



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

**Appeal No. UA-2021-000018-T
[2022] UKUT 141 (AAC)**

On appeal from the Decision of Gerallt Evans, Traffic Commissioner for the North West of England dated 29th July 2021

EGERTONS RECOVERY GROUP LIMITED

**Before: Upper Tribunal Judge Her Honour Judge Beech
Specialist Member of the Upper Tribunal Andrew Guest
Specialist Member of the Upper Tribunal David Rawsthorn**

Hearing date: 11th January 2022
Appeal Tribunal Venue: Field House, 15-25 Bream's Buildings, London, EC4A 1DZ
Decision date: 23rd May 2022

Representation:

Appellant: James Backhouse, of Backhouse Jones Solicitors

DECISION

The appeal is DISMISSED. The revocation of the Appellant's operator's licence will come into effect with immediate effect

Subject Matter: Loss of Professional Competence; Period of Grace; mandatory revocation at end of period of grace upon an operator's failure to comply with conditions imposed within the period of grace.

Cases referred to: 2014/040 & 041 C G Cargo Ltd & Sukhwinder Singh Sandhu; T/2020/72 Cambridge Removals & Storage Ltd; T/2011/036 LWB Limited; T/2014/08 Duncan McKee & Mary McKee; Bradley Fold Travel & Peter Wright v Secretary of State for Transport (2010) EWCA Civ.695.

REASONS FOR DECISION

1. This is an appeal from the decision of the Traffic Commissioner for the North West of England ("the TC") dated 29th July 2021 when he revoked the Appellant's standard international operator's licence with immediate effect

under s.27(1)(a) of the Goods Vehicles (Licensing of Operators) Act 1995 (“the 1995 Act”).

2. The background to this appeal can be found in the appeal bundle and is as follows. The Appellant (“Egertons”) is a specialist vehicle recovery operator with depots throughout the UK. The licence with which this appeal is concerned had an operating centre in Manchester with an authorisation of five vehicles and four trailers. Richard Iddon was the nominated transport manager.
3. On 18th January 2021, Mr Iddon used the VOL on-line facility to remove his name as transport manager from the licence. His action caused a letter of the same date to be automatically generated in the name of Jan Harney of the Office of the Traffic Commissioner (“OTC”) which was sent for the attention of Mr Iddon. The letter informed Mr Iddon that it had come to the traffic commissioner’s attention that there was no transport manager specified on the licence nor a period of grace in place and that accordingly, the Appellant was no longer professionally competent. The letter went on:

“Professional competence is a continuing and mandatory requirement of holding a licence and is only met when a suitably qualified transport manager has been approved on a licence by the traffic commissioner. It is also a condition of your operator’s licence that you notify the traffic commissioner of any change, which affects your ability to fulfil the requirement within 28 days.

Section 27(1) of the Act states that the traffic commissioner shall direct that a standard licence be revoked if at any time it appears that the licence-holder no longer satisfies the requirement to be professionally competent.

In view of the evidence currently available, the traffic commissioner considers that you no longer satisfy the requirement to be professionally competent. In accordance with Section 27(2) of the Act, I am serving notice that the traffic commissioner is considering the revocation of your licence on the grounds detailed above. Under Section 27(3) you are entitled to make written representations to the traffic commissioner. Any written representations must be made to this office by 08/02/2021 for the traffic commissioner’s consideration.

Your representations may include an application to add a replacement transport manager to your licence. You can do this by using the online facility (website address given).

Furthermore, Section 29(1) states that you may request a public inquiry in order to offer further evidence as to why the licence should not be revoked. Any such request must be made to this office by the date given above”.

However, it is important that even if you apply to nominate a transport manager using the online facility you must still respond to this letter by the date specified. You are also required to provide an explanation as to why you failed to comply with the condition to notify the traffic commissioner of the change in your professional competence. Until a transport manager is approved by the traffic commissioner the terms of this letter will apply. Responding with incomplete information could still result in the revocation of the licence.

The traffic commissioner may consider granting a period of grace to enable you to find a replacement and you should consider making such an application. Please note the traffic commissioner is not obliged to grant any such period and is unlikely to do so unless robust evidence of how the requirements will continue to be met is provided. An application for a period of grace must be made in writing and set out what you are doing to resolve the matter. Your application should also explain who will carry out the relevant responsibilities and provide details of their knowledge, skills and connection to the business....”

The letter warned that failure to respond by 8th February 2021 would result in the licence being revoked.

4. At 17.07 on the same date, Les Brooke, Financial Director for Egertons sent an email to Christopher Tucker of the OTC in the following terms:

“You will be aware that our Transport Manager, Richard Iddon, has resigned forthwith and removed his name from the on-line record as Transport Manager.

The background to this was that Mr. Iddon tendered his resignation, which we accepted, and had agreed to work until the end of January 2021.

Events have caused him to bring forward his departure to with immediate effect (sic)”.

The email advised that the operator was awaiting discussions with Foster Tachographs and Backhouse Jones solicitors as a matter of “*extreme importance and urgency*”.

The email was followed on the same day by another signed by Mr Brooke and Mark Egerton, Managing Director of Egertons, obviously in response to the OTC letter as it was addressed to Ms Harney. She was advised that the recruitment process for a new transport manager had been underway for some time but had been hindered by the third COVID lock-down. A period of grace for “*say, 3 months*” was requested to give the operator an opportunity to appoint the right candidate. During the period of grace (“PofG”) the responsibilities of the transport manager would be fulfilled by various members of the management team with support and assistance from Fosters Tachographs and Backhouse Jones Solicitors.

