

Appeal No. T/2016/27

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER (Traffic Commissioner Appeals)**

**ON APPEAL from the DECISION of the SCOTTISH TRAFFIC
COMMISSIONER (Ms J Aitken)**

Dated: 16 May 2016

Before:

Mr E. Mitchell	Judge of the Upper Tribunal
Mr D Rawsthorn	Member of the Upper Tribunal
Mr J Robinson	Member of the Upper Tribunal

Appellant: Mr K McDonald (t/a River Tay Executive Travel)

Heard at: George House, 126 George Street, Edinburgh
Date of hearing: 9 September 2016
Attendances: Mr T Docherty, solicitor, of Jeffrey Aitken Solicitors
Date of decision: 8 May 2017

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that this appeal is dismissed.

SUBJECT MATTER:-

Disqualification orders and directions under section 28 of the Transport Act 1985

CASES REFERRED TO:-

CG Cargo & Sandhu [2014] UKUT 436 (AAC)

REASONS FOR DECISION

Course taken by the Upper Tribunal proceedings

1. The Upper Tribunal previously heard, and dismissed, Mr McDonald's appeal against certain decisions taken by the Scottish Traffic Commissioner on 16 May 2016. Subsequently, the Upper Tribunal set its decision aside. We now explain why.
2. At the hearing of Mr McDonald's appeal, the Upper Tribunal asked his solicitor, Mr Docherty, what order he submitted the Upper Tribunal should make in the event that it found a disqualification order was justified but that the period of disqualification was disproportionate. He had no oral submissions to make and the Upper Tribunal informed him that, if his client wished to make submissions, these were to be received by the Upper Tribunal within two weeks of the hearing.
3. The Upper Tribunal's reasons for its original decision stated that Mr McDonald did not supply the Upper Tribunal with a written submission as discussed at the hearing. That was incorrect and the Upper Tribunal apologises to Mr McDonald for the inconvenience and frustration this is likely to have caused him.
4. The Upper Tribunal's investigations into this matter show:
 - (a) on 21 September 2016, Mr Docherty emailed the Upper Tribunal the written submission discussed at the hearing;
 - (b) on 22 September 2016 that email was forwarded to the presiding judge;
 - (c) around this time, a new judicial I.T. system became operational and included a 'clutter' file within judges' email systems;

(d) for reasons unknown, the email to the Judge was automatically placed in his clutter file, rather than his inbox, and for that reason was not identified and taken into account before the decision was given.

5. Due to this unusual sequence of events, the Upper Tribunal decided that the conditions for setting aside a decision that disposes of proceedings, contained in rule 43 of the Tribunal Procedure (Upper Tribunal) Rules 2008 were satisfied and that it was right to set aside its decision. The decision was set aside on 8 February 2017.

6. In issuing its set aside decision, the Upper Tribunal sought Mr McDonald's views on whether his appeal should be re-decided with or without a re-hearing and whether it should be re-decided by the same panel members that gave the original decision. Mr Docherty informed the Upper Tribunal that his client neither sought a re-hearing nor objected to his appeal being re-decided by the same panel members. For this reason, Mr McDonald's appeal is being re-decided without a re-hearing and by the same panel members who gave the original decision.

7. While the Upper Tribunal's original decision has been set aside, the written and oral submissions that preceded the decision have not ceased to exist. In accordance with Mr McDonald's wishes, in re-deciding his appeal we take into account the arguments previously advanced by Mr McDonald as well as the written submissions received on 21 September 2016.

Background

8. In 2003, Mr McDonald was granted a standard international public service vehicle (PSV) operator's licence. The operator's licence specified Ms I Armstrong as transport manager for the PSV operation.

9. By notification dated 1 July 2014 (although receipt-stamped 7 August 2014), Ms Armstrong notified the Office of the Traffic Commissioners (OTC) that she wished to be removed from the operator's licence as its transport manager.

10. Ms Armstrong's resignation was preceded by a Driver & Vehicle Standards Agency (DVSA) investigation which led DVSA to conclude there had been a number of breaches of driver hours rules by the operation's drivers.

11. In November 2015, Mr McDonald informed the OTC that he wished to nominate a Mr William Spiers as his transport manager. However, in Mr McDonald's public inquiry evidence he said that Mr Spiers subsequently decided he did not want to be the operation's transport manager.

12. The Scottish Traffic Commissioner (hereafter “the Commissioner”) conducted two public inquiries, on 3 December 2015 and 6 January 2016. At the second inquiry, Mr McDonald produced new evidence as to his financial standing (pp. 971 to 1067 of the OTC file).

