



**KEVIN KING, trading as Kevin King & Sons Transport
KD PLANT AND HAULAGE LIMITED
[2024] UKUT 47 (AAC)**

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

UA-2023-000290-T

**IN AN APPEAL FROM THE DECISION OF:
ANTHONY SECULER, DEPUTY TRAFFIC COMMISSIONER FOR THE
NORTH WEST OF ENGLAND TRAFFIC AREA
DATED 13th February 2023**

Before:

**Elizabeth Ovey, Judge of the Upper Tribunal
Richard Fry, Specialist Member of the Upper Tribunal
Sarah Booth, Specialist Member of the Upper Tribunal**

**Appellants: KEVIN KING, trading as Kevin King & Sons Transport
KD PLANT AND HAULAGE LIMITED**

Attendance: Mr. Darren B. Finnegan appeared for the Appellants.

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

Date of hearing: 28th September 2023

Date of decision: 8th February 2024

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that the appeal be DISMISSED.

SUBJECT MATTER: Breach of drivers' hours and tachograph regulations; misleading application for standard licence; false evidence; whether findings of fact can stand; whether disproportionate

CASES REFERRED TO: *Associated Provincial Picture Houses Limited v. Wednesbury Corporation* [1948] 1 K.B. 223; *Dukes Transport (Craigavon) Limited*, Appeal 68/2001; *Bryan Haulage Limited (No. 2)* 217/2002; *Priority Freight Limited and Williams* 2009/225; *Bradley Fold Travel Limited and Peter*

Wright v. Secretary of State for Transport [2010] EWCA Civ 695, [2011] R.T.R. 13; *Gilders Transport Limited* T/2017/45; *John Stuart Strachan t/a Strachan Haulage* T/2019/25

REASONS FOR DECISION

Introduction

1. This is an appeal by Mr. Kevin King, trading as Kevin King & Sons Transport, and by KD Plant Hire and Haulage Limited (“the Company”) against the decisions of the Deputy Traffic Commissioner for the North West of England (“the TC”) given on 13th February 2023 that:

- 1.1. The operator’s licence in the name of Kevin King & Sons Transport (for convenience “Mr. King’s licence”) was revoked from 23.59 on 13th March 2023.
- 1.2. The Company’s operator’s licence was revoked from 23.59 on 13th March 2023.
- 1.3. Mr. King lost his good repute as a transport manager.
- 1.4. Mr. King was disqualified from acting as a transport manager for 12 months.
- 1.5. Mr. King was disqualified from holding or applying for an operator’s licence for 12 months beginning on 13th March 2023.
- 1.6. Ms. Debbie Wallace, a director of the Company, was disqualified from holding or applying for an operator’s licence for 12 months beginning on 13th March 2023.

2. On bringing their appeal, the appellants also sought a stay of the decisions set out in paragraphs 1.2 to 1.6 above. The stay was granted by the TC on 14th March 2023.

The facts

(a) *Mr. King’s licence*

3. Mr. King’s licence (OC1122141) was a standard operator’s licence with a start date of 30th August 2013. The continuation application by Mr. King dated 26th June 2018 contained the standard terms as to keeping the rules on drivers’ hours and tachographs and associated records, keeping vehicles in a fit and serviceable condition and driver defect reporting. At the material times Mr. King was the nominated transport manager on the licence. He applied to

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surrender the licence on 20th June 2021, two days after the Company's operator's licence was granted, but the application was not accepted.

4. Mr. King was called to a public inquiry to be held on 31st January 2023 by a letter dated 22nd December 2022 which identified areas of concern which we summarise as:

- 4.1. The issue of prohibition and fixed penalty notices in the last five years.
- 4.2. Breach of the undertakings as to the condition of vehicles, drivers' hours and tachographs and driver defect reporting.
- 4.3. Whether Mr. King as transport manager was professionally competent and of good repute.

5. The detailed evidence leading to the TC's concerns was contained primarily in a traffic examiner visit report dated 6th December 2022 from Johannah Groom and a maintenance investigation report following a visit on 4th May 2021 from Colin Brown, both of the Driver and Vehicle Standards Agency ("the DVSA"). Reliance was also placed on a DVSA interview with a driver, Jason Day.

6. Ms. Groom explained that on 4th May 2021 she began to conduct a compliance check for drivers' hours and systems. Her report recorded one prohibition dated 16th March 2018 in respect of a tachograph which was not fitted properly and no prosecutions or fixed penalties. On the day of the visit (4th May 2021) she downloaded some data and requested the production of further information, some of which, but not all, was received on 16th May 2021. When she downloaded that data she identified a number of occasions between 27th July 2020 and 26th January 2021 which appeared to constitute infringement of the drivers' hours and tachograph rules. In particular it appeared that Mr. Day had been using Mr. King's driver's card.

7. On 14th June 2021 Ms. Groom wrote to Mr. King requesting further information. Appointments were made for meetings with Mr. King on 2nd July (a date which Mr. King had said he was able to make), 7th July and 19th October 2021, all of which he failed to attend. He finally attended on 12th November 2021 and was interviewed under caution. Following the interview Ms. Groom concluded that Mr. King had been in hospital when his card was used and was not aware of the use made of it, but the systems in place did not highlight that that was happening. In consequence of that and his failures to attend meetings and produce documents she considered that he was not complying with the statement of intent in relation to the undertakings on the licence.

8. The transcript of the interview contains the following:

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- 8.1. When asked why he did not attend the interview on 2nd July 2021 after having confirmed that he would be available, Mr. King said, "I will be honest. I panicked. I thought I was going to lose everything. I panicked. I have not been in these situations before."
 - 8.2. Mr. King also thought at that time that he had surrendered the licence and so would not need to provide the required documentation.
 - 8.3. He ignored the second letter asking him to attend for interview and to provide documentation because again he panicked. He was aware it was an offence not to provide required documentation.
 - 8.4. He was aware of drivers' hours rules and regulations and carried out regular checks, but not as many as he should have done.
 - 8.5. He did not check the missing mileage reports as regularly as he should.
 - 8.6. In relation to use of his card when Mr. Day's driving time was close to 4½ hours, Mr. King's explanation was that he had had a motor bike accident on 19th July 2020 and was in hospital for about four weeks. His card was in his truck with all his belongings and that was how Mr. Day had been able to use it.
 - 8.7. The reports he had done did not flag up that his card had been used.
9. Mr. Brown's maintenance report showed in the "unsatisfactory" category ineffective management of driver defect reports, inability to establish contractor arrangements for inspection and maintenance and no system for tyre management arrangements. It also showed three immediate prohibition notices not identified in Ms. Groom's report which were such as to require report to the Office of the Traffic Commissioner ("the OTC"). Mr. Brown required from Mr. King as operator and Mr. King as transport manager a written explanation of the reasons for the reported shortcomings and what was going to be done to prevent future problems.
10. No such written explanation had been received by the time Mr. Brown digitally signed the report on 8th July 2021, after Mr. King had missed the appointments on 2nd and 7th July. Mr. Brown did, however, write to the OTC on 28th February 2022 stating that Mr. King had decided to co-operate with him and Ms. Groom in trying to address the shortcomings noted and he had been able to check the invoices for maintenance repairs which he required.
11. Mr. Day's interview was conducted on 2nd September 2021 and was

also under caution. The transcript contains the following:

- 11.1. Mr. Day had been employed by Mr. King as a sole driver for about a year and a half but had stopped working for him about three months earlier.
- 11.2. On 27th July 2021 he removed his tachograph card as he was about to reach his daily driving limit and to be due for a break and drove for 37 minutes without a card before Peter Dickinson took over. The explanation was that he wanted to get a little closer to the operating centre before calling Mr. Dickinson to “rescue” him because Mr. King “used to go mad” if someone was coming out a long distance.
- 11.3. Most of the times put to him when Mr. King’s card was used were occasions on which he used Mr. King’s card. These were occasions in August and September 2021. He had never done anything like that before Mr. King had his bike accident.
- 11.4. Mr. King gave Mr. Day his card.
- 11.5. Mr. Day felt pressured into driving using the two cards. Because Mr. King was off the road following the accident there were two units and two trailers to finance. Mr. King would ring him up and scream down the phone at him that they could not afford to pay for everything and would tell Mr. Day to use his card.
- 11.6. Mr. Day did not benefit from it. He did not get any extra pay. He did as he was told.
- 11.7. There was no excuse and he was sorry.

