[2010] AACR 43

(*Bradley Fold Travel Ltd and another v Secretary of State for Transport* [2010] EWCA Civ 695)

CA (Sedley, Smith, Leveson LJJ))
18 June 2010 **Appeal 2009/289**

Traffic Commissioner case – revocation of Public Service Vehicle Operator's licence – scope of appeal to Transport Tribunal – relevance of pending criminal proceedings

In February and March 2007, the appellant company was subject to a Public Inquiry before a Traffic Commissioner in connection with its conduct of the Standard National Public Service Vehicle Operator's licence which it held for seven vehicles. Its licence was revoked and it appealed to the Transport Tribunal. The Transport Tribunal allowed the appeal and remitted the matter for rehearing before a different Traffic Commissioner, but reduced the number of vehicles authorised from seven to five until the rehearing and also indicated that the Vehicle and Operator Services Agency should be asked to carry out an unannounced inspection prior to the hearing. At the rehearing in March 2008 the Deputy Commissioner did not consider his public duty required him to go back to 2006 and, after an adjournment, proceeded to hear evidence of events following the Transport Tribunal. He confirmed the reduction of the number of vehicles authorised, concluded that the repute of the operator had been "tarnished rather than lost" and accepted a number of undertakings which were offered by the operator. Following a further inspection another Public Enquiry was held in April 2009. The Deputy Commissioner found that the operator no longer satisfied the requirement to be of good repute and that undertakings recorded in the licence had not been fulfilled, and revoked the licence, he also disqualified the director from holding or obtaining an operator's licence for 18 months. The operator appealed to the Transport Tribunal. The Tribunal did not uphold all the findings of the Deputy Commissioner but concluded that the adverse findings were so serious and so numerous that it was appropriate to disqualify the operator for 18 months. The operator appealed to the Court of Appeal. Before the Court of Appeal it was submitted for the first time that the Traffic Commissioner in March 2008 had acted outside his powers in limiting the scope of the hearing.

Held, dismissing the appeal, that:

1. although the jurisdiction of the Transport Tribunal is to hear and determine matters of both fact and law, it is not required to rehear the evidence and will reverse the Commissioner's evaluation of the facts only if it concludes that the process of reasoning, and the application of the relevant law, require it to adopt a different view (paragraphs 34 to 42);

2. it had not been submitted to the Deputy Commissioner at the hearing in 2008 that his approach to the Public Inquiry was wrong and no appeal had been mounted against the resulting decision, and, since the issue had not been ventilated before and decided by the Transport Tribunal, it was beyond the scope of the Court of Appeal (paragraphs 43 to 45);

3. the Tribunal considered the extent to which the errors in the findings of the Deputy Commissioner invalidated or undermined the overall conclusions reached, and the determination that they did not was entirely open to the Tribunal and reflective of the appropriate approach to issues of primary fact and inference (paragraph 46);

4. it was not unreasonable for the Deputy Commissioner to conclude that the operator posed a serious road safety risk when he was known to be contesting criminal charges, since the standard of proof in the criminal court is different and, in any event, the prosecution related to some but by no means all the apparent breaches of drivers' hours rest offences revealed by the records, a number of which were not in issue (paragraph 49);

5. in considering the case in the round the Deputy Commissioner and the Transport Tribunal had applied the correct approach as set out in *Bryan Haulage (No 2)* 2002/217 (following *Crompton (t/a David Crompton Haulage) v Department of Transport* [2003] EWCA Civ 64; [2003] RTR 34) and they were entitled to conclude that the failures to comply with all the obligations of the operators' licensing regime or the undertakings which had been offered were "so serious and so numerous" that the company deserved to be put out of business and that the period of 18 months disqualification was neither disproportionate nor excessive (paragraph 51).

DECISION OF THE COURT OF APPEAL

Mr Peter Wright appeared in person and on behalf of Bradley Fold Travel Ltd.

Mr Gordon Nardell QC (instructed by the Treasury Solicitor) appeared for the respondent.

Judgment

LORD JUSTICE LEVESON:

1. This is an appeal, brought as of right, from a decision of the Transport Tribunal (chaired by His Honour Michael Brodrick) by which Bradley Fold Travel Ltd (the operator) and its Director and Transport Manager, Mr Peter Wright (Mr Wright) seek to challenge the rejection of their appeal from a decision of the Deputy Traffic Commissioner for the North Western Area (the Deputy Commissioner) revoking the operator's public service vehicle operator's licence and disqualifying Mr Wright from holding an operator's licence for 18 months. A stay of the order was refused both on paper by Arden LJ and, following an oral hearing, by Laws LJ.

2. Although appeals in cases such as this have, from 1 September 2009, been transferred to the Upper Tribunal (with a further appeal to this court requiring permission), the amended grounds of appeal (which, at an earlier hearing, Ward, Wall and Wilson LJJ gave permission to argue) raise issues of principle which will also impact on the scope of an appeal to the Upper Tribunal and thus bear analysis. At the same hearing, the Secretary of State for Transport was given permission to intervene and has taken the place of the Traffic Commissioner as the respondent to the appeal.

