



Neutral Citation No: [2022] UKUT 00346 (AAC)
Appeal No. UA-2022-001205-T

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER
(TRAFFIC COMMISSIONER APPEALS)**

**ON APPEAL from the DECISION of the TRAFFIC COMMISSIONER FOR
THE SCOTTISH TRAFFIC AREA (Ms C Gilmore)**

Dated: 19 August 2022

Before:

Marion Caldwell KC	Judge of the Upper Tribunal
Mr Andrew Guest	Member of the Upper Tribunal
Mr Gary Roantree	Member of the Upper Tribunal

Appellants: T & M Contracts Ltd and Mr Michael Lally

Attendance: Mr Michael Lally

Heard at: George House, 126 George Street, Edinburgh.

Date of Hearing: 14 November 2022

Date of Decision: 14 December 2022

DECISION OF THE UPPER TRIBUNAL

The appeal is dismissed. The stay will remain effective up until, but not beyond, 4pm on 12 January 2023.

Subject Matter

Restricted operator licence; adjournment; breach of licence undertakings; inadequate monitoring systems; requirement not to be unfit in terms of section 13B of the Goods Vehicles (Licensing of Operators) Act 1995; revocation; disqualification.

Cases referred to:

Anthony Edwards t/a Jim Bertie Ltd [2010] UKUT 399 (AAC)

NT/2013/82 Arnold Transport & Sons Ltd v DOENI

Bradley Fold Travel Ltd & Peter Wright –v- Secretary of State for Transport [2010] EWCA Civ. 695

Bryan Haulage (No 2) T/2002/217

NT/2013/52 & 53 Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI

Priority Freight T/2009/225

2013/07 Redsky Wholesalers Ltd

VST Building & Maintenance Ltd [2014] UKUT 0101

REASONS FOR DECISION

Introduction

1. This is an appeal from the decision of the Traffic Commissioner for the Scottish Traffic Area given on 19 August 2022. The appeal was considered at an oral hearing at which Mr Lally was in attendance.
2. As a result of adverse findings under section 26(1)(c)(iii), (f) and (h) of the Goods Vehicles (Licensing of Operators) Act 1995, and a finding that T & M Contracts Ltd no longer satisfied the requirement not to be unfit in terms of section 13B of the Act, the Traffic Commissioner revoked the licence, disqualified T & M Contracts from holding or obtaining an operator licence in Great Britain for a period of four years in terms of section 28 (1) of the Act; disqualified Mr Lally from holding or obtaining an operator's licence or being director of any entity that holds or obtains such a licence in Great Britain for a period of four years in terms of section 28 (1) of the Act; and, that section 28(4) of the 1995 Act was to apply to the disqualification order made in respect of Mr Lally for a period of 4 years.
3. Mr Lally and T & M Contracts ("the operator") now appeal to the Upper Tribunal.

The proper approach of the Upper Tribunal to an appeal

4. The following principles (extracted from the Digest of Traffic Commissioner Appeals) as to the proper approach to an appeal in the Upper Tribunal can be found in the decision of the Court of Appeal in the case of *Bradley Fold Travel Ltd & Peter Wright –v- Secretary of State for Transport [2010] EWCA Civ. 695*:

- (1) *The Tribunal is not required to rehear all the evidence by conducting what would, in effect, be a new first instance hearing. Instead it has the duty to hear and determine matters of both fact and law on the basis of the material before the Traffic Commissioner but without having the benefit of seeing and hearing the witnesses.*
- (2) *The Appellant ‘assumes the burden’ of showing that the decision appealed from is wrong.*
- (3) *In order to succeed the Appellant must show not merely that there are grounds for preferring a different view but that there are objective grounds upon which the Tribunal ought to conclude that the different view is the right one. Put another way it is not enough that the Tribunal might prefer a different view; the Appellant must show that the process of reasoning and the application of the relevant law require the Tribunal to adopt a different view.*

The Tribunal sometimes uses the phrase “plainly wrong” as a shorthand description of this test. (*NT/2013/52 & 53 Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI*, paragraph 8).

