NCN: [2021] UKUT 198 (AAC)
Appeal No. T/2020/66

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

ON APPEAL from the DECISION of the TRAFFIC COMMISSIONER

Before:	M Hemingway: Judge of the Upper Tribunal A Guest: Member of the Upper Tribunal D Rawsthorn: Member of the Upper Tribunal
1st Appellant:	Thandi Coaches (Red) Ltd
2nd Appellant:	Amardeep Thandi
Reference:	PD0000154
Heard at Birmingham:	21 May 2021

DECISION OF THE UPPER TRIBUNAL

This appeal to the Upper Tribunal is allowed. The decision of the Traffic Commissioner made on 2 November 2020 (the date of the written reasons) to revoke the standard international public service vehicle operator's licence (PD0000154) belonging to the first appellant is set aside. The decision to the effect that the second appellant has lost good repute and is disqualified as a transport manager for a period of 12 months is also set aside. All matters are remitted to the Traffic Commissioner for re-determination at a public inquiry.

SUBJECT MATTER

Revocation
Transport Managers

CASES REFERRED TO

Bradley Fold Travel Ltd & Anor v Secretary of State for Transport [2010] EWCA Civ 695.
NCF (Leicester) Ltd [2017] UKUT 0426 (AAC).
Michael Hazell (No 2) [2017] UKUT 0221 (AAC).
H Sivyer (Transport) Ltd and Simon Sivyer [2014] UKUT 0404 (AAC).
Matthew Reynolds v Secretary of State for Transport [2016] UKUT 0159 (AAC).
Firstline International Limited and William Lambie v Secretary of State for Transport [2016] UKUT 0291 (AAC).

REASONS FOR DECISION

Introduction

1. This appeal to the Upper Tribunal has been brought by Thandi Coaches (Red) Ltd (from now on "the first appellant") and Amardeep Thandi (from now on "the second appellant") from decisions of the Traffic Commissioner for the West Midlands Traffic Area, made after a public inquiry ("PI") and set out in written reasons of 2 November 2020, to revoke the first appellant's standard international public service vehicles operator's licence and to disqualify the second appellant from acting as a transport manager for a 12 month period in consequence of lost repute. The first appellant has two directors one of which is the second appellant who is also its transport manager.

2. We held an oral hearing of the appeal which took place at Birmingham. The two appellants were represented before us by James Backhouse, a Solicitor. In addition to his oral submissions Mr Backhouse provided us with a detailed and helpful skeleton argument. Mr Backhouse raised a number of arguments before us, some perhaps more ambitious and far reaching than others, but we have done our best to focus primarily upon the issues which we feel we must resolve in order to decide this appeal. That said, we have expressed some non-binding but considered views on certain of the matters which we have not had to resolve.

Background and relevant history

3. The licence was granted in 1992. The Traffic Commissioner (TC) has not referred to any regulatory concerns arising prior to the matters which have ultimately led to this appeal. Nor has Mr Backhouse. But in August 2020 the TC received a report from one Tracy Love, a traffic examiner with the Driver and Vehicle Standards Agency, which had been prepared as a result of investigations conducted by her and commencing in October 2019. Her findings are summarised at paragraph 2 of the TC's written reasons but they included ones to the effect that drivers had been failing to insert a card into the tachograph units before driving vehicles operated under the licence, that driver record keeping was deficient, that drivers were not disciplined for infringements and that the second appellant had failed to record details of his work as transport manager and director. As a consequence, each appellant was called to a PI. The relevant call-up letter, dated 12 August 2020, made it plain that the licence might be revoked.

4. The PI was held on 16 September 2020. The first appellant's two directors (including the second appellant) attended. Both were represented by Mr Backhouse. The financial standing of the first appellant was an issue of concern for the TC since bank statements provided in advance of the PI showed it had an average credit balance, for the period from 1 July 2020 to 8 September 2020 of only £8,000 whereas, given the number of vehicles operated, the sum of £145,950 was said to be needed. According to the written reasons, Mr Backhouse had suggested the impact of the coronavirus pandemic was the explanation for the shortfall and he invited the TC to give a period of grace of 12 months so as to afford the first appellant a chance to once again become compliant. The TC, understandably, wanted to see evidence of the financial picture prior to the pandemic before making any decision. However, bank statements relating to the period from 30 November 2019 to 29 February 2020, provided by Mr Backhouse after the PI, did not evidence a rosier picture. Mr