5. By way of a letter dated 5th March 2021, Egertons was informed that the TC had decided to allow the operator’s licence to remain in force until 16th May 2021 without a specified replacement transport manager. This was felt to be sufficient time for Egertons to regain its professional competence. The letter continued:

“Before the deadline you must complete the enclosed form TM1 and return it to this office with your nominated transport manager’s original certificate of professional competence in road haulage operations.

On your application the traffic commissioner has made a finding that you no longer meet the requirement of professional competence so as to allow you the requested Period of Grace. The traffic commissioner has therefore complied with the requirements of section 27(2) of the above Act. The traffic commissioner is obliged to revoke the licence under the provisions of section

27(1)(a) of that Act if you fail to add a suitably qualified transport manager to your licence (sic) by the deadline stated above. The transport manager must have been accepted by the traffic commissioner as capable of meeting the requirements of section 13A(3).

In the meantime you must continue to ensure ongoing compliance with all of the terms and conditions under which your licence was granted ...

As stated above if, by 16 May 2021, you remain unable to meet the requirement to be professionally competent, the traffic commissioner will revoke your licence under section 27(1)(a) of the Act.

Your company is advised that you must not assume that any further extension will be granted and that any request for an extension should be submitted well in advance of the current expiry date. You are reminded that in any event the maximum period of grace will expire on 16 July 2021."

6. On 17th May 2021 (a day after the PofG expired), Mr Brooke emailed Mr Stephenson of the OTC requesting an extension of the PofG to 11th June 2021. The email averred that Nicola Egerton (director), the operator's "Transport Manager designate", had only recently had her CPC examination confirmed for 11th June 2021. In the circumstances, Mr Brooke asked for an extension of time to 11th June 2021. By a letter dated 25th May 2021, the directors of Egertons were informed that the TC had decided to allow the licence to remain in force until 16th July 2021 (the decision was in fact made by DTC Evans). The TC wished to impress upon the operator that:

"the revocation would be automatic if at the very least, no application has been made for the appointment as transport manager of a person qualified to take on the role is not in place by 16 July 2021.

You should also be clear that this office will not issue any further reminders about this matter. And that if the licence is to continue your company ought to put in place a contingency arrangements (sic) to cover the prospect that the applicant TM Nikki Egerton might be unsuccessful/not know her results.

This is felt a sufficient period for you to regain your professional competence. Before this deadline you must complete the enclosed form TM1 and return it to this office with your nominated transport manager's original certificate of professional competence ..

On your application the traffic commissioner has made a finding that you no longer meet the requirement of professional competence so as to allow you the requested Period of Grace. The Traffic Commissioner has therefore complied with the requirements of section 27(2) of the above Act. The traffic commissioner is obliged to revoke the licence under the provisions of section 27(1)(a) of that Act if you fail to add a suitably qualified transport manager to your licence by the deadline stated above. That transport manager must have been accepted by the traffic commissioner as capable of meeting the requirements of section 13A(3)...".

The warning was repeated that revocation would follow if by 16th July 2021, the operator was unable to meet the requirement to be professionally competent.

7. Nothing further was heard from Egertons and on 26th July 2021, the TC made the following determination:

“The maximum period of grace allowable has passed and the operator appears to have taken no steps to apply for the appointment of a new TM. The operator appears to be well aware of the situation from its previous correspondence.

I am concerned that someone is still using the former TM’s details to access the self service portal as recently as June 2021.

Revocation must now be confirmed ..”

The decision was notified to Egertons in a letter sent by email dated 29th July 2021.

8. The above emailed letter prompted a response on the same day from Steve Rothwell, the Regional Operations Manager of the Mansfield Group which informed the OTC that Egertons was the sister company of DH Mansfield Ltd, both being owned by Egerton Holdings Ltd. The email went on:

“Currently they have a person undergoing the TM qualification and expected the results by 16th July however, there was a delay in receiving them and as such I was appointed Tm for Egertons Recovery. Unfortunately, an admin error has led to the application not being submitted.

I am now seeking your advice as to which way to proceed to have the licence reinstated.

If you prefer to have a call to further explain please feel free to call on the number below.”

There then followed an email from James Backhouse (“Mr Backhouse”) sent on 2nd August 2021 informing the OTC that he was “*trying to avoid the costs and time of reapplying for a licence and appealing the revocation*”. Attached to the email was a letter from Mr Backhouse; a copy letter to Mr Rothwell from Mark Egerton dated 14th July 2021 purporting to appoint him as Egertons’ transport manager for a maximum of six months with immediate effect; Mr Rothwell’s CPC certificate and underlying certificates of qualification. In his letter, Mr Backhouse asserted that the revocation of the licence had amounted to a “*procedural irregularity*” and was “*unlawful*” by reason of the TC’s failure to comply with the provisions of sections 27 and 29 of the 1995 Act. The arguments advanced in support of those assertions were repeated before this Tribunal (see below) and do not require repetition here. A request for a public inquiry was made or in the alternative, the traffic commissioner was invited to set aside the order of revocation.

