IN THE UPPER TRIBUNAL **Appeal No. UA-2022-000572-T**
ADMINISTRATIVE APPEALS CHAMBER
(TRAFFIC COMMISSIONER APPEALS)

Neutral Citation No. [2022] UKUT 00274 (AAC)

ON APPEAL from a DECISION of the TRAFFIC COMMISSIONER for the WEST MIDLANDS

Before: M Hemingway: Judge of the Upper Tribunal
S Booth: Member of the Upper Tribunal
R Fry: Member of the Upper Tribunal

Appellants: Walsall Builders and Timber Merchants Ltd and Kamran Aftab

Reference No: OD2014122

Representation:

For the Appellant: Mr T Sasse (Counsel)

Heard at: Birmingham

Date of Hearing: 16 September 2022

Date of Decision: 14 October 2022

DECISION OF THE UPPER TRIBUNAL

This appeal is allowed. The case is remitted for further consideration by the Traffic Commissioner.

Subject matter:
Fairness

Cases referred to:
Bradley Fold Travel Ltd and Another v Secretary of State for Transport [2010] EWCA Civ 695
2005/110 G Dem Ltd
W Martin Oliver Partnership (2016] UKUT 0070 (AAC).

REASONS FOR DECISION

1. This appeal to the Upper Tribunal has been brought by Walsall Builders and Timber Merchants Limited ("the Operator") and its sole director Kamran Aftab ("Mr Aftab"). The decisions under challenge made by the Traffic Commissioner on 17 March 2022 were these:

> "1. The restricted goods operator licence OD2014122 held by Walsall Builders and Timber Merchants Ltd is revoked with effect from 0001 hours on 1 April 2022, pursuant to section 26(1)(a), (c)(iii), (e), (f) and (h) of the Goods Vehicles (Licencing of Operators) Act 1995 ("the 1995 Act").
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> 2. Walsall Builders and Timber Merchants Limited and its director Kamran Aftab are hereby disqualified under section 28 of the 1995 Act from holding or obtaining an Operator's Licence and (in Mr Aftab's case) from being the director of any company holding or obtaining such a licence. The disqualification is for a period of two years and is effective from 1 April 2022 until 1 April 2024".

2. The factual background to the appeal is set out in the decision of the Traffic Commissioner ("TC") of 17 March 2022 and related documentation. Put briefly, the operator had obtained its restricted licence on 31 August 2018 when authorisation was given to use three vehicles. On 22 May 2021 one of its vehicles was stopped by the Driver and Vehicle Standards Agency ("DVSA") and it was discovered that the tachograph unit had never been downloaded despite that vehicle having been specified on the licence since July 2019. That discovery triggered a DVSA investigation. The findings of the DVSA were summarised by the TC as follows:

> "i) the authorised operating centre was a builders' yard. On both the dates DVSA examiners visited (5 October and 8 December 2021), the operator's vehicles were parked on the public highway outside the yard, on double yellow lines in a residential street and on the pedestrian pavement. The builder's yard was clearly not large enough to allow three HGVs to park there during the day when customers required access and materials needed to be moved around.
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> ii) preventative maintenance inspections had occasionally missed the stated six week intervals. The operator claimed that the vehicles in question had been off the road, but there was no evidence of this as no VOR system was in use. No brake tests of any kind were being carried out during the safety inspections. The safety inspections were being carried out by a mobile mechanic, not the operator's stated maintenance provider. The inspections were not being carried out under cover.
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> iii) the operator's vehicles had a 67% initial MOT failure rate, far above the national average.
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> iv) during the visit by DVSA vehicle examiner Paul Matthews on 8 December 2021, one of the operator's vehicles had been given an immediate prohibition for a tyre with tread depth below the legal limit and a delayed prohibition for an ABS fault. The previous driver defect report had recorded no defects.
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> v) preventative maintenance inspection sheets frequently reported defects which should have been identified by the drivers' defect reports. These had all reported no defects, however.

