

Neutral Citation Number: [2017] UKUT 59 (AAC)

Appeal No. T/2016/50

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER
TRAFFIC COMMISSIONER APPEALS**

**ON APPEAL from the DECISION of
Kevin Rooney, Traffic Commissioner
for the North East of England dated 3 August 2016**

Before:

Her Honour Judge J Beech, Judge of the Upper Tribunal
Stuart James, Member of the Upper Tribunal
David Rawsthorn, Member of the Upper Tribunal

Appellants:

LORRAINE BALDWIN
ANDREW SKELTON
WAYNE BALDWIN

Attendances:

For the Appellants: James Backhouse, solicitor with Backhouse Jones Solicitors

Heard at: Field House, 15-25 Bream's Buildings, London, EC4A 1DZ

Date of hearing: 24 January 2017

Date of decision: 10 February 2017

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that:

- 1) the appeal of Lorraine Baldwin BE ALLOWED to the extent that the period of disqualification in her case is varied from an indefinite period to two years;
- 2) the appeal of Andrew Skelton BE ALLOWED;

3) the appeal of Wayne Baldwin BE DISMISSED.

SUBJECT MATTER:- Proportionality of Traffic Commissioner's determination on the issue of disqualification and breach of the rules of natural justice in failing to give notice of the risks of being found to be a de facto director and of being made subject to an order of disqualification.

CASES REFERRED TO:- None

REASONS FOR DECISION

1. This is an appeal from the decision of the Traffic Commissioner for the North East of England ("the TC") made on 3 August 2016 when he revoked the restricted operator's licences of Baldwin Crane Hire Limited ("the company") and disqualified Richard Baldwin ("RB") from applying for or holding an operator's licence for one year, Lorraine Baldwin ("LB") for an indefinite period, Andrew Skelton ("AS") for a period of two years and Wayne Baldwin ("WB") for a period of five years. The orders were made under ss.26-28 of the Goods Vehicles (Licensing of Operators) Act 1995 ("the Act") and were ordered to come into effect on 10 September 2016. The TC also refused an application by the company for a third restricted operator's licence in Newport, South Wales. A stay of the orders of revocation and disqualification was refused on 2 September 2016. Appeals against the revocation of the operator's licence, the application for an additional licence and the disqualification of Richard Baldwin were initially lodged but withdrawn prior to the Upper Tribunal hearing.

Background

2. The factual background to the appeal appears from the documents, the transcript and the TC's written decision. The company hires out and operates heavy mobile cranes. There are three directors of the company: Richard Baldwin who is described in the company documentation as the Chairman of the company; Wayne Baldwin who is the Heavy Cranes Sales Director (although also previously described as the Chairman) and Lorraine Baldwin who is the Company Secretary. Andrew Skelton, a Transport Manager CPC holder, is the Operations Director of the company which includes responsibility for health and safety and transport. At the time of the public inquiry, the company operated 81 cranes of which 10 or 11 were considered to be very large and 14 required ballast to be delivered by ballast vehicles in order for the cranes to be operated. The largest crane required up to twenty loads of ballast. Once a crane arrived on site along with the ballast, the crane then had to be rigged prior to its use and it follows, de-rigged

upon completion of its operation. No dedicated rigging crews were employed by the company.

3. On 3 April 2007, the company was granted a restricted operator's licence which at the time of the public inquiry authorised 14 vehicles with 14 being in possession. The operating centre was in Langley, Slough. The application did not name LB as a director. On 16 April 2009, the company was granted a restricted operator's licence authorising 4 vehicles and 7 trailers with 4 vehicles being in possession at the time of the public inquiry. The operating centre was in Leeds. Again, LD was not named as a director (indeed, she was not named on the application for a third licence). Of the 18 vehicles specified over the two existing licences, 17 were special type vehicles (exempt from plating and testing requirements and with a weight limit of 100 tonnes); there was also a four axle rigid vehicle fitted with a crane.
4. On 15 August 2011, Lyndsay Easton, an employee of the company was driving a 130 tonne mobile crane down a steep hill at a quarry when he lost control and was killed. Investigations revealed that the brakes of the crane were defective. On 1 December 2015, the company was convicted of one offence of corporate manslaughter and two health and safety offences. The company was fined £700,000 and ordered to pay costs of £200,000. This was the second fatality caused by a crane with defective brakes operated by the company (the first having occurred in 2009). The DVSA evidence indicated that there had also been a further serious accident involving a driver prior to the public inquiry although the details were not within the public inquiry documentation.
5. In September 2014, whilst the criminal investigations and proceedings in relation to the fatality were on-going, a drivers' hours investigation was commenced at the Langley operating centre. Quite independently, an investigation at the Leeds operating centre was also commenced and when it became apparent that the two licences were "*inextricably linked*", the DVSA National Investigation Unit became involved. The digital data for seven drivers and four vehicles was requested along with the drivers' time sheets for the period June to August 2014. Initial analysis showed that there were a large number of vehicle movements which were unrecorded. A cursory examination of the time sheets revealed that the unrecorded movements were taking place at various sites all over the country, predominantly whilst the rigging and de-rigging of cranes was taking place. Twenty eight offences of knowingly making a false record were identified in respect of five drivers. The modus operandi of the offences was the removal of a driver's card from the vehicle unit upon arrival at a site, giving the impression that either a daily or weekly rest period was being taken. However, the vehicle unit would show vehicle movements and the time sheets indicated that the drivers were involved in either rigging or de-rigging when they should have been resting. Some of the rest periods were reduced to as little as three or four hours. Further, the time sheets indicated that some

drivers would work seven days a week although they would only be paid for six as that was the company's policy and at the time, the company was aware of drivers working seven days a week as the time sheets were altered and annotated, striking out the claim for pay for the seventh day. At the time of the offending, Mark Wilkinson and Graham Boyd were the transport planners/managers.