The Relevant Legislative Provisions

5. Section 2 of the Goods Vehicles (Licensing of Operators) Act 1995 provides that no person shall use a goods vehicle on a road for the carriage of goods, for hire or reward, or in connection with any trade or business carried on by him, except under a licence issued under the Act.
6. In terms of section 13 of the 1995 Act, in determining an application for a restricted operator licence, the traffic commissioner must be satisfied, among other things, that the applicant is not unfit to hold an operator’s licence. Section 13B¹ provides:-

¹ Sections 13B and 13C replace previous legislative requirements which were in similar terms.

The requirement of this section is that the applicant is not unfit to hold an operator's licence by reason of—

(a) any activities or convictions of which particulars may be required to be given under section 8(4) by virtue of paragraph 1(e) or (f) of Schedule 2;

(b) any conviction required to be notified in accordance with section 9(1) (convictions etc required to be notified subsequent to the making of an application).

7. Section 13C of the 1995 Act requires satisfactory arrangements to have been made for a range of matters such as compliance with drivers' hours regulations and maintenance of vehicles.
8. Once a restricted licence has been granted the requirements of sections 13, 13B and 13C, among other conditions, are continuing obligations that require to be met throughout the lifetime of the licence².
9. Section 26(1) of the 1995 Act provides that the traffic commissioner may direct that a licence be revoked, suspended or curtailed on any of a number of grounds. Those grounds include failure to fulfil any undertaking recorded in the licence (such as observing the rules on drivers' hours, tachographs and keeping proper records) and a material change in the circumstances of the licence holder since the licence was granted.
10. Section 28(1) provides that where the traffic commissioner directs that the licence be revoked under s 26 the commissioner may order the person who was the holder of the licence to be disqualified (either indefinitely or for such period as the commissioner thinks fit) from holding or obtaining an operator's licence. Where the traffic commissioner disqualifies the licence holder, s 28(4) provides that the commissioner may specify that if that person, during the period of disqualification:-
 - (a) is a director of, or holds a controlling interest in—*
 - (i) a company which holds a licence of the kind to which the order in question applies, or*
 - (ii) a company of which such a company is a subsidiary, or*
 - (b) operates any goods vehicles in partnership with a person who holds such a licence, that licence of that company or, as the case may be, of that person, shall be liable to revocation, suspension or curtailment under section 26.*

² *Arnold Transport & Sons Ltd v DOENI*, NT/2013/82, at paragraph 11.

Background

11. The following is a summary of the background to this appeal taken from the decision of the Traffic Commissioner dated 19 August 2022 and other documentation within the bundle for the Traffic Commissioner and Public Inquiry (“PI”) in this case.
12. T & M Contracts Ltd (OM2006235) was incorporated on 31 August 1984. The operator’s application for a restricted vehicle licence for three vehicles and one trailer was considered at a PI in November 2018, following allegations, amongst other things, that the operator had been operating without a licence. There is no record of the former Traffic Commissioner’s formal findings, but the decision letter discloses that the licence was granted “with the severest warning short of refusing the application”.
13. In applying for the licence, the operator gave a number of undertakings including to observe the laws and rules relating to the driving and operation of its vehicles, drivers’ hours and tachographs; to keep proper records and to make these available on request; to keep vehicles and trailers in a fit and serviceable condition; and, to notify the traffic commissioner within 28 days of any changes that might affect the licence.
14. Mr Michael Lally is the operator’s sole director. A former director, Ashlee Lally, Mr Lally’s wife, resigned on 19 October 2021. The operator did not inform the TC’s office of that resignation, as it should have done.
15. A report dated 10 March 2022 by Traffic Examiner (“TE”) Wilkinson was submitted to the TC’s office. It was alleged, amongst other things, that the operator had no proper systems for ensuring that the rules on drivers’ hours and tachographs were observed, despite there having been a previous unsatisfactory TE investigation and assurances given by Mr Lally that improvements would be made.
16. The operator was called to a PI. The PI was initially set down for 30 May 2022. On 25 April 2022, Mr Lally emailed the TC’s office advising that he would be on holiday from 26 April until 3 June 2022. He provided vouching in the form of an email confirming his flight bookings and asked if the inquiry could be put off until he returned (page 251). The TC granted his request and directed that a fresh date for the PI be fixed. An email was sent to Mr Lally on 28 April 2022 advising him of the decision to adjourn and stating (page 250),
“I will write out to you once the new date has been set. I have attached a copy of the proof of papers. I have a hardcopy which would usually be sent by recorded delivery to the correspondence address listed on the licence, however, as you will be away, could you advise whether someone would be able to sign for the brief at the operating centre address in your absence?”
An electronic copy of the brief of papers for the inquiry was attached to that email.
17. Mr Lally returned from holiday on Friday 3 June 2022.