(b) Mr. King as transport manager

12. Mr. King was also called to the public inquiry to be held on 31st January 2023 in his capacities as transport manager for Kevin King & Sons Transport and the Company. The call-up letter was again dated 22nd December 2022 and stated that the inquiry would consider whether he continued to meet the requirement to be of good repute and accordingly could exercise effective and continuous management of the relevant transport operations. The evidence to be considered was effectively the evidence to be considered in relation to Mr. King’s licence.

(c) The Company’s licence

13. Documents obtained from Companies House show that the Company was incorporated on 12th March 2021, on which date Mr. King was appointed as a director. He resigned on 9th May 2021, five days after the visit to Ms.

Groom and Mr. Brown, and Ms. Wallace was appointed. Mr. King was reappointed as a director on 12th November 2021 and he and Ms. Wallace remained the directors at the date of the public inquiry. They live together and are both persons with significant control of the Company.

14. The Company applied for an operator's licence on 10th May 2021, the application being made by Ms. Wallace and Philip Ridgway being named as the (external) transport manager. As Mr. King had resigned the previous day, the application was technically correct in stating that no one named in the application, including directors and transport managers, currently held an operator's licence. The link with Kevin King & Sons Transport was not disclosed. A standard operator's licence (OC2045076) was granted with a start date of 18th June 2021. As explained in paragraph 3 above, two days later Mr. King applied to surrender his licence.

15. In the event, on 12th November 2021, the day on which he was reappointed as a director of the Company, Mr. King applied to be its (internal) transport manager. He stated in his application form that he was the licensed operator and that he had applied to surrender licence number OC1122141 as it was no longer in use. It appears from the case summary for the inquiry, however, that when he was interviewed by the DVSA the following week he stated that he would like to retract his application to surrender that licence.

16. The Company was also called to the public inquiry by a call-up letter dated 22nd December 2022. We summarise the areas of concern as:

- 16.1. Failure to notify events which affected good repute.
- 16.2. Making statements in the application for the licence which were either false or had not been fulfilled, namely, that the holder would abide by any conditions which might be imposed on the licence.
- 16.3. Failure to declare links with Mr. King on the application. (The call-up letter combines this with the previous area of concern, but we think it is in substance a separate matter.)
- 16.4. A material change in circumstances, consisting of adding Mr. King as a director and transport manager.

17. In addition a concern was raised that Mr. King as transport manager might not be exercising continuous and effective management of the Company's transport activities.

The hearing before the TC

18. Mr. King and the Company were represented at the public inquiry by Ms. Bell of Beverley Bell Consulting Ltd. The TC was also considering the

vocational driving entitlement of both Mr. King and Mr. Day, so Mr. Day was at the hearing, but he was unrepresented. In advance of the hearing Ms. Bell provided a considerable quantity of documentation on behalf of her clients, including proofs of evidence dated 27th January 2023 from Mr. King and Ms. Wallace.

19. Mr. King's statement included the following:
 - 19.1. The accident on 19th July 2021 was very serious. He spent about six weeks in hospital and was off work for about eight months.
 - 19.2. At the time Mr. King only sub-contracted for a major bulk company and it was that company which assigned work to Mr. Day after the accident.
 - 19.3. Mr. King had left all his gear, including his driver's card, in the lorry which he usually drove. He had no knowledge that Mr. Day had been using his card. Mr. Day was paid a flat rate of £750 per week whether he slept out or whether he got home each night. Mr. King did not benefit from Mr. Day's use of the card.
 - 19.4. He did not put pressure on Mr. Day to use two cards or scream at him down the phone.
 - 19.5. He fully accepted that the systems he had in place at the time were inadequate. He now operated only his own lorry, so what happened with Mr. Day would never happen again, and had new software which would make it easy to spot if a driver's card was being used when it should not have been.
 - 19.6. Mr. Day admitted to him about a month after the DVSA visits that he had been using Mr. King's card. Mr. King was very upset that Mr. Day had let him down and had to dismiss him. This was about June 2022.
 - 19.7. There was no excuse for his failure to co-operate with the DVSA inquiries and he was ashamed of his behaviour. He thought he was being asked for information he had already provided; he was panicking; and he believed he did not need to submit the information because the licence was in the process of being surrendered. "I just stupidly ignored it and hoped it would sort itself out." Partly this was because he knew Mr. Day had been using his card and it was likely the DVSA would discover it.
 - 19.8. The Company was incorporated as a plant hire and transport company to enable Mr. King and Ms. Wallace to obtain a bank loan to finance the purchase of a digger. They also wished to

obtain a mortgage to enable themselves to buy a bigger house and were advised by their accountant that their chances of obtaining a mortgage would be better if Mr. King could produce pay slips as a company employee rather than taking a director's salary and dividends. That was the only reason he resigned as a director and Ms. Wallace was added.

19.9. Mr. King was reappointed as a director on the advice of his solicitor at the time he attended the interview with the DVSA on 12th November 2021.

19.10. He did not declare his own business in what he described as "my" application for the Company licence because of his fear that to do so would derail everything because of his "silly mistake in not checking if Jason Day had been using" his card. Ms. Groom had not explicitly told him that double-carding had been detected, but he "had a fair idea what was coming".

20. Ms. Wallace explained in a much shorter statement that she had met Mr. King in 2013 and had always been involved in his transport business, helping with invoices, paying bills and general administrative duties. She is a qualified teaching assistant, which was her main occupation "alongside being a director" of the Company. She adopted the contents of Mr. King's statement so far as she had personal knowledge of the matters discussed. She remained a director of the Company after November 2021 because she enjoyed being a director and she and Mr. King wanted to make sure the Company was a success to provide a future for their twin boys. She stated that the incidents giving rise to the current difficulties were one-off events and did not reflect how Mr. King dealt with the Company.

21. The oral evidence at the hearing began with Mr. Day's evidence. Mr. Day confirmed the contents of his statement and then gave further evidence the relevant points of which we summarise as follows:

21.1. While Mr. King was away from work following the motor bike accident the business was run by Ms. Wallace.

21.2. Mr. Day received phone calls from Mr. King about the business both while Mr. King was in hospital and after he came out.

21.3. He said in his interview that Mr. King gave him the digicard but in fact Ms. Wallace gave it to him. She would have done so on Mr. King's orders. He was still running the business from hospital.

21.4. He was aware how serious the injuries were because he was present at the accident. At the stage when Mr. King was taken to hospital in the air ambulance he was in no fit state to run the

business because he was doped up on very strong medication.

- 21.5. Mr. Day was supposed to be off the week of the accident but Mr. King's lorry was loaded ready for delivery and Mr. Day was asked to take that load. He thought he was asked by Mr. King, whom he described as on his phone within an hour of arriving at the hospital.
 - 21.6. Ms. Wallace may have given him the card at her house. He did not think it was in the cab of Mr. King's vehicle.
 - 21.7. Mr. King solved the problem of having two vehicles and one driver by employing another driver, Graham Newton.
 - 21.8. Mr. Day stopped working for Mr. King because he had had enough of driving. He gave a week's notice and began his new employment, having worked the notice period, on the following Monday, 21st June 2021.
22. After Mr. Day's evidence, Ms. Bell made some opening remarks in which she clarified that Mr. King did not wish to retain both licences. Mr. King then adopted the evidence in the statement prepared for the hearing and gave further evidence which, again so far as relevant, we summarise as follows:
- 22.1. He set the Company up in March 2021 to obtain finance to buy a high value excavator. The application for the Company's licence was made by Ms. Wallace because the DVSA investigation was going on and he "knew there was at least one point that was going to arise". He removed himself as a director and put Ms. Wallace on because he did not want it jeopardising the new company. They also wanted bank statements for the mortgage.
 - 22.2. The bank statements were not the only reason for his resignation, as he had said in his statement.
 - 22.3. One of the reasons why he was not named as transport manager of the Company in the application was (as we understand the evidence) again to avoid jeopardising the new company.
 - 22.4. It was Ms. Wallace who completed the application, not him, but he helped.
 - 22.5. For three or four months following the accident Mr. King was not involved with the compliance side. He did not get anyone in to run it.