Backhouse did, though, provide some further evidence of finance in the form of some land registry documentation showing the second appellant to be the part owner of some land (said to be worth about £2,000,000) and some documentation provided by the 1st appellant's accountant which indicated the first appellant had a "*capital and reserves figure of £262,951 at 31 August 2019*". There was also a letter signed by the director other than the second appellant (though it may have been drafted by or with the assistance of Mr Backhouse) which had the relevant accounts attached to it and which stated "*It can be seen that these accounts show more than sufficient capital and Reserves on the balance sheet but they are not audited as we are under the audit threshold*". The reference to the audit threshold is a reference to provisions in the Companies Act 2006 which permit small companies (as defined at section 382) to provide to Companies House annual accounts which are not accompanied by an auditor's report. It seems to us that the intention in sending the material from the accountant was not limited to securing a period of grace but also amounted to an attempt to persuade the TC that the financial requirements were, in fact, met.

5. The TC was not invited to consider reconvening the PI in light of the provision of this new material and did not do so. He decided that the first appellant had not shown compliance with the financial standing requirements because the evidence provided by way of bank statements had shown it had an amount, for the periods covered by those statements, which was significantly below that which was required. As to the additional evidence and as to the possibility of providing the first appellant with a period of grace in which to rectify matters, he said "*Although the company's accountants state that capital and reserves stood at £293,000 on 31 August 2019 I note that the accounts are abridged and unaudited and do not contain information from the company's profit and loss account. The accounts are unaudited, I cannot take them into consideration. Nor can I take into account evidence as to property jointly owned by Amardeep Thandi, as it is not in the company's name. The Upper Tribunal has stated that an operator should consistently have enough money available for the financial requirement to be satisfied (2012/017 NCF (Leicester) Ltd). Although I am sympathetic to operators whose finances have been damaged by the loss of income resulting from the COVID-19 pandemic, it is clear that for a considerable time before the COVID crisis Thandi was already far short of being able to demonstrate appropriate financial standing. I am not therefore prepared to allow a period of grace in which to re-establish financial standing".* Although it may be possible to read the passage in a different way, we read it to mean that the TC had decided the accounts could not be considered <u>because</u> they had not been audited.

6. The TC then went on to consider the issues relating to lack of compliance with rules relating to tachographs and driver issues as well as the situation of Amardeep Thandi as transport manager. He found significant failings such that the first appellant had "*failed to fulfil its undertaking to ensure the observance of rules relating to drivers' hours and tachographs"*. He said that Amardeep Thandi had failed to understand how to use the first appellant's tachograph analysis system. He decided he had lost his good repute as transport manager and explained: "*In reaching this conclusion, I asked myself what I would expect of a reputable transport manager in charge of a licence of 32 vehicles with at least 20 vehicles operational. Whilst I accept that the chosen pattern of service was a complex one, I would have expected the transport manager to exercise close and effective management of drivers' hours accordingly. The fact that he was using an analysis system he did not understand, was failing to plan for timely downloads, failing to identify driving without a card, failing to see that drivers were being scheduled for duties they could not legally carry out, failing to ensure that drivers recorded as "other work" journeys to and from vehicles away from*

base (indeed, failing to record "other work"), and failing to educate or discipline drivers whose infringements were detected, leads me to conclude that Mr Thandi fell far short of the standards and performance expected of a reputable transport manager. Indeed, he presided over a chaotic operation in which no real control of drivers' hours was being exercised at all. This was a substantial coach operation, carrying passengers on inter-city routes and international tours: the passengers (and other road users) deserved better". The TC went on to add that a consequence of its transport manager lacking repute meant the first appellant lacked professional competence having regard to the content of section 17(1)(a) of the Public Passenger Vehicles Act 1981 ("the 1981 Act").

