Appeal Nos. T/2019/54
NCN: [2020] UKUT 121 (AAC)

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER
TRAFFIC COMMISSIONER APPEALS

IN AN APPEAL FROM THE DECISION OF
Simon Evans, Traffic Commissioner for
The North West of England dated 17 July 2019

Before:

Her Hon. Judge J Beech, Judge of the Upper Tribunal
John Robinson, Specialist Member of the Upper Tribunal
Andrew Guest, Specialist Member of the Upper Tribunal

Appellants:

BRIDGESTEP LIMITED
TOM BRIDGE

In attendance: Tim Nesbitt QC instructed by Dyne Solicitors Limited on behalf of both Appellants

Heard at: Field House, 15-25 Bream's Buildings, London, EC4A 1DZ
Date of hearing: 10 December 2019
Date of decision: 4 March 2020

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that:

(i) To the limited extent that the Appellants' should have been given an opportunity to address the issues of route planning and driver self-employment prior to the TC coming to adverse findings on those issues, the appeals are allowed;

(ii) The Traffic Commissioner's findings of loss of good repute in respect of both Appellants along with the order of revocation in respect of the company and the order of disqualification of Mr Bridge are endorsed pursuant to paragraph 17(2)(a) of the Schedule 4 of the Transport Act 1985.

SUBJECT MATTER:- The use of "self-employed" drivers under contract for services; whether such contracts were consistent with the operator's responsibilities under the operator's licence; whether the transport manager had continuous and effective management of transport operations without the right to direct and control its drivers; adequacy of notice that adverse findings likely or possible on these issues

CASES REFERRED TO:- 2009/516 Farooq Ahmed & Haroon Ahmed; T/2018/72 St Mickalos Company Ltd & Michael Timinis; T/2018/27 Allen Transport Ltd; Daniel Allen.

REASONS FOR DECISION

1. This is an appeal from the decision of the Traffic Commissioner for the North West of England ("the TC") made on 17 July 2019 when he:

   a) Revoked the operator's licence of Bridgestep Ltd ("the company") and revoked its operator's licence pursuant to s.26(1)(h) of the Goods Vehicles (Licensing of Operators) Act 1995 ("the Act") with effect from 23.45 hours on 30 August 2019;
   b) Found that the company was no longer professionally competent by reason of sub-paragraph (c) below and revoked its operator's licence pursuant to s.27(1)(a) of the Act. A period of grace for the licence to continue without professional competence was granted to 30 August 2019;
   c) Found that the Second Appellant ("Mr Bridge") had lost his good repute as the transport manager of the company and disqualified him from acting as such for an indefinite period. The rehabilitation measure required was that Mr Bridge attend a suitable refresher training course for transport managers carried out by the RHA, FTA or other suitable independent body before seeking further nomination as a transport manager.
   d) Issued a formal warning to the company and Stephanie Bridge, the sole director of the company.

Background

2. The background relevant to the appeal can be found in the appeal bundle, the transcript of the hearing and the written decision and is as follows. The company was granted a standard national operator's licence on 5 January 2017 with an authorisation of ten vehicles and ten trailers. The sole director was Stephanie Bridge and her husband, Mr Bridge was the transport manager. Up until 18 January 2018, the company had a Green/Green OCRS score and up until the week prior to the public inquiry, a 100% first time MOT pass rate. The company also had a prohibition, offence and fixed-penalty free history.

3. On 18 January 2019, the trailer being pulled by vehicle PE64 WXP which was owned by the company and being driven by Kevin Wall, struck a railway bridge on Stockport Road, Romiley, Greater Manchester. Network Rail informed the TC of the bridge strike. The company did not. Whilst the company and Mr Bridge as transport manager responded to a request for information concerning the incident, the TC determined that both the company and Mr Bridge should be called to a public inquiry.

Public Inquiry

4. In attendance at the hearing which took place on 14 June 2019, was Mr Bell, a specialist transport solicitor, Mr and Mrs Bridge and Alex Bridge who was the company's assistant transport manager (CPC qualified). Mr Wall also appeared at a conjoined driver conduct hearing.

