



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

**NCN: [2021] UKUT 0297 (AAC)
Appeal No. T/2021/29**

Appellant:

ZEESHAN AURANGZEB

DECISION OF THE UPPER TRIBUNAL

**Her Honour Judge Beech, Judge of the Upper Tribunal
Stuart James, Specialist Member
David Rawsthorn, Specialist Member**

Decision date: 23 November 2021

ON APPEAL FROM:

**Tribunal: Gerallt Evans, Traffic Commissioner for the North West of
England**
Tribunal Case No: OC1143571
Tribunal Venue: Field House, 15-25 Bream's Buildings, London, EC4A 1DZ
Date: 12 October 2021

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



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Appeal No. T/2021/29

On appeal from the Decision of Gerallt Evans, Traffic Commissioner for the North West of England dated 11 March 2021

Zeeshan Aurangzeb

Appellant

Before: Upper Tribunal Judge Her Honour Judge Beech
Specialist Member of the Upper Tribunal Stuart James
Specialist Member of the Upper Tribunal David Rawsthorn

Hearing date: 12 October 2021

Representation:

Appellant: Eliot Willis, solicitor of NA Legal Transport Solicitors on behalf of the Appellant

DECISION

The appeal is ALLOWED to the limited extent that the Traffic Commissioner's determinations upon the issues of disc lending and director disqualification are set aside and remitted for reconsideration before a different Traffic Commissioner following a further call up letter

Subject Matter: Loss of good repute as transport manager and director; maintenance; disc lending

Cases referred to: None

REASONS FOR DECISION

1. This is an appeal from the decision of the Traffic Commissioner for the North West of England ("TC") dated 11th March 2021 when he found that Zeeshan

Aurangzeb (“ZA”) had lost his good repute as a transport manager and disqualified him from acting as such for a period of two years with immediate effect under Schedule 3 of the Goods Vehicles (Licensing of Operators) Act 1995 (“the 1995 Act”). He further disqualified ZA from holding or obtaining any type of operator’s licence in any traffic area and from being a director of any company holding an operator’s licence under s.28(1), (4) and (5) of the 1995 Act for the same period.

Background

2. The background to this appeal can be found in the appeal bundle and the TC’s written decision and is as follows. Asons Transport Limited (“ATL”) was granted a standard national operator’s licence authorising five vehicles and five trailers in March 2016. At that stage, ZA was one of three directors along with his brother, Faizan Aurangzeb and Umar Altaf. Faizan Aurangzeb and Umar Altaf resigned their directorships in October 2016 and Mohammed Hamid was added. He resigned in December 2017, leaving ZA as the sole director until 2nd July 2019 when Mahmood Anwer became the sole director of the company and ZA, the company secretary. Then on 21st October 2019, ZA was once again named as a director, resigning on 18th June 2020.
3. The changes in directorships in 2016 were not notified to the TC until July 2017. In his evidence to the TC, ZA stated that these failings were the result of a lack of understanding on his part of what was expected. His awareness had improved after he became a qualified transport manager in July 2017. However, the change in ZA’s status as a director in 2019 was not notified to the TC at all and his removal as a director in June 2020 was only notified to the TC on 4th February 2021, two days after the call up letter had been issued. ZA attributed these failures to a continuing lack of awareness and difficulties making the changes on-line. In his decision, the TC noted that ZA had not encountered any difficulties in updating the online licensing system with the numerous changes in vehicles and questioned why director changes could not have been notified at the same time.
4. ZA became the nominated transport manager (“TM”) for ATL on 12th April 2019, remaining in post until 2nd March 2021, when Mr Anwer removed him as TM a week before the public inquiry. ZA was unaware of his removal. He had been paid £600 per month by the company but had not received any payment since November 2020.
5. In June 2019, ZA was appointed as TM for the standard international operator’s licence held by Frontier Transport Limited (“FTL”) authorising five vehicles and five trailers.
6. On 8th February 2020, a vehicle (PJ10 EOW) specified on the licence of ATL was issued with a delayed PG9 for excessive movement in the steering joint of axle 1. The trailer it was hauling (C226298) was issued with an immediate “S” marked PG9 for an excessively worn brake pad causing the backing plate to come into contact with the brake disc resulting in impaired braking efficiency and a delayed PG9 for a leak in the suspension unit of the steering joint on axle 1.