The facts

3. There is a substantial background to the present case which it is necessary to rehearse in order to provide the full context within which the issues of law have to be decided. In February and March 2007, the operator (engaged in transporting school children and general travel) was subject to a Public Inquiry before a Traffic Commissioner in connection with its conduct of the Standard National Public Service Vehicle Operator's licence which it held for seven vehicles. For reasons which do not need to be rehearsed, its licence was revoked.

4. An appeal was mounted against the decision to the Transport Tribunal which, largely as a consequence of the way in which the Public Inquiry was handled, was successful so that, in August 2007, the matter was remitted for rehearing before a different Traffic Commissioner. That is not to say that the Transport Tribunal did not have serious concerns about the operator and Mr Wright. The President (Hugh Carlisle QC) made it clear that there was "detail of many failings in maintenance, particularly in relation to the recent increase in prohibition notices and to the details in carrying out some preventative maintenance inspections", described "on any view" as serious. Further, it is important to note that these concerns were accepted by counsel for the operator. Because of the serious maintenance findings, giving rise to misgivings, the Transport Tribunal "curtailed" the number of vehicles authorised from seven to five until the rehearing. The Transport Tribunal also indicated that the Vehicle and Operator Services Agency (VOSA) should be asked to carry out an unannounced inspection prior to the hearing, adding that the operator "will, no doubt, carry out a thorough review of its maintenance arrangements and the role of its transport manager".

5. The rehearing came before the Deputy Commissioner on 28 March 2008. In the light of the substantial challenge made by Mr Wright (including a challenge to the completeness of the transcript), it is necessary to rehearse how the matter proceeded. The transcript reveals that the

Deputy Commissioner had read the decision of the Transport Tribunal but was conscious that he had to consider the position as at March 2008 (including the unannounced inspection). He said:

> "All issues remain open for the re-hearing, but certainly, and I thought this would be helpful indication to you … is that there's so much water under the bridge that if the Transport Tribunal awarded a fresh unannounced inspection … and vehicles to be put through the MOT, then it's really what's happened since the Transport Tribunal decision that I'm going to, if you agree, focus on, rather than going back into the [mists] of time."

6. Roger Allanson (then acting for the operator and Mr Wright) did not demur. He observed:

> "If [decisions as to acts of vandalism] because of the issues it had on culpability … is now consigned to the annals of time because the water's passed under the bridge as it were … and we need to look at the current position from August 2007 and the unannounced visit and how Mr Wright's vehicles performed in the September 2007 MOTs, that limits clearly the scope of the enquiry today …"

7. The Deputy Commissioner did not consider his public duty required him to go back to 2006 and, after an adjournment, he proceeded to hear evidence of events following the Transport Tribunal. In the event, taking into account the passage of time and the position at that date, he did not revoke the operator's licence but, by varying the relevant condition, confirmed the reduction of the number of vehicles authorised ("as a result of the breach of undertaking to maintain vehicles in a fit and serviceable condition"). He concluded that the repute of the operator had been "tarnished rather than lost" (this being a reference to the statutory requirements of the licence to which I shall return). He also accepted a number of undertakings which were offered by the operator and Mr Wright. These were recorded in a letter to the operator dated 3 April 2008 in these terms:

> "(a) Safety inspections will be pre-planned and never more than 6 weeks apart. The PMI reports will be retained for at least 2 years.
>
> (b) Except for advisory items, all defects found at safety inspections will be rectified by an outside professional maintenance contractor and all vehicles will not be used on the roads until such rectification has taken place and the contractor has signed the certificate of roadworthiness. Records to be kept for 2 years.
>
> (c) Operator will continue to use a nil driver daily reporting system.
>
> (d) All authorised vehicles will have a thorough and effective pre MOT inspection.
>
> (e) The operator will install and use a roller brake test machine (albeit a portable one if appropriate) within 6 months."

8. Mr Wright was content with the reduced number of licensed vehicles (on the basis that the financial position of the operator did not enable him to operate more than the reduced number); the business thus continued. The next development was the maintenance inspection directed by the Deputy Commissioner which took place on 14 and 24 November 2008: three vehicles were examined and maintenance documents checked. It was made clear that safety inspections were carried out every six weeks by a Mr Wolstenholme of Wolstenholme Transport Services Ltd who, presumably in response to a request from the VOSA examiner, wrote an undated letter to him in these terms:

> "I carry out all the safety inspections for [the operator] and prefer not to undertake any major repairs. Other than occasional replacement of fuses, light bulbs or tightening of bolts etc where required, I have never discovered any faults that would render the vehicle unroadworthy. If I did so, [the operator] would be advised accordingly."

