EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS]

IN THE DISTRICT COURT
AT PALMERSTON NORTH

CIV-2017-054-000544
[2018] NZDC 10875

BETWEEN	GRAEME THOMAS HORNBLOW Appellant
AND	NEW ZEALAND TRANSPORT AUTHORITY Respondent

Hearing: 18 December 2017

Appearances: Mr G Hughes for the Appellant
Mr P Murray for the Respondent

Judgment: 30 May 2018

RESERVED DECISION OF JUDGE L C ROWE
[On appeal against licence disqualification and revocation]

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[1] Graeme Hornblow has held a truck licence for approximately 40 years. In that time he has acquired the classes of licence 2, 3, 4 and 5 to enable him to drive all manner of heavy vehicles with or without trailers.

[2] Mr Hornblow's career since at least 1980 has been in the heavy road transport industry and he has held a transport (goods) service licence since 1983 to enable him to operate a goods service. Mr Hornblow has driven heavy vehicles either as an employee or as an owner driver for a number of transport businesses throughout his adult life.

[3] During this period Mr Hornblow has amassed 224 traffic offences or infringements comprising:

(a) 73 speeding offences

(b) 69 road user charges offences

(c) 16 overloading offences

(d) 66 further offences of various kinds including passengers not wearing seatbelts (x 6), using a mobile phone while driving (x 2), failing to stop or comply with traffic lights or stop signs (x 6), failing to keep left (x 1), following too close in a heavy motor vehicle (x 1), logbook offences (x 4).

[4] Mr Hornblow's traffic offences have occurred regularly throughout his driving career since 1985 for which he has accrued and paid approximately $125,550 in fines.

[5] Mr Hornblow has accrued demerits from his offences to the extent that he has received eight demerit suspension warning letters in 2000, 2003, 2007, 2009, 2010, 2011, 2014 and 2017, and has been suspended from driving due to accrual of demerit points on three occasions in 2009, 2011 and 2014.

[6] Fifteen of Mr Hornblow's 69 road user charges offences are attributable to his operation of a goods service licence.

[7] On 17 May 2012, a senior adjudicator for the NZTA, [the NZTA adjudicator], issued a notice of proposal to revoke Mr Hornblow's heavy transport licences (classes 2 to 5) due to his persistent traffic offending. After receiving submissions from Mr Hornblow's then counsel, [the NZTA adjudicator] instead issued a warning letter dated 15 June 2012 noting that, despite Mr Hornblow's persistent offending, he would be permitted to continue to hold his heavy transport licences on a "without prejudice basis" but any further convictions or infringements may result in a reassessment of his fitness and propriety to hold heavy transport licences.

[8] NZTA issued a further warning letter to Mr Hornblow on 20 September 2012 noting that he had incurred a further infringement of failing to stop at a stop sign since the previous warning letter. Mr Hornblow's attention was drawn to s 30C of the Land

Transport Act 1998 as to the assessment criteria for a fit and proper person to hold the relevant classes of licence. The letter included the following paragraph:

> Because the Agency wants to ensure you continue to operate successfully and safely as a transport service driver I must point out that, should the type of offending continue, this is placing your classes 2-5 at risk.

[9] Due to further persistent offending, [the NZTA adjudicator], on behalf of NZTA, on 20 February 2014, revoked Mr Hornblow's licence classes 2 to 5 and disqualified him from driving any vehicle used in a transport service, and from holding or obtaining drivers licence classes 2 to 5 for 13 months commencing 27 February 2014. From the time of [the NZTA adjudicator]'s warning letter of 15 June 2012 to the date of [the NZTA adjudicator]'s revocation letter, Mr Hornblow had committed eight further speeding offences, two overloading offences, a logbook offence (producing a logbook containing 11 or more omissions), failing to stop at a stop sign and using a mobile phone while driving.

[10] Because the licence suspension was more than 12 months, Mr Hornblow was required to re-sit his class 2 to 5 licences to resume driving heavy vehicles at the end of the suspension.[1]

[11] Mr Hornblow's class 2-5 driver licences were reissued to him on 14 April 2015.

[12] Since then, Mr Hornblow has committed a further seven speeding offences, four road user charges offences, two offences of driver or passenger not wearing a seatbelt, one overloading offence, one offence of failing to comply with a red traffic signal and three offences of operating unlicensed or unwarranted vehicles. The first speeding offence occurred on 18 April 2015, four days after Mr Hornblow regained his heavy transport licences.

