



**Appeal No.: T/2021/35
[2022] UKUT 126 (AAC)**

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

**IN AN APPEAL FROM THE DECISION OF:
RICHARD TURFITT, TRAFFIC COMMISSIONER FOR THE EAST OF
ENGLAND TRAFFIC AREA
DATED 4 MAY 2021**

Before:

**Elizabeth Ovey, Judge of the Upper Tribunal
Andrew Guest, Specialist Member of the Upper Tribunal
Stuart James, Specialist Member of the Upper Tribunal**

Appellant: KAMIL KODZIK TRANSPORT LIMITED

Attendance: No legal representation. Mr. Kamil Kodzik, the appellant's director, attended on behalf of the appellant.

Heard at: The Rolls Building, 7 Rolls Building, Fetter Lane, London EC4A 1NL

Date of hearing: 13th September 2021

Date of decision: 16th November 2021

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that the appeal be DISMISSED.

SUBJECT MATTER: assessment of financial standing; credit card in director's name; reliance on transport manager; *Priority Freight* test; disqualification

CASES REFERRED TO: *Bryan Haulage Ltd. (No. 2)* 2002/217; *Priority Freight Ltd.* 2009/225, *First Class Freight* T/2012/025; *Bradley Fold Travel Ltd. and Peter Wright v. Secretary of State for Transport* [2010] EWCA Civ 695, [2011] R.T.R. 13; *Hughes Bros. Construction Ltd.*, [2014] UKUT 0119 (AAC), T/2013/77; *LA and Z Leonida, t/a ETS* T/2014/24 *Transform Driveways Ltd.* [2020] UKUT 372 (AAC), T/2020/26

REASONS FOR DECISION

Introduction

1. This is an appeal from the decision of the Traffic Commissioner (“the TC”) for the East of England Traffic Area given on 4th May 2021. By his decision the TC:

- (1) revoked the operator’s licence no. OF2029242 (a standard international goods vehicle licence) held by Kamil Kodzik Transport Limited (“the Appellant”) from 23.45 on 19th May 2021;
- (2) found that the Appellant’s transport manager, Mr. Nicholas Fennell, had lost his repute;
- (3) disqualified the Appellant and its sole director, Mr. Kamil Kodzik, from holding or obtaining an operator’s licence for a period of 6 months from 19th May 2021;
- (4) disqualified Mr. Fennell from relying on his certificate of professional competence unless and until he had retaken and passed the relevant examinations.

2. Mr. Fennell has not appealed against that decision.

3. An appeal form was received by the Upper Tribunal on 26th May 2021 which is expressed as an appeal by Mr. Kodzik. In substance, however, it is an appeal against the TC’s decision revoking the licence and disqualifying the Appellant from holding an operator’s licence and has been treated as such. For completeness, we comment on Mr. Kodzik’s personal position at the end of this decision.

The facts

4. The Appellant was incorporated on 25th November 2013 and the nature of its business is to provide freight transport by road. Although the Companies House information in our bundle suggests that there were originally two directors, both called Kamil Kodzik, the second Mr. Kodzik is shown as having resigned on 2nd June 2016 and for the purposes of this appeal the Appellant seems clearly to be a one person company.

5. Until 2019 the Appellant’s registered address for the purposes of the legislation relating to companies was in Manchester and Mr. Kodzik told us at the hearing that the Appellant had carried on business in Manchester. In late 2019 Mr. Kodzik and the Appellant moved to Royston, Hertfordshire, and on 9th December 2019 Mr. Kodzik as director applied for a new operator’s licence on behalf of the Appellant. The application stated that the Appellant had previously held licence no. OC1145826 and that it had not been revoked, suspended or curtailed. Mr. Kodzik signed the director’s declaration as to observing the standard undertakings, including

undertakings relating to records of drivers' hours, keeping vehicles in fit and serviceable condition, reporting and recording of defects and keeping full records for at least 15 months of safety inspections, routine maintenance and vehicle repairs.

6. The transport manager form provided in connection with the application named Mr. Fennell as the transport manager and stated that he would do six hours work per week on Saturdays. Mr. Fennell signed the standard form declaration confirming, among other things, that he had a contract with the Appellant specifying the tasks to be performed, including responsibilities which we can summarise as being to ensure compliance with the operator's undertakings mentioned above. The form was also signed by Mr. Kodzik as director.

7. The new licence, no. OF2029242, was granted on 21st January 2020 subject to conditions that:

- (1) the Appellant should provide financial evidence "in the name of the limited company" covering January, February and March 2020 showing that the Appellant "has continued" to meet the required level of available finance throughout the period by reference to an average balance by no later than 30th April 2020;
- (2) Mr. Fennell should attend a two day transport manager refresher course by 30th March 2020 and send a copy of the certificate of attendance to the traffic area office in Leeds within 7 days of the course taking place.