9. The examiner looked at the PMI sheets which revealed that virtually all defects found at safety inspections had been designated "A" (advisory) and that Mr Wright had done the rectification himself. The sheets had been completed by Mr Wright although he later explained that he did so because Mr Wolstenholme's writing was poor and that the designation of defects as advisory was that of Mr Wolstenholme. Further, notwithstanding the undertaking, some defects marked "D" (delayed) had been rectified by Mr Wright.

10. There were a number of other concerns. In relation to C782 MVH, on 9 October 2008, a PG9D was issued in relation to a tyre below the legal limit: three days earlier it had been adjudged by Mr Wright or Mr Wolstenholme as "on limit". To have that prohibition cleared, the vehicle was taken to an MOT station where clearance could be treated as a full MOT; Mr Wright so elected but had no documentary evidence of a pre-MOT inspection although he said that he had done a walk-round check. In fact the MOT test had to be abandoned when the vehicle clutch pipe fractured although a number of faults (including an air leak from a relay valve with the foot brake applied and the exhaust front holed and blowing) were identified.

11. Further, there was no roller brake test machine and the examiner was not shown any documentation to confirm its acquisition although Mr Wright explained that he had acquired a second hand machine in September 2008 and that it was being refurbished.

12. The tachographs of the three vehicles then being used were also examined. Over the six months between 20 May 2008 and 13 November 2008, a number of problems were identified. Thus, Mr Wright (who did much of the driving) was not recording his regular journeys from home to the operating centre (and back again) in one of the vehicles; in relation to all three some tachograph charts were missing. Further on at least three occasions, as a consequence of his previous driving pattern, Mr Wright was obliged to take a weekly rest of at least 45 continuous hours and did not do so. When driving EC-regulated journeys, he did not complete manual records when working away from the vehicle so that there was no way of knowing what time was spent on other duties (attending safety inspections, undertaking rectifications and mechanical work etc) and whether this would have impacted on the legal requirements for rest. There were a number of centrefold offences for charts bearing his name and instances of his use of a chart over 24 hours so rendering the distance trace lines illegible thereby defeating proper analysis.

13. Because of these maintenance shortcomings and the apparent failure to comply with the undertakings that had been given to the Public Inquiry in March 2008, a further Public Inquiry was convened pursuant to the provisions of the Public Passenger Vehicles Act 1981 (as amended) (the 1981 Act) on the basis that the operator "may no longer satisfy the requirements regarding good repute, financial standing and professional competence". To that Inquiry, the operator was required to bring all documentary evidence relating to vehicle maintenance including safety inspection records and driver defects reports together with evidence of systems for ensuring compliance with the drivers' hours and tachograph legislation.

The Public Inquiry

14. The Inquiry was commenced on 4 April 2009 and was conducted (coincidentally) by the Deputy Commissioner who had conducted the Inquiry in March 2008. Further concerns were revealed. As for the way in which the PMI sheets had been completed and the account that Mr Wolstenholme's handwriting was illegible, the Deputy Commissioner noted that on one PMI sheet, dated 18 February 2009, which Mr Wolstenholme had completed, his writing had been perfectly legible but that the items had not been designated at all (with the result that there was no basis for concluding whether this was a repair which Mr Wright could complete or not). On 11 December 2008, one vehicle had been signed off as roadworthy by him, rather than Mr Wolstenholme (explained by Mr Wright on the basis that he had forgotten to take it to Mr Wolstenholme).

15. On the question of Mr Wright's failure to take adequate rests, he said that on one occasion he had been let down by some part-time drivers and, rather than let the customer down, he thought he would be able "to pull the hours back later" but had "either forgotten all about it or just not managed to do it". He had now devised a different strategy with Ms Hill double checking his own checks.

16. As to the roller brake test machine, it was still, apparently, at the engineers and had not been used; there was still no evidence to substantiate its purchase or its current condition. In addition, until very recently prior to the date of the Inquiry, there was no documentary evidence of any authorised vehicle having any roller brakes tests over the preceding 12 months.

17. In relation to MOT documentation, there were further concerns. Although there had been a safety inspection for L455 LVT on 23 January 2009, no documentation for a pre-MOT inspection (conducted on 17 February 2009) was disclosed although Mr Wright said that a roller brake test was attempted and he did a walk-round inspection. The vehicle failed its MOT on four grounds: these included electrical wiring revealing some wires exposed and not insulated, a fuel leakage from the engine and imbalance on the 2nd axle service brake. There were also three advisory items. Furthermore, there was an issue about whether C280 VFP had been used following the expiry of its MOT on 21 February 2009 because the tachographs that had been disclosed were dated 25, 26 and 27 February, it not being suggested that the tachographs bore incorrect dates. At the date of the hearing, that vehicle had not been submitted for a further MOT.

