

Appeal No. T/2017/47

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

**IN AN APPEAL FROM THE DECISION OF
Miles Dorrington, Deputy Traffic Commissioner for the
NORTH WEST OF ENGLAND TRAFFIC AREA dated 13 June 2017**

Before:

**Her Hon. Judge J Beech, Judge of the Upper Tribunal
Leslie Milliken, Specialist Member of the Upper Tribunal
David Rawsthorn, Specialist Member of the Upper Tribunal**

Appellant:

WISH TRAVEL AND TRANSPORTATION SOLUTIONS LIMITED

Attendances:

For the Appellant: Anthony Riley, Director and Transport Manager for the Appellant

Heard at: Field House, 15-25 Bream's Buildings, London, EC4A 1DZ

Date of hearing: 5 December 2017

Date of decision: 8 December 2017

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that the appeal be DISMISSED

SUBJECT MATTER:- Interpretation of paragraph 2(g) of Regulation 3 of the Vehicle Drivers (Certificates of Professional Competence) Regulations 2007 (as amended).

CASES REFERRED TO:- 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 Deputy Traffic Commissioner Dorrington for the North West of England Traffic Area (“the DTC”) made on 13 June 2017 when he:
 - a) Found that neither Mr Riley or his co-director, Leandra Mallinson were exempt from the requirement to hold a driver Certificate of Professional Competence (“CPC”) when they drove mini-buses operated by the Appellant company.
 - b) Reduced the Appellant’s vehicle authorisation from eight vehicles to five vehicles for fourteen days effective from the date of the public inquiry.
 - c) Issued a first and final warning to Mr Riley in his capacity as Transport Manager.

Statutory Background

2. The present regulatory requirement that professional drivers hold a driver CPC stems from European Directive 2003/59/EC “on the initial qualification and periodic training of drivers of certain road vehicles for the carriage of goods or passengers” (“the Directive”). The following paragraphs in the preamble are noteworthy:

“(3) To enable drivers to meet the new demands arising from the development of the road transport market, Community rules should be made applicable to all drivers, whether they drive as self-employed or salaried workers, and whether on own account or for hire or reward.

(4) The establishment of new Community rules is aimed at ensuring that, by means of his or her qualification, the driver is of a standard to have access to and carry out the activity of driving.

(5) More particularly, the obligation to hold an initial qualification and to undergo periodic training is intended to improve road safety and the safety of the driver, including during operations carried out by the driver while the vehicle is stopped. Furthermore, the modern nature of the profession of driver should arouse young people’s interest in the profession, contributing to the recruitment of new drivers at a time of shortage ..

(22) However, it is desirable, in order to respect the principles of Community law, that drivers of vehicles used to carry out transport where this is considered to have a lesser impact on road safety or where the requirements of this Directive would impose a disproportionate economic or social burden, should be exempted from the application of this Directive ..”

The exemptions referred to were set out in Article 2 of the Directive.

3. The Directive was implemented in UK legislation by The Drivers (Certificates of Professional Competence) Regulations (2007) as amended (“the

Regulations”) and Regulation 3 describes the categories of driver in respect of which the Regulations apply along with the exemptions set out in Article 2 of the Directive:

3 Persons to whom these Regulations apply

- (1) These Regulations apply to any person who drives a relevant vehicle, other than a vehicle to which paragraph (2) applies, on a road and is--
 - (a) a national of a member State; or
 - (b) a national of a third country employed or used by an undertaking established in a member State.

- (2) This paragraph applies to a vehicle--
 - (a) which it is an offence for that person to drive on any road at a speed greater than 45 kilometres per hour in Great Britain under section 89 of the Road Traffic Regulation Act 1984 or in Northern Ireland under the Motor Vehicles (Speed Limits) Regulations (Northern Ireland) 1989;
 - (b) which is being used by, or is under the control of any of the following--
 - (i) the armed forces;
 - (ii) a police force;
 - (iii) a local authority in the discharge of any function conferred on or exercisable by that authority under an order made under section 5 of the Civil Contingencies Act 2004 or regulations made under section 20 of that Act, . . .
 - (iv) a fire and rescue authority; [or
 - (v) the prison service;]