5. The essential circumstances of the bridge strike as identified by the TC in his written decision were as follows:

   a) On 18 January 2019, Mr Wall started his duty at the company's operating centre at about 06.00 and proceeded to the docks and then delivered to a location in Chesterfield. He then contacted the company for details of his next assignment.

   b) Staff in the company's Traffic Office identified a delivery to be made to Romiley, just outside Stockport. Mr Bridge told the TC that this was for an existing client but to a new delivery location.

   c) Mr Wall telephoned Mr Mitchell, another driver, for advice about the appropriate route to take. They settled upon a route using Google Maps, including the "Street View" capability and a specific app concerned with bridge information.

   d) Mr Wall admitted that he took a wrong turn during the journey which brought his vehicle into the Romiley area, near to the destination but on the wrong side of the bridge which would not have been encountered if he had followed the planned route.

   e) The bridge displayed signs prohibiting vehicles in excess of 14'9" (or 4.4m) from proceeding under it. The signage required drivers to stop if their own height exceeded the height displayed on the sign;

   f) Mr Wall was aware that the trailer displayed on its head board the height 14'10" and he had set his in-cab height indicator at 14'10" during his initial daily walk round check.

   g) By the time he had approached the bridge, Mr Wall had appreciated his error but panicked, feeling under pressure from other drivers who were being held up by him. He slowly pressed-on and the trailer became wedged under the bridge, its structure contorted and was left leaning precariously at an angle towards the centre of the road with the rearmost nearside wheels of the tractor unit and those of the nearside first axle of the trailer suspended in mid-air. The road was blocked off by the Police for recovery of the vehicle and the railway line had to be closed as a precaution, thereby delaying passengers on the commuter line from Manchester to New Mills and onward to Sheffield, with damage caused to the fabric of the bridge. No one was injured.

h) Subsequent investigations and measurements undertaken by the company disclosed that a trailer "*like that involved"* in the incident had a ride height of 15'3" not 14'10" and that trailer heights could vary because of the facility to adjust the coupling (or pin) height on the fifth wheel on the tractor units.

i) Mr Bridge told the TC that he had since become less clear about what he had then believed to be the actual height of the trailer. He conceded that the running height of the trailer on the day was not actually known and had not been measured.

j) Mr Wall was not regarded as an employee of the company. Despite not being an owner-driver, he was said to be driving for the company in a self-employed capacity. Indeed most, if not all of the company's drivers were treated as self-employed.

k) Mr Wall continued to drive for the company having undertaken an external driving assessment although his services were subsequently dispensed with when it was found that he had not disclosed a driving licence endorsement for using a hand-held mobile device whilst driving a company vehicle in February 2019.

6. During the course of his evidence, Mr Bridge told the TC that there had been a long-standing awareness within the company of the risks associated with bridge strikes, which had been raised with drivers. Checking trailer heights had been part of the driver's daily walk round check albeit that no actual measurement of trailer heights was possible, as measurement poles were not then in possession. Audits of driver walk round checks were already used prior to the incident which included reconciliation of marked trailer heights with the in-cab height indicators. Mr Bridge considered the incident to be "*freak accident".* He had not produced an accident investigation report, the paperwork which he had produced being more concerned with the company's insurance claim. He considered that incident was down to driver error in terms of his route and then failing to stop to get help before proceeding under the bridge. When asked if there was anything the company could have done to avoid the incident, Mr Bridge volunteered "*we could have planned the route for him".*

7. Mr Bridge told the TC that the reason why the company did not plan routes was because of the drivers' self-employment status which caused "*issues".* It was Mr Bridge's understanding that the company did not have any power to give the drivers any instructions on which route they were required to take, if they were to be regarded as self-employed. Instead, it was his expectation that the drivers would carry out their entire route planning themselves. A facility had existed on the run-sheet provided to the drivers at the beginning of their duty for "*special instructions"* to be drawn to their attention with regard to routes although there was no evidence before the TC that such instructions had been given either before or after the bridge strike.

8. The drivers continued to work subject to contracts for service, having formed individual limited companies. Mr Bridge averred that whilst the contracts did

address route planning (we can find no reference to this in the contract provided to the TC), the contract specifically stated the company did not "*supervise, direct nor control"* drivers. Mr Bridge acknowledged that the company needed to "*come away from"* the self-employed driver arrangements, in the light of what had happened. Whilst the change was under consideration, it had not taken place despite some 5 months having passed since the bridge strike. Some drivers had however been offered formal employment terms. The TC put to be Mr Bridge that the use of self-employed drivers was the wrong option bearing in mind the day to day responsibilities of the company to ensure that vehicles were deployed safely on the road. He had a group of drivers whom he felt unable to instruct or guide because the company had preferred an option that did not prioritise road safety. Mr Bridge did not disagree (whilst it was submitted during the appeal hearing that the latter part of Mr Bridge's evidence as summarised by the TC was not to be found in the transcript, we are satisfied that it is a summary of an exchange between Mr Bridge and the TC at page 282 of the transcript).