6. A number of the offending ballast vehicle drivers were interviewed in June 2015. Steven Gibson (driver) stated that he had been employed by the company for fourteen months and had now left. Rigging a 500 tonne crane would take approximately two to three hours whilst a 1000 tonne crane would take eight to ten hours depending upon the site conditions and the number of men involved. His vehicle would be moved on site by either himself or other drivers. They would all be involved in rigging. These duties were not recorded on his driver's card as he had been told by Mark Wilkinson and Graham Boyd to remove his card once on site so as not to record his rigging duties. Mr Gibson believed that the planners were "*under pressure*" to issue these instructions from WB. Mr Gibson accepted that he had committed six offences of knowingly making a false record. Mr Gibson later contacted Traffic Examiner ("TE") Cull to inform him that he had received the following Facebook message from Graham Boyd which he considered to be threatening:

"Can't believe you Steven you and your thick f.....g mates past and present incriminating each other??? Don't you know vosa want you all to give it some. Your cards not the company's. Keep off the f.....g phones to each other. The more you tell them the more you are admitting"

7. Christopher Ross (driver) stated in interview that he had worked for the company for two and a half years, although he too was no longer employed by the company. He estimated that rigging a 500 tonne crane would take about two hours whilst a 1000 tonne crane could take between four and twelve hours. He too confirmed that the vehicles on site would be moved whilst rigging was taking place and that the work was not recorded on drivers' cards. He had been told to remove his card by Mark Wilkinson. Prior to Mr Wilkinson joining the company, the instruction was a "*general thing that comes to them from Wayne Baldwin because he will issue them the jobs from the cranes .. They'd tell you not to put your card in*". He went onto to describe how he was also discouraged from inserting his card in the head of his vehicle if he was working in the yard just in case he was required to take the vehicle out. If he had inserted his card "*I'd be out the gate and on my way home with my bags packed, sort of thing. They are very cut and dry, it's all, like, set in stone that you are going to do this and you do it this way. And if you don't comply then you're out, it's as easy as that*". Mr Ross accepted that he had committed four offences of knowingly making a false record.

8. Laurence Oaten (driver) told TE Cull in interview that he had worked for the company for about a year and that he had now left. He estimated that it would take one and a half to two hours to rig a 500 tonne crane whilst a 1000 tonne crane would take six to eight hours. When involved in rigging, the drivers would drive each other's vehicles. Rigging would not be recorded on their driver's cards and he removed his driver's card as he had been instructed to do so by Gary Dagger (a predecessor of Mark Wilkinson and Graham Boyd) although the instruction would in fact have come from WB. Mr Oaten accepted seven offences of knowingly making a false record.
9. Philip Evans (driver) stated in interview that he had worked for the company since October 2013. He estimated that rigging a 500 tonne crane would take two to three hours and that whilst a 1000 tonne crane could take about eight hours, it could take as much as two days depending on the conditions. He had been told to remove his driver's card when performing rigging and loading duties by Alan Callender, a planner in the office. (We observe that Mr Callender was responsible for planning the vehicle routes and obtaining the necessary permissions). Mr Evans stated "*They told us to pull the card. ... As soon as you get to site, pull your card because you got to be out of there to be at so and so*". This was a regular instruction. The company's attitude was that the ballast drivers were just "*a carcass (on a seat)*". Mr Evans accepted six offences of knowingly making a false record.
10. Terence Hiley (driver) stated that he had worked for the company for about three years, with a break in between. He was no longer employed by the company. He estimated that rigging a 500 tonne crane would take five men two hours and a 1000 tonne crane would take six to eight men, ten to twelve hours. When on site, the ballast drivers would drive each other's vehicles and that WB had told them to "*pop your card*" when rigging. Mr Hiley had complained: "*I've rung Wayne Baldwin up and he threatened to sack me. I turned round and said to him, I said – 'we've had enough – there's 3 of use here' .. 'I'm having me .. 9 hours off'. He said that ... his exact words were 'you f.....g drivers are a bunch of c...ts, you're taking the piss. You're all sacked, when you get back you're .. all getting written warnings' and that was at 1 o'clock in the morning*". Mr Hiley accepted five offences of knowingly making false records.
11. As a result of these interviews, past members of the operational team were contacted by TE Cull and three were interviewed about the working conditions at the company. Gary Dagger stated that he had originally been employed as a ballast driver in April 2013 before moving into the office in April 2014 to work with Keith Lovejoy to "*run the transport*" as he had an understanding of the "*tacho law*". His responsibilities were to hire in transport, load the equipment and ballast necessary for a job, inform the drivers of their next job when they called in and to help Keith Lovejoy with maintenance. He also dealt with out

of hours breakdowns. It was WB who passed on the instructions as to the jobs and the equipment required. Because those instructions were not passed on by WB until the end of the day, everything was rushed. If drivers could not complete their allotted jobs, WB would become angry and sometimes threatening. Mr Dagger was one of the drivers with Mr Hiley in the incident referred to in paragraph 10 above. WB was the “overall boss” of the company, followed by Alan Callender. He planned the routes for the vehicles. Keith Lovejoy and John Kelly were classed as Compliance Officers and Mr Dagger and Sean Dove who took over from Keith Lovejoy were Transport Co-ordinators. Andrew Skelton was the Small Cranes Director with responsibility for health and safety and training. Whilst he could be approached for help, most of the time, AS was over ruled by WB. It was imperative that cranes and the necessary equipment and ballast be on site at the time given, otherwise the full price for the job would not be paid. Drivers regularly complained about not having time off as a result of rigging and de-rigging duties and being required to be on another job thereafter. The response of WB was “*that is the crane game and that why the pay is so good*”. Drivers would query their wages on a weekly basis and these would be passed onto WB. “*Nine times out of ten*”, the query would remain unresolved. It became the norm to rig and de-rig without the driver’s card being in the vehicle unit as this was the only way that a daily rest could be achieved on the driver’s card. Mr Dagger was aware that the Compliance Managers had tried to change this but to no avail and they then would leave. The vehicles were under STGO 3 with a maximum load of 100 tonnes but it was common practice to overload the vehicles with ballast and it was WB who prepared the loading lists. Further, the pre-determined, approved routes for these special vehicles were not always adhered to.

