



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

**NCN: [2022] UKUT 3 (AAC)
Appeal No. T/2021/53**

Appellant:

**NIGEL WYNN BROWN
trading as ROY BROWN'S COACHES**

DECISION OF THE UPPER TRIBUNAL

**Her Honour Judge Beech, Judge of the Upper Tribunal
Stuart James, Specialist Member
Andrew Guest, Specialist Member**

Decision date: 7th January 2022

ON APPEAL FROM:

**Tribunal: Victoria Davies, Traffic Commissioner for Wales
Tribunal Case No: PG0007419
Tribunal Venue: Field House, 15-25 Bream's Buildings, London, EC4A 1DZ
Date: 7th December 2021**

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NCN: [2022] UKUT 00003 (AAC)
Appeal No. T/2021/53

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

On appeal from the Decision of Victoria Davies, Traffic Commissioner for Wales dated 1st July 2021

Nigel Wynn Brown trading as Roy Brown's Coaches

Appellant

Before: Upper Tribunal Judge Her Honour Judge Beech
Specialist Member of the Upper Tribunal Stuart James
Specialist Member of the Upper Tribunal Andrew Guest

Hearing date: 7th December 2021

Representation:

Appellant: Appeared in person accompanied by his wife, Mrs Brown

DECISION

The appeal is DISMISSED

Subject Matter: Loss of good repute as transport manager and operator; proportionality.

Cases referred to: 2002/217 Bryan Haulage No.2; 2009/225 Priority Freight Ltd & Paul Williams; Bradley Fold Travel & 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 Traffic Commissioner for Wales ("TC") dated 1st July 2021 when she revoked the licence held by Nigel Wynn Brown ("NWB") with effect from 23.45 on 16th July 2021 under s.17 of the Public Passenger Vehicles Act 1981 ("the 1981 Act"); disqualified him from

holding or obtaining an operator's licence for a period of five years under s.28 of the 1981 Act; and found that NWB had lost his good repute as a transport manager and disqualified him from being a transport manager for five years and until such time as he resits the transport manager's CPC examination under s.14ZA(3) and Schedule 3 of the 1981 Act.

Background

1. The background to this appeal can be found in the appeal bundle and the TC's written decision and is as follows. NWB was granted a standard international operator's licence authorising 28 vehicles on 3rd March 2000. The nominated transport manager was William Haworth and the operating centres were at Garth, Llangammarch Wells and Builth Wells.
2. On 4th September 2002, the Welsh Compliance Team ("WCT") wrote to NWB informing him that the WCT had received an unsatisfactory maintenance investigation as a result of: an inadequate driver defect reporting system in operation; drivers disregarding letters placed in their wage packets; and a failure to adhere to the declared inspection frequency for the vehicles authorised on the licence. NWB was invited to submit an explanation, which he did and as a result, he was informed that the assurances he had given, and the efforts being taken by him had been noted and placed on file.
3. On 14th September 2007, NWB and Mr Haworth were called to a public inquiry as a result of an unsatisfactory maintenance investigation. The then TC found that NWB had breached the undertakings to keep vehicles fit and serviceable; that false statements had been made about carrying out six weekly preventative maintenance inspections; and failures in the driver defect reporting system. The TC downgraded the licence to a standard national licence; reduced the licence vehicle authorisation to 21 vehicles and required the following undertakings to be given:
 - (i) Safety inspections to be at 6 weekly intervals (8 weekly for minibuses) with PMI reports to be fully and properly completed and retained for 2 years;
 - (ii) Random audits of safety inspections to be conducted annually with vehicles and systems being checked by an independent contractor. The findings to be recorded and made available to staff from VOSA or the OTC on request;
 - (iii) There will be a nil defect daily driver defect reporting system. Defect reports will show rectification and will be retained for at least 2 years;
 - (iv) The operator will undertake a random audit of at least 3 drivers per week to ensure that the drivers are undertaking their walk-round checks correctly. The findings will be recorded and made available to staff from VOSA or the OTC on request;
 - (v) Mr Brown to become the nominated transport manager.
4. On 17th May 2017, NWB appeared before a second public inquiry which was called as a result of a further unsatisfactory maintenance investigation. The author of the report was Vehicle Examiner ("VE") Rees. A copy of that report is not included in our papers and as a result, we are not aware of the full detail

as Deputy Traffic Commissioner ("DTC") Seculer did not summarise its contents in his written decision.

