IN THE UPPER TRIBUNAL **Appeal No. UA-2022-001142-T**
ADMINISTRATIVE APPEALS CHAMBER
(TRAFFIC COMMISSIONER APPEALS)

ON APPEAL from A DECISION of the TRAFFIC COMMISSIONER for the South Eastern and Metropolitan Traffic Area

Before:	Zachary Citron:	Judge of the Upper Tribunal
	Stuart James:	Member of the Upper Tribunal
	Dr Phebe Mann:	Member of the Upper Tribunal

Appellants: Nirwan Ltd and Mr Daljeet Singh Nirwan

Representation

For the appellants: Mark Davies of counsel, instructed by Smith Bowyer Clarke

Heard: at Field House, London EC4

On: 9 June 2023

Date of decision: 13 July 2023

DECISION OF THE UPPER TRIBUNAL

The appeal is dismissed. The decision of the traffic commissioner in relation to the appellants, dated 5 May 2022, shall take effect from 23:45 on the date falling two months after the date this decision is issued to the parties.

Subject matter

Loss of repute; revocation of licence; disqualification; proportionality

Case referred to

Bradley Fold Travel Ltd & anor v Secretary of State for Transport [2010] EWCA Civ 695
Bryan Haulage Ltd v Vehicle Inspectorate Appeal 2002/217
Priority Freight & Paul Williams Appeal 2009/225

REASONS FOR THE DECISION

1. In what follows, references to "sections" or "s" are to sections of the Goods Vehicles (Licensing of Operators) Act 1995, and references to "paragraphs" (unless the context otherwise indicates) are to paragraphs of Schedule 3 (*Qualifications for Standard Licence*) to that Act.

The decision appealed against

2. The appellants (Nirwan Ltd and Mr Nirwan) appealed to the Upper Tribunal against a written decision (the "**decision**") of the Traffic Commissioner (the "**TC**") dated 5 May 2022

   (a) revoking two licenses held by Nirwan Ltd (OK1132138 and OF2031245) with effect from 23:45 on 4 July 2022 (pursuant to "adverse findings" under s26(1)(f) and (h) and s27(1)(a) and (b)),

   (b) disqualifying Mr Nirwan from acting as a transport manager on any operator licence for a period of three years from 23:45 on 4 July 2022; this was done upon a finding that Mr Nirwan no longer satisfied the requirements of s13A(3) to be of good repute, in accordance with Schedule 3; and a finding that he was unfit to manage the transport activities of an undertaking, and

   (c) disqualifying Nirwan Ltd and Mr Nirwan from holding or obtaining an operator's licence or being engaged in the management, administration or control of any legal entity that holds an operator's licence in Great Britain for a period of three years from 23:45 on 4 July 2022 (as provided for by s28).

3. The TC later directed (under powers in s29(2)) that the decision not take effect until the appellants' appeal to the Upper Tribunal had been disposed of.

4. By way of explanation of the statutory references in the decision:

   (a) under s26(1), the TC may direct that an operator's licence be revoked on grounds including that any undertaking recorded in the licence has not been fulfilled (this is (f)) and that since the licence was issued there has been a material change in any of the circumstances of the licence-holder that were relevant to the issue of the licence (this is (h));

   (b) under s27(1), the TC shall direct that a standard licence be revoked if at any time it appears to her that (a) the licence-holder no longer satisfies one or more of the requirements of s13A (*Requirements for standard licences*), or (b) the transport manager designated by the licence-holder no longer satisfies one or more of the requirements set out in paragraph 14A(1) and (2), or (1) and (3);

(c) s13A(2)(b) requires that the TC be satisfied that the applicant is of good repute (as determined in accordance with paragraphs 1 to 5);

(d) s13A(3) requires (where the applicant is not an individual) that the TC be satisfied that the applicant has designated a suitable number of individuals who satisfy the requirements set out in paragraph 14A(1) and (3);

(e) under paragraph 14A(1)(c), a transport manager must be of good repute (as determined in accordance with paragraphs 1 to 5);

(f) under paragraph 1, in determining whether an individual is of good repute, the TC may have regard to any matter but shall, in particular, have regard to (amongst other things) any information in her possession which appears to her to relate to the individual's fitness to hold a licence;

(g) under s28 (*Disqualification*), where, under section 26(1) or 27(1), the TC directs that an operator's licence be revoked, the TC may order the person who was the holder of the licence to be disqualified (either indefinitely or for such period as the TC thinks fit) from holding or obtaining an operator's licence; and where the TC makes such an order in respect of any person, the TC may direct that if that person, at any time or during such period as the TC may direct, is a director of, or holds a controlling interest in, a company which holds a relevant licence (or its subsidiary), the licence of that company shall be liable to revocation, suspension or curtailment under s26.