18. On Monday 6 June 2022, a package containing a hard copy of the brief of papers and a letter advising that the PI had been rescheduled for Monday 11 July 2022 was sent recorded delivery to the operator's correspondence address. The package was signed for, as delivered, on 7 June 2022.
19. At 06.03 on 7 July 2022, Mr Lally sent an email to the TC's office querying when a new date for the PI would be set. A member of the TC's staff responded at 11.51 the same day advising of the new date and also that notification of the date along with the papers for the PI had been sent some weeks earlier.
20. At 18.27 on Friday 8 July, Mr Lally emailed the TC's office stating,
"I didn't know it (the brief of papers) had been delivered when I was in the US for six weeks. As it was marked private and confidential my admin put it in my drawer and neglected to tell me. I assumed that like the first time I would have received an email with the new dates. Can this be continued in order that I have a chance to respond?" (Page 266.)
21. Mr Lally's email, having been sent outwith business hours, the TC was only made aware of it on the morning of the inquiry. She decided, therefore, to consider any request for a further adjournment as a preliminary matter at the inquiry.

The preliminary issue at the PI

22. Mr Lally gave evidence (page 268) that he had only got sight of the brief of papers the preceding Friday (8 July). He said he thought that what had happened was that they had come in to his accountant's office and because they were marked as private and confidential they had not opened them. He did not know what had happened between them being collected and taken to his office, but they were taken to his office and put in a drawer, nobody told him about them. He said it was only when he contacted the TC's office the previous week to ask about the new PI dates that he was told the case was calling on Monday 11 July. He said that he had read the documents sent by email but that he had not had a chance to respond to them (page 269).
23. Mr Lally moved for an adjournment.

The TC's decision on the preliminary issue

24. In deciding to refuse the motion for an adjournment, the TC stated (page 851):

12. I noted that this was the second occasion upon which Mr Lally had requested an adjournment. The matters raised in TE Wilkinson's report were serious and included allegations that the operator still had no proper systems for managing drivers, drivers' hours and vehicle maintenance, despite

previous promises to improve. There had been offences identified during a roadside stop, including several incidences of driving off card.

13. I further noted that Mr Lally's case had been under investigation by DVSA since March 2020. Prima facie, that case appeared to be characterised by delays in providing information and requests by Mr Lally for extra time to do so.

14. Mr Lally's email requesting the initial adjournment advised that he would be out of the country until 3 June 2022. The flight booking that he produced confirmed that return date. However, the hardcopy papers had been signed for as received after that date, on 7 June 2022.

15. Mr Lally waited until 7 July 2022 to contact my office. I considered that any diligent operator, on notice that a fresh date for a public inquiry was to be fixed, would have been alert to the fact that communication from my office was imminent and made sure that anything which arrived in their absence was brought to their attention.

16. In any event, Mr Lally was told by my office on the morning of 7 July of the new date for the inquiry. He had several days, therefore, to gather the evidence requested most of which --- simple vehicle maintenance records or evidence of financial standing---should have been readily available to him. Mr Lally failed to do so, advising instead that he had followed the direction in the call up letter that documentation should be lodged seven days in advance of the inquiry. Again, I considered that any diligent operator who had evidence demonstrating that they had effective systems and financial standing would have requested leave to lodge that evidence, although late. Mr Lally chose not to do so.

17. Mr Lally told me that he had read the electronic copy of the papers for the inquiry, albeit briefly, when he received the email on 28 April. There was no documentation in addition to those papers before me. I found, therefore that Mr Lally was on sufficient notice of all the matters to be considered at the inquiry.