7. The “S” marked PG9 triggered an unannounced maintenance investigation which took place on 11th March 2020, conducted by Vehicle Examiner (“VE”) Wylie. At the time, the company had five vehicles specified on its licence which ZA asserted were hired from TAF Transport. No hire agreements were produced. VE Wylie inspected one vehicle and issued an advisory notice. He noted that ZA (who was his sole point of contact) was co-operative throughout. The investigation was marked “unsatisfactory”. The main reasons were:
 - a) ZA asserted that the maintenance of the vehicles and some of the trailers was carried out by TAF Transport. However, he did not produce a maintenance contract. The listed maintenance contractor on the licence was MAN Trucks, Manchester;
 - b) Trailer inspection sheets had been used to record vehicle preventative maintenance inspections (“PMIs”) of the tractor units on occasions;
 - c) The driver defect reporting system (“DDR”) was weekly rather than daily and when undertaken, registration numbers and mileage were missing on occasions;
 - d) One recently acquired vehicle had missed a PMI and another older vehicle had been listed as VOR for a period of twelve months as a result of an engine problem. However, it had travelled 46,724kms between the relevant PMIs. ZA told VE Wylie that the vehicle had been loaned to another operator following its repair. There was no record of this loan;
 - e) An “S” marked PG9 had been issued. ZA asserted that the trailer was hired and that the hire company was responsible for its maintenance. However, the drivers were instructed to carry out a visual walk round check whenever they picked up a hired trailer or vehicle. ZA maintained asserted that in any event, the driver would not have been able to identify the defective brake on his walk round check.
8. VE Wylie noted that in his (undated) PG13G RFE Response, ZA stated that the company had removed all of its specified vehicles from its licence but that when others were acquired, the company would use its own maintenance provider.
9. Having considered VE Wylie’s report, the TC determined that the matter could be dealt with by way of further undertakings being attached to the licence as follows:
 - a) The operator will arrange for all authorised vehicles to have a rolling road brake test every 3 months including the MOT; the results to be recorded and records kept for at least two years;
 - b) Safety inspections will be pre-planned and never more than six weeks apart. The PMI reports to be fully and properly completed, showing rectification and be retained for at least two years;
 - c) (In summary) - by 31st October 2020, director Mahmood Anwer will attend an OLAT course or will participate in a virtual online OLAT course which is run by a trade association (FTA or RHA) or another training provider;

- d) (In summary) – the operator will arrange an independent audit of its systems for maintenance and drivers' hours to be carried out by the RHA/FTA or other trade body in the month of March 2021.
10. On 26th March 2020, vehicle YA13 NGV received an immediate PG9 for a deep cut to a tyre with cords exposed (axle 1 nearside) and then on 19th October 2020, trailer C454179 was issued with an immediate PG9 for a tyre tread worn beyond the legal limit (axle 1 offside).
11. On 18th November 2020, Traffic Examiner ("TE") Russell and TE Belton undertook a Desk Based Assessment ("DBA") of ATL's compliance with the requirements of its licence. By this stage, the operator had two vehicles specified on its licence. The assessment was marked "unsatisfactory" for the following main reasons:
- a) Driver walk round checks and driver defect reports:
- There was no evidence of walk round checks being undertaken on trailers as they were not recorded on the available defect reports;
 - There were no defects reported on any defect report for the specified period, yet a PG9 had been issued for a trailer with a tyre below the legal limit which indicated a failure in walk around checks systems;
 - There was no evidence of quality assurance audits taking place on the DDR system;
 - There was no evidence of a system that addressed non-compliance as there was no evidence to show investigations had been conducted into the two PG9s issued for tyre defects;
 - ATL was required to provide driver defect reports covering a period of one month. Three reports were missing for PF19XRW and eight reports were missing for WN14YHA;
 - There was no evidence of fluid levels (AdBlue, diesel etc) being checked;
 - Three out of the four PMI sheets supplied were missing their back page. As a result, the VE was unable to determine if any driver detectable defects had been identified but not recorded on the driver defect reports. The PG9s however, indicated clear failings in that system;
 - The system was clearly failing.
- b) PMI and maintenance records:
- As only the front side of three of the four PMI records had been supplied, it was impossible to determine who had completed the inspections;
 - There were no brake print outs produced for any PMIs supplied;
 - The TEs were unable to say whether PMIs were being completed correctly;
 - There had been a stretched interval between PMIs of 62 days for WN14YHA;

