John Pronk Transport BV
[2023] UKUT 184 (AAC)

IN THE UPPER TRIBUNAL **Appeal No. UA-2022-001184-T**
ADMINISTRATIVE APPEALS CHAMBER

On appeal from the Decision of Nick Denton, Deputy Traffic Commissioner for the East of England dated 28th July 2022

John Pronk Transport BV

Appellant

and

Driver and Vehicle Standards Agency

Respondent

Before: **Upper Tribunal Judge Her Honour Judge Beech**
Specialist Member of the Upper Tribunal Dr Phebe Mann
Specialist Member of the Upper Tribunal Martin Smith JP

Hearing date: 11th July 2023

Representation:
Appellant: Murray Oliver, solicitor of Smith Bowyer Clarke
Respondent: Toby Sasse of Counsel for the DVSA

DECISION

The appeal is DISMISSED

Subject Matter: Impounding; knowledge of vehicle being used in contravention of s.2 of the Goods Vehicles (Licensing of Operators) Act 1995; adequacy of reasons

Cases referred to: T/2013/21 Societe Generale Equipment Finance Ltd; Nolan Transport v VOSA & Secretary of State for Transport (2012) UKUT 221 (AAC); Bradley Fold Travel Ltd & Peter Wright v Secretary of State for Transport (2010) EWCA Civ.695.

REASONS FOR DECISION

1. This is an appeal from the decision of the Deputy Traffic Commissioner for the East of England ("DTC") dated 28th July 2022 when he refused to return impounded vehicle 57 BK V2 to the Appellant ("JPT"") under regulation 4(3)(c) of the Goods Vehicles (Enforcement Powers) Regulations 2001 (as amended) ("the Regulations").

2. The background to this appeal can be found in the appeal bundle and the DTC's written decision dated 28th July 2022 and is as follows. JPT is a Dutch haulage company which undertakes cabotage work in the UK, delivering flowers and plants. On 26th May 2022, vehicle 57 BK V2 ("the vehicle") coupled to a trailer loaded with empty auction flower boxes and pallets (confirmed by the CMR note produced by the driver) was stopped at the port of Harwich, Essex. Traffic Examiner ("TE") Hunt spoke to the driver, Brian Mobbs who stated that he had been employed by JPT for "*over 20 years".* He confirmed the contents of the trailer. He was unable to produce the CMR notes for his incoming journey or for any of those then undertaken before he was stopped on 26th May 2022 as JPT instructed its drivers to return the notes with the trailers. Mr Mobbs was not aware that it was a legal requirement that the CMR notes must remain with the vehicle whilst in this country.

3. With the help of the Tachoscan system, Mr Mobbs, accepted that illegal cabotage had probably taken place and gave a brief summary of his journeys when interviewed under caution:

   Inbound Load Trailer 1: embarked on the Eurostar on 18th May to Folkestone (arriving in the early hours of 19th May 2022). He then drove to Covent Garden to deliver his load.

   First domestic journey – Trailer 2: on the 19th May 2022 having taken his daily rest, he dropped trailer 1 at Harwich and collected trailer 2. He delivered part of the load to Thorpe-Le-Soken and the remainder to Covent Garden. Following his daily rest period, he delivered trailer 2 (loaded with auction flower boxes etc) to Harwich on 20th May 2022.

   Second domestic journey – Trailer 3: in the evening of 20th May 2022, he collected trailer 3 from Harwich and delivered it to Derby and then had his weekly rest.

   Third domestic journey – Trailer 4: on the evening of 23rd May 2022, he returned trailer 3 to Harwich and collected trailer 4 and delivered it to Derby and then returned to Harwich. He then took his daily rest.

   Fourth domestic journey – Trailer 5: on the morning of 24th May 2022, he collected trailer 5 from Harwich and then made a delivery to Milton Keynes and two to Birmingham. The following morning (25th May), he delivered to Derby and then returned to Harwich and dropped off trailer 5.

   Fifth domestic journey – Trailer 6: On 25th May, he picked up trailer 6 and delivered to Derby and then took his rest at Dunmow East before returning the trailer to Harwich on the 26th when the vehicle was stopped.