The Public Inquiry

25. The TC then proceeded to hear evidence from Traffic Examiner Wilkinson. Mr Lally was given an opportunity to put questions to TE Wilkinson. Mr Lally then gave evidence.
26. The TE gave evidence that in March 2020, one of the operator's vehicles was stopped and the tachograph data showed that it had been driven on 16 occasions, some for considerable periods of time, without a card being inserted. The operator had not been locked into the tachograph equipment and the data had not been downloaded from it within the required 90 day period.
27. An investigation was begun into the operator systems and Mr Lally was asked to provide documentation. Deficiencies in the operator systems for downloading and analysing tachograph data to ensure compliance with the law were identified. Mr Lally provided written assurances that the deficiencies identified would be remedied.

28. The TE followed up the operator's case to see if the promised improvements had been made. TE Wilkinson asked Mr Lally for tachograph data for analysis in September 2021. Mr Lally failed to comply with that request. TE Wilkinson arranged to meet Mr Lally at the operating centre on 6 November 2021. Mr Lally failed to attend that meeting. On 23 November 2021, TE Wilkinson attended the operating centre and found Mr Lally had not implemented any of the systems he had promised.
29. TE Wilkinson prepared a report on the deficiencies and asked Mr Lally to respond and provide further tachograph information by 7 December 2021. In particular, he asked for raw tachograph data for anyone who drives vehicle MX59AHJ, for raw tachograph data for that vehicle, and for a copy of the tachograph calibration certificates.
30. On 9 December Mr Lally asked for an extension of the deadline and TE Wilkinson agreed to an extension to 22 December 2021. On 22 December 2021 Mr Lally asked for a further extension, which was granted to 5th January 2022.
31. On 4 January 2022, Mr Lally responded to TE Wilkinson saying that the company had been closed for a year, except for emergency work and they had been trying to sort out tachograph data when they reopened in September 2021. He provided a tachograph data file for vehicle MX59AHJ which only had information for one day, 19 December 2021. He did not provide the additional tachograph data that TE Wilkinson had requested. On 14 and 31 January 2022, TE Wilkinson emailed Mr Lally again, asking for the tachograph data and clarification on certain matters. Mr Lally failed to respond to those emails. As at the date of the PI, TE Wilkinson had still not received any response from Mr Lally to those later requests.
32. This evidence was not challenged by Mr Lally at the PI.

The TC's consideration of the evidence and findings

33. The TC, having heard the evidence found as follows:-

34. Mr Lally is the sole director of the operator and is in sole control of it. His actions, therefore, can be equated with that of the operator itself.

35. I found Mr Lally to be an unconvincing and unreliable witness. He stated that he accepted responsibility for compliance with his operator licence undertakings, yet he readily offered excuses – staff illness, staff not informing him of documentation arriving, the Covid pandemic – for his repeated failures to implement change or to provide information and documentation which had been requested of him.

36. *Mr Lally had failed to co-operate fully or timeously with the DVSA investigations into his transport operation. He was dilatory in his responses, repeatedly seeking extensions of time to meet requests for information which should have been readily to hand. Given further time, he still failed to provide acceptable responses or complete information. Set against that backdrop, I found his evidence regarding his failure to be prepared for inquiry to be wholly incredible. I considered it to be, yet another, poor excuse and an attempt to delay findings of failure on his part.*
37. *This operator's licence had been in force since November 2018, yet in July 2020 serious deficiencies in road safety critical systems were identified. 16 instances of driving off card - each of which would render a driver's vocational driving entitlement liable to revocation - had been identified. Mr Lally gave assurances that improvements would be made but Examiner Wilkinson found in November 2021 that there had been no change.*
38. *Mr Lally's position was that his business had closed down due to Covid for about a year and that, other than emergency work, they were not operating. However, he admitted that, when the business reopened, he carried on using his lorries without any systems in place for downloading and analysing tachograph data.*
39. *Even taking into account the impact that the Covid pandemic had on all businesses, I would have expected a responsible operator to have effected immediate change when such serious matters were brought to their attention. Mr Lally did not. In fact, when his business reopened, he continued to use his vehicles without any proper systems in place, full in the knowledge that he should not have. Such actions indicate a serious disregard for road safety on his part.*
40. *Having found I could not rely on Mr Lally's evidence generally, I did not believe his assertions that adequate systems were now in place to ensure that the operator met its licence undertakings. Had there been, he would have been able to produce documentary evidence in relation to many of them at short notice. I find it more likely than not, therefore, that this operator has not, since the inception of the licence in 2018, had adequate systems in place for downloading and analysing tachograph data, ensuring compliance with the working time directive, driver training, driver licence checking or maintenance forward planning.*
41. *The operator's MOT pass rate is poor. That indicates that there are also deficiencies in its systems for vehicle maintenance. A prohibition had been issued in March 2020 for defects found on one of the operator's vehicles. In the absence of any documentation demonstrating that an effective vehicle maintenance regime is in place, I also find that the operator's vehicles are not being maintained in accordance with the licence undertakings.*