- The one full PMI report supplied recorded a defective light. There was no driver defect report recording that defect;
 - Only two PMIs were supplied for two trailers. ZA asserted that the operator only provided traction and that the trailers hauled were not in the operator's possession for longer than a day;
 - There was no evidence to support ZA's assertion that a tyre company checked tyres on a fortnightly basis with immediate repairs of defects taking place and the two PG9s issued for tyre defects in March 2020 called his assertion into question;
 - The six weekly wall planner supplied did not show VOR'd vehicles and there was no evidence that VOR signs were placed in vehicles;
 - There was no evidence to support ZA's contention that he conducted quality assurance checks on the vehicles and drivers.
- c) Training:
- There was no evidence of staff training;
 - Staff handbooks existed but there was no evidence of additional training;
 - ZA stated that new employee inductions took place and provided a check list but there was no evidence of what the training involved.
- d) Driver Licence/CPC/ADR:
- There was no evidence to support the assertion that driving licence checks took place every three months;
 - There was no evidence of a system to check driving licences;
 - Driver CPCs were checked at the start of their employment but no explanation or evidence was provided to show how CPCs were tracked. The operator did arrange CPC training for drivers;
 - There was no evidence of storage arrangements of driving licence details.
- e) Drivers Hours Systems:
- 89 records checked for two drivers. Infringements: driving without a card x 3; power supply interruption x 1; daily rest offence x 1; weekly rest offence x 1. A Drivers' Hours PG9 had been issued and the driver fined in February 2019. There was no evidence as to what action was taken as a result and no evidence was supplied to show a disciplinary procedure;
 - Stated download interval of 28 days at most. The interval had been stretched by 32 days and 31 days.
- f) There was no evidence of physical training on load security or overloading;
- g) There was no evidence that internal audits of system compliance had been carried out although an audit had been arranged with Junction 17

Defensive (*sic*) Driving on 16 November 2020 (two days before the DBA conducted by the VEs).

ZA responded to the above criticisms. He maintained that ATL used rental vehicles only supplied by FTL and Jaxon Wolf Ltd. TE Belton noted that the vehicles in fact appeared to be passed between the companies as inspection records for vehicles used by ATL rarely received safety inspections that had been arranged by ATL. The stretched interval between PMIs of 62 days indicated that the vehicle's PMIs had not been correctly planned. Apart from one PMI conducted by Renault Trucks, TE Belton was unable to determine who had conducted the PMI inspections supplied and brake test results had not been provided. Renault Trucks is not a listed maintenance provider and as a result, it was likely that the PMIs on other vehicles used by the company had not been completed by a listed maintenance provider (Man Trucks and Prescotts Garage). Invoices were also supplied from Scania. Copies of the maintenance contracts were requested but not provided and it appeared that maintenance was outside the company's control and the relevant contracts did not exist. Moreover, ATL appeared to have no control over the maintenance and condition of the trailers. This was highlighted by the PG9 issued for the trailer on 19th October 2020. The explanation given by ZA was that the company simply moved the trailer from an Amazon depot to a repair garage on that day and did not haul it thereafter. The explanation given indicated that ATL had failed to request information as to why the trailer was being moved to a garage and demonstrated "*severe failings in drivers walk around checking procedures. It was also noted that no margin for trailer use was authorised on the operator's licence*". Whilst ATL did supply evidence of internal spot checks for four vehicles (one per month), that evidence did not alter TE Belton's conclusions that the driver defect reporting was inadequate.

12. TE Belton concluded that ATL was failing to accept any responsibility for the condition of vehicles and trailers because they were rented or not owned by them and therefore they should not be held responsible for the maintenance condition whilst being operated under its licence. TE Belton considered that the company was failing to ensure that adequate measures were being taken to ensure vehicles being used were safe and roadworthy and were unable to produce adequate PMI records or evidence of systems in place to ensure that the vehicles and trailers were operated safely. In the absence of any reference to trailers on the driver defect reports it was not unreasonable to assume that the trailers were not inspected or maintained by ATL.
13. ATL's response to the request for tyre and wheel nut retorquing records also indicated that they were not aware of the correct procedures and record keeping as the only record supplied was a tyre invoice for adjusting the pressures on a vehicle and no records of wheel nut retorquing were provided. The VOR procedure was inadequate.
14. Having supplied an inadequate forward planner for 2020, ZA sent an excel spread sheet. This too was inadequate as it failed to record all vehicles that had been listed on the licence during 2020. A second spreadsheet for 2021 was also supplied for five vehicles although it was intended that these would be removed from the licence in February 2021.

