allowed the licence to go back up to the 60."

20. Once again, the transcript of the Public Inquiry suggests that neither Mr Burnett nor Mr Carless took any steps to assist the Traffic Commissioner by pointing out that he was mistaken on this issue. On the evidence before us, his remarks were doubly inaccurate: the increase was allowed following the provision of an action plan, not an audit, but (and more importantly for present purposes) there is no evidence before us that there had ever been a curtailment from 60 to 40 vehicles. This confusion between permitting an increase from 40 to 60 with a curtailment from 60 to 40 appears to have persisted throughout the hearing as when summing up his interim thoughts at the end of the hearing, the Traffic Commissioner twice repeats the point (p200G and 201A-B). The latter is particularly telling of the Traffic Commissioner's thinking:

> "There will be significant regulatory action here because I do not know how I could frame the message in any other way to get through to you because clearly a curtailment from 60 to 40 did not get the necessary message across last time. In my view that was a significant curtailment and it led to various assurances being given. I do find it incredible that looking here today we find those assurances came to nothing and I am not impressed by that. So

> whatever happens there will be a much more significant action this time to see if we can finally get through to you that you cannot carry on as you are."

21. It is, however, the Traffic Commissioner's decision which is the subject of the appeal to us, not the proceedings of the Public Inquiry in and of themselves. Paras 2 to 5 of the Decision (p276) correctly summarise the history as set out at [3]-[5] above. At no point does the reasoning in the decision proceed on the basis set out in the remarks I have quoted immediately above and the failure to honour assurances previously given to the Traffic Commissioner, which played a significant part in his decision (see in particular [21], quoted in para 23 below) was a matter worthy of carrying considerable weight, whether the context was the correct one as recognised in the Decision of investigating previous shortcomings and considering an application for an increase in the number of permitted vehicles, or the incorrect one articulated at the Public Inquiry of responding to a curtailment.

22. For that reason, we do not find a material error in the decision on this ground, although we consider the Traffic Commissioner might have been well advised, given his extended misunderstanding of the position at the Public Inquiry, to have recorded expressly in his decision his apparent realisation that he had been mistaken and that the mistaken position had played no part in his decision.

Ground 2A Failure to consider the correct legal test before revoking and/or to consider proportionality

23. In *Bryan Haulage Limited* (217/2002) the Transport Tribunal considered the implications of the Court of Appeal's decision in *David Crompton Haulage v Department of Transport* [2003] EWCA Civ 64, concluding (at [11]) that:

> "In applying the *Crompton* case it seems to us that traffic commissioners and the Tribunal have to reconsider their approach. In cases involving mandatory revocation it has been common for findings to have been made along the lines of "I find your conduct to be so serious that I have had to conclude that you have lost your repute: accordingly, I have also to revoke your licence because the statute gives me no discretion". The effect of the Court of Appeal's judgment is that this two-stage approach is incorrect and that the sanction has to be considered at the earlier stage. Thus the question is not whether the conduct is so serious as to amount to a loss of repute but whether it is so serious as to require revocation. Put simply, the question becomes "is the conduct such that the operator ought to be put out of business?". On appeal, the Tribunal must consider not only the details of cases but also the overall result."

24. The relevant part of the Traffic Commissioner's decision was as follows:

> "*Balancing exercise*
>
> 21. On the positive side of the balance is the operator's relatively low prohibition rate of 11% over the last two years (compared to a national average for PSVs of about 16%). There is also the fact that Mr Burnett clearly does maintain his vehicles, although the 38% failure rate at MOT is a concern.

On the negative side however is the fact that record keeping is chaotic to non-existent; that vehicles are missing their eight-weekly checks which are inadequately documented when they do take place; and that these shortcoming[s] were pointed out to Mr Burnett in early 2018 but that he has ignored all advice on how to address them. Further, he has failed to carry out most of the specific assurances he gave me in the action plan of July 2018: these assurances and my belief that I could rely on him to carry them out were the only reason I agreed to the increase in the licence authority from 40 vehicles to 60. The fact that his assurances proved worthless necessarily devalues the assurances he is offering this time round. On balance, I conclude that Mr Burnett is not an operator whom I can any longer trust to comply with the requirements relating to frequency of record inspection and proper keeping of maintenance records and records of driver entitlement checks.