 - [(c) which--
 - (i) is undergoing road tests for technical development, repair or maintenance purposes;
 - (ii) is being used for the purpose of submitting it (by previous arrangement for a specified time on a specified date) for a relevant test, or of bringing it away from such a test; or
 - (iii) is a new or rebuilt vehicle which has not yet been put into service;]

 - (d) which is being used in a state of emergency or is assigned to a rescue mission;
 - (e) which is being used in the course of a driving lesson or driving test for the purpose of enabling that person to obtain a driving licence or a CPC;

- (f) which is being used for the non-commercial carriage of passengers or goods for personal use;
- (g) which is carrying material or equipment to be used by that person in the course of his work, provided that driving that vehicle is not his principal activity];
- (h) to which sub-paragraphs (a) to (g) do not apply, but which satisfies all of the conditions in paragraph (3)].

[(3) The conditions referred to in paragraph (2)(h) are that--

- (a) the vehicle is being driven by a person whose principal activity in the course of his work is not driving relevant vehicles;
- (b) the vehicle is being driven within a [100] kilometre radius of the driver's base;
- (c) the driver is the only person being carried on the vehicle;
- (d) in so far as the vehicle may be carrying goods or burden, the goods or burden must only be equipment, including machinery, that is permanently fixed to the vehicle.

4. It should be noted that the exemptions in paragraph 2(b)(v) (prison services) and paragraph 2(h) have been added by subsequent amendment. “*Relevant vehicle*” means a vehicle which requires driving licences in categories C, C+E, D or D+E.

5. The original explanatory note to Regulation 3 states:

“Regulation 3 describes the categories of driver in respect of which the Regulations apply. Broadly, these are professional bus and lorry drivers. The main exceptions are those driving emergency vehicles, vehicles used by the police or armed forces, and vehicles used for training or testing purposes”.

Factual Background

6. On 19 May 2014, the Appellant was granted a standard national passenger service vehicle (“PSV”) licence authorising eight vehicles. The directors of the company are Anthony Riley and Leandra Mallinson. Mr Riley is also the nominated Transport Manager. The Appellant company operates a fleet of minibuses for private hire and a driving licence of category D1 is required to drive the vehicles. It follows that the vehicles operated by the Appellant company were being operated for hire and reward and are “*relevant vehicles*” for the purposes of the Regulations.

7. At 23.55 on 25 April 2015, Traffic Examiner Aspell, who was in a marked DVSA vehicle, was engaged on a mobile road-side check of PSVs in Liverpool City Centre when he saw a 14 seater Ford Transit minibus registration W15HTE travelling in the opposite direction. He could see that

the passengers were a group of young women and that they were seated upon one another's knees on the back row of the seats in the minibus. The vehicle, which was being operated by the Appellant company and was being driven by Mr Riley, then stopped at the side entrance of Central Station and the passengers started to alight. By the time that TE Aspell had parked safely behind the minibus, Mr Riley was at the nearside of TE Aspell's vehicle with his tachograph record sheets. TE Aspell was unable to ascertain the number of women who were being carried by Mr Riley. Mr Riley was asked to produce his driver's CPC to which he responded that he had left it in his jacket at work. A systems check revealed that Mr Riley did not hold a driver's CPC. When this was pointed out to him, Mr Riley stated that he was exempt from the requirement to hold one. He was then interviewed in which he stated:

".. I am employed as a company director and as such my duties go way beyond a driver. The driver CPC only applies to employed drivers my employ is director. Secondly under European Directive 2003/59/EC there is a list of exemptions and my exemption is placed under exemption G because I fall within that exemption in that I am carrying my phone which is my equipment that I use in the course of my work as a director and most notably that my driving of this vehicle is far from my principal activity. Therefore I fall within the exemption and do not need to hold a driver CPC qualification. This is further supported by an email received from what used to be VOSA, confirming my belief which I will rely upon in court. I believe I do not need a driver CPC ..

The exemption is silent on carrying passengers at all provided I am carrying my equipment and it is not my principal activity. I am exempt".

Mr Riley's was reported for an offence of driving without a driver's CPC.