42. *Standing all of the foregoing, I have concluded that this operator poses a significant risk to road safety. Fair competition has also been impacted as a result of the operator's failure to have adequate systems in place; systems which other, compliant, operators are required to have and properly manage to ensure that they meet the undertakings on their licence. Mr Lally also admitted that he failed to notify the resignation of Ashlee Lally as director within the required 28-day period. Findings in terms of S.26(1)(c)(iii), (f) and (h) of the Act are made out.*
34. The TC then went on to consider whether Mr Lally and the operator could be trusted to comply with the licensing regime in the future (2013/07 *Redsky Wholesalers Ltd* and 2009/225 *Priority Freight*). She concluded that they could not and that the licence could not survive. She considered the question posed in *Bryan Haulage*, "Is the conduct of this operator such that it ought to be put out of business?" and answered it in the affirmative.
35. As the operator does not advance any grounds of appeal directed at the TC's disposal of the case, it is not necessary for us to consider this further.

Further procedure

36. The revocation and other orders took effect on the date of the TC's decision causing the operator practical difficulties in moving the vehicles and the equipment they were carrying. Following the issue of the decision, Mr Lally requested a stay and submitted some further documentation to the TC's office in support of this.
37. The Deputy Traffic Commissioner (DTC) granted a time limited stay. When that expired, on 2 September 2022, the operator applied for a further stay. This was refused by the DTC, but was subsequently granted by the Upper Tribunal, pending the outcome of this appeal.

The grounds of appeal

38. The grounds of appeal are at pages 842 to 848. There are essentially two grounds which can be broadly stated as follows: (1) The Traffic Examiner's evidence painted a misleading picture to the TC, and (2) the TC erred in the exercise of her discretion in refusing to adjourn the PI to allow the appellant to produce evidence that it was a compliant operator.
39. Regarding the first ground of appeal, the appellant challenged the evidence of TE Wilkinson narrated in the TC's decision at paragraphs 27 and 28:-

27. On 4 January 2022, Mr Lally finally responded to Examiner Wilkinson. His response consisted of an explanation that the company had been closed for a year, except for emergency work, and they had been trying to sort out the

tachograph data when they reopened in September 2021. He did not provide the additional tachograph data that Examiner Wilkinson had requested.

28. Examiner Wilkinson emailed Mr Lally again, asking for the tachograph data and clarification on certain matters. Mr Lally failed to respond to that email. As at the date of inquiry Examiner Wilkinson had still not received any response from Mr Lally.

40. Mr Lally submits that he sent tachograph information to TE Wilkinson on 25 November 2021 and 4 January 2022. He said he did not see the later email request for tachograph information as it had gone into his spam folder and so he did not respond to that.
41. Regarding the second ground of appeal, Mr Lally submits that the proceedings were unfair. Mr Lally states that he was in a position to provide evidence to rebuke³ parts and explain parts of the examiner's report. He states, *"It was well understood by the Commissioner that my position was (although she did not believe me) that I only received the notification of the new date one or two business days before the hearing."* He states (page 846) that the address the Commissioner has as his correspondence address is his accountant's address. *"The paperwork was delivered there, normally it is opened and an email copy is sent, but because this was marked confidential it was set aside for me to pick up"*.
42. He states further, *"It specifically said in the paperwork that all evidence 'must' be submitted by specific date. 'Must' suggests an absolute obligation, so it was understood by me that anything I brought would not be considered. Had I been afforded the time to mount a proper defence or indeed time to properly read and research the brief, I could have pointed out that Mr Wilkinson did indeed receive the downloaded data from me. It is clear from the Commissioner's report that the biggest concern is that proper systems aren't in place. I would've been able to demonstrate that they were."*