9. The TC put to Mr Bridge that in recent years, HMRC advice, which had been endorsed by the trade bodies, including the FTA and RHA, had emphasised the very limited circumstances in which drivers of large goods vehicles would legitimately qualify for self-employed status. That advice had referred to the risk of financial penalties, which might follow if it were found that the rules were being broken. The guidance stated that in road haulage, it would be rare for any person to be genuinely self-employed, unless they were an owner-driver carrying the risk himself or herself about the availability of work. Mr Bridge nevertheless maintained that the contractual relationship he had with his drivers was a legitimate one.

10. Mr Bridge set out the steps that the company had taken since the incident:

    a) A reminder issued to drivers about bridge strikes including laminated sheets and verbal daily briefings given to drivers;

    b) Driver defect reports to include trailer height as an issue (although on the sheet provided to the TC dated 12 June 2019, the driver had failed to fill in the required section);

    c) Forward facing cameras and trackers had been fitted to all vehicles, albeit this was an insurance requirement on the company's policy;

    d) Trailer height poles had been purchased and were in use;

    e) A decision had been made to standardise all pin heights of fifth wheel settings across the fleet;

    f) A request had been made for a training presentation on bridge strikes to Network Rail;

    g) The company had joined the FTA;

h) Mr Bridge had booked, along with other staff to attend the OLAT course and would also be attending a two day transport manager refresher course;

i) He would be giving up his role as transport manager on another licence in the near future;

11. Mrs Bridge told the TC that she was predominantly concerned with the accounts and finances of the business. She and Mr Bridge had worked hard to build up the business. She went through the range of regulatory action available to the TC and how each would affect the company. She stated that she had formally disciplined her husband as a result of the bridge strike. The company had implemented a range of policies and procedures with the help of Peninsular, a human resources company including a Driver's Handbook (see below). She considered that the reason why the company was before the TC was that the HMRC guidance prohibited the company from route planning and had stipulated that it was the driver's responsibility to collect or deliver and was responsible for completing the task "*unaided"* and "*unsupervised"* and that was "*the conflict"*. They now saw self-employment as a barrier to being compliant. The HMRC "*legislation"* had been "*very confining"* in what they were able to do with the drivers. Because of financial limitations, the company was "*restricted"* from taking on employed drivers because of the liability to pay national insurance contributions of 13.8%, which "*bumps up"* the cost of a driver along with pension contributions. It was all expense and the company was only five years old. Whether the drivers were really self-employed was "*another debate".* The company owned all of the vehicles driven by the "*self-employed*" drivers and the reality was that all of the drivers either worked for the company or for the driving agency which Mr and Mrs Bridge also operated.

12. At the conclusion, Mr Bell summarised the evidence that the TC had heard about the bridge strike and the steps taken afterwards. He pointed to the company's clean bill of health in compliance terms and submitted that any regulatory starting point should be at the lower end of the scale. Mr Bell failed to make any submissions upon the evidence the TC had heard about the legality of the contract for services used by the company and how the provisions of those contracts had prevented the transport manager and the company from effectively and continuously managing the transport activities of the company's operation.

13. Following the hearing, the company provided the TC with a copy of the contract for services used to contract with its drivers. The following features of the contract are of note:

a) The nature of the services provided by the "*contractor"* i.e the driver, were not particularised at all;
b) The contract made clear that the company was not liable for sick or holiday pay or for pension contributions and was not liable for income tax or national insurance;
c) The contractor had the "*unfettered and unlimited right, at its absolute discretion to send a substitute or delegate to perform the works or to hire*

assistance to complete the works" without the agreement of the company, with the driver being absolutely responsible to ensure that the substitute had relevant qualifications, the correct driving licence and we assume, sufficient drivers' hours to complete the task. The substitute also had to meet the company's insurance criteria;

d) The contractor *"will not work under the direction and control of the company and is free to use their own initiative in completing the agreed works".*