7. It is worth saying something at this stage about the relevant legislation to which the TC had regard to when arriving at the above decisions and to which Mr Backhouse has had regard to in making submissions to the Upper Tribunal. With respect to financial standing, section 14ZA(2)(c) of the 1981 Act provides that an applicant for a standard operator's licence must be of appropriate financial standing "as determined in accordance with Article 7 of Regulation EC No 1071/2009 of the European Council and of the Council of 21 October 2009" ("the Regulation"). Article 7 of the Regulation makes it clear that that is a continuing obligation. As was pointed out in *NCF (Leicester) Ltd* [2017] UKUT 0426 (AAC), the purpose of the financial standing requirement is spelt out in general terms in Recital 10 to the Regulation which provides: *"It is necessary for road transport undertakings to have a minimum financial standing to ensure their proper launching and administration*". That was said in the above case to translate into an intention "*to ensure that vehicles can be operated safely because the operator can afford to maintain them promptly and properly*". In T/2017/7 Michael Hazell (No 2) [2017] UKUT 0221 (AAC) the Upper Tribunal observed that "*financial standing can be demonstrated in a variety of ways*" but also took the view that the most reliable evidence of available funds would be "*cash in either bank accounts or reserves which have been held over a period of time".*

8. As to requirements for good repute of a transport manager and professional competence of an operator, section 14ZA(2)(b) of the 1981 Act provides that an operator must be "*professionally competent*". For professional competence, Schedule 3 to the 1981 Act links an operator's competence to the competence and repute of its transport manager "*a company satisfies the requirement as to professional competence if, and so long as it has a transport manager…who… is of good repute and professionally competent".* Paragraph 7B of Schedule 3 provides that in proceedings concerning whether a transport manager is of good repute or professionally competent, "*a traffic Commissioner must consider whether a finding that the person was no longer of good repute or (as the case may be) professionally competent would constitute a disproportionate response".* In this appeal, though the focus is on good repute only.

9. As to action which might or must be taken where there has been a breach of these requirements, section 17(1) of the 1981 Act provides that a TC must (in other words this is mandatory) revoke a licence if it appears to him/her that the requirements of section 14ZA(2) are no longer satisfied. So, an adverse finding under 14ZA(2)(c) with respect to financial standing or an adverse finding with respect to professional competence under section 14ZA(2)(d) would, subject to what is said below, lead to revocation of the licence. But any harshness caused by the mandatory aspect of the above provisions may be ameliorated by the granting of a period of grace in which rectification may be achieved. It will be recalled that Mr Backhouse had, at the PI, invited the TC to consider granting such a period. Periods of Grace have their origin in Article 13 of the Regulation which, Mr

Backhouse helpfully reminds us, provides "*Where a competent authority establishes that an undertaking runs the risk of no longer fulfilling the requirements laid down in Article 3, it shall notify the undertaking thereof. Where a competent authority establishes that one or more of those requirements is no longer satisfied it may set one of the following time limits for the undertaking to rectify the situation*", and it then goes on to provide for the giving of a period of 6 months with respect to financial standing and 6 months (with a facility for the giving of a further 3 months on narrow and defined bases) with respect to competence or repute of a transport manager for the replacement of that transport manager. Section 17(1A) of the 1981 Act states "*Before revoking a standard licence under subsection (1), the traffic commissioner may serve on the holder a notice setting a time limit, in accordance with Article 13.1 of the 2009 Regulation for the holder to rectify the situation". It is then stated that if rectification is achieved within such time "the traffic commissioner must not revoke the licence".*

10. Section 17 of the 1981 Act provides that a TC may (not must) revoke a licence on any grounds contained within section 17(3). And 17(3)(aa) contains a ground to the effect that "*there has been a contravention of any condition attached to the licence*".

11. In putting together the grounds of appeal, the skeleton argument referred to above (which contained some contentions which went beyond the grounds though we do not say that by way of criticism) and the oral submissions, we think the arguments to the Upper Tribunal may be fairly summarised in the way we have done so in the paragraphs which immediately follow.