It was confirmed that on each occasion the trailers were returned to Harwich (save for one instance), they were laden with empty containers as with trailer 6. TE Hunt considered that as the vehicle did not leave with the trailers when they were despatched from Harwich back to Holland, the number of illegal cabotage journeys (which she calculated to be three) could be in increased by one for each laden trailer dropped off at Harwich which she had not taken into account. We agree with that assessment.

4. The basis upon which TE Hunt made her assessment of illegal cabotage is conveniently set out in paragraph 2 of the DTC's decision:

"*Under post-Brexit cabotage rules, the number of cabotage journeys (ie movements carrying goods within the UK) an EU-based vehicle can perform after its incoming international journey is limited to two, after which the vehicle must depart the UK within seven days of tipping the inbound international load. This limit was temporarily relaxed between October 2021 and 30 April 2022 to help tackle driver shortages. But on 26 May 2022 the cabotage limit was again in force.".*

As TE Hunt observed in her Impounding Report, the cabotage rules "*allow for a vehicle to enter the UK with a load, that can be delivered to multiple destinations. The same vehicle is then permitted to collect and deliver two loads in the UK at which point, the vehicle can then only collect a load for an outbound journey. All of this must take place within 7 days from offloading the original inbound load …"*

5. During the impounding process, Mr Mobbs spoke to Steve Perry, JPT's Operations Manager based in the UK. Mr Perry then spoke to TE Hunt and expressed the view that the cabotage rules had been followed and referred to the temporary relaxation of the cabotage rules allowing 14 days with unlimited journeys. TE Hunt explained that the temporary relaxation had ceased on 30th April 2022. Mr Perry averred that he kept up to date with the legislation and that he had not been so advised. He was shown the relevant page on the Gov.uk website and he accepted the position. The vehicle was impounded.

6. By an application dated 14th June 2022, JPT applied for the return of the vehicle under regulation 4(3)(c) of the regulations:

c) that, although at the time the vehicle was detained it was being, or had been, used in contravention of section 2 of the 1995 Act, the owner did not know that it was being, or had been, so used";

In section 6 of the application form, which provides the applicant with an opportunity to explain their case, the following appears:

"*Formal witness statement(s), evidence, and written representations will be provided once the information-gathering process is complete and, in any event, within such time limits as the Traffic Commissioner sees fit to direct".*

By a letter dated 17th June 2022, DTC Secular directed JPT to file a statement in support of its application within 14 days. A reminder was sent by email on 5th July 2022 to both JPT and Smith Bowyer Clarke. That resulted in various untranslated pieces of documentation being filed which principally went to the issue of ownership of the vehicle. The remainder of the documentation was

made up of various CMR and carriage documents covering the period 18th to 26th May 2022. No witness statements were filed.

7. The hearing of JPT's application took place on 15th July 2022. Mr Dunne, solicitor, represented JPT and Steve Perry attended. TE Hunt attended by video link on behalf of the DVSA; Mr Sasse of Counsel was instructed by the DVSA.

8. At the outset, the TC accepted that JPT was the owner of the vehicle and it was conceded on behalf of JPT that illegal cabotage had taken place although there was an issue as to whether five or six trailers had been utilised during the relevant period. The DTC however indicated that as illegality had been conceded, he was not concerned with the exact number of illegal journeys that had taken place.

9. Mr Perry then gave evidence. He had held the position of Operations Manager for JPT for eight and a half years. He lived in the UK and travelled to Holland on a monthly basis. He averred that the JPT transported on average, 6,000 trailers to the UK a year. The company had invested about €200,000 on telematics and electronic CMR systems. The company trained the drivers and the driver trainer, who had a very good educational background, also dealt with tachograph infringements and insurance claims.

10. Mr Perry volunteered that the first time that it had been suggested by the DVSA that the company had been in breach of the cabotage rules was prior to 2019 but no action was taken at that stage. Then in April 2019, the company was fined £300 for being in breach of the rules, which at that stage, permitted three domestic journeys in seven days (his evidence must refer to a stop in August 2019). He averred that this infringement was relayed to the planning team in Holland who were told that they must adhere to the rules. He told the TC that there were two export planners in the office in Holland who worked very closely together. One plans and the other creates the export documents which then go to the Brexit Department. There were three departments involved in the process, but it was primarily planning and at the end of the season, that department was essentially Jan Dood. The other planner was Jacob Groot who created the export documents.