18. There were further, more recent, concerns about the analysis of tachographs, not all of which were available; a total of 9,038 km could not be accounted for by reference to charts. Mr Wright maintained that there were other documents and, on the basis that the Inquiry would not conclude that day, he was afforded a further opportunity to submit charts for analysis. The relevant traffic examiner said that the new charts accounted for 2,379 km, leaving 6,659 unaccounted for. There were further conclusions beyond the period being examined (which led to a request for an adjournment) but the Deputy Commissioner refused to allow this further evidence, observing that all the charts for the period to November 2008 should have been available by mid December 2008. The time had only been allowed to "fill the gaps" and Mr Wright could not suggest that these charts were a surprise to him.

19. At the Inquiry, Mr Wright accepted that he had failed to comply with three of the undertakings that he had given and he offered what the Deputy Commissioner described as "lengthy and detailed explanations" for the various failures. The designation of defects derived from Mr Wolstenholme; he now kept to the six-weekly intervals for safety inspections. Despite

his errors in relation to weekly rests, his duties did not make him tired or a danger on the roads; in any event, he had now engaged Ms Hill to ensure compliance. As for the tachographs, he explained that he had difficulty in retrieving a number from some of his drivers, one of whom was seriously ill. He denied using C280 VFP after the expiry of the MOT but said that the tachographs had been incorrectly dated. He had paid £1500 for the roller brake tester but explained that brakes were "at the forefront" of his maintenance arrangements. Ms Hill gave evidence that she helped with tachograph compliance: she was very organised whereas Mr Wright was not. Mr Wolstenholme did not give evidence.

20. The operator's legal representative reminded the Deputy Commissioner that Mr Wright had acted as a "whistleblower" in relation to a previous operator and had thereby demonstrated an unwillingness to sanction failure to comply with the requirements of the legislation; he submitted that none of the issues raised implied any risk to public safety and that, with help from Ms Hill, Mr Wright was unlikely to repeat problems with drivers' hours etc. Bearing in mind the requirements of proportionality, with "firmed up" undertakings, the licences should be permitted to continue.

21. The Deputy Commissioner did not accept the characterisation of the case suggested. He said:

> "I regard this as an extremely serious case with clear public safety implications, coupled with an almost arrogant disregard – or, at least, a wilful misinterpretation – of the undertakings given last time, coupled with the expectations that we all had in relation to future maintenance arrangements and the role of the Transport Manager."

22. He went on to deal with a number of the specific points. As to the defects, he was not able to say whether designations were appropriately advisory only but he rejected the claim that they came from Mr Wolstenholme, based on his failure to designate in the document he had seen. Given the age of the vehicles and their condition at MOT, he found the designation troubling rather than reassuring. He found the arrangement with Mr Wolstenholme "bizarre"; if he preferred not to undertake major repairs, there was a lacuna in the maintenance arrangements (which he considered a breach of the undertaking as to rectification of defects by an outside contractor); it was astonishing that he had never discovered any fault that would render the vehicle unroadworthy. He pointed to Mr Wright undertaking repairs and, indeed, signing his own certificate of roadworthiness; he rejected Mr Wright's assertions that he undertook equivalent but unrecorded pre-MOT inspections.

23. The Deputy Commissioner considered the drivers' hours offences to be serious with the gap of 6,000 km "a big hole" and he was equally critical of the repeated breaches of rest requirements, noting that Mr Wright undertook most of his own vehicle maintenance and concluded that, with the myriad of other tasks he carried out, there was clear evidence of danger to Mr Wright's passengers and other road users. Neither was he persuaded that a vehicle was not used after the MOT expired but he went on:

> " [E]ven if his account were true, I am not of the view that repeated and gross errors in relation to the accurate completion of tachograph records are any less serious than running a vehicle for a week after its MOT expired."

24. The Deputy Commissioner believed that Mr Wright had used up whatever credit he deserved for having been a whistleblower and pointed to the value of watching and listening to Mr Wright give evidence, identifying a strong feeling that his evidence could not be trusted, that

he was manipulative and was "not a man that the Traffic Commissioner can do business with any more"; he did not trust him to keep his promises.

25. Applying section 17(1) of and Schedule 3 to the 1981 Act, the Deputy Commissioner found that the operator and Mr Wright no longer satisfied the requirements to be of good repute; under section 17(3)(aa), he found that undertakings recorded in the licence had not been fulfilled and did not regard any of the explanations put forward as adequate. He concluded:

> "On the spectrum of seriousness, I find this case is at the extreme end. Mr Wright's experience before the Transport Tribunal should have been seen as a last chance to get things right. Even then the tribunal described Mr Wright's failings as serious… In my judgment this is now a case where revocation is not only proportionate, but also inevitable – if the PSV operator licensing system is to have any credibility. Bradley Fold Travel does indeed deserve to be put out of business. … I further consider that a reasonable time must elapse before Mr Wright could possibly claim to have regained his good repute and before he could possibly return to this important industry – upon which so many people, including vulnerable people and school children rely, and in which they have put their faith."