13. The Commissioner was dealing with a complex multi-faceted case. Not only did it concern Mr McDonald’s operator’s licence, it also raised questions as to the professional competence and good repute of Ms Armstrong as transport manager, whether to revoke an operator’s licence granted to another PSV operator (a partnership trading as Nevis Coach Hire) and driver conduct matters for four PSV drivers. We should note that the Commissioner decided that Ms Armstrong had lost neither her repute nor her professional competence and decided not to revoke Nevis Coach Hire’s operator’s licence.

14. Mr McDonald does not dispute the Traffic Commissioner’s findings of fact about Mr McDonald’s operation and matters connected to Ms Armstrong’s resignation as transport manager.

15. The Commissioner’s findings included:

- (a) on 23 August 2014, Mr McDonald wrote to the OTC stating that he was hiring a new transport manager and would produce further information within four weeks. In the meantime, the previous transport manager (Ms Armstrong) was “coming in weekly to check tachographs and operations”;
- (b) Ms Armstrong was a part-time transport manager who carried out her duties at weekends;
- (c) “latterly the expansion of the business to 5 vehicles, with Ms Armstrong’s full-time employment prevented her from engaging with the drivers and an absence of robust written procedures resulted in vulnerability in the effectiveness of the transport manager”;
- (d) Ms Armstrong “detected infringements on the [tachograph] charts and...alerted Mr McDonald to the deficiencies in relation to feeder journeys and neglect of the mode switch. She fully trusted Mr McDonald to raise these matters with the drivers and he assured her that he would do so. Her trust and confidence in Mr McDonald to tackle the adverse matters which she drew to his attention in her role as transport manager was misplaced and breached by him. Whilst he may from time to time have spoken to drivers, he did not implement robust measures to ensure that he scheduled duties compliantly and that a true record of drivers hours was kept”;

- (e) Ms Armstrong had only ever wanted to be a temporary transport manager. Her intention was to help Mr McDonald establish his business and she told him “years ago” he needed to make alternative arrangements;
- (f) Mr McDonald presented as a “nice guy, a genial chap...who wanted to be on friendly terms and would not present as being resistant to advice or authority”;
- (g) Mr McDonald had complied with Traffic Examiner visits and requests for information. He had been co-operative;
- (h) “Mr McDonald would have presented himself to Ms Armstrong as one who was listening to her, giving her the assurances she needed to hear, being at the operating centre when she needed him to be there and so on. I am sure he would have disliked any confrontation with drivers”;
- (i) “Ms Armstrong would not have known the extent of non-compliance [with drivers’ hours and tachograph rules] because she trusted Mr McDonald implicitly. He was the operator and ultimately he was responsible for his own licence and speaking to his own drivers. He knew that Ms Armstrong did not have the availability to see the drivers and that the onus was on him to tackle the infringing behaviour which she had drawn to his attention”;
- (j) Mr McDonald “breached the licence undertakings in relation to the drivers hours rules and tachograph regulations”;
- (k) Mr McDonald “has not had in place proper systems to ensure that journeys were properly recorded; that drivers were taking breaks and rest when required to do so on all occasions; that he allowed prevalent failure to use the mode switch both in his own driving and that of his employees”;
- (l) The Commissioner found it “incredulous” that Mr McDonald had not himself read a tachograph analysis report of his operations produced by the Penkridge Group, a transport consultant, and supplied to him prior to the public inquiry held on 3 December 2015;
- (m) The Commissioner had doubts as to whether Mr McDonald had the required financial standing;
- (n) Of itself, the absence of a transport manager called for revocation of Mr McDonald’s licence because, without a transport manager, Mr McDonald’s operation could not meet the requirement for professional competence. In addition, the Commissioner found that Mr McDonald had lost his good repute due to his own actions or inactions, and could not be trusted with an operator’s

licence, because he failed to follow the advice of his former transport manager and a DVSA Traffic Examiner;

- (o) Mr McDonald tried to rely on his “genial nature” to circumvent attempts made to ensure his operation complied with PSV regulatory rules and he had never paid enough attention to the rules;
- (p) Mr McDonald’s attempts to rectify matters were “last minute” and “too little, too late”;
- (q) There were no documented roadworthiness failings for Mr McDonald’s operation.

