

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

Case No. T/2019/30

**ON APPEAL from the DECISION of the DEPUTY TRAFFIC COMMISSIONER
FOR THE EAST OF ENGLAND TRAFFIC AREA (Mr J Baker)**

Dated: 21 March 2019

Before:

**C.G. Ward
Mr. L. Milliken
Mr. A. Guest**

Judge of the Upper Tribunal
Member of the Upper Tribunal
Member of the Upper Tribunal

Appellant: TA Trucking Limited

Attendance:

For the Appellant: No attendance or representation

Heard at: Field House, London EC4
Date of Hearing: 25 June 2019
Date of Decision: 25 July 2019

DECISION OF THE UPPER TRIBUNAL

The appeal is dismissed.

Subject Matter

Revocation of licence
Section 26(1)(b)(e) and (f) of the Goods Vehicles (Licensing of Operators) Act 1995.
Failure to meet requirements of professional competence and good repute.

Cases referred to:

Bradley Fold Travel Ltd and Peter Wright v The Secretary of State for Transport
[2010] EWCA Civ 695
Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI, NT/2013/52 & 53
NT/2013/82 Arnold Transport & Sons v. DOENI
T/2012/34 Martin Joseph Formby t/a G & G Transport

Introduction

1. This is an appeal from the decision of the Deputy Traffic Commissioner for the East of England Traffic Area given on 21 March 2019.

The Public Inquiry

2. The Public Inquiry was held at Cambridge on 13 March 2019. Those present were Mr Kellegher, Mr Miney (director of the company until February 2019), Mr Isaac (transport consultant) and Vehicle Examiner Peter Forshaw.

The Decision

3. In summary, the Deputy Traffic Commissioner ordered that the licence of the operator (“the company”) be revoked with effect from 15 April 2019 under section 27 of the Goods Vehicles (Licensing of Operators) Act 1995 (“the 1995 Act”) on the ground that there had been breaches of section 26(1)(b)(e) and (f) and a failure to meet the requirements for professional competence and good repute in accordance with section 13 of that Act. The former director, Mr Pádraig Miney, was disqualified for a period of one year with effect from the date of the Deputy Traffic Commissioner’s decision from holding or obtaining an operator’s licence and a direction made under s.28 (see [7] below). No further order was made in respect of Mr John Kellegher, the sole shareholder and director of the company, who was already subject to disqualification from taking on a transport manager role. The Deputy Traffic Commissioner offered him firm guidance for the future.

Relevant legislative provisions and other legal principles

4. Section 2 of the 1995 Act provides that a person may not use a goods vehicle on the road for the carriage of goods for hire or reward or in connection with a business or trade carried on by him except under a licence issued under the Act. The operator licence specifies the maximum number of vehicles that may be used under it (section 6).

5. In terms of section 13 of the 1995 Act in determining an application for a standard operator licence, the Traffic Commissioner must be satisfied, among other things, that the applicant is of good repute and professionally competent (ss. 13 and 13A(2)(b) and (d)).

6. Section 26 provides that the Traffic Commissioner may direct that a licence be revoked on any one of a number of grounds including (b) that the licence-holder has contravened any condition attached to the licence; (e) that the licence-holder made, or procured to be made, (for relevant purposes) a statement of fact that, whether to his knowledge or not, was false, or a statement of expectation that has not been fulfilled; and (f) that any undertaking recorded in the licence has not been fulfilled.

7. Section 28(1) provides that where the Traffic Commissioner directs that the licence be revoked under s 26 the commissioner may order the person who was the holder of the licence to be disqualified (either indefinitely or for such period as the

commissioner thinks fit) from holding or obtaining an operator's licence. Where the Traffic Commissioner disqualifies the licence holder, s 28(4) provides that the commissioner may specify that if that person, during the period of disqualification is a director of, or holds a controlling interest in a company which holds a licence of the kind to which the order in question applies, that licence of that company or, as the case may be, of that person, shall be liable to revocation, suspension or curtailment under section 26.