8. At 00.10 hours on 5 July 2015, TE Groom was on duty in Trafford Street, when the same vehicle being driven by Mr Riley was stopped. When asked for his tachographs, digital card, driving licence and driver's CPC, he stated that he had nothing with him and he knew what would happen. He told TE Groom that he was exempt from the requirement to hold a driver's CPC. Miss Mallinson then arrived in another minibus with Mr Riley's tachograph records. Miss Mallinson did not hold a driver's CPC and she also stated she thought that she was exempt from the requirement. When asked to produce his tachograph for that evening's driving, Mr Riley was unable to do so, claiming that it had been in the vehicle but it had disappeared. Later, during the encounter, he claimed that he had taken the tachograph out and had mislaid it and that he thought that he might have inadvertently put it in a bin. As it appeared that Mr Riley had been driving without using a tachograph, a driving prohibition was issued to Mr Riley and Miss Mallinson was required to take over his duties.
9. On 3 August 2015, TE McCabe, attended the Appellant's operating centre to interview the directors. During the course of their interviews, both contended that they were exempt from holding a driver's CPC under paragraph 2(g) of Regulation 3 of the Regulations because their principal activity was that of company director rather than driver and that their phones/PDA's were

necessary “*equipment*” for the purposes of managing the business. At the conclusion of the interviews, both directors were reported for offences of driving without a driver’s CPC.

10. On 19 April 2016, Mr Riley was convicted of an offence of driving without a valid driver’s CPC and an offence of failure to use a tachograph record sheet or driver’s card and was fined £1,032. On the same day, Miss Mallinson was convicted of an offence of driving without a valid driver’s CPC and was fined £386. Both directors appealed to the Crown Court where their convictions were upheld. It follows that both the Magistrates Court and the Crown Court rejected the contention that Mr Riley and Miss Mallinson were exempt from the requirement to hold a driver’s CPC.
11. The public inquiry was convened on 13 June 2017. Mr Riley and Miss Mallinson had been called to the inquiry as directors and drivers with Mr Riley also called up in his capacity as transport manager. He represented both of their interests and those of the Appellant company. The facts were agreed.
12. From the outset, the DTC explained that he could not “go behind” the convictions of both directors but could take account of the background circumstances. Mr Riley then began by stating that as someone who had a law degree and a post graduate diploma in legal practice, he understood the law and how the judiciary interpret the law. When the time approached for existing drivers to obtain a driver’s CPC (10 September 2013), he noticed there was a disparity between the wording of the Regulations and the way in which VOSA/DSA were interpreting them in advice given on its website. He therefore sent an email to VOSA in May 2013 in which he maintained that “exception G” applied to his and his co-director’s situation as driving was not their principal activity and that their phones were equipment used by them in their principal activity of company director. He asked for guidance. His enquiry was re-directed and so it was that Mr Cater of “Corporate Correspondence” within the DSA responded. His email stated:

“It would appear from your email that you would be exempt from Driver CPC under exemption “(g) vehicles carrying material or equipment to be used by the driver in the course of his or her work, provided that driving the vehicles is not the driver’s principal activity”.

However, there has been no case law in respect of Driver CPC, so we are only able to give an indication as to the position that we think the courts may adopt.

We recommend in all cases where a driver feels that an exemption applies that the driver seeks independent legal advice”.

Mr Riley submitted that the DVSA had narrowed the scope of the exemptions by introducing the concept of “hire and reward” into the Regulations when that was not a phrase that was used by the EU. The DVSA relied on this argument in both trials to argue that as Mr Riley was driving for hire and reward, the exemptions did not apply and the Judges accepted that argument despite the fact that they also accepted that the exemption applied. The outcome was grossly unfair.