- 22.6. He spoke to Mr. Day during the week following the accident and had contact with him thereafter, including speaking to him on the phone from hospital.
- 22.7. Mr. King did a missing mileage report in about December 2020 and saw a pattern of missing mileage on the Thursday so that Mr. Day could have an early finish on Friday. He gave Mr. Day a written warning.
- 22.8. It was when the DVSA wanted some tachograph raw data that Mr. Day admitted that he had used Mr. King's card. Mr. King was not happy. He thought that was a Tuesday. He sacked Mr. Day on the Friday. It was about the 18th, 19th or 20th of June. He just told Mr. Day over the phone.
- 22.9. Mr. King said he had a fair idea what was coming because he had the missing mileage. The reports he had run off at that stage did not show mileage on his driver's card. The only infringements he raised with Mr. Day related to the missing mileage, not exceeding daily rest or daily driving hours.
- 22.10. At the time of the accident, Mr. King's digicard was in his lorry. He had been going to work the next day (Monday) and usually left his card there rather than keeping it in his wallet because he had on a few occasions gone to work leaving his wallet at home.
- 22.11. He had spoken to both Mr. Day and Ms. Wallace within the day or a day or two of the accident and could not say who he had spoken to first. He was on morphine.
- 22.12. He thought it was Ms. Wallace who told Mr. Day to take the load in his lorry. The keys would have been in the washer bottle or Ms. Wallace would have had them. He did not tell Mr. Day to use his digicard. The business kind of ran itself because the work was subcontracted. It was just a question of making sure the driver turned up on time and did the work.
- 22.13. At the time of the accident Mr. King had independent savings which he could draw on if he needed. He employed a second driver in about October but from July to October he could afford to keep the lorry he drove off the road. He did not want anyone else driving it because it was his "pride and joy". Then he found his injuries were more serious than he had originally thought, so he could not drive, and the business had secured a new contact, so he asked Mr. Newton if he wanted to come back. Mr. Newton drove the second lorry while Mr. Day drove Mr. King's lorry.
- 22.14. Before the accident he had generated some infringement

reports based on missing mileage by Mr. Day. In December 2020 he did missing mileage reports for the whole year and that led to giving Mr. Day a written warning. The infringements were not substantial.

22.15. The Company was effectively a joint venture between Mr. King and Ms. Wallace and Mr. King accepted that not putting his name on the application was dishonest. He understood that it was serious. As to future compliance, he was the only driver and infringements had become really minor and tachograph analysis had improved.

22.16. During the relevant period he had not been doing working time reports as he had told Ms. Groom. If he had done so, the reports would have shown up the use of his card.

23. Ms. Wallace also gave oral evidence. She similarly adopted the evidence in her statement and then gave further evidence, the relevant points of which we summarise as follows:

23.1. She was aware when she made the application for the Company's licence that Mr. King was under investigation by the DVSA and that was one of the reasons why she left him off the application form. That was also why Mr. King was not named as transport manager. She did not say that in the initial statement because she panicked.

23.2. At the material time she was working full time as a teaching assistant. She did not deal with compliance and maintenance matters. She attended a Zoom new operator's seminar after the licence had been granted.

23.3. The accident happened while Covid restrictions were in place, so she was unable to go to see Mr. King in hospital. She communicated with him by phone. The nurses had to take the phone to him.

23.4. Ms. Wallace already knew that Mr. King's lorry was loaded for delivery on the day following the accident, so she asked Mr. Day to take it. She gave Mr. Day the keys, which Mr. King kept in the car, but not the digicard, which Mr. King always kept in the lorry.

23.5. She helped in the sole trader business with general administrative duties but did not run the report for tachograph analysis or do anything of a similar nature. She could not explain the drivers' hours rules.

- 23.6. Mr. King helped her with the Company's licence application. She was aware at the time of the DVSA investigation. She accepted that she did not know about the operational aspects of the business of holding an operator's licence.
- 23.7. Mr. King told her in advance of dismissing Mr. Day that he was going to do so and would just ring him.
- 23.8. She knew that Mr. King had not attended interviews with Ms. Groom. They had a conversation about it and thought that because he had surrendered his sole trader's licence he did not have to go. She did not know how serious it was.
- 23.9. She could not remember when they found out about Mr. Day's use of Mr. King's digicard. She was unable to explain, if they did not know about it, what was so serious that Mr. King would not be able to get a new licence in the Company's name.
24. Ms. Bell then made submissions on her clients' behalf. So far as material, they were to the effect that:
- 24.1. The TC should find as a fact that neither Mr. King nor Ms. Wallace gave Mr. King's driver's card to Mr. Day and Mr. King had no knowledge that Mr. Day was using his card.
- 24.2. Mr. King's licence had been in existence since 2013 and there had been nothing adverse other than a couple of prohibitions which would not warrant his being called to a public inquiry and nothing since the DVSA investigation. The real issue was the data from the downloads and Mr. King accepted he was not drilling down as he ought to have done.
- 24.3. The test was whether the TC could trust Mr. King. Mr. King had been honest, although very late in the day, and in the light of his overall record he could be trusted going forward. The TC should consider *Priory Freight Limited and Williams 2009/225* and *Bryan Haulage Limited (No. 2) 217/2002*.
- 24.4. It was accepted that the case was in the severe category because of the attempt to conceal Mr. King's involvement with the Company's licence. It was, however, one single failing, although a severe one, and although revocation should be considered it should be discarded and Mr. King should be allowed to continue to operate with one vehicle and one trailer under the Company licence. That would itself be a significant indefinite curtailment which would materially affect the transport operation.

- 24.5. Ms. Bell did not seek to dissuade the TC from revocation of Mr. King's own licence given the background that Mr. King had applied to surrender it in any event. "If ... you decide that it's appropriate to make an order for loss of repute for that licence, so be it." It would still be possible to find that repute was satisfied in connection with the Company's licence.
- 24.6. In reality Ms. Wallace did not fully understand her responsibilities as director of a transport operation and it would be possible for the Company to continue its business without her as a director but continuing to play a supportive role in the background.
- 24.7. Mr. King himself was principally guilty of stupidity, "doing an impression of an ostrich." The shock of having to attend a public inquiry, facing the TC and admitting what he had done was sufficient to allow him his repute back. He was willing to undertake that a compliance audit should be conducted in whatever time the TC thought appropriate. Mr. Ridgway the external transport manager would remain in place keeping watch on Mr. King's activities and Mr. King could, if the TC wished, resign as internal transport manager.
- 24.8. (at the prompting of the TC) the circumstances of the obtaining of the Company licence were capable of raising the question of disqualification, but disqualification would achieve nothing as far as the TC's regulatory role was concerned and revocation coupled with disqualification would cause Mr. King to lose his business. Given his acceptance of his failings, his apology and his overall compliance, that would not be appropriate.

The TC's decision

25. The TC's decision was made on 13th February 2023. Having summarised the facts, he identified as the critical area of disagreement between the parties how Mr. Day came to be in possession of Mr. King's card and whether Mr. King had known about or prompted the use of the card. Paragraphs 20 to 40 of the decision are a detailed discussion of the evidence on the point, leading to the conclusion that Mr. King had knowingly allowed his card to be used by another driver and pressured him into committing drivers' hours offences.

26. The TC's reasons for coming to that conclusion were based on the credibility of Mr. Day's evidence compared with the evidence of Mr. King and Ms. Wallace and in particular:

- 26.1. Mr. Day's co-operation with the DVSA and admission, against his interest, of serious driver offences.

- 26.2. Mr. Day's resolute adherence when cross-examined by Ms. Bell and questioned by the TC to the evidence he had given in his DVSA interview.
- 26.3. Mr. King's acceptance that his systems for monitoring drivers' hours between July and November 2020 were inadequate and the inconsistency in his evidence as to the reports he ran in December 2020.
- 26.4. Mr. King's failures in co-operation with the DVSA and the reasons he gave for that.
- 26.5. The late admission of Mr. King and Ms. Wallace that they sought to mislead the OTC by not declaring Mr. King's involvement in the Company. The statements they signed on 27th January 2023 were inaccurate.
- 26.6. On the TC's findings, the only reason why knowledge of Mr. King's involvement would have jeopardised the new licence was that Mr. King knew full well about the use of his card by Mr. Day when the application was made.
- 26.7. Also on the TC's findings, Mr. King did not dismiss Mr. Day on finding out, in June 2021, about Mr. Day's use of his card.
27. The TC's findings as set out in paragraph 41 were that Mr. King had:
 - 27.1. Knowingly allowed his digital driver card to be used by another driver.
 - 27.2. Pressured that driver into breaching drivers' hours offences.
 - 27.3. Failed to co-operate with a DVSA investigation into serious allegations.
 - 27.4. Failed to carry out constant and effective management of transport activities as a transport manager between July and October 2020.
 - 27.5. Made a false/incomplete application for an operator's licence to the Office of the Traffic Commissioner.
28. The TC then turned to the balancing exercise he was required to undertake. The positive features he found to exist were:
 - 28.1. Maintenance arrangements were mostly satisfactory when the DVSA conducted their maintenance investigation in May 2021.