11. Mr Perry's explanation for how illegal cabotage took place on this occasion was that it was the end of the season and the planning team were worn out. Jan Dood took leave on Friday and returned on the Wednesday. Jacob Groot then had an extended weekend commencing Wednesday. As a result, there was no internal handover or talks between them on the Wednesday when Jan Dood returned to work. Mr Perry had spoken to Mr Dood following the incident. He was under the impression that Mr Mobbs had shipped to the UK on the Monday and that he could carry on working for the rest of the week. It was a lack of communication and human error. Both planners had been reprimanded by John Pronk personally and warned that another incident of this nature would result in them being fired. Mr Pronk was very angry as he had lost a vehicle.

12. Mr Perry agreed with Mr Mobbs that he had been driving for JPT for twenty years. Mr Mobbs understood the cabotage rules and all drivers were instructed in the three-in-seven rule, which on the company's version is an incoming trailer, two further trailers transported internally and a fourth returning

to Holland with the vehicle and driver. Mr Mobbs would have been aware that he was driving in breach of the rules. Mr Perry produced documentation that had not been filed with the Office of the Traffic Commissioner ("OTC") which he asserted demonstrated that there were only two illegal cabotage journeys undertaken by Mr Mobbs. It does not appear that this documentation was shared with the DTC and/or Mr Sasse and does not appear in the appeal bundle. It could not be shared with TE Hunt as she was appearing remotely.

13. Mr Mobbs status was then explored. Mr Perry averred that as a result of the IR35 ruling of 2021, JPT drivers were now employed through a UK company and their salaries paid through that company. Neither John Pronk nor Mr Perry knew that Mr Mobbs was going to undertake illegal cabotage and such conduct would not be sanctioned. The new electronic systems introduced in March 2022 would give the company more knowledge of what was going on in the UK and the drivers had been told that they must report to the planning team if they think that "*something's happening".*

14. In cross examination, Mr Perry confirmed that on his account, there would not be any circumstances in which a vehicle would be in the UK for more than seven days. He denied that the vehicle being driven by Mr Mobbs was in the UK for eight days but then accepted that this was the case and that this should have been picked up by the planners as they should have been checking that the journeys were lawful as they had been trained to do. The April/August 2019 offence resulted in an illegal cabotage warning letter being sent by the DVSA on 14th October 2019. Mr Perry was not aware that there had been two further DVSA stops as a result of illegal cabotage in 2020 despite them having been referred to in the hearing bundle. He had not been able to investigate those incidents and then he changed his evidence and averred that he could not recall whether he had investigated them or not. He presumed that they had been investigated. He accepted that the bundle contained evidence of illegal cabotage having been undertaken by the vehicle and Mr Mobbs between 2nd and 16th May 2022 (fourteen days) as well was between 19th and 26th May 2022. He had not investigated the earlier journeys because he was concentrating on preparing for the hearing and had only received the bundle a week before the hearing. There was no documentation evidencing disciplinary action being taken against Mr Mobbs as all disciplinary action was verbal. Mr Perry observed that Mr Mobbs had been fully trained by JPT and he knew that he could question the duties he was given by the planners who he was in touch with on a daily basis. Mr Perry had only spoken to Mr Mobbs to verbally warn him about this incident during the week of the hearing (so just under thirteen months after the impounding). He accepted that there were no records of training for either the planners or Mr Mobbs although Mr Mobbs did have a driver CPC and cabotage was "*an understanding within the business".* From now on, there will be a documented procedure which Mr Perry will draw up to highlight the full implications of these infringements and to ensure that it does not happen again. This had not been done before because it was believed that the 2019 fine was a one-off. He averred that the two stops in 2020 had not resulted in any action being taken by JPT because of COVID. He would have been aware of these stops and he would now investigate them again. He accepted that when he spoke to TE Hunt, he thought that JPT vehicles were still operating under the exemption that had finished three

weeks earlier. So, the law had changed but the company was still operating its own version of the three-in-seven rule, although on this occasion, it was not. Mr Perry had not had any training in international transport and cabotage although he looked through the updates of the "RHN" (probably misheard by the transcriber and should be the RHA) and the FTA and he looked at the regulations on gov.co.uk. His training was self-managed.