12. This is the argument in Ground 1: The financial standing requirement stems from the Regulation. Article 7 of the Regulation principally requires a company to show compliance "*on the basis of annual accounts certified by an auditor or a duly accredited person, that every year it has at its disposal capital and reserves totalling at least £8,000 when only one vehicle is used and £4,500 for each additional vehicle used* ". The words in italics are from Article 7(1) itself. There is provision for derogation (in Article 7(2)) which is rather restrictively provided in these terms *"the competent authority may agree or require that an undertaking demonstrate its financial standing by means of a certificate such as a bank guarantee or an insurance, including a professional liability insurance from one or more banks or other financial institutions, including insurance companies, providing a joint and several guarantee for the undertaking in respect of the amounts specified in the first sub-paragraph of paragraph 1*". Although the domestic approach, as set out in relevant Statutory Guidance issued by the Chief Traffic Commissioner tends to favour a "*cash at the bank*" approach, and although TC's and indeed the Upper Tribunal have taken a broader approach to that provided for in Article 7, provision of evidence of compliance by way of cash at the bank is not a lawful way of showing compliance. What must be shown (and nothing else by way of other evidence of finance will be permissible) is the annual accounts, appropriately certified, evidencing the necessary capital and reserves or, pursuant to a derogation, the other specified and particular types of evidence. In this case, runs the argument, the requirements in Regulation 7(1) were met because the accounts showed the operator did have the necessary capital and reserves at its disposal and because although the accounts were unaudited, they were approved by one of its directors. As to the latter point, the company (or operator) was exempt from the normal rigours of filing full and audited accounts and was acting compliantly with the relevant terms of the Companies Act 2006 and indeed with the 2113/34 EU Directive on company accounts by having its accounts simply approved and signed by a director. That being so, it followed that the director

approving the accounts is an "*accredited person*" as the term is used in Article 7 of the Regulation. But even if that is wrong, an operator is entitled to show compliance with the financial standing requirement by relying on accounts and it is wrong to simply exclude consideration of them.

13. What we have called Ground 2 related to the refusal of the TC to give a period of grace. As we understand it, the argument here is that the provisions which concern the giving of a period of grace and, in particular, paragraph 12 of the preamble to the Regulation, whilst permitting "*suspending or withdrawing authorisations or declaring as unsuitable transport managers*", serve to require the enforcement actors to provide a warning in most or every case where the possibility of mandatory revocation has arisen, that such action may be taken and a period to put things right. Mr Backhouse specifically relies on these words as contained in the above preamble "*An undertaking should, however, be warned in advance and should have a reasonable period of time within which to rectify the situation before incurring such penalties*". That reasonable time would be the period of grace of 6 months provided for. In other words, in the circumstances of this case the TC was actually required to give a period of grace both with respect to the financial standing issue and the professional competence issue and fell into error of law in failing to do what the law required of him.

14. What we shall call Ground 3 is a little more mundane. It is really a contention that the decision as to the second appellant's repute as a transport manager was made without taking all relevant matters into account and was disproportionate.

15. We shall take the last point made with respect to Ground 1 first of all. The TC, on our reading as we have already said, excluded the material supplied by the accountant from his deliberations because the accounts were unaudited. The TC does not say so but it seems to us very likely that he had in mind the wording of Article 7 of the Regulation concerning the need for accounts to be "*certified by an auditor or accredited person*". Now Mr Backhouse argues two things of potential relevance here. His primary position, as explained, is that the accountants have been certified by an accredited person because they have been signed by a director. But, in the alternative, he says that the accounts, even if not properly certified, have some evidential value such that it was not permissible to exclude them. As to the latter point, we note that the accounts did indicate that capital and reserves stood at £293,000 as at 31 August 2019. That was above the figure said to be needed to satisfy the financial standing requirement even though the money in the bank figure was much less than what was required. We have had regard to Senior Traffic Commissioner Statutory Document 2: Finance, which makes clear that one of the most reliable indicators of available finance is "*cash or a facility being held in a bank account of the licence holder over a period of time*". But we do not detect in that Guidance or in any legislation anything which serves to shut out the possibility of successful reliance on other evidence of finance. In *Michael Hazell (No 2),* cited above, the Upper Tribunal said "*Our starting point is that financial standing can be demonstrated in a variety of ways and the total figure in any given case can be made up by a portfolio of different sources*". We appreciate that, in that case, the Upper Tribunal was dealing with arguments concerning reliance upon credit facilities but there is no reason to think the general statement we have quoted above was limited to a consideration of the appropriateness of reliance upon credit only. We appreciate that paragraph 2(1) of Schedule 3 to the 1981 Act requires the finance to be both sufficient and available to ensure the establishment and proper administration of the business carried on or proposed to be carried on under the relevant licence. It may have been the case that had the TC decided the accounts did not show the funds to be available, in the sense that cash