Basic background

5. The basic background to this case included that:

(a) licence OK1132138 was a standard national licence from 10 October 2014, authorising 12 vehicles (10 were in possession); and licence OF2031245 was a standard national licence from 26 March 2020, authorising one vehicle;

(b) Mr Nirwan was sole director, and transport manager, of Nirwan Ltd;

(c) a Driver & Vehicle Standards Agency ("**DVSA**") traffic examiner investigation into Nirwan Ltd commenced on 12 March 2021;

(d) On 5 August 2021 Nirwan Ltd applied to add Mr Colin Evans as an additional nominated transport manager;

(e) a public inquiry was held on 11 October 2021; it was adjourned part heard and recommenced on 6 December 2021;

(f) a significant period of the public inquiry was taken up addressing whether a disciplinary letter produced by Nirwan Ltd dated 27 March 2021 (addressed to one of Nirwan Ltd's drivers, for driving without a card) was

genuine, both in terms of whether that driver was driving at all and whether the letter was created after the event (and so was fraudulent); and

(g) Mr Evans withdrew his nomination shortly after the 11 October 2021 public inquiry hearing.

The decision

6. In the section of the decision headed "Determination", the TC's findings included:

(a) that Mr Nirwan admitted failing to exercise quality, monitoring and control of the transport operations (of Nirwan Ltd) as director, and failing to exercise continuous and effective management of the transport operations as the transport manager;

(b) that the TC had not found Mr Nirwan to be a truthful witness;

(c) that the TC had made two serious findings as regards Mr Nirwan:

i. creating a false document (this was the finding at paragraph 18 of the decision that the disciplinary letter dated 27 March 2021 was deliberately created (by Mr Nirwan) after the event to mislead the DVSA traffic examiner); and

ii. deliberately or recklessly failing to make and/or keep and/or produce records since January 2020;

(d) that there were positives to be weighed in the balance:

i. it was Nirwan Ltd's first public inquiry; there was no previous adverse history;

ii. Mr Nirwan completed a two-day transport manager "CPC [certificate of professional competence] refresher" on 29-30 June 2021 (albeit Nirwan Ltd accepted that this did not appear to have produced a significant improvement, particularly in vehicle maintenance);

iii. Mr Nirwan engaged a transport consultant to assist with the DVSA investigation and nominated a second transport manager in August 2021;

iv. the drivers hours tachographs and working time directive records produced prior to the hearing on 11 October 2021 demonstrated an improving picture in that there were no issues with the digital data for two specified vehicles and two reports produced show that missing mileage was being checked. There were no significant periods of driving without card. Driver summary reports for three drivers showed four apparent working time directive infringements and two drivers hours infringements. Mr Nirwan was responsible

for one drivers' hours infringement and two working time directive infringements from that list. No evidence of disciplinary action was produced because no behaviours reached the points-based system used by Nirwan Ltd;

(e) that Mr Nirwan's deliberate, and reckless, acts, which undermine road safety/prevent an effective assessment of risk over a sustained period, were so serious that they could not be cast aside as some temporary aberration. These behaviours informed the TC about the underlying honesty and integrity of the individual. Dishonesty and reckless self-interest are not behaviours that can be unlearnt on a 2 day course they are inherent. Mr Nirwan's conduct struck at the heart of road safety and fair competition; casting aside the requirement of adherence to high standards daily both as operator and transport manager. The TC accepted there were systemic improvements across areas of compliance, but considered it telling that brake testing was not resolved by 6 December 2021 and the improvements were mainly when Mr Nirwan knew he was being reported to the Office of the Traffic Commissioner ("**OTC**");

(f) that the gravity of the case in terms of Mr Nirwan's conduct is such that Mr Nirwan could not be trusted moving forward at all; revocation was the only possible outcome. Nirwan Ltd's loss of good repute and Mr Nirwan's loss of good repute as transport manager were essential to maintain the professional standing of the operator licencing regime.