14. It is appropriate at this stage to say something about the Drivers Handbook referred to by Mrs Bridge in her evidence. First of all, it only related to employee drivers. Secondly, it was clearly a document that was not in active use by the company as it contained no references to the company and had not been personalised in any way for use by the company. By way of example, where the company's name should appear in various parts of the document, the phrase "*Error! Bookmark not defined"* appeared. So, by way of example, on page 34 it stated: "*Our vehicles must not be used for any business or purpose of any kind except that of Error! Bookmark not defined"* It was simply a standard document produced by Peninsula. Thirdly, it was implicit in the evidence of Mrs Bridge that this handbook related to all drivers. However, sections within it were inconsistent with the purported self-employment status of the drivers and in particular, the section entitled "*Authorised Drivers"* which reads:

"*No one will be authorised to drive any of our vehicles unless they have produced their driving licence for validation or given us the information required us to check for ourselves at the Driver and Vehicle Standards Agency (DVSA) web page .. ".*

This section is inconsistent with the clause in the contract for services set out in paragraph 13(c) above.

The Traffic Commissioner's decision

15. In his written decision, the TC found Mr Bridge to be open and transparent although there was a "*distinct lack of application of practical knowledge"* for example, his lack of awareness of the advice provided by Network Rail and in particular, about route planning. The TC quoted at length from the guidance and emphasised the following:

"*The risk of bridge strikes should be assessed based on the height and width of the vehicle …*
Routes should be planned in advance, and routes selected to eliminate the risks of bridge strikes .."

He made the following findings:

a) Whilst the primary responsibility for the occurrence of the bridge strike was that of the driver, the operator's failures significantly contributed to the incident;

b) Whilst the fact that the consequences of the incident in terms of harm caused were at the lower end of the scale, that was more a matter of good fortune than judgement;
c) The operator's claimed level of understanding of the issues surrounding bridge strikes was superficial and not based on comprehensive risk management strategies designed to identify, overcome or at least minimise the risk of their occurrence;
d) The operator and its transport manager abrogated their responsibility for route planning to individual drivers in a negligent manner;
e) The operator's acceptance that its decision to take on drivers as purported self-employed contractors, which was clearly against the current advice offered by HMRC, led directly to its conclusion that it was disabled from directing or guiding its drivers so that the risk of encounter with low bridges could be avoided;
f) The operator's readiness to prefer a situation where its drivers were self-employed but judged incapable of control or direction, over one where they would otherwise be employees and then capable of such control or direction demonstrated a seriously faulty or cavalier approach to business;
g) This failure to direct drivers would have increased a road safety risk to the public, when it might otherwise have been managed, if they were employees;
h) The contracting of self-employed drivers, when their status was properly that of employee, was anti-competitive and prejudicial to fair competition in the industry. The payment of national insurance contributions in respect of such drivers, and the requirement to offer, enrol them in and contribute to pensions schemes would be avoided as would the duty to plan for their statutory paid holiday entitlement;
i) Whilst the operator accepted at the hearing that there was a compelling need to change the nature of its employment relationship with its drivers, no decisive action to correct the position had been made prior to the hearing;
j) Whilst practical changes had been made to systems and procedures, the new forms produced at the hearing did not serve to demonstrate that thorough and effective route planning was being undertaken. There was no evidence for example of identification of all low bridges near to the operating centre or in the proximity of the typical long-term delivery locations. No attempt had been made to identify safe secondary routes to such locations to be used in the event of a road closure or other unavailability of a typical route.
k) The operator had no adverse history and so this incident was the first, significant failure.

16. The TC considered the Senior Traffic Commissioner's Statutory Document No.10: The principles of decision making and the concept of proportionality including Annex 3. He found that this was a serious case where the risk was a substantial one. The decision of the operator and transport manager that drivers could alone carry the risk associated with route planning was one lacking judgement and was "*wholly reprehensible".* The seriousness of the position was compounded by the competitive advantage achieved at the same time because their staffing overheads were reduced. The position was further compounded by the failure to resolve the issue prior to the public

inquiry. A real threat to road safety was reflected in this misconduct and continuing failures. Having balanced the appropriate steps that had been taken prior to the hearing and the hitherto impressive compliance record, the absence of regulatory action and the embarrassment at being called to a public inquiry, the TC nevertheless concluded that the company's repute was lost. Critical in that decision was the company's failure to put itself in a position where the likelihood of a further bridge strike was reduced so that it was unlikely. Whilst the drivers could not be given guidance and direction on routes to be taken, the risk remained heightened and was dependent on the skill and competence of individuals not charged with the responsibility for continuous and effective management of transport operations. The company could not be trusted to achieve licence compliance with such a state of affairs. The TC then went onto answer the Priority Freight question in the negative and the Bryan Haulage No.2 question in the positive.

