

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

Appeal No. T/2017/72

ON APPEAL from a DECISION of the DEPUTY TRAFFIC COMMISSIONER for the East of England made on 4 September 2017.

Before: Mr M R Hemingway Judge of the Upper Tribunal
Mr M Farmer Member of the Upper Tribunal
Mr J Robinson Member of the Upper Tribunal

Appellant: Reads Worldwide Ltd.
Reference: OF1042622

Attendances:

For the Appellant: Mr Paul Fletcher: In person

Heard at: Field House, Breams Buildings, London EC4A 1DZ

Date of Upper Tribunal Hearing: 13 February 2018

Date of Decision: 12 April 2018

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that this appeal be dismissed.

Subject matter:

Undertakings.

Cases referred to:

Bradley Fold Travel Limited and Peter Wright v The Secretary of State for Transport [2010] EWCA Civ 659.

REASONS FOR DECISION

Introduction

1. This is an appeal to the Upper Tribunal from a decision of the Deputy Traffic Commissioner for the East of England (“DTC”) made on 4 September 2017 to revoke a Standard International Operator’s Licence held by the appellant, with effect from 4 September 2017.

The Background

2. Mr Paul Fletcher has at all material times been the sole director of the appellant company (Reads Worldwide Ltd). Despite its name it is and always has been, as Mr Fletcher confirmed to us, a small undertaking. It was granted a Standard International Operator’s Licence on 14 February 2005 authorising five vehicles and five trailers.

3. The appellant company was first called to a public inquiry in 2012. It was held on 11 October 2012. It is unnecessary to go into fine detail but at that public inquiry the Deputy Traffic Commissioner dealing with that matter (not the DTC who has made the decision with which this appeal to the Upper Tribunal is concerned) accepted an undertaking from Paul Fletcher that he would attend an Operator Awareness Training Course provided by a trade body or other appropriate organisation, by 11 February 2013. It is not a matter of dispute that Mr Fletcher did not attend such a course within that time scale. Indeed when the Office of the Traffic Commissioner (“OTC”) made enquiries of him he acknowledged in an e-mail of 21 October 2014 that he had not done so. In fairness to him it is right to point out that he did subsequently albeit belatedly attend such a course.

4. On 29 July 2015 the OTC wrote to the appellant company (essentially to Paul Fletcher) noting that its nominated transport manager (“TM”) was no longer in its employ. The letter contained a reminder that a condition attached to the licence required the appellant company to provide notification of any relevant changes in circumstances and that in order to be considered professionally competent an operator had to have a suitably qualified TM. The appellant company was told that it had to inform the OTC of arrangements to nominate a replacement TM by 12 August 2015. It is not a matter of dispute that the appellant company had not informed the OTC of the departure of its TM.

5. Paul Fletcher responded by applying to be the TM himself. He completed a standard application form known as TM1. But in so doing he failed to declare a number of matters which he was required to declare. He did not disclose the fact that he was actually a director of the appellant company. He did not disclose his directorship of another company called F and N Worldwide Logistics Ltd. He did not disclose the fact that F and N Worldwide Logistics Ltd’s licence had been curtailed after a public inquiry of 1 July 2015. He only offered an explanation for his failure to do so after receiving a reminder from the OTC. In the end the OTC refused to accept Mr Fletcher as TM “due to concerns with his professional competence and repute”. The appellant company was then reminded of the requirement to have an appropriately qualified TM which is underpinned by the content of section 27(1)(a) of the Goods Vehicles (Licence of Operators) Act 1995. On 21 January 2016 the OTC wrote to the appellant company drawing attention to a number of concerns. It was said that since 10 December 2014 no vehicles had been specified on the licence; it was said that the OTC had

not been provided with evidence that Paul Fletcher had attended the above training course in respect of which he had offered an undertaking; it was pointed out that the appellant company still did not have a TM; and it was said that it appeared that the appellant company no longer had sufficient financial resources to support the number of vehicles authorised by the licence. It was stated that unless a request for the holding of a public inquiry was received on behalf of the appellant company on or before 11 February 2016, its licence would be revoked. The appellant company responded to the OTC by e-mail stating “although we have vehicles on the licence none are being used at the moment as we build back up the trade that has been lost” and by sending an application for the former TM who had previously left its employ, to be its TM once again.

6. There were difficulties with respect to that TM’s application and, as a result, the OTC wrote to the appellant company once again, on 11 March 2016. It asked why it was that the TM had previously left (in fact resigned) as the appellant company’s TM and it asked why in the current application the now prospective TM had failed to disclose a previous association with a company (Birchtree Removals Ltd) which had had its licence revoked and had gone into voluntary liquidation. On 14 March 2016 it was decided that there would be a public inquiry. Prior to its being held the prospective TM told the OTC that she had not informed it of the voluntary liquidation of Birchtree Removals Ltd because it had been “a very difficult time” for her and she had not known “what was happening until the last minute”. On 5 May 2016 the OTC wrote to the appellant company pointing out that evidence had not been provided, as yet, as to the prospective TM’s professional competence. We note that a Certificate of Professional Competence relating to the prospective TM was then sent to the OTC. There was also some correspondence between the OTC and the appellant company regarding the adequacy or otherwise of its finances and the financial documentation it had provided.