[13] On 7 June 2017, the front left wheel of Mr Hornblow's truck came away from the vehicle. [The NZTA adjudicator] reviewed this incident, took advice, and concluded that Mr Hornblow was not at fault. This incident however caused [the NZTA adjudicator] to review Mr Hornblow's history up to that point to see whether

[1] Land Transport Act, s83

there had been any further offences committed by Mr Hornblow which affected his fitness or propriety to hold heavy transport licences or operate a goods service. It was during this review that [the NZTA adjudicator] found the records of the 18 offences referred to, committed since Mr Hornblow had regained his heavy transport licences.

[14] [The NZTA adjudicator] determined, after receiving submissions from Mr Hornblow's counsel, that the further offences, in the context of Mr Hornblow's previous offending history, meant he was not a fit and proper person to hold heavy transport licences or a goods service licence. [The NZTA adjudicator] initially proposed to revoke Mr Hornblow's licences and disqualify him from holding or obtaining heavy transport licences, or driving any vehicle in a transport service, for a period of four years. After considering counsel's submissions, [the NZTA adjudicator] revoked Mr Hornblow's class 2 to 5 licences and his goods service licence, and disqualified him from holding or obtaining these licences or from driving any vehicle in a transport service, for a period of three years commencing 13 October 2017.

[15] Mr Hornblow telephoned [the NZTA adjudicator] to seek an extension of the date for revocation of the goods service licence on the basis he was selling his transport business and [the NZTA adjudicator] accordingly extended that date to 17 October 2017.

[16] Mr Hornblow now appeals the revocation of his licences, and thereby the finding that he is not a fit and proper person to hold the relevant licences, or alternatively the length of his disqualifications.

Principles on appeal

[17] The appeal is brought as a general appeal under s 106 of the Land Transport Act. The Court may confirm, reverse or modify the decision appealed against.

[18] Every appeal must be made and determined in accordance with the District Courts Act 2016 and rules made under that Act. The Court may receive further

evidence and representations whether or not that evidence would be otherwise admissible in the Court.[2]

[19] Part 18 of the District Courts Rules 2014 governs appeals to the District Court and, amongst other things, provides that appeals are by way of re-hearing.[3]

[20] The Court is required to reconsider the merits of the case afresh and come to its own decision about the correctness of the determination being appealed against.[4]

[21] In the context of NZTA appeals, the applicable principles have been summarised as follows:[5]

(a) The appeal is a rehearing;

(b) There is a wide discretion to accept evidence with consideration guided by relevance;

(c) The standard of proof is the civil standard;

(d) The statutory criteria is the essence of the appeal;

(e) The Court is necessarily constrained by the material submitted to it;

(f) In an unlikely situation of equipoise, the onus will be on the appellant;

(g) The more important the question, the more cogent the evidence will be expected to be;

(h) However, in the end it is for the appellate authority to be satisfied of the applicability of the statutory criteria to the facts.

The issues

[22] On this appeal, the Court is required to make its own mind up, having regard to all of the evidence:

(a) Whether Mr Hornblow is a fit and proper person to hold licence classes 2, 3, 4, and 5, and/or a good service licence; or

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[2] Land Transport Act, s 111.
[3] Rule 18.19.
[4] *Kacem v Bashir* [2011] 2 NZLR 1; and *Austin, Nichols & Co Inc v Stitchting Lodestar* [2008] 2 NZLR 141.
[5] *Brown v NZTA*, DC Dunedin, CIV-2010-012-808, 14/4/11 (Kellar DCJ).

(b) Whether, if he is not a fit and proper person, the disqualification period imposed by the NZTA is excessive.

What is a fit and proper person?

[23] The relevant criteria for whether Mr Hornblow is a fit and proper person to hold class 2-5 licences are set out in s 30C of the Act which provides:

> **30C General safety criteria**
>
> (1) When assessing whether or not a person is a fit and proper person in relation to any transport service, the Agency must consider, in particular, any matter that the Agency considers should be taken into account—
>
> (a) in the interests of public safety; or
>
> (b) to ensure that the public is protected from serious or organised criminal activity.
>
> (2) For the purpose of determining whether or not a person is a fit and proper person for any of the purposes of this Part, the Agency may consider, and may give any relative weight that the Agency thinks fit having regard to the degree and nature of the person's involvement in any transport service, to the following matters:
>
> (a) the person's criminal history (if any):
>
> (b) any offending by the person in respect of transport-related offences (including any infringement offences):
>
> (c) any history of serious behavioural problems:
>
> (d) any complaints made in relation to any transport service provided or operated by the person or in which the person is involved, particularly complaints made by users of the service:
>
> (e) any history of persistent failure to pay fines incurred by the person in respect of transport-related offences:
>
> (f) any other matter that the Agency considers it is appropriate in the public interest to take into account.
>
> (3) In determining whether or not a person is a fit and proper person for any of the purposes of this Part, the Agency may consider—
>
> (a) any conviction for an offence, whether or not—
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> (i) the conviction was in a New Zealand court; or