13. As for the requirement that the vehicle must be carrying materials or equipment to fall within (g), their telephones had three purposes. First of all, they were used for making and receiving calls from customers and drivers. The second was that the company's electronic diary was accessed using the phones and were used to transfer the job details to the relevant drivers. Thirdly, the directors received and sent emails on their phones. He agreed that any driver who could put themselves into a position whereby they could be nominated as a director, could fall within the exemption provided they were not employed under a contract of employment. He insisted that the Crown Court had found that (g) applied to his situation but nevertheless, having heard the case *de novo* had convicted him of driving without a driver's CPC. He wanted the DTC to refer the matter to the "*European Commission*" and when told that this was not possible, he queried how his "*European Directive Rights*" could be protected. He denied that he was aware that he could have applied to Administrative Court by way of Case Stated but in any event, it would not have changed the decision and the cost would have been disproportionate.
14. Mr Riley submitted that a literal interpretation of the exemption must be adopted unless to do so would be "*manifestly absurd*". His interpretation of the exemption was literal and was not manifestly absurd.
15. The DTC then heard evidence from Miss Mallinson, which apart from recording that her principal activity was equestrian photography, added little to the evidence of Mr Riley. The DTC then heard other evidence concerning the operator's regulatory compliance (which was positive) and he then retired to consider his decision.

The DTC's oral decision

16. The DTC was satisfied that both directors had been convicted of the relevant offences and that they had not appealed to the Administrative Court by way of case stated despite advice that they undoubtedly would have received from their solicitor at the time (the DTC was in error in also finding that an appeal to the Court of Appeal was also available to the directors but nothing turns on the point).
17. He was satisfied that the directors were not exempt from holding a driver's CPC. He continued:

"I add that my interpretation of the (Regulations) at paragraph 3(2)(g) is that a mobile phone does not fall within the exemption of carrying material or equipment to be used by that person in the course of his work. To find otherwise would create, in my determination, a wholly perverse outcome. In my determination, paragraph 3(2)(g) refers to material or equipment that the vehicle is carrying in a common sense interpretation, for example, scaffolding poles for scaffolders who drive the vehicle as an ancillary activity to scaffolding, for which the load of scaffolding poles and equipment is required. A mobile phone carried by a driver of a vehicle to which these regulations

apply is neither material or equipment, and neither is carried for the purposes necessary to be used for either Miss Mallinson or Mr Riley in the course of their work at that point in time.”

The DTC went onto find that neither director had deliberately breached the Regulations and that they held a strong view that the rules had been unfairly interpreted against them. It was upon the basis of those findings, that the DTC took the regulatory action that he did (as set out in paragraph 1 above).

The Appeal

18. At the hearing of this appeal, Mr Riley again represented the interests of all parties. Whilst Miss Mallinson had travelled from the North West with Mr Riley, she had been unavoidably delayed as a result of, we understand, difficulties in parking and did not in fact attend the hearing.
19. Mr Riley repeated the submissions that he had made before the DTC. In respect of the DTC’s criticism of the directors failing to appeal their convictions in the Crown Court, Mr Riley stated that at that stage they had already been fined a total of £3,500 and the DTC had described the jurisdiction of the Traffic Commissioners as “*very specialist*”. Mr Riley was satisfied that the Upper Tribunal was the most suitable forum to consider the interpretation of the Regulations rather than the Administrative Court.
20. The DTC had failed to apply the ordinary interpretation of the exemption. He used the example of scaffolding poles and by doing so, he had narrowed the interpretation of the word “*equipment*”. Equipment could be a computer or microphone or even a paper diary. The DTC did not consider that a phone was equipment which was necessary for the directors to fulfil their functions, particularly in relation to the phones having access to an electronic diary. The DVSA had applied the concept of “*hire and reward*” to the Regulations when Europe did not use that phrase. He invited the Tribunal to consult the two dictionaries he had brought to the appeal in order to consider the definition of “*equipment*”. Finally, the DTC used the incorrect test when stating that the directors arguments would result in a “*wholly perverse outcome*” when the correct test when considering the literal interpretation of a piece of legislation was whether the result would be “*manifestly absurd*”.
21. If the DTC’s interpretation was correct, then there was a second problem which was that immediately after the public inquiry, both directors booked places on a driver’s CPC course at a cost of £550. They attended together because the courses were not held regularly. They would not countenance attending separate courses because if one director remained at the office and they were on their phone, then the calls would be directed to the phone in the possession of the other director. The other director could not switch off their phone because work could be lost. Neither could an alternative person take possession of that phone in order to answer the calls even if only to say to the caller that someone would ring the caller back. In the result, they attended together but within a short period of time, the directors were asked to leave

the lecture room because their phones kept ringing. As a result, it was impossible for the directors to obtain their driver's CPC. The Tribunal questioned whether Mr Riley was being unnecessarily obstructive in relation to acquisition of a driver's CPC. He denied that this was the case.