28.2. The licence had been held since 2013 and there had been no previous public inquiries.

28.3. The maintenance and traffic compliance files submitted for consideration up to the date of the inquiry appeared in good order and satisfactory.

28.4. Mr. King attended a transport manager refresher training course in September 2022.

28.5. Financial standing was present.

29. He also took into account the mitigating factors in terms of Mr. King's serious accident and medical condition at the time the offences first occurred and the fact that they happened over a reasonably condensed period. He nevertheless found that whatever Mr. King's financial position, his overriding reaction to his incapacity and his contractual commitments was to say, "Just get the job done," as described by Mr. Day.

30. The TC's conclusion was that the matters we have listed in paragraph 27, taken together, were fatal to the continuation of good repute. If Mr. King could not himself act, he had the option to decline work, subcontract or hire in help. In encouraging breaches of drivers' hours and rest period offences, he and Ms. Wallace had put their commercial interests above the need for public safety on the roads. On Mr. King's own evidence he allowed large goods vehicles to continue to be used on the licence when he was not in a fit state to provide continuous and effective management of the transport activities, but on the TC's findings, his culpability was much higher. He therefore determined that Mr. King had lost his good repute as a transport manager.

31. As respects Mr. King's repute as an operator, the TC said that good repute was either present or it was not and the essential question was one of trust. He cited *Arnold Transport & Sons Limited v. Department of the Environment of Northern Ireland* NT/2013/82. He asked himself the *Priority Freight* question, "How likely is it that this operator will, in future, operate in compliance with the operator's licensing regime?" and gave the answer that it was highly unlikely, having regard to Mr. King's conduct leading up to and during the investigation and his own finding that Mr. King had not been truthful at the public inquiry. He then answered the *Bryan Haulage* question, "Is the conduct such that the operator should be put out of business?" in the affirmative, saying:

"Giving your digital driver card to another in order to falsify tachograph records, making a misleading application for a licence, non-cooperation with a DVSA investigation and false evidence at a public inquiry are the most serious matters of conduct."

32. The TC then referred to the Senior Traffic Commissioner's Statutory Document No. 10 and placed the conduct in the severe category as "Deliberate or reckless acts that compromised road safety and gave the operator a clear commercial advantage and permitted driver offending and any attempt by the operator to conceal offences or failings." He regarded the appropriate starting point as revocation with detailed consideration of disqualification and determined that suspension or curtailment would not reflect the severity of the case.

33. He concluded:

- 33.1. As a transport manager losing repute, disqualification of Mr. King from managing the transport activities of an undertaking was inevitable under Sch. 3, para. 17 (we think this was a typographical error for 16), of the Goods Vehicles (Licensing of Operators) Act 1995.
- 33.2. Grounds for action under the (mandatory) revocation provisions of s.27 of the Act were established in respect of Mr. King's own licence on the basis of loss of good repute as an operator and loss of professional competence on the finding of loss of good repute as a transport manager.
- 33.3. Grounds for action were also established under the (discretionary) revocation provisions of s.26 of the Act on the basis of prohibitions in the last five years and failure to honour the undertaking to observe the rules on drivers' hours and tachographs and to keep proper records.
- 33.4. Ms. Wallace's failure to make full and honest disclosure in making the application for the Company's licence was fatal to her good repute as the sole director at the time.
- 33.5. Mr. King had lost his repute as an operator, which would render him unfit to be the sole director of the Company.
- 33.6. Grounds for action against the Company's licence were established under s.27 on the basis of loss of good repute and under s.26 on the basis of the false statement made when applying for the licence and a material change, namely, the involvement of Mr. King.
- 33.7. It was appropriate and necessary to disqualify Mr. King from holding or obtaining an operator's licence for a period of 12 months, which would have been much longer but for the positive matters identified and the mitigating circumstances.
- 33.8. The primary reason for Ms. Wallace being the sole director of

the Company was to facilitate the concealment of Mr. King's involvement. She did not have the operational experience and knowledge to oversee the compliance regime as a director and should also be disqualified for 12 months.

The appeal

34. Mr. King and the Company appealed against the TC's decision by a notice of appeal dated 9th March 2023 and also applied for a stay of the decision. As explained in paragraph 2 above, the TC granted a stay in respect of all aspects of the decision other than the revocation of Mr. King's licence, a stay of which was not sought.

35. The grounds of appeal were summarised in the notice of appeal but set out in a detailed skeleton argument dated 10th March 2023 prepared by Mr. Finnegan, who also made supplementary written submissions dated 14th June 2023 and oral submissions to us at the hearing of the appeal. We are grateful to him for his careful and clear arguments. There were four grounds of appeal, as follows.

Ground 1: the finding of fact that Mr. King pressured Mr. Day into using two digital tachograph cards was wrong, arrived at in error and was based on a lack of procedural propriety.

36. Under this head it is contended in the skeleton argument that:

36.1. As respects procedural impropriety:

36.1.1. Mr. Day was making an allegation against Mr. King and Ms. Wallace which ought to have been put into a written statement in good time before the inquiry so that they could prepare their defence. In addition, Mr. Day changed a critical element of his story at the hearing, namely, that rather than being given the card by Mr. King, he was given it by Ms. Wallace.

36.1.2. The TC did not distinguish between the driver conduct hearings and the operator licensing hearings. It ought to have been made clear that evidence from Mr. Day in his driver conduct hearing was to be used against Mr. King in the operator licensing hearing.

36.2. The error in making the finding of fact arose because:

36.2.1. The TC was wrong to find that Mr. King had failed to co-operate with the DVSA investigation. He had co-operated apart from the three occasions on which, having panicked, he failed to attend for interview. He

had in fact provided the data which showed Mr. Day's use of his card.

- 36.2.2. The TC failed to deal in any way with the change in Mr. Day's evidence as to who gave him Mr. King's card. This was a change in a pivotal element of Mr. Day's evidence. The TC made no finding of fact as to how Mr. Day came to be in possession of the card.
- 36.2.3. The TC failed to take adequate account of three points from Ms. Groom's evidence, namely (i) that she stated that Mr. Day knowingly used a second card but made no mention of his being pressured to do so, (ii) she did not put Mr. Day's allegations to Mr. King in interview and (iii) she concluded that Mr. King was not aware that his card was being used.
- 36.2.4. The TC found no motive for Mr. Day to lie, but ought to have had regard to the fact that a driver facing a driver conduct hearing could rely by way of mitigation on proving that the employer caused or permitted the falsification and offending.
- 36.2.5. The TC did not take account of Mr. King's lack of motivation for making Mr. Day use two cards, bearing in mind his comfortable financial situation and the fact that the earnings of the vehicle did not increase.

37. The supplementary written submissions were made when the appellants had received the transcript of the inquiry. Under this ground of appeal attention is drawn to the specific passages in Mr. Day's evidence dealing with how he acquired Mr. King's card. The point is also made that Mr. Day's evidence that Mr. King was easily able to hire a second driver supports the argument that double-carding was not necessary for commercial reasons.

38. Mr. Finnegan put the reliability of Mr. Day at the forefront of his oral submissions. He drew attention to Mr. Day's evidence that "if" Ms. Wallace had given him the card, it would have been on Mr. King's orders, which he described as equivocal rather than resolute. He submitted that in saying at the inquiry that Ms. Wallace had given him the card on Mr. King's orders, Mr. Day had been groping for a way to justify what he had untruthfully said at his DVSA interview. This, he said, was a material point impugning Mr. Day's credibility. Despite that, the TC's decision gave the impression that there had been no change in Mr. Day's evidence.