5. NWB was represented by Backhouse Jones Solicitors and in attendance was Paul Davies, a transport consultant. NWB accepted that undertakings (i) – (iii) set out in paragraph 3 above had not been fulfilled although in respect of (ii), he did engage the FTA to carry out the audits for a "couple of years". The evidence of VE Rees was not disputed.
6. In his written decision dated 22nd May 2017, the DTC found that MWB had:
 - (i) Made a false statement that vehicles would be inspected on a 6 weekly basis;
 - (ii) Breached the undertakings to: observe the rules on tachographs and drives hours; keep vehicles fit and serviceable; operate an effective driver defect reporting system; keep proper records;
 - (iii) Breached the additional undertakings imposed on 14th September 2007.

The DTC found that NWB had been "*particularly lax in not complying with the undertakings on the licence ..*". The seriousness of the breaches and the failure to fulfil basic undertakings made on applying for the licence and specifically repeated at public inquiry gave rise to consideration of revocation of the licence. The DTC asked himself the questions posed in 2002/217 Bryan Haulage No.2 and 2009/225 Priority Freight Limited and Paul Williams. He found:

"The operator's recent history and the manner in which he gave his assurances, both in writing to the VE and orally at the inquiry, leave substantial doubts as to the likelihood of future compliance if left to his own devices. Whilst co-operative and "will to do whatever was needed" to keep his licence, the operator was vague and aspirational rather than focussed and determined in his commitments. As an example, his approach to the drivers' shortcomings in driver defect reporting was to ask if they "were happy" with their walk round checks rather than taking a proactive approach and insisting upon relevant training. I would describe his demeanour at the public inquiry as lackadaisical, which is consistent with his approach to the licence requirements".

The DTC weighed into the balance the positive aspects of the business:

- NWB had funds and had invested in the fleet and facilities and intended to invest further;
- He had been co-operative with the investigation, albeit the VE had similar doubts as to whether NWB's stated commitment would lead to sustained action;
- Few of the prohibitions were safety critical and the DTC was prepared to accept that most of the stretched safety inspection intervals were down to missing records rather than "*complete neglect*";
- He had booked training and engaged assistance prior to the hearing;
- NWB was providing an essential service to schoolchildren and the public in a diverse rural area with limited public transport.

7. The DTC accepted NWB's promise to continue to engage Paul Davies as a transport consultant and was prepared to give NWB "**one final opportunity to demonstrate that he can run a fully compliant operator's licence**" (our emphasis). NWB's good reputation as an operator and transport manager was seriously tarnished and he was given a "*formal and final warning as to his future conduct*". The DTC further reduced the vehicle authorisation on the licence to 15 and required the following undertakings from NWB:
- (i) Safety inspections to be at 5 weekly intervals (6 for minibuses). PMI reports to be fully and properly completed on up-to-date inspection sheets and retained for 2 years;
 - (ii) There will be a nil defect daily driver defect reporting system. Defect reports will show rectification and will be retained for at least 2 years;
 - (iii) The operator will undertake a random audit of at least 3 drivers per week to ensure the drivers are undertaking their walk-round checks correctly. The findings will be recorded and made available to staff from VOSA or the OTC on request;
 - (iv) All vehicles will have rolling road brake tests on at least quarterly intervals. Results to be recorded and retained;
 - (v) A transport consultant will be engaged to oversee the systems for maintaining vehicles, records and drivers' hours and Working Time Directive compliance for at least 2 full days per month;
 - (vi) An audit report on the maintenance, drivers' hours etc regime will be conducted after 6 months from this date and a copy of the report and schedule of actions to implement recommendations will be submitted to the DVSA and the Office of the Traffic Commissioner by 31st December 2017. Reports then to be submitted annually until ordered by Traffic Commissioner.
8. In purported compliance with paragraph 7(vi) above, Paul Davies submitted an Audit Report on 1st December 2017 which only dealt with maintenance systems. On 7th February 2018, the OTC wrote to NWB pointing out the omission and requiring an audit to cover drivers' hours and records within 14 days. The audit which was dated 19th March 2018 was sent to the OTC on 3rd April 2018 (considerably outside the time frame set out in the undertaking and outside the 14 days given by the OTC). The contents of the audit were less than satisfactory although this does not appear to have been picked up by the OTC or commented upon by the DVSA. Indeed, it appeared that Graham Owens, the author of the report had not been involved with the company prior to being instructed to undertake the audit.
9. No further annual audits were submitted to the OTC.
10. At some point on or after 8th October 2020, the DVSA received a complaint that vehicle W208CDN had been used on a school run with a flat tyre on 8th October 2020. The driver was informed by a parent but he drove off with children on board. There was also an allegation that the vehicle had been driven with its exhaust hanging down. The complaint itself was not within the public inquiry bundle and it was unclear to us whether the allegation about the exhaust was made at the same time as the allegation about the tyre.

