Appeal No. T/2019/74
NCN: [2020] UKUT 0153 (AAC)

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER
TRAFFIC COMMISSIONER APPEALS

IN AN APPEAL FROM THE DECISION OF
Fiona Harrington, Deputy Traffic Commissioner for
The North East of England dated 21 October 2019

Before:

Her Hon. Judge J Beech, Judge of the Upper Tribunal

Appellant:

M WHITE (SKIPS) LIMITED

In attendance by telephone: Jamie White, lay advisor to the Appellant.

Heard at: Preston Combined Court Centre, Ringway, Preston, PR1 1LL
Date of hearing: 24 March 2020
Date of decision: 30 April 2020

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that the appeal be dismissed.

SUBJECT MATTER:- Application for a restricted licence; fitness to hold a restricted licence; unlawful operation of goods vehicles; adequacy of the call up letter; procedural fairness and failure to consider adjourning hearing for the Applicant to address issue of unlawful operation; application of Priority Freight and Bryan Haulage questions

CASES REFERRED TO:- T/2012/34 Martin Joseph Formby t/a G&G Transport; NT/2013/82 Arnold Transport & Sons Ltd v DOENI; Aspey Trucks Ltd (2010) UKUT 367 (AAC); T/2010/006 J & C Cosgrove trading as Fisher Tours; 2002/217 Bryan Haulage (No.2); 2009/225 Priority Freight; T/2013/07 /Redsky Wholesalers Ltd; Bradley Fold Travel Ltd v Secretary of State for Transport (2010) EWCA Civ 695

REASONS FOR DECISION

Introduction

1. This is an appeal from the decision of the Deputy Traffic Commissioner for the North East of England ("the DTC") made on 21 October 2019 when she refused the Appellant's application for a restricted goods vehicle licence, the Appellant having failed to discharge the evidential burden that it was not unfit to hold a licence under s.13B of the Goods Vehicle (Licensing of Operators) Act 1995 ("the Act").

2. This appeal was originally listed to be heard at Field House, the Tribunal's hearing centre in London. As a result of the Covid-19 pandemic restrictions imposed and the "lockdown" imposed on 23 March 2020, it was not possible for the hearing to take place as an attended in person hearing either at Field House or an alternative hearing centre. In the circumstances, rather than adjourning the hearing, the appeal was re-listed to be heard by telephone in Court 6 at Preston Combined Court Centre. The reason for doing so was that it was in the interests of justice for the appeal to be heard swiftly, not least because a linked entity to the Appellant had made a fresh application for a licence and the Office of the Traffic Commissioner ("OTC") was awaiting this determination. Further, as it was not possible for the specialist members to attend the hearing, it was determined that in the interests of justice, the hearing could and should be conducted by Judge alone. In making the above decisions, the Tribunal had regard to fairness, the principles of natural justice and the overriding objective and the Pilot Practice Direction: Panel Composition in the First-tier Tribunal and Upper Tribunal dated 19 March 2020 and the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal dated 19 March 2020.

Background

3. The background relevant to the appeal can be found in the appeal bundle, the transcript of the hearing and the written decision and is as follows. M White Limited ("MWL") was incorporated in 1994 with three equal shareholders, Mark White ("M White"), Jamie White ("J White") and Fiona Bullivant nee' White ("F Bullivant"). F Bullivant had been the company secretary since incorporation and M White had been a director for the same time. J White became a director in September 2014 (a change which was not notified to the OTC). MWL's business was waste processing and skip hire.

4. MWL was granted a standard national operator's licence in May 1999 authorising 3 vehicles (later increased to 10 vehicles). The nominated transport manager was M White. In 2008, MWL was called to a public inquiry for consideration of regulatory action in connection with vehicle roadworthiness prohibition notices, an apparent failure to comply with statements of intent and undertakings, concerns about good repute, financial standing and professional competence. At the conclusion of the hearing,

Traffic Commissioner ("TC") McCartney issued a formal warning to MWL and undertakings were attached to the licence with regard to maintenance safety inspections, a nil defect daily driver reporting system and a maintenance audit. Further evidence of financial standing was required.