12. When drivers started work, they received a driver’s hand book and they watched a slide show although drivers commencing employment in another depot might not be seen for a few months or may be missed altogether. Data downloading was “*few and far between*” until Keith Lovejoy started work but when he left, it was not “*100%*” and it only took place at Langley. Whilst infringements were pointed out to drivers by Keith Lovejoy and latterly, John Kelly, Mr Dagger was not aware of any driver being disciplined for infringements.
13. Mr Dagger left the company because he felt that his pay was being incorrectly calculated and also because it was “*nearly impossible*” to implement changes to the way the company worked.
14. John Kelly was employed as a Transport Compliance Manager from October 2014 to February 2015. He was a Transport Manager CPC holder although this was not a requirement for the role. He was responsible for drivers hours, PMI inspections, the daily driver defect reporting system, ensuring that the operator’s licence was up to date and that all new trailers were covered by the Special Types General Order. He had to liaise with the planners to ensure that vehicles were

available for PMI inspections and repairs. Whilst he was assisted in this latter task by Mark Wilkinson and Gary Dagger, vehicles were often “*stuck up country and missed scheduled inspections*”. WB was in overall charge of the heavy cranes and it was that department which took on the jobs.

15. Mr Kelly was not aware of any induction or checks on drivers’ knowledge of the drivers’ hours rules although the drivers received a driver’s hand book. He had wanted drivers’ hours to be included in the drivers’ induction, but it did not happen. Mr Kelly would try and download the drivers’ cards and vehicle units on a weekly basis but it did not happen very often. He occasionally would drive around the country to locate the vehicles so that downloads could take place. The data would be sent to the RHA and the drivers advised of any infringements identified. Whilst Mr Kelly would occasionally receive the drivers’ time sheets, he did not compare them to the tachograph data and he was not aware of drivers working off card. However, he had been told that it had happened. He was also aware of complaints made by the drivers that they could not do some jobs because they were out of hours. He was not aware of any instructions having been given to the drivers to work over their permitted hours. However, “*the drivers always looked tired*”. Although the company was very successful, “*the high staff turnover speaks for itself*”.
16. Keith Lovejoy was employed as a Transport Manager between November 2013 and August 2014. Once employed, he was asked to look at transport compliance. The day to day running of the cranes and the vehicles was handled by WB, Alan Callender and AS. Mr Lovejoy’s role was very similar to that described by Mr Kelly. Whilst no one obstructed him in his attempts to download drivers’ cards and vehicle unit data, it was not made easy for him and he would have to drive all around the country to collect the data. If he gave the operational team a list of drivers whose cards needed to be downloaded, they would be sent “*miles away*”. Whilst AS was 100% behind Mr Lovejoy, he was quite often overridden by Richard and Wayne Baldwin. All operations were controlled by WB including the loading and planning of crane ballast and auxiliary equipment. Alan Callender was responsible for vehicle routing. If a vehicle was sited at Port Talbot Steelworks but had to be in Scunthorpe at 9.00, the driver would be told by WB or Alan Callender, under WB’s instruction, that the vehicle had to be in Scunthorpe regardless. Mr Lovejoy had “*countless conversation with drivers about breaking the drivers hours rule and told them I would sack them if I caught them. But was often told by drivers that they would be sacked anyway if they didn’t follow Wayne’s instructions*”. WB had no regard for drivers’ hours when planning crane movements. Mr Lovejoy raised his concerns with AS, WB and RB on numerous occasions suggesting how work could be achieved legally but would be overruled. Whilst he had instructed the drivers to record all other work on their driver’s card, it became apparent that this was not the case and he raised the issue with AS. As there were no rigging crews, the

ballast lorry drivers were rigging the cranes. It was Mr Lovejoy who introduced a drivers' hours questionnaire for use upon a driver's induction and he introduced driver infringement recording. Mr Lovejoy left the company because he did not think that his work was being taken seriously and he was not happy with the company's working practices.

17. In September 2015, the company initially accepted an invitation to attend an interview but it was subsequently cancelled by Backhouse Jones solicitors. On 15 October 2015, a driver was issued with a prohibition notice for failing to keep a record of other work.
18. On 28 September 2015, a new production notice was served upon the company for the period June to August 2015 (the second investigation) and as a result, 17 drivers were summonsed for a total of 70 offences of knowingly making a false record and failing without reasonable excuse to make a relevant record. One driver was alleged to have used the driver's card of Mark Wilkinson in order to continue driving beyond the permitted hours. The remainder of the offences related to unrecorded rigging or de-rigging work during a rest period. None of the drivers made any comment when interviewed. However, on 3 December 2015, Kevin Johnston, a ballast driver, telephoned TE Cull and told him that he had left the company in September 2015 as he *"could not take it anymore, that he was always arguing with Mark Wilkinson who kept asking him why he hadn't taken his card out"*. Mr Johnston stated that his response would be that it was illegal. He faced one charge of knowingly making a false record. His offending was *"all under duress from Wayne ultimately ... you do it if you want to get paid .."*
19. Another ballast driver, Mark Walker telephoned TE Cull and told him that *"they wanted you to work rigging the cranes off the card. I mean, what are you gonna do? You either get on with it or you get the sack. So I sacked myself so to speak, I left"*.
20. On 23 May 2016, fourteen drivers pleaded guilty to 43 offences; 16 offences were withdrawn *"for reasons of pragmatism and expediency"*. Three drivers faced 11 offences but had not yet appeared in court. There were in addition, *"numerous additional issues of unrecorded duties which were dealt with by way of warning letters"*. TE Cull's conclusions were that numerous allegations made by former management and drivers and the number and regularity of the offending over two periods suggested that there was a systemic and widespread abuse of the regulations by the company and its drivers. He highlighted a note in the schedule of ballast driver rates and allowances stating that *"drivers will normally be asked to work 5 "drive shifts" in a week"*. It also stated that ballast drivers could only earn a maximum of six days pay in any one week. The document did not say that they could not work more than six days. The drivers hand book stated that the drivers must ensure that their time sheets corresponded

to their tachograph records (otherwise the tachograph record would appear false). It was however clear that the time sheets were checked as drivers had pay deducted under the 6 day rule despite the fact that drivers had worked seven days in a week. Who had planned and allowed drivers to do so? The company was well aware of the rules and the need to keep records. TE Cull suspected that there was no inclination on the part of the company to cross reference the time sheets against the tachograph data and to deal with it accordingly. There was then the issue of the infringement reports produced. Whilst it was clear that these reports were looked at, no consideration was given to glaring matters such as another driver using someone else's driver's card or work which exceeded six daily driving periods. One debrief note merely recorded "*Dvr is a cock*". On the face of it, the company appeared to be complying with its responsibilities in relation to drivers' hours and records, however, the method did not seek to address the problems and reflected poor attitudes towards compliance. He noted that the approximate annual wage of the ballast drivers was £40,500 to £50,580 compared to the average wage of HGV Class 1 drivers of between £18,000 and £28,000. TE Cull considered there was a degree of intimidation towards the drivers and the message sent to Mr Gibson suggested that such intimidation was on-going. Since the investigation had concluded, the DVSA continued to receive anonymous telephone calls making similar allegations to those investigated by TE Cull.