15. As for driver training, the company provided a list of driver training conducted on 21 September 2019 for fourteen drivers, none of whom could be linked to the company at that time.
16. The company was in breach of its undertakings to the TC. There were no brake reports on PMIs supplied save for one vehicle on its first inspection. PMI planning was poor and did not cover all vehicles used. The PMI reports supplied "*did not appear to be owned by the company*". Finally, Mr Anwer had failed to attend an OLAT course by 31 October 2020 and only did so after a reminder from the OTC on 23 November 2020. No explanation had been given for the delay.
17. It was clear that all of the above failings were due to "*poor administration processes*" and ATL had failed to provide suitable assurances concerning the observations made. Moreover, whilst assurances were given following the previous DBA in March 2020, no action was taken at that time. The current assurances could not be relied upon.
18. TE Belton asked to see a copy of the audit undertaken by Junction 17 Defensive Driver Training Ltd on 16 November 2020. The auditor's findings were similar to those of the VEs including a finding that there was no evidence of any meetings between Mr Anwer (Director) and ZA as TM to discuss compliance with the licence and to demonstrate continuous and effective control. The auditor also noted that ZA was unaware of the requirement to undertake continuing professional development and that there was no evidence of internal audits, driver training on DDR and found little evidence that this was taking place. He concluded that ZA had a "*basic understanding*" of the required standard of transport management and that he needed additional training. The vehicle maintenance system was reactive and did not comply with DVSA guidance.
19. By separate call up letters dated 3 February 2021, ATL and ZA were called to a public inquiry on 10 March 2021. The letters notified the parties that the hearing was to take place via Microsoft Teams as a result of "*the new restrictions announced recently*" and the parties were advised that they must contact the OTC if they could not participate in a virtual hearing. They had until 17 February 2021 to provide email addresses. On that date, ZA notified the OTC that he was attending remotely and that he was to be represented by Anton Balkitis. On 23 February 2021, Mr Willis notified the OTC that he was representing ZA. He did not raise any objection to the public inquiry taking place by Microsoft Teams.
20. The call up letter listed the documents which were to form part of the public inquiry brief. These were either maintenance related or related to ZA's nomination as transport manager on various licences. There was no mention in the letter of any concerns the TC may have had about disc lending. The only reference which could be said to touch upon the issue read as follows:

“The Traffic Commissioner is aware of the apparent links with Zia Logistics Ltd [OB2012203]”.

The Case Summary contained in the public inquiry brief did refer to Zia Logistics Ltd:

“At a public inquiry held in March 2020 with regard to an application by Zia Logistics Ltd .. it was found that the company had been operating vehicles on their interim licence which were specified to Asons Transport Ltd and that this arrangement (stated to be with Zeeshan Aurangzeb) had been in place for approximately 5 months”.

The brief also contained one paragraph of the decision (paragraph 11) made in the public inquiry which took place before the TC for the North East on 24 November 2020 (referred to in the above paragraph) concerning Zia Logistics:

“Prior to the hearing I reviewed the vehicle history of the 5 vehicles currently specified on the interim licence. The linkage with TAF Transport Ltd and Mr Faisal Akram was again noted. However, it was also noted that the vehicles had been specified on another licence after the arrangement with Road Kings Ltd had elapsed. Asons Transport ... For varying periods between 4 November 2019 and 29 March 2020 the applicant’s vehicles were specified on that entity’s licence. I requested an explanation for this in advance of the hearing together with an explanation of the arrangement with supporting evidence, as it would seem that the entity had embarked on an arrangement similar to that with Road Kings Ltd. The Company’s response stated that there was an arrangement in place with Asons Transport .. but that again has been brokered by Mr Hussain. It was conceded that this arrangement mirrored that with Road Kings Ltd and effectively it was Zia Logistics Ltd that was again the Operator utilising the margin on the Asons .. licence. Mr Harrison was a Director from 6 December 2019 but had not questioned the arrangements for the hiring out of company vehicles and the work undertaken was on behalf of Zia Logistics Ltd, still based from the Company’s Wakefield base.”