Moreover, NWB has never seen the detail of these allegations save for a very brief summary in VE Rees' subsequent maintenance report.

11. On 4th December 2020, VE Rees made an unannounced visit to the Bulth Wells operating centre. Whilst NWB was not available, VE Rees was able to inspect the vehicle and look at the relevant paperwork. A slight exhaust blow had been reported on 25th and 28th September 2020 and rectification work had been carried out and a job card completed.
12. VE Rees returned on 8th December 2020 by appointment and interviewed the driver of the vehicle under caution. He averred that there was no issue with the tyre when he had conducted his walk round check before taking the vehicle from the yard on 8th October 2020 but that a parent had mentioned the tyre during one of his pick-ups. The driver had inspected the tyre and concluded that it had a slow puncture. As he only had a short distance to travel with six stops for children who were waiting on roads without pavements, he determined that he should complete his journey and then report the issue back at the yard. He denied that the exhaust was hanging down. NWB confirmed that the tyre had been changed but there was no evidence that the driver had reported the problem and there was no job card (neither VE Rees or the TC came to any conclusions about these allegations and the matter was left hanging in the air).
13. VE Rees then proceeded with his maintenance investigation. The report resulted in a report to the OTC for the following main reasons:
 - a) Prohibition Assessment: three vehicles were inspected on the day with one delayed prohibition and two advisory notices issued; there had been one delayed and one immediate mechanical prohibition since the last public inquiry in 2017; the mechanical prohibition rate was 28.57% whereas the national average was 16.88%;
 - b) Operating Centres: the parking arrangements were inadequate with vehicles parked at the main entrance to the Bulth Wells operating centre in close proximity to the A481 with one SORN vehicle (X4PCL) parked in a public layby one mile away;
 - c) Inspection and Maintenance records: Inspection records were not properly completed with intervals "*not properly managed*". Vehicles were being used unintentionally whilst SORN; various PMI sheets had percentages entered in the brake performance section but nothing to identify how these were achieved; incorrect registrations were entered onto sheets; odometer readings were missing; there were no tyre depth recordings;
 - d) There was no evidence of a system for dealing with manufacture's safety defect and recalls;
 - e) There was no evidence of a system for reporting reportable PSV incidents. NWB was not aware of the relevant form for completion (PSV112);
 - f) Driver defects were found on PMI sheets and on pre-MOT inspection sheets with no evidence of the defects having been identified on the driver defect sheets completed beforehand. Minor improvements were recommended as there was an appropriate system of assessment of the reported defects and their repair although the system was ineffectively

managed. The undertaking required that a random audit take place of at least 3 drivers per week to ensure correct walk round checks were being carried out. There was no evidence that the undertaking was being adhered to;