21. Amongst those drivers identified during the second investigation as having allegedly committed offences was Robert Buxton. He was not in fact prosecuted. On 13 June 2016, Mr Buxton provided a witness statement to TE Cull. He had been employed by the company as a ballast driver between July 2015 and January or February 2016. He knew Mr Boyd and Mr Wilkinson when they had been drivers. He was taken on by the company without an interview. He went to the company's head office where he was "*talked through*" the various bits of equipment. He was not shown how to load the vehicles or rig the cranes because he did not have a Slinger Banksman's card and he was told that there was a rigging crew. In fact, the rigging crew consisted of the crane driver and one rigger and they expected the ballast vehicle drivers to help. Mr Buxton did not receive an induction as to the drivers' hours regulations. He accepted the job and worked his notice with his then employer. On the first day at the depot, he was approached by Alan Callender and told "*this is how we operate. You'll get on site. Pull your tacho card, assist rigging the crane, once the cranes finished the job you'll assist de-rigging it and once you've had an official 9 or 11 hour tacho break you'll insert your card and drive to your next job with the ballast to work on the next site*". Mr Buxton's response was "*You're talking to the wrong man if you want to work illegal 'cause I won't do it. Then Wayne Baldwin who was sat in the corner at the time... said to me "this is my company, this is how we fucking operate to keep the cranes working". To which I told him I still wouldn't be doing it ... I can't remember his exact response but he*

wasn't happy, but by this point I knew they had a lack of drivers for the ballast so he had to take me on but gave me an ultimatum, which was "get the ballast to site, get it alongside the crane, fuck off and have your tacho break" and the crane driver and whoever else would rig the crane would move my vehicle about". Mr Buxton remained in employment on those terms. He nevertheless continued to get calls from Mr Wilkinson and Mr Boyd saying that WB was *"on their case"* saying that the crane drivers and other crew were complaining that Mr Buxton was not assisting in rigging the cranes. He was told to assist in rigging off his card which he was not prepared to do.

22. Mr Buxton's day to day instructions came from the planners but WB was in overall control. There were three types of shift and the drivers did not receive any additional pay for the additional work. When back at the yard, WB would approach Mr Buxton and they would argue about him not working off the card. WB would reiterate *"it's my company, this is how we do things"*. It was WB who started the arguments. As a result of the problems, WB was looking to sack Mr Buxton and as a result, the planners would try and plan Mr Buxton's work so that he did not return to the yard. The company rules were that a driver would be paid for six days one week and five days the second. Mr Buxton received a call from Mr Boyd asking if he would work six days in the second week. He said he would provided he was paid for the sixth day. WB agreed to do so. Mr Buxton then worked the sixth day but did not receive pay for the extra shift. When Mr Buxton objected to this, WB ignored him. A couple of months later, Mr Buxton was asked to work six days in a second week and he refused to do so because he had not been paid for the previous shift. WB said *"You work for me. You'll do as I tell you. I need the ballast taking to the job"*. Mr Buxton refused causing WB to become loud and abusive not only to Mr Buxton but to the planners because they had employed him. Mr Buxton told WB that *"for a multi-million pound company, the way it was run was disgusting. Asking drivers to run illegally, the servicing of vehicles was poor"*. WB's response was to tell the planners *"just fucking send him home"*. At the end of his weekly rest period, Mr Buxton received a call from Mr Boyd informing him that WB had told the planners to keep Mr Buxton off work so that he did not get paid. He was to be called into a disciplinary meeting at which he was to be sacked. Mr Buxton considered himself sacked and found other work. Mr Buxton then received a call to say that someone had seen him driving and so the company wanted him to resign otherwise he would not receive the pay he was owed. The email that Mr Buxton sent to the company reads as follows:

"Please accept this as my letter of resignation after been informed (sic) I would be suspended and possibly removed from my position .. after letting my opinions being known (sic) that I disliked working at the company after attempts of getting us to work illegally (sic), also sending poorly serviced trailers on the road which were dangerous, unappreciated for the service provided to the company and also myself

being involved in a vosa investigation due to the company even tho iv (sic) not worked illegally and not receiving any assistance from Baldwins for the troubles and stress due to the situation. I believe this to be poor practice from a professional business”.

23. Mr Buxton was shown an infringement “debrief” report dated 7 August 2015 concerning his failure to take a minimum daily rest the month before. Mr Buxton said that when he signed the report, there was only one other signature on the report, which was Graham Boyd’s and there was no other handwriting on the document. Someone had since written a “*debrief note*” commenting that Mr Buxton had left his card in after “*a long period break. Rob has been reminded to ensure card is removed at shift end*”. Mr Buxton did not know who had made this note or whose signature had been added to the document. No one else was present at his debrief other than Mr Boyd.
24. On 3 February 2016, a maintenance investigation took place which was marked as unsatisfactory for the following reasons; PMI frequencies were not being adhered to; there were shortcomings with the driver defect reporting system; no maintenance contracts were on file for new vehicles; in-house inspections of low-loader trailers were insufficient as there was no under-vehicle inspection facility; twelve roadworthiness prohibition notices had been issued with one “S” marked on 24 November 2014; one fixed penalty notice had been issued for loose wheel nuts. Ultimately, the TC did not attach any significant weight to the shortfalls in the company’s maintenance systems as there had been improvement over time.