15. As for the CMR documentation, the reason why the drivers were instructed to return the documentation with/in the trailers was because a new electronic system had been introduced in March which was then implemented over the following eight months. If Mr Mobbs had known (which he did not), he could have opened up an App on his tablet where all previous journeys and signed electronic CMRs could be found. Mr Mobbs had only been trained on the system in Holland "*this week".* Mr Perry admitted that the company had not put everything in place as it should have done. He admitted that there was an issue with training. Since February 2022, the company had been looking to open a UK operation and apply for an operator's licence to have everything "*just tight"* (although that may be a transcribing error and should read "*just right").* The company planned to import twelve vehicles and register them in the UK. He accepted that the failures that led to the impounding were failures at a supervisory level, a planning level and at driver level.

The TC's decision

16. Having summarised the evidence, the DTC dealt with the issue of whether JPT knew that the vehicle was being operated in contravention of s.2 of the 1995 Act in this way:

"*17. … I have reminded myself of the five categories of knowledge as established by the Upper Tribunal (paragraph 57 of the Senior Traffic Commissioner's Statutory Guidance Document 7 refers. The first is actual knowledge.*

18. In considering whether there was actual knowledge that the vehicle was contravening the law, I bear in mind that the appellant is the company .. not any individual. For the ground of appeal to be made out, the ***company*** *… must show that it had no knowledge of its vehicle's illegal cabotage operations in the period 19-26 May 2022.*

19. I did consider Mr Perry's evidence that the two planners had got things mixed up owing to exhaustion and a poor handover. But I was not convinced that a botched handover on Wednesday 25 May was a plausible explanation for illegal cabotage which began (according to both driver Mobbs and to DVSA's analysis of the vehicle's tachoscan data) on the evening of Monday 23 May. The evidence the planners did not know of the illegal cabotage is therefore very flimsy (to put it no higher).

20. Having considered the evidence produced both in advance of and at the hearing, and irrespective of whether Messrs Dood and Groot had actual knowledge. I find that the company did have actual knowledge of this. The reasons for reaching this finding are:

i) Driver Mobbs, who Mr Perry confirmed understood the rules relating to cabotage, knew that he was carrying out more than the two permitted cabotage journeys. Although not directly employed by

(JPT) (he is employed through the UK company), he was the agent of the Dutch company in the week in question. The company's agent knew that the vehicle's schedule had passed into illegality during the week in question;

ii) The schedulers in the Netherlands planned the incoming international journey on 18/19 May 2022 and (collectively) planned at least five cabotage journeys thereafter before the outgoing international leg due to take place on 26 May. Whether any individual scheduler knew that the permitted number of cabotage journeys was about to be exceeded or had been exceeded is immaterial. The fact is that the company as a whole had this knowledge and failed – whether through poor systems, miscommunication, human error or deliberate act – to prevent it.

21. I have reminded myself of paragraph 59 of Statutory Document 7. This relates to the question of whether a company had taken steps to prevent illegal cabotage, which is not in fact the ground claimed in this application. However, it is worth citing at length because it illustrates starkly how insouciant the company has been in the face of the 2019 warning in causing or permitting further illegal cabotage operations since then.

22. (the TC then set out paragraph 59)

23. In re-reading this paragraph and its lengthy list of the kind of evidence which an appellant might be expected to produce, I am struck by the fact that (JPT) has not been able to produce any documentary evidence of any such actions. No evidence of journey planning systems or guidance, or of training for schedulers has been provided. No evidence of any investigation or any other action following the October 2019 warning letter from DVSA has been provided. No evidence of the discipling of the schedulers has been provided.

24. As I mention above, the failure to provide such evidence is not strictly relevant to my finding that the company had actual knowledge of its transgression, but it illustrates the point that the company had actual knowledge of its transgression from October 2019 at the latest but failed to take any action to avoid a repetition and to design its systems to ensure that its servants and agents had the same knowledge which the company as a corporate entity had.

25. (JPT) has failed to demonstrate that it did not know that vehicle 57-BK-V2 was being used during the period 19-26 May 2022 in contravention of Section 2 of the 1995 Act. That being the case, its application for the return of the vehicle is refused .."