9. The TC refused both requests. He had not seen any evidence that the purported appointment of Mr Rothwell dated 14th July 2021 had been submitted to the OTC prior to the expiry of the PofG on 16th July 2021. He referred to the Tribunal decision of 2014/040 & 041 C G Cargo Ltd & Sukhwinder Singh Sandhu in which it was determined that an operator will not meet the requirements of Article 4 of Regulation (EC) No 1071/2009 (“the 2009 Regulation”) unless and until the appointment is approved by the traffic commissioner. He took account of the fact that Egertons had been called to a public inquiry in April 2019 and had been given a formal and final warning at

that stage and that the operator had then been called to a further inquiry in January 2020, although no further action had been taken at that stage. It was reasonable to expect that an operator with such a recent history should have been more careful to ensure prompt compliance with warnings from the TC. He was satisfied that the terms of sections 27 and 29 of the 1995 Act had been complied with. The order of revocation was the completion of the process that had started with the removal of Mr Iddon on 16th January 2021 along with the formal notices contained in the letter of 18th January 2021.

10. By a Notice of Appeal dated 10th August 2021, Egertons appealed the order of revocation. A stay of the order was granted by Judge Hemmingway on 25th August 2021.

The Appeal

11. At the hearing of this appeal, Mr Backhouse appeared on behalf of Egertons having previously filed a skeleton argument and a bundle of authorities and legislation for which we were grateful. Mr Backhouse helpfully summarised the grounds of appeal as follows:

- 1) The TC erred in fact and in law in finding that Egertons no longer satisfied the requirement to be professionally competent under s.27(1)(a) of the 1995 Act;
- 2) The TC erred in law and procedurally in failing to refer to and offer to Egertons the opportunity to make written representations as required by s.27(2) & (3) of the 1995 Act and/or to be heard at Public Inquiry in accordance with ss.29 and 27(4) of the 1995 Act, before making the determination under s.27(1) in the letter dated 29th July 2021; and
- 3) In interpreting the legislation in the way that he did, the TC deprived Egertons of their right to a fair hearing, indeed to any substantive hearing at all, pursuant to Article 6 of the European Convention on Human Rights and Freedoms as it applies in England and Wales, by virtue of the Human Rights Act 1998.

Mr Backhouse's submissions in support of the grounds are set out below.

Ground 1

12. The obligation to designate a Transport Manager on an operator's licence is contained in Articles 3(c) and 4(1) of the 2009 Regulation. Article 3 reads:

“Undertakings engaged in the occupation of road transport operator shall:
(a) have an effective and stable establishment in the United Kingdom;
(b) be of good repute;
(b) have appropriate financial standing; and
(c) have the requisite professional competence.”

Professional competence is achieved by complying with Article 4 of the Regulation and designating a Transport Manager who meets the requirements of Article 8 entitled, *“Conditions relating to the requirement of professional competence”*.

13. Article 4(1) of the Regulation reads: *“An undertaking which engages in the occupation of road transport operator shall designate at least one natural person, the transport manager, who satisfies the requirements set out in Article 3(1)(b) and (d) and who:*
(a) effectively and continuously manages the transport activities of the undertaking;
(b) has a genuine link to the undertaking, such as being an employee, director, owner or shareholder or administering it, or, if the undertaking is a natural person, is that person; and
(c) is resident in the United Kingdom or a Member State.”

Article 4(4) reads:

“The undertaking shall notify the competent authority of the transport manager or managers designated”.

(We note that Article 4 has since been amended by Goods Vehicles (Licencing of Operators) (Amendment) Regulations 2022/293).

14. Mr Backhouse submitted that it was apparent that Article 4 prescribes two steps for an operator to take:
- a) The designation step set out in Article 4(1) which requires the operator to designate a natural person, meeting the qualifying criteria, as transport manager. By that designation, the operator meets the requirement to have professional competence; and
 - b) The administrative step whereby the operator notifies the TC of the identity of the designated transport manager.

Mr Backhouse took issue with the OTC’s letter dated 18th January 2021 describing this process as an *“application to appoint”* a transport manager.

15. He then turned to s.13A(2) of the 1995 Act which sets out the requirements in domestic legislation about which a TC needs to be satisfied upon an application for a licence. Section 13A(2) reads:

“(2) The first requirement is that the traffic commissioner is satisfied that the applicant—
(a) has an effective and stable establishment in Great Britain (as determined in accordance with Article 5 of the 2009 Regulation),
(b) is of good repute (as determined in accordance with paragraphs 1 to 5 of Schedule 3),
(c) has appropriate financial standing (as determined in accordance with Article 7 of the 2009 Regulation), and
(d) is professionally competent (as determined in accordance with paragraphs 8 to 13 of Schedule 3).”

Section 13A(3) of the Act reads:

“(3) The second requirement is that the traffic commissioner is satisfied that the applicant has designated a transport manager in accordance with Article 4 of the 2009 Regulation who –

(a) is of good repute (as determined in accordance with paragraphs 1 to 5 of Schedule 3),

(b) is professionally competent (as determined in accordance with paragraph 13 of Schedule 3), and

(c) in the case of a transport manager designated under Article 4.2 of the 2009 Regulation—

(i) is not prohibited from being so designated by a traffic commissioner, and

(ii) is not designated to act as transport manager for a greater number of road transport undertakings or in respect of a greater number of vehicles than the traffic commissioner considers appropriate, having regard to the upper limits in Article 4.2(c) of the 2009 Regulation, or such smaller number as the commissioner considers appropriate (see Article 4.3 of the Regulation).”