The brief also contained a s.9 witness statement signed by Nazihah Ali, a former director of Zia Logistics Ltd. It was said to be an *“additional witness statement in response to questions raised by the Traffic Commissioner on 23 November 2020”*. The witness statement sets out the purchase dates of the five vehicles concerned (all of which had been specified on ATL’s licence) and the history of *“hiring”* which included ATL. Under the heading *“Links to Asons Transport Ltd (“Asons”)*” the statement stated:

5. *An arrangement was made between me and Zeeshan Aurangzeb about us hiring vehicles and drivers to Asons and them operating the vehicles.*
6. *The arrangement lasted from November 2019 until late March 2020.*
7. *Zeeshan Aurangzeb is a director and a qualified transport manager of Asons.*
8. *I have been advised that such an arrangement can be undertaken lawfully if everything is done properly.*
9. *I relied on the expertise of Zeeshan Aurangzeb to ensure the arrangement was undertaken legally.*
10. *The agreement came to an end when our Interim licence was granted”.*

The Public Inquiry

21. The public inquiry took place on 9 March 2021. By 2 March 2021 all vehicles specified on ATL’s licence had been removed and on that date, Mr Anwer removed ZA as transport manager.
22. At the hearing, ZA attended remotely along with Mr Willis. It is of note that Mr Willis did not express any concerns about the TC’s decision to conduct the public inquiry remotely via Microsoft Teams.
23. The following documents were submitted on behalf of ZA prior to the hearing: an acknowledgement by the RHA of ZA reserving a place on an online transport manager refresher course on 17 March 2021; a transport manager contract dated 11 July 2019 between ZA and ATL; a sheet entitled “*Internal Spot Check Sheet*” recording one spot check per month of drivers performing their DDR walk round check between August and November 2020; an advice note from Protyre dated 19 November 2020 addressed to “*Frontier*” recording that a tyre pressure check had taken place on WN14 YHA (the last vehicle to be specified on ATL’s licence); a drivers handbook. The DVSA reports were accepted by ZA and he accepted that the audit findings of Junction 17 were consistent with the DVSA reports.
24. Mr Anwer did not attend the hearing and the company was without representation. ZA stated that Mr Anwer had been unwell and he had been unable to speak with him since December 2020 as Mr Anwer was not returning his telephone calls. ZA was attempting to communicate with him via Mr Anwer’s brother. The TC was rightly satisfied, having considered the evidence available, that Mr Anwer was aware of the hearing and had chosen not to attend. That determination is supported by the fact that two hours after the hearing had concluded, Mr Anwer accessed the online licencing system and submitted an application to surrender ATL’s licence and that neither ATL or Mr Anwer have lodged an appeal in respect of the TC’s decision to revoke the licence of ATL and disqualify Mr Anwer under s.28 of the 1995 Act for a period of two years.
25. ZA gave confused and confusing evidence to the TC. By way of example, when asked about vehicle WN14 YHA, he told the TC that it was rented from the local Scania dealership. When it was pointed out to ZA that the Protyre record referred to Frontier, he stated that in fact the vehicle was rented from

Frontier and that Frontier was mistakenly named on the record (rather than ATL) because the trailer attached to the tractor unit was owned by Frontier. When it was pointed out to him that he was the transport manager for both Asons and Frontier and should therefore be in a position to say who owned the vehicle, he stated that he had assumed that it was the local Scania dealership because he had seen it in their centre awaiting an MOT test. When asked who had booked the test, he suggested that it was Scania dealership itself that had done so. His final position was that Frontier might have bought the vehicle from Scania and rented it to ATL. As the TC noted, ZA could not explain why he was not clearer on such a fundamental issue when he was the transport manager for both operations.