- g) Training of the mechanics was out of date;
 - h) Wheel & tyre management: there was no evidence of current calibration certificates for the torques wrenches; there was a wheel torquing procedure which was followed on occasions; there was no evidence of tyre pressures being checked or entered onto the PMI sheets;
 - i) Vehicle emissions: there was no evidence of maintenance and monitoring of systems to ensure the correct operation of emissions control systems;
 - j) The transport manager (NWB) was considered to only have "*partial control*" of the operation for the following reasons:
 - SORN vehicle (X4PCL) parked in a layby on the side of the A481;
 - There was evidence of vehicles being used without a current MOT (once by NWB);
 - Driver defect reports not acted upon e.g. there was evidence of 11 consecutive driver defect reports showing the same defect without rectification work being carried out;
 - Incorrect procedure when completing PMI sheets e.g. using MOT brake print outs for PMIs;
 - 15 vehicles authorised with 18 specified on the licence including 3 which were SORN;
 - Vehicle CN07GWK operated as a PSV when it was a Class 5 vehicle and tested as a Class 5 vehicle;
 - Vehicle M266NTA specified on 2 operator licences;
 - Vehicle M784MBA could not be found on a vehicle search;
 - Vehicle N244PVL – no test history or vehicle details;
 - Incorrect PMI frequency stated on the VOL system;
 - No monitoring of annual test failures.
14. NWB and Mr Davies responded to the report. NWB did not recollect there having been an issue with the exhaust on W208CDN on 8th October 2020 and averred that the tyre fault had been rectified prior to the afternoon school run on the same day. He also averred that the use of vehicles without MOTs was an oversight and he accepted the advice of VE Rees with regard to safety recalls, the use of PSV112 to report relevant incidents and the monitoring of AdBlue use and vehicle emissions systems. He considered that all assurances had been complied with; Mr Davies continued to visit once a month and that Mr Owens dealt with drivers' hours and records. Improvements had been made since the last public inquiry but more were needed including the replacement of older vehicles. One member of the garage staff had been on sick leave because of a major operation but was due back in January 2021 and another had volunteered to attend any appropriate

courses. Mr Davies dealt with the detail of VE Rees' report and accepted that clerical errors and omissions had been made by the technical staff in the completion of the PMI sheets. He provided explanations for some of the issues identified by VE Rees including that some vehicles were VOR'd at a time when they would otherwise be due for a PMI, hence the apparent extended intervals between inspections. He advised that it was not possible to conduct random driver defect reporting audits on 3 drivers a week because of staff shortages but he assured VE Rees that all drivers were regularly checked and records made.

15. VE Rees considered that the above responses were unsatisfactory for the following reasons:
 - The issue of inadequate parking at the operating centre had been highlighted during his visit in 2017. The problem had persisted;
 - There was no explanation why CN07GWK had been tested as a class 5 vehicle and used as a PSV. Whilst Mr Davies had stated in his response that the vehicle had ceased being used prior to VE Rees' visit, it was still specified on the operator's licence as at 11th January 2021;
 - The evidence of the annual test failure rate being four times higher than the national average had not been addressed or commented upon;
 - Whilst Mr Davies averred in his response that the operator took all prohibitions seriously and investigated how they had occurred and how to prevent them happening in the future, there was no evidence submitted to show this was the case;
 - Whilst Mr Davies averred that all audit reports due had been submitted, the OTC had only received one;
 - Whilst NWB confirmed that Mr Davies attends one day a month, the undertaking required his attendance two days a month;
 - The following issues had not been addressed: SORN vehicle parked in a layby; M266NTA specified on two licences; M784MBA not found on vehicle search; N244PVL – no test history or vehicle details; incorrect PMI frequency stated on VOL; no monitoring of annual test failures.
16. By a call up letter dated 4th May 2021, NWB was called to a public inquiry in his capacities as operator and transport manager. By an email to the OTC on 1st June 2021, Donna Howells, a Transport Consultant, advised that NWB had given her little time to prepare for the hearing as she had not been engaged "*until very recently*".
17. On 30th May 2021, Ms Howells submitted a short "*report*" in which the following points were made:
 - Breach of the undertaking to submit annual audit reports: NWB appreciated that as transport manager, he had failed both personally and professionally to meet this requirement. He would ensure in future that the undertaking was complied with and was committed to improving compliance and that the audit would benefit the business to ensure on-going compliance and safe working practices;

- NWB appreciated that his vehicle authorisation was 15 and he had never exceeded the authorisation. The list of specified vehicles had now been updated and would be in the future. NWB accepted that he had overlooked the importance of keeping the VOL system updated;
- Whilst the undertaking to engage a transport consultant was for two days a month, NWB had engaged Mr Davies for one day a month for “*vehicle checks etc*” whilst drivers’ hours and records were dealt with by Graham Owens;
- As at the date of the report of VE Rees (December 2020), the final fail rate for MOT was 36%, which NWB recognised was substantially higher than the national rate. Since then six vehicles had been presented for test and the final fail rate had reduced to 16.66%;
- NWB has arranged for all the technical staff to attend a relevant PSV inspection course. They agree that it would be beneficial;
- NWB accepted that any prohibition is an indicator of how effective a maintenance system is, it was worthy of note that none of the 12 prohibitions issued since the licence was granted were “S” marked;
- Whilst the services of Mr Owens were used for external tachograph analysis, there were no records for the previous six months as no private hire work had been undertaken as a result of COVID-19. Drivers only covered school contracts, driving for no more than 4 hours a day and as such, no breaches of RTWTD or drivers’ hours rules had occurred;
- In conclusion, NWB accepted that the undertakings attached to the licence had not been fully met although some improvements had been made to systems. He requested that the TC consider allowing him to share the role and responsibility of transport manager with a suitably qualified and experienced external transport manager who would be equally accountable to the TC for any failings. NWB was hopeful that his contractual relationship with Powys County Council would be considered. He employed approximately ten people and it would have a devastating impact on him to lose his good repute.