17. As for Mr Bridge, the TC determined that he was a *"significant decision maker in the business with a role extending far beyond that of the TM".* He was entirely in support of the arrangements whereby responsibility for route planning was surrendered to drivers in order to protect their supposed employment status. Whilst the TC afforded Mr Bridge some credit for appreciating that the self-employment position of the drivers needed to be brought to an end, he had not carried it through. That was the least the TC would have expected. It followed that his repute was lost. There needed to be a period during which Mr Bridge could reflect on events and how any repetition could be avoided. Mr Bridge was disqualified indefinitely with the rehabilitation measure provided in the terms set out in paragraph 1(c) above.

18. The TC delayed the revocation of the licence for six weeks so that a new application for a licence could be submitted. The application would need to demonstrate that those making key decisions about the company were appointed as directors and that the drivers were manifestly employees of the company unless they clearly fell within the circumstances described by the HMRC. Further, the company would be required to file its plans to implement the Network Rail guidance for transport managers about avoiding bridge strikes. Such an application would, other things being equal, be capable of being granted an interim licence without any hiatus between termination and the start of a new licence.

The appeal to the Upper Tribunal

19. At the hearing of this appeal, the Appellants were represented by Mr Nesbitt QC who provided a skeleton argument for which we were grateful. His submissions can be summarised in this way:

    a) No notice was given by the TC to the Appellants of the possibility of any adverse findings being made about the responsibility for route planning being "*abrogated"* by the operator to the drivers. It was accepted that this issue could not have been included in the call up letter, not least because, in his email response to the TC's request for information about the bridge strike, Mr Bridge had stated "*.. we are actually shocked that it has happened as we are extremely strict about planning routes. The driver in*

question had actually planned his route with us and another driver .." which gave the clear (and false) impression that either the company and/or Mr Bridge did play a part in route planning. Nevertheless, once the TC was aware that the company did not play any role in route planning and having heard evidence from Mr Wall and Mr Bridge that they as drivers, had never been provided with route planning by any of their previous employers, the TC should have made clear during the public inquiry, that the issue needed to be addressed. Mr Bell did not appreciate the importance of this during the course of the hearing and if the importance of it had been raised by the TC, then Mr Bell would either have been able to address the issue or request an adjournment in order to do so. Mr Nesbitt QC made an application to adduce new evidence in the form of a number of slides making up a Fleet Operator Recognition Scheme Tool Box Talk on route planning and in particular a slide entitled *"Who needs to plan the journey?"* which reads:

"The responsibility of planning journeys can lie with:

- *The transport office (if the company has one)*
- *Another role within the company*
- *Or in some circumstances, this could lie with you, the drivers".*

The case of *T/2018/27 Allen Transport Limited; Daniel Allen* was relied upon in support of the application.

b) The same complaints are made of the TC's approach to the issue of the drivers' purported self-employment. Mr Nesbitt QC again accepted that the issue could not have been raised in the call up letter because the TC was unaware of the position, not having been alerted to it in Mr Bridge's email response to his request for information concerning the bridge strike. However, once the issue was raised, the TC should have made clear that it was an issue that needed to be specifically addressed as it was possible that adverse findings on it may lead to the revocation of the licence and the loss of good repute. If the TC had done so, Mr Bell would have addressed the issue and would have requested an adjournment to produce further evidence or advice from an accountant. Mr Nesbitt QC referred to the case of *T2009/516 Farooq Ahmed & Haroon Ahmed* and submitted that the "*acid test was fairness".*

c) The TC was plainly wrong in concluding that the company's conduct in relation to the bridge strike amounted to *"deliberate or reckless acts that have compromised road safety".* These are the words used in the STC's Statutory Guidance No.10 to describe conduct which justifies a regulatory starting point of "*severe".* It was too harsh to place the Appellants into that category as the bridge strike was caused by driver error. There was nothing wrong in drivers' planning their own routes and if the Tribunal was satisfied to the contrary, such a failing could not be categorised as a "*deliberate or reckless act endangering road safety".* Further, whilst it may have been a misjudgement to adopt an arrangement of purported driver self-employment, that did not have any consequences in road safety terms or otherwise.

