



SCA Haulage Ltd
[2023] UKUT 159 (AAC)

Appeal No. UA-2021-2001536-NT

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

**ON APPEAL from the DECISION of the HEAD of the TRANSPORT
REGULATION UNIT
Dated 27 October 2022**

Before:

**Kenneth Mullan
Mr Richard Fry
Mr Martin Smith**

**Judge of the Upper Tribunal
Member of the Upper Tribunal
Member of the Upper Tribunal**

Appellant:

SCA Haulage Ltd

Attendances:

For the Appellant: The Appellant was not present but was represented by Mr Manley

For the Respondent:

Heard at: Tribunal Hearing Centre, Royal Courts of Justice, Belfast.
Date of hearing: 31 March 2023
Date of decision: 06 July 2023

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that this appeal be ALLOWED.

SUBJECT MATTER:- Revocation; Public Inquiry; late submission of evidence requested in call-up letter; procedural irregularity

CASES REFERRED TO:- NT/2013/52 & 53 Fergal Hughes v DOENI & Perry
McKee Homes Ltd v DOENI; Bradley Fold Travel Ltd & Peter Wright v Secretary of State for Transport [2010] EWCA Civ. 695;

REASONS FOR DECISION

1. This is an appeal from the decision of the Head of the Transport Regulation Unit, (“Deputy Head of the TRU”) to revoke the Appellant’s goods vehicles operator’s licence with effect from 23.45 hours on 28 November 2022 and ordered that the operator was disqualified from holding or obtaining a goods vehicle operator’s licence for a period of three years commencing at 23.45 hours on 28 November 2022.
2. The factual background to this appeal appears from the documents and the Head of the TRU’s decision and is as follows:-
 - (i) The Appellant is the holder of a Standard International Operator’s Licence authorising the use of 5 vehicles and 1 trailer. Mr Sean Patrick Woods is the sole director.
 - (ii) In correspondence dated 9 March 2022 an officer in the TRU informed the Appellant that the Department was considering making a direction to revoke the operator’s licence on a number of grounds.
 - (iii) In correspondence dated 28 March 2022, the Appellant made representations on the evidential basis for the proposal to revoke the operator’s licence and made a request for the case to be listed for a Public Inquiry of the points which had been made and not considered.
 - (iv) In email correspondence dated 5 September 2022 the Department wrote to the operator with a direction for the supply of records for assessment ahead of the Public Inquiry. These records, to be provided not later than 30 September 2022, related to financial standing, maintenance, drivers’ hours, internal procedures and the authorisation to use the nominated operating centres.
 - (v) The Department has asserted that no response was received, and no records were provided by the date specified.
 - (vi) The Department has stated that a ‘calling in letter’ was issued to the Appellant on 3 October 2022. Further, the Department has asserted that this letter ‘again ... requested evidence of systems and procedures, and any representations, to be provided to the Department not later than 17 October 2022. As before no records were received in advance of the date specified.’
 - (vii) The Public Inquiry took place on 24 October 2022. Mr Woods was present and was represented by Mr Manley. We return below to aspects of what transpired at the Public Inquiry.
 - (viii) On 27 October 2022 the Head of the TRU issued his decision as summarised in paragraph 1 above.
 - (ix) An appeal against the decision of 27 October 2022 was subsequently received in the office of Administrative Appeals Chamber (AAC) of the Upper Tribunal.
 - (x) Included in the notice of appeal was an application for a stay of the effect of the decision of 27 October 2022. In a determination dated 28 November 2022 the application for a stay was refused by the Head of the TRU.

- (xi) The application for a stay was renewed before the Upper Tribunal. In a determination dated 7 December 2022 the further application was refused by Upper Tribunal Judge Hemingway.

Relevant legislative provisions

3. Sections 2, 12, 12A, 12B, 12C, 12D, 12E, 17, 23(1) and 24(1) of the Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010 ('the 2010 Act') provide:

2. "Standard" and "restricted" licences

- (1) An operator's licence may be either a standard licence or a restricted licence.

- (2) A standard licence is an operator's licence under which a goods vehicle may be used on a road for the carriage of goods—

(a) for hire or reward, or

(b) for or in connection with any trade or business carried on by the holder of the licence.

- (3) A restricted licence is an operator's licence under which a goods vehicle may be used on a road for the carriage of goods for or in connection with any trade or business carried on by the holder of the licence, other than that of carrying goods for hire or reward.

