



**IN THE UPPER TRIBUNAL Appeal No. UA-2024-000189-T
ADMINISTRATIVE APPEALS CHAMBER
(TRAFFIC COMMISSIONER APPEALS) [2024] UKUT 398 (AAC)**

ON APPEAL from A DECISION of the TRAFFIC COMMISSIONER for the West Midlands Traffic Area

Before: Zachary Citron: Judge of the Upper Tribunal
Kerry Pepperell: Member of the Upper Tribunal
Sarah Booth: Member of the Upper Tribunal

Appellants: Miss Babrah Kufandirori and Excell Logistics Ltd

Representation

For the appellant: Connor Benn (agent)

Heard: at Birmingham Civil Justice Centre

On: 10 October 2024

Date of decision: 4 December 2024

DECISION OF THE UPPER TRIBUNAL

The appeal is **allowed**.

The decision of the Traffic Commissioner of 17 January 2024 to revoke Excell Logistics Ltd's operating licence, and to disqualify both it and Miss Kufandirori, is **set aside**.

The matter (of whether Excell Logistics Ltd's licence should be revoked, and whether it, and/or Miss Kufandirori, should be disqualified) is **remitted** to a different Traffic Commissioner to rehear (at a public inquiry) and determine.

Subject matter

Revocation of licence
Disqualification
Procedural irregularity; rules of natural justice

Cases referred to

Bradley Fold Travel Ltd & anor v Secretary of State for Transport [2010] EWCA Civ 695
OC International Transport Ltd v Dept of Environment Northern Ireland [2014] UKUT 0346 (AAC)
Serafin v Malkiewicz [2020] UKSC 23

REASONS FOR THE DECISION

The decision appealed against

1. In what follows, (unless the context otherwise indicates) references to “sections” (or “s”) or “Schedules” are to sections of, or schedules to, the Goods Vehicles (Licensing of Operators) Act 1995.
2. The appellants appealed to the Upper Tribunal against a decision of a deputy Traffic Commissioner (the “TC”) dated 17 January 2024, following a public inquiry on 11 January 2024. The decision
 - (a) revoked the licence of Excell Logistics Ltd under s27(1), upon losing good repute and failing to demonstrate professional competence (we note that s27(1)(a) requires a TC to direct revocation of a licence where the licence-holder no longer satisfies a requirement of s13A, or a transport manager no longer satisfies certain requirements in paragraph 14A of Schedule 3); the decision cited both s13A (sub-section (2)(b) of which requires the applicant to be of good repute) and paragraph 14A of Schedule 3 (which, amongst other things, requires that a transport manager be professionally competent)
 - (b) disqualified both appellants under s28 from holding or obtaining an operator’s licence for a period of 12 months (we note that under s28(1), the TC had the power to disqualify Excell Logistics Ltd, as the holder of the licence that had been revoked, and that under s28(5), the TC had the power to disqualify Miss Kufandirori, as a director of Excell Logistics Ltd)
 - (c) ordered that the above take effect from 00.01 on 1 February 2024.

The TC’s written decision

3. The “background” section of the TC’s written decision included the following:
 - (a) Excell Logistics Ltd held a standard operator’s licence to operate one vehicle and one trailer. Miss Kufandirori was its sole director. She was, effectively, the operator
 - (b) The licence was granted on 7 November 2021. At the time, Anthony Foster was the nominated transport manager. He resigned in November 2022. In January 2023, after a period of grace, Danial Saleh Izadkhast (“**Mr Saleh**”) was appointed transport manager
 - (c) In May 2023 Excell Logistics Ltd applied to increase authorisation from one to four vehicles. It was informed (by the Office of the TC (“**OTC**”)) that its bank statements showed insufficient funds to support the application
 - (d) On 27 June 2023, OTC granted Excell Logistics Ltd a “time limited interim” licence for four vehicles; there was a signed commitment by

Excell Logistics Ltd and Miss Kufandirori to supply financial information to support the four-vehicle authorisation, by 26 September 2023