could be drawn when needed to deal with the proper administration of the business including safety aspects such as vehicle maintenance and repair, then we would not have been able to detect a basis to interfere. It may be that if the TC had clearly decided that the accounts were simply unreliable evidence and so not worthy of much weight because they were not audited, then again there might not have been a basis for us to interfere. Such an approach would not be precluding the accounts from consideration at all (which is what we think the TC did) because they were unaudited but rather admitting them for consideration but then attaching little or no weight to them. The distinction might be thought a fine one, but it is not unimportant. We have concluded that the TC erred because he wrongly excluded the accounts from consideration at all (as opposed to considering them and deciding what weight should be attached to them or deciding whether or not they revealed the existence of available funds). Had he not so erred he might, for the other reasons we have touched on, reached the same outcome on finance but he has not said he would have done nor set out any alternative conclusion leading to the same result. That being so, we have decided, whilst had he chosen to have said more our position might well have been different, that his decision as to financial standing as explained by him, is not a legally sound one.

16. Having reached the above view and having decided that Ground 1 is made out, it is not necessary for us to say anything about the other points (the more far-reaching points) made under that ground and, indeed, anything we do now say about those points will not be binding. But we do not think we should leave the arguments completely unaddressed. We note the argument to the effect that in a "*small*" company with exemption under the Companies Act 2006, a director is an accredited person such that accounts signed by such a person are compliant with Article 7(1) of the Regulation. Had we been called upon to resolve that argument we should have done so against Mr Backhouse. In our view, whilst we are cautious of reliance upon dictionary definitions, it seems to us that the natural or normal meaning of the word "accredited" in the way in which it is used in the Regulation, connotes a person with some form of official recognition or who is in possession of some relevant qualifications. In other words, someone who is professionally equipped to certify accounts even if not an auditor. A director might be but is not necessarily so equipped and no-one has suggested in this appeal that the director who signed the accounts is qualified as an auditor or an accountant or anything similar. We are not persuaded that the facility for accounts to be signed by a director of a "*small*" company has any bearing on the way in which the wording of Article 7 of the Regulation is to be interpreted and we think that the clear aim of the relevant part of Article 7 is to ensure the accounts are certified by a person with expertise and professional detachment from the operator. That is not to say annual accounts not certified by an auditor or "*duly accredited person*" as we interpret that phrase must be disregarded simply because they are not appropriately certified (see above) and it would be wrong for a TC to seek to impose or apply such an inflexible rule. But it will be for a TC, whilst considering such evidence, to decide what value and weight it should have and we think, speaking generally and not seeking to lay down any general rule, that there might be reason to treat uncertified or not properly certified accounts as being less persuasive than certified accounts or, in particular, other clear evidence such as money in the bank. But in our view the terms of Regulation 7(1) are not met in our view by accounts, as here, signed by a director of the relevant company.

17. That brings us on to the other contention contained in Ground 1. It is perhaps the most far reaching one. Again, because we have accepted Ground 1 is made out for other albeit more mundane reasons, we do not have to decide the point in a way which would be binding and, on that basis, we draw back from doing so. But it would be wrong, given that Mr

Backhouse sought to argue the point with determination and eloquence, for us not to express a view. The argument is, we accept, a superficially attractive one. Paragraph 1 of Regulation 7 does, according to its wording, lay down a general rule that compliance with the requirement on the part of an undertaking (operator) to show that it is "*at all times able to meet its financial obligations in the course of the annual accounting year*" is to be demonstrated "*on the basis of annual accounts certified by an auditor or a duly accredited person*". Paragraph 2 permits derogation but only, says Mr Backhouse, to a limited and specific extent: "*By way of derogation from paragraph 1, the competent authority may agree or require that an undertaking demonstrate its financial standing by means of a certificate such as a bank guarantee or an insurance, including a professional liability insurance from one or more banks or other financial institutions, including insurance companies, providing a joint and several guarantee for the undertaking in respect of the amounts specified in the first sub-paragraph of paragraph 1*". On the face of it and on one reading, that seems to exclude reliance on other sorts of financial evidence such as the type most commonly relied upon at least in the UK, which is money in the bank and overdraft facilities. That is how Mr Backhouse urges us to read it and at the hearing, whilst he accepted there had been derogation via section 14ZA of the 1981 Act, he said the extent of the derogation permitted by Regulation 7(2) was limited to the reliance upon what he described as "*a very short exclusive list*" of evidence. The indication in the Chief Traffic Commissioners Statutory Document 2 to the effect that any evidence not in that list and in particular bank statements, overdraft facilities or credit card statements, may be taken into account is, suggested Mr Backhouse, irrational by which he means the approach suggested goes beyond what is lawfully permitted.