It appears from the case summary at p.5 of our bundle that both undertakings were marked as fulfilled and we have seen a copy of Mr. Fennell's certificate, in fact dated 10th June 2020. We have not seen the financial evidence. The Appellant was authorised to operate one lorry and one trailer.

8. Unfortunately on 16th October 2020 the lorry failed its annual MOT test for parking brake performance. It failed again on 29th October 2020 for the same reason and on 17th November 2020 for brake systems and components. It only eventually passed on 19th November 2020. Notwithstanding the fact that the lorry had failed the test, the Driver and Vehicle Safety Agency ("the DVSA") had evidence that the lorry had been used on the road between 16th and 22nd October 2020.

9. The DVSA therefore arranged for a site visit by a vehicle examiner, Mr. Gary Thomas, who attended the Appellant's operating centre on 7th December 2020 and interviewed both Mr. Kodzik and Mr. Fennell. His report shows that six out of the twelve areas of investigation were unsatisfactory. Those areas related to inspection and maintenance records, driver defect reporting, inspection facilities and maintenance arrangements, vehicle emissions, wheel and tyre management and load security. In relation to the transport manager/responsible person assessment, Mr. Thomas stated:

"The responsible person appears to lack any experience or knowledge, there is no evidence of [continuing professional development]."

Transport manager does not know when the vehicle or trailer is next due [preventative maintenance inspection], transport manager has minimal involvement in the management of this operator's licence. Systems are in place, but the transport manager is not aware of their operation."

He recommended that the case should be reported to the Office of the Traffic Commissioner. The report contained a warning that immediate action was required as there had been failure to comply with the conditions of the operator's licence and required a written explanation from both the Appellant and Mr. Fennell of the reasons that caused the reported shortcomings and what they were going to do to prevent future problems.

10. Mr. Kodzik replied stating that he was unaware that he could not use the lorry on the road after it failed its MOT test. He thought he had two weeks in which to submit it for re-testing and could continue to use it in the meantime. Now that he knew he was wrong, he would avoid similar situations in future. He also said that he was going to implement more frequent brake system tests, to be performed at the DAF centre, and emissions tests to be performed there. He would buy equipment for testing headlamps and stem/pressure washing would take place. He was also working on improving his maintenance systems and stated that he attached further evidence.

11. Mr. Fennell replied going through the various paragraphs of the report in terms which largely amounted to assertions that Mr. Kodzik had the relevant systems in place. He described Mr. Kodzik as having "repellent [we think this should read "relevant"] experience and training". He also expressed concern that Mr. Thomas had "seemed to worry [Mr. Kodzik] which I do not think this is a wise choice as your fundamental job is to help operators and give them advice" and objected to the comments made about him personally, stating that he had qualified 20 years ago, had done a refresher course to enable Mr. Kodzik to get his licence and had "full control" of the licence.

12. These responses were regarded as unsatisfactory by Mr. Thomas. He commented:

- (1) to advise and guide the operator is the job of the transport manager and it seemed to him that Mr. Fennell was passing the buck on that responsibility;
- (2) Mr. Fennell had provided no evidence to show what systems had been put in place;
- (3) there was no satisfactory response from Mr. Fennell about the fact that Mr. Kodzik had been driving the lorry on public roads with a known defect relating to the parking brake performance after it had failed its test;
- (4) Mr. Kodzik's lack of awareness that driving the lorry in such circumstances was an offence raised concerns about his knowledge regarding safety defects and the knowledge of Mr. Fennell to allow it to be driven without the braking defect being rectified.

The call-up letters and the public inquiry

13. Both the Appellant and Mr. Fennell were then called to a public inquiry, to be held virtually by Microsoft Teams, by call-up letters dated 30th March 2021.

14. The letter to Mr. Kodzik as director of the Appellant raised the following issues:

- (1) breach of the conditions of the licence consisting of failure to notify any event that affected the professional competence of the operator and transport manager;
- (2) failure to observe the laws relating to the driving and operation of vehicles used under the licence;
- (3) breach of the undertakings given that:
 - (a) the lorry and trailer would be kept fit and serviceable;
 - (b) records would be kept for 15 months of driver defect reports, safety inspections and routine maintenance;
 - (c) drivers would report promptly any defect which could prevent the safe operation of vehicles and trailers and any defect would be promptly recorded in writing;
- (4) that there might have been a material change in the Appellant's circumstances, namely, that it might no longer have sufficient financial resources.

Further, it was stated that as a result of those matters the Appellant might no longer be of good repute, be of the appropriate financial standing or meet the requirements of professional competence. Failure to meet those requirements meant that the licence was at risk. In addition, the TC was concerned that Mr. Fennell might not be exercising continuous and effective management of the Appellant's transport activities and so might not be professionally competent and of good repute. That also put the licence at risk.