- (4) Notwithstanding subsections (2) and (3), a company may use a goods vehicle on a road for the carriage of goods for hire or reward under a restricted licence instead of a standard licence if (but only if) the goods concerned are the property of a company which is—

(a) a subsidiary of the first company,

(b) a holding company for the first company, or

(c) a subsidiary of a company which is a holding company both for that subsidiary and for the first company.

- (d) if the Department thinks fit, whether the requirement of section 12D is satisfied.

- (5) A standard licence may authorise a goods vehicle to be used for the carriage of goods by road—

(a) on both national and international transport operations; or

(b) on national transport operations only.

- (6) Except as provided in subsection (4) and subject to sections 2A and 3, a person who uses a goods vehicle under a restricted licence for carrying goods for hire or reward is guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale.

- (7) A person who uses a goods vehicle for carrying goods by road for hire or reward on international transport operations under a standard licence which covers the carriage of goods on national transport operations only is guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale.

12. Determination of applications for operators' licences

- (1) On an application for a restricted licence the Department must consider—

- whether the requirements of sections 12A and 12C are satisfied; and
- if the Department thinks fit, whether the requirement of section 12D is satisfied.

(2) On an application for a restricted licence the Department must consider—

- and
- (a) whether the requirements of sections 12B and 12C are satisfied;
 - (b) if the Department thinks fit, whether the requirement of section 12D is satisfied.

(3) Subsections (1) and (2) are subject to section 10 (publication of application), if applicable, and 47(2) (payment of application fee).

(4) In considering whether any of the requirements of sections 12A to 12D are satisfied, the Department must have regard to any objection duly made under section 11(1)(a) in respect of the application.

(5) If the Department determines that any of the requirements that it has taken into consideration in accordance with subsection (1) or (2) are not satisfied, it must refuse the application.

(6) In any other case the Department must grant the application, unless either of the following provisions applies—

- (a) section 13(2) (power to refuse application on environmental grounds);
- (b) section 47(2) (power to refuse to proceed until fee is paid).]

Determination of applications

Requirements for standard licences

12A.(1) The requirements of this section are set out in subsections (2) and (3).

(2) The first requirement is that the Department is satisfied that the applicant—

- (a) has an effective and stable establishment in Northern Ireland (as determined in such manner as may be prescribed);
- (b) is of good repute (as determined in such manner as may be prescribed

and

- (c) has appropriate financial standing (as determined in such manner as may be prescribed);

(3) The second requirement is that the Department is satisfied that the applicant

...

- (a) is an individual who—
 - (i) is professionally competent (as determined in such manner as may be prescribed) and

- (ii) has designated a suitable number of individuals (which may include the applicant) who satisfy such requirements as may be prescribed, or
- (b) if the applicant is not an individual, or is an individual who is not professionally competent, has designated a suitable number of individuals who satisfy such other requirements as may be prescribed.
- (c)
- (4) For the purposes of subsection (3), a number of designated individuals is suitable if the Department is satisfied it is proportionate to the maximum numbers of motor vehicles and trailers that may be used by the applicant in accordance with section 5 if the standard licence is issued.
- (5) In this Act, “transport manager” means an individual designated under subsection (3)(a)(ii) or (b).

12B Requirements for restricted licences

12B. The requirement of this section is that the applicant is not unfit to hold an operator’s licence by reason of—

- (a) any matter of which particulars are required to be given under section 7;
- or
- (b) any event required to be notified in accordance with section 8(1).

12C Requirements for standard and restricted licences

- (1) The requirements of this section are that it must be possible (taking into account the Department’s powers under section 14(3) to issue a licence in terms that differ from those applied for) to issue a licence in relation to which-
 - (a) in the case of a light goods vehicle licence, subsections (2) to (4) will apply, or
 - (b) in the case of a heavy goods vehicle licence, subsections (2) to (6) will apply.
- (2) There must be satisfactory arrangements for securing that the following are complied with in the case of vehicles used under the licence—
 - (a) Article 56 of the Road Traffic (Northern Ireland) Order 1981 (drivers’ hours); and
 - (b) the applicable Community rules, within the meaning of Article 2 of that Order.
- (3) There must be satisfactory arrangements for securing that vehicles used under the licence are not overloaded.
- (4) There must be satisfactory facilities and arrangements for maintaining the vehicles used under the licence in a fit and serviceable condition.
- (5) A heavy goods vehicle licence must specify at least one place in Northern Ireland as an operating centre of the licence-holder, and each place so specified must be available and suitable for use as an operating centre of the licence-holder (disregarding any respect in which it may be unsuitable on environmental grounds).