16. Mr Backhouse submitted that it was clear that Parliament’s approach in the Act is in all material respects the same as that prescribed in the Regulation: (1) the designation step, and (2) the administrative (notification) step (although we note that there is no equivalent provision to Article 4(4) in s.13A). Mr Backhouse continued: it is not the case that the TC has any power at all to ‘approve’ or ‘reject’ the notification of that designation. The TC can explore whether the designation in fact complies with the conditions and if it does not then the TC can determine that the operator is not professionally competent.
17. If, as in this case, the designated person meets the criteria of Article 8 and is not restricted by Article 4(3), (Article 4(3) relating to the appointment of External Transport Managers who are restricted by the number of vehicles/operators licences they can be responsible for), then the TC has no discretion to ‘refuse’ a notification of designation.
18. Consequentially, the Traffic Commissioner is entitled to examine, where an operator has designated a transport manager, that the designated person meets the regulatory criteria. However, assuming that he or she does meet those criteria, then that operator is professionally competent from the point in time that the person was designated to that role. The question as to whether an operator is professionally competent is purely a question of fact determined retrospectively and is based on evidence as to whether the operator has designated a suitably qualified person who meets the regulatory criteria.
19. Failure to notify the appointment of a transport manager is a breach of a licence condition and therefore a criminal offence which also gives rise to discretionary action pursuant to section 26 of the Act. However, a failure to notify does not, of itself, determine whether the operator is, professionally competent. If there is evidence of the designation of a suitably qualified person in the role at all material times, the operator remains professionally competent.
20. Mr Backhouse submitted that the Traffic Commissioner erred in both fact and law in ordering revocation on 26th July 2021 as Egertons had in fact designated their replacement Transport Manager, Mr Steve Rothwell, on 14th July 2021, before the expiry of the PofG granted by the TC. The step which Egertons had not taken at the date of the Traffic Commissioner’s determination, was the administrative step of notifying the TC that it had designated Mr Rothwell as transport manager on its licence . No determination

was made by the TC whether Mr Rothwell fulfilled the requirements set out above and so it follows, no determination as to whether Egertons fulfilled the professional competence criteria irrespective of the failure of the operator to notify the TC within the PofG. In essence, the TC erred in law in conflating the designation of a transport manager to meet professional competence, with the separate requirement to notify him of that designation.

21. In addition to the above, Mr Backhouse relied upon the provisions of s.22(2)(a) and (b) of the 1995 Act which reads as follows:

“(2) On issuing a standard licence, a traffic commissioner shall attach to it the following conditions, namely—

(a) a condition requiring the licence-holder to inform a traffic commissioner of any event which could affect the fulfilment by the licence-holder of any of the requirements of section 13A(2), and to do so within 28 days of the event; and

(b) a condition requiring the licence-holder to inform a traffic commissioner of any event which could affect the fulfilment by a transport manager of the requirements mentioned in section 13A(3), and to do so within 28 days of the event coming to the licence-holder's knowledge.”

Mr Backhouse submitted that these licence conditions were applicable to what he described as ‘the administrative step’ of notifying the TC of the designation of a transport manager. He submitted that an operator has 28 days from the date that the operator designated a person to be their transport manager to then take ‘the notification step’ and notify the Traffic Commissioner of their designated Transport Manager.

In this case, Egertons had completed ‘the designation step’ required on 14th July 2021 by appointing Mr Steve Rothwell to be its transport manager and evidence of this appointment had been provided to the TC within 28 days, albeit after the decision was made to revoke the licence. It followed that Egertons had complied with its obligations within the prescribed periods.

22. Indeed even if the Traffic Commissioner was entitled to revoke a licence without offering a public inquiry, which is not accepted by Mr Backhouse (see below), on the basis that the mandatory requirement of professional competence was not met, he was not enabled on the facts to do so before the expiry of the notification period of 28 days set out above. This is because until the expiry of that time period, from the last date of the period of grace, the Traffic Commissioner could not rationally make a finding of fact on the balance of probabilities that professional competence, was not being complied with.
23. The only other way that a decision to revoke could be made at the end of the PofG (without waiting for the 28 day period to expire) would have been to ask if the operator had designated a qualified transport manager). This request of the operator was not made.

Ground 2

24. Section 27 which reads:

“27. Revocation of standard licences.

(1) *A traffic commissioner shall direct that a standard licence be revoked if at any time it appears to him that —*

(a) *the licence-holder no longer satisfies the requirements of section 13A(2), or*

(b) *the transport manager designated in accordance with Article 4 of the 2009 Regulation no longer satisfies the requirements of section 13A(3).*

(2) *Before giving a direction under subsection (1) in respect of a licence, a traffic commissioner shall give to its holder notice in writing that he is considering giving such a direction.*

(3) *A notice under subsection (2) shall state the grounds on which the traffic commissioner is considering giving a direction under subsection (1) and —*

(a) *shall invite the licence-holder to make written representations with respect to those grounds, and*

(b) *shall state that any such representations must be received by the commissioner dealing with the matter within 21 days of the date of the notice;*

and a traffic commissioner may not give a direction under subsection (1) without considering any representations duly made under this subsection.”