- (e) On 1 August 2023 Excell Logistics Ltd withdrew its variation application via OTC's on-line system
 - (f) On 5 October 2023 OTC wrote to Excell Logistics Ltd referring to the withdrawn variation application and stating that the TC found "no persuasive reason to reinstate" the application or to "grant any type of interim licence" given Excell Logistics Ltd's lack of financial standing and evidence of its having been "operating without a licence, due to the Time Limited Interim ceasing to exist when the variation application was withdrawn". The letter noted "no genuine link" between Excell Logistics Ltd and Mr Saleh, its transport manager. It said that the TC had decided to convene a public inquiry to consider "your repute and professional competence"
 - (g) On 24 October 2023 a vehicle operated on behalf of Excell Logistics Ltd was stopped by DVSA. The vehicle was not displaying an operator's licence and was not specified on any operator's licence. The driver "admitted" that a second vehicle was in use and that the two vehicles had been used from August through to the stop date
 - (h) Mr Saleh resigned as Excell Logistics Ltd's transport manager in late October. Excell Logistics Ltd said that AS Miles Consulting Ltd had been engaged to provide compliance and support, based on which OTC granted a "period of grace"
 - (i) Miss Kufandirori was interviewed under caution on 22 November 2023
 - (j) Excell Logistics Ltd was called to public inquiry by letter of 4 December 2023, as a result of "unauthorised vehicle use" and "in the absence of professional competence"; Excell Logistics Ltd and Miss Kufandirori were also called in respect of good repute under s13A
 - (k) On 24 December 2023 OTC received notification from AS Miles that they had "withdrawn their support on failing to get the 'level of commitment from Babrah Kufandirori that we require, especially in light of the considerable amount of work that was required'."
4. The TC's written decision included the following under the heading "The public inquiry":
- (a) Miss Kufandirori attended the public inquiry, represented by a solicitor
 - (b) Mr Saleh attended the public inquiry "to answer the call-up letter issued in respect of his good repute as a transport manager"

- (c) The TC stated that prior to the hearing, he received maintenance and driver defect documentation from Excell Logistics Ltd and financial statements, as well as a statement from Miss Kufandirori
- (d) Paragraph 17 of the written decision stated: “Mr Saleh produced compliance documents from his time as transport manager and a statement dated 26 October 2023 explaining the reasons for his resignation”
- (e) The TC stated that he heard evidence from Miss Kufandirori and Mr Saleh, and representations from the solicitor acting for the appellants.

5. The TC’s written decision made findings in the section headed “Findings on the evidence”, including the following:

- (a) Excell Logistics Ltd knew that it was not authorised to use a certain vehicle (“**Vehicle X**”) on 24 October 2023; that vehicle had been used in August, September and October without being specified on Excell Logistics Ltd’s licence; Miss Kufandirori’s initial statement in the interview that the use of that vehicle was to cover another vehicle (“**Vehicle Y**”) being “not on the road” was patently untrue;
- (b) Miss Kufandirori was not honest with the DVSA traffic examiner in the interview on 22 November 2023. She stated that only one vehicle was in use on the 24 October 2023 despite the driver admitting that Vehicle Y was in use on that date and ANPR evidence confirming its use on numerous dates in October;
- (c) OTC’s record clearly showed a “digital fingerprint” for every password controlled entry and stated that the withdrawal of Excell Logistics Ltd’s variation application was done by Miss Kufandirori on 1 August 2023 at 21.56. It was Miss Kufandirori who withdrew the application online on this date;
- (d) Miss Kufandirori’s commitments as a single parent and a full-time social worker left the TC in considerable doubt as to her ability to run a transport operation of any size, let alone the applied-for number of 4 vehicles. Miss Kufandirori’s evidence at the public inquiry gave the TC no reassurance; Miss Kufandirori’s continued reliance on consultant transport managers, whose role tends to be reactive rather than proactive, left the TC in grave doubt as to who, if anybody, was providing day to day management and control over drivers and their working activities;
- (e) Three of the four drivers engaged by Excell Logistics Ltd were “self employed contractor/limited companies”. This failed to provide sufficient control over the drivers’ activities and was anti-competitive. It was symptomatic of the absence of control over drivers. Work schedules appeared to be wholly determined by Amazon; vehicles were out working day and night; drivers were rarely seen at the operating centre;

- (f) Paragraphs 29 to 32 of the TC’s written decision, within this section, read as follows:

29. Mr Saleh testified to his difficulties in engaging with drivers and with the operator working full time in a demanding role as a social worker, initially spending 2 days a week in Devon and 3 days working from home and then working full time for the Local Council in the Midlands, it would appear that the majority of the drivers worked autonomously and without adequate control by the operator.

30. I found the evidence of Mr Saleh credible and concerning in terms of the operator/director’s unwillingness to listen to sensible professional advice or to implement compliance systems.. He advised the operator that she had insufficient funds to support the variation application and that she should proceed incrementally in increasing authorisation. He stated that Mrs Kufandirori ignored this advice because she wanted to avoid the cost of repeated applications, an unwise saving. He also stated that she “disregarded the strict requirements set out in the conditions of the interim licence and also my very firm instructions upon her receiving the interim licence”.