15. The Appellant was informed of the evidence which the TC would rely on so far as then available and told to collect its own evidence, which should include at least various specified documents. Among those were regular safety inspection records and driver defect reports for the past 12 months, the maintenance contract, evidence of systems for ensuring compliance with the drivers' hours and tachograph legislation and evidence of payments to Mr. Fennell and his attendance at the operating centre. The evidence was to be submitted before 20th April 2021.

16. Mr. Fennell's call-up letter notified him that the TC would consider whether he continued to meet the requirements to be of good repute and professionally competent. He was told to produce similar material by the same date.

17. Further evidence was produced following the call-up letters to address the requirements to provide original maintenance records and evidence of the system for ensuring compliance with the drivers' hours and tachograph legislation and to show the payments made to Mr. Fennell and his attendance at the operating centre.. The Appellant also provided bank statements and other financial information. Various points on the documentation provided were drawn to Mr. Kodzik's attention by an email dated 29th April 2021, which included the information that the TC could not take account of the American Express credit card because it was in Mr. Kodzik's personal name and not in the name of the Appellant.

18. Mr. Kodzik on behalf of the Appellant and Mr. Fennell both attended the virtual hearing. Reading the transcript gives the impression that neither of them was very well prepared. Mr. Kodzik was clearly struggling at times with understanding the TC and explaining matters in English. It was unclear whether he properly understood the documentation he was looking at or whether he simply did not understand the TC's questions about it. Some documents Mr. Kodzik and Mr. Fennell wished to refer to had been sent late and had not arrived with the TC.

19. The overall impression of the Appellant's operation is that Mr. Fennell relied almost entirely on Mr. Kodzik's assurances about what he was doing and did very little by way of examining records, many of which were kept on Mr. Kodzik's tablet. The tachograph records from the lorry had never been downloaded. There was evidence, in particular by reference to a defective windscreen wiper, that the driver defect reporting system was not working. There was no explanation of the brake testing arrangements, which admittedly could not be carried out at the operating centre and had to be done at the DAF centre, which Mr. Fennell thought might have been closed because of the pandemic. He clearly had no real idea what Mr. Kodzik might have been doing about brake testing and Mr. Kodzik's evidence was that he did inspections on a Monday, when he was out of driving hours and so could not take the vehicle to the DAF centre for a brake test. The TC said at the outset that financial standing was not met and at one point retired, leaving it to the clerk to explain the process of doing the necessary calculation. Although the TC seems to have intended that that would not be included in the transcript, it is in fact before us and it does not seem to us clear that Mr. Kodzik entirely understood the process even after the clerk's attempts to explain. What does seem to be the case is that he relied on the American Express credit card and on a transfer of £5,000 he had made to the Appellant's account in April, in preparation for the inquiry. Be that as it may, when the TC returned, he asked Mr. Kodzik if he now understood what the TC had been talking about and Mr. Kodzik said that he did. The TC then said that it was inevitable he would conclude there was no financial standing.

20. Towards the end of the inquiry the TC asked Mr. Kodzik what he could tell him that would assure him that the Appellant would comply with the laws and the rules in future. Mr. Kodzik offered some explanation about how he would address financial standing and was then asked what about the actual operation, the maintenance, the driver defect reporting and the management. The answer was:

"I need spend more time with all paperworks and should be okay. If I'm doing all of everything myself, sometimes I'm missing something. But it's

nothing what I can repair in the couple of weeks.”

Later the following exchange took place:

“[Mr. Kodzik] It’s a lot of paperwork for one person. But ... it’s much, much ... it’s progress. Last three months after [Mr. Thomas] inspect my operation place, when I’m started, couple of years ago

[TC] But forgive me, that’s not really evident in your paperwork, is it?

[Mr. Kodzik] Sometimes I forget about something. It’s not that doing something special.

[TC] No.

[Mr. Kodzik] It’s a lot of paperwork for one person.

[TC] But that’s really why you have a transport manager, isn’t it?

[Mr. Kodzik] Nicholas ... Nicholas is top man, he’s first man which I’ve spoke as my third transport manager. And he said at the beginning that he doesn’t want much. But truck must be in good conditions. Every previously one transport manager was just a man, this guy is different. So if I’m keep this licence, obviously I want to keep Nicholas because he’s good.”

21. At the very end of the inquiry there were some further exchanges between the TC and Mr. Fennell. The TC described himself as “not very impressed” with the operation or the level of scrutiny or level of knowledge displayed by Mr. Fennell. Mr. Fennell admitted that he had been “really lax” but said that Mr. Kodzik had really tried and, recognising the difficulties of an owner driver, he had given him “a bit of leeway”, but his top priority was the vehicle and when it went on the road “that’s 100% legal and up and together”. He said that Mr. Kodzik does not go over his driving hours limit but “maintenance is a bit sporadic, I suppose. But it’s getting there.” He recognised that if the licence continued they would have “to really put ourselves together and decide what is going to be best”, but drew attention to what a difficult time it had been during the pandemic. In conclusion he recognised he was not up to date with everything.