> vi) vehicle tachograph units had not been locked in to the operator until 2 October 2021, four days before the arranged meeting with traffic examiner Kathrine Cox on 6 October (in the event she visited the operating centre on 5 October). The operator had possessed a digital tachograph vehicle since August 2018. No downloads from the vehicle units had ever been carried out.
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> vii) the first download of driver tachograph cards which the operator had evidence of was carried out on 27 July 2021, around four weeks after TE Cox first wrote to the operator to ask for drivers' hours records. The infringement report generated showed that one driver was being regularly scheduled to work Mondays to Thursdays and on Saturdays, which prevented him from taking the required weekly rests. The operator had never picked this up. A number of 4.5 hours offences were also identified".

3. The TC, unsurprisingly, decided to call the operator and Mr Aftab to a Public Inquiry ("PI"). Accordingly, on 14 February 2022 the Office of the Traffic Commissioner ("OTC") wrote to inform the operator and Mr Aftab that the PI would be held on 17 March 2022. We shall not go through the content of that call-up letter in detail but it made clear that the content of a report prepared by DVSA vehicle examiner Paul Matthews would be considered at the PI; that the TC would expect the operator and Mr Aftab to deal with various of the failings identified in that report; that the TC expected to be provided with documentary evidence regarding the operator's financial standing and regarding aspects of its vehicle maintenance and safety arrangements; that such evidence was required to be provided to the TC at least seven days prior to the date of commencement of the PI; and that revocation of the licence and disqualification of the operator and of Mr Aftab was an available option. The TC also required an attendance form to be completed and returned by email. The letter included the following warning "the Traffic Commissioner is unlikely to allow a postponement unless the circumstances are exceptional. **If you do not attend, the case will be heard in your absence"** (the emphasis is the OTC's).

4. It does not appear to us that the attendance form was completed and returned. Neither Mr Aftab nor anyone else who might have been able to act for the operator provided any financial evidence or any of the other written evidence which the TC had required.

5. On 15 March 2022 the OTC received an email which had been sent to it by Mr Aftab. We have not been provided with a copy of the email, but it is apparent from what is said in other documentation that Mr Aftab asserted he had developed a high temperature and symptoms of a cold and expressed a willingness to attend the "*next interview*". He did not, in terms, request a postponement of the PI but it appears clear that either he was seeking such a postponement, or he was, given his reference to the "*next interview*", simply assuming such would be granted. He seems to have adopted a somewhat cavalier approach. No medical evidence was provided and there was no indication on the part of Mr Aftab that he had, at that stage, attempted to seek any medical evidence in support of the postponement request. There is no indication in the documentation before us that the implicit postponement request (and we accept that is what it amounted to) made by Mr Aftab was considered prior to the commencement of the PI or that, if it was so considered, any decision upon it had been communicated. But the PI proceeded, in the absence of Mr Aftab (who failed to attend) or any other representative for the operator, on the scheduled date.

6. Faced with non-attendance, the TC decided matters on the basis of the written material before him which, of course, was not supplemented by anything sent by or on behalf of the

operator or by Mr Aftab notwithstanding the content of the call-up letter. In explaining why he was proceeding the TC said this:

> "Public inquiry
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> 4. I was very concerned by the content of DVSA's reports and decided to call the operator to a public inquiry. The call-up letter was sent on 14 February 2022, citing Section 26(1)(a), (b), (c)(iii), (e), (f) and (h) of the 1995 Act. The inquiry was scheduled to take place in Birmingham on 17 March 2022. The call-up letter made clear to the operator that it must submit maintenance and drivers' hours records, together with evidence of sufficient funds for three vehicles, to my office by 10 March 2022 at the latest (seven days before the public inquiry).
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> 5. The operator failed to submit any records or evidence, either by 10 March or later. At 1631 hours on 15 March (i.e. some 40 hours before the inquiry was due to commence) my clerk received an email from director Kamran Aftab, saying that he would not be attending as he had been suffering with a high temperature and a cold for a couple of days and did not feel he would be well enough to attend by 17 March. No evidence of his condition was provided. Mr Aftab said that he would ensure that "I am fully able to attend the next interview".
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> 6. The use of the word "interview" by Mr Aftab suggested to me that he did not fully appreciate the seriousness of the public inquiry process, and that he might consider the inquiry to be akin to an interview with DVSA (he had twice postponed deadlines for supplying documents to DVSA and once postponed a scheduled interview with them). However, the call-up letter was quite clear about the seriousness of the issues and of the public inquiry process. The fact that Mr Aftab had not bothered to submit any evidence of funds or any maintenance and drivers' hours records by the deadline of 10 March also suggested to me that he was insouciant about the inquiry process. A temperature and cold for "a couple of days" prior to 15 March should not have prevented him from submitting the requested records by 10 March.
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> 7. I therefore decided to proceed with the public inquiry and consider the evidence on the basis of the papers before me".