5. In 2009, MWL was called to a public inquiry for DTC Perrett to consider a variation application for a new operating centre for 1 vehicle. As the proposed operating centre was in fact a residential site (the home of M White), the application was refused.

6. In 2013, at Sheffield Magistrates Court, MWL, M White and J White were convicted of offences relating to breaches of environmental permit requirements at its operating centre at 65 Worthing Road, Attercliffe, Sheffield. The offences related to the storage of more waste than was permitted by the environmental permits held by MWL.

7. In January 2014, a petition to wind up MWL was presented by HMRC in respect of outstanding tax liabilities and arrears of £84,198.58 and a winding up order was made on 6 October 2014, with the winding-up process completed on 15 September 2017. MWL failed to notify the OTC of the winding up order. The winding up order did however, come to the attention of the OTC and a propose to revoke letter was sent to MWL in December 2014 on the ground that the company no long had the necessary financial standing for its operator's licence. The operator's licence was subsequently revoked on 22 April 2015 and following correspondence from J White in which he asserted that the winding up order had been rescinded, the OTC requested bank statements for the previous three months. MWL duly produced bank statements but they were not in the name of MWL but rather, were in the name of the Appellant company, Mark White (Skips) Ltd.

8. On 10 June 2015, MWL and M White (as transport manager) attended a public inquiry for TC Rooney to consider the following areas of concern: the failure to notify the 2013 convictions; the absence of adequate financial resources; the failure to notify the OTC that the company had entered compulsory liquidation. On 12 June 2015, the TC's decision was notified to the directors in these terms:

"*The entity holding the licence is in liquidation. Revocation therefore stands. The directors have a separate limited company. I would be content to grant interim authority if a new application is made, is complete and the only outstanding issue is repute. My consideration of repute will await the completion of the ongoing (appeal) against conviction. Interim authority can be granted on that basis without referral".*

The word in brackets was omitted from the decision letter and the "conviction" referred to by the TC were the convictions referred to in paragraph 6 above. At the date of the hearing before TC Rooney, an appeal against conviction had been dismissed by the Crown Court and an application for case stated to the Administrative Court was in progress. That application was refused in July 2015.

9. The separate limited company referred to by the TC was the Appellant ("the company") which had been incorporated in November 2013. The shareholders of the company were the same as those of MWL; F Bullivant was the company secretary; J White was a director until 10 July 2018; M White was a director between November 2013 and July 2015 and was then re-appointed following the resignation of J White on 10 July 2018. The reason for J White's resignation was that on 6 July 2018, at Cardiff Magistrates Court, he was disqualified under s.5 of the Company Directors Disqualification Act 1986 from acting as a director of a company for a period of two years with effect from 27 July 2018 by reason of his conduct while acting for the company. J White described his current relationship with the company as one of "advisor".

10. It is accepted that the company continued to operate the business previously conducted by MWL following the winding up of MWL, hence the provision of bank statements to the OTC on 6 May 2015. It is also accepted that following the receipt of the decision letter dated 12 June 2015, the company failed to make an application for an operator's licence until an on-line application for a restricted licence was received by the Central Licensing Unit ("CLO") on 15 March 2019. In the meantime, in November 2018, Companies House commenced action to strike the company off the Register and dissolved the company on 23 July 2019. Following an application made to the High Court by J White and the company, the company was restored to the Register on 30 July 2019. However, as at the date of the public inquiry, the company's accounts remained overdue.