16. After the final public inquiry, but before the Commissioner made her decisions, Mr McDonald notified the OTC on 28 April 2016 that he wished to vary his operator’s licence to add a new transport manager. The proposed transport manager was a Mr C Boyce who resided in St Leonards-on-Sea, Hastings, East Sussex. There is no evidence in the OTC file that the Commissioner was expressly requested to take this matter into account in making her decision. In fact, the Commissioner, in refusing Mr McDonald’s subsequent application for a stay of her decision, said she was unaware of this application when she made her decision.

17. On 16 May 2016 the Commissioner made the following decisions:

- (a) she revoked Mr McDonald’s operator’s licence with effect from 23.59 on 31 May 2016;
- (b) under section 28(1) of the Transport Act 1985, she made an order disqualifying Mr McDonald from holding or obtaining a PSV operator’s licence together with a direction under section 28(4) that the traffic commissioners’ powers in section 17(2) of the 1981 Act would be exercisable in relation to a PSV licence held by a company or partnership with which Mr McDonald was involved. The order and direction had effect for two years from 23.59 on 31 May 2016.

18. On 26 May 2016, Mr McDonald applied for the Commissioners’ decisions to be stayed pending his appeal to the Upper Tribunal. The Commissioner was on leave at the time. In her absence, another traffic commissioner decided the decisions of 16 May 2016 were not to take effect until 7 June 2016 by which time the Scottish Traffic Commissioner would be able to consider the stay application herself.

19. On 1 June 2016, the Commissioner refused Mr McDonald’s application for a stay. By this time, she had become aware of Mr McDonald’s application for Mr Boyce to

be specified as his operation's transport manager. In the Commissioner's decision she records her that the Boyce application neither required her to re-open the public inquiry nor change her decisions.

20. Mr McDonald's renewed application for a stay was refused by Upper Tribunal Judge Levenson on 9 June 2016.

The public inquiries

21. In the light of Mr McDonald's grounds of appeal, we have analysed the inquiry transcripts to see what they reveal about Mr McDonald's plan to nominate a new transport manager and to enter into new contracts.

The inquiry hearing on 3 December 2015

22. At this hearing:

- p.783H of the OTC file – the Commissioner was informed a transport manager application had been made but the Commissioner was “astonished that he [the proposed manager] has not been brought as a witness”;
- p.785B – the Commissioner said it was “extraordinary” that Mr McDonald's preparation for the inquiry did not include presenting as a witness his proposed transport manager
- p.785H – the Commissioner noted she was dealing with an operator with a “very precarious licence”;
- p.799H – Mr McDonald's solicitor requested an adjournment because the Commissioner's observations caused him a “degree of concern”. From the Commissioner's final decision, it is clear that the reason for the adjournment was a potential conflict of interest on the part of the representative who appeared for Mr McDonald at the first inquiry hearing.

23. The Commissioner agreed to an adjournment.

The inquiry hearing on 6 January 2016

24. At this hearing, Mr McDonald was represented by Mr Docherty (who represented him before the Upper Tribunal):

- p.873G – Mr McDonald accepted in evidence that he had not had a transport manager since Ms Armstrong departed in 2014;

- p.875H – in response to the Commissioner’s questions, Mr McDonald accepted it was a “serious matter” for a PSV operator with a standard licence to operate without a transport manager;
- p.877A – Mr McDonald informed the Commissioner that, following Ms Armstrong’s departure, he placed advertisements for a new manager without success and so he thought “well, I’ll just carry on”;
- p.877F – Mr McDonald said he can “only wholeheartedly apologise” for carrying on his operation without a transport manager. “I’ve been sticking my head in the sand”;
- p.879B – Mr McDonald informed the Commissioner that Mr Spiers, his proposed transport manager, was “quite a quiet man” who was “a bit scared to come up to the PI”. Mr McDonald added that “once I mentioned the public inquiry to him, he declined”;
- p.879B – Mr McDonald said an organisation called the Penkridge Group had tried to locate a transport manager for him but potential candidates in England were not willing to travel to Scotland;
- p.879F – more recently, an organisation called IFTS located a potential transport manager in Glasgow who would be willing to attend the inquiry;
- p.881C – despite the above evidence, Mr McDonald told the Commissioner he did not know the name of this potential transport manager and, furthermore, he had withdrawn his interest. IFTS continued to search for a transport manager;
- p.883A – Mr McDonald said he felt let down by the organisations he had paid to try and find a transport manager for him;
- p.883D – Mr McDonald informed the Commissioner that, if his licence were revoked, the business would be finished, staff laid off and vehicles repossessed;
- p.925F – in closing submissions, Mr McDonald’s solicitor said “Mr McDonald’s licence is in extreme danger given what you have heard”;