22. Some additional maintenance documentation arrived with the TC while he was in the course of writing his decision and its content is summarised in the decision. The ultimate position was that the TC was provided with preventative maintenance inspection reports only for 2021 and that there were no print-outs or other records of brake efficiency, although there were references in some of the documents to brake tests having been carried out. The latest brake test result, which Mr. Kodzik referred to during the inquiry, showed that the secondary brake had failed the test, although neither Mr. Kodzik nor Mr. Fennell appeared to be aware of that. The tachograph checks were done solely on the basis of the driver’s card and there were no infringement or missing mileage reports.

The decision and the grounds of appeal

23. In his decision the TC, having set out the issues and summarised the evidence turned first to Mr. Fennell and concluded that he had “failed to come close” to any of the responsibilities of a transport manager as set out in Statutory Document No. 3 on Transport Managers. He found that Mr. Fennell had lost his repute under s.27(1)9b) of the Goods Vehicle (Licensing of Operators) Act 1995. He then continued:

“22. I am therefore satisfied that I must make adverse findings against the operator under sections 26(1)(b), (e), (f) – undertakings to keep vehicles fit and serviceable, to have a satisfactory written driver defect reporting system, and complete and retain maintenance records and 26(1)(h) – material change, relating to financial standing and professional competence. Those necessitate adverse findings under section 27(1)(a).

23. I note the positive features present:

- There is no previous offending history, but this licence has been in existence for such a short space of time, that can count for very little. There is accordingly a low prohibition rate and limited annual test history. There is some evidence of driver walk round checks undertaken by the Director/driver, fitter, but I refer to my comments above.

Those are balanced against the negative features and this case amounts to the following:

- Ineffective management control and insufficient or no systems and procedures in place to prevent operator licence compliance failings
- Ineffective or no analysis procedures in place to detect falsification, drivers’ hours (EC & domestic) and/or Working Time Directive infringements
- Ineffective or insufficient driver training with insufficient or ineffective monitoring and disciplinary measures in place
- Insufficient and/or ineffective changes made to ensure future compliance

This suggests a starting point of SEVERE to SERIOUS, where the licence is at danger, even if there were sufficient financial standing.

24. As the appellate Tribunal identified in 2012/025 First Class Freight: *“While it is true that a transport manager must ‘effectively and continuously’ manage the transport activities of the undertaking for which he or she works and is now required to be familiar with a wide range of topics, including the law in relation to operator’s licensing, that does not mean that the person or persons who control an entity which operates heavy goods or public service vehicles is or are absolved of responsibility. Such a person must know enough to ensure that someone employed as a transport manager is up to the job and they must also be able to supervise them to ensure that they do a proper job.*

It is, after all, for the director or directors of a company to set the standards which the employees are required to meet.” This cannot all be attributed to Mr. Fennell.

25. So, when I posed the question suggested by the Upper Tribunal in 2009/225 Priority Freight, namely: *how likely is it that this operator will, in future, operate in compliance with the operator’s licensing regime*, even were there to be financial standing and a competent Transport Manager to assist, I could not reach a positive conclusion. The operator will have gathered that I found the conduct of this operation to be so serious as to require revocation. I note that loss of repute under section 271)(a). The positive, such as I could identify, are reflected in the length of disqualification. For the sake of completeness, I went through the potential impact of intervention on this licence. Mr. Kodzik indicated that his sub-contract work is undertaken at very little notice. I took account of his financial obligations but also how far this operation had fallen below the basic standard. He suggested that he might return to agency driving, without the additional strains of running his own business.

26. The operator’s licence is revoked under section 27(1)(a) and following adverse decisions under sections 26(1)(b), (e), (f) and (h) from 23.45 on 19 May 2021.

27. The operator and Director are disqualified from holding or obtaining an operator’s licence in any traffic area, for a period of 6 months from the above date, pursuant to sections 28(1) and (4).”

24. The grounds of appeal read as follows:

“At a public hearing regarding my operating licence, I was stripped of my operation licences, my transport manager, and the ability to run my business for six months. I disagree with that decision and would like to appeal against that decision.

The Commissioner was wrong to suggest that I did not have sufficient resources to run my business. After presenting my evidence of having the required amount, I was informed that the bank statements are not made on one day of each month and will not be accepted. It is impossible to complete bank statements for one day as each bank issues statements on a different day.

I ran a person-company, where I’m a driver and owner. All funds at my company disposal have been deposited on the accounts as needed to secure company operations and fulfil the obligations stated in the operating licence.