26. With regard to the other vehicles which had been specified on the licence, ZA repeated his statement made to VE Wiley that they had been rented from TAF Transport. He had been unaware that they were owned by Zia Logistics Limited or that they had previously been specified on the licence of Road Kings Ltd. He had not heard of either company. He did not know whether there had been any hire contracts for the vehicles even though he was transport manager and a director of ATL at the time. He asserted that the vehicles were operating out of the company's warehouse in Wakefield (a facility which had not been referenced at all during either the DVSA investigations or the Junction 17 audit and which was not listed as an operating centre on ATL's licence; however, Wakefield was where Zia Logistics was based). He asserted that he had never spoken to Ms Ali and her witness statement was untrue. She must have been mistaking him for someone else. When asked why Ms Ali had made a false statement implicating him, ZA stated: "*.. because I was harassing them. When I was visiting them and telling them, "This week I've had issued and your garage is not fixing it .."*". This was interpreted by the TC as a suggestion that during the period of hire, ZA had complained about the quality of the vehicles.
27. ZA blamed Mr Anwer for failing to provide him with the documents necessary to show that ATL was a compliant operator. He continued to abdicate responsibility for maintenance because the vehicles were rented by ATL and the trailers did not belong to the company.

The Traffic Commissioner's decision

28. Dealing first with maintenance and ZA's position as transport manager, the TC found that ZA was responsible for the failings identified by the DVSA officers and Junction 17. Even if the TC accepted ZA's assertion that he had been unable to demonstrate compliance because of the way that Mr Anwer managed the licence, he did nothing to bring his concerns to the attention of the TC. The TC reminded himself of the directions on the general responsibilities of Transport Managers set out in the Senior Traffic Commissioner's Statutory Document No.3. Having considered the same, the TC concluded that ZA had provided little evidence that he had met the requirements. He was unable to give cogent evidence on the ownership of WN14 YHA and he had failed to bring to the OTC's attention, changes of directors, even after he had obtained his CPC qualification. The booking of a place on a transport manager's refresher course was a step forward but his past failings as transport manager were too great for rehabilitation to be

considered in the near future. ZA had lost his good repute as a transport manager and as a result, disqualification must follow.

29. Turning then to the TC's determination that ZA and ATL had been involved in disc lending, the TC made the following findings:
- a) In November 2019 four vehicles were specified on ATL's licence that had previously been specified on the licence of Road Kings Ltd. A fifth was added in January 2020. That too had previously been specified on the licence of Road Kings Ltd; Faisal Akram had been involved with this company (and we note TAF Transport). The licence of Road Kings Ltd had been revoked on 15 September 2010. The TC in that case found that Road Kings Ltd had allowed vehicles on its licence to be operated by two other companies, one of which was Zia Logistics Ltd. We note that the evidence to support these findings was not contained in the public inquiry brief, there being no reference to Road Kings Ltd within the papers apart from in paragraph 11 of the decision in Zia Logistics set out in paragraph 20 above;
 - b) ZA maintained that ATL had hired the vehicles from TAF Transport although that company's licence had been revoked in September 2019. We note that the information about the revocation of this operator's licence was not within the public inquiry brief;
 - c) On 26 March 2020, all five vehicles were specified on the new interim licence of Zia Logistics in Wakefield and were removed from the ATL licence on 27 and 29 March 2020 by ZA. ZA had maintained that this was because the vehicles were returned to the owners after the end of the rental period;
 - d) The TC relied upon the s.9 witness statement of Ms Ali;
 - e) At the Zia Logistics public inquiry on 24 November 2020, the current director of Zia Logistics (Stephen Harrison) had told the TC that the vehicles in question had been operated throughout by Zia Logistics from its operating centre in Wakefield making use of the authority on ATL's licence. This was a similar loaning arrangement to the one it had made with Road Kings Limited. Evidence had been given that Faisal Akram was the husband of Ms Ali. This information was again, not included in the public inquiry brief for ATL;
 - f) ZA had denied the allegations and denied having met Ms Ali. However, he was a director of ATL during the period 21 October 2019 to 18 June 2020 when this arrangement had taken place as well as being the transport manager. ZA had insisted that the vehicles were operated by ATL although he conceded that the vehicles were based in Wakefield, where ATL did not have an operating centre.
30. The TC rejected ZA's account that he had not been involved in an arrangement with Zia Logistics. He had been reappointed as a director just two weeks before the first of the Zia Logistics vehicles appeared on ATL's licence. ZA had maintained that the reason for this appointment was that Mr Anwer did not want to run the business. The coincidence of the disc lending arrangement starting within two weeks of his appointment was too great and added support to the other evidence and in particular, Ms Ali's statement