The Public Inquiry

18. The public inquiry took place on 8th June 2021. VE Rees attended on behalf of the DVSA and NWB attended and was represented by Ms Howells. Mr Forsey from Powys Council attended as an observer.
19. Prior to the hearing, VE Rees had a little time to look at some of the up to date records provided by NWB in a zip file which was too big to access easily. From the documents he was able to access, he noted the following:
 - CU59FJK: on 19th March 2021, the driver reported that the driver’s door was not opening and closing; on 22nd March 2021, the driver reported that the “*passenger door was playing up*” and on 23rd March 2021, the driver reported that the passenger door was not working. No rectification work was shown on any of the reports.

- An engine warning light was reported on driver reports for 3rd, 4th, 5th, and 9th March 2021 and again on consecutive days between 19th and 22nd April 2021 without rectification work shown. Whilst it may have been an advisory light, if reported to the mechanics, a note should have been made to record that it was being monitored;
 - CU59FJK was specified on the licence on 22nd May 2021, yet there was a driver defect report dated 22nd January 2021.
20. Ms Howells having indicated that she had no questions of VE Rees save in respect of a typographical error in his report, NWB then gave evidence. He accepted immediately that there were shortcomings in his operation that were being addressed. He had been through a lot of the detail with Ms Howells. Mr Davies had been very good but there were a couple of things that he had not kept up with. NWB complained that he had never seen the complaint about the incident on 8th October 2020 although he did remember the driver returning to the yard and stating that a tyre was underinflated. The driver was a competent driver and he had told NWB that there were four or five children on the coach and the tyre was not bulging and with a six-mile journey to complete, he made the decision to continue. He had denied that the exhaust had become detached. He would not have continued with the journey if it had been unsafe.
21. NWB accepted the contents of VE Rees' report and that four of the five undertakings given in 2007 and 2017 had not been fulfilled. He assured the TC that since April 2017 the PMI interval of five weeks was being adhered to and that the records were kept for two years. He also kept the driver defect reports for two years. The driver audits were more difficult as the mechanic who was responsible for doing them had been off work for ten weeks and the operation now only employed ten drivers as a result of COVID-19. He asked the TC whether the undertaking could be reduced to two drivers per week as it was difficult to audit three drivers on the number employed.
22. As for the roller brake testing undertaking, NWB assured the TC that the tests were included on the wall planner and a Tapley Meter was used during every PMI (the DTC indicated that she was satisfied with NWB's evidence on this point).
23. Ms Howells then turned to the undertaking to engage the services of a transport consultant for two days a month. NWB explained that Mr Davies had been recommended by Backhouse Jones and that he was an experienced ex-DVSA examiner. Mr Davies had said that he did not deal with drivers' hours and tachographs and recommended Mr Owens to deal with that side of things and Mr Owens reported to Mr Davies. However, NWB had not undertaken any private hire work for twelve months and so there were no tachographs to analyse. It was Mr Davies who suggested that with Mr Owens dealing with drivers' hours and tachographs, NWB only needed Mr Davies for one day a month. NWB accepted that he should have informed the TC about this change. So, Mr Davies was responsible for the forward planner and PMI inspections sheets, the booking of roller brake testing, calibration of tachographs, the booking of MOTs and keeping everyone up to date whilst NWB consulted with Mr Davies and assisted with the inspections, assisted the drivers with their walk round checks and assisted Mr Davies with his

responsibilities. NWB denied that he was blaming Mr Davies for failing to comply with the undertaking to engage a transport consultant two days per month and he had to accept that he had failed to monitor Mr Davies. He had expected Mr Davies to bring to his attention that annual audits were not being submitted.