The Transport Tribunal

26. A number of challenges were advanced. The first concerned the finding of a breach of three aspects of the undertaking given at the Public Inquiry in March 2008. As to the absence of a thorough and effective pre-MOT check, the Transport Tribunal held that the Deputy Commissioner was entitled to conclude that the PMI check or submission of a vehicle for clearance of a prohibition did not amount to a "thorough and effective pre-MOT inspection" and, furthermore, that Mr Wright's attitude towards compliance with this undertaking provided support for the conclusion that he was manipulative. Similarly, in relation to the roller brake tester: whether or not one had been purchased, none had even been installed by the time of the second Public Inquiry. The Transport Tribunal agreed that the Deputy Commissioner was right to conclude that this undertaking had been broken and also that his approach was relevant to his assessment of Mr Wright as a witness and as a holder of the CPC licence for the operator.

27. In relation to the undertaking to have all defects rectified by an outside contractor, the operator and Mr Wright were slightly more successful. It was argued that Mr Wolstenholme's "preference" did not affect the contract which he had and it was pointed out that there was no evidence that he had declined to carry out a major repair or that Mr Wright had even seen the letter (which was addressed to the examiner from VOSA). The Transport Tribunal saw force in these submissions and concluded that the finding that "Mr Wright appeared not to have in place a contractor who would rectify all defects found at safety inspections apart from advisory items" went too far.

28. The Transport Tribunal did not, however, accept the submission that there was no breach of this undertaking. Quite apart from the fact that it was open to the operator to call Mr Wolstenholme, the suggestion that the Deputy Commissioner was not entitled to reach adverse conclusions about his integrity was rejected and, given the poor view formed of Mr Wright, he was equally entitled both to attach little weight to the fact that Mr Wolstenholme had signed PMI sheets that Mr Wright had completed and also use the fact that most defects had been designated "advisory" as further evidence of manipulation. In that regard, I note the extent to which vehicles failed MOT examination notwithstanding the comparatively clean bill of health that they had received in these checks. He was similarly entitled to reach adverse conclusions based on the one PMI sheet which Mr Wolstenholme had completed legibly but without any designation of

defects: it had, of course, been open to the operator and Mr Wright to produce other sheets to demonstrate that this was (as the Tribunal put it) the odd one out. The matter was summarised in this way:

> "The rejection of Mr Wright's explanation still stands, so does the conclusion that the designation of the majority of defects as 'advisory' was both troubling and a manipulation by Mr Wright in order to provide the justification for him to carry out the repairs himself. The criticism of Mr Wolstenholme's failure to find defects rendering vehicles unroadworthy also stands. Finally, it was clear, and never challenged, that on several occasions Mr Wright had carried out repairs to items designated 'delayed' rather than 'advisory'. In our view ample justification remains for the conclusion that there was a breach of this undertaking."

29. In relation to the use of the C280 VFP without an MOT certificate, again, the operator was more successful because a tachograph for 19 February had been produced which suggested that the mileage followed the tachographs for 25–28 February. Thus the Deputy Commissioner's primary finding (that the vehicle had probably been used after the expiry of the MOT) could not stand but the Transport Tribunal did observe that he was entitled to have regard to the fact that, on four occasions, the date was inaccurately recorded. On the more general issue of the tachograph records, the fact that Mr Wright was contesting criminal charges in relation to drivers' hours did not, concluded the Tribunal, render it unreasonable for the Deputy Commissioner to conclude that there was a serious risk to passengers: that risk arose from the failure to take proper rest which was demonstrated on the face of the charts and did not depend on the proof of a criminal offence. Combined with the inability to account for a significant mileage after submitting two batches of charts made it "hardly surprising" that the Deputy Commissioner took a serious view of the operator's failure to keep proper records.

30. By way of overall assessment, the Transport Tribunal rejected the argument that the Deputy Commissioner had failed to give proper weight to Mr Wright's conduct as a whistleblower in 2003. That feature, along with other, limited, positive aspects of the case had to be set against the fact that his good repute was "tarnished" as a result of the first Public Inquiry and that he had not complied with all the obligations of the licensing regime, including the undertakings that he had given at that Inquiry as a demonstration of his willingness to change (leading the Deputy Commissioner to conclude that he was manipulative and untrustworthy), causing the Transport Tribunal to conclude:

> "In our view the adverse findings are so serious and so numerous that there can be only one outcome in this case, namely that the [operator] does deserve to be put out of business, on all the grounds relied upon by the Deputy Traffic Commissioner.
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> In addition we are satisfied that Mr Wright, as the CPC holder, has also lost his good repute. His failings were such that it was clearly appropriate to disqualify him. The period of 18 months disqualification is neither disproportionate nor excessive."

The appeal: approach

31. The first ground which the operator and Mr Wright now pursue concerns the approach of the Transport Tribunal to the appeal and, in particular, its failure to undertake an appropriate re-determination of the issues both factual and legal.