- (6) The capacity of the place specified as an operating centre (if there is only one) or both or all of the places so specified taken together (if there is more than one) must be sufficient to provide an operating centre for all the heavy goods vehicles used under the licence.
- (7) In considering whether the requirements of subsections (2) to (6) are satisfied, the Department may take into account any undertakings given by the applicant (or procured by the applicant to be given) for the purposes of the application, and may assume that those undertakings will be fulfilled.
- (8) In considering whether subsection (5) will apply in relation to a licence, the Department may take into account any conditions that could be attached to the licence under section 20(1)(a) (conditions of licences) and may assume that any conditions so attached will not be contravened.
- (9) In considering whether subsection (5) or (6) will apply in relation to a licence, the Department may take into account whether any proposed operating centre of the applicant would be used—
- (a) as an operating centre of the holders of other heavy goods vehicle licences as well as an operating centre of the applicant; or
 - (b) by the applicant or by other persons for purposes other than keeping heavy goods vehicles used under the licence.

12D. Further requirement for standard and restricted licences

The requirement of this section is that the provision of the facilities and arrangements for maintaining the vehicles in a fit and serviceable condition is not prejudiced by reason of the applicant's having insufficient financial resources for that purpose.

12E Professional competence for restricted licence holders

12E. As from such date as may be prescribed, section 12B shall have effect as if—

- (a) the existing text of section 12B were renumbered subsection (1),
 - (b) in section 12B(1), in the words before paragraph (a), before “requirement of” there were inserted “first”, and
 - (c) after section 12B(1) there were inserted—
- “(2) The second requirement of this section is that the applicant—
- (a) if an individual, is professionally competent (as determined in such manner as may be set out in regulations made for the purposes of section 12A(3)(a)(i)), or
 - (b) if not an individual, or an individual who is not professionally competent, complies with section 12A(3)(b) as if the applicant were an applicant for a standard licence who is not an individual or is an individual who is not professionally competent.”

17.— Publication of notice of applications for variation of heavy goods vehicle licences in any locality affected

(1) Subject to subsection (4), in relation to a heavy goods vehicle licence, the Department shall refuse an application for any of the directions

mentioned in subsection (2) without considering the merits unless it is satisfied that subsection (3) has been complied with in respect of each locality affected by the application.

(2) The directions referred to in subsection (1) are—

- (a) any direction under section 16(1)(a) that a maximum number of heavy goods vehicles specified in a licence under section 5 be increased;
- (b) any direction under section 16(1)(c) or (e) that has the effect of authorising the use of a heavy goods vehicle;
- (c) any direction under section 16(1)(g) that a new place be specified in a heavy goods vehicle licence as an operating centre of the licence-holder; and
- (d) any direction under section 16(1)(h) or (i) which might result in a material change in the use of any operating centre of the licence-holder.

(3) This subsection has been complied with in respect of a locality affected by an application for the variation of a heavy goods vehicle licence if, within the period beginning 21 days before the date on which the application is made and ending 21 days after that date, notice of the application in such form and containing such information as may be prescribed has been published in one or more local newspapers circulating in the locality.

(4) The Department is not required by this section to refuse an application if—

- (a) it is satisfied as mentioned in subsection (1), except that the form or contents of the notice of application as published in any newspaper did not comply with the prescribed requirements; and
- (b) it is satisfied that no person's interests are likely to have been prejudiced by the failure to comply with those requirements.

(5) For the purposes of this section a locality is affected by an application for the variation of a heavy goods vehicle licence if—

- (a) it contains any place that will be an operating centre of the licence-holder if the application is granted; or
- (b) it contains an existing operating centre of the licence-holder and
 - (i) the granting of the application would or could result in an increase in the number of heavy goods vehicles, or the number of heavy goods vehicles above a certain weight, that have that centre as their operating centre; or
 - (ii) any undertaking recorded in, or condition attached to, the licence that the application seeks to have varied or removed relates to that centre.