31. In the relatively short time since this licence was granted, the operator has had two transport managers resign and one transport consultancy withdraw their services. Mr Saleh described [Miss Kufandirori] in January 2023 as “missing the very basic requirements of an operator”. He doubted the account given by the operator that his predecessor had left for “personal related reasons”. He stated in his evidence that he regretted his involvement and he appreciated that he put his own repute at risk by being on the licence.

32. Mr Saleh, in his letter to the OTC dated 26th October 2023, doubts whether the operator understands the “seriousness and the severity of the conditions which we as operators have to abide by”. This is borne out by my observation of the operator and consideration of the paperwork forming part of this public inquiry. I do not doubt Mr Saleh’s evidence that the operator lied to him about the operation of unauthorised vehicles.

- (g) AS Miles’ withdrawal and their difficulties in getting the “level of commitment from Babrah Kufandirori that we require”, spoke volumes for Excell Logistics Ltd’s approach to compliance and the level of trust that can be placed in Miss Kufandirori. It was also significant that the visit from AS Miles identified a “considerable amount of work that was required” and a “general lack of action in carrying out activities that had been previously requested”;

- (h) There were clear and obvious deficiencies in Excell Logistics Ltd’s maintenance documentation.

6. The final section of the TC’s written decision, headed “Considerations and decision”, included the following:

- (a) The TC placed Excell Logistics Ltd’s conduct in the ‘severe’ category: “deliberate or reckless act(s) that compromised road safety and/or gave the

operator a clear commercial advantage and/or any attempt by the operator to conceal offences or failings”:

- i. The use of unauthorised vehicles was deliberate and contrary to a clear OTC direction
- ii. Miss Kufandirori lied to DVSA examiners in interview: she initially stated “it was only the one vehicle” used; she then stated: “our granted interim licence is valid for up to 6 months from June 2023” (whereas the OTC letter of 5 October 2024 “made it clear that the interim authority had ended”
- iii. The TC found that the positive features (listed at paragraph 39) were far outweighed by the negative events in the case:
 - (a) Excell Logistics Ltd had flouted restrictions on number of vehicles it was allowed to operate despite “clear instructions from OTC and firm advice from [its] transport manager that mandatory financial standing was lacking”
 - (b) False responses to DVSA in formal interview under caution, as regards believing that interim authority existed in late October 2023
 - (c) Miss Kufandirori’s statement and evidence gave the TC no basis for trusting her to run a compliant licence in the future
 - (d) Successive transport managers had been unable to secure a genuine and sustained commitment to compliance; the TC firmly believed that Excell Logistics Ltd would continue to place commercial expediency above legal compliance
- iv. The conduct was such that Excell Logistics Ltd should be put out of business; the TC did not trust Excell Logistics Ltd to be compliant in the future; Excell Logistics Ltd had gained an unfair commercial advantage over compliant competitors; road safety was compromised by failures to manage drivers on a day to day basis; that had not been done in the past
- v. Excell Logistics Ltd had lost good repute under s27; it was necessary and appropriate to revoke its licence
- vi. Excell Logistics Ltd had breached the undertaking, and requirement under s6, not to use more than the authorised number of vehicles; the TC revoked its licence under s26(1)(f) in addition
- vii. The TC refused to extend the “period of grace” for operating with a transport manager; the TC consequently revoked Excell Logistics Ltd’s licence under s27(1) for lack of mandatory professional competence, per paragraph 14A of Schedule 3

- viii. The TC considered it necessary to disqualify Excell Logistics Ltd and Miss Kufandirori for 12 months, under s28
- ix. Mr Saleh was formally warned regarding his good repute. The TC took into account his relative inexperience as a transport manager and Mr Saleh's recognition that any future engagements must demonstrate far greater control and management. The TC noted that Mr Saleh's involvement with Excell Logistics Ltd was relatively brief and that Mr Saleh had given a full account of his own, and Excell Logistics Ltd's, failings.

Jurisdiction of the Upper Tribunal

7. The holder of an operator's licence may appeal to the Upper Tribunal against a direction given under section 26(1) or (2), or 27(1), in respect of the licence: s37(2).
8. 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.
9. 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.
10. 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 proceedings in this case

11. We had before us a bundle of 772 pages (not including the (revised) grounds of appeal, which were expressed in a further 7 pages). About 400 of the 772 pages were the bundle prepared by OTC for the Upper Tribunal hearing: this included, amongst many other things, the call-up letters to the public inquiry, correspondence between the call-up letter and the public inquiry ("section B") and a transcript of the public inquiry. The bundle before us also included a further 300 pages of documents submitted by the appellants, including 68 pages of "written submissions" dated 19 September 2024 and, on 26 September 2024, 200 or so pages of submissions and evidence. This included over 100 pages of "screenshot evidence" of messages between Miss Kufandirori and Mr Saleh between November 2022 and January 2024.
12. We are grateful to Mr Benn for his submissions and his assistance at the hearing in navigating the voluminous bundle.

