NCN: [2017] UKUT 62 (AAC)

IN THE UPPER TRIBUNAL **Appeal No. T/2016/56**
ADMINISTRATIVE APPEALS CHAMBER
(TRAFFIC COMMISSIONER APPEALS)

ON APPEAL from the DECISION of Kevin Rooney, TRAFFIC COMMISSIONER for the North East of England of 14 September 2016.

Before:	Mr M R Hemingway	Judge of the Upper Tribunal
	Mr M Farmer	Member of the Upper Tribunal
	Mr G Inch	Member of the Upper Tribunal
Appellant:	Tracy Noddings	Trading as Noddies Cars

Attendances:

For the Appellant: No attendance
For the Respondent: No attendance

Heard at: Field House, London.

Date of Hearing: 2 February 2017

Date of Decision: 10 February 2017

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that this appeal be DISMISSED

Subject matter:

Restricted licence; fitness; whether revocation and disqualification proportionate.

Cases referred to:

Bradley Fold Travel Limited and Another v Secretary of State for Transport [2010] EWCA Civ 695; Subesh and Others v Secretary of State for the Home Department [2004] EWCA Civ 56;

REASONS FOR DECISION

Introduction

1. This is an appeal to the Upper Tribunal brought by Tracy Noddings (trading as Noddies Cars) from a decision of the Traffic Commissioner for the North East of England Traffic Area made on 14 September 2016. The decision was to revoke Tracy Noddings restricted public service vehicle operator's licence pursuant to sections 16(1), 17(3)(a), 17(3aa), 17(3)(c) and 17(3)(d) of the Public Passenger Vehicles Act 1981 and, pursuant to section 28 of the Transport Act 1985, to disqualify her from holding, either personally or as a partner or director or major shareholder of a company, a public service vehicle operator's licence for an indefinite period. The Traffic Commissioner also decided that any licence application involving one Stuart Noddings was to be referred to a Traffic Commissioner, but that part of the decision was not the subject of any appeal before us.

The background

2. Tracy Noddings (hereinafter "the appellant") was granted a restricted public service vehicle operator's licence on 30 April 2007. It authorised the use of two vehicles from an operating centre in Stockton-on-Tees. The business in respect of which the licence had been obtained was concerned with the transportation of persons for personal gain. It appears that, for the most part, the work involved driving young children to and from various schools. Perhaps that explains the trading name.

3. The appellant had fallen foul of the regulatory regime on an earlier occasion, having been called to a Public Inquiry in July 2013, following an unsatisfactory maintenance investigation. She did not attend that Public Inquiry citing ill health as the reason. On that occasion it was decided to issue a formal warning and to record undertakings with which she subsequently complied.

4. On 26 February 2016, a vehicle bearing the registration number SG52WYK was encountered at a Driver and Vehicles Standards Agency (DVSA) check at a school. The driver of the vehicle indicated that he was driving it on behalf of the appellant despite the vehicle displaying a disc in the name of a different operator. It was confirmed that the appellant had a contract with the Stockton-on-Tees Borough Council to transport children to school and that the vehicle was being used, at the time it was stopped, for that purpose. Since two other vehicles, under registration numbers YS10 JHA and BK07 HTN were also being used in the business, it meant that the appellant was using one more vehicle than she was licensed to use as well as using a vehicle which was licensed to another operator.

5. Unsurprisingly, the DVSA decided to carry out a follow-up investigation. That, in part, involved an examination of the appellant's maintenance systems. It is recorded in a report prepared by one Stephen Cave, a vehicle examiner, that the following shortcomings were found:

> " 1. Complete set of safety inspection records not available.
>
> 2. Safety inspection records in use not suitable.
>
> 3. It is not always clear that defects highlighted during safety inspections have been rectified.

4. Written driver defect reporting system clearly not operating as intended.

5. Very few defects have been reported using the written driver defect reporting system and it is not always clear that reported defects have been rectified.

6. Defects recorded on Prohibition Notices and inspection records confirmed that the written driver defect reporting system is ineffective.