(3A) *A notice under subsection (2) may set a time limit, in accordance with Article 13.1 of the 2009 Regulation, for the licence-holder to rectify the situation.*

(3B) *If the licence-holder rectifies the situation within the time limit set under subsection (3A), the traffic commissioner must not make the direction under subsection (1).*

(4) *This section has effect subject to section 29 (and, in particular, nothing in subsections (3) to (3B) above shall be taken to affect a person's right under section 29(1) to require the holding of an inquiry).*

25. Mr Backhouse submitted that there were four procedural steps to be taken prior to the revocation of a licence:

- there must be a finding, on the information before the TC, that one of the mandatory criteria is not met;
- a notice that the TC is considering revocation must be sent to the operator which includes the content prescribed under subsection 3 including the right to make written representations which must then be considered;
- Consideration of whether a PofG should be granted, but only in the context of sending a section 27(2) notice. A PofG can be granted without a request for such an order and can be contained within the s.27(2) notice;

- There is an overarching right to request a public inquiry and by virtue of the wording of s.29 of the 1995 Act, s.27 is subordinate to this right and importantly, s.27(4) preserves this right to a public inquiry even where the subsection 3A power to grant a PofG is used. Mr Backhouse submitted that the legislation reinforces the s.29 right to a public inquiry even if all the other safeguards in s.27 are provided.

26. Section 29 reads:

“(1) A traffic commissioner shall not—

(a) give a direction under section 26(1) or (2) or 27(1) in respect of any licence,

(b) make an order under section 26(6) in respect of any vehicle, or

(c) make an order or give a direction under section 28(1) or (4) in respect of any person,

without first holding an inquiry if the holder of the licence or (as the case may be) the person concerned requests that an inquiry be held.”

Mr Backhouse submitted that an operator must be asked and must refuse or fail to respond to a reminder that they can request a public inquiry before the TC is empowered to give a direction under section 27(1) and the reminder must be contemporaneous with the proposed decision to revoke the licence and must continue to apply until that decision is made.

27. Apart from the letter of 18th January 2021, the correspondence from the OTC made it clear that the right to a public inquiry was no longer available to Egertons and that revocation was automatic at the end of the period of grace. This approach amounted to an error in law as it was not consistent with any reading of s27(4) or s29 of the Act.

28. Moreover, the TC erred in law in granting a PofG in March 2021 and then granting an extension in May 2021 when such orders were not part of a s.27(2) notice as required as part of ss.3A (which would have included the mandatory requirements contained in s.27(3)), thereby failing to afford Egertons the right to make further written representations. As a result, the TC in turn failed to consider any written representations prior to the decision to revoke and failed to inform Egertons of its right to a public inquiry which supersedes the s27(3A) PofG. The earlier notice set out in the letter of 18th March 2021 did not extinguish the TC’s obligation to comply with his obligations under ss.27(2) and (3) notice on any subsequent proposal to revoke, even if the issue giving rise to the proposal to revoke is the same mandatory criteria not being met at that time. Mr Backhouse submitted that this point was important because having decided not to revoke following a response from an operator to the initial notice, the TC restarted the process as if he was considering whether to make a revocation order at some future point. It is likely that the factual basis will have changed and the point of the s.27(2) notice was to give the TC an opportunity to receive an updated position and representations to protect a licence at risk of being revoked.

29. Mr Backhouse described the TC's decision to grant a PofG (such decision being conveyed in the letter of 5th March 2021) as a decision "*not to revoke*" and at that stage the process under section 27 was concluded. Automatic revocation did not follow upon the expiry of the PofG. In July 2021, when the PofG expired, the TC was again required to comply with s.27(2) and s.29 of 1995 Act. In a case such as this, the TC was required to follow the s.27(2) procedure on three separate occasions in order to revoke a licence which has been allowed to continue by virtue of a PofG.
30. Had the TC followed the correct procedure, the operator would have been offered an opportunity to make further written representations or request a public inquiry before the TC made the determination he did under s.27(1) on 26th July 2021. The failure to do so deprived Egertons of the right to a fair trial (Ground 3).

Discussion

31. In order to successfully apply for a standard operator's licence, the operator **shall** satisfy the four requirements set out in Article 3(1) of the 2009 Regulation and s.13(A)(2) of the 1995 Act and a licence will not be granted unless the TC is so satisfied.
32. With regard to professional competence, Article 4(1) requires the operator to designate one or more persons as transport manager who satisfy the requirements set out in Article 3(1)(b) and (d) i.e. individuals who are of good repute and of the requisite professional competence and who "*effectively and continuously manages the transport activities of the undertaking .. has a genuine link to the undertaking ... and is resident in the United Kingdom or a Member State*". In his submissions, Mr Backhouse did not refer to Article 4(2) which sets out the additional matters about which the TC needs to be satisfied with regard to external transport managers. Nor did he refer to Article 4(3). They read:

"2. If an undertaking does not satisfy the requirement of professional competence laid down in Article 3(1)(d), the competent authority may authorise it to engage in the occupation of road transport operator without a transport manager designated in accordance with paragraph 1 of this Article, provided that:

- (a) *the undertaking designates a natural person residing in the United Kingdom or a Member State who satisfies the requirements laid down in Article 3(1)(b) and (d), and who is entitled under contract to carry out duties as transport manager on behalf of the undertaking;*
- (b) *the contract linking the undertaking with the person referred to in point (a) specifies the tasks to be performed on an effective and continuous basis by that person and indicates his or her responsibilities as transport manager. The tasks to be specified shall comprise, in particular, those relating to vehicle maintenance management, verification of transport contracts and documents, basic accounting, the assignment of loads or services to drivers and vehicles, and the verification of safety procedures;*

- (c) *in his or her capacity as transport manager, the person referred to in point (a) may manage the transport activities of up to four different undertakings carried out with a combined maximum total fleet of 50 vehicles; and*
- (d) *the person referred to in point (a) performs the specified tasks solely in the interests of the undertaking and his or her responsibilities are exercised independently of any undertakings for which the undertaking carries out transport operations.*

3. A competent authority may decide that a transport manager designated in accordance with paragraph 1 may not in addition be designated in accordance with paragraph 2, or may only be so designated in respect of a limited number of undertakings or a fleet of vehicles that is smaller than that referred to in paragraph 2(c)".