11. The application for a licence (authorising two vehicles), which was completed by F Bullivant, appeared to contain inaccurate information:

    a) Section 5: M White was named as the sole director. At the date of application, J White was the sole director listed at Companies House;
    b) Section 9: the answer to the question "who will carry out the safety inspections" was answered "Jamie White". It was accepted by J White, during the public inquiry that this answer was incorrect not least because he is not a trained mechanic;
    c) Section 10: the answer "no" to the question "has anyone you've named in this application (including .. directors ..) ever been involved with a company .. that has gone (or is going into liquidation), owing money";
    d) Section 11: the answer "no" to the question "has anyone you've named in this application .. previously held or applied for a goods .. operator's licence ..";
    e) Section 11: the answer "no" to the question "has anyone named in this application .. ever had a goods .. operator's licence revoked …"

12. On 20 March 2019, the OTC requested further information including further financial evidence. The letter queried the answers given as set out in sub-paragraphs 11(a), (c) – (e) above and requested a further, corrected application to be submitted. The letter contained a warning in bold print that the company was not authorised to operate vehicles exceeding 3.5 tonnes

until an operator's licence was granted and the fee paid. Advice was given about applying for an interim licence.

13. On 25 March 2019, a retrospective change was made to the directors' details at Companies House to show that J White had resigned and M White had been appointed on 10 July 2018. It should be noted that despite that change the Companies House records deem J White as a person who has "*significant influence or control as a member of a firm".* By a letter dated 1 April 2019, J White apologised for the answer set out in sub-paragraph 11(c) above and cited confusion in respect of the answers set out in sub-paragraphs 11(d) to (e) and averred that he considered sufficient time had passed since the revocation and liquidation of MWL to deem it relevant information. J White concluded the letter by asking for an interim licence. Enclosed with the letter was an amended application in respect of the answer set out in sub-paragraph 11(c) only.

14. In a final attempt to resolve matters, the OTC wrote to the company again on 24 April 2019, requesting further financial information. It was pointed out that M White had been a director of MWL and this should have been recorded on the application. Further, licensing records for MWL showed that documents had been signed by both M White and J White in their capacity as directors and so it followed that both were linked to the licence at the time of revocation. An account of the events leading up to the liquidation of MWL was requested along with an explanation as to why Companies House records showed a Proposal to Strike Off marker against the applicant company. The letter (which was posted by 1st class post and recorded delivery and sent by email to J White) again contained the same warning that it was unlawful to operate goods vehicles in excess of 3.5 tonnes without authority.

15. On 16 May 2019 M White wrote to the OTC enclosing relevant bank statements. He averred that the winding up of MWL was not the result of "*fault or blame on our part"* but rather:

    a) the number of customers who had entered liquidation owing MWL substantial amounts of money during the recession; and
    b) employees deliberately becoming unproductive to maintain their hours and jobs; and
    c) two vehicle thefts, one of which was a specialist vehicle which was not replaced resulting in further loss of business.

    The directors had invested heavily into MWL and had sold personal assets to avoid MWL's insolvency. They had sustained significant personal losses. As for the Applicant company, he enclosed a Notice of Temporary Suspension of the striking off of the company from the register and various court orders.

Public Inquiry

16. By a call up letter dated 4 September 2019, the company was called to a public inquiry to be held on 10 October 2019 for the DTC to consider the

application. The letter indicated that the DTC wished to be satisfied that the company was not unfit to hold a licence as a result of relevant activities or convictions (s.13B of the Act) and had sufficient financial resources (s.13(D). The background correspondence and concerns were set out, including the full text of the decision letter of TC Rooney sent to MWL on 12 June 2015.

17. In written submissions dated 3 October 2019, M and J White asserted (in summary) that the insolvency proceedings in respect of MWL brought by HMRC were unlawful. The fact that MWL had still not been dissolved was evidence of that and absent the liquidation of MWL, the Applicant company was not obliged to notify the OTC. It was averred that the revocation of the MWL licence was a "*natural consequence"* of the winding up order which could not reflect badly on any party involved in MWL. Reference was made to the decision of TC Rooney in June 2015 which was interpreted as being an indication that the TC would issue a new operator's licence if the only outstanding issue was repute. As the new application was for a restricted licence, "*reputation is not a consideration at all".* In any event, whilst the challenge in respect of the conviction "*ran into problems"*, a new challenge with expert evidence was to "*come soon".* Attached to the submissions were a witness statement of M White in the MWL insolvency proceedings, a skeleton argument on behalf of the HMRC dated 2 October 2014 and a skeleton argument on behalf of M and J White dated 23 October 2014 in the same proceedings. Other documents filed prior to the hearing included a maintenance agreement with an independent contractor.