The appellants' grounds of appeal

13. The appellants' (revised) grounds of appeal may be summarised as follows:

- (a) that the TC's decision dealt with evidence unfairly or irrationally, in particular by relying on evidence of Mr Saleh, that was hostile to the appellants
- (b) that there had been procedural unfairness in the proceedings before the TC; in particular, that Miss Kufandirori was, at the public inquiry, unprepared for the hostility of the case against the appellants, in particular, the hostile evidence of Mr Saleh; and that the TC was biased and hostile, appearing to have made up his mind on the evidence prior to the hearing
- (c) that it was wrong for the TC's decision to have found as a fact that Miss Kufandirori (1) withdrew the application to vary Excell Logistics Ltd's licence; and (2) was dishonest in the interview with DVSA
- (d) that it was wrong for the TC's decision to have concluded that Miss Kufandirori could not be trusted to run a compliant operation in the future.

The procedural fairness issue

14. It seems to us the most efficient way of dealing with this appeal is to consider, first, one aspect of the procedural unfairness ground. This requires us to summarise, in some detail, some particulars of the proceedings before the TC. We will first do that, and then present our analysis of the procedural unfairness issue.

Summary of Mr Saleh's letters to OTC prior to the public inquiry

- 15. Section B of the bundle prepared by OTC for the Upper Tribunal hearing contains two letters from Mr Saleh to the TC, neither of which were in the bundle for the public inquiry itself.
- 16. One letter, dated 26 October 2023 and at page 165-167 of the bundle prepared by OTC for the Upper Tribunal hearing (page 232-234 on the Upper Tribunal's own pagination), included the following:
 - (a) The letter stated that about a month after Mr Saleh was appointed, Miss Kufandirori wanted to increase the authorisation to four vehicles – but, the letter states, after requesting financial information, Ms S “could see that [Miss Kufandirori] was not in a position to apply for this increase”;
 - (b) The letter said that Mr Saleh advised Miss Kufandirori against making the application on three occasions, due to not having enough financial capital in the business; he did, however, advise that she increase to two, and increase a further one at a time thereafter;
 - (c) The letter said that in May 2023 Miss Kufandirori “persisted” that the application had to be made; that Mr Saleh still advised against applying for

four vehicles; but “against [Mr Saleh’s] advice” Miss Kufandirori wanted to go ahead and apply for four trucks;

- (d) The letter said that, after the interim licence was granted to Excell Logistics Ltd, Mr Saleh was “very firm in [his] advice to [Miss Kufandirori]” about maintaining funds in the account; that he was told by Miss Kufandirori, after a month, that “everything was in the green and on track”; that, a week before the deadline set by OTC for submitting financial statements, Mr Saleh asked Miss Kufandirori for these; when he saw them he “knew [his] instincts were right and that Excell Logistics had not maintained the required funds ...”; that he expressed his concerns to Miss Kufandirori “and asked why she had told [him] everything was fine financially, unfortunately likewise to previous occasions I could not get a straight answer from [Miss Kufandirori] ...”;
- (e) The letter said that Mr Saleh then “instructed” Miss Kufandirori to write to OTC explaining the situation (as to the inadequacy of Excell Logistics Ltd’s funds);
- (f) The letter then continued as follows:

“In the matter of honesty, at this point after 9 months of being on the licence and encountering a number of issues and problems with [Miss Kufandirori] (which will be explained on separate documents prepared for public inquiry) I had decided I no longer wished to be transport manager for [Miss Kufandirori] due to the lack of honesty in communication and other factors.

My concerns were expressed to [Miss Kufandirori] very firmly ... I began to construct a letter of resignation of the licence to the TC and to [Miss Kufandirori] when the following day I was by notified by [Miss Kufandirori] of the TC referring the case to a public inquiry.”