- 33. In addition to the requirement that the TC must be satisfied that a designated transport manager fulfils the requirements of Article 4, Section 13A(3) makes it clear that an operator's licence will not be granted unless in addition, the TC is satisfied that the transport manager is not designated to act as a transport manager for a greater number of undertakings or in respect of a greater number of vehicles than the TC considers appropriate, having regard to the limits in Article 4.2(c), or some smaller number as the TC considers appropriate.
- 34. It is clear that there are considerable matters about which the TC must be satisfied with regard to transport managers before the application to nominate a transport manager will be accepted and no doubt, that is the reason why the form "*TM1: Application to add a Transport Manager to a licence*" contains 14 sections which require considerable detail about the transport manager which, if answered correctly and if accompanied by the required documentation, will assist a TC in determining whether the transport manager fulfils the requirements of Article 4 and s.13A(3). Moreover, section 14a of the form contains ten declarations that an internal transport manager must sign and eleven declarations that an external transport manager must sign. As for the applicant for a licence or an existing licence holder, the TM1 form contains two declarations that they must sign. It is clear and obvious, that without this form being properly completed and signed, a TC would be unable to be satisfied of all the matters concerning professional competence and the suitability of a designated transport manager, all of which amount to preconditions to a transport manager being accepted by the TC.
- 35. The application to add a transport manager to a licence using the TM1 Form is not an administrative step as described by Mr Backhouse. It is a step that is necessary to enable TCs to discharge their regulatory functions so as to be satisfied of all matters referred to above before an application for a licence will be granted and before the TC can be satisfied that an existing operator is/will be professionally competent and has nominated a suitable replacement transport manager. Our determination is supported by the Tribunal case of

T/2011/036 LWB Limited (which considered the wording of paragraph 3 of Schedule 3 and s.82(1) of the 1981 Act):

16. *For a company to satisfy the requirement of professional competence it must come within the terms of Paragraph 3 of Schedule 3 to the 1981 Act which provides that: “a company satisfies the requirement as to professional competence if, and so long as, it has a transport manager or transport managers of its road transport business who, or each of whom, is of good repute and professionally competent”.*

It follows, in our view, from the terms of paragraph 3 of Schedule 3, that the appointment of a new transport manager is, on its own, not enough to satisfy the requirement of professional competence. Instead the operator must go further and show that the person appointed is of ‘good repute’ and ‘professionally competent’ and that the person is under contract to provide “continuous and effective responsibility for the management of the road passenger transport operations of the business”. That is why notification by TM1(G), is so important because it is the contents of this form, together with the original of the Certificate of Professional Competence, (or other proof of professional competence), the contract and the declaration by the new transport manager forming part of TM(1)G, which enables checks to be made to confirm that paragraph 3 of Schedule 3 has been satisfied. The existence of a contract is important because, together with other background information and the answers given on TM1(G) it will assist the Traffic Commissioner to assess whether the transport manager will be able to have: “continuous and effective responsibility for the transport operations” carried out under the operator’s licence, as required by s.82(1) of the 1981 Act.

Our determination is further supported by the Tribunal case of T/2014/40-41 C G Cargo Ltd & Sukhwinder Singh Sandhu in which the Tribunal determined in paragraph 8:

“ unless the Traffic Commission is satisfied that the nominated CPC holder will be able to undertake continuous and effective control of the undertaking’s transport activities, the nominated transport manager remains as described in the call-up letter – a proposed transport manager”.

36. We have also considered the use of the words “*designate*” and “*designated*” in the 2009 Regulation and s.13A. It is of note, that the On-Line Edition of the Oxford English Dictionary (March 2022) defines “*designate*” as:

“Marked out for a particular position; appointed to office but not yet installed”.

We find that the use of “*designate*” rather than “*appoint*” is important as it implies or infers that something else is left to be done once a transport manager has been identified by an applicant for a licence or an existing operator and terms and conditions agreed. We find that the “something else left to be done” is the application to nominate the individual/s for approval or otherwise by the TC.

37. We reject the proposition that an operator can simply designate a new transport manager and acquire professional competence from that moment without reference to a TC (the something else to be done). Operators will not be professionally competent unless the proposed transport manager is formally nominated and a TC is satisfied of all the required matters whether at the outset when an application for a licence is applied for or when the operator is proposing to replace or add a transport manager or has lost professional competence and is given a period of grace to rectify the position within the period given (see below).
38. The requirements set out in s.13A are mandatory requirements which must be complied with at all times during the life of a licence and every licence has attached to it, conditions requiring the operator:
- to inform the traffic commissioner of any event which could affect the fulfilment by the operator of any requirements of s.13A(2) and to do so within 28 days of the event (see s.22(2)(a)) and
 - to inform the traffic commissioner of any event which could affect the fulfilment by a transport manager of the requirements mentioned in s.13A(3) and to do so within 28 days of the event coming to the operator's knowledge (see s.22(2)(b)).

Since the introduction of the VOL on-line system which operators and transport managers use to notify the OTC of changes, more often than not, changes which may affect the operator's compliance with the mandatory requirements and in particular, the requirements to have a transport manager and to be professionally competent, are notified at the time of or soon after the resignation or departure of the nominated transport manager. As in this case, s.27(2) notices are automatically generated. If the VOL system is not used, then an operator has 28 days to inform the TC of a material change and that too will generate a s.27(2) letter or a call up letter to a public inquiry.