18. At the public inquiry, M White, F Bullivant and J White attended with all three shareholders giving evidence as and when they or the DTC considered appropriate although the company's case was mostly presented by J White. The DTC was told about the circumstances of the liquidation of MWL; the background to the 2013 convictions and that whilst the company continued to operate the waste processing site at 65 Worthing Road, it did not hold a licence to do so. J White considered that such a licence was "*implied by behaviour".* The difficulty was that whilst waste remained on the site, an application for a permit could not be made.

19. J White described himself as an advisor to his father. He was not a director because of the disqualification order. There had been "*lots happening"* at the material time of his disqualification, including bankruptcy proceedings brought by HMRC against J White personally for unpaid tax in the sum of £80,000. J White explained that it was all tied up with the loans that he had made to MWL before the company was dissolved. A fresh appeal was imminent.

20. The TC asked about the vehicles that had been operated by MWL. She was told that one had been stolen, a second had "*gone"* and the third continued to be operated by the company. M White stated that they were operating two vehicles because they were hoping to be granted a licence. J White told the DTC that they had applied for an interim licence and he believed that by reason of that application, an interim licence had been granted. It was ascertained by the DTC that all three shareholders had seen the correspondence from the OTC concerning the licence application. The DTC

referred to the warning referred to in paragraph 12 and above and asked J White to read it. The following exchange then took place:

JW *… it says that, "You can have, have no fully operating goods vehicles exceeding three and a half tonnes."*
DTC *Right, and then it goes on, "If you do so, you risk having your application refused."*
JW *Yes .. but if there's reasons for it. You know, you can't, you can't simply stop operating, you know, for, for six months, because that, that would mean the disruption of your company. You, you may as well not even apply for, for the Operator's licence. You would, you would lose customers in two days.*
DTC *Right, there are two issues. You are saying that you thought you did have authority.*
JW *Yes*.
DTC *Then you are saying there are reasons for continuing operating, which indicates that, you know, you were waiting for an interim licence to be granted, but commercially, you needed to carry on operating.*
JW *Well .. it is both of those really.*
DTC *Well, it cannot be, really. You either knew or you did not.*
JW *Well … we did ask for an interim licence.*
DTC *All right.*
JW *Right. And … we didn't really get an answer, so, you know, they didn't, they didn't say no, first of all, and secondly, we, we couldn't just, just stop trading for, for half a year. We .. may as well just, just kind of close up, sell, sell the yard and, you know, wave goodbye to kind of .. 20 years of hard work. It is nonsensical.*

21. As for the letter dated 1 April 2019 in response to the OTC's letter of 20 March 2010 and which contained a request for an interim licence, F Bullivant would have drafted it. M White had read it and had assumed that an interim licence would be granted and that it was straightforward because the vehicles had been maintained and the company was of "*good character"*. He accepted that he had not received any discs from the OTC and that as a transport manager, he appreciated that discs were issued when a licence had been granted. He now appreciated that an interim licence had not been granted.

22. J White then addressed the same issue. He had dealt with the OTC correspondence concerning the application. When he received the correspondence containing the warning about operating large goods vehicles, he just took the wording to be part of a standard letter and that the warning itself had not even been typed by the sender. The consequences of not receiving an interim licence would have been "*catastrophic"* and in the absence of a refusal, the company assumed that it had been granted.

23. The reason for not applying for a new licence with an interim authority in June 2015 was that J White was concentrating on overturning the winding up order of MWL so that the company could be reinstated and the times were "*turbulent"*. MWL was being "*victimised and torn apart*". Whilst the Applicant company was operating without a licence, the vehicles were being maintained

by an external contractor and they were being tested, taxed and insured. Drivers hours however, were not being analysed.