(ii) the offence was committed before the commencement of this Part or corresponding former enactment; or

(iii) the person incurred demerit points under this Act or a corresponding former enactment in respect of the conviction; and

(b) the fact that the person has been charged with any offence that is of such a nature that the public interest would seem to require that a person convicted of committing such an offence not be considered to be fit and proper for the purposes of this section.

(4) Despite subsection (3), the Agency may take into account any other matters and evidence as the Agency considers relevant.

[24] [The NZTA adjudicator]'s primary concern, in terms of s 30C is the interests of public safety having regard to Mr Hornblow's history of transport related offences, including infringement offences.[6]

[25] The same criteria apply to the fit and proper person assessment for a goods service licence as well as those set out in s 30F of the Act, which provides:

30F Additional criteria for goods service

Without in any way limiting the matters that the Agency may have regard to under section 30C(2), when the Agency is assessing whether or not a person is a fit and proper person in relation to any goods service, the Agency must consider, in particular,—

(a) any criminal activity conducted in the course of any transport service or transport-related business or employment:

(b) any offending in respect of major transport-related offences, particularly offences relating to safety or to road user charges.

[26] [The NZTA adjudicator]'s primary concerns in terms of s 30F are those mentioned in terms of s 30C but, in particular, Mr Hornblow's offences relating to safety or road user charges.[7]

[6] S 30C(1)(a) and (2)(b).
[7] S 30F(b).

Is Mr Hornblow a fit and proper person?

[27] The primary consideration in the present appeal is the interests of public safety. If a licensee infringes seriously or persistently in a way that compromises public safety then the privilege of having a licence can be revoked.[8]

[28] Persistent speeding is obviously a public safety issue.[9]

[29] Other infringement offences also relate to road safety including, obeying road signage or signals, having passengers wear seatbelts, not overloading vehicles, complying with logbook requirements, not using a cell phone while driving and keeping to the left.

[30] It is no answer for Mr Hornblow to say that, despite his numerous infringements, he has not had an accident. The risks associated with speeding or disobeying other road safety requirements, give rise to road safety risks whether they lead to an accident or not.

[31] It is no answer that Mr Hornblow has not been charged with more serious offences such as reckless, dangerous or careless driving and has never been declined insurance. These are simply more serious consequences of unsafe driving. The absence of such outcomes does not make other unsafe driving any more safe.

[32] It is no answer that Mr Hornblow is well thought of by others in the road transport industry, and considered safe and reliable where, despite the regard he is held in, he persistently infringes against road rules designed to protect the public.

[33] Whether some, or even many, of the infringements have been incurred in private motor vehicles, rather than heavy vehicles, does not make the conduct represented by the infringement offence safe. Further, persistent infringing, particularly in the face of numerous warnings about the consequences of such conduct, may legitimately give rise to concerns whether a licensee is a fit and proper person to

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[8] C*heyenne Haulers Ltd v NZTA*, HC Auckland, CIV-2011-404-2457, 12/05/11 (Keane J) at [40] and [41].

[9] *Daniels v Director of Land Transport Safety* [2002] DCR 375; and *Collings v Land Transport* NZ, DC Timaru, CIV-2010-076-37, 15/03/10 (B Callaghan DCJ).

hold a heavy transport licence where the consequences of such conduct, in the event of an accident, are likely to be considerably worse having regard to the size of the vehicle driven by the licensee.