25. Given the way in which this appeal has developed, we set out in full the Commissioner’s reasons for making a disqualification order:

“57. Having decided to revoke this licence I now apply myself to the question of disqualification. I am of the view that there has to be such and I have come to the view, having regard to the case law, that this is far from a case in which I have to impose a lengthy or indefinite period. It is far from being the worst case I have seen. There was no evidence of fraud or manipulations through falsifications or such like. This was the first time at Public Inquiry and as Mr Docherty pointed out there was not a history of roadworthiness failings. However there was the knowing pattern of not having professional competence on the licence and the neglect of making sure drivers, including him, were compliant which continues given the infringement reports lodged at the inquiry. He cannot come straight back in which could be the case if I did not disqualify, for such would offend fair competition and further would not set down the necessary regulatory marker which is required to secure the purposes of the regulatory regime. A period of two years will reflect the latter and also the period during which he chose to operate without transport manager arrangements.”

Legal framework

26. Section 12(1) of the Public Passenger Vehicles Act 1981 (“the 1981 Act”) prevents a public service vehicle from being used on a road for carrying passengers for hire or reward “except under a PSV operators’ licence granted in accordance with the following provisions of this Part of this Act”.

27. The requirements for granting a standard PSV operators’ licence are contained in sections 14ZA and 14ZC of the 1981 Act (section 14).

28. The requirements in section 14ZA include that a traffic commissioner is satisfied:

- (a) an applicant for a licence is of good repute (section 14ZA(2)(b)). Under Schedule 3(1) determinations as to good repute must have regard to all the relevant evidence including, in particular, information a commissioner before a commissioner as to a person’s previous conduct in operating vehicles in the course of a business;
- (b) an applicant is professionally competent (section 14ZA(2)(d)). Questions as to professional competence are to be determined in accordance with Schedule 3(4), (5) and (6) to the 1981 Act. Schedule 3(4) provides that, where an individual is not himself professionally competent, the requirement for professional competence is satisfied “if, and so long as, he has a transport manager of his road passenger transport business who is of good repute and professionally competent”;
- (c) an applicant has designated a transport manager in accordance with Article 4 of the 2009 Regulation (Regulation (EC) no 1071/2009) who is of good repute

(as determined in accordance with Schedule 3(1) to the Act) and professionally competent (as determined in accordance with Schedule 3(6) to the Act) (section 14ZA(3)(a) and (b)).

28. The requirement for professional competence is a qualifications-based requirement. Schedule 3(6) to the 1981 Act provides:

“An individual shall be regarded as professionally competent for the purpose of Part II of this Act if, and only if,—

(a) he has demonstrated that he possesses the requisite skills by passing a written examination organised by an approved body and is the holder of a certificate to that effect issued by that body; or

(b) he is the holder of any other certificate of competence, diploma or other qualification recognised for the purposes of this paragraph by the Secretary of State.”

29. Since Mr McDonald did not claim personally to meet the qualifications-based requirement for professional competence, the only way in which he could meet that requirement was by having a transport manager who was professionally competent and of good repute.

30. The requirements in section 14ZC include that a traffic commissioner is satisfied there will be adequate arrangements for securing compliance with the requirements of the law relating to the driving and operation of the vehicles proposed to be used under the licence.

31. On issuing a standard licence, section 16A of the 1981 Act requires a traffic commissioner to attach certain conditions, including a condition requiring the licence-holder to inform a traffic commissioner of:

(a) any event which could affect the fulfilment by the licence-holder of any of the requirements of section 14ZA(2) of this Act, and to do so within 28 days of the event; and

(b) any event which could affect the fulfilment by a transport manager of the requirements mentioned in section 14ZA(3)(a) and (b) of the 1981 Act, and to do so within 28 days of the event coming to the licence-holder's knowledge.

32. A failure to comply with a section 16A condition is a criminal offence (section 16A(3)) and is also a ground on which a traffic commissioner may revoke an operator's licence.

33. Section 17(1) of the 1981 Act requires a traffic commissioner to revoke an operator's standard licence in certain cases, including where;

- (a) the licence-holder no longer satisfies the requirements of section 14ZA(2), including, that is, the requirement for good repute and professional competence;
- (b) the designated transport manager no longer satisfies the requirements of section 14ZA(3).