Upper Tribunal Hearing

Fresh Evidence and Ground of Appeal no. 2

43. The documentation submitted by the operator following the TC's decision (pages 761-805) included emails dated July and August 2020 from tachograph providers with proposals for tachograph systems and associated documentation; insurance documentation dated 2 December 2021; some vehicle and worker usage summaries at various dates between 2020 and 2022 from Tachomaster; and other printouts that were very poor copies. This was material that had not been made available to the TC.

³ He probably meant "rebut".

44. Mr Lally stated that this additional documentation proved that he did have a proper system in place. He said this documentation had been available at the date of the PI and he could have obtained it if he had been given time. He said he was not given the opportunity to obtain this evidence and present it at the PI. He invited the Upper Tribunal to admit this evidence and to consider it.
45. He told the Upper Tribunal that he had not found out about the new PI date until Thursday 7 July 2022, 2 business days before the PI set down for Monday 11 July. He said that he had returned from holiday on Monday 6 June. He had been expecting a new PI date to be sent to him by email which, he said, was his preferred method of communication and how he had been informed of the first PI date. However, he said, when he checked, there was nothing about a new date. He said he then emailed the TC's office on Thursday 7 July and it was only then he found out that the PI was fixed for 11 July and that the letter with the new date and hardcopy bundle had been sent to his correspondence address, which was his accountant's office. He said that under normal circumstances, his accountant's office would open any mail for him and scan and email a copy to him. However, as this was marked "private and confidential", that had not happened. It was only when he got the reply email from the TC's office on 7 July that he realised the bundle had been delivered to his accountant's office. His wife, Ashlee, then went up to the accountant's office to collect the PI bundle on Friday 8 July. It was only then, he said, that he got sight of the bundle.
46. It was pointed out to Mr Lally by the Upper Tribunal, that he had given a different account to the TC in an email and at the PI. He had stated that the bundle had been collected by a member of his staff and placed in a drawer and no one told him it was there (pages 266 and 716). He said that that version was wrong; the papers had been put in a drawer at his accountant's office and later collected by his wife. He offered no explanation for the different accounts.
47. Mr Lally was asked to comment on the email correspondence with the TC's office and, in particular, the email at page 250. In that email, the TC caseworker stated, "I will write out to you once a new date has been set", and asked if someone at the operating centre would be able to sign for the brief of papers in his absence. He said he had not replied to that email but he had assumed the new date would be sent by email.
48. Mr Lally said he could have produced all the necessary documentation at the PI but did not do so because the letter advising him of the new date (page 261) stated that the documentation had to be submitted no later than 4 July 2022. He thought that meant there was no point as it would be rejected. He stated that he had fully expected to be granted an adjournment on 11 July and so had not put any time into assembling a defence. He said that was why the TC's decision was unfair because he had not been given the opportunity to produce documentation showing he had a system in place.

Ground of appeal no. 1

49. Mr Lally said that the crux of the matter was that TE Wilkinson made it look as if he had not provided any information about his systems. That was misleading. The TE had received information from him prior to January 2022 which demonstrated that he had a system in place. Mr Lally stated that driver downloads were sent on 25 November 2021. TE Wilkinson in his report (page 72) states that, he had interrogated the tachograph data produced by Mr Lally for the period for drivers for the period 16 September and 23 November 2021. Mr Lally submits that it is clear from that statement that TE Wilkinson had the driver data. That information and the information sent in his email of 4 January 2022 were sent from the new tachograph system. During the Covid lockdown he had been working to put a new tachograph system in place. The vehicle required a completely new tachograph installed so that it could connect to the system.
50. Mr Lally accepted that he had not responded to the later emails from TE Wilkinson. He said these had gone into his email spam folder.