39. Mr. Finnegan also referred to paragraph 8(b) of the TC's decision granting the stay. That paragraph addressed the point about the change of evidence as follows:

“The fact that I found Mr. Day to be plausible when he stated that Debbie Wallace was acting as an intermediary between him and Mr. King whilst Mr. King was in hospital and that Mr. King “gave” him the card through Ms. Wallace is again a matter of assessment of the evidence heard in its overall context.”

It is said that this confirms that Mr. Day had changed a material part of his evidence and had confirmed that his original evidence was not correct, which is the hallmark of the unreliable witness. Mr. Finnegan submitted that no reasonable decision maker could have made the assessment which the TC made and it satisfied the test of *Wednesbury* unreasonableness. That was a shorthand reference to the decision of the Court of Appeal in *Associated Provincial Picture Houses Limited v. Wednesbury Corporation* [1948] 1 K.B. 223, in which the court accepted that a decision of a local authority could successfully be challenged if it was established that the decision was so unreasonable that no reasonable authority could ever have come to it.

40. Mr. Finnegan pointed out that the question whether Mr. King put Mr. Day under pressure was separate from the question whether Mr. King, albeit through Ms. Wallace, gave Mr. Day his card. He argued that there was little of substance to show pressure and little reasoning in the decision about pressure and the TC’s conclusion was similarly tainted by his assessment of Mr. Day. The DVSA had interviewed Mr. Day first and he had made his accusation then, but the DVSA had concluded that the card had been left in the lorry and made no reference to pressure on Mr. Day. It was not put to Mr. King that it was not normal practice to leave the driver’s card in the lorry.

41. Mr. Finnegan further submitted that it was not clear where the TC’s conclusion as to Mr. King’s and Ms. Wallace’s preference for their commercial interests over public safety had come from and that the commercial necessity had not been proved. He repeated the point that there had been no increase in earnings per vehicle and suggested that Mr. Day might have chosen to miss rest breaks in order to get home early.

Ground 2: the finding of fact that Mr. King and Ms. Wallace failed to admit to misleading the Office of the Traffic Commissioner in relation to the Company licence application was arrived at in error.

42. In the skeleton argument it is contended that Mr. King and Ms. Wallace did effectively admit misleading the OTC in their proofs of evidence by the admission in Mr. King’s statement, adopted by Ms. Wallace, that he did not declare his sole trader business due to his fear that that would derail everything. It is pointed out that the TC did not consider the fact that the Company had been incorporated almost two months before the DVSA investigation began and it was inevitable that it would at some point apply for a licence. It is said that it is not clear why the TC discounted the quest for a mortgage and did not address the possibility that the timing of the change of

directors could have been a coincidence.

43. In the supplementary submissions it is argued that in his evidence Mr. King clarified with his representative his reasons for resigning as a director of the Company and the TC misinterpreted the clarification as a fundamentally incorrect proof of evidence. It is also argued that the TC stated that Ms. Wallace admitted that her statement was misleading in terms of the Company's application, but no such admission can be found from the transcript.

44. In his oral submissions Mr. Finnegan acknowledged that it was not in contention that Mr. King and Ms. Wallace intended to deceive, but said that the question was when they had that intention. On the basis already outlined, he submitted that this finding of fact was also *Wednesbury* unreasonable and described it as a conspicuously defective finding of fact which infected the entire reasoning and went to the root of the whole case.

45. Mr. Finnegan also made the point that in paragraph 62 of the decision the TC gave as his reason for disqualifying Ms. Wallace her lack of operational experience and knowledge to oversee the compliance regime, but the possession of such experience and knowledge is not the test of good repute. He argued that if Ms. Wallace was complicit in the deception the TC ought to have said so, and that goes to his inadequate treatment of the issue of deception generally.

Ground 3: the regulatory action taken by the TC was disproportionate

46. In the skeleton argument it is agreed that, on the basis of failure to detect Mr. Day's use of Mr. King's card, the case fell into the severe category, but contended that:

46.1. The proportionate response as respects the Company's licence would have been to impose a suspension on the Company along with an indefinite curtailment to one vehicle and one trailer, on the grounds that:

46.1.1. The offences (i.e., failing to detect infringements) are of diminishing relevance. The last occasion of Mr. Day's using Mr. King's card was in September 2020.

46.1.2. The pattern of use can be interpreted as a single, isolated pattern rather than widespread use over a period of many months.

46.1.3. The pattern occurred while Mr. King was largely in hospital and on morphine. Apart from that, there was no significant adverse history.

- 46.2. The TC failed to consider the impact Mr. King's disqualification would have on him and his family. Running small haulage undertakings had been his livelihood since 2013 and owing to the disability resulting from the accident he was restricted in the type of work he could do.
- 46.3. It was not clear why Ms. Wallace had been disqualified for 12 months when her conduct had not been impugned to the same extent as Mr. King's.
- 46.4. The decision was out of step with similar jurisprudence from the Upper Tribunal. The cases of *Gilders Transport Limited T/2017/45* and *John Stuart Strachan t/a Strachan Haulage T/2019/25* were cited in support.

47. The supplementary submissions did not address this ground. In his oral submissions Mr. Finnegan stressed that what had happened ought to be looked at as an isolated incident.

Ground 4: insufficient reasons given

48. This ground relates to the TC's finding that grounds for action are established against Mr. King's licence on the basis of prohibitions within the last five years. It is pointed out that that is the only mention of prohibitions in the decision and is contended that it is not clear which prohibitions the TC was referring to or why he felt they were of such severity as to constitute part of his decision to revoke the licence. In his oral submissions Mr. Finnegan relied on his skeleton argument in relation to this point.

The applicable law

49. The legislative framework relating to this appeal is contained in the Goods Vehicles (Licensing of Operators) Act 1995. The relevant provisions are as follows:

“13.(1) On an application for a standard licence a traffic commissioner must consider-

- (a) whether the requirements of sections 13A and 13C are satisfied; ...

13A. (1) The requirements of this section are set out in subsections (2) and (3).

(2) The first requirement is that the traffic commissioner is satisfied that the applicant –

...

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

(3) The second requirement is that the traffic commissioner is satisfied that the applicant –

- (a) is an individual who -
 - (i) is professionally competent (as determined in accordance with paragraph 13 of Schedule 3), and
 - (ii) has designated a suitable number of individuals (which may include the applicant) who satisfy the requirements set out in paragraph 14A(1) and (3) of Schedule 3, or
- (b) if the applicant is not an individual, or is an individual who is not professionally competent, has designated a suitable number of individuals who satisfy the requirements set out in paragraph 14A(1) and (3) of Schedule 3.

...

(5) In this Act, “transport manager” means an individual designated under subsection (3)(a)(ii) or (b).

26.(1) Subject to the following provisions of this section ... a traffic commissioner may direct that an operator’s licence be revoked, suspended or curtailed ... on any of the following grounds -

...

- (c) that during the five years ending with the date on which the direction is given there has been -

...

- (iii) a prohibition under section 69 or 70 of the Road Traffic Act 1988 ... of the driving of a vehicle of which the licence-holder was the owner when the prohibition was imposed;

...

- (e) that the licence-holder made, or procured to be made, for the purposes of –

- (i) his application for the licence ...

a statement of fact that, whether to his knowledge or not, was false ...

- (f) that any undertaking recorded in the licence has not been fulfilled;

...

- (h) that since the licence was issued or varied there has been a material change in any of the circumstances of the licence-holder that were relevant to the issue or variation of the licence ...

27.(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 one or more of the requirements of section 13A, or
- (b) the transport manager designated by the licence-holder no longer satisfies one or more of the requirements set out in paragraph 14A(1) and (2), or (1) and (3), of Schedule 3 ...

28.(1) Where, under section 26(1) or 27(1), a traffic commissioner directs that an operator's licence be revoked, the commissioner may order the person who was the holder of the licence to be disqualified (either indefinitely or for such period as the commissioner thinks fit) from holding or obtaining an operator's licence ...

(4) Where a traffic commissioner makes an order under subsection (1) in respect of any person, the commissioner may direct that if that person, at any time or during such period as the commissioner may specify –

- (a) is a director of, or holds a controlling interest in –
 - (i) a company which holds a licence of the kind to which the order in question applies, or
 - (ii) a company of which such a company is a subsidiary, or
- (b) operates any goods vehicle in partnership with a person who holds such a licence,

that licence of that company or, as the case may be, of that person,

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shall be liable to revocation, suspension or curtailment under section 26.