- (g) The letter said that it was at this point that Mr Saleh learned that the application to vary Excell Logistics Ltd’s licence had been withdrawn at the beginning of August; Mr Saleh said he believed that Miss Kufandirori had mistakenly done this but had not mentioned it; he commented that “this is the main issue which has persisted throughout my time on the licence, the seriousness and severity of the conditions which as operators we have to abide by, I believe [Miss Kufandirori] sometimes struggles to understand these things”;
- (h) The letter then explained why Mr Saleh did not resign as transport manager at that point and says that he “firmly instructed” Miss Kufandirori to adhere to the conditions of the licence;
- (i) The letter then explains how it was that, after the incident on 24 October 2023 with one of Excell Logistics Ltd’s drivers being pulled over by DVSA, Mr Saleh discovered that Excell Logistics Ltd was operating more than the one vehicle for which it was licenced. The letter then said this:

“It is here and now where I have decided to draw the line for giving [Miss Kufandirori] any further chances, she has lied to me about the number of vehicles she is operating, and not adhering to firm instructions from the TC and from me on several occasions, this unfortunately is something I can no longer be part of, it is for this reason I have removed myself with immediate effect from being a transport manager on Excell Logistics licence.

I will be attending the public inquiry to represent myself however I no longer wish to be associated with Excell Logistics as of this date [Miss Kufandirori] is not being compliant ...”

17. A further letter from Mr Saleh to OTC was at page 193-196 of the bundle prepared by OTC for the Upper Tribunal hearing (page 260-263 on the Upper Tribunal’s own pagination) was undated but starts by hoping that the recipient had enjoyed her “festive holidays” and said that the letter was “in support of the evidence which has been submitted for the upcoming public inquiry on 11 January 2024” – it therefore seems the letter was written in late December 2023 or early January 2024. This letter included the following:

- (a) The letter said that soon after becoming transport manager of Excell Logistics Ltd, Mr Saleh came to the view that the previous transport manager had not, contrary to what Miss Kufandirori told him, left for personal reasons; rather, it was because, although Miss Kufandirori “seemed to have the best intentions she seemed to be missing the very basic requirements of an operator, I struggled to make her understand these measures due what I can only describe as language barriers and the basic understanding of being an operator however I persisted into the coming months to incorporate the basic infrastructure of a compliant operator into [Miss Kufandirori] and Excell Logistics.”
- (b) Mr Saleh then described instances of him “chasing” Miss Kufandirori for compliance and commented that “unfortunately, it seemed that consistently my firm words and instructions were falling on deaf ears and the [Miss Kufandirori] simply did not understand the seriousness and requirements of being an operator”;
- (c) Later in the letter Mr Saleh described Miss Kufandirori “a lovely person just not knowledgeable at all ...”;
- (d) Describing the period leading up Excell Logistics Ltd’s application to vary its licence, Mr Saleh said he had “initially refused twice” to make the application due to the funding position; he said Miss Kufandirori “persisted” in making the application; Mr Saleh said that, upon this happening, he had a meeting with Miss Kufandirori “and explained that I will not be a part of her company going forward if she carried on operating in the way she way she was with the 1 truck which she had once the interim was granted for 4”; he said he was “assured that going forward all [his] instructions would be met specifically; Mr Saleh then described in some detail his efforts to improve various aspects of compliance;

- (e) The letter explained, in a similar manner to Mr Saleh’s previous letter, how he discovered that Excell Logistics Ltd was operating more than the one vehicle for which it was authorised. The letter then said this:

“ ... I had given [Miss Kufandirori] a lot of help since joining Excell Logistics and I had accepted a lot of excuses while giving her too many chances to improve her operating methods and compliance, however this [operating more than one vehicle] was an outright refusal to follow instructions both from the [TC] and myself and it is non-compliance that I could control or be a part of, although I was certain it would not shine a good light on my name removing myself off Excell Logistics licence with an upcoming PI, this is something I did not want to stain my name with, at every stage I believed [Miss Kufandirori] to be unknowledgeable about being an operator and slightly ignorant to the facts, however she always had good intentions and appeared to be trying to improve her ways which is why I had remained with her as long as I had, however I had to draw the line when [Miss Kufandirori] willingly and knowingly deceived myself and the TC by operating more than 1 vehicle.

It is with regret that I did not remove myself from Excell Logistics in the first few months when I had concerns regarding [Miss Kufandirori’s] understanding of compliance, however it was only with a good heart that I remained and I wished to help [Miss Kufandirori] as she is a lovely individual and as a small haulage operator myself, I gave her more chances than I should out of compassion and inexperience.

I look forward to discussing the above matters with you in further detail on the day of the public inquiry.”