34. Section 17(2) and (3) of the 1981 Act permits a traffic commissioner to revoke an operator's licence in certain cases, including where there has been a contravention of any condition attached to a licence and where, since the licence was granted, there has been a material change of circumstances.

35. Section 50 confers a right of appeal to the Upper Tribunal against certain traffic commissioner decisions including a decision to revoke a licence and a decision to disqualify a PSV operator by order or direction under section 28 of the Transport Act 1985.

36. Section 84(1) of the 1981 Act provides:

“It is hereby declared that nothing in this Act is to be treated as conferring on the holder of a licence granted there under any right to the continuance of any benefits arising from, or from a licence granted under, this Act, or from any conditions attached to any such licence.”

37. Section 28(1) of the Transport Act 1985 gives a traffic commissioner power, upon revoking an operator's licence, to order the former holder of the licence “to be disqualified, indefinitely or for such period as he thinks fit, from holding or obtaining a PSV operator's licence”.

38. Alongside an order under section 28(1) of the 1985 Act, a traffic commissioner may also under section 28(4) direct that, if a disqualified person is a director of, or holds a controlling interest, in a company which holds a PSV licence or operates a PSV vehicle in partnership with a person who holds a PSV licence, the powers under section 17(2) of the 1981 Act (revocation and suspension of operators' licences) are exercisable in relation to that licence.

39. Section 28(6A) gives a traffic commissioner power to cancel a disqualification order and any direction given under section 28(4).

40. The Upper Tribunal's decision in *CG Cargo Ltd* [2014] UKUT 0436 (AAC) concerned an operator's disqualification order made under the Goods Vehicles (Licensing of Operators) Act 1995 but we see no reason why it should not also apply

to orders under the Transport Act 1985. In fact Mr Docherty submitted it was applicable to PSV operator disqualification orders.

41. In *CG Cargo* the Upper Tribunal said:

“12. The tribunal decision in [*David Finch t/a David Finch Haulage* [2010] UKUT 284 (AAC)] pre-dates the issue of the Senior Traffic Commissioner’s Statutory Documents. The Traffic Commissioner was right to refer to the Statutory Documents and, in particular, to Document No 10 [*The Principles of Decision Making & the Concept of Proportionality*]. Here the Senior Traffic Commissioner states:

“74. Taking account of the guidance from the Upper Tribunal that each case must be looked at on its merits, Traffic Commissioners may wish to use as a starting point for a first public inquiry consideration of a disqualification period of between 1 and 3 years, but serious cases, where, for example, the operator deliberately puts life at risk and/or knowingly operates unsafe vehicles or allows drivers to falsify records, may merit disqualification of between 5 to 10 years or in certain cases for an indefinite period. It is always open to a disqualified person to make application for removal or reduction of the order. Unless there are exceptional circumstances, a disqualification of less than two years will not normally be reduced, and disqualification for longer or indefinite periods will not normally be reviewed, until half the period or 5 years of the disqualification have elapsed as applies.”

13. In addition, the Statutory Document indicates that Traffic Commissioners will consider conduct generally in the context of a regulatory starting point ranging from ‘Low’ at the bottom end, up to ‘Severe’ at the top end:

CONDUCT	REGULATORY STARTING POINT
Any conduct designed to strike at the relationship of trust between traffic commissioners and operators	SEVERE
Deliberate acts or omissions that compromise road safety and/or result in the operator gaining a commercial advantage	SEVERE to SERIOUS
Any conduct designed to mislead an enforcement agency or the Office of the Traffic Commissioner	SEVERE to SERIOUS

14. It is clear to us that the Senior Traffic Commissioner, following appropriate consultation with colleagues and the industries, has decided that there can be

severe cases where, instead of an indefinite disqualification, a fixed term disqualification of 5 to 10 years is justified. Therefore, in the light of the Statutory Document, we consider that the decision in David Finch should not now be relied upon to criticise fixed term disqualifications of more than three years if, at a first public inquiry, the facts are such as to put the case into one or more of the categories referred to.”

42. It should be noted that the table from the Senior Traffic Commissioner’s Statutory Document, cited in *CG Cargo*, was not specifically devised for the purposes of disqualification order decision-making. The table features in Annex 3 of the Document. Annex 3 addresses many different types of regulatory breach. In some cases, it does so in quite specific terms (for example, in relation to tachograph regulations and driver hours offences). The present table, however, is for the purposes of “miscellaneous offences and conduct – starting points for regulatory action”.