24. NWB set out the positive features: roller brake testing was taking place; head light aim was now being checked; the mechanics would be retrained when COVID-19 permitted; the MOT fail rate had reduced to only two times higher than the national average as opposed to four times higher; older vehicles would be replaced and this programme would have commenced sooner but for COVID-19; the business was picking up again and NWB intended to invest in better equipment. He accepted the MOT fail rate was "*shocking*" but the workshop was down by one fitter. NWB had to consider whether to continue using the services of Mr Davies. He would prefer to use an external transport manager who would be more answerable: "*I need someone to take responsibility*" as NWB was "*on the coal face*". He needed someone with computer skills. NWB accepted that he was failing as a transport manager.
25. As for possible regulatory action, he was mostly using all 15 vehicles presently authorised on the licence and operating 10 to 12 school contracts. There was a problem in the area in finding suitably specialist and experienced technicians to deal with some mechanical problems which kept vehicles off the road. He had a clear and focussed plan for the future and it would be devastating to him and those he employed (10 to 15 employees) if he were to lose his licence. NWB had taken the business over from his father and he was passionate about it. There were no "S" prohibitions and there was never a question about money being spent on the vehicles. He needed different help to that which he had had hitherto.
26. The TC then asked Mr Forsey to comment on the effect that licence revocation would have on the school services operated by NWB. He said that he was disappointed to be at another public inquiry with another operator from Powys and that the Council needed to deal with its supplier base. In terms of impact, should the licence be revoked, he had made contingency plans to cover the routes that NWB covered.
27. When asked whether she had any final submissions for the TC to consider, Ms Howells said she had not apart from asking the TC to consider the undertakings offered within the "*submissions*" (which we take to mean the "*report*" referred to in paragraph 17 above).

The Traffic Commissioner's decision

28. Having summarised the evidence and noting NWB's acceptance of the contents of VE Rees' report, the TC found that s.17(3)(a) of the 1981 Act was made out (statements of fact which were false or had not been fulfilled); s.17(3)(aa) (undertakings given which had not been fulfilled); and s.17(3)(c) (prohibitions had been issued). She reminded herself that the operator licencing regime was based on trust and that in the light of her findings, she was entitled to question NWB's fitness to hold a licence. She took into account the fact that NWB had failed to comply with undertakings imposed in 2007 as well as 2017 and that at that stage, NWB's repute was found to be seriously tarnished and he was given a formal and final warning as to his

future conduct. He had failed to heed that warning and had again, breached the trust placed in him. The TC concluded that NWB had lost his good repute (s.14ZA(2) of the 1981 Act). NWB had also accepted that in his capacity as transport manager he had failed to effectively and continuously manage the transport activities of the business and in particular, he had failed to exercise effective quality controls over the PMI sheets, the driver defect report system was poor and undertakings on the licence had not been complied with. He had been given a clear warning in 2017 when his reputation as transport manager was found to be seriously tarnished. The TC concluded that NWB no longer satisfied the requirements of s.14ZA(3) of the 1981 Act and had lost his good repute.

29. In coming to her conclusions, the TC had undertaken the required balancing exercise. She accepted that none of the prohibitions issued were "S" marked; that since December 2020, the MOT fail rate had improved although being two times higher than the national average still gave rise to concerns; and that NWB had been cooperative. In answering the *Priority Freight* question, "*how likely is it that this operator will in future, operate in compliance with the operator's licensing regime?*", the TC took account of NWB's regulatory history and his failure to heed warnings and concluded that it was highly unlikely that he would comply in the future. She considered that his failings had put road safety at risk, which was particularly concerning given that he was carrying school children. His failings had also given him an unfair commercial advantage over other operators. In considering the *Bryan Haulage* question, "*is the conduct such that the operator ought to be put out of business?*" the TC had regard to the Senior Traffic Commissioner's Statutory Document 10, Annex 4. For the same reasons relied upon in answering the *Priority Freight* question in the negative, the TC answered the *Bryan Haulage* question in the affirmative. She considered this to be a bad case with a starting point of "severe" for regulatory action. Other operators would be shocked if another operator were permitted to operate vehicles against the background of this case. Revocation of the licence was therefore inevitable and NWB "*deserved*" to be disqualified under s.28 of the Act from holding a licence in future. Paragraph 100 of the Senior Traffic Commissioner's Statutory Document 10 (now paragraph 103 in the October 2021 version) suggests a starting point of between one to three years for a first public inquiry. This was NWB's third and a final warning had been given. A period of five years disqualification was considered necessary to meet the objectives of the operator licensing regime and to mark the serious breach of trust. For the same reasons as above, the TC also considered a period of disqualification of five years to be proportionate in respect of NWB acting as a transport manager. As a rehabilitation measure, NWB was required to re-sit the transport manager CPC course and should NWB wish to be appointed as a transport manager in the future, his application would be considered at public inquiry.