24. In his closing submissions (in summary), J White described the history of MWL as having some "*serious complicating factors*" caused by the "*tyranny"* of HMRC and the Environment Agency. None of the history was "*their fault"*. They had just intended to run the "*old company*" going forwards and did not plan for the "*turmoil*". The application for a licence was their opportunity to *"kind of come in from the cold*". The vehicles had been appropriately maintained and the family were genuine, decent people who were just trying to make the yard work. It was not a massive operation and the company had not been convicted of fly tipping, misbehaving or similar. Neither they as individuals nor the company were unfit to hold a licence.

The Deputy Traffic Commissioner's decision

25. In her written decision dated 21 October 2019, the DTC set out the relevant statutory provisions and reminded herself of the Upper Tribunal decision of *T/2012/34 Martin Joseph Formby t/a G&G Transport* and in particular, that the operator's licencing system was based upon the open and accurate provision of truthful information and records to the Traffic Commissioner and the enforcement authorities at all times. It was essential that any operator could be trusted to comply with all of its licence obligations and to operate vehicles strictly and only within the terms of the law. The matter of fitness was accordingly central to the integrity and efficacy of the system for the licensing of all goods vehicle operators. The DTC determined that the relevant activities in this case may include those of M White as a director of the company, the relevant activities of MWL, a company of which M White was a director and the relevant activities of the Applicant company. The DTC did not take account of the relevant activities of J White as an individual as he was no longer a director of the company although he may be a shadow director, an issue that the DTC did not go on to determine.

26. The DTC's starting point was that the Applicant company had for a period of some five years, unlawfully operated two goods vehicles in circumstances which required an operator's licence. One of the drivers of those vehicles was M White. The DTC broke down the period of unlawful operation into three periods for the purposes of considering the company's explanations for the unlawful operation. The first period was between 6 October 2014 (the winding up order) and 10 June 2015 (the public inquiry). The DTC determined that the winding up order had not been notified to the TC and no application was made to make the continued operation of goods vehicles lawful. She rejected the company's explanations for failing to engage with the TC and in failing to make an application for a licence in its own name for the period of eight months. The explanations she recorded were the unexpected and unreasonable conduct by the HMRC; the various "*complicated*" appeals being pursued by J White; the belief that there was a reasonable prospect of those appeals succeeding. She found them "*difficult to accept*" in light of the previous experience of the parties in operator licensing and the fact that M White was the nominated transport manager of MWL.

27. The second period was between 10 June 2015 and the application for a licence made on 15 March 2019. The TC had made it "*absolutely clear"* that the previous licence was revoked and yet no application was made. The DTC rejected the explanations given which were the on-going appeals against conviction and "*oversight*" due to the amount of time J White was spending on various other appeals. The issue of a further application and an interim licence were clearly dealt with by the TC in his decision and the explanations for not making an application in June 2015 were neither credible or acceptable as explanations for continued unauthorised use.

28. The third period was between application and public inquiry. The DTC found the explanations given by M and J White which were that the application for an interim licence had not been refused and that they were hoping that the application would be granted were "*incredible"* and "*did not stand critical scrutiny"*, particularly against the background of the clear warnings given about operating vehicles in the absence of a licence. The DTC reminded herself of the exchange which is set out in paragraph 20 above and having heard and assessed the evidence of J White, she concluded that the company knew that it did not have authority to operate vehicles at least from 2015 and most certainly since the application for a licence in March 2019 and had continued to operate vehicles for financial and commercial reasons in the face of written warnings from the OTC not to do so. Such illegal operation was a very serious matter and the company had forfeit the trust required to enable the DTC to be satisfied that it shall comply with the law and requirements of the licence. It was not saved by its openness at the hearing, its assurances that the vehicles have been maintained during the period of illegal operation; by the explanation of "*complicated factors";* by the "*complexity"* and "*turmoil"* of various legal actions affecting MWL and J White personally or by the long period of operating by MWL without regulatory action being taken by the TC save for a warning letter in 2008 relating to maintenance and the revocation in 2015. In the circumstances, the company had failed to satisfy the DTC on the balance of probabilities that it was not unfit to hold the licence applied for.