Discussion and Decision

Fresh Evidence

51. The principles for allowing fresh evidence to be heard, and which apply to the Upper Tribunal, are laid down on the case of *Ladd v. Marshall* [1954] 1WLR 1489 where Denning LJ held (at 1491):
- To justify the reception of fresh evidence...three conditions must be fulfilled: first it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.*
52. The evidence about events leading up to the PI, and which was largely unchallenged, showed that Mr Lally had been asked for documentation demonstrating a suitable system on many occasions, but had failed to satisfy the requests from TE Wilkinson. A call-up letter was sent to the operator at the end of April 2022 (page 12 ff). Mr. Lally accepted that he had received that and read it. The call-up tells the operator that he must now start collecting his own evidence, including:-
- (i) *The original maintenance records for all three vehicles for the last three months;*
 - (ii) *The original maintenance contract;*
 - (iii) *The Forward Planner (or photographic evidence thereof if large);*
 - (iv) *Evidence of your systems for managing drivers to include at least the following for the last three months:*
 - *Driver licence checks*
 - *Driver infringement reports*

- *Vehicle unit download reports*
- (v) *Anything else which you think will help show you are compliant operator or are taking steps to address the failings identified.*

53. Along with the call up letter, Mr Lally received the electronic bundle which showed the records that had been produced and what was still required. Mr Lally's evidence was that he had read the bundle. He returned from holiday, aware that a new date for a PI was to be fixed imminently, but did nothing to prepare his case.
54. The documentation Mr. Lally seeks to submit late, could have been obtained for the PI, if he had exercised due diligence. We find that he did not exercise due diligence. As the fresh evidence does not satisfy the conditions set out in *Ladd*, we are unable to consider it. We therefore refused the motion to admit this evidence.

Ground of Appeal no. 2

55. The principles regarding adjournment are summarised in the Digest of Traffic Commissioner Appeals (page 66):-

Once called to a Public Inquiry it is for an operator who seeks an adjournment to satisfy the Traffic Commissioner that it is appropriate and in the interests of justice to set another date. Deciding whether or not to adjourn involves an exercise of discretion. In exercising that discretion the TC is entitled to take into account all relevant factors, for example, (i) the reason, (ii) supporting evidence or the lack of it, (iii) any delay between learning of the difficulty and applying to adjourn, (iv) the length of adjournment requested and (v) the impact on road safety, fair competition and/or compliance with the regulatory regime of adjourning for the period requested. These are no more than examples, other factors may be relevant, if so they should be considered

56. In *VST Building & Maintenance Ltd* [2014] UKUT 0101, The Upper Tribunal stated (at paragraph 10):-

Operators seeking an adjournment must understand that it is up to them to persuade the Traffic Commissioners that the reason for requesting an adjournment is good enough to justify granting an adjournment, that it is confirmed, whenever possible, by independent evidence and that the length of the adjournment requested will not be such as to give rise to unacceptable risks to road safety, fair competition and/or the proper enforcement of the regulatory regime. Operators should also bear in mind that Traffic Commissioners are entitled to take into account the circumstances in which the request for an adjournment is made. It is important for operators to apply immediately it becomes apparent that there is a problem with the date fixed for the Public Inquiry. Those who wait until the last moment, (perhaps hoping that this will compel the Traffic Commissioner to grant an adjournment), may well find that they have simply aroused suspicion as to their motives and as to whether or not there are genuine grounds for adjourning.

57. We are satisfied that the TC, in exercising her discretion not to grant an adjournment, gave proper consideration to relevant issues. In particular, the

operator accepted that he had received and read the electronic bundle which gave him fair notice of the issues to be considered at the PI and the information he was required to assemble for it. The TC did not accept Mr Lally's evidence regarding his failure to be prepared for the PI which she found to be wholly incredible.

Courts have recognised the benefit of seeing and hearing a witness giving evidence. This is in the context of limiting the extent to which an appellate court will interfere, even in an appeal on the facts, with a conclusion reached by a judge who took the oral evidence. The significance of these factors reflects the fact that a bare transcript of the evidence and the judge's judgement setting out the findings of fact cannot convey every nuance of the evidence as given in court.

(Jacobs, Tribunal Practice and Procedure, 5th ed, page 467.)