7. In the next section of the decision, headed "Disqualification", the TC's findings included:

(a) that Mr Nirwan had demonstrated that he could not be trusted to comply with the regulatory regime: he produced a fake letter after receipt of the TEVR [traffic examiner visit report] and held it out as legitimate to DVSA and through the public inquiry; he ensured statutory records were not kept or if they were kept, not produced in full to DVSA; he failed to give proper attention to the roadworthiness of vehicles over many months and this remained the case as of 6 December 2021; failing to properly brake test 32t multi axis vehicles was stupefying, in the face of the 2015 Bath tipper tragedy involving a vehicle of the same size;

(b) that the objectives of the system, the protection of the public and fairness to other operators, required that Nirwan Ltd and Mr Nirwan be disqualified for a period;

(c) that this was Nirwan Ltd's first public inquiry and therefore falls into a starting point of 1-3 years; the disingenuous behaviours and significant risk posed placed it at the top end of that band.

Grounds of appeal and submissions

8. In the appeal form, the grounds of appeal were

(a) the conduct of the TC's balancing exercise failed to give sufficient weight to the positive aspects of the appellants' case; and

(b) the decisions of the TC were, in all the circumstances of the case, disproportionate.

9. Mr Davies' skeleton

(a) confirmed what had been said by the appellants in their application for a "stay" dated 26 May 2022: the findings of fact made in the decision were not contested by the appellants;

(b) referred to the *Bryan Haulage* question – is the conduct such that the operator ought to be put out of business? – as well as to the *Priority Freight* 'preliminary question', explained thus in that case (at [9]):

> "The third point taken by Mr. Laprell was that the Traffic Commissioner gave no reasons for concluding that 'the conduct was such that the Appellant company ought to be put out of business'. There will be cases where it is only necessary to set out the conduct in question to make it apparent that the operator ought to be put out of business. We are quite satisfied that this was not such a case. On the contrary this was a case which called for a careful assessment of the weight to be given to all the various competing factors. In our view before answering the 'Bryan Haulage question' it will often be helpful to pose a preliminary question, namely: how likely is it that this operator will, in future, operate in compliance with the operator's licensing regime? If the evidence demonstrates that it is unlikely then that will, of course, tend to support a conclusion that the operator ought to be put out of business. If the evidence demonstrates that the operator is very likely to be compliant in the future then that conclusion may indicate that it is not a case where the operator ought to be put out of business. We recognise, of course, that promises are easily made, perhaps all the more so in response to the pressures of a Public Inquiry. What matters is whether those promises will be kept. In the present case the Appellant company was entitled to rely on that old saying that 'actions speak louder than words'."

(c) submitted that in choosing the top end of the 1-3 year "band" for disqualification, the decision appeared not to have given any 'credit' to the appellants for the positive features that were outlined in the decision. It was submitted that in failing to account for the positive features of the appellants' case, the conclusions reached in the decision were plainly wrong. It was also submitted that the decision was disproportionate when considered against its impact i.e. putting Nirwan Ltd out of business and disqualifying it and Mr Nirwan for three years;

(d) invited the Upper Tribunal to overturn the decision

i. in respect of Nirwan Ltd and consider the formalisation of previously offered undertakings

ii. in respect of Mr Nirwan's repute, instead marking it as severely tarnished

iii. in respect of disqualifying the appellants.

10. In his oral submissions Mr Davies

    (a) referred to

        i. the written statement of Mr Nirwan of 9 November 2021, in which he said he had become overstretched as sole director, transport manager, and driver, leading to mistakes occurring; and had invited Mr Evans to be transport manager (and that he, Mr Nirwan, would resign as transport manager);

        ii. Nirwan Ltd's disciplinary and driving licence check procedures;

        iii. a letter from Mr Nirwan to an Nirwan Ltd driver dated 28 February 2021, headed "notification of disciplinary meeting", requiring the driver to attend a disciplinary meeting the next day; Mr Davies submitted that this letter cast some doubt on something said by the TC at the 11 October 2021 public inquiry, about the disciplinary letter dated 27 March 2021 (which the decision was to find to be fraudulent): the quotation was on p435 of the bundle, where the TC said that the 27 March 2021 letter "seems officiant in a way that the rest of the data keeping was not …". Mr Davies' point was that the 28 February 2021 letter was, likewise, 'officiant';