32. It is common ground that section 50 of the Public Passenger Vehicle Act 1981 Act provides for an appeal to the Transport Tribunal against a number of regulatory and enforcement decisions both by the operator (subsection (4)) and any person aggrieved by any order made of disqualification of an operator (subsection (5)): such decisions include a variation of any condition attached to a PSV operator's licence. There are similar provisions in relation to HGV operators pursuant to section 37 of the Goods Vehicles (Licensing of Operators) Act 1995 (the 1995 Act). For the avoidance of doubt, from 1 September 2009, the appeals are no longer to the Transport Tribunal but to the Upper Tribunal: see Transfer of Functions (Transport Tribunal and Appeal Panel) Order 2009 (SI 2009/1885) (the Transfer Order).

33. The provisions governing the jurisdiction of the Transport Tribunal are to be found in Schedule 4 to the Transport Act 1985 (the 1985 Act) which, by paragraph 1, designates it as a court of record and provides (in language materially the same as now describes the jurisdiction of the Upper Tribunal: see paragraph 17 *ibid* as inserted):

> "**8. –** (1) … the tribunal shall for the purpose of the exercise of any of their functions have full jurisdiction to hear and determine all matters whether of law or of fact
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> (2) As respects –
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> (a) the attendance and examination of witnesses;
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> (b) the production and inspection of documents; …
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> the tribunal shall have, in England and Wales, all such powers, rights and privileges as are vested in the High Court …
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> **9. –** (1) On an appeal from any determination of a traffic commissioner under … the 1981 Act, [the 1995 Act] … the tribunal shall have power –
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> (a) to make such order as they think fit …
>
> (2) The tribunal may not on any such appeal take into consideration any circumstances which did not exist at the time of the determination which is the subject of the appeal."

34. The first issue raised by this ground is to identify the breadth of the review which the Transport Tribunal (and, thus, now the Upper Tribunal) must undertake. On behalf of the operator and Mr Wright, it is argued that the language of paragraph 8 of Schedule 4 to the 1985 Act ("full jurisdiction to hear and determine all matters whether of law or of fact") did not permit the Transport Tribunal to limit itself simply to a review of the "reasonabless/rationality" of the Deputy Commissioner's conclusions but required the actual evidence to be addressed and consideration given to the extent to which relevant features of the case had been ignored. This requires an analysis of the effect of the jurisdiction and its proper function as an appellate body from the decision of the Deputy Commissioner.

35. The first point to make (the contrary not being suggested) is that the function of the Transport Tribunal is not equivalent to an appeal to the Crown Court against a conviction in criminal proceedings in the magistrates' court which is treated, in effect, as a new first instance hearing with evidence (which may or may not be the same as was called before the magistrates) being called a second time. Although there is a power to permit further evidence (see paragraph 8(2), subject to paragraph 9(2) which does not permit any appeal to take into consideration any circumstances which did not exist at the time of the determination subject of the appeal), whether

or not to permit such evidence is clearly a matter for the tribunal: it does not arise in this case as no attempt was made to rely on it.

36. Thus, although the jurisdiction is to hear and determine matters of both fact and law, the material before the Transport Tribunal will consist only of the documents placed before the Deputy Commissioner and the transcript of the evidence; the Tribunal will not have the advantage that the Deputy Commissioner had of seeing the parties and the witnesses, hearing them give evidence and assessing their credibility both from the words spoken but also the manner in which the evidence was given. Recognising that advantage both in relation to credibility and findings of fact, in *Biogen Inc v Medeva Plc* [1997] RPC 1, Lord Hoffmann explained (at 45):

> "The need for appellate caution in reversing the [trial] judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance ... of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."

37. The extent to which those considerations are appropriate was considered in *Assicurazioni Generali SpA v Arab Insurance Group* [2002] EWCA Civ 1642; [2003] 1 WLR 577, in which Clarke LJ (as he then was) gave guidance in relation to appeals based on errors of fact in these terms:

> "15. In appeals against conclusions of primary fact the approach of an appellate court will depend upon the weight to be attached to the findings of the judge and that weight will depend upon the extent to which, as the trial judge, the judge has an advantage over the appellate court; the greater that advantage the more reluctant the appellate court should be to interfere. As I see it, that was the approach of the Court of Appeal on a 're-hearing' under the Rules of the Supreme Court and should be its approach on a 'review' under the Civil Procedure Rules 1998.
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> 16. Some conclusions of fact are, however, not conclusions of primary fact of the kind to which I have just referred. They involve an assessment of a number of different factors which have to be weighed against each other. This is sometimes called an evaluation of the facts and is often a matter of degree upon which different judges can legitimately differ. Such cases may be closely analogous to the exercise of a discretion and, in my opinion, appellate courts should approach them in a similar way."

38. The approach to appeals in cases such as this was further considered in *Subesh & ors v Secretary of State for the Home Department* [2004] EWCA Civ 56; [2004] INLR 417 in relation to the statutory regime then in force by which an appeal lay from the Adjudicator (who heard the evidence) to the Immigration Appeal Tribunal. Paragraph 22 of Schedule 4 to the Immigration and Asylum Act 1999 conferred an unqualified right of appeal on any party, not limited by reference to any particular issue.