Summary of the call up letter to Excell Logistics Ltd

18. We note the following from the “call up letter” to Excell Logistics Ltd of 4 December 2023:

- (a) the issues of concern were listed as follows:
- i. operating more vehicles than the maximum on the licence
 - ii. breach of conditions on the licence: failure to meet continuing and mandatory requirements; failure to notify events affecting good repute
 - iii. statements made when applying for the licence (re: notifying the TC of convictions, changes to maintenance arrangements or financial status affecting the licence) not fulfilled;
 - iv. not honouring undertakings made when applying for the licence, re: informing the TC of changes or convictions affecting the licence
 - v. material change in circumstances of Excell Logistics Ltd

- vi. concern that Excell Logistics Ltd not being of appropriate financial standing
 - vii. concern that Excell Logistics Ltd not meeting the requirement of being of good repute, or meeting the requirements for a transport manager;
- (b) the letter said that, in addition, the TC was concerned that concern that Excell Logistics Ltd’s “nominated transport manager”, Mr Saleh, may not be exercising continuous and effective management of the transport activities of Excell Logistics Ltd. It said that a separate letter had been sent to Mr Saleh to invite him to the public inquiry, which would also consider his competence and repute;
- (c) under the heading “Evidence the TC will consider”, the letter referred to Excell Logistics Ltd’s variation application and questions asked of it by “the central licencing office”; it also referred to the “Finance Time limited Interim” granted by the TC and its requests; it then referred to Mr Saleh not having logged in to his vehicle operator licencing account since 29 November 2022, and that the TC was seeking an explanation as to how Mr Saleh exercised continuous and effecting management of Excell Logistics Ltd’s transport activities; Excell Logistics Ltd was requested to bring its contract with Mr Saleh and bank statements showing payments to him.

Public inquiry transcript

19. We note the following from the transcript of the public inquiry:

- (a) In the introductory part of the hearing, the TC said that he had received a “file” from Mr Saleh “with regard to his role as transport manager” and that the TC proposed to “go through” that evidence with Mr Saleh (top of page 336 of the Upper Tribunal bundle);
- (b) After some preliminary questioning of Ms K about how many vehicles Excell Logistics Ltd had on the road at various times, the TC said he was going to deal with the role of the transport manager at the time (when one of Excell Logistics Ltd’s vehicles was pulled over by DVSA) (page 341);
- (c) After questioning Mr Saleh on his responsibility for compliance matters, the TC turned to the “interim licence” and then asked: “And you said in your submission dated the 26th of October that you were surprised the interim was granted because of the issues with regard to finances. Is that right?” (page 342);
- (d) Shortly afterwards, the TC asked this: “And then you also say that you had been on the licence for nine months and there were a number of issues and problems in respect of your role as transport manager. Tell me about the issues and problems that you had” (top of page 343);

- (e) In response, Mr Saleh referred, amongst other things, to “communications issues” with Miss Kufandirori. In the course of questioning, one of the things Mr Saleh said was that 4 October was the first he, or Miss Kufandirori, knew of the withdrawal of the application to vary Excell Logistics Ltd’s licence (see page 345);
- (f) The TC referred (again) to Mr Saleh’s “statement” (bottom of page 346), referring specifically to Mr Saleh’s stated belief that Miss Kufandirori mistakenly withdrew the variation application and did not wish to mention that (top of page 347);
- (g) Mr Saleh’s “letter” is again referred to be the TC (in respect to Mr Saleh’s reasons for not immediately resigning as transport management when he discovered that Excell Logistics Ltd was operating more than one vehicle) – page 348;
- (h) Following the TC’s questioning of Mr Saleh, Miss Kufandirori’s solicitor was given the chance to ask Mr Saleh questions (page 349); as part of this, Mr Saleh agreed that Miss Kufandirori by and large followed Mr Saleh’s advice, and had good intentions; and that Mr Saleh did not see any “knowing wrongdoing” within Excell Logistics Ltd. The solicitor then said this (bottom of page 349):
- “Thank you. That’s my cross examination, sir. It was just whether, because that’s the first we’ve heard of this evidence. I didn’t take any witness statement or anything, whether [Miss Kufandirori] – do you, obviously there will be points you agree on there. Was there anything that you disagreed with fundamentally with what Mr Saleh was saying?”
- (i) Miss Kufandirori then referred to some details of the compliance record; this moved to the TC starting his own questioning of Miss Kufandirori (page 350).