During the hearing I was asked about the consequences revoking my licence would have on my business. I confirmed that in that case I would be forced to undertake a driving job through an agency. I have never suggested that this would not happen without major financial consequences. Having my licence revoked had a significant effect on my company and my financial situation ... Revoking my licence and prohibiting me from holding OC for six months

profession is synonymous with causing bankruptcy in a short time. I will not be able to fulfil my financial obligations if the only source of income is my earnings as an agency driver.

When I was asked by the Commissioner about what I would do in the future to avoid similar situations and the lack of an unambiguous answer on my part, I only have that English is my second language and the long question was not obvious to me at the moment.

There should be only one answer to correcting all the shortcomings that have arisen. I also disagree that my service in 2020 was below the standard. At that time, due to lockdown, I had limited access to the brake tests, which I run as standard at a DAF service located 0.5 miles from my Operation Centre. This had a direct impact on the December result of Truck MOT. The truck undergoes regular inspection and is in good condition.

With the covid restrictions being lifted, I was happy that I managed to keep my company operational and that no financial organisation is chasing me for unpaid debts. However, with my licence revoked this will likely soon change. Therefore, I consider Traffic Commissioner's judgment too severe and not fair."

25. The Appellant has not applied for a stay of the TC's determination.

The legal context

26. Under s.26(1) of the Goods Vehicles (Licensing of Operators) Act 1995 a traffic commissioner has power to direct, among other things, that an operator's licence be revoked on any of a number of grounds, including that:

- (1) any of the conditions attached to the licence has been contravened (s.26(1)(b));
- (2) a statement made by the licence-holder for the purpose of the application for the licence was false or has not been fulfilled (s.26(1)(e));
- (3) any undertaking recorded in the licence has not been fulfilled (s.26(1)(f));
- (4) there has been a material change in the circumstances of the licence-holder (s.26(1)(h)).

27. Further, under s.27(1) of the Act a traffic commissioner must revoke an operator's licence if:

- (1) the licence-holder no longer satisfies the requirements of s.13A(2); or
- (2) the licence-holder's transport manager no longer satisfies the

requirements of s.13A(3).

28. S.28(1) of the Act then provides that if a person's licence is revoked under s.26(1) or s.27(1), the commissioner may also direct that that person be disqualified from holding or applying for a licence either indefinitely or for such period as the commissioner may specify. Under s.28(5), where the person in question is a limited company, the power of disqualification extends also to any director.

29. S.13A(2), referred to in s.27(1), requires among other things that a licence-holder must be of good repute, have appropriate financial standing and be professionally competent. Whether the requirements of good repute and financial standing are satisfied is to be determined in accordance with the provisions of Schedule 3. Whether the requirement of appropriate financial standing is satisfied is to be determined in accordance with art. 7 of EU Regulation 1071/2009

30. S.13A(3), also referred to in s.27(1), requires among other things that a transport manager should be of good repute and professionally competent, again as determined in accordance with the provisions of Schedule 3.

31. Paragraph 8 of Schedule 3 provides that the requirement of professional competence must be satisfied by an individual and enables a company to satisfy the requirement of professional competence by employing a transport manager who is of good repute and professionally competent. The effect of paragraphs 1 and 12 is that a traffic commissioner may have regard to "all the material evidence" in deciding whether the requirement of good repute is satisfied.

32. Art. 7 of Regulation 1071/2009 requires that an operator should be able to meet its financial obligations at all times during the annual accounting year and must demonstrate that ability by showing in its accounts a certain level of capital and reserves at its disposal. Alternatively, the relevant national authority may decide to take into account a suitable financial guarantee. In practice the United Kingdom has exercised that power and the Senior Traffic Commissioner has issued Statutory Document No. 2 containing guidance and directions as to the appropriate financial standing requirement. Statutory Documents are issued under the power given to the Senior Traffic Commissioner by s.4C of the Public Passenger Vehicles Act 1991 to give guidance or general directions to traffic commissioners as to the exercise of their functions under any enactment. We return to the Statutory Document later, but at this point note that the required level of available resources for one vehicle is and was at all material times £8,000.

33. The call up letter sent to the Appellant referred to the provisions of ss. 26, 27 and 28 identified above and stated that:

- (1) the basis of reliance on s.26(1)(b) was a contention of failure to notify any event which affected the professional competence of the Appellant and the transport manager;
- (2) the basis of reliance on s.26(1)(e) was a contention that the laws relating to the driving and operation of vehicles used under the licence were not observed;

- (3) the basis of reliance on s.26(1)(f) was a contention that the vehicle and trailer had not been kept fit and serviceable, records of driver defect reports, safety inspections and routine maintenance had not been kept for 15 months and made available and drivers had not reported promptly any defect or symptom of defect which could prevent the safe operation of vehicles and trailers and defects had not been promptly recorded in writing;
- (4) the basis of reliance on s.26(1)(h) was a contention that the Appellant no longer had sufficient financial resources;
- (5) because of those matters, the TC was concerned that the Appellant was not of good repute, was not of appropriate financial standing and did not meet the requirement of professional competence;
- (6) the TC was also concerned that Mr. Fennell was not exercising continuous and effective management of the Appellant's transport activities and was not professionally competent and of good repute.