18. It is worth pondering on the implications if Mr Backhouse is correct. His approach would effectively amount to overturning the practice which has been taken by TC's and by the Upper Tribunal since the incorporation of the Regulation into UK law. It would require the taking of an inflexible approach. It would exclude any consideration of money in the bank which, as explained in the above Statutory Guidance in a passage with which we agree, is "*one of the most reliable indications of money being available*" to meet the financial standing requirement. It would mean, in this case, given the view we have reached about the interpretation of the word "*accredited*" that none of the financial evidence provided by the first appellant, either the unaudited accounts or the bank statements, could be considered such that its bid to show compliance with the financial standing test would be bound to fail. It would mean the Upper Tribunal's starting point in Michael Hazell No 2, to be the wrong one notwithstanding that that approach has also been taken by the Upper Tribunal in many other cases. It would, we think, leave entirely bemused a hypothetical operator who for whatever reason might not have the accounts required or any of the other items specifically referred to in Article 7(2) but who is, nevertheless, comfortably able to show compliance via the provision of genuine bank statements. In fairness, we do not think Mr Backhouse really disagrees with any of this. He simply says that is, in consequence of the wording of Article 7, the correct legal position whatever the consequences and that is so even if there has never been a decision to that effect before. Is that really the case?

19. We are, of course, as we have already explained, not actually deciding the matter in a way which would be binding because we do not have to. But again, we shall opine. The wording as relied on by Mr Backhouse does cause problems in appearing to limit the range of evidence which might be relied on. But it is not appropriate to limit consideration of this issue solely to a consideration of the words used at Article 7. The legal authority for the Regulation is Title 5 of the Treaty on the Functioning of the European Union. Article 71 of

the Treaty authorises "*measures to improve transport safety*". We have already set out what is said in Recital 10 to the Regulation and the wider import of those words as explained in NCF (Leicester) Ltd, cited above, with which we respectfully agree. And Recital 1 refers to the aims of the Regulation as including "*an improved quality of service, in the interests of road transport operators, their customers and the economy as a whole, together with improvements in road safety*". We do not see that a narrow construction of Article 7(2) such that the list contained is an exhaustive one, contributes to the interests of road safety as opposed to simply precluding operators who are, through the provision of wider evidence such as bank statements and overdraft facilities, able to show the financial wherewithal to keep their fleet of vehicles properly maintained. We do not see that the restrictive approach adopted by Mr Backhouse does anything to further and indeed runs contrary to the interests of the "*economy of a whole*" of any State. On that basis, we are of the view that, notwithstanding the words used, Regulation 7 is not to be read as setting out an inflexible and exhaustive list of items of evidence which a State is able to take into account when deciding whether the test for financial standing is met. That being so, had we been called upon to decide the point, we would have concluded that TC's, whilst of course not limited to considering bank statements, overdraft facilities and credit facilities, are able to take such into account alongside whatever other relevant evidence is advanced by an operator. But for other reasons already explained, we conclude that the first appellant succeeds under Ground 1.

20. We shall take Ground 3 next. By way of reminder it relates to the loss of repute of the second appellant as transport manager. It is readily apparent from the part of the TC's reasoning which we have set out at paragraph 6 above, that he was significantly unimpressed with his more recent level of performance in the role. We understand why the TC took the view he did and we note that, at the PI, Mr Backhouse had realistically accepted that his performance at least in 2019 had been "*poor*" such that his repute might be tarnished albeit that, it was argued, it should not be lost. Mr Backhouse, before us and in his skeleton argument, argued that the TC had failed to consider matters which he said weighed in favour of the second appellant such as his own honesty about his failings, the fact there had been a satisfactory traffic examiner report in 2018, and that changes were being implemented in consequence of the previous failings. He suggested this had "*not been a case of repeated negligence or bad faith*".