29. Having made the above finding, the DTC did not go on to consider making any further findings concerning other relevant activities by relevant persons that may also have been relevant to considerations under s.13B (which may have included issues of compliance with the law concerning environmental permits, the due payment of taxation liabilities and a failure to comply with the law concerning the filing of accounts) and the remaining requirements of the Act.

The appeal to the Upper Tribunal

30. J White ("Mr White") attended by telephone.

31. The Notice of Appeal submitted by Mr White on behalf of the company set out ten grounds extending to thirty-six paragraphs. Immediately prior to the appeal hearing, Mr White submitted a twenty-three page skeleton argument

containing seventy four paragraphs which was overly long and repetitive. In the interests of proportionality, the combined effect of both documents and Mr White's oral submissions is summarised below.

32. Grounds A, C and J: the DTC's determination that the company could not be trusted to operate compliantly in accordance with an operator's licence was not supported by the evidence. The officers of the company had operated goods vehicles under a previous operator's licence for sixteen years "*without problems".* Further, the DTC failed to properly take account of the company's position that its actions in unlawfully operating goods vehicles were not "*deliberate"* or with "*mens rea"* but was something that was imposed upon the company by the conduct of HMRC and the Environment Agency which was "*unlawful".* Paragraphs 12 and 13 of the Tribunal decision of *NT/2013/82 Arnold Transport & Sons Ltd v DOENI* were relied upon. The DTC should have asked herself two questions: "*why did they run without a licence?*" and "*did they operate as though they had one?"*. Had the latter question been asked, the DTC would have been satisfied that the company was fit to hold a licence, because, for example, the company was using tachographs (although the Tribunal notes, not analysing them), putting its drivers through drivers' CPC qualifications, keeping the vehicles taxed, fit and serviceable and using a "*proper"* operator's centre. In any event, "*trust"* was a matter of "*repute or reputation",* it was not a necessary requirement of not being "*unfit"* to the extent that it was a reason to refuse the application.

33. Ground B: the matters raised in the call up letter for consideration at the public inquiry were the insolvency of MWL and the revocation of MWL's operator's licence. The letter did not include the issue of unlawful operation of goods vehicles and this failure amounted to a "*procedural corruption".* This failure was despite the ample evidence available, if adequate investigations had taken place, that the company was continuing to operate goods vehicles without authority. The bank statements by way of example, showed that the company was operating a skip hire business. The failure to discover that the company was operating unlawfully amounted to "*shoddy preparatory work .. by the OTC"* which was not the fault of the company. The DTC then "*seized"* upon the unlawful operation of vehicles and did not allow the company an opportunity to present evidence to fully explain it. The DTC had predetermined the issue and "*exceeded her powers and corrupted the parliament-prescribed screening process for granting operator's licences"*. Paragraph 16 of the Tribunal decision of *Aspey Trucks Ltd (2010) UKUT 367 (AAC)* and *T/2010/006 J & C Cosgrove trading as Fisher Tours* were relied upon. The purpose of the 1995 Act was to help operators comply with the law and the blinkered approach of the DTC to the issue of trustworthiness was "*puzzling". "As it happens* (the company) *was running a lorry on another company's OL for a long time from 2014. This had escaped out attention because we were under the impression that operating without an OL was not an issue".*

34. Ground D: the DTC made an incorrect finding that the company knowingly operated vehicles without an interim licence. It had been argued by Mr White that the letters containing the warning about unlawful operation were "*cut and*

paste" standard letters and as such, they "*did not amount to a refusal to grant interim authority. Therefore we believed we were operating under an interim authority".* This was an important issue as it was the "*central reason"* for the DTC refusing to grant the licence. This added weight to the complaint of "*predetermination and unfairness".* By s.24(1) of the 1995 Act, a traffic commissioner, may, if the applicant requests, issue to him an interim licence. It is not the fault of the company if the OTC failed to put the company's request before the TC for consideration and it cannot be blamed for the consequences of operating without a licence, nor for doing so knowingly. It follows that the DTC's conclusion that the company was unfit to hold a licence was not supported by the evidence. In any event, the company did not know whether an interim licence had not been issued. In his skeleton argument, Mr White averred that the DTC did not make her decision upon the basis of the period of unlawful operation between 2015 and March 2019 and there was no evidence to justify the determination that the company knowingly operated vehicles without a licence.