7. The public inquiry took place on 20 July 2016. Paul Fletcher was in attendance. We have no transcript of the public inquiry but it is clear that issues considered related to the adequacy of the financial evidence; the ongoing absence of a TM nominated on the licence; and the appellant company’s apparent indication that although it did not currently have any vehicles on the licence it wished to keep the licence on a “just in case” basis in order to give it future business flexibility. The latter suggestion was something which the DTC clearly considered to be inappropriate. The DTC did not however, at this stage, take a decision to revoke the licence. Instead, she suspended the licence until 26 September 2016, accepted three undertakings given by Paul Fletcher on behalf of the appellant company and indicated that if those undertakings were not complied with by 26 September 2016 the licence would be revoked. In a letter sent to Mr Fletcher on 21 July 2016 the undertakings were recorded in this way:

“The following undertakings are to be complied with:

1. The operator will provide original financial evidence for the months of April, May and June 2016 or, alternatively, copies or on-line documents with every page stamped by the bank certifying that the documents are true copies. Statements for bank accounts and credit cards in the company name must be provided for the months of April, May and June 2016. The full signed overdraft agreement is also to be provided together with evidence to show the amount of the overdraft remaining for the months of April, May and June 2016. Financial evidence to be provided to the Office of the Traffic Commissioner, Cambridge by 8 August 2016.

2. By 12 noon on 26 September 2016 a transport manager must be nominated on licence OF1042622.
3. The operator must purchase three vehicles and have in place a maintenance contract for 6-8 weekly inspections. A wall planner must be in use. The operator will submit vehicle documents, including MOT certificates, and documentation for drivers to the Office of the Traffic Commissioner, Cambridge by 12 noon on 26 September 2016.”

8. Presumably, had those undertakings been timeously honoured that would have been the end of the matter. But they were not.

The Deputy Traffic Commissioner’s decision

9. As to the first undertaking, the appellant company did comply by 13 September 2016. As to the second undertaking, the TM signed and submitted standard form TM1 on 28 February 2017 but the application was still defective because it was not also signed on behalf of the appellant company. That was rectified in April 2017 and on 18 April 2017 the TM was added to the licence. But, of course, all of that should have been done by 26 September 2016 if the undertaking was to have been complied with. As to the third undertaking that was not complied with at all. Indeed that was so despite the OTC having sent to a reminder to the appellant company by e-mail on 12 May 2017. So, the DTC decided to revoke the licence.

10. The paperwork in front of us does not reveal why, given that the deadline was 26 September 2016, action was not taken earlier but in any event, on 1 September 2017, the OTC wrote to Paul Fletcher at the appellant company’s address setting out the above failings concerning the undertakings and confirming that, as of that date, a decision had been taken to revoke the licence.

11. Paul Fletcher then, on behalf of the appellant company, made an unsuccessful application for a stay of the decision (which was refused by the DTC) and appealed to the Upper Tribunal.

The written grounds of appeal

12. In the grounds it was asserted, in summary, that although the TM had been added to the licence on 18 April 2017, the OTC had not informed the appellant company of that development until 1 September 2017 which is when it had been decided to revoke the licence. It was said that, in consequence of that delay on the part of the OTC, the appellant company had been unable to seek to add any vehicles to the licence because that licence had remained suspended. It was suggested that if notification of the adding of the TM had been given timeously two vehicles (not three) could have been added to the licence straightaway. The written grounds did not, though, address the question of the earlier delay on the part of the appellant company in seeking to attend to all of the necessary formalities so as to have the TM added to the licence.

The oral hearing of the appeal

13. Since Paul Fletcher, on behalf of the appellant company, had requested an oral hearing of his appeal before the Upper Tribunal a hearing was held. He attended but he and the appellant company were not legally represented. There were no other attendees.

14. Mr Fletcher addressed us. He told us, by way of background, that the appellant company is a small operation providing “a basic service for people who want to move house”. It has been trading for many years. He then repeated the point made in the written grounds regarding the claimed delay on the part of the OTC in notifying the addition of the TM on the licence. He asserted that the appellant company is a “good operator” and had not been given a proper chance by the DTC.

15. In response to questions put by the panel members, he said that attempts had been made since the end of 2016 to have the TM added to the licence. But something had gone wrong. It is not, he explained, easy to find a suitable TM. If he had known that the TM had been added to the licence in February 2017 vehicles would have been added to the licence at that point. Whilst Mr Fletcher did not disagree with the point put to him that the DTC had given clear deadlines for compliance with the undertakings after the public inquiry, he said that he had not taken any formal advice and had not thought that matters would “escalate to this”. He was not able to explain the lack of response to the reminder e-mail of 12 May 2017 referred to above. But all of that had been “a learning process” for him and he did not think that the outcome should be one preventing the company from trading. He asked for a second chance.