The Public Inquiry

25. The company directors were notified that the company was to be called up to a public inquiry which was to take place on 15 June 2016. As a result of disclosure issues, the hearing took place on 20 July 2016.
26. At that hearing, Andrew Woodfall appeared on behalf of the company. Richard Baldwin, Andrew Skelton and Mark Wilkinson were also in attendance and all three had provided witness statements. Mr Nugent from Foster Tachographs, who had provided a drivers’ hours and records report, was also in attendance as were drivers Gibson and Jameson who were present for driver conduct hearings and Mr Buxton who was a witness for the DVSA. Other drivers were being called to driver conduct hearings in the traffic areas in which they resided. TE Cull was present and the DVSA was represented by Mr Sasse of counsel. WB did not attend but submitted a witness statement; LB did not attend and did not provide a witness statement. The TC was told that WB was looking after the business. There was no explanation as to why LB did not attend in her capacity as company director.
27. There were issues during the course of the hearing concerning the amount of time allocated for the case and whether a second day would

be required. The TC initially indicated that having read TE Cull's report, he felt the need to control the licence if there was to be an adjournment as there was enough evidence which pointed to the operation of the company's vehicles posing a real and present danger on the roads. The TC was therefore keen to hear the evidence that day so that he could prepare his written decision. In fact, the hearing went into the following day. There was also an issue as to disclosure of information contained in the driver's call up files which had not been disclosed to the company. After some discussions, disclosure was provided and Mr Woodfall was given time to read the documentation.

28. The TC first heard from the drivers. Steven Gibson stood by his answers in interview. He had pleaded guilty to six offences of knowingly falsifying records and had been sentenced to a conditional discharge with costs of £1,500. He had been recruited by Tony Wilson, the "*transport director*" who was a friend of Mr Gibson. He confirmed that it was part of his role to rig the cranes once he had driven ballast to the site. He did have a Slinger Banksman card. Messrs Wilkinson and Boyd were the Transport Managers and they answered to WB. He only had brief conversations with WB about matters unconnected to work and his timesheets. Mr Gibson believed that it was WB who approved the timesheets and it was he who struck off days claimed on the time sheets. He had never seen WB do this. In cross examination, Mr Gibson confirmed that there was pressure put upon the drivers to work off card. He gave an example of the type of pressure he was under. He had to drive from the Midlands to London and went by the route that had been planned and approved. Other ballast drivers, took a different and quicker (unapproved) route and as a result, they arrived on time at the site and he was late. He "*got his head bitten off*" and the following day's wages were docked from his pay. He gave other examples of poor treatment of him by the company involving non-payment for shifts worked and a deduction of £600 from his wages on one occasion because he had brought another driver's trailer back to the yard from Southampton docks at night when he was close to being out of his hours and the next morning a sheered wheel nut was identified. The trailer was nevertheless taken down to Southampton docks again and then repaired in Southampton and the £600 "*fine*" represented the costs of repair. He was asked about a prohibition for not having a registration plate on his vehicle. He said that he had repeatedly telephoned the office requesting that a new registration plate be ordered but to no avail.
29. Driver Matthew Dickson was still employed by the company. He had pleaded guilty to five offences. The TC went through them. Mr Dickson maintained that he had driven without a card on one occasion because there was no other driver to do the job and the company was not aware that he was out of hours and that he should have been taking his weekly rest (we observe at this stage, that it should have been patently obvious to the company that he would be out of hours if appropriate procedures were in place and being implemented). There

was another instance of driving without a card because there was no other driver available. WB had always “*been alright*” with Mr Dickson.

30. Driver Stuart Jameson had pleaded guilty to three offences of knowingly making a false record. He was no longer working for the company. Mr Jameson gave an explanation why somebody else’s card was used in the middle of a journey being undertaken by Mr Jameson. He denied that he had ever worked off card and that he had pleaded guilty to the offences because of the threat of there being a trial rather than because he was guilty.
31. Mr Buxton then gave evidence. He stood by the contents of his witness statement. He had been sacked by the company because he had stood his ground. He had been charged with five offences of knowingly making a false record and had elected Crown Court trial but the trial had not proceeded. In cross examination, he denied that he had been disciplined for not wearing the correct PPE (personal protection equipment) when on a Balfour Beatty site. He said that the company had not provided him with any PPE apart from a harness and that he had had to buy his own. He was not aware that on this particular site, hi-viz trousers were required. He was shown a picture downloaded from Facebook of Mr Buxton standing on top of a vehicle with the caption which referred to Mr Buxton having consumed ten pints of Guinness. Mr Buxton said that it was a friend’s vehicle and the picture was taken during his weekly rest period at the Lymm Truck Stop. It was his own time and he wanted to have “*a beer and a laugh with my friends then I can do that*”. He confirmed that he not received any induction upon starting work with the company. He was simply asked whether he knew the law and was asked some questions. He was told on the first day of his employment to falsify his tachographs by Alan Callender and WB.
32. TE Cull then adopted his report. He considered that the falsification of tachographs amongst the company’s ballast drivers was “*endemic*”. He agreed that it appeared that the company had the necessary procedures in place but it “*astounded*” him that the obvious discrepancies in the records had not been identified. It was obvious that drivers were working for fourteen consecutive days and that some of them were taking their forty five hour weekly rest in their vehicles which is not permitted. TE Cull did not investigate these issues further because there was just too much to cover in the investigation.
33. Andrew Skelton was the lead witness for the company. He was primarily responsible for recruitment and the management of health and safety including the monitoring of all aspects of safe working. Although his job title was “Operations Director” he was not a statutory director. In his witness statement he set out the chronology of management appointments and described the various systems that had been put in place to ensure transport compliance. He had been responsible for collating an Internal Investigation Report based upon

the call up letter. He denied that the allegations made by Mr Lovejoy were true and in particular, that he, Mr Skelton, had ever been overruled by WB. The company's relationship with Mr Lovejoy broke down because Mr Lovejoy disagreed with the type of vehicle that the company was going to purchase. Mr Skelton denied that any driver had been told to falsify their tachographs although they had been told to remove their driver's card once on site so that if the vehicle needed to be moved, this would not interrupt the driver's rest on his card. Since "*the investigation*" there had been greater scrutiny to "*missing driver*" reports and it was not until the second investigation that the company realised that tolerances applied by the RHA analysis system instituted after the first investigation were too high and did not identify movements of less than one kilometre. Mr Skelton was confident that the company was now identifying all movements of vehicles and the drivers were being dealt with accordingly. His conclusion was that whilst procedures had been in place since 2012, individuals responsible for applying them were "*not up to the task*" or because they had been "*engaged in a multitude of roles which had led to "split loyalties"*". He did not explain what those split loyalties were or how it impacted upon the lawful operation of the business. A separate company, Baldwin Support Services Limited had already been incorporated, with Mr Skelton as the sole director, which was to be responsible for transport with "*no outside interference*". That new company had already applied for standard national licences in the North East, Western and Welsh traffic areas. Mr Skelton was the nominated Transport Manager. It was proposed that Marcus Gough, another CPC holder who had been employed by the company (and whose name was on the debrief form describing a driver as "*a cock*") was going to join Mr Skelton as a director of the new company and Compliance Manager and Greg Ramsdale, a present employee of the company would be a nominated Transport Manager on some of the licences and there would be a dedicated Transport Director. The present compliance procedures the company had in place would be retained. Fosters would also be retained to undertake audits.