Our analysis of the procedural unfairness argument

20. In our view, the procedural unfairness argument in this appeal, most worthy of consideration, is the argument that, because Miss Kufandirori was not informed of the content of Mr Saleh’s two letters to the OTC prior to the public inquiry, either by being sent a copy of them in advance, or by having their substance be summarised as part of the issues presented in the call-up letter sent to Excell Logistics Ltd, Miss Kufandirori was not given a fair opportunity to gather and adduce evidence that might counter what Mr Saleh said in those letters, or to cross-examine Mr Saleh at the public inquiry on things said in those letters. To the extent that Mr Saleh, at the public inquiry, gave evidence matching what he said in those letters, the argument is that Miss Kufandirori was “ambushed” by such evidence. To the extent the content of Mr Saleh’s letters was not repeated at the public inquiry, but was relied on in the TC’s decision, that was unfair to the appellants.
21. If authority were needed for the fairness principles underlying the argument as just set out, there are a number of cases set out in the *Traffic Digest* under *Rules of Natural Justice*; it may be worth quoting one of the more recent, and principles-based, articulations cited there - [2014] UKUT 0346 (AAC) *OC International Transport Ltd v Dept of Environment Northern Ireland*, at [9]:

This tribunal is moving away from long recitations of previous case law in favour of clear statements of the applicable principle. In this case, the principle is that so far as is reasonably possible, an operator called up to a public inquiry should be told about all the material evidence that the decision-maker may reasonably consider to be relevant, and should be given an appropriate opportunity to consider, prepare and present a response to it - at a hearing, should they wish. If information that has a reasonable prospect of becoming relevant to the outcome becomes available at the last minute, it should be disclosed at the earliest opportunity, and time to consider it, or an adjournment, should be offered. This rule applies even if, in the event, the information does not attract adverse weight. If an operator has been put on the back foot by the surprise production of new evidence part way through the hearing, an unfortunate sense of unfairness and injustice may arise – even if the information happens to be available, somewhere on the internet.

22. In regard to assessing the procedural unfairness argument as just summarised, the key questions in our view are:

- (a) Was Miss Kufandirori fairly made aware of the contents of Mr Saleh's letters to OTC, prior to the public inquiry?
- (b) Did Mr Saleh's letters to OTC contain things (assertions, contentions, and the like) which Miss Kufandirori could not, fairly and reasonably, have been expected to be prepared (without sight of the letters) to deal with at the public inquiry, via cross examination of Mr Saleh, her own evidence and submissions on her behalf? In other words, was the public inquiry "fair", despite Miss Kufandirori not having been made aware of the contents of Mr Saleh's letters to OTC in advance?
- (c) Did the contents of Mr Saleh's letters to OTC make a difference to the outcome of the public inquiry? In other words, was the unfairness (if any) at the public inquiry *material* to the TC's decision?

First question: was Miss Kufandirori fairly made aware of the contents of Mr Saleh's letters to OTC prior to the public inquiry?

23. We find the answer to this factual question to be “no”, given that Mr Saleh's letters to OTC were not in the bundle prepared by OTC for the public inquiry; and we see nothing else in the bundle prepared by OTC for this hearing, including in the transcript of the public inquiry, to suggest that they were sent to Miss Kufandirori. Moreover, we see nothing in the call-up letter, or other communication to Miss Kufandirori by OTC prior to the public inquiry, which disclosed the substantive content of Mr Saleh's letters.

Second question: fairness of Miss Kufandirori not being made aware of the content of Mr Saleh's letters to OTC prior to public inquiry

24. On this question, it seems to us that Mr Saleh's detailed challenge to Miss Kufandirori's overall competence, and to her honesty on one or two key matters, in his letters to OTC, were not something Miss Kufandirori, fairly and reasonably, could have been expected (without sight of the letters) to deal with at the public inquiry. The contents of those letters painted a picture of, on the one hand, Mr Saleh's competence and whole-hearted attempts to bring Miss Kufandirori to compliance, and, on the other, Miss Kufandirori's lack of competence, persistent resistance to Mr Saleh's sound advice, and, on one or two matters, outright dishonesty. In our view, in the circumstances, Miss Kufandirori could not reasonably, and fairly, have been expected to be prepared, with no notice, to deal with these assertions, which would have involved gathering her thoughts, and memories, as to the episodes to which Mr Saleh referred, assembling any contemporaneous documentary evidence she held in respect of them, and, with these “counter” materials, assisting her solicitor to prepare to cross examine Mr Saleh on his evidence. We do not accept that, just because Miss Kufandirori knew that the public inquiry related to “good repute”, it was unnecessary for Miss Kufandirori to be given notice of the *detailed* evidence provided by another person as to her lack of competence and, in one or two important matters, dishonesty.
25. Related to this, we are also persuaded that, had she known the contents of Mr Saleh's letters, Miss Kufandirori would have gathered evidence in an attempt to counter significant aspects of what he asserted. We say this largely on the basis of over 100 pages of contemporaneous evidence of communications between Mr Saleh and Miss Kufandirori (prior to the public inquiry) produced by the appellants to the Upper Tribunal (pages 602 to 731 of our bundle): these are extensive and detailed and, without prejudging the issues, seem to us to offer reasonable scope for a portrayal of the facts that was, at a minimum, not as clear-cut or “black and white” as was portrayed in Mr Saleh's letters to OTC.
26. We therefore answer the second question, as we have posed it above, thus: it *was* unfair for the content of Mr Saleh's two letters to OTC not to have been disclosed to Miss Kufandirori in advance of the public inquiry, to allow her a fair opportunity to prepare her case.