23.— Revocation, suspension and curtailment of operators' licences

(1) Subject to the following provisions of this section and the provisions of section 26, the Department may direct that an operator's licence be

revoked, suspended or curtailed (within the meaning given in subsection (9)) for any reasonable cause including any of the following—

- (a) in the case of a heavy goods vehicle licence, that a place has, at a time when it was not specified in the licence as an operating centre of the licence-holder, been used as an operating centre for heavy goods vehicles authorised to be used under the licence;
- (b) that the licence-holder has contravened any condition attached to the licence;
- (c) that during the 5 years ending with the date on which the direction is given there has occurred a prescribed event affecting information required to be given to the Department under section 7 or 8;
- (d) that the licence-holder made, or procured to be made, for the purposes of—
 - (i) the licence-holder's application for the licence,
 - (ii) an application for the variation of the licence, or
 - (iii) a request for a direction under paragraph 1 or 3 of Schedule 1, a statement of fact that, whether to the licence-holder's knowledge or not, was false, or a statement of expectation that has not been fulfilled;
- (e) that any undertaking recorded in the licence has not been fulfilled;
- (f) that the licence-holder, being an individual, has been adjudged bankrupt or has become the subject of a bankruptcy restrictions order or a debt relief order has been made in respect of him or he has become the subject of a debt relief restrictions order or, being a company, has gone into liquidation, other than voluntary liquidation for the purposes of reconstruction;
- (g) that since the licence was issued or varied there has been a material change in any of the circumstances of the licence-holder that were relevant to the issue or variation of the licence;
- (h) that the licence is liable to revocation, suspension or curtailment by virtue of a direction under section 25(3).

24.— Revocation of standard licences

(1) The Department shall direct that a standard licence be revoked if at any time it appears to the Department that

- (a) the licence-holder no longer satisfies one or more of the requirements of section 12A, or
- (b) a transport manager for the licence-holder ceases to satisfy such requirements as may be set out in regulations made for the purposes of section 12A(3)(a)(ii) or (b).

General principles on the operation of the Act and Regulations

4. At paragraphs 10 to 13 of the decision in NT/2013/82 Arnold Transport & Sons Ltd v DOENI, the Upper Tribunal set out the following general principles in the operation of the legislative provisions in Great Britain and Northern Ireland:

'Some General Principles

10. An operator's licence can only be granted if the applicant satisfies the Department that the relevant requirements, set out in s. 12 of the 2010 Act as amended, have been met. [The expression Department is used in the legislation but for the purposes of the decisions required to be taken under the legislation it is the Head of the TRU who takes them]. The relevant requirements are now set out in Paragraph 17(5) of the Goods Vehicles (Qualifications of Operators) Regulations (Northern Ireland) 2012, ("the Qualifications Regulations), which substitutes a new s.12 and adds ss. 12A-12E to the 2010 Act. The Qualifications Regulations also contain important provisions in relation to Good Repute, Professional Competence and Transport Managers.
11. The grant of an operator's licence does not mean that an operator can then proceed on the basis that the requirements that must be met in order to obtain a licence can thereafter be disregarded. In our view it is clear both from the terms of the 2010 Act and from Regulation 1071/2009 that these are continuing obligations, which an operator is expected to meet throughout the life of the licence. It is implicit in the terms of s. 23, which gives the Department power to revoke, suspend or curtail an operator's licence, that this can take place at any time and for any reasonable cause, including matters covered by the requirements of s. 12 as amended. It is explicit in s. 24, which provides that a standard licence shall be revoked if at any time it appears that the licence-holder is no longer (i) of good repute, (ii) of appropriate financial standing or, (iii) professionally competent. The underlining, in each case is ours. First, we wish to stress that once it appears that the licence-holder is no longer of good repute, or of appropriate financial standing or professionally competent the licence must be revoked because the Act makes it clear that there is no room for any exercise of discretion. Second, the use of the expression 'at any time' makes the continuing nature of the obligations crystal clear.
12. The Tribunal has stated on many occasions that operator's licensing is based on trust. Since it is impossible to police every operator and every vehicle at all times the Department in Northern Ireland, (and Traffic Commissioners in GB), must feel able to trust operators to comply with all relevant parts of the operator's licensing regime. In addition other operators must be able to trust their competitors to comply, otherwise they will no longer compete on a level playing field. In our view this reflects the general public interest in ensuring that Heavy Goods Vehicles are properly maintained and safely driven. Unfair competition is against the public interest because it encourages operators to cut corners in order to remain in business. Cutting corners all too easily leads to compromising safe operation.
13. It is important that operators understand that if their actions cast doubt on whether they can be trusted to comply with the regulatory regime they are likely to be called to a Public Inquiry at which their fitness to hold an operator's licence will be called