We have no reason to disturb or disagree with the TC's finding on Mr Lally's credibility, particularly as he gave a different account about the receipt of the hardcopy bundle to the Upper Tribunal.

58. Regarding the new date for the re-arranged PI and receipt of the hard copy bundle, it was the operator's duty to ensure that the TC's office could communicate that to him effectively. As was stated by the Upper Tribunal in *Anthony Edwards t/a Jim Bertie Ltd* [2010] UKUT 399 (AAC), at paragraph 9:-

The duty upon an operator to ensure that the Traffic Area Office is able to communicate effectively is particularly important in a case such as this where it was fully known and appreciated that a public inquiry had to be re-scheduled for hearing. Mr Edwards only had to telephone the Office of the Traffic Commissioner in order to discover the new date. As it was, properly posted letters were not returned, no alternative postal address was provided, efforts by the Office of the Traffic Commissioner to make contact by phone failed, and the operator and Transport Manager made no effort whatsoever to keep in touch with the office (once an adjournment had been granted at the operator's request) even though they were fully aware of the ongoing proceedings, and the fact that the Deputy Traffic Commissioner had already adjourned the hearing 3 times in order to accommodate a range of difficulties.

59. Mr Lally had been put on notice by emails from the TC's office that the caseworker would "write out" to him with the new date (page 250). That strongly suggests a letter by post rather than email; and that the hard copy of the bundle would be sent to him (pages 250 and 252). Further, Mr Lally did not reply to the TC caseworker's email asking if the papers could be received at the operating centre while he was on holiday. In the absence of a reply, the papers were sent to the operator's nominated address for communications. Mr Lally was well aware that a PI had to be re-arranged. He could have telephoned the TC's office immediately on his return from holiday. These were matters that the TC, rightly in our opinion, had in mind when considering adjournment. She also had regard to the fact that the operator did not request an adjournment at the

earliest opportunity, nor did he produce any documentation, which he could have done had he had a system in place, as he maintained. Given his previous failures and delays in producing documentation, his submission that he thought he could not submit documentation late was disingenuous.

60. We do not consider there to be any illogicality in the TC's reasoning on this issue, or that there were matters she should have taken into account but did not, or that she omitted to have regard to relevant facts and circumstances. We can find no fault with her reasoning or find that she was plainly wrong in the exercise of her discretion.

Ground of appeal no. 1

61. Mr Lally accepted at the PI that he was operating his vehicles without the required monitoring systems in place. The height of his argument to the Upper Tribunal was that he had provided "some" tachograph information to TE Wilkinson; he does not claim that all the tachograph information requested was supplied. The call up letter made it clear why he was being called to PI and what evidence he had to provide (see paragraph 52 above). He did not, and has not, provided evidence to demonstrate that the operator was downloading and analysing the digital tachograph data. He had not provided it before the PI, as the report and evidence of TE Wilkinson made clear. That evidence was, essentially, unchallenged by Mr Lally.
62. Further, Mr Lally accepted that he had not responded to the requests for further information and documentation from TE Wilkinson made on 14 and 31 January 2022. He claimed these messages had gone into his spam folder. We were unable to accept this explanation for his failure because the other emails sent by TE Wilkinson had been received; Mr Lally claimed that email was his preferred mode of communication, if so, and if he had been responsible he would have been checking his spam folder regularly; and, this explanation was not given at the PI. In any event, TE Wilkinson's report in the PI brief refers to the email request for further documentation made on 14 January 2022 and the fact that no response had ever been received. Mr Lally could therefore have taken steps to provide that information, if it existed and the means of generating it existed, before the PI. He did not do that.
63. We see no reason to disturb the TC's findings in fact or her reasoning in reaching her conclusion that the operator did not have, even by the date of the PI, adequate systems in place to ensure the operator met its licence undertakings. There are no grounds for holding that the TC's decision on this issue was plainly wrong.

Decision

64. The decision of the TC dated 19 August 2022 is confirmed in all respects. The appeal is dismissed.

65. The stay granted by the Upper Tribunal on 23 September 2022 will remain effective until, but not beyond, 4 pm on 12 January 2023.

**Authorised for issue
On**

**Marion Caldwell KC
Judge of the Upper Tribunal**