d) The TC was plainly wrong in concluding that the "Priority Freight" question should be answered in the negative and the "Bryan Haulage" question answered in the affirmative. The company's history had been exemplary and robust measures had been put in place in the aftermath of the bridge strike. The company's systems were good and the Appellants had demonstrated a willingness to address issues and in the circumstances, they could be trusted to operate compliantly in the future. They did not deserve to be put out of business. The reason why the company had not changed the employment status of the drivers in the five months between the incident and the hearing was because "*there are two parties to the arrangement".*

e) The TC erred in revoking the operator's licence and disqualifying Mr Bridge without giving specific warning or notice during the hearing that he was considering such action. The case of *T/2018/72 St Mickalos Company Limited & Michael Timinis* was referred to. Mr Nesbitt QC described Mr Bell's closing submissions as being "*pitched towards a low-level sanction"* rather than addressing the issues of good repute and disqualification.

The Tribunal's Interim Order following the appeal hearing

20. At the conclusion of the appeal hearing, we were satisfied that as a result of the way in which the issues of route planning and driver self-employment had been brought to the attention of the TC, there had been a need for the TC to make clear to Mr Bell that it was possible that significant adverse inferences could to be drawn in relation to them so that Mr Bell could determine how best to deal with them. In considering how to dispose of the appeal and being mindful of the Upper Tribunal's power to substitute its own decision for that of the TC by virtue of paragraph 17(2)(a) of Schedule 4 of the Transport Act 1985, the Tribunal issued an Interim Order on 11 December 2019 requiring the Appellants to file any additional written submissions upon the issues of driver route planning, driver self-employment and good repute with any additional documentation that would have been placed before the TC if the Appellants had either been invited to do so or had requested further time to do so.

21. Further submissions and documentation were received on 3 December 2019. The documents included:

a) A further statement from Mr Bridge reiterating his experience within the transport industry and repeating the evidence he gave to the TC that in his experience, operators delegated route planning to their drivers. He further repeated his evidence that the use of self-employed drivers was common place within the haulage industry and that it was perfectly proper for the company to have used contracts for services and that expert advice had been taken (not attached or otherwise verified) which confirmed that there was a "*fine line"* between self-employment and employment and that a driver must not be engaged in a way which made them under the company's "*supervision, direction and control".* Mr Bridge understood that route planning was one aspect that HMRC expected self-employed drivers to be free to determine. However, all of the drivers were nevertheless required to follow the company's procedures and the company was careful

to collect tachographs and would regularly monitor the drivers walk round checks;

b) A number of statements from HGV drivers and CPC holders describing their experiences of route planning as drivers within the industry;

c) Various documents published by different bodies including the DVSA, Kent County Council and the Welsh Government referring to the responsibility of drivers to plan their routes;

d) Various downloads from internet job information sites which describe HGV drivers' responsibilities including planning of routes;

e) An article from the Transport Operator publication dated November/December 2019 highlighting a presentation given by TC Rooney at the FTA conference in which he warned that bridge strikes could put operator licences at risk and had commented that he was "*surprised"* by how few operators gave any kind of routing instruction to their drivers to help them avoid low bridges;

f) Further submissions drafted by Mr Nesbitt QC.

We note that the Appellants have failed to produce any confirmation from either an accountant (as envisaged by Mr Nesbitt QC in his submissions) or from the HMRC that the manner in which the company was utilising drivers via a contract of services was compliant with the HMRC rules on self-employed drivers.

Discussion

22. We do not consider that the additional information now provided to the Tribunal adds to the evidence before the TC to any material extent if at all.

23. Dealing first with route planning, we do not read the TC's decision as amounting to a prohibition on the delegation of route planning to drivers and it is clear from the various documents produced, including the FORS Toolbox Talk, that route planning can be undertaken by drivers. However, it is incumbent upon the transport manager and the company to ensure that the company's vehicles are operated without risk to road safety and in particular, that the risk of bridge strikes, which could have catastrophic consequences, should be assessed and routes planned in advance to eliminate that risk. It is of note that Mr Bridge implicitly accepted that responsibility when he asserted in his email to the TC that the company took its role with regard to route planning "*very seriously"* and was "*extremely strict about planning routes"* and that Mr Wall had "*actually planned his route with us and another driver"*. That of course was not the case but the fact that Mr Bridge asserted to the contrary, undermines the Appellants stance that operators are not obliged to have any input into route planning. We of course accept that Mr Wall did plan his route with another driver and the subsequent bridge strike was a result of his error and that if Mr Bridge's assertion in his email had been correct, then

severe regulatory action would not have been justified on this ground alone. But his assertion was not correct.