into question. It will become clear, in due course, that fitness to hold an operator's licence is an essential element of good repute. It is also important for operators to understand that the Head of the TRU is clearly alive to the old saying that: "*actions speak louder than words*", (see paragraph 2(xxix) above). We agree that this is a helpful and appropriate approach. The attitude of an operator when something goes wrong can be very instructive. Some recognise the problem at once and take immediate and effective steps to put matters right. Others only recognise the problem when it is set out in a call-up letter and begin to put matters right in the period before the Public Inquiry takes place. A third group leave it even later and come to the Public Inquiry with promises of action in the future. A fourth group bury their heads in the sand and wait to be told what to do during the Public Inquiry. It will be for the Head of the TRU to assess the position on the facts of each individual case. However it seems clear that prompt and effective action is likely to be given greater weight than untested promises to put matters right in the future.'

The proper approach on appeal to the Upper Tribunal

5. In NT/2013/52 & 53 Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI, the Upper Tribunal said the following, at paragraph 8 of its decision, on the proper approach on appeal to the Upper Tribunal:

'There is a right of appeal to the Upper Tribunal against decisions by the Head of the TRU in the circumstances set out in s. 35 of the 2010 Act. Leave to appeal is not required. At the hearing of an appeal the Tribunal is entitled to hear and determine matters of both fact and law. However it is important to remember that the appeal is not the equivalent of a Crown Court hearing an appeal against conviction from a Magistrates Court, where the case, effectively, begins all over again. Instead an appeal hearing will take the form of a review of the material placed before the Head of the TRU, together with a transcript of any public inquiry, which has taken place. For a detailed explanation of the role of the Tribunal when hearing this type of appeal see paragraphs 34-40 of the decision of the Court of Appeal (Civil Division) in Bradley Fold Travel Ltd & Peter Wright v Secretary of State for Transport [2010] EWCA Civ. 695. Two other points emerge from these paragraphs. First, the Appellant assumes the burden of showing that the decision under appeal is wrong. Second, in order to succeed 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 expression "*plainly wrong*" as a shorthand description of this test.'

At paragraph 4, the Upper Tribunal had stated:

'It is apparent that many of the provisions of the 2010 Act and the Regulations made under that Act are in identical terms to provisions found in the Goods Vehicles (Licensing of Operators) Act 1995, ("the 1995 Act"), and in the Regulations made under that Act. The 1995 Act and the Regulations made under it, govern the operation of goods vehicles in Great Britain. The provisional conclusion which we draw, (because the point has not been argued), is that this was a deliberate choice on the part of the Northern Ireland Assembly to ensure that there is a common standard for

the operation of goods vehicles throughout the United Kingdom. It follows that decisions on the meaning of a section in the 1995 Act or a paragraph in the Regulations, made under that Act, are highly relevant to the interpretation of an identical provision in the Northern Ireland legislation and vice versa.'

The Public Inquiry

6. Mr Woods attended the Public Inquiry and was represented by Mr Manley. The following extract from the transcript of the Public Inquiry is relevant to our reasoning:

S2: The other point to make upfront is that this is a hearing at your request, following a letter proposing to revoke the licence; that was back on the 20th March. I need to also bring to the attention the fact that there was a letter issued on 5th September asking for information to be provided by the 20th September; we didn't receive a response to that letter, that's a concern that I'll want to discuss. And then furthermore, there was a callup letter but then that had asked for any other information or any information to support your case to be provided by the 17th October; and again, no response to that. Before we proceed in terms of outlining my main concerns, can I get an understanding of why these important documents from the Department haven't been responded to.

S3: So can I answer this question?

S2: No. If you don't mind, I'll ask-

S5: I got that letter late you see.

S2: You got it late?

S5: Yeah.

S2: You got it late in what sense, sorry?

S5: In came late in the post ... like not late in the post, someone else must have signed for it.