39. Giving the judgment of the court, Laws LJ analysed the authorities (both general and specific to asylum and immigration). Having made the preliminary points that the IAT's jurisdiction was not limited by *Wednesbury* considerations (see [1948] 1 KB 223) and that it was "commonplace" that "an appellate court which has not heard the material oral testimony must be

slow to impose its own view" (see [40] and [41]), he approached the question of what was meant by error – as opposed to mere disagreement – sufficient to justify interference with its decision. He said, the emphasis being his (at [44]):

> "The answer is, we think, ultimately to be found in the reason why (as we have put it) the appeal process is not merely a re-run second time around of the first instance trial. It is because of the law's acknowledgement of an important public interest, namely that of finality in litigation. The would-be appellant does not approach the appeal court as if there had been no first decision, as if, so to speak, he and his opponent were to meet on virgin territory. The first instance decision is taken to be correct until the contrary is shown. As Lord Davey put it in *Montgomerie* [[1904] AC 73 at 82-3], '[i]n every case the appellant *assumes the burden* of shewing that the judgment appealed from is wrong' (our emphasis). The burden so assumed is not the burden of proof normally carried by a claimant in first instance proceedings where there are factual disputes. An appellant, if he is to succeed, must persuade the appeal court or tribunal not merely that a different view of the facts from that taken below is reasonable and possible, but that there are objective grounds upon which the court ought to conclude that a different view is the right one. The divide between these positions is not caught by the supposed difference between a perceived error and a disagreement. In either case the appeal court *disagrees* with the court below, and, indeed, may express itself in such terms. The true distinction is between the case where the appeal court might *prefer* a different view (perhaps on marginal grounds) and one where it concludes that the process of reasoning, and the application of the relevant law, *require* it to adopt a different view. The burden which an appellant assumes is to show that the case falls within this latter category."

40. Thus, Laws LJ made it clear that the question was whether the appellate tribunal "concluded on objective grounds that a different view from that taken by the Adjudicator was the right one, or (and we mean it to be the same thing) that reason and the law impelled them to take a different view" ([53]). For my part, this reasoning applies equally and with as much force to appeals from the Commissioner to the Transport Tribunal; neither do I read the recent decisions emanating from that tribunal to which we have been referred as suggesting to the contrary.

41. Before leaving this issue, it is appropriate to identify the different approach adopted in relation to appeals to this court. Paragraph 14 of Schedule 4 to the 1985 Act provides:

> "(1) Subject to sub-paragraphs (2) and (3) below, an appeal shall lie in accordance with rules made by the Secretary of State from the tribunal to the Court of Appeal … .
>
> (2) No appeal shall lie from the tribunal on a question of fact or locus standi.
>
> (3) [relates to rules of court]
>
> (4) On the hearing of an appeal the Court of Appeal … may draw all such inferences as are not inconsistent with the facts expressly found and are necessary for determining the question of law, and may make any order which the tribunal could have made, and also any such further or other order as may be just."

42. These provisions restrict the right of appeal to a point of law (on which see *Surrey County Council v Paul Williams (t/a Garden Materials Landscaping) & anor* [2003] EWCA Civ 599 *per* Laws LJ (at [25]) and Simon Brown LJ (at [26]). No permission to appeal is required (cf the equivalent right of appeal from the Upper Tribunal to the Court of Appeal which, by section 13

of the Tribunals, Courts and Enforcement Act 2007 similarly limits an appeal to any point of law but also requires the permission of the Upper Tribunal or this court).

The breadth of the challenge

43. Mr Wright's submissions to this court focussed first and foremost on the conduct of the rehearing in March 2008 which had been ordered by the Transport Tribunal. Although this point was not taken before the Transport Tribunal, he submits that the Deputy Commissioner should have conducted a complete rehearing as directed and suggests that the transcript omits reference to an adjournment after which Mr Allanson said (in connection with the suggestion that the Deputy Commissioner would analyse the case from the date of the Transport Tribunal onwards) that the operator and Mr Wright "reserved their position". He now seeks to challenge that approach and all that flows from it.

44. When asked about his failure to appeal that decision at the time, Mr Wright frankly accepted that he was content to proceed on the basis of the reduced number of vehicles not having sufficient money to continue to operate the seven originally licensed. As far as he was concerned, he made a commercial decision but had reserved his position should it ever prove necessary to challenge the approach.

45. Without descending into the question of the accuracy of the transcript, that approach is flawed for a number of reasons. First, although I cannot conceive of the advantage to the operator or Mr Wright, it was open to Mr Allanson to submit to the contrary to the Deputy Commissioner; indeed, if he believed that it was outside his powers to proceed as he did, it was his duty to do so. In fact, focus on events since the Transport Tribunal reduced the risk of loss of licence. Secondly, if there was to be an appeal, that appeal had to be mounted within the period prescribed by the legislation; it is far too late now to seek to challenge it. Third, this appeal can only raise points of law ventilated before and decided by the Transport Tribunal; this argument does not arise from any aspect of the decision under appeal.