7. The maintenance provider has been changed – no evidence of a maintenance agreement in place.

8. Greater systems of quality control are required.

9. Prohibition Notices were issued to vehicles YS10 JHA and BK07 HTN on 8 March 2016.

10. Annual Test results poor – Operator provided with details of failure.

11. Investigation being carried out into use of third parties Operator Licence by this Operator."

6. Further, Mr Cave uncovered some issues with respect to the condition of the vehicles including a concern that one of the inner brake pads for vehicle YS10 JHA was excessively worn.

7. The appellant, responding to the concerns which Mr Cave had identified, suggested that the maintenance contractor she had employed was responsible for the condition of the vehicles. As to the use of the third vehicle she acknowledged having used it with, she said, the permission of the other operator and explained that she did not know that doing so amounted to "wrong doing".

8. It was in light of the above that the appellant was called to Public Inquiry.

The Public Inquiry

9. There is really very little to say about this because the appellant did not attend the Public Inquiry which took place on 14 September 2016. She explained, in writing, in advance of it that she would not be attending due to "ongoing medical condition that is aggravated by stress and anxiety". Pausing there, it does not appear that any medical evidence confirming an inability to attend on health grounds was ever provided.

10. In the circumstances, the Traffic Commissioner made his decision on the basis of the documentation before him.

The Traffic Commissioner's decision

11. Having considered matters the Traffic Commissioner decided, as noted above, to revoke the licence and to disqualify the appellant. By way of explanation he said this:

> " 10. Having been unable to hear any oral evidence, I make my findings and decision on the papers in front of me. In her letter to Vehicle Examiner Cave of 19 April 2016, Mrs Noddings accepts that she ran a vehicle using Gary Rutherford's licence. This aligns with the evidence of the vehicle's driver and of Mr Rutherford. It is clearly also the view of the Vehicle Examiner and supported by the statement in his public inquiry brief that Mrs Noddings has three contracts to transport children to

schools with Stockton on Tees Borough Council. These contracts were awarded to Mrs Noddings in July 2012 and vehicle SG52WYK, which is specified on Mr Rutherford's operator's licence, is detailed as being available to satisfy the requirements of the contract. I can see no suggestion anywhere in the papers that Mrs Noddings has subcontracted the work to Mr Rutherford. I therefore find very clearly on the balance of probabilities that Mrs Noddings has used Mr Rutherford's licence within her own business to operate a third vehicle. It follows that Section 16(1) is made out and I attach significant weight to this finding.

11. The shortcomings identified in the maintenance systems by the Vehicle Examiner are extensive. They, along with Mrs Noddings response, point to a lack of acceptance of responsibility for compliance on her behalf. As well as the prohibitions issued during the maintenance investigation, two S-marked prohibitions have been issued within the last year highlighting significant issues with driver defect reporting to the extent that the driver was also issued with fixed penalty notices in relation to the defects. The operator appears to have done nothing to investigate those shortcomings and remedy the cause. I find that the maintenance system is significantly deficient. It follows that I find that Section 17(3)(a), 17(3aa) and 17(3)(c) are made out. Again, I attach significant weight.

12. I turn now to the question of repute. Mrs Noddings borrowed a licence disc from another operator to extend her business. That hits at the heart of the trust required within the operator licensing system. As the holder of a restricted PSV licence for nine years, I have no doubt that Mrs Noddings knew this act was unlawful. She has put commercial gain ahead of compliance. Two vehicles is the maximum number that can be operated under any restricted PSV licence. Beyond that, a standard national licence is required which also requires an operator to employ a qualified transport manager. In operating three vehicles with a restricted licence, Mrs Noddings has gained a commercial advantage over competitors. It is also notable that the shortcomings found by the Vehicle Examiner would not be expected to arise should a qualified competent transport manager be employed. Not only has Mrs Noddings enjoyed a commercial advantage, it is clear she has also put the safety of her passengers and other road users in jeopardy. The combination of using another operator's licence disc along with her preference for commercial gain over safety mean that I find Mrs Noddings to have forfeit her good repute. Section 17(3)(d) is made out and again I attach significant weight to that.