21. In *H Sivyer (Transport) Ltd and Simon Sivyer* [2014] UKUT 0404 (AAC) it was said that a failure to maintain continuous and effective control of a fleet of vehicles could, where appropriate, properly ground a decision that a transport manager had lost good repute. In *Matthew Reynolds v Secretary of State for Transport* [2016] UKUT 0159 (AAC) it was said in effect that the good repute of a transport manager extended beyond questions of integrity and that it was appropriate to consider, with respect to repute, any matter relevant to the fitness of an individual to act as a transport manager including performance levels in the role. In *Firstline International Limited and William Lambie v Secretary of State for Transport* [2016] UKUT 0291 (AAC) it was said that to justify a finding of loss of repute the matters found proved must be such that disqualification is a proportionate regulatory response.

22. The TC's reasoning on the issue of loss of good repute as transport manager was brief to the point of being terse. We do not wish to criticise succinctness. But the reasoning, which we have set out above, does not address matters which might have been relevant to a consideration as to whether good repute should be lost rather than tarnished. The reasoning

does not show that anything which might have weighed in favour of the second appellant was factored into the overall consideration of loss, or otherwise, of repute. We accept that very low performance levels are likely to be highly relevant in some cases where the repute of a transport manager is in issue. We accept that incompetence, in some cases, will of itself justify a finding of loss of good repute. But other factors may be relevant too. Here there was the apparent honesty of the second appellant with respect to his failings, the seeming (so far as we can tell) ability to cope with the demands of the role prior to the introduction and utilisation of a new analysis system (there was the satisfactory traffic examiner report in 2018), the apparent absence of performance concerns prior to 2019 and the seeming realistic recognition that, in future, a new transport manager would have to be appointed. In light of the above we have concluded that the TC has not shown that he has factored in all relevant matters prior to reaching his conclusion on repute. Indeed, what he had to say included what seem to have been all of the negative factors but none of the conceivably positive ones. We accept that the failings were significant and serious but there was, nevertheless, from the point of view of fairness, a need to consider and evaluate the competing arguments and we are not persuaded on the material before us that that has been done. We have, nevertheless, asked ourselves whether the adverse findings were such that whatever considerations there were which pointed the other way, loss of good repute was inevitable such that either the TC did not materially err or, if he did, that we should not interfere. But although it might be a close-run thing, we have not found ourselves able to go quite that far. We have concluded, therefore, that ground 3 is made out.

23. The success of the second appellant has a knock-on effect for the first appellant. That is because the TC had decided that, in addition to the arising of a mandatory basis for revocation of the licence with respect to financial standing, there was also a mandatory basis with respect to the first appellant's professional competence as a result of the loss of its transport manager's good repute. But the conclusions we have reached so far mean that both bases have been successfully challenged before the Upper Tribunal. There was a third basis for revocation relied upon by the TC under section 17(3)(aa) of the 1981 Act relating to a contravention of a condition attached to the licence (see paragraph 10 above). The TC had said at paragraph 8(ii) of his written reasons that "*the operator has failed to fulfil its undertaking to ensure the observance of rules relating to drivers' hours and tachographs*". That was offered as a third basis for the revocation of the licence. But that basis for revocation is a discretionary one not a mandatory one. That being so, a balancing exercise is called for and the written reasons do not show that such has been carried out. We do not criticise the TC for that because he had already identified two mandatory grounds so that, from his point of view, the carrying out of such an exercise probably seemed unnecessary. But it becomes necessary if it is of itself to justify revocation given our conclusions as to the matters we have already addressed above.

24. We have not gone on to consider ground 2 which relates to the arguments concerning a period of grace. The appeal before us has already succeeded without that ground. We now, having identified errors in the TC's decision, have to decide what to do. Our powers on disposal are set out at paragraph 2 of the Transport Act 1985. We set aside the TC's decision to revoke the licence of the first appellant. We set aside the TC's decision that the second appellant has lost his good repute as a transport manager. It follows that the disqualification of the second appellant falls away. We remit with respect to all matters relating to each appellant so that such matters may be reconsidered entirely afresh, and together, by a different TC to the one who made the decisions we have set aside. In our view a PI should be held by the new TC unless the appellants indicate that they do not want one. Neither

appellant should assume that the mere fact we have set aside these decisions means that, ultimately, they are likely to succeed. They might but they might not.

M R Hemingway
Judge of the Upper Tribunal
Dated: 10 August 2021