34. As can be seen from the extracts from the TC's decision set out above, he found that the Appellant had lost its good repute, was not professionally competent (since it did not employ a transport manager who was professionally competent and of good repute) and did not have appropriate financial standing. On the basis of those findings revocation of the licence was mandatory. The TC also found that the conditions for discretionary revocation set out in s.26(1)(b), (e), (f) and (h) were made out.

Discussion

35. We consider the appeal under the headings (i) financial standing (ii) loss of repute and (iii) proportionality, those being the areas for consideration which appear to us to be raised by the Appellant's grounds of appeal. We remind ourselves that the task of the Upper Tribunal when considering an appeal from a decision of a traffic commissioner is to review the material before the traffic commissioner, and the Upper Tribunal will only allow an appeal if the appellant has shown that "the process of reasoning and the application of the relevant law require the tribunal to take a different view", as explained in *Bradley Fold Travel Limited and Peter Wright v. Secretary of State for Transport* [2010] EWCA Civ 695, [2011] R.T.R. 13, at paragraphs 30-40. This is sometimes summarised as requiring the Upper Tribunal to conclude that the traffic commissioner was plainly wrong.

(i) Financial standing

36. The material before the TC at the time of the inquiry showed that the Appellant had an account with Cashplus Bank ending in the numbers 2945, an account with Virgin Money ending in 7113 and an account with Yorkshire Bank ending in 7142. The papers also include statements for an HSBC Visa card with a £7,500 limit. The card appears to have been in Mr. Kodzik's name, but, at least in

March 2021, statements were going to the Appellant's address, so it may have been a card made available to Mr. Kodzik as director of the Appellant. Pages 138-139 in our bundle show a calculation of the average of the balance on the three accounts from 16th January 2021 to 16th April 2021 and the available sums under the Visa card amounting to £4,977 plus £1,850, i.e., £6,827. It was on this basis, as we understand it, that the TC said that the Appellant did not satisfy the financial standing requirement.

37. Assuming that the Visa card was a company card, this approach to assessing financial standing was entirely in accordance with Statutory Document No. 2: see in particular paragraph 38, which is part of the directions section of the Statutory Document setting out how the assessment must be approached. If Mr. Kodzik thought, as the grounds of appeal suggest, that the Appellant's bank statements were not accepted, he was mistaken.

38. The real difficulty for the Appellant is that Mr. Kodzik wanted the TC to take into account also an American Express credit card on which there was a credit limit of £5,000 (increasing to £13,000 on or about 21st May 2021) and available credit of £4,446.00 at 10th April 2021. The American Express card, however, is a personal card, not a company card. Statutory Document No. 2 states clearly that resources not in the company's name cannot be considered and cites in support *Hughes Bros. Construction Ltd.*, [2014] UKUT 0119 (AAC), T/2013/77. That was also a case in which a company sought to rely on an account in the director's personal name and it was determined that the traffic commissioner was right in refusing to allow it to do so. A similar problem arose with a similar result in *Transform Driveways Ltd.* [2020] UKUT 372 (AAC), T/2020/26.

39. The upshot is that the TC's approach at the inquiry followed the Statutory Document which in turn reflects previous decided cases. We understand that Mr. Kodzik may feel that as a one-person company the Appellant's financial resources extend to his personal financial resources, but legally that is not the case. Mr. Kodzik has chosen to trade with the benefit of limited liability, meaning that the Appellant's debts are not his debts. Equally, the Appellant's resources are not his resources while they remain in the name of the Appellant and his resources are not the Appellant's resources if they remain in his name. As a matter of fact, he did not draw on his American Express card and transfer money to the Appellant in a sufficient amount to ensure that the financial standing requirement was satisfied.

40. At the hearing Mr. Kodzik drew our attention to a document at p.197 in our bundle headed "Budget for January, February, March 2021 which he said showed the necessary financial resources. When asked how a budget could show the resources the Appellant had had in the past he was unable to answer and we think his English may have been inadequate to enable him to understand the question. Assuming, however, that the document was intended to show resources available in the past and ignoring the fact that it does not on its face show an average of balances over the three months of January, February and March 2021, it includes what we take to be the undrawn credit on the American Express card in each month. The monthly figure shown would in each case be below the £8,000 requirement if the American Express figure is excluded. On its own terms, then, the document does not support Mr. Kodzik's case.