34. When questioned by the TC, it was clear that Mr Skelton did not have a good grasp or understanding of the documents he had collated to form the Internal Investigation Report. He did not realise the significance of some Debrief Reports which had been annexed to the Investigation Report to demonstrate that the company was investigating instances of missing mileage from the data. The driver was in fact taking his ballast vehicle home and parking it on a residential estate over night. Mr Skelton's evidence about how it came to be that on 24 November 2014, a ballast vehicle being driven by Mr Oaten was found to be overloaded by 65.35% was also lacking. There were ultimately three explanations for the overloaded vehicle being used on the highway and Mr Skelton's was the least credible. There was also an issue about loose wheel nuts and wheel losses on public roads. The TC found Mr Skelton's evidence to be vague on this point. The TC was forced to conclude that Mr Skelton had little real understanding of the evidence that he

himself had put forward. He was an unreliable witness who was prone to making up answers as he went along. As the person nearest to being a transport manager within the company, he had “*not got a grip*”.

35. Richard Baldwin then gave evidence. The salient parts of his witness statement informed the TC that whilst he was Chairman of the company, he did not get involved in the day to day operations which he left to the other “*company directors*” (i.e. WB and LB) and a team of senior managers. It was WB who was responsible for the heavy cranes and he formulated all of the transport and equipment requirements for a contract and those details were then given to the transport team to manage. LB supervised the accounts and the finance team. RB did not believe that any of his co-directors or transport managers had issued instructions to drivers to falsify tachographs although clearly there had been some failings and a lack of proper management control. He gave various explanations for the high turnover of both drivers and members of the management team (138%). In his evidence he stated that he had never heard WB instruct drivers to work off card and neither had he issued such instructions. He had been deeply shocked and saddened by what had happened.
36. The TC then adjourned to the following day so that Mark Wilkinson could give evidence. Mr Woolfall also indicated that consideration would be given overnight as to whether WB would be called to give evidence at the resumed hearing but ultimately, neither WB nor LB attended.
37. In his witness statement provided to the TC, Mark Wilkinson denied that any driver had been instructed to rig off card. The only instruction they had been given was to remove their driver’s card from the vehicle unit at the beginning of their rest period because drivers were not using their mode switches properly. He considered that Gary Dagger was dishonest and unreliable. He disagreed with John Kelly’s assertion in his witness statement that WB had anything to do with the transport side of the company and he asserted that John Kelly had failed to follow an instruction given to him by AS to order three digi-downloaders. He considered that the overloading of the vehicle being driven by Mr Oaten, was because the driver had “*allowed*” an extra ballast slab to be added to his load.
38. Mr Wilkinson expanded on his explanation for the overloading when giving evidence. He had told Mr Oaten that the ballast would be split between two trailers but there had been a misunderstanding and Mr Oaten had brought all of the load back to the yard on his vehicle. He denied that drivers ever got involved in rigging cranes although others may move the drivers’ vehicles whilst they were on rest. The drivers were not “*necessarily under pressure from Wayne Baldwin*” although there was an element of pressure in the work because of unpredictable situations. Mr Wilkinson had never heard WB speak to a driver in a threatening way. WB would tell Mr Wilkinson where the cranes were

going to next and how much equipment and ballast was required and he would then leave it up to Mr Wilkinson and Mr Boyd to sort the transport out. He considered that there may be reasons personal to drivers for driving off card. He had never lent his digi-card to another driver.

39. The TC asked Mr Wilkinson where WB was. He said that he was back in the office as the operation was “24 hours, 365 days”. WB was a salesman who knew how many vehicles the company operated and how many vehicles were needed for each job. If necessary, a sub-contractor would be used although a purchasing order from head office would be required. WB had a good understanding of the transport side of the business. Whilst there had not been a dedicated rigging crew at the time of the two investigations, there was one now.
40. Whilst Tony Wilson was not called by the company to give evidence, he had produced a witness statement. He had been employed as a Transport Manager between October 2010 and April 2014. It was he who had introduced a drivers hand book and procedures to monitor drivers’ hours and infringements. He also trained drivers and introduced maintenance procedures. He had not encouraged any driver to work off card.
41. Wayne Baldwin had also produced a witness statement. Having described his role as Heavy Cranes Director, he denied that he had any responsibility for transport and he had never overruled the “dedicated and qualified team” which reported to AS. He asserted that the witness statement of Keith Lovejoy was untrue. Mr Lovejoy had never been overruled save in relation to the choice of new vehicles. Mr Lovejoy raised issues about his pay and would not work after 6pm or at weekends. As for Gary Dagger, his witness statement was untrue. He was a “strange character” who would go missing for days. He had money problems. There were issues with missing fuel and money. He was unreliable and untruthful and he was friends with all of the other ex-members of the management team who had provided untruthful witness statements. They were all using WB’s name “in vain”. The driver Terry Hiley had been reprimanded because of damage to vehicles, damage to the property of third parties and his poor driving standards. He had been “fined” by the company and he had become very angry, abusive and threatening. There was also an issue about fuel and that was the reason he left. As for the driver Kevin Johnston, WB had heard him being abusive and argumentative towards Mr Wilkinson. There was an issue about fuel and as a result he became awkward and he deliberately “messed up jobs”. He also wanted more pay and did not like the shift rota. The statement of the driver Chris Ross was also untrue. He had been spoken to about damage to the property of third parties and he had been fined for damage to a new tractor unit. He moaned about his pay and left. Finally, the witness statement of driver Steven Gibson was untrue. He was always arguing with Mr Wilkinson and Mr Boyd because he would not follow

instructions. WB denied ever having given a driver instructions to work off card.