(5) The powers conferred by subsections (1) and (4) in relation to the person who was the holder of a licence shall be exercisable also –

- (a) where that person was a company, in relation to any director of that company ...

Schedule 3, paragraph 1.(1) In determining whether an individual is of good repute, a traffic commissioner may have regard to any matter but shall, in particular, have regard to –

- (a) any relevant convictions of the individual ...
- (b) any other information in his possession which appears to him to relate to the individual's fitness to hold a licence.

(2) In determining whether a company is of good repute, a traffic commissioner shall have regard to all the material evidence including, in particular –

- (a) any relevant convictions ...
- (b) any other information in his possession as to the previous conduct of –
 - (i) any of the company's officers, servants or agents, or
 - (ii) any of its directors, in whatever capacity,

if that conduct appears to him to relate to the company's fitness to hold a licence.

[Paragraphs 2 to 5 contain provisions about convictions.]

[Paragraph 13 makes provision for the certification of professional competence.]

14A.(1) A transport manager must be –

- ...
- (b) of good repute (as determined in accordance with paragraphs 1 to 5),
- (c) professionally competent (as determined in accordance

with paragraph 13), and

- (d) able to manage effectively and continuously the operator's transport service.

16.(1) In proceedings under this Act ... for determining whether a person who is a transport manager is of good repute or professionally competent, a traffic commissioner must ... consider whether a finding that the person was no longer of good repute or (as the case may be) professionally competent would constitute a disproportionate response.

(2) If the commissioner determines that the person is no longer of good repute or (as the case may be) professionally competent, the commissioner must order the person to be disqualified (either indefinitely or for such period as the commissioner thinks fit) from acting as a transport manager.”

- 50. It is well established 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.
- 51. It is also well established that when considering mandatory revocation of a standard operator's licence the questions a traffic commissioner will need to consider will include how likely the operator is to operate in compliance with the licensing regime in future and whether the conduct which has taken place is such that the operator should be put out of business. The first of those questions was identified in *Priority Freight Limited and Williams* 2009/225 and is commonly referred to as “the *Priority Freight* question” and the second was identified in *Bryan Haulage Limited (No. 2)* 217/2002 and is commonly referred to as “the *Bryan Haulage* question”. It is clear from the decision in *Bryan Haulage* that the question was framed in the light of the need for a relationship of proportionality between the conduct found to have occurred and the sanction necessarily to be imposed. If a positive answer is to be given to the question, it is because revocation is a proportionate response to the relevant conduct. The *Priority Freight* question is regarded as a preliminary question, to be asked before the *Bryan Haulage* question is asked, because, as explained in *Priority Freight*, if the evidence demonstrates that the operator is very likely to be compliant in future, that may indicate that the case is not one in which the operator should

be put out of business.

Discussion

Ground 1 (finding of pressure to use two cards)

52. In our view there is no substance in this ground so far as it relates to procedural impropriety. The call-up letters made clear that the inquiry would consider the evidence of Mr. Day's interview with Ms. Groom, the record of which includes Mr. Day's statements that Mr. King had given him his driver's card and had pressured him to use it. We do not agree that the appellants or their representative were in any way ambushed by the evidence Mr. Day gave at the inquiry. Indeed, paragraph 15 of Mr. King's statement dated 27th January 2023 expressly addresses the evidence of pressure in Mr. Day's statement and paragraph 12 asserts that his card was in the vehicle. The fact that Mr. Day changed a part of his evidence at the inquiry is not a procedural impropriety. The case of *Dukes Transport (Craigavon) Limited*, Appeal 68/2001, to which we were referred, is a helpful illustration of what the rules of natural justice may require in certain circumstances, but there was clearly no breach of natural justice in the manner suggested in the present case.

53. Moreover, at the outset of the inquiry the TC explained, particularly for the benefit of Mr. Day as an unrepresented party, that the evidence of his use of Mr. King's card as contained in the DVSA interview was a key issue and that his proceedings as a driver were separate proceedings but did impact on Mr. King's repute as an operator and transport manager and fitness as a driver. He further explained that he would hear evidence from Mr. Day at an early stage, would then hear evidence from Mr. King and any other parties he wished to call and would then indicate the process as far as his decisions were concerned. This ought to have made it clear that evidence from Mr. Day in the driver conduct hearing was to be taken into account in the operator licensing hearing. When Mr. King began to give evidence Ms. Bell clarified the position further and it does not appear from the transcript that Ms. Bell found any difficulty in that approach. In our view the TC acted perfectly properly in taking that course.

54. It follows that we do not accept the submission that the important finding that Mr. King had pressured Mr. Day into using two cards was in any way affected by procedural impropriety. We therefore turn to the question whether the TC was plainly wrong in all the circumstances to make that finding.

55. We agree with Mr. Finnegan that strictly speaking the issue whether Mr. King (through Ms. Wallace) gave Mr. Day his card is separate from the issue whether Mr. King put pressure on Mr. Day to use the card and the evidence relating to pressure is more limited than the evidence relating to the first issue. That is no doubt in part because, having asserted that Mr. Day had taken the card from the lorry and he had no knowledge that Mr. Day was using

it, Mr. King could not give evidence to the effect that it had not been necessary to put Mr. Day under any pressure because he was willing to use the card to help Mr. King in dealing with the aftermath of the accident. It is, however, a fair comment that having accepted Mr. Day's evidence as to how he came to be in possession of Mr. King's card, the TC accepted Mr. Day's evidence as to pressure without any additional reasoning.

56. Nevertheless, it is clear, and indeed was part of Mr. Finnegan's submissions, that the TC effectively approached the case on the basis that if Mr. Day was a more credible witness than Mr. King and Ms. Wallace, his assessment of credibility extended not only to the question how Mr. Day obtained the card but also the question whether Mr. King put Mr. Day under pressure. This ground of appeal stands or falls with the question whether the TC was plainly wrong in his overall assessment of Mr. Day's credibility compared with the credibility of Mr. King and Ms. Wallace. Mr. Finnegan's attack on the TC's assessment was effectively two-pronged, consisting of submissions as to why Mr. Day should not have been treated as a credible witness on the one hand and submissions as to why Mr. King and Ms. Wallace should have been treated as more credible witnesses than the TC found them to be on the other.

57. The attack on Mr. Day's credibility focuses primarily on the change in his evidence from his statement that Mr. King gave him the card to his statement at the inquiry that Ms. Wallace gave it to him on Mr. King's orders. We recognise that there is a change in evidence there which was not expressly mentioned in the TC's decision. In practical terms, however, the vital point for the purposes of the inquiry was not by what precise means the card came into Mr. Day's possession but whether he had it and used it with Mr. King's authority or without that authority. Overall Mr. Day's evidence was that Mr. King knew he had the card and was urging him to use it. In paragraph 36 of the decision the TC stated that he found Mr. Day's evidence at the inquiry that Mr. King gave him the card "via Ms. Wallace" clear and credible and we read the paragraph as a finding of fact that that was what happened.

58. It is submitted that the TC erred in saying that Mr. Day had no reason to lie, because evidence of pressure from the employer could be taken into account as mitigation in the driver conduct proceedings. We agree that that is so in principle. The TC, however, having referred in paragraph 20 of the decision to Mr. Day's evidence at interview about Mr. King having instructed him over the phone to put his (Mr. King's) card in and make sure he was first on the job in the morning, referred in paragraph 21 to Mr. Day's admission that there was no excuse, he had done it and everyone has a choice. There is nothing in Mr. Day's evidence at the inquiry to suggest that he was trying to rely on pressure from Mr. King as mitigation, although the TC had ascertained from him that he was aware of the Statutory Document on driver conduct. As we read the transcript, he simply confirmed his evidence at interview that Mr. King had shouted at him, saying that they could not afford to pay for everything, and that he did not himself benefit from the double-carding. He

expressed the view that Mr. King was afraid he would lose the business, but accepted that he had not asked him if that was the case.

59. There was in fact a further direct conflict of evidence between Mr. Day and Mr. King as to whether Mr. Day had left voluntarily or Mr. King had dismissed him. Mr. Day's evidence, as summarised above, was that he had given a week's notice, worked his week and left on the Friday, starting his new job on the following Monday. By contrast Mr. King said that Mr. Day had told him for the first time on the Tuesday or Wednesday about the use of his card and on the Friday he had dismissed him over the telephone. In accepting Mr. Day's evidence on the point, the TC commented on his demeanour and it is noteworthy that the transcript records Ms. Bell as saying to Mr. Day, when she put Mr. King's case to him, "Clearly that amuses you."