S2: Someone else at your business?

S5: No, in the yard.

S2: So when did you receive it?

S5: I received it last month.

S2: So this is the 5th September letter you received last month?

S5: Yeah.

S2: Okay. So that's still in September, so how come we still haven't received a response?

S5: It's October.

S2: So this is October; you received it last month?

S5: Yeah.

S3: Mr Mulhern, if I could just interject at this point, I appreciate obviously it's for the Operator to respond to that particular question but in response to the letter that we received in September, obviously the company and the Transport Manager had to seek legal advice in relation to it. We have obviously over-shot that particular period in which to find that documentation and appreciate we are to be criticised and rightly so for that. Subsequent to that, since Friday evening past, my office undertaken to forward documentation in soft copy in response to many of the issues that were raised in the September letter; I appreciate that was dropped on you guys very last minute and no doubt you haven't had an opportunity to even open it or indeed to consider it, but I just thought for the point of the record that information has been made available.

Now, in terms of, I'll obviously come into it later on, Mr Mulhern, to the particular call-up letter. The call-up letter that I have in the particular pack is dated 3rd October, obviously we've only come on record on the Friday evening passed. During the course of our consultation on Friday evening a suggestion was made by me that perhaps we may have a legitimate reason to request an adjournment application, given the 21 day deadline had not been complied with by the DRU. We're certainly not in a position to forward that, we don't wish to forward that.

S2: Sorry, give me that again, sorry. What's the concern, the date of the call-up letter?

S3: The call-up letter received by Registered Post is dated the 3rd October 2022. Now the point I would make is that in order to prepare for the inquiry, the period of time in which to provide is a minimum period of 21 days. My submission on the point is very simply that obviously there won't have been enough time to prepare adequately, now that doesn't ... it's by the by in terms of the information that has been requested by the Department, obviously there was a deadline proposed, they had advanced notice of that in the September letter, but it's merely just a point that the Operator, Transport Manager and the solicitor are here today to deal with the issues they've had, and it's really just to put the point on the record Mr Mulhern, essentially we wish to engage, this is really a means of engaging with the Department on all of the issues that you have and all the concerns that you have, and it was my advice to them that they sought an application in the circumstances for an adjournment – we didn't wish to do that, we wanted to come and deal with the inquiry.

S2: Can I just clarify because I think it's an important point going forward that if the grounds are there and I want to have a look

at the call-up letter just to check the dates and you think there's an opportunity to call for an adjournment, I'm happy to hear that. What I will say is what I don't want to be done is be bound by-

S3: No.

S2: -if things don't go a certain way I don't then want to have gone through this process. So, what you're saying is there's an issue, there's a question mark; you're not asking for an adjournment, we'll proceed on the basis, okay. Noted, thanks and I'll certainly look at the dates.

S: 21 days was provided which is the statutory period.

S2: That's I think the point Mr Manley is suggesting is that the 21 days hadn't been reached.

S3: The letter is dated 3rd October and obviously we're on the 24th which is the 21st day. My point is very simply that the letter wouldn't have been received on time during that 21 day period. The point Mr Mulhern you're making is look-

S2: Are they (inaudible; over-talking 00:09:09)?

S3: I don't believe it has. But I take your point; if it's an issue of an adjournment we're suggesting that we're waiving our right to an adjournment simply to let the inquiry progress.

S2: Okay. Thank you. What I propose to do then Mr Manley, is I'll outline the concerns, there's a few, replicating largely what's in the call-up letters, these won't be things. Can I just ask, when were you engaged by Mr Woods then?

S3: We would have been retained on the end of last week, I think it was Friday afternoon was the first opportunity I had to consult with Mr Woods on the matter.

S2: I appreciate that puts you under a little bit of pressure also.

S3: It did, but-

S2: So we'll work through this as best we can.

S3: Absolutely.

...

We have attempted to the very best of our ability to address a number of the issues which have arisen in the context of the audit process and indeed some of the other fundamental proofs that are required to retain an Operator's Licence. If I can begin firstly with the financial requirement; again, the Department has now been provided with a series of bank statements which you have had an opportunity to consider in a very brief

fashion, but certainly it has shown, or at least the business has shown certainly early signs or health signs of a profitable business.'

7. The reference to 'Mr Mulhern' in this extract is erroneous. The Public Inquiry was chaired by Mr Mullan who, at that stage, was the Head of the TRU.