8. The following principles (extracted from the Digest of Traffic Commissioner appeals) as to the proper approach to an appeal in the Upper Tribunal can be found in the decision of the Court of Appeal in the case of Bradley Fold Travel Ltd and Peter Wright v The Secretary of State for Transport [2010] EWCA Civ 695:

- (1) *The Tribunal is not required to rehear all the evidence by conducting what would, in effect, be a new first instance hearing. Instead it has the duty to hear and determine matters of both fact and law on the basis of the material before the Traffic Commissioner but without having the benefit of seeing and hearing the witnesses.*
- (2) *The Appellant 'assumes the burden' of showing that the decision appealed from is wrong.*
- (3) *In order to succeed the Appellant must show not merely that there are grounds for preferring a different view but that there are objective grounds upon which the Tribunal ought to conclude that the different view is the right one. Put another way it is not enough that the Tribunal might prefer a different view; the Appellant must show that the process of reasoning and the application of the relevant law require the Tribunal to adopt a different view.*

The tribunal sometimes uses the phrase "plainly wrong" as a shorthand description of this test. (Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI, NT/2013/52 & 53 paragraph 8).

Traffic Commissioners must be able to trust those to whom they grant operator's licences to operate in compliance with the regulatory regime. The public and other operators must also be able to trust operators to comply with the regulatory regime (T/2012/34 Martin Joseph Formby t/a G & G Transport).

In NT/2013/82 Arnold Transport & Sons v. DOENI at paragraphs 12 & 13 the Tribunal said:

11. The Tribunal has stated on many occasions that operator's licensing is based on trust. Since it is impossible to police every operator and every vehicle at all times the Department in Northern Ireland, (and Traffic Commissioners in GB), must feel able to trust operators to comply with all relevant parts of the operator's licensing regime. In addition other operators must be able to trust their competitors to comply, otherwise they will no longer compete on a level playing field. In our view this reflects the general public interest in ensuring that Heavy Goods Vehicles are properly maintained and safely driven. Unfair competition is

against the public interest because it encourages operators to cut corners in order to remain in business. Cutting corners all too easily leads to compromising safe operation.

12. It is important that operators understand that if their actions cast doubt on whether they can be trusted to comply with the regulatory regime they are likely to be called to a Public Inquiry at which their fitness to hold an operator's licence will be called into question. It will become clear, in due course, that fitness to hold an operator's licence is an essential element of good repute. It is also important for operators to understand that the Head of the TRU is clearly alive to the old saying that: "actions speak louder than words", (see paragraph 2(xxix) above). We agree that this is a helpful and appropriate approach. The attitude of an operator when something goes wrong can be very instructive. Some recognise the problem at once and take immediate and effective steps to put matters right. Others only recognise the problem when it is set out in a call-up letter and begin to put matters right in the period before the Public Inquiry takes place. A third group leave it even later and come to the Public Inquiry with promises of action in the future. A fourth group bury their heads in the sand and wait to be told what to do during the Public Inquiry. It will be for the Head of the TRU to assess the position on the facts of each individual case. However it seems clear that prompt and effective action is likely to be given greater weight than untested promises to put matters right in the future.

The appeal to the Upper Tribunal

10. The appeal was brought by the company only. The hearing was listed for 25 June at 1030. On 18 June Mr Kellegher emailed the Upper Tribunal saying, "Hello I have a family emergency and from tomorrow until 5/7 I'm going to be away is there any chance we can postpone."

11. On the same date a Registrar emailed him at the judge's request, seeking further details and supporting evidence. The reply was "My family member is very sick I'll supply copy of tickets when purchased if you like Thanks".

12. Mr Kellegher was then given until 5pm on 21 June to supply evidence. No communication in response was received from him by then.

13. On 24 June at 0853 an email was received from Mr Kellegher's email account. It attached copy flight tickets from London to Brisbane via Dubai, flying out on 20 June and returning on 2 July. The accompanying text was "my dad has asked me to send this on as he is away at a family funeral."

14. In refusing the application for postponement, the judge observed that while sorry to hear it if that was so, the Upper Tribunal had not been told enough about the circumstances of Mr Kellegher's absence and at the moment there was still no corroborative evidence that he had had to attend a funeral at all. The judge indicated that if Mr Kellegher informed the Upper Tribunal of the identity of the person who had

died and their relationship to him and the date and place where the funeral was to be held or had been held, his application would be reconsidered. That was emailed to Mr Kellegher's email account on 24 June at 1052, with a direction that he provide the information identified by the judge by 1600 London time.

15. Due to an administrative misunderstanding, a clerk in the Upper Tribunal office just after 0700 on 25 June provided Mr Kellegher with a further opportunity to provide the information the judge had sought by 1000 on 25 June. No reply was received by that time.