Our reasoning

16. The jurisdiction and powers of the Upper Tribunal when hearing an appeal of this nature are governed by Schedule 4 to the Transport Act 1985 as amended. Paragraph 17(1) provides that the Upper Tribunal is to have full jurisdiction to hear and determine all matters whether of law or fact. However, it is necessary to bear in mind that such an appeal is not, for example, the equivalent of a Crown Court hearing an appeal against conviction from a Magistrates Court where the case effectively begins all over again and is simply reheard. Instead, an appeal hearing before the Upper Tribunal takes the form of a review of the material before the Traffic Commissioner. In this context we take full account of the valuable guidance to be found in a passage from paragraphs 30 to 40 of the judgment of the Court of Appeal in *Bradley Fold Travel Ltd and Peter Wright v The Secretary of State for Transport* [2010] EWCA Civ 695. We also note that an appellant bears the burden of showing that a decision under appeal is wrong and that, in order to succeed, an appellant must demonstrate that “the process of reasoning and the application of the relevant law require the tribunal to adopt a different view”. Put another way, it might be said that in order to succeed an appellant has to demonstrate to the Upper Tribunal that the decision under appeal was “plainly wrong”.

17. We have borne the above in mind in considering this appeal.

18. The basis of the DTC’s decision, notwithstanding other issues of concern highlighted in the history set out above, was the failure to comply with the second and third undertakings, either timeously or at all. According to section 26(1)(f) of the Goods Vehicles (Licensing of Operators) Act 1995 a Traffic Commissioner (or in this case a DTC) may revoke a licence in circumstances where undertakings recorded in the licence have not been fulfilled

19. Mr Fletcher argued that it was not really his or the company's fault that there had been a failure to comply. Though in response to questions about that it might be thought that he backtracked somewhat in acknowledging a degree of fault. Be that as it may, the undertakings given by him on behalf of the company at the public inquiry were very clearly set out in subsequent correspondence as was the requisite date for compliance. Even if we are to take what Mr Fletcher contended at its highest, which is that he and the appellant company started to address the TM issue at the end of 2016 that was still some considerable time after the expiry of the required compliance period. Such a gap has never been explained. We do not regard anything which Mr Fletcher said to us orally or in writing as constituting even an attempted explanation for that period of delay. It is, in truth, a most surprising period of delay given the decision taken at the public inquiry to suspend the licence and the indication that failure to comply with the undertakings would result in revocation.

20. Mr Fletcher's key point was that relating to the claimed delay on the part of the OTC to notify him of the adding of the TM to the licence in February 2017. But as we say, even if we accept what he says about that in its entirety it is, nevertheless, incapable of amounting to an explanation as to why he or someone else on behalf of the appellant company did not act earlier with respect to the TM issue. Surely one would have expected him to have ensured that all of the appropriate paperwork was provided, along with a complete application, prior to the date for compliance with the undertakings which had clearly been given to him along with a very clear indication as to what the consequences of non-compliance would be. As to the number of vehicles on the licence, we have our doubts that the DTC was necessarily correct to take the view that the continued holding of a licence on a "just in case" basis was somehow unacceptable. But nevertheless, a willing undertaking to add three vehicles to the licence had been given at a public inquiry and has simply not been complied with at all. It is no answer, as Mr Fletcher seeks to do, to say that he was not able to add vehicles to the licence because he did not know that a TM had been added to the licence in February 2017. That simply serves to focus attention upon the fact that the TM ought to have been appointed much earlier.

21. In the above circumstances we have concluded that it was open to the DTC to take a serious view as to the failure to comply with undertakings and that she was right to do so. We do not think a proper explanation as to that failure was ever given to the DTC or, indeed, to us.

22. Certain of Mr Fletcher's closing words might be interpreted as an argument, although it was not put quite this way, that the decision to revoke the licence was disproportionate. But we think it was open to the DTC to take the view that such was proportionate and we cannot see that her decision in that regard can be characterised as one which was plainly wrong. As we have said, the DTC had been at pains to point out the consequences of any failure to comply. The failure itself was for a significant period and we cannot see that any attempt to comply with the second and third undertakings was even commenced until the expiry date had passed. That does, we would agree with the DTC, demonstrate a cavalier attitude on the part of the appellant company. We cannot say, therefore, that the DTC was wrong let alone plainly wrong in deciding that this was an appropriate case for revocation.

23. As to the request for a second chance, we could only take a decision which had that result if we thought the DTC had either erred in law or had otherwise been plainly wrong. As we have not so decided, we cannot assist in the way Mr Fletcher invites us to.

24. In light of all of the above this appeal to the Upper Tribunal does not succeed. We would point out to Mr Fletcher though that it remains open to him to make a fresh application for a licence if he sees fit. Perhaps that is something he might wish to take some advice about. But, of course, the making or otherwise of any future application and the taking of appropriate advice are entirely matters for him.

25. Finally, we would point out that we were concerned to note the long delay between the public inquiry of 20 July 2016 (at which the deadline for complying with the conditions was given as 26 September 2016) and the final revocation decision given on 1 September 2017. There seems to be no apparently tenable reason for this delay.

Conclusion

26. This appeal to the Upper Tribunal is dismissed.

Signed

M R Hemingway
Judge of the Upper Tribunal

Dated

12 April 2018