7. Having considered matters the TC made these findings;

> "Findings
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> 8. After having considered the evidence, I make the following findings.
> i) the operator has failed to demonstrate that it has sufficient financial resources to support the maintenance of its vehicles. No evidence of finances has been submitted (Sections 13D and 26(1)(h) of the 1995 Act refer);
> ii) the operator's vehicles have been parked when not in use at a place other than the authorised operating centre (Section 26 (1)(a) refers). It is wholly unacceptable for vehicles to be parked on yellow lines and on the pavement. Had I been aware of the operator's need to park vehicles on the public road during the day while the builder's yard was operational, I would never have granted authority for this operating centre.
> iii) the operator's vehicle has received prohibitions (Section 26(1)(c)(iii) refers). A vehicle was given an immediate prohibition for an illegal tyre and a delayed prohibition for an ABS fault in December 2021;

> iv) the operator has failed to honour its promise, given on application, that vehicles would be given safety inspections every six weeks (Section 26 (1)(e) refers). Six-week intervals were exceeded in several cases and the failure to present up-to-date records to the inquiry have prevented me from assessing the current picture.
> v) the operator has failed to fulfil its undertaking to ensure that drivers report defects in writing. Drivers appear to be simply ticking boxes and driving off, missing obvious defects with their vehicle;
> vi)the operator has failed to fulfil its undertaking to keep vehicles fit and serviceable. A 67% MOT failure rate shows that vehicles are frequently being operated in an unroadworthy condition;
> vii) the operator has failed to fulfil its undertaking to ensure that the rules relating to drivers' hours and tachographs are observed. It is clear that Mr Aftab had no understanding of these rules and took no trouble to find out what they were. Although the first digital tachograph vehicle was specified in August 2018, no vehicle units were locked in until a few days before TE Cox's scheduled visit in October 2021. No downloads from the vehicle units were ever carried out. No downloads from driver cards could be evidence until 27 July 2021, after DVSA first asked for drivers' hours records. I was not persuaded by Mr Aftab's claim to have downloaded driver cards before this: if he had been doing so he would have spotted that the weekly work schedule of one driver was clearly incompatible with the rules on weekly rest".

8. The TC then reached this somewhat coruscating conclusion:

> "9. It is clear from the above findings that the company and its director Kamran Aftab have ventured into the highly regulated world of HGV operator licencing without the slightest idea of what this involves. Mr Aftab signed the application form in which he undertook to ensure compliance with rules relating to maintenance of vehicles and drivers' hours rules, but in the event did nothing to ensure that these undertakings were carried out. The result has been widespread non-compliance over the entire life of the licence. This has posed a significant danger to road safety and has constituted grossly unfair competition against compliant operators".

9. The TC's written decision was sent to the operator and Mr Aftab on 17 March 2022. The letter contained an explanation as to the availability of a right of appeal to the Upper Tribunal.

10. On 22 March 2022 Mr Aftab obtained a letter written by his GP. The letter listed what were said to be Mr Aftab's "*current medical conditions*" as follows:

> "**Active**
> Viral Upper Respiratory Tract Infection – symptoms started 15/3/22
> Pure hypercholesterolaemia
> Vitamin D deficiency
> Anxiety with depression
> Type 2 Diabetes Mellitus
> Essential hypertension".