which indicated that ZA was at the heart of this arrangement. ZA was the one common thread running through the history of the licence. In that 60 months, ZA had been a director for 49 of them and he was the one person who had permanently held responsibility for the licence whether as director or transport manager. There was very little evidence of active management by Mr Anwer raising the probability that he was a director in name only for much of his tenure. The liaison with the DVSA in March and November 2020 had been solely conducted by ZA. The only trace of Mr Anwer on the licencing system was the changes he made to it in the week before the public inquiry. All the evidence pointed to ZA being the person controlling the licence or at least being a controlling mind during the crucial period of November 2019 and March 2020. Mr Willis had submitted that ZA presented as “*trustworthy*” in answering the TC’s questions. The TC disagreed, describing ZA’s evidence as “*inconsistent or vague. He gave the impression throughout of trying to distance himself from key events which clearly should have been within his responsibility as a director at the relevant time*”. The TC determined that it was appropriate for him to take action to prevent ZA from acting as a licence holder or acting as a director of a company holding an operator’s licence until such time had passed that he could show himself to have been rehabilitated and capable of being trusted to operate compliantly.

The Appeal

31. The first ground of appeal was critical of the TC’s decision to hold a remote hearing. Mr Willis referred to the criteria for holding remote hearings outlined in the Senior Traffic Commissioner’s statutory document: Contingency Statutory Document: COVID-19 Response. At paragraph 2.10 of that document, remote hearings are described as being suitable in “*limited circumstances*” and each case required careful consideration as to whether it could be listed for a remote hearing. There follows six bullet points which should be considered when making the decision. The first was that the case should not be complex and preferably single issue with an expectation that the duration of the hearing should not exceed one hour; the fourth is that remote hearings may be particularly beneficial for preliminary hearings; the sixth is that a preliminary view of the outcome of the hearing is that a significant adverse decision is not the most likely outcome. Mr Willis submitted that this case did not fall within any of these bullet points: it was complex and conjoined and lasted for one hour twenty-seven minutes and the outcome was significantly adverse to ZA. In the circumstances, the process was unfair and it was wrong for the TC to make such a significant adverse decision.
32. The second ground of appeal concerned the non-attendance of Mr Anwer and the company. The inquiry was convened to investigate numerous serious matters including the repute of the operator and ZA. It was understandable that regulatory action was taken against the operator for the reasons outlined by the TC. However, the non-attendance of the operator prevented ZA from hearing and testing the operator’s testimony. The fair way to proceed would have been for the TC to hear from “*both parties*” and for them to give their potentially differing accounts. Instead, the TC appeared to conflate the parties, effectively treating ZA as both the operator and the transport manager notwithstanding that ZA was a former director of the company rather than a present director and having questioned him on matters which should have

been put to the operator and then ultimately held him responsible for the operator's deficiencies. Moreover, ZA was at a disadvantage as a result of the operator failing to attend the hearing with all of the relevant documentation to demonstrate compliance and he was deprived of the opportunity of questioning the operator. In the circumstances, ZA should not have been "*subject to the Decision in the circumstances*".

33. The third ground of appeal concerns the evidence relied upon by the TC in support of his findings that ZA was involved in disc lending. Mr Willis submitted that there was no direct evidence that disc lending had in fact taken place. The TC relied upon the witness statement of Ms Ali. Mr Willis queried whether that could properly be considered as evidence in this case as it was not known whether Ms Ali had intended for her statement to be used in this way. The TC himself had stated during the hearing that Ms Ali was not accusing ZA of anything underhand in the statement. Mr Willis queried whether the statement could even be classed as hearsay evidence and posed the question: what is the weight that should be attached to the statement? Mr Willis further pointed to the failure of the OTC to provide ZA with a copy of the full decision of the TC for the North East following the Zia Logistics public inquiry held on 24 November 2020 and had not provided ZA with a copy of the decision resulting in the revocation of the licence held by Road Kings Ltd. Finally, there were the comments of Mr Harrison referred to by the TC which were not included in the brief (probably because they were drawn from the decision of 24 November 2020). Mr Willis queried whether Mr Harrison's evidence could even be classed as hearsay evidence. The only direct evidence concerning disc lending came from ZA who denied any involvement in such arrangements.
34. The final ground of appeal was that in all of the circumstances, the TC's decision was unreasonable and disproportionate.