The appeal

17. By way of an Appellant's Notice dated 24th August 2022, JPT set out three grounds of appeal:

"*1. The Applicant was not in breach of EU Regulation 1072/2009.*

2. The Deputy Traffic Commissioner took into consideration matters which he ought not to have taken (not further particularised); *and*

3. The Applicant seeks clarification of the proper approach to be taken to an incoming international journey in which:

3.1 perishable goods are conveyed, and delivered, in specialised "cages" or stillages;

3.2 multiple deliveries are made from the one vehicle;

3.3 at each delivery point empty cages or stillages, delivered by the Applicant as laden cages or stillages on an earlier incoming international journey, are collected by the delivering vehicle for reuse by the Applicant; and

3.4 those empty cages or stillages are transported by the Applicant to his home country (sic) *for reuse".*

18. Prior to the hearing of this appeal, both Mr Clarke and Mr Sasse submitted helpful skeleton arguments for which we were grateful and at the hearing, Mr Oliver appeared on behalf of JPT and Mr Sasse for the DVSA.

19. At the outset, it was confirmed by Mr Oliver that ground 1 had been abandoned. As for Ground 3, he frankly acknowledged that he may be in some difficulties in persuading the Tribunal to provide the clarification sought. We indicated without hesitation, that his analysis of the position was correct for the following reasons:

    a) none of the issues raised by that ground, were raised as issues by TE Hunt, Mr Sasse, Mr Dunne, Mr Perry or indeed the DTC. Mr Clarke was therefore asking the Tribunal to consider issues which were not relevant to the evidence put before the DTC or relevant to his findings. It follows that the ground sought clarification of issues which were entirely academic in nature and such academic clarification is not the purpose of the Tribunal's appellate jurisdiction;

    b) the skeleton argument proceeded upon the basis that the auction flower boxes, containers and pallets carried back to Harwich and then Holland were the property of JPT when there was no evidence before the DTC (or indeed before the Tribunal) as to ownership of the items.

    No further consideration was given to this ground.

20. Ground 2 was re-presented as a new submission that the DTC had provided inadequate reasons to support the finding that JPT had "actual knowledge" that the vehicle was being unlawfully operated. Moreover, the DTC ought not to have found that Mr Mobbs was the agent of JPT and ought not to have determined that his knowledge of illegal cabotage could be taken to be the knowledge of the company. Mr Oliver sought permission to amend ground 2. Mr Sasse fairly conceded that by reason of the DTC's equivocal wording in the last sentence of paragraph 20(ii) of his decision (see paragraph 16 above) and there being no clear-cut finding of dishonesty made by the DTC, Mr Sasse was in difficulties in defending that part of the DTC's findings, although he wished to do so with respect to paragraph 20(i). In the event, he did not oppose the amendment sought.

21. It is JPT's case that the DTC's analysis of the facts was flawed. His finding that Mr Mobbs was an "agent" of JPT and that his knowledge of illegality could be ascribed to JPT had no basis on the evidence. There was no evidence that

the driver held any office, had any decision-making authority or other control over the activities of the company. He was nothing more than a driver, employed by a different company who drove on a sub-contracting basis. The company held no *"continuous and effective control"* over his activities. In support of that submission, reference was made to paragraph 25 of *Nolan Transport v VOSA & Secretary of State for Transport (2012) UKUT 221 (AAC)* in which it was held that for the purposes of Article 8.3 of Regulation (EC) No. 1072/2009, "haulier" means the operator of the vehicle as opposed to the driver. Article 8 sets out the general principles which apply to cabotage. Moreover, whilst the TC was entitled to make findings about journey planning, in doing so he failed to engage in any reasoning so as to enable JPT to understand the adverse findings the DTC made on the company's knowledge of illegality. Reference was made to paragraph 48 of Statutory Document 7 which indicates that when considering knowledge in impounding cases, "*any other explanation put forward by the owner must be considered and assessed".* In this case, JPT's explanation was dismissed as unconvincing and flimsy. However, the DTC failed to give any reasoning for that finding. That is important because paragraph 49 of Statutory Document 7 requires consideration of motivation for the operator's conduct and that "*circumstances which show that the owner's conduct was inadvertent or accidental would mean that it was not wilful".* In describing JPT's conduct in the way that he did, the DTC referred to different types of knowledge without considering each of the five categories of knowledge set out in *Societe Generale Equipment Finance Limited v VOSA (2013) UKUT 0423 (AAC)* and without determining which category of knowledge the conduct fell into. This was an important omission as descriptions such as "*human error*" or "*miscommunication"* could be categorised as conduct which was inadvertent or accidental and therefore "*not wilful*" and not dishonest (as would be required if the conduct fell within categories iv. and v. of knowledge as set out in *Societe Generale)* (supra). If the DTC had followed the process of considering the evidence and deciding which category it fell into, he would or should have concluded that the vehicle should have been returned.