60. Mr. King's case on this point faced the obvious difficulty that it depended on his having known nothing about Mr. Day's use of his card earlier, so that his concern about what the DVSA might find on downloading the tachograph data provided in May 2021 could not have been concern about the disclosure of double-carding. That was very difficult to reconcile with the facts that shortly after the DVSA investigation began Mr. King resigned as a director and Ms. Wallace was appointed and that, as was admitted, the changes in directorship were at least in part intended to conceal Mr. King's connection with the Company in case that derailed the Company's application.

61. Looking at this interrelated evidence as a whole, we think the TC's finding of fact that Mr. King was well aware of the use of his card when the change of directorship took place was entirely reasonable. There is no suggestion that he could have become aware of it by that date through any other means than having had knowledge from the outset. This part of the case strongly supports the TC's overall conclusion on credibility.

62. It is submitted that the TC was in error in treating Mr. King as having failed to co-operate with the DVSA by comparison with Mr. Day. Given that Mr. King failed on three occasions to attend for interview, without explanation and even on a date when he had said he would be available, we do not think that there was anything unfair in the TC's assessment. Mr. King tried to excuse this failure in part on the basis that he thought it was unnecessary to provide the requested information because the sole trader licence was being surrendered. He could very readily have checked that point with Ms. Groom, but made no attempt to do so. His other explanation is that he panicked. Panicking because the traffic examiner or the OTC might find out certain facts does not mean that the operator in question has not failed to co-operate with the DVSA if he fails to supply information or attend interviews or that the failure to co-operate is to be treated lightly.

63. We recognise that the TC's conclusion on credibility means that he differed from Ms. Groom's apparent conclusion that Mr. King did not know of the use of his card by Mr. Day, but we agree with the TC's comment when

granting a stay of his decision that it was for the TC to determine which of Mr. King and Mr. Day was to be believed, on the basis of the evidence heard at the inquiry. He had the advantage, which Ms. Groom did not, of hearing them give evidence in succession and of hearing the evidence tested. The fact that a traffic commissioner has that advantage is one of the reasons for the “plainly wrong” approach adopted in *Bradley Fold*. We do not think that the TC’s failure specifically to address the points Mr. Finnegan makes on Ms. Groom’s evidence comes close to bearing enough weight to impugn his decision.

64. As to Mr. King’s alleged lack of motivation for requiring Mr. Day to use two cards, the TC referred to the evidence in paragraph 25 of the decision and also in paragraph 43, where he stated:

“Whatever Mr. King’s financial position, I believe that his overriding reaction to his incapacity and his contractual commitments was to say, “Just get the job done,” as described by Mr. Day.”

In our view, the TC was entitled, on the basis of the evidence he had heard and as part of his overall assessment of credibility, to come to that conclusion. It appears to us inherently probable that a man who had suffered a very serious accident would think first about how to get the job done (especially at the outset, when his own lorry was already loaded) and would not stop to consider what savings he had and how they might be used. We note that the double-carding stopped at about the time when Mr. Norton was employed as a second driver. Given that Mr. King was still unable to give full attention to the business and in particular was unable to drive his lorry, we see no reason why Mr. Day should have stopped using Mr. King’s card if he was doing so for his personal convenience.

65. Finally, if Mr. King had indeed instructed Mr. Day to use his card in order to get the job done during Mr. King’s incapacity, we think it necessarily follows that he, and Ms. Wallace with him, put their commercial interests ahead of public safety, since the purpose was to enable Mr. Day to break the rules on drivers’ hours.

66. For all the above reasons, we reject the first ground of appeal. Far from being plainly wrong or *Wednesbury* unreasonable, the finding of fact was entirely reasonable and was soundly based on the totality of the evidence which could properly be taken into account.

Ground 2 (finding of failure to admit misleading the OTC)

67. The TC’s reasoning in this respect, as we understand it, was as follows:

67.1. Mr. King and Ms. Wallace both sought to mislead the OTC by removing any trace of Mr. King’s involvement with the Company from the application, although in fact Mr. King was always going to be in day-to-day control (paragraph 32).

- 67.2. The reason why they did so was that Mr. King was well aware when the application was made that Mr. Day had been using his card and they were afraid both that as a result Mr. King's licence would be revoked and that if the OTC knew of the connection with Mr. King the new licence would not be granted (paragraphs 34 and 35).
- 67.3. They could have admitted that they did seek to mislead the OTC when they made their statements of 27th January 2023, but instead they asserted that Mr. King only resigned as a director to assist a mortgage application (paragraph 33).
- 67.4. The admission was eventually made at the inquiry itself and so was both late and, given the reason for the attempt to mislead as then admitted, undermined their credibility generally (paragraph 33).

68. We think that Mr. Finnegan is strictly correct in contending that, in substance, paragraph 34 of Mr. King's statement is a recognition that he tried to conceal from the OTC his involvement with the Company. His difficulty, however, is that in paragraph 32 of his statement Mr. King asserted that the sole reason for his resignation as a director was to help with the mortgage application. He rightly says in the supplementary submissions that the two paragraphs do not sit comfortably together, because the attempted concealment would have been impossible if Mr. King had remained a director. It appears logically to follow that if paragraph 32 had been true, the decision that he should resign would have been a happy coincidence which made the concealment admitted in paragraph 34 possible.

69. Mr. King's evidence at the inquiry made it clear that there was no such happy coincidence. The first reason he gave in response to Ms. Bell for having resigned as a director was the existence of the DVSA investigation. She referred to that admission as a "slight change" in paragraph 32. Not surprisingly, the TC returned to the point and it is clear that the evidence that the mortgage application was "the sole reason" for resignation was straightforwardly untrue. In those circumstances, it is arguably more correct to say that (i) Mr. King attempted to mislead the inquiry as to his reason for resigning as a director, having previously attempted to mislead the OTC as to his involvement with the Company and (ii) he did so in an attempt to conceal the fact that his desire to mislead the OTC arose from his knowledge that Mr. Day had been using his card.

70. In those circumstances, while paragraph 33 of the TC's decision may have run together the attempted deception of the inquiry and the attempted deception of the OTC, we do not think that any such flaw in the reasoning undermines the TC's conclusion as to credibility. It cannot, of course, undermine the separate finding that Mr. King made a false or incomplete

application for an operator's licence, because that is what is now undisputedly the case.

71. A similar point arises in relation to the statement of Ms. Wallace. In her statement she adopted Mr. King's evidence. Ms. Bell gave her the opportunity to correct her statement in so far as it dealt with Mr. King's reason for ceasing to be a director, but she did not. In answer to the TC she said that she was aware of the DVSA investigation and effectively confirmed that the mortgage application was not the sole reason for Mr. King's resignation and that she left him off the application form to avoid jeopardising it. She was also effectively unable to answer, except by referring again to having panicked, when the TC asked her why her statement was incorrect. Her credibility stands or falls with that of Mr. King on this point. We accept that she admitted by her statement that they had attempted to mislead the OTC and did not in so many words admit in her evidence that she had attempted by her statement to mislead the inquiry, but again we do not think that this affects the TC's conclusion overall as to her credibility. In response to Mr. Finnegan's further point that if the TC regarded Ms. Wallace as complicit in the deception he ought to have said so, we express the view that, on a fair reading of the decision, he did.

72. Again, for all the above reasons we do not accept that the TC's finding of fact was plainly wrong or *Wednesbury* unreasonable. Mr. King and Ms. Wallace had the opportunity when they made their statements to give a full and accurate account of why Mr. King ceased to be a director and its relevance to the attempt to conceal his involvement from the OTC and clearly failed to do so. In failing to give accurate evidence about their attempt to mislead the OTC, they also attempted to mislead the TC. There is nothing in this point which adversely affects the TC's overall assessment of credibility and we reject this ground of appeal also.