13. I have no financial evidence in front of me. In the event, I find it unnecessary to make a finding in relation to financial standing.

14. Finally I consider whether a period of disqualification is appropriate. The seriousness of the issue of using another person's disc, putting commercial gain ahead of compliance and road safety, and failure properly to explain the shortcomings mean that something more than mere revocation is necessary and disqualification is appropriate. For that disqualification to be lifted, Mrs Noddings will need to satisfy a Traffic Commissioner that she is again of good repute and is minded to comply. For that reason, it is not possible for me to put a specific period of time on the disqualification.

15. I am concerned at the role played on this licence by Mr Stuart Noddings. From the evidence of Mr Rutherford, it was Stuart Noddings who instigated the lending of the disc. However, without having heard evidence from him, and he was not separately called to the public inquiry, it would be unfair of me to make a formal finding, for example that he is a partner in the business, and to disqualify him. However any attempt by him to hold an operator's licence in the future will need to be scrutinised by a Traffic Commissioner."

12. The appellant, dissatisfied with the outcome, appealed to the Upper Tribunal.

The proper approach on an appeal to the Upper Tribunal

13. The jurisdiction and powers of the Upper Tribunal when hearing an appeal from a Traffic Commissioner are governed by Schedule 4 to the Transport Act 1985 as amended. So far as matters of fact are concerned, the Upper Tribunal's jurisdiction was examined by the Court of Appeal in *Bradley Fold Travel Limited and Another v Secretary of State for*

Transport [2012] EWCA Civ 695. The court applied *Subesh and Others v Secretary of State for the Home Department* [2004] EWCA Civ 56, where Woolf LJ held:

> " 44. … the first instance decision is taken to be correct until the contrary is shown … 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 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."

14. So, an appeal is not, for example, the equivalent of a Crown Court hearing an appeal against a conviction from a Magistrate's Court, where the case effectively begins all over again and is simply reheard. Instead, an appeal before the Upper Tribunal takes the form of a review of the material before the Traffic Commissioner.

15. Paragraph 17(3) of Schedule 4 to the Transport Act 1985 provides that "the Upper 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".

16. The Upper Tribunal's powers of disposal on allowing an appeal are to be found in paragraph 17(2) of Schedule 4. The tribunal may make "such order as it thinks fit" or remit the matter for "rehearing and determination".

The proceedings before the Upper Tribunal in this appeal

17. The appellant submitted written grounds of appeal to the tribunal. The contentions contained therein may be summarised as follows:

(a) she had not been aware that she was doing anything wrong in using a vehicle licensed to a different operator in the course of her business;

(b) she is not mechanically minded and so had relied upon a garage and it was not her fault if the garage staff had not done their job correctly;

(c) although the brake pads on vehicle YS10 JHA had been worn there had been no braking deficiency resulting from it and such had been confirmed by testing;

(d) although it was said that there were defects with respect to vehicle BK07 HTN such contentions amounted to "a blatant lie" so the Traffic Commissioner had based his decision upon false information;

(e) Mr Cave had refused to look through all of the paperwork she had provided yet had subsequently suggested that her paperwork, concerning maintenance issues, was incomplete;

(f) the DVSA and in particular Mr Cave had specifically targeted her.

18. The appeal was listed for a hearing before the Upper Tribunal which was scheduled to take place on 2 February 2017. However, the appellant had given a written indication, in advance, that she would not attend the hearing and she was as good as her word. Accordingly, given that she did not seek an adjournment or offer any explanation for her non-attendance, we resolved to decide the appeal on the basis of the documentation before us having firstly reminded ourselves of the content of rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

19. There is no doubt that the various concerns referred to above and which the Traffic Commissioner had in mind when he made his decision are serious ones. We agree with the Traffic Commissioner that the use of an additional vehicle not covered by an appropriate licence is something which "hits at the heart of the trust required within the operator licensing system". We also agree that the maintenance issues identified upon investigation were, certainly when taken together, significant and, from a safety perspective, concerning.