16. The panel considered r.31 of the Upper Tribunal's rules and concluded that it was in the interests of justice to proceed in the absence of Mr Kellegher or indeed anyone on behalf of the company. He had repeatedly failed to take up opportunities to provide the information and evidence which might justify a postponement. There was no reason to suppose that Mr Kellegher would be unable to receive email whilst in Australia and allowing for the time difference between London and Brisbane, the email of 24 June would have been received during the evening and that of 25 June during the afternoon. Further, Mr Kellegher's son or daughter, who had apparently sent the email at 0853 on 24 June, would clearly have been in a position to watch out for a reply from the Upper Tribunal, which had been promptly sent. Further again, it would have been possible for Mr Kellegher to have provided more details than he did before leaving for Australia and/or if he was precluded by circumstances from attending the hearing himself, to have appointed someone else to do so, such as a solicitor or Mr Isaac, the transport consultant who had assisted him at the public inquiry.

17. The panel considered whether it was in a position to reach a fair decision on the appeal in the absence of Mr Kellegher. It concluded that it was. There were grounds appended to the appeal form UT12 which were sufficiently clearly expressed. As the Upper Tribunal's function in such cases is one of review, it could be performed with the benefit of the apparently comprehensive bundle of papers available to the panel.

18. Considerable public resources had been expended in setting up the hearing.

19. There is in general terms a public interest in not allowing regulatory proceedings to be delayed with insufficient cause, although the weight to be attached to this was limited given that an order for suspension of the Deputy Traffic Commissioner's decision had been refused.

20. Looking at the reasons canvassed in paras 16 to 19 in the round, the panel concluded that it was in the interests of justice to proceed.

21. In the course of preparing the decision the panel subsequently noted that the statutory declaration by Mr McMahon did not in fact appear within the bundle of papers which it had. Enquiries were made both of Mr Kellegher (who did not respond) and of the Deputy Traffic Commissioner, who through his office indicated that while the document could not be located, it had been a single page A4 with a short statement which is as quoted in his decision, with Mr McMahon's signature at the bottom and a solicitor's stamp. The panel noted that the quoted passage

appears at para 7(a) of the decision at the top of internal page 4 and accepted what it had been told by the Deputy Traffic Commissioner through his office as adequate secondary evidence of the content of the statutory declaration.

22. There are 8 grounds of appeal which may be summarised as follows and are considered in turn below.

A. It was wrong for the Deputy Traffic Commissioner to draw adverse inferences from the purchase price paid for the company based on the level of balances held, without having sought an explanation (which could have been provided) for that level of balances

23. The call-up letter had indicated concerns that the company might be being used as a front for the involvement of Mr McMahon. The decision imposing a lengthy period of disqualification on Mr McMahon was within the case papers. The call-up letter had expressly provided that "Following the noted history and various connections to a Mr McMahon the operator is directed to provide evidence to the presiding Traffic Commissioner so that s/he can satisfy themselves that the licensed operator is controlling the operations." At a preliminary hearing there had been a direction to provide 12 months of financial evidence as evidence of the way in which the relationship with MPS Freight (Enterprises) and connected entities (i.e. entities in which Mr McMahon was thought to be involved) had operated. This was not complied with. The Deputy Traffic Commissioner was entitled to consider whether or not the purchase of the company was a bona fide transaction, as to which the balances were merely one "further anomaly". The share transfer from Mr Miney to Mr Kellegher was an unconvincing document, as the Deputy Traffic Commissioner found. There was no corroborative evidence of the price paid. At best limited due diligence had been undertaken, despite the view of his accountant that as Mr Kellegher had no previous knowledge of the company nor of its previous owners nor its tax and financial records, a due diligence investigation would have been appropriate. On the evidence before him, the Deputy Traffic Commissioner was entitled to take the view that it was odd to pay the claimed purchase price of £35,000 for a company which had £40,000 of balances and to rely on that as one factor, among others, for his conclusion. If the company wished to negate the scope for such a view to be formed, it was incumbent on it to put forward evidence accordingly.

B. The Deputy Traffic Commissioner made a mistake as to the company owning the vehicles: it was correctly MPS Freight Ltd, not (as stated by the Deputy Traffic Commissioner) MPS Enterprises Ltd

24. While it does appear that the incorrect company was named in the decision, it is clear (see pp9 and 91) that Mr McMahon was involved with both. The grounds of appeal do not suggest why the apparent error made any difference and in the panel's view it did not.