11. The letter then set out a list of medication which Mr Aftab had been prescribed. The letter did not explain how it had been concluded that the upper respiratory tract infection had been symptomatic since 15 March 2022 (we presume that must have been based upon what Mr

Aftab had told the GP) nor did it contain any evaluation of Mr Aftab's likely fitness to attend a PI on 17 March 2022. A stay of the effect of the TC's decisions was sought but such was refused by both the TC and the Upper Tribunal. The appellant's appeal to the Upper Tribunal was received on or shortly after 7 April 2022.

12. The grounds of appeal did not take issue with the findings of the TC as had been made on the basis of the material before him. Rather, those grounds focused upon the fairness or otherwise of the PI proceedings. Essentially, the contentions raised were to the effect that the TC had acted unfairly in proceeding with the PI given that Mr Aftab had informed the OTC in advance of the PI that he "*felt unfit to attend*"; that the TC had been wrong to proceed in circumstances where the absence of Mr Aftab as the operator's sole director made it inevitable that revocation would follow; that the TC had unfairly criticised Mr Aftab for failing to provide medical evidence in support of the postponement request "*in the particular context of the prevailing health emergency, the associated National Health Service instructions to avoid attendance and the proper patient response thereto, and given the impracticability of procuring examination/appointment with a GP when symptomatic*"; that the TC had implicitly and unfairly drawn adverse inferences from the lateness of the communication regarding Mr Aftab's ill health in circumstances where "*it is in the very nature of such viral illness that symptoms can present at short notice*"; that the TC had wrongly proceeded in circumstances where Mr Aftab had "*evinced a clear intention to attend any adjourned date*"; that the TC had unfairly taken into account claimed failures to co-operate with DVSA officers when considering whether to postpone; that the TC had unfairly placed weight upon Mr Aftab's use of the informal term "*interview*" in his postponement request. It was indicated in the grounds of appeal that the operator and Mr Aftab would, in due course, seek permission to adduce fresh evidence before the Upper Tribunal in the form of the GP letter referred to above which, of course, had not and could not have (given its date) been before the TC when the decision now under appeal was made.

13. We held an oral hearing of the appeal which took place at Birmingham on 16 September 2022. The operator and Mr Aftab were represented, before us, by Mr T Sasse of counsel. It transpired that Mr Sasse had helpfully prepared some written submissions in advance of the hearing which, for reasons unknown, had not reached us. But copies were provided and we were able to read what was said prior to being addressed by Mr Sasse.

14. Mr Sasse invited us to admit into evidence the GP letter of 22 March 2022. He asserted that the "*Ladd v Marshall*" conditions were met. But, irrespective of the letter and its content, he asserted there had been unfairness. Although he maintained all of the points which had been made in the written grounds of appeal, his primary argument was based upon what he said was a failure of the TC or the OTC to communicate, in advance of the PI, any decision refusing the postponement request. As to that failure and its claimed significance, he relied upon the content of the Senior Traffic Commissioner's Statutory Document No. 9 on Case Management. That document was issued pursuant to section 4C of the Public Passenger Vehicles Act 1981 (as amended) and sets out the way in which the Senior Traffic Commissioner believes that TC's should interpret the law in relation to case-management. The current version of that document took effect from September 2022 and so after the TC's decision. But the preceding version which was in force at the time of the PI and the TC's decision was not materially different with respect to the relevant passages. Mr Sasse contended that the terms of the Statutory Document required that notification of any decision refusing to postpone be sent in advance of any PI hearing. Such, he pointed out, had not happened here. That being so, ran the argument, Mr Aftab, as a lay person, could not be significantly criticised for failing to attend or for assuming

that his request, in the absence of the communication of refusal, had been granted. Mr Sasse did accept that there would be some duty upon an applicant for a postponement to chase such a request but suggested that less could be expected, in that context, of a lay person such as Mr Aftab than could be expected of an operator or individual with professional representation. Mr Sasse pointed out that all of this was taking place during a time when restrictions were in place as a result of the coronavirus pandemic and that the symptoms described by Mr Aftab might be thought to be similar to those which a person infected with covid-19 might exhibit. That complicated matters. He pointed out that guidance had been issued by the OTC to the effect that a person exhibiting symptoms of coronavirus ought not to attend a hearing of a PI but should, instead, contact the OTC. Thus, argued Mr Sasse, expecting Mr Aftab to attend the PI hearing was requiring him to contravene justifiable guidance.