20. The appellant has consistently indicated that, with respect to the use of the third vehicle, she did not appreciate that she was doing anything wrong. The Traffic Commissioner did not believe her about that citing, at paragraph 12 of his decision, the fact that she had been a holder of a restricted licence for some nine years. We agree. Indeed, not only had the appellant had her licence for nine years but, as noted above, she had previously encountered the regulatory regime and had been called to a Public Inquiry. Whilst that Inquiry was not concerned with her using an additional vehicle, it is difficult to believe that such encounters would not have prompted her, if she had not done so already, to familiarise herself with what the regulatory regime required of her. That is particularly so since, of course, her business would be dependent upon her compliance with that regime. Further, she must have known very well that she was entitled to use only two vehicles under her licence, such a restriction being clear, unambiguous and straightforward. We are very far from being able to say that in disbelieving the appellant's protestations the Traffic Commissioner was plainly wrong. Indeed, we would agree with his conclusion as to that.

21. Turning then to the problems with the maintenance systems, we have taken into account the various points made in the grounds of appeal and which we have summarised above. However, it seems to us that, with respect to vehicle YS10 JHA, the question of whether, upon testing, there was any actual braking deficiency is neither here nor there. As the Traffic Commissioner noted the rear brake pads had been worn to such a degree that the metal backing plate was in contact with the inner face of the brake disc. That, on any view, must be regarded as a serious state of affairs. We see no reason to think that Mr Cave or anyone else involved in the investigation would wish to tell any lies regarding the condition of any vehicle nor would wish to ignore paperwork provided and then disingenuously assert that paperwork concerning the maintenance systems was missing. We also note that the appellant has not, either for the benefit of the Traffic Commissioner or the Upper Tribunal, supplied copies of any documentation which she says had been provided to Mr Cave but had not been looked at by him. Nor can we see any reason why the DVSA and Mr Cave would wish to, as she put it, specifically target her. That simply has the status of a mere unsubstantiated assertion.

22. We note the appellant's contention that responsibility for maintenance failings lies with the persons to whom she had entrusted responsibility. However, it seems to us that, ultimately, as the proprietor of the business the responsibility for ensuring that properly maintained vehicles were used for the purposes of that business, rested with her. The

Traffic Commissioner carefully noted, at paragraph 11 of his decision, certain of the failings in that regard and he concluded that the appellant "appears to have done nothing to investigate those shortcomings and remedy the cause". Again, we find ourselves in agreement with the view of the Traffic Commissioner and are certainly very far from being able to say that his conclusions as to where the responsibility for the failing should lie (the appellant) was plainly wrong.

23. In light of the above, therefore, we have concluded that the grounds offered by the appellant do not demonstrate any failings in the approach of the Traffic Commissioner nor in his reasoning and conclusions. We have not limited ourselves to a consideration of the specific points raised in the grounds of appeal and have undertaken our own assessment of the Traffic Commissioner's decision. However, in our view all relevant matters were fully and fairly considered and appropriately decided. The failings identified were serious, particularly against a background of a degree of previous non-compliance, and the Traffic Commissioner was right to regard them as such. His reasoning is properly set out and is cogent and rational. As to proportionality, we agree with his view, as explained at paragraph 12 of his decision, to the effect that the appellant was putting commercial gain ahead of compliance through using a third vehicle in the way that she did. Had she, of course, sought to incorporate a third vehicle in her business through proper channels, she would have had to apply for a standard national licence which would, amongst other things, have required her to use a qualified transport manager. The Traffic Commissioner concluded, in effect, that she was deliberately attempting to circumvent such requirements and he attached significant weight to her motivation in that regard when deciding what action should be taken against her. He acted perfectly properly in so doing and in concluding she had lost her good repute, that her licence ought to be revoked and that disqualification was appropriate. Indeed, it seems to us that it would have been surprising had any other outcome been reached.

Conclusion

24. The appellant's appeal to the Upper Tribunal is dismissed.

Signed

M R Hemingway
Judge of the Upper Tribunal

Dated: 10 February 2017