41. In addition, it does not appear to have been before the TC and for the purpose of deciding whether the TC was plainly wrong it is the evidence before him which we must take into account. Mr. Kodzik told us that at the inquiry he had not had available a letter to show that in addition to the sums in its bank accounts the Appellant had available a £1,000 overdraft facility from Cashplus Bank (a facility which is included in the budget document). The existence of that overdraft facility does not seem to have been mentioned at the inquiry and so, assuming in the Appellant's favour that it is available, it does not affect our decision. In any event, even if it could be taken into account, the average balance would only increase to £7,827 and the financial standing requirement would still remain unsatisfied.

42. In those circumstances, the ground of appeal relating to financial standing must fail. Far from being plainly wrong, the TC was plainly right.

(ii) *Loss of repute*

43. The TC's finding of loss of repute in paragraph 25 of his decision follows on from his reference to the question posed in *Priority Freight Ltd. 2009/225* ("How likely is it that this operator will, in future, operate in compliance with the operator's licensing regime?") and his statement that he found the conduct of the operation to be so serious as to require revocation. The statement itself is clearly based on the decision in *Bryan Haulage Ltd. (No. 2) 217/2002* that a finding of loss of repute, with the consequence that revocation is mandatory under s.27(1), requires consideration of whether the operator's conduct is so serious as to require revocation. *Priority Freight* states that it will often be helpful, before reaching a conclusion on the *Bryan Haulage* question, to consider the likelihood of future compliance, in effect as part of the reasoning process leading up to the conclusion. The TC's approach was therefore clearly based on the relevant case law.

44. This brings us to his reasons for his conclusions on the *Priority Freight* and *Bryan Haulage* questions. They are to be found in paragraphs 22 to 24 of the decision. First, the TC made adverse findings on the s.26 issues in all respects. That is to say, the findings covered not only the lack of financial standing and the loss of professional competence in the light of the TC's decision relating to Mr. Fennell, but also the issues relating to the condition of the vehicle, the driver defect reporting system and the maintenance of records. In paragraph 23 the TC set out what he saw as the positive and negative features of the case (also in accordance with *Priority Freight*). Those features can be seen to be based on the examples of positive and negative features set out in Annex 4 to the current version of Statutory Document No. 10. As can be seen, the negative features included not only substantially defective systems and procedures but also insufficient and ineffective changes made to secure future compliance. The starting point of severe to serious referred to in paragraph 23 also derives from Annex 4.

45. Finally, the TC referred to the principle set out in *First Class Freight T/2012/025* that the person controlling an entity which operates heavy goods vehicles must know enough to ensure that someone employed as a transport manager is up to the job and must be able to supervise the transport manager to ensure that he or she does a proper job. It is for the director of a company to set the standards which the

employees are required to meet. A similar point was made in *LA and Z Leonida, t/a ETS T/2014/24*, where it was said:

“it does not matter whether an operator’s licence is held by an owner operator, a partnership or a limited company because in each case the person or persons responsible for managing the business bear the ultimate responsibility for ensuring that the road transport aspect of the business operates in compliance with the regulatory regime. That means that they cannot plead ignorance or put the blame on the transport manager because they are required to have sufficient knowledge of the regulatory regime to ensure compliance in general and the proper performance of the transport manager’s duties in particular.”

46. It is clear that the TC found that there were very serious shortcomings in the Appellant’s operation and that he regarded Mr. Kodzik as ultimately responsible for them. The grounds of appeal are not very helpful on this issue, since in one sentence reference is made to “all the shortcomings that have arisen” and in the next Mr. Kodzik contends that the Appellant’s service in 2020 was not “below the standard”. He supports the latter assertion by saying that during lockdown he had limited access to the DAF centre where he carried out brake tests, which he says had a direct impact on the December result of the lorry’s MOT. At the hearing before us, however, he told us that he could use the DAF centre during lockdown and it provided a good service. Moreover, the lorry failed its MOT in October rather than December 2020.

47. To the extent that the grounds of appeal accept that there were shortcomings, it is also stated “there should be only one answer to correcting” those shortcomings. No answer is given in the grounds themselves and when Mr. Kodzik was asked at the hearing what the answer was, he was unable to tell us. It emerged that the English version of the grounds of appeal is the product of translation, either by a computer programme or by a translator.

48. We therefore see no basis for the conclusion that the TC was wrong in finding, on the evidence before him, that there were very serious shortcomings for which the director and through him the Appellant were ultimately responsible. The TC then rightly addressed the question of future compliance and did so having already stated as a negative factor that there had been insufficient or ineffective changes made to ensure future compliance.

49. We have set out in paragraph 20 above the oral evidence Mr. Kodzik gave about future compliance, which also covers changes following Mr. Thomas’s inspection. Allowing for the limitations of Mr. Kodzik’s English, it nevertheless gives the impression that he found keeping up with the paperwork burdensome and did not expect he would always get it right. We note that by the time of the inquiry the Appellant had had more than four months to act on Mr. Thomas’s findings and to improve compliance and in our view the TC’s criticisms of what had been achieved in that period, as evidenced before him, were justified. We also note that Mr. Kodzik seemed at the inquiry to have no grasp of the scale and extent of Mr. Fennell’s deficiencies as a transport manager, to the extent that he described him as a “top man”.