15. We were invited to allow the appeal and to remit so that matters might be reconsidered entirely afresh at a PI.

16. This appeal has been brought pursuant to Section 37 of the Goods Vehicles (Licencing of Operators) Act 1995. In considering an appeal such as this the Upper Tribunal may not take into consideration any circumstances which did not exist at the time of the determination which is the subject of the appeal. The Upper Tribunal has jurisdiction to hear and determine all matters (whether of law or of fact) but, as was explained in *Bradley Fold Travel Ltd & Anor v Secretary of State for Transport* [2010] EWCA Civ 695, it is not required to rehear all of the evidence by conducting what would, in effect, be a new first-instance hearing. In order to succeed before the Upper Tribunal an appellant must show that the process of reasoning and the application of relevant law requires the Upper Tribunal to take a different view to that taken by the TC. The Upper Tribunal, if allowing an appeal, may make such order as it thinks fit or may remit the matter to the TC for rehearing and redetermination in any case where it considers it appropriate to do so. The Upper Tribunal's powers in that regard are set out at paragraph 17 of Schedule 4 to the Transport Act 1985 (as amended).

17. We have asked ourselves whether we should admit the GP letter referred to above. As Mr Sasse acknowledges, in circumstances where an appellant wishes to introduce new evidence which was not before the TC, the well-established principles in *Ladd v Marshall* (1954) 1 WLR 1489, apply. As explained by the Transport Tribunal in *Thames Materials Ltd* (2002/40) those principles, in the context of traffic cases, translate as follows:

> (i) The fresh evidence must be admissible evidence
> (ii) It must be evidence which could not have been obtained, with reasonable diligence, for use at the public inquiry.
> (iii) It must be evidence such that, if given, would probably have had an important influence on the result of the case, thought it does not have to be shown that it would have been decisive.
> (iv) It must be evidence which apparently credible though not necessarily incontrovertible.

18. In *W Martin Oliver Partnership* [2016] UKUT 0070 (AAC) it was confirmed that the full rigour of the *Ladd v Marshall* test is to be applied in traffic cases.

19. With respect to the second of the above requirements, Mr Sasse argues that the operator and Mr Aftab were not in a position to supply such evidence prior to the taking place of the PI. We disagree. Clearly the actual GP letter, since it was written on 22 March 2022,

could not have been placed before the PI. But the question is whether medical evidence concerning the medical condition of Mr Aftab as might have been relevant to his claimed inability to attend a PI, could have been obtained with reasonable diligence. We are not told of any attempt made by Mr Aftab to obtain medical evidence from his GP prior to the PI, which he could then have put forward in support of his postponement request. At the hearing Mr Sasse told us he was not aware of any such attempt. We are told that the GP letter was obtained as a result of telephone contact and that it was not obtained as a result of a face-to-face medical consultation. We do not see why, therefore, if such evidence could have been obtained on 22 March 2022 it could not have been obtained prior to the PI, had Mr Aftab employed due diligence at the time he came to feel he might not be fit to attend the PI. In truth, he did not exercise any diligence at all because he did not even try to secure such evidence in advance of the PI. We have concluded, therefore, that the test in *Ladd v Marshall* is not met and we decline to admit the GP letter.