C. More weight should have been given to the recognition by Mr Kellegher of the need to make an appropriate long-term appointment of a transport manager, evidenced by the putting forward, albeit after the public enquiry, of Mrs Helen Barnard

25. Mr Kellegher had bought a company which had operated for some 13 months without a transport manager, with a period of grace given only from November 2018 to 7 January 2019, so there was clearly a serious issue to be addressed. Mrs Bernard's nomination was made after the public inquiry but before the decision was issued and the Deputy Traffic Commissioner did take it into account, as he said he would, giving it weight at para 9 of his decision. Given the history and the lateness of Mrs Bernard's nomination, it is impossible to say that the weight which was given to this on the credit side of the scales was so insufficient as to be plainly wrong.

D. The maintenance record of H2T Express Ltd (a company in which Mr Kellegher had previously been involved) ought to have been reflected favourably in the Deputy Traffic Commissioner's decision.

26. The Deputy Traffic Commissioner addressed the loss of H2T Express Limited's licence at para 6 of his decision, noting that the reasons had related mainly to a failure to produce the necessary documentation to persuade the Traffic Commissioner that the vehicles were being maintained appropriately and that Mr Kellegher was carrying out his duties as director and transport manager. The Deputy Traffic Commissioner had before him the written confirmation (including reasons) of the Traffic Commissioner's oral decision of 7 March 2018 from which it is clear that the absence of documents, along with the lack of a transport manager and of any operating centre in the region, was indeed the reason for the revocation. In the face of these difficulties, the panel does not criticise the balanced view given by the Deputy Traffic Commissioner in para 9 of his decision.

E. Mr McMahon's involvement was via the maintenance agreement in place; the evidence that Mr McMahon had purchased the company from Mr Turvey was incorrect.

27. The claimed maintenance agreement was not in evidence. The Deputy Traffic Commissioner was unimpressed by the share transfer document and the lack of supporting evidence concerning the purchase of the company. The lack of credible evidence in support of a bona fide purchase of the company and the lack of corroborative evidence concerning the arrangements which it was said were in place justified the conclusion that there were links with MPS Enterprises and Mr McMahon sufficient, with other factors mentioned in para 12 of the decision, to justify the conclusion that the company could not be trusted to operate in a compliant manner going forward.

F. Mr K's links with Mr McMahon "are of a purely business nature".

28. This is a variant of ground E and the observations above are repeated.

G. While the Deputy Traffic Commissioner correctly observed that Mr Kellegher's repute had previously been tarnished, he gave credit for his attendance on a CPC refresher course, the involvement of Mr Isaac and the bringing in of Mrs Bernard as transport manager.

29. As the ground acknowledges, the Deputy Traffic Commissioner did give credit for these factors (see para 9 of his decision). How much weight to give was in essence

a judgement call for him. The panel sees no reason to disagree with that judgement call.

H. The statutory declarations state there would be “no controlling involvement by Mr McMahon.”

30. The Deputy Traffic Commissioner had access to the findings that had been made by the Traffic Commissioner when imposing an eight year disqualification from holding or obtaining an operator’s licence or being involved in any entity which holds or obtains such a licence. The content of the statutory declaration, as recorded by the Deputy Traffic Commissioner at para 7(a) of his decision, was extremely sparse and he was entitled to attach little weight to it.

31. Accordingly, the appeal is dismissed.

32. Later on 25 June at 1512 an email was received saying “Hello my dad can pick up emails till tomorrow sorry “. (It is assumed that “can’t” rather than “can” may have been intended.) On 26 June an email timed at 0942 was received from Mr Kellegher stating “I was unable to contact you before now. As I’m away can you send me the [decision] by email please I’m a bit disappointed because I would not lie about a funeral .“ As the email appears to be accepting that the decision would be sent, the panel does not interpret the email as an application to set its decision aside, nor, if it did, would it be likely to be granted given the paucity of the information (which still fails to include what the judge had previously suggested be provided, never mind evidence as to communication difficulties or otherwise which might account for why adequate information and evidence were not provided to the Upper Tribunal in time.)

C.G. Ward
Judge of the Upper Tribunal
Date:25 July 2019