22. Mr Riley indicated that if the appeal failed, then he would close down the business. He had lost faith in the system. He knew the rules and he was complying with them.

Discussion

23. Our starting point in determining the correct interpretation of the Regulations is the originating Directive so that the purpose of the Regulations can be fully appreciated. The title of Directive 2003/59/EC speaks for itself. The Directive is concerned with the qualification and training of drivers driving "*certain*" road vehicles for the "*carriage of goods or passengers*". If there was any doubt that the Directive concerned the carriage of goods or passengers for hire or reward, that doubt would and should be dispelled by reading paragraph 3 of the Pre-amble to the Directive and the exemptions themselves. Mr Riley's contention that the Directive is silent upon the subject of "hire or reward" is incorrect. Neither is it correct to suggest that the Regulations only apply to employed drivers.
24. Once it is appreciated that the Directive is concerned with road vehicles for the carriage of goods or passengers, then the exemptions to the requirement that drivers of "*relevant vehicles*" must hold a driver's CPC can easily be put into context. All exemptions concern vehicles which are not being operated to carry goods or passengers for hire or reward. We do not need to repeat them here (see paragraph 3 above). The only relevant exemption in relation to the carriage of passengers is (f) which exempts vehicles being used for the non-commercial carriage of passengers (or goods for personal use). Of course, the directors cannot avail themselves of this exemption because the carriage of passengers for hire or reward is the very purpose of the Appellant's business.
25. As for Paragraph 2(g) of Regulation 3, this relates to a relevant vehicle which is carrying material or equipment. The exemption relates to the vehicle, not the driver. The purpose of the exemption is to enable a person to transport his materials and equipment in the relevant vehicle which are necessary for him to undertake his work. Our examples would be an electrician or a plumber whose vehicles contain their tools along with some plumbing or electrical materials. Their principal activity is not driving the vehicle and the vehicle cannot be said to be engaging in the "*carriage of goods*" for hire or reward. It is not possible to interpret this exemption so as to include a relevant vehicle carrying passengers for hire or reward being driven by an occasional driver carrying with him a mobile phone and such an interpretation would be plainly wrong and in error.

26. The construct of the directors' case ignores the reality of their respective positions which is, that both carry passengers for hire or reward. The purpose of the Directive and the Regulations is to ensure that such drivers are trained to a higher standard than had hitherto been the case which has a direct, positive impact on road safety. The argument that the possession of a mobile phone with or without access to an electronic diary amongst other things, permits a company director to claim exemption under (g) despite the fact that they are driving a relevant vehicle carrying passengers for hire or reward however infrequently, is manifestly absurd. Further, in relation to "*principal activity*", if it had been the intention of the European or UK Parliaments to make a distinction between drivers of vehicles used for hire or reward whose principal activity was professional driving and those who only drive occasionally and whose principal activity was something other than professional driving (whether that principal activity was related to vehicle operation or otherwise) then that distinction would have been made clear and an exemption would have been specifically crafted to exempt part time drivers whose driving was not their principal activity. In short, the directors' approach to the Regulations is untenable and if they are to continue to occasionally drive relevant vehicles for hire or reward, then they must obtain a driver's CPC.
27. We are satisfied that this is a case where neither the law or the facts impel us to interfere with the DTC's decision as per the decision in *Bradley Fold Travel Ltd & Peter Wright v Secretary of State for Transport (2010) EWCA Civ. 695* and accordingly the appeal is dismissed.
28. By way of a post-script we would add, that we find it surprising to say the least that Mr Cater wrote the email set out in paragraph 12 above in the terms that he did. Despite the fact that the Regulations were relatively recent when he chose to indicate "*... the position that we think the courts may adopt*" we are at a loss as to how the opinion he expressed was formed.



**Her Honour Judge Beech
8 December 2017**