Decisions

Transport Manager repute

22. No one who witnessed his performance at the public inquiry could conclude other than that Mr Burnett is entirely dismissive of the views of others and utterly incapable of delegating to anyone else (Mr Khan for instance). Indeed, he frankly accepted as much. He firmly believes his own way of doing things is best and I do not believe he is capable of change or of acting according to the standards required of a modern-day transport manager. I recognise that Mr Burnett's letters since the inquiry have struck a different tone, but I have concluded that his true attitude was on display at the inquiry. He wrote a similar contrite letter after the 2018 public inquiry, but it proved to be empty words.

23. Owing to his past history of broken promises and failure to heed expert advice constructively given, I no longer have any confidence in the new assurances that he has made. I have reluctantly therefore come to the conclusion that Mr Burnett is not of good repute. I must therefore disqualify him under Schedule 3 of the 1981 Act from acting as a transport manager. Mr Burnett's shortcomings are not such as the mere passage of time will suffice to rectify: I am thus disqualifying him for an indefinite period, although he may regain his repute by retaking and passing the transport manager CPC examination.

Operator licence

24. Because I have concluded that Mr Burnett lacks financial standing and is not of good repute, revocation of the licence is mandatory under section 17(1)(a) and (b). I did consider whether to allow a period of grace in which to appoint a new transport manager (and finally produce the right financial evidence) but I concluded that in practice there was no point as Mr Burnett is clearly never going to submit to the authority of another transport manager."

25. The above paragraphs do provide some support for Mr Nesbitt's submission. Nowhere is the *Bryan Haulage* question posed in terms. When repute is considered without it (as in paras 21 and 22) and then the reasoning progresses to the mandatory character of revocation, there must be a real risk of such a ground being made good. Mr Nesbitt submits that the *Bryan Haulage* question must be asked, if not expressly, then at least in terms which "capture the gist" of the question.

26. Because the rationale for the *Bryan Haulage* test is the need for proportionality to be built in, as articulated in *Crompton*, what is needed to answer it is not just a recitation of factors which go to repute, but an evaluation of their severity and in particular whether they reach the bar set by the proportionality test. In our view, while the Traffic Commissioner has clearly identified a number of factors bearing on Mr Burnett's repute, we conclude that the *Bryan Haulage* question either was not asked or (and perhaps more likely given that it is something of a staple of Traffic Commissioners' work) cannot be demonstrated to have been asked and adequately answered.

Ground 3 Material error in approaching case on basis/finding that there was a 12-week PMI gap in the maintenance records for vehicle KY58WNT after 24 June 2019

27. As previously noted, planned maintenance inspections were to be carried out at 8-weekly intervals.

28. In the call-up letter dated 5th August 2019 Mr Burnett was told to bring inspection records "for the last 12 months". He understood that he was required to bring records for the last 12 months (i.e. ending on 5 August 2019) when attending the public inquiry on 18 September.

29. The latest inspection of KY58WNT, at the time the call-up letter was received, had been on 24 June. 8 weeks had not passed between then and the call-up letter.

30. Mr Burnett explained to the Traffic Commissioner (p163G) that he had "got all his evidence about six/seven weeks ago altogether" and just had not updated it.

31. The Traffic Commissioner found (Decision, [10]) that the most recent inspection of KY58WNT had taken place "12 weeks previously" (i.e. previous to the public inquiry), on 24 June 2019. There was no evidence available to him, either way, as to whether there had been an inspection of that vehicle between 5 August and 18 September 2019 and so the finding was in error of law and plainly wrong. We cannot say that it was, as also claimed, in error of fact as there is no material before us showing that the claimed inspection after 5 August 2019 was carried out and if so, when.

32. However, whilst the Traffic Commissioner was therefore in error of law on this point, there was evidence that the 8-week requirement had been missed earlier in the year in respect of a different vehicle (BU57NOH) and no explanation for that failure in the evidence. We would therefore not have set the decision aside on the basis of the error concerning KY58WNT alone.

Ground 4 Failure to undertake a proper balancing exercise
Ground 8 Coming to a decision that was disproportionate

33. It was in para 21 of his Decision that the Traffic Commissioner undertook a balancing exercise. Mr Nesbitt relies on the decision in T/2010/52 and 53 *Shaun Andrew Taylor*:

> "In 2007/104 *Steven Lloyd t/a London Skips* the tribunal re-affirmed that there are three main ingredients in a properly conducted balancing exercise. First, all the relevant factors should be identified. Second, each relevant factor should be assessed. And third, the analysis must indicate the weight or significance that has been attached to the relevant factors and reasons for the various judgments made should be given. Thus if one factor or group of factors outweighs another or others, some explanation should be disclosed in order to provide a rational explanation for the conclusion reached. The tribunal stressed the need for a Traffic Commissioner to make it clear that he had in mind all the factors, both favourable and unfavourable, which were capable of influencing the decision in question."