    (b) submitted that the TC put too much weight on the finding that the disciplinary letter dated 27 March 2021 was fraudulent, given, amongst other things, that Mr Nirwan had not been interviewed under caution;

    (c) submitted that the TC did not adequately take into account progress made by the appellants prior to 27 August 2021, the date of OTC's public inquiry call-up letter;

    (d) gave details of the debt liabilities of the appellants (as at the time of the hearing and as at the (earlier) time of the decision being issued); Mr Davies submitted that these figures showed that, by running the business (profitably) in the period from the stay, the appellants had paid down their debts; this showed that the effect of the decision would be bankruptcy for the appellants. Mr Davies said that the appellants were "offering" independent audit, and external transport manager and potentially other undertakings;

    (e) in response to a question from the tribunal panel, said that the appellants, if the appeal were to be dismissed, would like the decision to take effect three months after the issuance of the tribunal's decision.

Jurisdiction of the Upper Tribunal

11. The holder of an operator's licence may appeal to the Upper Tribunal against any direction given under s26(1) or s27(1) in respect of the licence: s37(2).

12. A person in respect of whom an order has been made under s28(1) may appeal to the Upper Tribunal against that order: s37(4)

13. The Upper Tribunal has jurisdiction to hear and determine all matters whether of fact or law for the purpose of the exercise of its functions under an enactment relating to transport. It has the power to make such order as it thinks fit or, in a case where it considers it appropriate, to remit the matter to a TC for rehearing and determination.

14. The Upper Tribunal may not take into consideration any circumstances which did not exist at the time of the determination which is the subject of the appeal.

15. The task for the Upper Tribunal on an appeal is to conclude whether or not, on objective grounds, a different view from that taken by the TC is the right one or (meaning the same thing) whether reason and the law impel the Upper Tribunal to take a different view (*Bradley Fold Travel and anor v Secretary of State for Transport* [2010] EWCA Civ 695 at [40]).

The Upper Tribunal's reasoning

16. Given the unchallenged findings of fact in the decision, the answers to the *Bryan Haulage* and *Priority Freight* questions given by the decision cannot be said to be plainly wrong (or disproportionate):

    (a) the decision found Mr Nirwan, the controlling mind of Nirwan Ltd, to be untrustworthy and dishonest and that the appellants had acted in reckless self-interest; it cannot be said (and, despite the handful of criticisms made in submissions, the appellants, quite rightly, did not try to argue this) that the decision was wrong to make these factual findings; and having made the findings, we do not accept that the decision was wrong to put the weight on these findings that it did; they are, self-evidently, very significant findings; and

    (b) the decision took account of a number of "positives" as regards the appellants, but concluded that these did not materially affect the very serious findings about the appellants summarised immediately above; in our view, that conclusion about the "positives" cannot be said to be wrong or disproportionate.

    Based on the above, the decision concluded that the appellants were very unlikely, in future, to operate in compliance with the licencing regime; and so Nirwan Ltd, under the controlling mind of Mr Nirwan, ought to be put out of business.

    Neither the steps in the thinking above, nor the conclusion, can be said to be plainly wrong, or disproportionate.

17. The three-year disqualification period, similarly, cannot be said to be plainly wrong, or disproportionate, given the decision's factual findings. It was not unreasonable for the decision to choose the top end of the "band" it identified (for those that had not had a public inquiry before), given the relatively minor

materiality of the "positives" as found in the decision; in any case, the "band" range is statutory guidance to TCs by the senior TC rather than statute or regulation binding this tribunal, so the core question for us is whether a three-year disqualification is "plainly wrong" or "disproportionate" in the circumstances as found in the decision; in our view, it plainly is not.

18. It follows that we must dismiss the appeal. We do however think it right that, just as the decision gave a two-month gap between issuance and its taking effect, we should likewise build in a two-month gap between issuance of our decision and its taking effect, to allow for the orderly winding down of the appellants' business.

Zachary Citron
Judge of the Upper Tribunal

Stuart James
Dr Phebe Mann
Members of the Upper Tribunal

Authorised for issue on 13 July 2023