50. In the grounds of appeal it is stated that the long question about what the

Appellant or Mr. Kodzik would do in the future to avoid similar situations was “not obvious” to him. A lack of understanding does not emerge from the transcript, but, putting that to one side, in any event the Appellant has not subsequently taken the opportunity to answer the question. At the hearing Mr. Kodzik told us that he had experience of transport managers other than Mr. Fennell and they had not attended the operating centre at all. He said he did not know what a good transport manager would do. He repeated what he had said at the inquiry, that Mr. Fennell said he did not want much but the truck must be in good condition.

51. In our view, the TC’s decision on loss of repute was well justified. There had been substantial non-compliance with the requirements of the regulatory system for which the Appellant was ultimately responsible and there was no evidence to show that Mr. Kodzik as the sole director of the Appellant understood the nature and extent of the failings and had taken appropriate corrective action. There was certainly no evidence to suggest that he had the knowledge necessary to ensure that Mr. Fennell was up to the job of transport manager and was able to supervise him to ensure he did a proper job. Nor was there any evidence that Mr. Kodzik proposed to take steps to put himself in a position to obtain such knowledge. Rather, he apparently proposed to continue to rely solely on Mr. Fennell.

52. For those reasons, this ground of appeal also fails.

(iii) Proportionality

53. Under this heading we address the complaint that the TC’s decision was too severe and unfair.

54. To the extent that the Appellant makes this complaint in relation to revocation, it cannot succeed. As we have said, consideration of proportionality is part of the consideration of loss of repute and for the reasons given in our view the TC was not wrong in the way he dealt with this. Having found loss of repute, the TC was obliged to revoke the licence under s.27(1).

55. Even if that were not the case, the TC was obliged to revoke the licence on the grounds of lack of financial standing and lack of professional competence. The lack of professional competence followed from Mr. Fennell’s loss of repute as transport manager.

56. We have, however, considered whether the decision could be said to be too severe and unfair in relation to disqualification, since revocation of a licence does not necessarily lead to disqualification. There is little in the decision to explain the reasons why the TC decided to disqualify the Appellant and Mr. Kodzik and it would have been helpful if the decision had said something more on this point. On a fair reading of the decision, however, it seems to us that there is sufficient to show that disqualification was imposed because of the very serious and wide-ranging nature of the problems with the Appellant’s operation which showed that safety was potentially at risk (particularly through the apparent omissions in relation to brake tests, the lack of proper driver defect reporting and the lack of proper analysis of drivers’ hours). In particular, it appears from Annex 4 to Statutory Document No. 10 that a starting point of severe to serious will involve consideration of disqualification. It also seems,

however, that the TC was being fairly lenient in imposing a period of six months and in doing so bore in mind the positive features he had identified. A period of disqualification of one to three years is often regarded as a starting point.

57. In our view a period of disqualification of both the Appellant and Mr. Kodzik was appropriate. Mr. Kodzik clearly has some learning to do before he will be in a position to ensure that the Appellant is employing a transport manager who is competent and to ensure that the job is done properly. His belief that he could drive a lorry on the public roads which had failed its MOT test is an example of his own lack of knowledge of basic and important matters and of the risk that he will simply rely on what he is told by someone else without being in a position to assess whether it is, or is likely to be, correct. The fact that when the Appellant was operating in Manchester it apparently employed transport managers who were even less effective than Mr. Fennell is another.

58. It follows that this ground of appeal fails also.

Mr. Kodzik's personal position

59. While it is understandable that Mr. Kodzik tends to see himself and the Appellant as one and the same, it is not legally correct. As we said at the outset, it is the Appellant's licence which has been revoked and any appeal against the revocation decision must necessarily be brought by the Appellant.

60. We recognise that if the appeal had been successful, there would have been no basis for disqualifying either the Appellant or Mr. Kodzik. Given that the appeal fails, however, there remains a theoretical possibility of different outcomes as between the Appellant and Mr. Kodzik on the issue of disqualification. Nevertheless in the present case the relevant factors apply equally to Mr. Kodzik and to the Appellant, which acts solely through him. It is therefore appropriate that we should make clear that if Mr. Kodzik had intended to appeal in his personal capacity as director as well as on behalf of the appellant and ought therefore to have been shown as a second appellant, that appeal would also have failed.

Conclusion

61. For the reasons set out above, the appeal is dismissed.

62. Finally, I have to apologise for the delay in producing this decision, which was the result of other commitments.

(signed on the original)

E. Ovey
Judge of the Upper Tribunal
16th November 2021