[34] Persistent infringements against road rules and regulations following repeated warnings about the consequences of such conduct, may demonstrate that a licensee has a propensity for non-compliance with, or disregard of, traffic laws and regulations generally which includes those related to road safety.[10]

[35] It is also not relevant that a professional driver, such as Mr Hornblow, spends more time on the road than other drivers. If the number and regularity of infringements related to public safety demonstrate that Mr Hornblow is inclined to drive in a way that risks public safety, then the fact Mr Hornblow spends more time on the road than others may demonstrate he is a greater risk.[11]

[36] It was inescapable that [the NZTA adjudicator] would need to consider Mr Hornblow's full driving history when reassessing his licence in 2017. [The NZTA adjudicator] would have failed in his duty to the public if he did not consider recent infringements against Mr Hornblow's driving history to assess whether there was a pattern of offending despite warnings. This is not a matter of punishing Mr Hornblow twice for the same offences. It is a matter of logical assessment of risk having regard to context.[12]

[37] The revocation of Mr Hornblow's heavy transport licences and 13 month disqualifications imposed in 2014 do not create some form of "clean slate" in respect of previous offences if subsequent offending demonstrates the same pattern of conduct. If anything, repeated infringements that relate to road safety or other licence requirements relevant to fitness and propriety, after such a disqualification, is more concerning, not less.

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[10] *Manoloff v NZTA*, DC Rotorua, CIV-2009-063-543, 28/04/10 (Cooper DCJ) at [14] and [18].
[11] *Kini v NZTA*, DC Lower Hutt, CIV-2011-032-000401, 18/11/11 (Harrop DCJ) at [44].
[12] *Kerr v Director of Land Transport Safety*, HC Wellington, AP 276/97, 06/11/98 (Doogue and Durie JJ) at p 13, and *Tuineau v NZTA*, DC Wellington, CIV-2012-085-172, 01/06/12 (Tuohy DCJ) at [21].

[38] Mr Hornblow has received the following warnings in relation to his driving behaviour, relevant to his fitness and propriety to hold heavy transport or goods services licences:

(a) The 224 convictions and infringements Mr Hornblow has received. A reasonable person, concerned with road safety, does not need to receive 73 separate speeding offence notices, and numerous other offence notices relating to road safety, to understand the need to take more care. A reasonable goods service operator, concerned with compliance with the licensing regime, does not need to receive 69 road user charge offence notices (15 as an operator) to understand the need to comply with licence conditions.

(b) Mr Hornblow's licences (of all kinds) have been suspended on three occasions due to accumulation of demerit points which themselves followed several warning letters.

(c) Mr Hornblow received an explicit warning about the consequences of ongoing infringements in terms of his being assessed a fit and proper person in 2012.

(d) The warning and sanction associated with revocation of licences and disqualification in 2014 could not have been more salutary or explicit.

(e) Every speeding or infringement offence since Mr Hornblow regained his licence in 2015 would have served as a repeated warning given the previous consequences of such persistent behaviour.

[39] Mr Hornblow was found speeding four days after he regained his licences in 2015 and went on in the following 26 months to accrue a further six speeding infringements. He accrued other infringements relevant to road safety including failing to comply with a red traffic light, on two occasions carrying passengers who were not wearing seatbelts, one overloading offence and, on one occasion, driving a

motor vehicle with no evidence of inspection. Relevant to the goods services licence, Mr Hornblow accrued four road user charges offences.

[40] The number, type and regularity of offences committed after Mr Hornblow regained his licences in April 2015 suggest he simply went back to his previous pattern of behaviour which had led to his numerous and regular traffic offences, including those related to road safety, that had occurred throughout his driving career since 1985.

[41] [The NZTA adjudicator] did not give inappropriate weight to Mr Hornblow's offending prior to 2014. Rather, [the NZTA adjudicator] assessed how that offending gave context to the subsequent offending.

[42] Nor was it inappropriate for [the NZTA adjudicator] to conduct this assessment. [The NZTA adjudicator] was familiar with Mr Hornblow's relevant background. There is no evidence [the NZTA adjudicator]'s assessment was part of a personal vendetta against Mr Hornblow, and it was improper of Mr Hornblow to make such a suggestion without such evidence. Any reasonable NZTA adjudicator in [the NZTA adjudicator]'s position would have come to the same conclusion as to Mr Hornblow's fitness and propriety having regard to his offending history.

[43] The only realistic conclusion is that Mr Hornblow is not a fit and proper person to hold heavy transport licences or have a goods service licence.

Was the three year disqualification excessive?

[44] Where the NZTA is satisfied that a heavy truck driver is not a fit and proper person to hold the relevant licences, the Agency may disqualify that person for a period of up to 10 years from driving a vehicle of the relevant classes.[13]

[45] [The NZTA adjudicator] disqualified Mr Hornblow from driving vehicles in a transport service and from holding or obtaining driver licence classes 2 to 5 for three years given his view that this was the minimum period required to protect the public

[13] Land Transport Act, s 87A.

having regard to Mr Hornblow's lengthy and persistent offending despite the various warnings issued to him.