24. There is another concerning feature of the evidence concerning route planning. If a company is going to rely solely upon its drivers to plan routes which eliminate the risks to road safety, including bridge strikes, the drivers must be provided with adequate information about the vehicles they are driving. It is all very well emphasising that the company's drivers were required to check the height of the trailer scribed on its headboard and that regular compliance checks were made to ensure that the drivers set the in-cab height indicator to that height, but if that height is wrong and/or does not represent the actual ride height of the trailer, then that is a different matter. If, as it transpired in this case, an operator is not aware of the actual ride height of its trailers, then how can a driver safely plan his/her route? This failing was a serious one and in the case of Mr Wall, he was unaware that his trailer's ride height was 15'3" rather than 14'10" as recorded on the trailer headboard. Even if he had avoided the bridge in question on 18 January 2019, there remained an avoidable *"accident waiting to happen".*

25. Turning then to the employment status of the drivers, whilst the Appellants now rely upon documents showing that many LGV drivers classify themselves as self-employed within the UK, that information is of little assistance without an analysis as to which sectors of the industry those drivers are deployed, for example, how many are employed in parcel delivery? The legitimacy or otherwise of a driver's self-employment status is fact specific and as the Factsheet produced by the RHA on self-employment contained within the bundle makes clear:

"*Unless they are an owner-driver, it is very rare for a lorry driver to be legally "self-employed"."*

The company's drivers in this instance were not owner-drivers and the clauses in the contract which were designed to give the drivers a degree of control over the vehicles provided to the drivers by the company and over their work, for example, by being entitled to provide another driver as a substitute, were fundamentally undermined by the Driver's Handbook. We repeat, there is nothing before the Tribunal to confirm that the arrangement between the company and its drivers was compliant with the HMRC guidelines. In his witness statement, Mr Bridge avers that he was aware of legal issues in relation to the arrangement the company had with the drivers as a result of a number of "*blue chip"* companies enquiring as to whether the company was "*HMRC compliant"*. This was in 2018. Paragraph 21(a) above summarises Mr Bridge's evidence as to the company's response to those inquiries. It was unsatisfactory.

26. We are satisfied that the TC's determinations about the company's arrangements with its drivers are beyond criticism. This was a bad case in which the company and transport manager had made a conscious decision to enter into an arrangement with the company's drivers which was highly questionable if not a sham. The reasons for doing so were anti-competitive being as they were, concerned solely with the cost of employing the drivers

and by reducing that cost, gaining a competitive advantage over other compliant operators. Whilst the vast majority of new operations make the right decision to employ their drivers, paying national insurance, pension contributions, holiday and sickness entitlement, these Appellants did not do so. The consequence of that decision was that the company and the transport manager felt unable to give any instruction to drivers whether it be in relation to route planning or otherwise and as a consequence, were unable to have continuous and effective management of the transport operation. That is plain and obvious from the contract of services that was later provided to the TC with some of the clauses set out in paragraph 13 above. In short, the company and transport manager had abdicated their responsibility for ensuring that the transport operation was compliant and safe in order to save money. This was the real mischief that was revealed during the public inquiry.

27. The seriousness of the conduct of the Appellants along with their failure to rectify the position in the five months leading up to the public inquiry meant that both Appellants rightly lost their good repute and that was a proportionate response in the circumstances. The company deserved to be put out of business and in view of its failure to change its arrangements with its drivers, it was entirely proper that the licence be revoked. The TC's choice of categorisation for the purpose of identifying the appropriate starting point for regulatory action was not plainly wrong. Neither the revocation or the inevitable order of disqualification of Mr Bridge along with a low level rehabilitation requirement are open to criticism.

Conclusion

28. The Appellants should have been given an opportunity to address the issues that arose in the public inquiry and to that limited extent, these appeals succeed. However, having considered the further evidence provided by the Appellants, we are satisfied that the TC's decision was not plainly wrong in any respect and that it is unnecessary to substitute our own decision for that of the TC. We therefore simply endorse his decision in respect of both Appellants.

Her Honour Judge Beech
4 March 2020