Discussion

22. By virtue of s.2 of the Goods Vehicles (Licensing of Operators) Act 1995 ("the 1995 Act"), it is a criminal offence to use a goods vehicle on a road for the carriage of goods, either for hire or reward or for or in connection with any trade or business carried on by the user of the vehicle without holding an operator's licence.

23. The purpose of the impounding regime is to protect the public, improve road safety standards and ensure that operators compete fairly with other hauliers (see paragraph 261 of *Nolan Transport* (supra).

24. Everyone is taken to know the law, namely:

    a) that the use of a vehicle in breach of section 2 is unlawful;

    b) that to do so renders it liable to being impounded;

    c) that the grounds for the return of an impounded vehicle are limited to those set out in regulation 4(3) of the Regulations

25. Every claim for the return of a vehicle under Regulation 4(3)(c) of the Regulations "*raises a deceptively simple question, which the Traffic Commissioner must answer .. Has the claimant satisfied me that he, she or it probably did not know that the vehicle was being or had been used in contravention of s.2 of the 1995 Act?"* (see paragraph 16 of *Societe Generale) (*supra*)*. The burden of proof rests upon the applicant throughout to prove the negative and in the absence of any evidence capable of showing lack of knowledge of use in contravention of s.2, the applicant will have failed to discharge the burden of proof and there is no requirement for a TC to go further and embark on the process of deciding whether or not the applicant had actual, imputed or constructive knowledge of illegal use.

26. The starting point must be JPT's history of illegal cabotage to which the DTC referred. There is a list of occasions in TE Hunt's witness statement (pg 67 of the appeal bundle) when illegal cabotage had been found to have been committed by JPT. The first was in June 2019 when no action was taken by the DVSA. According to Mr Perry, he was aware of this stop. The second was in August 2019 when a driver fixed penalty notice of £300 was issued and resulted in the issuing of the impounding warning letter which was sent in October 2019 to JPT. Mr Perry was aware of this stop and of the warning letter. There were then two further stops in August and October 2020 when illegal cabotage was found to have taken place and again, no action was taken by the DVSA. Mr Perry gave equivocal evidence as to whether he knew about these stops and/or whether they had been investigated by JPT. Then crucially, after the relaxation of the cabotage rules came to an end in April 2022, there were further cabotage infringements between 2nd and 16th May 2022 before the vehicle was eventually impounded on 26th May 2022. Mr Perry could not provide any explanation for those infringements and admitted that he had not investigated the circumstances in which they had occurred. Then there is of course, the illegal cabotage that resulted in the impounding. The only evidence before the DTC about the circumstances of this illegal cabotage was the admissions by Mr Mobbs and the bare assertions made by Mr Perry that the planners were reminded to abide by the rules in 2019, that driver and planning training had taken place, that a new electronic system was in the process of being installed. There was no documentary evidence before the DTC in the form of procedures, systems, training materials whether of drivers or planners, witness statements from Mr Mobbs and/or the planners and/or a director of the company, disciplinary records or indeed any of the types of documentation which a TC might expect to be provided with (and as set out in paragraph 59 of Statutory Document 7), which might have caused the DTC to accept the sole explanation for the illegal cabotage from 23rd May 2022 as being human error or a "botched" handover on 25th May 2022.