The factual merits

46. The operator and Mr Wright also argue that the decision of the Transport Tribunal is flawed because of its failure to deal with the case they advanced regarding pre-MOT inspection, the circumstances of MOT failures, contradictory treatment by the Deputy Commissioner of the meaning of "advisory" items and the real relevance of Mr Wright's history as a whistleblower. For the reasons that I have sought to outline, that argument starts from the wrong position. The Transport Tribunal set out the facts in summary form and analysed the complaints which were advanced to it. The judgment is conspicuous for its clarity and its demonstrable attention to the detail. In a number of respects, the Tribunal accepted the submissions made about the conclusions reached by the Deputy Commissioner (both in relation to the undertaking to have in place a contractor who would rectify all defects found at safety inspection and the errors in relation to the dating of the tachographs). The Tribunal then considered the extent to which those errors invalidated or undermined the overall conclusions reached. The determination that they did not was entirely open to the tribunal and reflective of the appropriate approach to issues of primary fact and inference: it does not even start to generate any issue of law which would justify intervention by this court.

47. Mr Wright then complains that the treatment of his successful challenge to findings of dishonest use of C280 VFP after expiry of the MOT was so unreasonable as to be perverse on the grounds that it equated the innocent misdating of several tachograph charts to the illegal use

of the vehicle, falsification of charts and persistent dishonesty. Again, I do not agree. The Deputy Commissioner was careful in his analysis when he said:

> "I am not persuaded, on balance, by Mr Wright's claims in relation to the tachograph discs that appear to show journeys after the expiry of an MOT certificate. And even if his account were true, I am not of the view that repeated and gross errors in relation to the accurate completion of simple tachograph records are any less serious than running a vehicle for a week after its MOT expired."

48. Although the Transport Tribunal considered the primary conclusion flawed, it went on to express the view that he "… was entitled to have regard to the fact that on four occasions the date on a tachograph started with a '2' when it should have been a '1' [such that] success on this point [was] "limited". Again, there is not the slightest error of law in this approach: the Transport Tribunal was simply confirming the alternative approach that the Deputy Commissioner had adopted. There was nothing perverse about its conclusion.

49. Finally, it is argued that the finding of road safety risk was based in significant part on findings of drivers' hours rest offences which was undermined by Mr Wright's acquittal on appeal so that a decision on repute, resting upon a mistaken view is flawed and unsafe. The first point to be made is that both the convictions and the acquittal on appeal (being challenged by VOSA in respect of Mr Wright by way of case stated) post-date the hearing before the Deputy Commissioner and the appeal. As the Secretary of State makes clear, the Deputy Commissioner made findings about the breaches revealed by the tachograph records for the purpose of the administrative proceedings before him and he did so on the basis of the evidence that he heard; he was entitled to proceed as he did. Whether or not an application was made on this ground to adjourn the hearing before the Deputy Commissioner, the point taken before the Transport Tribunal was that it was it was unreasonable for him to conclude that the operator or Mr Wright posed a serious risk when he was known to be contesting the criminal charges. There is absolutely nothing in that point: the standard of proof in the criminal court is different and, in any event, the prosecution related to some but by no means all the apparent breaches revealed by the records, a number of which were not in issue.

50. Following the decision of this court in *Crompton (t/a David Crompton Haulage) v Department of Transport* [2003] EWCA Civ 64; [2003] RTR 34, the Transport Tribunal revisited its approach to the issue of sanction in *Bryan Haulage (No 2)* 2002/217 and put the test in a manner not challenged before us, namely (at [11]):

> "[T]he question is not whether the conduct is so serious as to amount to a loss of repute but whether it is so serious as to require revocation. Put simply, the question becomes 'is the conduct such that the operator ought to be put out of business?' On appeal, the Tribunal must consider not only the details of cases but also the overall result."

51. That is the approach adopted both by the Deputy Commissioner and the Transport Tribunal in this case. Both considered the case in the round, paid proper attention to Mr Wright's history as a whistleblower but noted that his reputation (as had been made clear in the 2008 hearing) was "tarnished". Further, his failures to comply with all the obligations of the operators' licensing regime or the undertakings which he had offered were "so serious and so numerous" that the only conclusion was that the operator did deserve to be put out of business. Both also concluded that Mr Wright had also lost his good repute and that the period of 18 months' disqualification was "neither disproportionate nor excessive". Each of these was a conclusion which the Deputy Commissioner and the Transport Tribunal respectively was entitled to reach.

52. For my part, I detect no flaw in the approach adopted by the Transport Tribunal and no error of law either in reasoning or conclusion. I would dismiss this appeal.

LADY JUSTICE SMITH:

53. I agree.

LORD JUSTICE SEDLEY:

54. I also agree.