42. Finally, there was a witness statement from Alan Callender who denied giving drivers any instructions save to order them to take their legal breaks. He too was critical of Keith Lovejoy and Gary Dagger and recalled an occasion when Mr Lovejoy had threatened a driver with violence if he did not return a vehicle to the yard despite the fact that the driver was “*out of hours*”.
43. The salient parts of Mr Woolfall’s closing submissions for the purposes of this appeal were as follows. The company “*flatly denied*” instructing drivers to falsify their tachographs. The live evidence of Mr Dickson and Mr Jameson had to be compared to that of Mr Gibson and Mr Buxton. Mr Wilkinson had denied issuing the kind of instructions that Mr Gibson complained about. He had also referred to pressure from WB but Mr Gibson had left the company “*under a cloud*”. Those who had given evidence and provided witness statements adverse to the company had an “*axe to grind against the company*” some having been dismissed, others leaving amidst ill feeling. The most telling point was that during the second investigation only 42 offences were prosecuted out 721 shifts worked which equated to 5.8% infringement rate which did not support the contention that there was a standing instruction to the drivers to work off card. (We note that Mr Woolfall’s submissions on this point failed to take account of the very many offences which were not prosecuted).
44. Mr Woolfall did not make any submissions in relation to the possibility of director disqualification and how it should be approached. The TC did raise the issue of why the company persisted in failing to mention that LB was a director either in its licence applications or subsequent correspondence and documentation. He was told that the failure to make this disclosure was because LB solely dealt with the accounts department.

The TC’s decision dated 3 August 2016

45. The relevant parts of the TC’s decision relating to AS are set out in paragraph 34 above. As for WB, Mr Buxton had given the TC an indication of his approach to drivers. Mr Woolfall had failed to cause Mr Buxton to change his account despite challenging his good repute. The TC found Mr Buxton to be a reliable and compelling witness and he accepted his evidence and attached significant weight to it.
46. WB’s “*alleged approach*” appeared evident from his own statement concerning Gary Dagger which had been included in the Internal Investigation Report produced by AS. The TC quoted this passage from it:

"I became very angry with Gary Dagger after repeatedly asking him and told him not to take the fucking piss and return the money the woman needed it desperately and it was not his money".

The TC understood that robust language was commonly used in many workplaces but it was surprising to find it within a formal witness statement prepared for an internal investigation and for production in a formal tribunal process.

47. The TC had been asked to accept that WB had nothing to do with the transport side of the company's business but he found that difficult to reconcile with WB's role as heavy crane sales director. AS had explained how the heavy cranes and the ballast vehicles worked. The TC failed to see how WB could do his job without knowing exactly what the ballast vehicles were doing. He needed first-hand knowledge of whether or not the drivers were free to drive the vehicles. The TC had no doubt that WB sought to maximise the utilisation of the heavy crane fleet. It followed that he sought to maximise the utilisation of the ballast vehicle fleet. WB was responsible for delivering the crane service to its customers and that service was wholly reliant upon the ballast vehicles. He was therefore very much engaged with the overall operation of the vehicles authorised under the licences. That engagement was apparent from the reference to him in a letter dated 30 September 2014 in relation to seeking permission to buy in external transport.
48. The TC found that WB coerced the drivers, whether directly or indirectly or through others, to falsify their tachograph records so that cranes would be on site ready to work on time. The TC relied upon the "robust" evidence of Mr Buxton and Mr Gibson to make such a finding. He also relied upon the statements of Gary Dagger and Keith Lovejoy. "Under ideal circumstances" the TC would have put the allegations to WB but he had chosen not to attend despite the hearing running into a second day and the TC having indicated that his presence would be helpful. WB had been given the opportunity to personally challenge the allegations but had chosen not to do so and he had given no explanation for his non-attendance.
49. No mention had been made of LB at any time. While she had been listed as a director for many years, she had never notified the TC that she was a director.
50. In summary, the TC found that AS was unreliable. RB had allowed false record offences to be committed by not properly engaging in the management of the transport operation. WB had caused false records and drivers hours' offences to be committed and LB had played no part in the operation of the licence. It followed that he could not trust the company to be compliant in the future. WB's role at the centre of the offending meant that a lengthy disqualification from operating goods vehicles was appropriate. AS was a person with significant authority within the corporate structure of the company such that the TC found

that he was a de facto director. He was the person entrusted with the internal review and provided the public inquiry evidence. Having found him to be an unreliable witness, it was appropriate that he be disqualified for a period. RB and LB had failed in their duties as statutory directors to ensure compliance and again a period of disqualification was appropriate such that they may reflect upon the seriousness of the matters and the potentially deadly outcome of the offending they allowed to take place. The TC then made the orders of disqualification set out in paragraph 1 above.

The Upper Tribunal Appeal

51. At the hearing of this appeal, Mr James Backhouse represented all three Appellants. He began by describing the public inquiry as “*rushed*”. The hearing was not structured or well managed and as a result, unfair pressure was placed upon Mr Woolfall and the company. In support of his submission, Mr Backhouse referred the Tribunal to a statement made by the TC before any evidence had been heard on the first day. He said:

“I am not going to finish today not having heard all of the evidence and allow this operator to continue as it is now .. I am not going to .. adjourn until sometime in September potentially ... to leave this operator to go away and kill someone”.

This gave the impression that the TC had already made up his mind about the issues. Then it became clear that the TC was holding evidence in the driver conduct files of those who were to give evidence prior to the company hearing which the company had not had sight of. The discussions about that evidence and the company’s right to see it further gave the impression that the TC was rushing proceedings. The TC did however, not only disclose the evidence but also gave Mr Woolfall time to read it which he did “*on the hoof*”. Mr Backhouse submitted that the rushed nature of the proceedings meant that the TC did not give himself sufficient time to consider the respective roles of those involved in the management of the company. Mr Backhouse did not consider that the TC understood the role of AS in the company. In summary, the way that the hearing was conducted amounted to a procedural unfairness which denied the TC an opportunity to take an informed approach to the Appellants.