39. Section 27 makes the position clear: if at any time it appears to a TC that a licence holder no longer satisfies the requirements of s.13A(2) or that the transport manager no longer satisfies the requirements of s.13A(3): the TC "*shall direct that a standard licence be revoked*" (our emphasis). Before such an order can be made, a s.27(2) notice must be sent, stating the grounds upon which the TC is considering an order of revocation and inviting the operator to make representations in respect of those grounds which must be received by the OTC within 21 days of the notice. Moreover, the right of an operator to request a public inquiry when a TC is considering an order of revocation (as enshrined in s.29 of the 1995 Act) is highlighted by s.27(4). The s.27(2) notice in this case, fully complied with the requirements of that section. Furthermore, the operator was notified of the TC's power to grant a PofG and invited to consider making such a request. It is for the operator to determine within the period allowed whether to request a public inquiry or make representations (including the nomination of a new transport manager) and/or request a PofG. A request for a PofG is an admission on the part of the operator that they no longer satisfy one or more of the statutory requirements.

40. With regard to the PofG, Article 13.1 clearly envisages a two-step process. The first is that when a TC establishes that an operator “*runs the risk*” of no longer fulfilling the requirements laid down in Article 3, it shall notify the undertaking thereof. We consider this first step to be the s.27(2) notice. The second step is when a TC “*establishes that one or more of the requirements is no longer satisfied*” at which point the TC may set a time limit (or PofG) and that will be separately conveyed at a later date to the s.27(2) notice.
41. It is clear that a finding that an operator no longer meets one of the requirements is necessary before a PofG can be considered and this is how the TC approached the operator’s position in this case as evidenced by the wording of the TC’s letter of 5th March 2021 and in particular: “.. *On your application the traffic commissioner has made a finding that you no longer meet the requirement of professional competence so as to allow you the requested Period of Grace*”.

Without a PofG, the licence “*shall*” be revoked.

42. The TCs discretion to grant a PofG is dealt with in an unsatisfactory way by s.27(3A). “Unsatisfactory” because the section states that the s.27(2) notice “*may set a time limit*”, without reference to any other circumstances in which a PofG could be set and granted. However, by reason of the use of the word “*may*” in the subsection, we do not accept that a PofG can only be granted in a s.27(2) notice. If that was the intention of Parliament, we would have expected more restrictive language to be used, making clear that a PofG can only be granted in a s.27(2) notice. We are satisfied that Mr Backhouse’s submission, wrongly restricts the terms of the subsection. Moreover, we consider that such a restrictive interpretation (if that was the intention) would represent a misunderstanding on the part of those who drafted the sub-section or represents a misinterpretation of Article 13. The reasons for that determination are:
- a) the sub-section does not reflect the contents of Article 13.1 and its two-step process;
 - b) it fails to take account of the fact that when the s.27(2) notice is issued, the TC may not have the necessary information before them or an admission from the operator that one of the mandatory requirements is no longer met;
 - c) even if the TC has the necessary information or an admission as required in order to conclude that one of the mandatory requirements is no longer satisfied, in the vast majority of cases in which a s.27(2) notice has been issued, the TC at that stage will have little or no information before them to determine whether the discretion should be exercised at all and if there is such information, the appropriate length of the period of grace to be granted. As was stated in *T/2014/08 Duncan McKee & Mary McKee*:

“ .. when considering whether or not to grant a period of grace, Traffic Commissioners will need some tangible evidence, beyond mere hope and aspiration, that granting a period of grace will be worthwhile, and that there are reasonable prospects for a good outcome. Some sort of analysis along these lines will be necessary because, amongst other reasons, Traffic

Commissioners have to decide how long to grant. Moreover, as with a stay, there is no point in granting a period of grace if the likely effect is just to put off the evil day when regulatory action will have to be taken.”

Whilst there may be cases in which the TC has been given notice of a material change along with representations and a request for a PofG prior to the s.27(2) notice being issued, the notice cannot be dispensed with as the contents ensure that the operator is aware of all of the options available to them (including the right to request a public inquiry). This is particularly important when the request for a PofG amounts to an admission that one of the mandatory requirements is no longer satisfied and that as a consequence, without a PofG being granted, the licence shall be revoked. We find that it is almost inevitable that the grant of a PofG will be subsequent to the s.27(2) notice.