The Appeal

30. NWB submitted grounds of appeal and revised grounds once the transcript was available. He also made oral submissions to the Tribunal. The combined effect of his submissions were as follows:
- (i) The determinations that he had lost his good repute as operator and transport manager along with the orders of disqualification for five years

were wholly disproportionate. He did not consider that his case should be treated as falling in the "severe" category as he had not benefited from any commercial advantage over other operators and road safety was not compromised. Whilst he had struggled to set priorities during the pandemic, he had not wilfully neglected his first priority to maintain safe vehicles. He had employed Mr Davies and Mr Owens and a few months thereafter, a new full time mechanic primarily to help him maintain the written records;

- (ii) The TC gave the impression of not having read the papers properly as she was flicking through them during the hearing. NWB gained the impression that she had already decided the case against him by for example, insisting that roller brake testing was not taking place but later accepting that it was;
- (iii) The hearing was unfair for the following reasons:
 - Having been informed that VE Rees was not going to attend the hearing, he did attend and was already seated in the hearing room when NWB arrived;
 - The call up letter stated that the TC "*shall wish to explore the report at length and in great detail during the hearing*" which is what NWB expected but that did not take place. The hearing lasted an hour and seventeen minutes and ended abruptly. Few questions were asked of him or of Ms Howells or of VE Rees;
 - Having been asked by the TC about the consequences of revocation of the licence, NWB explained that the business was his only source of income and the business would have to close. No opportunity was given to make submissions as to how this could be avoided;
 - Once the TC had asked Mr Forsey whether he had contingency plans in the event of revocation, NWB considered that his fate was sealed;
- (iv) NWB now takes issue with the findings made by VE Rees which were relied upon by the TC. He gave examples;
- (v) He now takes issue with the finding that he failed to comply with five out of six of the undertakings given by him in 2017. The only undertaking he had failed to adhere to was the provision of annual audits and that error could have been explained by Mr Davies if he had attended the hearing. Ms Howells had told NWB that his attendance was not required;
- (vi) NWB initially disputed that during the course of the hearing he had accepted that he had failed as a transport manager;
- (vii) The TC failed to give consideration to alternative action short of revocation. The improving MOT pass rate was evidence that the operation was improving. He considered himself an honest, responsible and safe operator. He had never falsified records or allowed employees to do so. If given the opportunity to do so, he would gladly have offered to reduce the number of discs allowed;

- (viii) NWB was concerned by the fact that whilst waiting for the written decision of the TC, he was contacted by the Bus Registration section of the OTC and was informed that he still had registered bus routes, which was not the case. This caused NWB to fear that there was other information held on the TC's file which was wrong;
- (ix) NWB took issue with the TC's finding that his operation had put road safety at risk. If that was so, why did the TC delay the revocation of the licence for twenty-seven days following the hearing? Rather, the revocation conveniently came into force when the school holidays commenced;
- (x) The use of the word "*deserves*" by the TC when referring to disqualification, indicated that the TC had punishment in mind rather than seeking to promote the objectives of the legislative regime.