The decision notice

8. In his decision notice, the Head of the TRU dealt with the substantive aspects of the case. We focus, however, on the following procedural aspect:

'I am advised that a bundle was provided, electronically, at 17:45 on Friday 21 October 2022, less than one working day before the hearing was due to commence at 14:00 on Monday 24 October 2022. This was issued using 'Drop Box' and could not be accessed by department officials. Regardless, even had the material been accessible, the timeframe was insufficient to allow an assessment of the material provided. I still do not have access to any of the requested records (aside from finance which I will address below) and on account of the timeframe allowed to the operator to provide the material, I do not offer the opportunity to allow a review of these records in advance of completing my decision.

...

Whilst I am appreciative to Mr Manley for doing his best to assist at the very last hour, I am mindful that this operator was requested to provide this evidence, not within the calling in letter, but in a previous communication dated 05 September - some seven weeks prior to the hearing. It is simply not appropriate for an operator to ignore the clear directions of the Department within its investigations. The 'propose-to-revoke' letter had previously put this operator on notice and it was the operator that requested the public inquiry, as is their right. The explanation that someone else had signed for the letter, and Mr Woods only got it on 05 October carries no weight with me. If true, this was still sufficient time to provide the material before the hearing - but it is one of many occasions where the operator laid the blame elsewhere.'

The grounds of appeal

9. The following grounds of appeal were set out in the notice of appeal:

1. The Tribunal Head failed to give due consideration to an application for an adjournment in circumstances where the original "Call Up" Letter published by the Department was dated 03rd October 2022 with the Public Inquiry scheduled on 24th October 2022. It is submitted that 21 clear days were not provided to the Operator as per the tribunal guidelines in preparation of the Public Inquiry. The Operator's failure to file documents on time were routinely criticised in the Decision notice, however the department's own shortcomings in this regard were merely overlooked. It is submitted that the Deciding Officer failed to strike a balance in assessing both parties shortcomings.

2. The Deciding Officer, despite having been provided with documents in support of the Appellant's position, in advance of the Public Inquiry, failed to acknowledge or indeed consider the documents presented. At paragraph 10 of the Decision Notice the Deciding Officer comments, "a bundle was provided, electronically, at 1745 on Friday 21 October 2022, less than one working day before the hearing was due to commence at 14:00 on Monday 24 October 2022". He further comments, "I do not offer the opportunity to allow a review of these records in advance of completing my decision". It is submitted that it is a regular feature of Public Inquiry's that further documents can and very often are served on the Operator immediately prior to the hearing of a Public Inquiry. Very often time is afforded to acquaint oneself with the documents supplied (as would be right and proper). The Appellant would respectfully submit that vital evidence was submitted which would undoubtedly alleviate the Department's concerns, however the Deciding Officer simply chose not to consider or indeed acknowledge the evidence provided.

3. The Deciding Officer proceeded with a Public Inquiry, in circumstances where an application to add a new Transport Manager was pending. At paragraph 4 of the Decision Notice the Deciding Officer comments that, "an application to add a new Transport Manager has been submitted". He later comments at paragraph 16, "the application to nominate Mr. McDonald as transport manager was submitted after the Calling in Letter and that there had not been any concerns raised by the team processing that application". The Appellant would therefore respectfully submit that the Deciding Officer could have and indeed should have applied discretion in affording the Appellant time to install the new Transport Manager thus alleviating many of the concerns held;

4. The Deciding Officer erred in both law and fact in failing to correctly distinguish the difference between a corporate entity and a single individual entity. The Deciding Officer routinely criticised the sole director, Mr. Sean Woods, for being unable to answer questions put to him in the course of the Inquiry and indeed for relying on the assistance of others in answering questions. At paragraph 18 the Deciding Officer comments "Mr. Woods was unable to answer questions put to him. Initially, I had to intervene to prevent Mr. McDonald from responding on behalf of the Operator - I reminded all in attendance that it was Mr. Woods, a sole director, with whom the Department was entrusting with a licence and it was he that needed to satisfy me as to the Department's concerns". At paragraph 21, the Deciding Officer comments "when coupled by the complete lack of operational knowledge held by Mr. Woods, satisfy me that this is not an Operator that I can trust". At paragraph 33 the Deciding Officer comments "it is Mr. Woods to whom I'm being asked to entrust a licence and I do not find him trustworthy or capable". It is clear from these comments alone that the Deciding Officer has conflated the idea Mr. Woods was in some way the 'holder' of the Operator Licence when in fact the Operator was a limited/corporate entity, which does not prevent third party assistance being provided.'