43. It should be further noted that, in *CG Cargo*, the Upper Tribunal did not cite the complete Table of regulatory action starting points within the Statutory Document (it did not need to). The remaining parts of the Table read:

Persistent offending/conduct after previous advice from VOSA or a previous warning(s) from a traffic commissioner but where there is no risk to road safety and no commercial gain	SERIOUS to MODERATE
Persistent offending/conduct where there is no risk to road safety and no commercial gain but where there are numerous balancing features	MODERATE to LOW
Use of an unauthorised operating centre or breach of environmental conditions	SERIOUS to LOW

Grounds of appeal

44. Mr McDonald relied on the following written grounds in his appeal to the Upper Tribunal:

1. The Traffic Commissioner erred in fact and law in finding that Mr McDonald had been involved in “a knowing pattern of not having professional competence on the Operator licence”. The Commissioner’s error was her failure to take into account that a new transport manager had been nominated before she gave her decision.

2. The Traffic Commissioner erred in fact and law in applying the Priority Freight Test without taking into account the nomination of a new transport manager.

3. During the period starting with the second (and final) public inquiry – 6 January 2016 - and the date of the Traffic Commissioner’s decision – 16 May 2016 – DVSA Vehicle and Traffic Examiner inspections concluded “the Operator’s vehicles and records were found to have been in good order and issue free”. In the light of those findings, the Commissioner’s decision to revoke Mr McDonald’s licence was disproportionate.

4. During the period referred to in ground 3, in reliance on the positive DVSA inspections Mr McDonald entered into new contractual obligations. His obligations under those contracts persisted after the date on which his licence was revoked. As a result, the decision to revoke was disproportionate.

5. The Traffic Commissioner’s decision to revoke Mr McDonald’s licence was wrong because none of the features which led to the decision in *CG Cargo Ltd*, which the Commissioner relied on in her decision, were present in this case.

45. At the hearing before the Upper Tribunal, Mr Docherty, for Mr McDonald, informed the Tribunal that he no longer challenged the Commissioner’s decision to revoke his licence. He only wished to challenge the disqualification order which, at two years duration, he argued was disproportionate. In more detail, he argued:

1. the delay of some four months between the conclusion of the second public inquiry and the Commissioner’s decision was too long and, as Mr Docherty’s skeleton argument put it, “impacts upon the credibility of the regulatory regime”;
2. as time passes following a public inquiry without a decision having been given, the operator could ‘perhaps be forgiven’ for taking the view that revocation of a licence was not inevitable. Further, the PSV industry itself would expect swift and severe action when that was called for;
3. according to the skeleton argument, the Commissioner seemed to concede during the 6 January 2016 inquiry “that had matters been otherwise she may have been prepared to take into account the nomination of the Transport Manager made after the conclusion of the evidence” (Mr McDonald’s solicitor relied on p.31 of the transcript / p. 887 of the OTC file). Given this ‘concession’ and the evidence as a whole, the disqualification order and in particular its length were disproportionate.

46. At the hearing, we asked Mr Docherty what order he submitted the Upper Tribunal should make in the event that it found a disqualification order was justified but that the period of disqualification was disproportionate. He had no submissions to make and we informed him that, if his client wished to make submissions on what would have been a proportionate period of disqualification, these were to be received by the Upper Tribunal within two weeks.

47. A written submission was duly received. It reads:

“While the Traffic Commissioner states that she has had regard to the case law, the Appellant’s position is that a period of 2 years’ disqualification is not justifiable in terms of that case law.

While no specification is given of such case law the Appellant would refer to the recent decision of *CG Cargo Ltd*. T/2014/40-41 as germane to the logic of the Traffic Commissioner’s decision on the matter of the disqualification and its length.

It is submitted that a proportionate disposal in light of the positive factors present and identified ought to have resulted in a disqualification period shorter than one of 12 months in all the circumstances.

The Traffic Commissioner did record various issues which ought to be weighed in the balance and given significance set against the principal infringement, as it were, in this case. The positive factors were as follows:

1. (pp695 and 877 of the bundle) The very real attempts to obtain a CPC qualification himself. Mr McDonald had passed the multiple choice exam but had failed the case study element as at 18 September 2015.
2. His advertising for a new incumbent (pp887 of the bundle).
3. His payment to Glasgow Training Group to progress to a new diet of examinations.
4. The nomination of Mr Spears.
5. (pp879 of the bundle) Mr MacDonald’s involvement with an organisation called IFTS with which he had made enquiries about arranging for a replacement transport manager.
6. Mr MacDonald’s admission to the Confederation of Passenger Transport.
7. (pp883 of the bundle) Mr McDonald’s statement that he intended to pursue the CPC qualification himself.