Discussion

35. Ground 1: putting on one side the TC's decision to take into account evidence that had not been disclosed to ZA, this was a straightforward public inquiry involving a transport manager and a company with a single director. It did not fall within the ambit of a "*conjoined hearing*", a term which applies to a public inquiry in which either an operator and its drivers are before a TC together or when more than one company are called together because it is suspected, that they are linked. We do not accept that the guidance given in the Contingency Statutory Document must be followed to the letter and a decision must be taken on a case by case basis. Crucially in this case, ZA was represented by a lawyer and Mr Willis could have raised the issue of the suitability of this case to be heard remotely either when he was first instructed or at the outset of the hearing. He did not do so. We are satisfied that there is no merit in this point.
36. Ground 2: The TC does not have the power to order the attendance of an operator if they choose not to attend a public inquiry. The TC was right to continue with the hearing in the absence of Mr Anwer and/or a representative of the company as there were important issues to be considered. ZA has lost sight of the fact that he was the transport manager of ATL between 12 April 2019 and 2 March 2021 and was a director for 49 of the 60 months that ATL

held a licence. The TC was right to hold that he was the common thread and a director at the crucial time that the alleged disc lending took place. We do not understand Mr Willis' submission that by reason of the operator failing to attend, ZA was deprived of the opportunity of testing its testimony as there was none. As for the absence of documents, he was the transport manager until a week before the hearing and if he had encountered difficulties in gaining access to maintenance and compliance documents and others such as hire agreements, then he should immediately have informed the TC of the unsatisfactory position that he was placed in. He did not do so. The TC's reasoning for finding that ZA was the controlling mind of ATL is beyond criticism. There is nothing in this point.

37. Ground 3: We disagree that the TC was not entitled or should not have placed weight on the s.9 statement of Ms Ali. It is a formal witness statement with a statement of truth which had been provided to the TC for the North East to address the very issues that this TC was considering i.e. disc lending. It was open to the TC to place such weight on it as he thought fit. Moreover, he is entitled to take account of findings of fact made by a TC in different proceedings and evidence given by witnesses in those proceedings. Again, it's a question of weight. We therefore disagree that the evidence of Mr Harrison which presumably was given before the TC for the North East could not be taken into account in principle. However, we are troubled by the fact that the full decision of the TC for the North East dated 24 November 2020 was not disclosed in the public inquiry brief or at any stage and if it was not that decision that included Mr Harrison's evidence, the source of it. We are further concerned that the decision of the TC for the North East revoking the licence of Road Kings Ltd was not included in the brief as it too was referred to. Even if that decision had come to the attention of the TC following the conclusion of the hearing with ZA, it should have been provided to him with an invitation for comments or a request for a further hearing. Failure to give ZA an opportunity to comment upon the additional evidence relied upon by the TC amounted to a material unfairness and as a result, this ground succeeds.
38. The above finding does not however result in this appeal succeeding in its entirety, being satisfied as we are that the TC's approach to and findings on ZA's failings as a transport manager with regard to maintenance and compliance are beyond criticism. We are satisfied that the TC was plainly right to find that ZA had lost his good repute as a transport manager as a result of his failings and that this was a proportionate finding and that as a result, disqualification was inevitable. The TC's decisions in this regard also goes to ZA's trustworthiness as a director.
39. We have determined that the most appropriate, fair and proportionate outcome of this appeal is to uphold the TC's findings of fact with regard to ZA as a transport manager and his loss of repute and disqualification as such for a period of two years but to set aside his findings with regard to disc lending and his disqualification of ZA as a director which was founded mainly on the TC's findings with regard to disc lending. We direct that the issues of disc lending and whether ZA should be disqualified under s.28 of the Act should be remitted for a further consideration by a different TC with a fresh call up letter and brief which includes all relevant matters which a different TC may take into account when determining the issues of disc lending and whether ZA should

be disqualified as a director. We did consider exercising our powers to substitute our own decision for that of the TC on the issue of disc lending but having read the TC's decision and the evidence he has referred to which was not disclosed to ZA, it would appear that the TC's findings on the issue are well founded unless the evidence is capable of being challenged. It is for that reason that we have decided to remit the issue for further consideration in order to give ZA an opportunity to challenge the evidence if he is able to and make appropriate submissions as to the weight that should be attached to it. ZA must be advised that at the end of the process, having had regard to the evidence, the new TC may make the same or similar determinations as those made on 11 March 2021.

40. The appeal is allowed to the limited extent as set out above.



Her Honour Judge Beech

Judge of the Upper Tribunal

23 November 2021