Ground 3 (regulatory action disproportionate)

73. We start by observing that Mr. Finnegan's submissions begin by admitting that the case fell into the severe category even on the basis of failure to detect Mr. Day's use of Mr. King's card. That, however, was not the basis adopted by the TC, who found that Mr. King was well aware of Mr. Day's use of the card and put pressure on him to make use of the card. In addition, the TC found that Mr. King and Ms. Wallace had made a misleading application and had attempted to mislead the TC. Plainly the case fell into the severe category all the more on the basis of the facts found by the TC. As we have explained, we see no ground for interfering with those findings of fact.

74. Moreover, the TC's findings of fact necessarily formed a substantial part of his reasons for deciding that Mr. King had lost his good repute as operator, transport manager and director, that Mr. King had therefore also lost professional competence as operator, that Ms. Wallace had lost her good repute as director and that the Company had lost its good repute. Except as respects Mr. King's standing as a transport manager, these are grounds for

mandatory revocation under s.27 of the Goods Vehicles (Licensing of Operators) Act and the question of proportionality in relation to revocation therefore does not arise. The *Priority Freight* and *Bryan Haulage* questions which we referred to in paragraph 51 above and which were asked by the TC in this case have been formulated to ensure that revocation is indeed a proportionate response to the conduct which has occurred. For the avoidance of doubt, we state expressly that in our view the TC was not wrong, in the light of his findings of fact, in going on to find loss of good repute and professional competence.

75. A similar analysis applies to the determination that Mr. King lost his good repute as a transport manager. Para. 16(1) of Sch. 3 to the Act requires a traffic commission to consider whether a finding that a person was no longer of good repute would constitute a disproportionate response. We recognise that the TC did not expressly address this point, but his reasons for finding that Mr. King lost his good repute as transport manager were in effect those which he gave for finding that Mr. King lost his good repute as operator. Considerations of proportionality were built into that part of the decision as explained in the preceding paragraph and it appears to us that given those reasons the TC could not realistically be expected to come to any other conclusion in respect of Mr. King's repute as a transport manager. Para. 16(2) of Sch. 3 then makes disqualification from acting as a transport manager mandatory.

76. It follows that any argument of disproportionality can apply only to the TC's decisions to disqualify Mr. King and Ms. Wallace from holding or applying for an operator's licence, including his decision as to the length of disqualification, and to the length of Mr. King's disqualification as a transport manager.

77. As to Ms. Wallace, she is not an appellant in her personal capacity, although she had a right of appeal against the TC's decision to disqualify her when the Company's licence was revoked. We therefore comment only that although the TC dealt with her position comparatively briefly:

77.1. He made a clear finding that she lost her good repute because of her failure as sole director to make full and honest disclosure when applying for the Company's licence (paragraph 57 of the decision).

77.2. Our understanding of paragraph 62 of the decision, which is criticised by Mr. Finnegan, is that the TC found that she merited disqualification because she became the sole director of the Company, thereby assuming a duty to oversee the compliance regime which she did not have the operational knowledge and experience to perform, in order to conceal the involvement in the Company's affairs of Mr. King.

78. In those circumstances, and having regard to Ms. Wallace's involvement in attempting to mislead the inquiry, we would not have been inclined to find the TC's decision plainly wrong even if we had been invited to do so.

79. As to Mr. King, we agree with Mr. Finnegan that his conduct was impugned by the TC to a substantially greater extent than Ms. Wallace's conduct. We note that under para. 17(1A) of Sch. 3 to the Goods Vehicles (Licensing of Operators) Act, where a disqualification order is imposed on a transport manager because of a loss of good repute, the order cannot be cancelled earlier than one year from the date of the order. We further note that the directions given in para. 108 of Statutory Document No. 10 provide that the starting points are a minimum period of disqualification for a transport manager of one year and for an operator's first public inquiry consideration of a disqualification period of between 1 and 3 years.

80. The disqualifications imposed by the TC are therefore fairly to be seen as the minimum possible. It is clear from paragraphs 43 and 61 that in imposing the disqualification as operator and determining the length of that disqualification and the disqualification as transport manager the TC had in mind Mr. King's accident, his medical condition at the time of the double-arding offences and the fact that they happened "over a reasonably condensed period of time". We have referred at paragraph 28.4 above to Ms. Bell's submission that disqualification would mean that he would lose his business, which would not be appropriate "in view of his acceptance of his failings, his apology, albeit late in the day, and his overall compliance". This submission, however, loses its weight in the light of the TC's findings as to the use of Mr. King's driver's card, the attempt to mislead the inquiry and what was found to be the false evidence that he dismissed Mr. Day. The TC was right to find that Mr. King's conduct was serious.

81. Mr. Finnegan's submission brings in additional matters such as the adaption of Mr. King's trailer so that he could operate it with his lasting disabilities and the limitations on the type of work Mr. King can now do. There was no evidence before the TC on those points and clearly there could have been such evidence. There has been no attempt to bring further evidence before us. In those circumstances the TC could not, and we do not, take into account those matters.

82. We have considered the cases of *Gilders Transport Limited*, T/2017/45, [2018] UKUT 0036 (AAC) and *John Stuart Strachan t/a Strachan Haulage*, T/2019/25, [2019] UKUT 287 (AAC) to which Mr. Finnegan referred. In the *Gilders* case the Upper Tribunal were satisfied that the case was a bad case of lack of compliance with the regulatory regime and undoubtedly a substantial number of drivers' hours offences had been committed which the company operator had failed to detect, at least in part because no proper analysis was carried out. The company operated a fleet of 33 vehicles under 3 licences and the traffic commissioner had curtailed the licence by 20% on the basis of

continuing concerns over professional competence and the need to take regulatory action. The company appealed against that decision, arguing that the disqualification of one of the transport managers was a sufficient regulatory sanction. The Upper Tribunal found itself unable to endorse the decision that 20% curtailment was appropriate and made clear that, having reviewed the evidence, its conclusions were less favourable to the company than those of the traffic commissioner. The case was remitted to the traffic commissioner for further consideration, although the Upper Tribunal recognised that in the light of his findings of fact it would be difficult for him to impose more serious regulatory action.

83. *Strachan* was another case involving substantial drivers' hours offences and "huge failings" in analysis. Further, when the operator became aware of the DVSA's interest, the vehicle tachographs were replaced, making it impossible to obtain access to the earlier data, and the traffic commissioner found that that was the purpose of the change. She also decided that the case fell into the severe category, but stopped short of revocation and disqualification, apparently because of the length of time the operator had been in the industry. Instead she imposed a significant curtailment, which she recognised "might take the business to the brink of survival" and against which the operator appealed. The Upper Tribunal recognised that the traffic commissioner's decision was based on having seen, heard and assessed the witnesses and that she had conducted a careful balancing exercise. It concluded she had had the right considerations in mind and it was unable to hold that she was plainly wrong or reached a plainly wrong result in the curtailment imposed.

84. In both these cases the Upper Tribunal declined to interfere with the decision of a traffic commissioner who had heard and assessed the witnesses. We think the cases are to be regarded as illustrations of the fact that a wide range of potential outcomes is open to traffic commissioners in the light of their assessment of witnesses, provided that the correct legal principles are applied. Further, it does not appear that either case involved an attempt first to mislead the traffic commissioner and then an attempt to mislead the inquiry, as was the case here.

Ground 4 (insufficient reasons)

85. As we have said, this ground relates only to there having been prohibitions in the preceding 5 years. It is true that the prohibitions are not mentioned in the decision except as a ground for action against Mr. King's licence. There is no discussion of their nature and significance. The report of the maintenance investigation was, however, clearly identified in the case summary and the call-up letter dated 22nd December 2022 as a matter to be considered at the inquiry and the report was included in the papers.

86. We recognise that at the inquiry Mr. King was not asked about the prohibitions and Ms. Bell did not address them. This was clearly regarded as a minor point by comparison with the double-carding and misleading issues. While it might have been preferable for them to have been dealt with expressly at the inquiry if the TC intended to place reliance on them in his decision, we have no doubt that he would have reached the same conclusion even if there had been no record of prohibitions giving rise to the possibility of revocation under s.26 of the 1995 Act. This is not a point which leads us to conclude that the TC's decision was plainly wrong.

Conclusion

87. For the above reasons, we have come to the conclusion that the appellants do not satisfy the *Bradley Fold* test. We therefore dismiss the appeal.

88. Finally, we apologise for the length of time it has taken to produce this decision. That is owing to illness in the judge's family.

E. Ovey
Judge of the Upper Tribunal
8th February 2024