The credibility of the operator's position in this regard is enhanced by him obtaining the CPC qualification in full as at July 2016, a matter which was referred to at the appeal hearing on 8 September 2016.

As submitted at the appeal hearing the knowing pattern of not having professional competence does not sit easily with the totality of the evidence in this case at the time of the decision on 1 June 2016.

The Traffic Commissioner's assertion that there was this knowing pattern of not having professional competence on the Operator Licence does not bear scrutiny in circumstances where the nomination of Mr Boyce took place prior to the issue of the decision on 1 June 2016.

In acknowledging that the nomination of Mr Boyce took place prior to the decision of 1 June 2016 but that this development would not have made any difference to the decision, the Traffic Commissioner has in effect deprived the operator of the opportunity of making representations on the matter to her. Further the fact of the nomination of Mr Boyce represents further material to the effect that at the time of the decision to revoke and disqualify there was not this known pattern of not having professional competence on the operator licence.

The conduct of the Commissioner prior to the issue of the decision of the decision of the Traffic Commissioner amounts to action having been taken by him to address the basis of the decision to disqualify in terms of the length of the order itself.

In the case of CG Cargo Ltd. the Appeal Tribunal makes reference to the statutory document issued by the Senior Traffic Commissioner. The up to date version of the guidance document number 10 again, as in the cited case, sets out the "regulatory starting point" in respect of conduct as found by a Traffic Commissioner in any given case.

The Appellant would submit that the facts in this case, in particular the positive features referred to in the submission, and most importantly the developments prior to the issue of this on 1 June 2016, take this case into the low to moderate category in all of the circumstances.

The very fact that the Operator has not been at public inquiry in the past is another factor where the proportionate response would have been to take the view that a lesson had been well learned as a result of the proceedings themselves and that the regulatory balance would have been re-established by

means of a short disqualification to one of less than 12 months in all the circumstances.”

Conclusions

48. We do not accept any of the arguments put forward by Mr Docherty on behalf of Mr McDonald.

49. There is no justification for the argument that the period of time taken to issue a decision permits an operator to assume a licence will not be revoked. That is correct as a matter of principle and, moreover, in this case Mr McDonald conceded at the public inquiry that his licence was at risk.

50. In any event, we do not accept that the time taken by the Commissioner to produce her decision in this case was necessarily unreasonable. As we noted above, the public inquiries were concerned with a number of regulatory matters and, for Mr McDonald’s case alone, the OTC file contained over 1,000 pages of evidence including some 200 pages of financial evidence that were not supplied until the day of the second inquiry.

51. We had difficulty understanding the ground of appeal based partly on a supposed concession by the Traffic Commissioner. The portion of the transcript referred to by Mr Docherty (p.887 onwards of the OTC file) does not contain any concession of a type referred to by Mr Docherty.

52. We do not accept that the Commissioner was plainly wrong to fail to take into account the April 2016 nomination of a new transport manager. The Commissioner was not in fact aware of this nomination when she made her decision. It is argued that the OTC administration was at fault for failing to draw the nomination to the Commissioner’s attention, then we would disagree. Mr McDonald could and should have taken steps to ensure this was done. But, in any event, we fail to see how a nomination of a new transport manager residing at the opposite end of the country, made some four months after the conclusion of the inquiry, could realistically have made a difference in the case of an operator who, at the date of the inquiry, had already been without a transport manager for some eighteen months.

53. We also do not accept that the post-inquiry DVSA investigations undermine the Commissioner’s decision. These have not been proved in evidence but, even if we accept Mr McDonald’s account, they make no difference. The Commissioner was well aware that the roadworthiness of Mr McDonald’s operation was not in issue and so further confirmation of that could not have made any difference.

54. Mr McDonald's decision to enter into new contractual obligations, despite his concession at the inquiry that his licence was precarious, carries no weight in his favour. There was no justification at all for him assuming that his licence would not be revoked. All he was entitled to do was proceed on the basis that his licence might be revoked.

55. In our view, the Commissioner cannot be said to have been plainly wrong to impose a disqualification order. She took a very dim view of an operator, who did not himself have professional competence, who thought he could stop seeking a transport manager – who would supply that professional competence – once his initial attempts had come to nought and who had previously decided not to follow the advice of a transport manager. The Commissioner was not plainly wrong to place significant weight on these features of the case. The requirement for a professionally competent transport manager is an integral part of how the regulatory scheme seeks to ensure safe public transport operations.