20. We now move on to consider the claimant's grounds of appeal. We find certain of the arguments advanced by Mr Sasse to be unpersuasive. As to that, the TC was not required to postpone the PI simply on the basis that the operator's sole director (Mr Aftab) had advised in advance of the PI that he felt unfit to attend. It was necessary for a much wider consideration than that to be undertaken. We do not accept, insofar as it may be relevant, that the absence of Mr Aftab, described as "*the enforced absence*" in the grounds of appeal, made it "*practically inevitable*" that revocation would follow. Of course, a failure to attend a PI will, speaking generally, hardly help an appellant. But there might not have been the inevitability suggested in the grounds had Mr Aftab assiduously compiled the sort of documentation which the TC had required him to submit. Notwithstanding the measures in place in consequence of the coronavirus pandemic, the TC was entitled to have some regard to the lack of any medical evidence (particularly where there was nothing to suggest such had been sought) when conducting an overall consideration as to the appropriateness or otherwise of proceeding. The TC was entitled to take into account what he felt to be unwillingness on the part of Mr Aftab to fully engage with DVSA officers. Previous engagement or non-engagement is capable, in our view, of informing as to the overall attitude of an individual or an operator to the regulatory regime. Whilst the TC commented upon the reference in the email to an "*interview*" rather than to a PI hearing, we do not agree with the suggestion in the grounds of the appeal that the TC was placing "*undue weight*" upon the use of that informal term or that he was, in some way, seeking to penalise Mr Aftab and/or the operator for its use. In our view the primary point which the TC was making at paragraph 6 of his written reasons was to the effect that, although Mr Aftab had used that term and although its use of it might suggest he had failed to grasp the importance and gravity of a PI, he would not have a justifiable basis for any such misapprehension on his part because what was at stake had been made abundantly clear in the call-up letter.

21. The above leaves us with the point stemming from a failure to notify Mr Aftab, prior to the PI, of a decision regarding what we are satisfied (see above) amounted to an implied postponement request. In truth, it seems to us (and there is nothing we can find in the documentation to contradict this view) that the email containing the postponement request was received on 15 March 2022 but was not actually considered until the commencement of the PI on 17 March 2022. If, contrary to that, the email was considered by the TC prior to the date of the PI, there is nothing to suggest any decision as to a postponement was taken, and, even if it was, that it was then communicated to Mr Aftab. We proceed on the basis that an implied postponement request was received on 15 March 2022, but that Mr Aftab was never notified as to any refusal.

22. The relevant extract from the above Statutory Document to which Mr Sasse refers and upon which he relies, is as follows:

> "29. There is a considerable public interest in hearings taking place on the date set and so hearings should not be adjourned unless there is a good and compelling reason to do so. In considering the competing interests of the parties, Traffic Commissioners should examine the likely consequences of the proposed adjournment and its likely length. The reason that the adjournment is required should be examined and if it arises through the fault of the parties seeking the adjournment, that is a factor against granting the adjournment, carrying weight in accordance with the gravity of the fault. Parties who wait until the last moment to apply for an adjournment will justifiably arouse suspicion as to their motives. The reason for the adjournment should also relate to the party called to the hearing and not a third party. The administration of an effective and efficient system will bring about great benefits to users of the Traffic Commissioners' tribunals.
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> 30. Requests for adjournments on medical grounds should be supported by medical evidence which states if and why a party cannot attend a hearing. A court is not automatically bound by a medical certificate and may exercise its discretion to disregard a certificate, which it finds unsatisfactory and in particular where:
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> - The certificate indicates that the party is unfit to work (rather than to attend a hearing);
> - The nature of the ailment (e.g. a broken arm) does not appear to be capable of preventing attendance at a hearing
> - The party is certified as recovering from stress/ anxiety/ depression and there is no indication of the party recovering within a realistic timetable
>
> 31. Any application for an adjournment requires a decision and must be referred to a Traffic Commissioner and similarly the decision must be communicated to the party. If the Traffic Commissioner accepts that a party's absence from the hearing is not the fault of that party the general rule is not to proceed in absence unless there is a compelling reason to proceed. If the Traffic Commissioner does not believe the explanation, reasons should be given. Where an operator and/or driver has the opportunity to engage in a professional and cooperative way but fails to do so then repeated avoidance may result in the loss of that operator licence (or the vocational licence)".

23. It is the first sentence of paragraph 31 which Mr Sasse claims is key in the context of this case.

24. In looking at the considerations referred to in the above passage, the application for a postponement was a late one though we would accept that if an individual intending to attend a PI becomes ill shortly before it, then such lateness will be inevitable. The postponement request was not supported by medical evidence. There is nothing to suggest that any attempt to obtain any such evidence was made at the time. But Mr Sasse argues, in effect, although he did not put it in quite this way, that even if the postponement request was itself weak or potentially unpersuasive, that did not relieve the TC or the OTC of the duty to make a prompt decision on the request and to then communicate it to Mr Aftab.