Third question: did the unfairness make a material difference?

27. On this question, it seems clear to us that the TC did rely, materially, on the contents of Mr Saleh's letters, in reaching conclusions as to competency, honesty, and the "deliberate" nature of Excell Logistics Ltd's infringement of its licence terms. This can be clearly seen at paragraphs 30-32 of the TC's written decision (quoted at [5f] above). Mr Saleh's was not the only evidence as to these matters before the TC, by any means - but it was, at a minimum, importantly corroborative of other evidence; it is by no means clear that the TC would have reached the same conclusions about competence, honesty, "deliberacy", and repute, absent the contents of Mr Saleh's letters. The unfairness (in not fairly disclosing Mr Saleh's letters to OTC, to Miss Kufandirori) did therefore make a difference to the TC's decision that, under s27, he was required to direct that Excell Logistics Ltd's licence be revoked.

28. We note, however, that the TC's decision also invokes s26(1)(f) as an *additional* reason for revoking the licence; that provision gives the TC a power to revoke a licence where any undertaking recorded in the licence has not been fulfilled; in this case, it was the undertaking not to use more than the authorised number of vehicles. We note that s26 is a power (or a discretion) to revoke in certain circumstances, in contrast to s27, which imposes a requirement to revoke in certain circumstances. In our view, even though the contents of Mr Saleh's letters may not have made a difference to the TC's deciding that Excell Logistics Ltd had breached the undertaking about the number of vehicles it used, they did make a difference to the TC deciding to exercise his discretion under s26 to revoke the licence. This is because, in exercising a discretion, a decision-maker has to take into account all relevant considerations: and there can be no doubt that the considerations about Miss Kufandirori's competence and honesty, which in turn, as we have already found, materially relied on the contents of Mr Saleh's letters, were relevant considerations. Thus, in a slightly more indirect way, the content of Mr Saleh's letters made a difference to the TC's decision under s26(1)(f), as well as to his decision under s27.

Conclusion on procedural unfairness

29. We conclude that the aspect of the procedural unfairness argument, on which we have focused in our reasoning above, is made out: it was materially unfair for Miss Kufandirori not to have been made aware of the contents of Mr Saleh's letters to OTC, prior to the public inquiry.

Disposal of the appeal

30. Given our conclusion above, the TC's decision was marred by a material legal error and so it is right that we set the decision aside. As Lord Reed is memorably recorded as having observed in the hearing of *Serafin v Malkiewicz* [2020] UKSC 23 (at [49]), "a judgment which results from an unfair trial is written in water."

31. It follows that it is unnecessary for us to consider, and decide on, the other legal errors in the TC's decision alleged by the appellants; it suffices to say that the reason we considered one aspect of the appellants' procedural unfairness argument first, is that it seemed to us the strongest of the appellants' grounds, by some way.

32. Having set the TC's decision on revocation and disqualification aside, we are in no position to remake it: we had a half day hearing in which the focus was on whether the TC's decision was plainly wrong; to remake these decisions fairly and justly will involve hearing the oral evidence directly and making factual findings, based on all the evidence, necessary to resolve the matters at hand. A public hearing before a new TC (to avoid any question of appearance of bias) seems to us the right forum to do this, in all the circumstances. We have therefore exercised our power to remit the matter to a new TC for rehearing and determination.

33. For the avoidance of doubt,

- (a) pending that rehearing and determination, the revocation of Excell Logistics Ltd's licence, and disqualification of it and Miss Kufandirori, by the TC's decision of 17 January 2024, have no effect (as they have been set aside by this decision); and
- (b) the rehearing concerns matters affecting the appellants (as opposed to matters affecting Mr Saleh, who did not appeal the TC's 17 January 2024 decision so far as it related to him). Whether Mr Saleh gives evidence at the rehearing is an entirely different question and one which we leave to the case management discretion of the new TC, fairly taking into account the views of the parties.

Zachary Citron
Judge of the Upper Tribunal

Kerry Pepperell
Member of the Upper Tribunal

Sarah Booth
Member of the Upper Tribunal

Authorised for issue on 4 December 2024