56. We also reject the argument that the Commissioner was plainly wrong, or acted disproportionately, in imposing a two year disqualification order or that (an initially unspecified) shorter period of disqualification would have been the proportionate regulatory response. The written submissions on this point were framed as if the Upper Tribunal was considering this matter afresh. They also relied on points not all of which appeared to have been put to the Commissioner and some even concerned circumstances that arose after the Commissioner gave her decision. But, even if the Upper Tribunal assumes it can look at the matter afresh, taking into account all the points made in the written submission, apart from those concerning post-decision developments, we do not think a two year disqualification order was a disproportionate regulatory response.

57. We do not consider the Upper Tribunal's decision in *CG Cargo* ([2014] UKUT 436 (AAC)) provides Mr McDonald with any real assistance. To reiterate, in *CG Cargo* the Upper Tribunal referred with approval to the Senior Traffic Commissioner's guidance to commissioners that:

“Traffic Commissioners may wish to use as a starting point for a first public inquiry consideration of a disqualification period of between 1 and 3 years, but serious cases, where, for example, the operator deliberately puts life at risk and/or knowingly operates unsafe vehicles or allows drivers to falsify records, may merit disqualification of between 5 to 10 years or in certain cases for an indefinite period. It is always open to a disqualified person to make application for removal or reduction of the order.”

58. Of course, the exercise of judgement involved in deciding whether to make a disqualification order and, if so, its length must be informed by a traffic commissioner's

findings of fact. In this case, the Commissioner made findings that Mr McDonald knowingly operated without a designated transport manager for a significant period of time and the attempts he made to secure a transport manager were half-hearted. We also note that, running through the Commissioner's reasoning, are her findings about Mr McDonald's personality, in summary he thought that he could rely on his affable nature to avoid strict compliance with licensing requirements, in particular those relating to transport managers and record-keeping. Those findings were sound; they were certainly not plainly wrong. Mr Docherty relies on various steps taken by Mr McDonald himself to obtain a transport manager qualification and professionalise his operation. However, none of this detracts from what went on before. The Commissioner made findings that, for well over a year, Mr McDonald knowingly operated without a designated transport manager.

59. We find it difficult to understand Mr Docherty's criticisms of the Commissioner's finding of a knowing pattern of non-compliance with the designated transport manager rule. The matters he relied on do not support the argument that Mr McDonald was unaware his operation lacked a designated transport manager. He admitted as much at the public inquiry. In reality, these are matters which went to the severity of the regulatory response, rather than to whether Mr McDonald's knew his operation was non-compliant. The Commissioner acknowledged that some steps were taken by Mr McDonald to rectify matters but there were "too little, too late". The Commissioner's finding was not plainly wrong given Mr McDonald's evidence at the public inquiries. For example, he did not present a proposed transport manager for questioning at the inquiries, told the Commissioner that, following his fruitless 2014 advertisements for a transport manager, he thought "well, I'll just carry on", and he did not know the name of a potential candidate identified by the IFTS organisation.

60. The next question is whether the Commissioner's response was too severe – disproportionate – given the factors in Mr McDonald's favour. We reject this argument. A two year disqualification was in the mid-range of the Senior Traffic Commissioner's suggested period of disqualification following a first public inquiry and, under the Senior Traffic Commissioner's policy on cancellation of such orders, meant he had a better opportunity of seeking cancellation of the order than under a shorter period of disqualification (since the policy is that shorter disqualifications will not normally be reduced). The Commissioner made a sound finding that Mr McDonald knowingly operated without professional competence and it is clear he thereby obtained a commercial advantage over operators who complied with the law and employed transport managers. The Commissioner rightly decided a two year period of disqualification was justified in the circumstances of this case.

61. Mr Docherty has not explained how the 'regulatory action' table, within statutory document no.10, is to be factored into disqualification order decision making. But, even if they do, his submissions overlook the commercial advantage that Mr McDonald must have enjoyed by operating without a transport manager, a factor that

is indicative of more severe regulatory action. Whatever the precise relevance of the table to disqualification order decision-making, we are satisfied that the Commissioner was not plainly wrong to decline to categorise the present case as one of moderate to low severity.

Mr E. Mitchell, Judge of the Upper Tribunal,

8 May 2017

(signed on original by Judge Mitchell, for himself, Mr Rawsthorn and Mr Robinson)