25. We accept that the TC or the OTC did not follow the above guidance. But such a failure does not, of itself, necessarily translate into an error of a type which will cause the Upper Tribunal to set aside the decision of the TC. That said, of course, it is a cardinal requirement that proceedings be fair. Even irrespective of what is said in the above passage, fairness dictates that so long as an application for a postponement is made in sufficient time for it to be properly considered and then for a decision made in response to it to be properly communicated, such ought to be done. Had a refusal to postpone been issued in this case, and we accept that there was on the face of it time for a postponement decision to be made and communicated, then Mr Aftab would have had some alternatives available to him. He could have resolved to attend the PI notwithstanding the claimed health problems and any difficulties which might have been caused by the guidance in place concerning the coronavirus pandemic. He could have renewed his application for a postponement and perhaps made more rigorous efforts to obtain some medical evidence in support. He could have renewed his application and even in the absence of medical evidence made further and perhaps better points in support. He could have sought legal advice, albeit that such would have to have been done on an urgent basis. We do accept that Mr Aftab can be criticised for failing to chase the matter up and perhaps for failing to turn up in the absence of a favourable postponement decision. But we do, nonetheless, against a background of there being sufficient time for a decision on the postponement to be issued in advance of the PI, conclude that there has been unfairness.

26. Our conclusion as to unfairness is not enough, of itself, for us to be able to allow this appeal. Given the circumstances of this particular case we have found it necessary for us to go on to consider whether the unfairness which has resulted from the failure to communicate a postponement decision in good time, has materiality.

27. Firstly, as to materiality, we ask ourselves whether it was, in fact, inevitable that a postponement would not be granted even had there been a renewed request of a fuller and properly argued nature. Clearly the TC who decided the case would have refused the postponement request which had been made had he considered and determined it in advance of the PI hearing because he did so, on the same material, at the commencement of the PI. But we are not quite able to dismiss the possibility that the communication of a refusal to postpone prior to the commencement of the PI might have led to a renewed application which might have been granted.

28. We have also considered whether the operator and Mr Aftab would have inevitably been unsuccessful anyway, even if Mr Aftab had attended the PI. Mr Sasse simply says we cannot conclude that he would have had "*at least a slim chance of succeeding*". He says that, on that basis, we must allow the appeal. But it is right to say that the failings of the operator and Mr Aftab, as detailed by the TC in his written reasons which we remind ourselves were made without the benefit of his presence at a PI, were considerable. There had also been a failure on his part to supply the documentary evidence the TC had required. That failure, notwithstanding that there has been a hearing before us, remains unexplained. But we note that in a not entirely dissimilar case, that of *G DEM Ltd* 2005/110, the Upper Tribunal allowed an appeal where a request for a postponement of a PI had been made three days prior to the scheduled hearing date and where a determination upon that application had not been issued in advance of the PI. That case too involved some concerning history regarding road safety considerations.

29. We have concluded that, whilst this is very marginal, we are not able to say that the outcome would have been inevitable even had Mr Aftab attended a PI. In those circumstances,

we have concluded that there was material unfairness consequent upon the postponement decision not being adjudicated upon and communicated prior to the scheduled date of the PI. Accordingly, we have to set aside the TC's decision.

30. We are asked to remit. We conclude that is the appropriate course. The case should be reconsidered at a PI. We are not going to seek to tell the OTC how it should go about exercising its listing functions, but we would simply express the view that it would be better if this case could be considered at a PI as soon as reasonably practicable. We consider that to be appropriate given the facts and nature of this case. We are pleased to note that Mr Aftab now has legal representation, and it may be, therefore, that he will be better equipped to present his case than he would have been at the previous PI. But we would remind him that he will be expected to provide the sort of documentation specified in the initial call-up letter and, of course, he has now been on notice for a number of months that such would be required. Further, whilst such will not be a matter for us, we would have thought it sensible for Mr Aftab not to assume any application he may make to postpone any future PI will be granted.

31. This appeal to the Upper Tribunal is allowed. The case is remitted to the TC for reconsideration at a PI.

M R Hemingway
Judge of the Upper Tribunal
14 October 2022