34. Mr Nesbitt provided in argument a lengthy list of positive features of the operator's case that were in evidence, a good many of which he said were not addressed by the Traffic Commissioner as part of his balancing exercise. It is not necessary to set them all out. We note from the opening of para 21 of the Decision that the Traffic Commissioner did identify some factors on the positive side of the balance, but of the factors raised by Mr Nesbitt we consider that at any rate the operator's apparently blemish-free regulatory history between 1993 and 2018 and the absence of any conviction or serious accidents during that period were positive features of the operator's case which ought to have been, and be seen to have been, weighed in the balance. It is entirely understandable that the Traffic Commissioner should have been concerned about the poor keeping of maintenance records and associated matters and the failure to honour assurances given to him in 2018, but in our view an undue focus developed on those issues, to the partial exclusion of factors needing to be included on the positive side of the balance.

35. It is not possible to say whether or not it was a proportionate decision, because the relevant factors were not weighed up.

36. The panel does not consider that Ground 8 adds materially to Ground 4 and Mr Nesbitt does not need it for his case to succeed.

Ground 7 Error in concluding that Mr Burnett would never submit to the authority of another transport manager without exploring that issue with the other manager and CPC holder present at the inquiry

37. Mr Nesbitt frankly acknowledges this is not his best point and the Panel agrees. In the course of the Public Inquiry evidence was obtained from Mr Burnett as to the scope for giving Mr Khan more extensive involvement and/or taking on someone else with CPC. Mr Burnett's answers did not suggest he was positively disposed to such a step; indeed, the opposite. The Traffic Commissioner saw and heard the

witnesses and on the evidence that was before him was entitled to come to the conclusion that “Mr Burnett is never going to submit to the authority of another transport manager.” Given that was the attitude of Mr Burnett, the owner of the business, what Mr Khan might have thought on this topic was of no great consequence.

38. The fact that, as we were informed at the oral hearing, a very recent application has been made for the approval of Mr Khan as transport manager is not material for the purposes of the appeal to us. The Traffic Commissioner to whom this case is remitted may wish to explore that aspect, including whether, even if Mr Khan is approved, Mr Burnett would step back to the requisite extent.

Conclusion

39. We can very well understand the Traffic Commissioner’s frustration not only that the operator’s approach to the role of record-keeping as an integral part of maintenance was unconventional and unsatisfactory but also, and significantly, that previous assurances had not been honoured. Unfortunately, from the beginning of the Public Inquiry things seemed to get off on the wrong foot and through to the decision an undue and largely exclusive emphasis remained on that aspect, causing errors of fact and law to be made. Many of the errors were significant and affected the conclusion both on financial standing and on repute. We accordingly set the Traffic Commissioner’s decision aside.

40. We considered whether there was any decision we could sensibly make other than remitting the matter and concluded that there was not. We do not have all the evidence before us that was brought to the Public Inquiry. Even if, despite that, we were prepared to make a decision, we cannot pre-empt consideration of the application for Mr Khan to be approved as transport manager nor without either Mr Khan or Mr Burnett before us can we realistically go behind the Traffic Commissioner’s assessment of the feasibility of approving the former as transport manager.

41. We recognised that remitting the matter for rehearing would inevitably lead to some delay. Whilst the operator would be continuing to provide services during that time, we did not consider that there was likely to be any unacceptable risk in his so doing. His prohibition rate was well below the national average (even if, to a degree, that may be a reflection of the size of vehicles being operated). There was no evidence to suggest that the operator was operating unroadworthy vehicles: when defects were found, they were advisory only.

42. We are very doubtful that the Public Inquiry will have felt fair to Mr Burnett. As noted above it got off on a wrong footing in relation to both finances and the supposed history of curtailment and never really recovered. It is therefore appropriate that the matter be considered afresh by a different Traffic Commissioner.

43. Mr Burnett should however not assume from the fact that his appeal has been allowed that he faces any less onerous regulatory regime. How that regime will be

applied to him as transport manager and to his business as operator is entirely a matter for the Traffic Commissioner to whom this case is now remitted.

C.G. Ward
Judge of the Upper Tribunal
Date: 3 January 2020