[46] The purpose of disqualification under s 87A is clearly to protect the public against risks created by serious or persistent offending. Previous offences however cannot be forever held against someone who might genuinely try to reform or demonstrate reform.[14]

[47] Assessment of the length of disqualification is an exercise in proportionality having regard to:

(a) The maximum period of disqualification of 10 years, which must be reserved for cases involving the most serious offending or repeated serious offending.

(b) Mr Hornblow's culpability in relation to the further offending – the worse the offending, the longer the period necessary to effect reform.[15]

(c) The extent to which Mr Hornblow has heeded previous warnings.

(d) Any disqualification longer than 12 months will require Mr Hornblow to re-sit the relevant licence classes.[16]

(e) When Mr Hornblow regains his licences, he will remain subject to reassessment as a fit and proper person where any further offending is likely to impact on that assessment and cause future revocation and disqualification.

[48] While Mr Hornblow's offending is persistent and frequent, it is not difficult to imagine more serious offences, or offence types, including where accidents have been

[14] *Pinn v Ministry of Transport* [1990] DCR 565.
[15] *Neas v New Zealand Transport Agency*, DC Invercargill, CIV-2010-025-000378, 07/10/10 (Moran DCJ) at [7].
[16] Land Transport Act, s 83.

caused or injuries and fatalities have resulted, where longer periods of disqualification would be justified.

[49] While the fact Mr Hornblow has never had an accident, or been prosecuted for reckless or dangerous driving, does not make his traffic offending or infringements any less serious, equally this means an aggravating feature is absent that could justify a longer disqualification.

[50] As for culpability, the speeding offences since Mr Hornblow regained his licences were all in private motor vehicles rather than trucks and comprised the following:

(a) 18 April 2015 – speed camera – exceeded speed limit by 19 kilometres per hour, no demerit points incurred, fine of $120 which was subsequently waived.

(b) 31 December 2015 – speed camera – exceeded speed limit by 13 kilometres per hour, no demerit points incurred, fine $80.

(c) 27 March 2016 – speed camera – exceeded speed limit by 6 kilometres per hour, no demerit points incurred, fine $30.

(d) 18 April 2016 – traffic stop – exceeded speed limit by 13 kilometres per hour, 20 demerit points incurred, fine $80.

(e) 20 December – traffic stop – exceeded speed limit by 15 kilometres per hour, 20 demerit points incurred, fine $80.

(f) 24 May 2017 – speed camera – exceeded speed limit by 9 kilometres per hour, no demerit points incurred, fine $30.

(g) 3 August 2017 – speed camera – exceeded speed limit by 6 kilometres per hour, no demerit points incurred, fine $30.

[51] None of the offences involved speed more than 20 kilometres per hour over the speed limit and three offences involved offences within 10 kilometres of the speed limit. They were therefore not the most serious examples of speeding that might occur.

[52] Mr Hornblow's offending of course came after several warnings and a previous disqualification of 13 months that did not cause Mr Hornblow to change his pattern of behaviour. In the face of such warnings, and the previous period of disqualification, a longer period is logically called for to effect reform.

[53] The nature and type of offences since Mr Hornblow regained his licence however are not so egregious as to require a disqualification period as long as three years, particularly where Mr Hornblow's livelihood has been closely associated with his ability to operate heavy transport vehicles. Mr Hornblow will need to re-sit his licence classes for any disqualification longer than 12 months and will be more acutely aware than ever that keeping his licences, and securing his livelihood in this industry, will always be subject to ongoing assessment of his fitness and propriety, having regard to road safety.

[54] Taking all of these matters into account therefore, I consider the appropriate period of disqualification from driving transport service vehicles and from holding or obtaining heavy transport licences is two years.

Outcome

[55] Mr Hornblow's appeal against revocation of his class 2, 3, 4 and 5 licences and his goods services licence is dismissed. The NZTA's assessment is correct. Mr Hornblow is not presently a fit and proper person to hold such classes of licence or a goods service licence.

[56] Mr Hornblow's appeal against the length of his disqualifications from driving vehicles in a transport service and from holding or obtaining driver licence classes 2, 3, 4 and 5 for a period of three years is allowed. The period of disqualification in all cases is reduced to two years.

L C Rowe
District Court Judge