Discussion

31. Our starting point is that NWB was represented by a transport consultant who held herself out as an expert in passenger transport regulation. Whether it was upon the advice of Ms Howells or of his own volition, NWB accepted the contents of VE Rees' report, accepted that he had failed to comply with five out of six of the undertakings given by him in 2017 and further accepted that he had failed as a transport manager. Whilst NWB may now regret the approach taken by himself and Ms Howells to the evidence in this case, he cannot go behind the admissions that he made and cannot challenge the detail of VE Rees' report as neither he nor Ms Howells had done so during the hearing.
32. As a consequence of the admissions that he made before the TC, NWB's complaints about the failure of the TC to question VE Rees closely are misplaced. His evidence was accepted. Whilst the call up letter did warn that his report would be considered in detail, that was unnecessary bearing in mind NWB's acceptance of its contents. Moreover, insofar as NWB had anticipated that questioning of VE Rees would assist him in challenging either the negative features of VE Rees' report or drawing out the positive features of his report, that was the role of Ms Howells who either had no instructions to do so or chose not to do so. It is of note that she did not ask VE Rees one question about the contents of his report. And as for NWB being given an opportunity to set out the positive features of his operation or explore possible alternatives to revocation, he first of all had that opportunity when the "*report*" was submitted prior to the hearing and then given an opportunity when he gave evidence in answer to the questions of Ms Howell (see paragraph 24 above). Moreover, if there are important matters which an operator would wish the TC to consider, including alternatives to revocation, it is the role of operator's representative to ensure that this takes place with reference being made to them again in their closing submissions. Whilst she was invited to do so, Ms Howells did not make any closing submissions save for asking the TC to accept the undertakings set out in the submissions which amounted to a proposal that NWB share the role of transport manager with an external transport manager. An offer to reduce the number of discs could have been made if considered appropriate and was not, although it is doubtful that such an offer would have made any difference.

33. We do not consider that the hearing was unfair. The hearing was short because the evidence of VE Rees was accepted; there was no unfairness in VE Rees being in attendance at the hearing and this point is inconsistent with NWB's concerns that few questions were asked of him; the fact that the TC flicked through her papers is understandable in view of the size of the hearing bundle which ran to 611 pages; there was no indication from the transcript that the TC had not mastered the brief save for some confusion about roller brake testing which was soon clarified and NWB's evidence accepted; whilst the TC did ask Mr Forsey about contingency plans, the TC made it clear in her decision, that she did not take his comments into account when determining the issues in the case.
34. We do not consider there to be any merit in NWB's point about the contact he had with the bus registration unit nor in the point that the revocation of his licence did not take effect until 16th July 2021. Following the hearing, the TC had to consider and then write her decision. The TC could not have revoked the licence prior to the date that her decision was published which was 1st July 2021 and she then delayed the effect of her decision for sixteen days, no doubt to give NWB some time to wind down the business.
35. The regulatory history of NWB's operation made this a bad case. He had been required to give assurances in 2002 following an unsatisfactory maintenance report (within two years of the licence being granted). He was required to give further undertakings at a public inquiry in 2007 at which his licence was downgraded to a standard national licence and his vehicle authorisation reduced from 28 to 21. Further undertakings were required at a public inquiry in 2017 with the licence authorisation reduced further to 15. Yet the issues raised in 2002, 2007 and 2017 were the same as those raised in 2020: driver defect reporting system and maintenance and records. Whilst road safety had not in fact been compromised, the failures in NWB's systems gave rise to such a risk. We accept that NWB's failings were not deliberate or intentional. However, the TC's assessment that he could not be trusted to operate compliantly in the future whether as a transport manager or operator is not open to challenge as it was well founded on the evidence. DTC Seculer described NWB's approach to licencing requirements in 2017 as "*lackadaisical*"; the same comment applied as at the date of this public inquiry. Neither were the TC's findings that NWB had lost his good repute open to challenge. Disqualification as a transport manager was therefore inevitable and proportionate and disqualification under s.28 of the 1981 Act as an operator, in the circumstances of this case, was also entirely appropriate and proportionate. The TC had regard to the relevant guidance when determining the length of the period of disqualification. Whilst a five year disqualification is long, it is proportionate in the circumstances. The only comment we would make is that it was inappropriate for the TC to use the phrase "*I conclude that Mr Brown deserves to be disqualified under s.28 ..*" as that implies that an order of disqualification was being used as a punishment rather than a means to ensure compliance with the statutory regime. We are satisfied however, that the use of the word "*deserves*" is no more than an unfortunate error on the part of the TC which does not undermine her determinations and reasoning overall.

36. In all the circumstances we are not satisfied that the TC's decision was plainly wrong in any respect and neither the facts or the law applicable in this case should impel the Tribunal to allow this appeal as per the test in *Bradley Fold Travel & Peter Wright v Secretary of State for Transport (2010) EWCA Civ.695*. The appeal is dismissed.

A handwritten signature in black ink, appearing to read 'Judge Beech', written in a cursive style.

**Her Honour Judge Beech
Judge of the Upper Tribunal
7th January 2022**