43. In rejecting Mr Backhouse’s submission we are further satisfied that to require a second s.27(2) notice would be nonsensical against the background of the regulatory framework. The operator will have already been offered the opportunity to make representations (and in the case of professional competence, to nominate a transport manager), to request a public inquiry and/or a PofG. The granting of a PofG will inevitably have flowed from representations and a request for such an order (which amounts to an admission that a mandatory requirement is no longer satisfied) and in those circumstances, the operator will have satisfied the TC that their discretion should be exercised in favour of a PofG (as occurred in this case). The contents of a s.27(2) notice do not need to be repeated. Quoting the words in paragraph 24 of the Tribunal decision of T/2020/72 Cambridge Removals & Storage Ltd at that stage, “*nothing remained to be said*” save for granting the PofG and spelling out the consequences of failing to comply with its terms. We are satisfied that the s.27(2) notice and the letter granting a period of grace, when taken together reflect the process set out in Article 13.1 of the 2009 Regulation and constitute compliance with s.27(3A). The letter notifying the decision to grant a PofG is not required to be in the form of a second s.27(2) notice. Neither is there a requirement to repeat the offer of a public inquiry. The first offer in the s.27(2) letter complies with s.27(4) and s.29.
44. We reject Mr Backhouse’s submission that the granting of a PofG amounts to a decision “*not to revoke*” a licence which entitles an operator to a further s.27(2) notice rather than automatic revocation. At the stage of granting the PofG, the finding of loss of professional competence will have already been made and unless a PofG is granted and complied with, the licence will be revoked. A period of grace is a regulatory dispensation to avoid what would otherwise amount to the inevitable i.e. an order of revocation. When a PofG is granted, it will be for the operator to ensure that they comply with the terms of the PofG by providing the TC with the information required to ensure that the TC is in a position to determine whether the operator is compliant by the end of the period.
45. Mr Backhouse’s submission ignores the wording of Article 13.3 of the 2009 Regulation which reads as follows:

“If the competent authority establishes that the undertaking no longer satisfies one or more of the requirements laid down in Article 3, it shall suspend or withdraw the authorisation to engage in the occupation of road transport operator within the time limits referred to in paragraph 1 of this Article” (our emphasis).

The Article makes clear that revocation is the inevitable result of failing to satisfy one or more of the Article 3 requirements within the PofG. It is of course, for the operator to provide to the TC, the information necessary for the TC to be satisfied that the operator has rectified the position within the PofG.

Section 27(3B) of the 1995 Act uses similar language to Article 13.3:

“If the licence-holder rectifies the situation within the time limit ... the traffic commissioner must not make the direction under subsection (1)” (our emphasis).

The wording of s.27(1), Article 13(3) and s.27(3B) is not open to an interpretation so as to provide the operator with any further opportunity to either make representations or request a public inquiry once the PofG has come to an end. In this case, Egertons was required to complete and file a TM1 form and return it to the OTC with the transport managers original certificate of competence within the PofG which it did not do.

46. It follows from the above, that we reject Mr Backhouse’s submission that s.22 applies to the steps taken to rectify the position with regard to mandatory matters during a PofG. The relevant material change was that which triggered the s.27(2) letter (in this case, the resignation of Mr Iddon as transport manager). That material change was addressed by Egertons in acknowledging the loss of professional competence and the request and grant of a PofG, a regulatory dispensation. The failure to comply with the terms of that regulatory dispensation meant that an order of revocation was mandatory. Section 22 can play no part in the process laid down by Article 13 and s.27 and cannot be relied upon to extend the period during which an operator must rectify the position to avoid losing their licence. To argue otherwise, is an attempt to circumvent the clear process set out in the regulatory and statutory regime.
47. The failure of Egertons to apply to the Traffic Commissioner to appoint a transport manager who fulfilled all of the requirements set out in paragraphs 41 to 43 above, within the PofG, meant that revocation was inevitable. It follows that all grounds of appeal are rejected as we are not satisfied that there was any procedural unfairness in this case or that the TC’s decision was plainly wrong in any respect and neither the facts nor the law applicable in this case should impel the Tribunal to allow this appeal as per the test in Bradley Fold Travel & Peter Wright v Secretary of State for Transport (2010) EWCA Civ.695. The appeal is dismissed.

Postscript

48. Mr Backhouse sought to rely upon an additional ground concerning the interpretation of Article 13(3) of the 2009 Regulation. He submitted that the wording of the Article must be read directly into domestic legislation and accordingly, s.27 must be read so as to include a power to suspend a licence in the alternative to the power of revocation. He argued that having failed to read the section in that way, the TC had deprived Egertons of the opportunity of having its operator's licence suspended rather than revoked.
49. The above ground was not raised by Mr Backhouse in the request made to the TC to review his decision. Neither did it form a ground of appeal nor did it find its way into Mr Backhouse's skeleton argument, not even in passing. There was no application for the grounds of appeal to be amended either before the hearing or at the outset of it and Article 13 was not even included in the authorities and statute bundle provided by Mr Backhouse. The Tribunal has repeatedly stated that any new grounds of appeal which a representative of an operator wishes to raise during the course of an appeal hearing must be the subject of an application in advance of the hearing or at the very least, at the outset of the hearing (although that approach is to be discouraged). In raising additional grounds of appeal without the appropriate notice being given, an Appellant denies the Tribunal the opportunity to consider the grounds to determine whether permission should be granted and if necessary to make appropriate case management directions which may include an invitation to the Secretary of State for Transport to apply to be a party to assist the Tribunal on the issue raised. The failure to make an application to amend the grounds of appeal in this case so as to include the above argument is a serious one as it questions the manner in which Article 13 has been drawn down into the 1995 Act for which there may be a good explanation. In all the circumstances, we are satisfied that the Appellant should not be permitted to rely on the additional ground.
50. If this matter were to be raised again, the assistance of the Secretary of State would be required. Our preliminary view is that the legislature was entitled to determine how to implement Article 13(3) as it is within the margins of appreciation which include a discretion as to whether the legislature adopt either or both suspension and revocation as the result of a TC finding that an operator no longer satisfies one or more of the mandatory requirements. Of course, the power to suspend a licence following a finding at a public inquiry that there had been a material change under s.26(1)(h) is open to a TC if an operator requests a public inquiry.



**Her Honour Judge Beech
Judge of the Upper Tribunal**

23rd May 2022