The oral hearing

10. At the oral hearing, Mr Manley indicated that he was proceeding with ground number 2 as set out in the notice of appeal and wished to introduce a new ground which was that part of the reasoning of the Head of the TRU was not

in keeping with the principles set out by the Upper Tribunal in *Deborah Marie Toner T/A DDT Haulage* (UA-2022-000811- NT).

Analysis

11. It is axiomatic that we accept that the Appellant was at fault in failing to respond to the contents of the correspondence sent to him by an officer in the TRU on 5 September 2022 by the requested date of 20 September 2022 and which had requested that the Appellant provide certain documentation and responses. He was equally at fault in failing to respond to the Public Inquiry 'call-up' letter of 3 October 2022, which had also requested evidence of systems and procedures, and any representations to be provided by 17 October 2022. Finally, we cannot ignore that Mr Manley was engaged as a representative for the Appellant in and around the end of the week of 17 October 2022 which was the week before the Public Inquiry itself which was held on Monday 24 October 2022. As a consequence, the items requested by the TRU were only received in the office of the TRU at 17.45 on Friday 21 October 2022 and then in a digitised format. No fault attached to Mr Manley in relation to any of this.
12. The matter was raised at the Public Inquiry itself. As was noted above, there was some discussion as to whether there was, in fact, a requirement for the Appellant to be given a longer timeframe of 21 days within which to provide evidence requested for a Public Inquiry but the transcript demonstrates that Mr Manley waived any right to an adjournment of the proceedings.
13. The Chair of the Public Inquiry noted the failure by the Appellant to respond within the requested timeframes to the correspondence of 5 September 2022 and 3 October 2022. Mr Manley informed the Chair that the requested materials and responses had been forwarded and apologised to the Chair for their late arrival.
14. We accept that submission of evidential materials and submissions at a very late stage in regulatory or legal proceedings is frustrating and inconvenient for those who are involved in their assessment. Nonetheless, this is a feature, albeit an unfortunate one of the justice system.
15. It is our view that there was a clear duty on the Head of the TRU to undertake a rigorous assessment of all the evidence before him and to give an explicit explanation as to why it has preferred, accepted or rejected evidence which is before him and which was relevant to the issues arising in the case.
16. It was procedurally unfair for the Head of the TRU to determine that he would not give any consideration to the evidence which had been submitted. In his closing remarks at the Public Inquiry, he indicated to the Appellant's representative that he would aim to issue his decision within twenty-one days. If that was the case, we can see no reason why he could not have taken the time to refer to the further evidence and materials, determine whether it was relevant to the issues arising in the case and then to undertake a thorough assessment of it. At the oral hearing before us, we asked Mr Manley whether he could provide copies of the evidence and materials which had been submitted to the office of the TRU. Despite a delay occasioned by Mr Manley's belief that a direction to that effect would issue

from the office of the Administrative Appeals Chamber, all of the relevant material was provided without any difficulty.

17. We must, of course, address the question of materiality. In one sense, that is an easy question to answer, as the further evidence and materials were provided, albeit it late, in response to the Public Inquiry call-up letter. There is further support, however, for the question of relevance, to be answered in the positive. One of the departmental concerns identified in the call-up letter was whether the licence holder satisfied the requirement to be of appropriate financial standing. At the oral hearing, Mr Manley did provide a copy of a bank statement which, in the Head of the TRU's decision, 'showed a healthy bank balance'. The Head of the TRU declined, however, to give consideration to the question of financial standing despite, in the Public Inquiry, stating that the financial standing requirement was satisfied.
18. The failure by the Head of the TRU to consider the additional evidence and materials amounts to a procedural irregularity and, therefore, his decision is plainly wrong. The appeal is, accordingly, allowed.
19. We remit the case to the Department for reconsideration and recommend that a further Public Inquiry is held before a different decision-maker where consideration can be given to the additional materials and evidence provided by Mr Manley,



**Kenneth Mullan, Judge of the Upper Tribunal,
06 July 2023**