52. We are not satisfied that there was any procedural unfairness in the way that the public inquiry was conducted. We do acknowledge that the TC’s comment (set out in paragraph 51 above) was ill-judged but understandable against the background of the company’s recent conviction for corporate manslaughter and the very serious allegations being made about the culture of non-compliance and pressure placed on drivers to work off card during their daily and weekly rest periods. As it transpired, the hearing resumed the following day with sufficient

time available for Mr Wilkinson to give evidence and closing submissions to be made by Mr Woolfall. As for the non-disclosure of evidence contained in the driver's files, their positions had been summarised in TE Cull's public inquiry report. At the end of the time given by the TC for Mr Woolfall to read the interviews of the drivers, he did not complain that he needed further time. We do not consider that the public inquiry was rushed and the TC took steps to ensure that sufficient time was available by clearing his diary the following day.

53. Andrew Skelton

We consider it appropriate to deal with this Appellant first as his grounds of appeal are different in nature to those of LB and WB. AS was not a statutory director, although he may have been acting as a de facto director by reason of his position and role within the company. It would have been perfectly proper for the TC to find that AS was a de facto director but only if any of the following steps had been taken:

- a) The allegation had been included in the call up letter addressed to the directors with reasons for making the allegation and alerting AS to the possibility that he may be found to be a de facto director with a consequential risk of disqualification;
- b) AS had been sent a separate call up letter in the above terms;
- c) If the TC's concerns only began to formulate during the course of the two hearings, the TC should have put Mr Woolfall and AS on notice of his concerns about AS's role within the company and thereby given them an opportunity to deal with his concerns. If AS did not accept that he was de facto director, then that matter should have been adjourned in his case for a separate call up letter to be sent out so that AS could properly deal with the issues in a separate hearing;
- d) If the TC's concerns only began to formulate as he was writing his decision, then again, AS should have been put on notice so that he could deal with those concerns prior to the TC coming to his decision and if necessary, a further hearing should have been offered with a full call up letter having been issued.

As it was, both AS and Mr Woolfall were completely unaware that there was a possibility, let alone a likelihood, that the TC would find that AS was a de facto director and that his failings warranted a period of disqualification of two years. In failing to take any of the steps set out above, there was a fundamental breach of natural justice and the TC's finding that AS was a de facto director and the order of disqualification cannot stand and his appeal is allowed. This does not mean that the TC is now precluded from calling AS to a public inquiry for proper consideration to be given to his role within the company but that is a matter for the TC. Whatever the TC chooses to do, any future nomination of AS as a Transport Manager (utilising his CPC qualification for that purpose) may well involve consideration of AS's role within Baldwin Crane Hire Limited.

54. Wayne Baldwin

Mr Backhouse was critical of the TC's approach to the evidence implicating WB in causing drivers to falsify their charts and to work off card. He submitted that apart from Mr Buxton (whose credibility had been attacked), the other drivers who had attended driver's conduct hearings, did not implicate WB in wrong doing, although Mr Gibson stated that he believed that the pressure on drivers came from WB through Mr Wilkinson and Mr Boyd and that he was responsible for striking out the driver's legitimate claims for pay. There was no proper assessment of the evidence of Mr Buxton and no analysis of the evidence implicating WB. The evidence was of insufficient quality for the TC to properly come to the conclusions he did about WB and to then disqualify him for a period of 5 years.

55. Mr Backhouse submitted that it was inappropriate to place any weight upon WB's decision not to attend the public inquiry as there was no obligation upon him to do so. In failing to attend, he was not demonstrating his contempt for the regulatory process. The TC should have approached WB's position in the same way as he had approached that of RB and concluded that their culpability was similar, imposing upon WB a period of disqualification similar to that imposed upon RB i.e. one year.

56. We are satisfied that the evidence demonstrating that WB was the driving force in causing drivers to falsify their records and to work off card was overwhelming despite the fact that much of it was hearsay evidence and that there were some live evidence and statements to the contrary. The evidence of Mr Buxton would have been sufficient on its own but the sum total of the evidence including the witness statements of both drivers and managers and the further hearsay comments documented in the report of TE Cull leads to an irresistible conclusion that WB was the driving force behind this company and its wrong doing despite some statements to the contrary. It would have been preferable for the TC to have referred to all of the evidence but in such an overwhelming case, his failure is understandable. We reject the submission that the TC's analysis of Mr Buxton's evidence was insufficient. He saw Mr Buxton give evidence; he was able to assess his demeanour and his response to the cross examination which involved an attack on his good repute. To conclude that he accepted Mr Buxton's evidence as being reliable and compelling is sufficient in those circumstances.

57. It is fair to say that the TC failed to provide any reasoning for the disparity between the periods of disqualification ordered in respect of the three directors. RB had overseen an operation in which a culture of deliberate non-compliance had developed and even if he was not aware before the first investigation, he should have been aware after it had concluded. Nevertheless, there was no evidence that he did

anything as head of this family business to address the issues and thus avoid the second set of prosecutions a year later. The period of disqualification of one year in respect of him was lenient to say the least. WB also received a period of disqualification which was lenient to say the least when one considers the Senior Traffic Commissioner's Statutory Guidance suggested starting point for those who allow falsification of records (disqualification range of five to ten years). As WB caused such falsifications we do not agree that his disqualification was disproportionate. His appeal fails.

58. Lorraine Baldwin

We agree with Mr Backhouse that the TC did not undertake any analysis of LB's role within the company (or lack of it). Neither did he provide any reasoning for why LB should be disqualified for an indefinite period as opposed to her father who was disqualified for one year, or indeed her brother who was disqualified for five years. It is clear that the TC did find that LB had not played any role in the operation of the licence and that finding was adverse to her (rather than a positive finding as submitted by Mr Backhouse). We further note that whilst LB may not have been aware of the culture of falsification prior to the first investigation, she would have not been left in any doubt, thereafter. There was nothing before the TC to suggest that LB discharged her duties as a statutory director in such a way so as to ensure that the company was doing all that was reasonably practicable in ensuring compliance with the drivers' hours rules. Even a witness statement might have assisted the TC in this regard. She therefore does bear some responsibility for what took place and at the very least, after the first investigation and before the second. In the absence of any reasoning for an indefinite order of disqualification, the Tribunal is satisfied that the period of disqualification cannot stand. We cannot be guided by the period of disqualification ordered in respect of RB as that was overly lenient. Neither do we consider that LB should be disqualified for the same period as her brother. However, she does need a significant period in order to reflect upon her responsibilities as a statutory director of a company which holds an operator's licence. In the circumstances, a period of two years is considered appropriate in her case. To that extent, her appeal is allowed.



Her Honour Judge J Beech
10 February 2017