27. Of course, JPT's explanation, even without taking account of the illegal cabotage history did not withstand close scrutiny. As the DTC correctly found, the explanation of a "botched handover" on 25th May 2022 could not explain illegal cabotage which had commenced on 23rd May 2022. In addition, the vehicle had been in the UK for eight days when it was stopped. The legal limit was/is seven days. There was no explanation for that save for the "botched handover" and the assertion that Mr Dood had wrongly assumed that Mr Mobbs had entered the UK on 23rd May 2023. There was no evidence to

support that assertion. Whilst it is submitted in Mr Clarke's skeleton argument that the DTC failed to give reasons for rejecting the explanation given, we consider the DTC's reliance on the timing of the commencement of the illegal cabotage and the timing of the handover to be adequate reasons for his rejection of the explanation along with the absence of any documentation as listed in paragraph 59 of Statutory Document 7 which might have shown systems in place to ensure that illegal cabotage did not take place, even by reason of human error.

28. Having rightly rejected the sole explanation for the illegal cabotage given by Mr Perry in bare assertions, the DTC was entitled to find that there was no evidence before him upon which he could be satisfied that JPT probably did not know that the vehicle was being used between 19th and 26th May 2022 in contravention of s.2 of the 1995 Act. Further analysis of JPT's knowledge was not required and the DTC was fully entitled to refuse the application for return of the vehicle.

29. Nevertheless, the DTC then went on to find that JPT had actual knowledge of the illegal cabotage, giving his reasons in paragraph 20. It is accepted on behalf of the DVSA that the DTC's reasoning contained in that paragraph cannot be supported, the DTC having referred to matters in paragraph 20 (ii) which are more indicative of the categories of knowledge in (iv) and (v) of paragraph 13 of *Societe Generale* (supra) which require additional findings of dishonesty, which the DTC did not then proceed to make.

30. So that leaves the DTC's findings with regard to Mr Mobbs and determination that the driver was acting as an agent of JPT. What was available to the DTC in this regard was the admission made by Mr Mobbs to TE Hunt and the admission by Mr Perry in evidence that the former had been employed by the company for over 20 years. He was trained by JPT; he was disciplined by JPT; he drove the company's vehicles; his work was scheduled by JPT planners and there was no evidence that he had any choice as to how or when he made the deliveries he was required to undertake. Moreover, he spoke daily to the planners in Holland and received instructions from them. For all intents and purposes, he was an employee of JPT and was under the continuous and effective control of JPT and its transport manager. The suggestion that this was not the case is misconceived. The suggestion that Mr Mobbs was being paid via another company (no evidence given and not explored) does not assist. If a conduit company was being used to pay Mr Mobbs in order to utilise the IR35 provisions to reduce the tax liability of both the driver and the employer, then that does not determine whether someone is in fact an employee, whether a "disguised employee" or not or self-employed or in some way at arms-length from JPT. The irresistible inference is that Mr Mobbs was a de facto employee of the company and there is no evidence to the contrary.

31. It matters not whether Mr Mobbs could have been characterised as an "agent" of the company in the circumstances of this case in addition/or in the alternative to being a de facto employee. Against the significant background of: the illegality found by DVSA officers since 2019; the absence of any documentary evidence upon which the DTC could be satisfied that JPT had all reasonable procedures in place to ensure criminal offences were not committed in the UK by itself and its drivers; the absence of any suggestion

that Mr Mobbs was on a "frolic of his own" when he was stopped on 26th May 2022; and the fact that illegal operations had been planned in Holland by the planners, the DTC was not plainly wrong to determine that the knowledge of Mr Mobbs could be imputed to the company. Even if we are wrong in our analysis, we nevertheless repeat that the DTC's consideration of knowledge in this case was unnecessary by reason of the matters set out in paragraphs 26 to 28 above. His flawed reasoning as to actual knowledge in paragraph 20(ii) of his decision could not and should not be taken to undermine his primary answer to the "*deceptively simple question"* that he was required to answer which is set out in paragraph 25 above.

32. In all the circumstances this appeal is dismissed. We are not satisfied that the DTC's decision was plainly wrong in any respect and neither the facts nor the law applicable in this case should impel the Tribunal to allow this appeal as per the test in *Bradley Fold Travel Ltd & Peter Wright v Secretary of State for Transport (2010) EWCA Civ.695.* The appeal is dismissed.

Her Honour Judge Beech

Judge of the Upper Tribunal

27th July 2023