35. Grounds E, G and I: lack of proportionality/balancing exercise. The DTC failed to carry out a proper and proportionate balancing exercise when deciding that the company could not be trusted and when deciding "*whether to put the company out of business".* The exercise should have included the peculiar circumstances which left the company operating without a licence when the company's owners had previously operated a licence without "*major problems"* for a period of some 16 years. The balancing exercise which did take place simply nullified any potential positives such as openness at the hearing; assurances given that vehicles would be properly maintained and the complicating factors and turmoil of unwarranted legal actions. The DTC's conclusion should have been that unlawful operation of vehicles was "*an unwitting, inadvertent, unwanted and unsought course of action by the company".* Further, the DTC could have imposed conditions on the licence rather than simply refusing it. "*However, since we were refused on not applying for one, when it is indisputable that we did apply, this refusal point (operating without one) is rather odd; does she think we will forget to apply for one after we have been granted one?"* The decision was tantamount to finding that an operator without a licence will automatically not be granted another under any circumstances and this was not "*lawful".*

36. Ground F: In refusing the application, the DTC exceeded the authority given to her by Parliament which did not give her authority to "*damage people's businesses"* or give her the power to "*assume life or death powers for companies that have been the victim of government malfeasance (HMRC and the Environment Agency)".*

37. Ground H: the DTC conducted the hearing on a "*hostile and pre-determined footing",* which was "*procedural corruption".* This was evident from her determination that the evidence of unlawful operation was sufficient to refuse the application without considering other, potentially relevant matters. The DTC "*hit on something that she felt she could use to refuse the application and closed her mind to everything else. This suggests a warping of the requirements to give careful jurisprudence and general care, when grave*

decisions are to be made. Not to gleefully seize on something and exceed her authority". There was no reason why a licence could not have been granted in this case.

38. Finally, in his skeleton argument and oral submissions, Mr White sought to persuade the Tribunal that the principles enunciated in both *2002/217 Bryan Haulage (No.2)* and *2009/225 Priority Freight* should be applied to applications for new licences as well as to those cases involving existing operators who are facing mandatory loss of repute and/or revocation. The questions that should have been asked by the DTC were: "*how likely is it that this operator will, in future, operate in compliance with the operator's licensing regime?"* (the Priority Freight question) and *"is the conduct such that the operator ought to be put out of business?"* (the Bryan Haulage question) and if the DTC had approached the application in this way, she would have granted it.

Discussion

39. The grant of a restricted operator's licence is dependent upon the Applicant satisfying the TC/DTC that they fulfil the requirements set out in s.13B of the Act, namely, that the Applicant is not "*unfit"* to hold a restricted licence as a result of relevant activities as defined in paragraph 1 of Schedule 2 of the Act. The issue of whether "*unfitness*" to obtain and retain a restricted licence is a materially different requirement to being of *"good repute"* in order to obtain and retain a standard operator's licence was considered by the Tribunal in *T/2013/07 Redsky Wholesalers Ltd* and having analysed the provisions of Schedule 2, the Tribunal concluded at paragraph 19:

"*We do not think that fitness is a significantly lower hurdle than the requirement to be of good repute …"*

It follows that any suggestion that "*trust"* is more to do with "*good repute"* than "*unfitness"* is misconceived. The issue of whether an Applicant can be trusted to comply with the regulatory regime whether in the context of a restricted licence or a standard licence is an issue relevant to both types of licence and it is nonsense to suggest otherwise.

40. The unlawful operation of goods vehicles strikes at the heart of the regulatory regime as it allows the unlawful operator to escape scrutiny which would otherwise take place to ensure that the operation is compliant, that there are sufficient financial resources available for the maintenance of the vehicles and that road safety is not being compromised by badly maintained vehicles or by the utilisation of over-tired and inadequately qualified drivers. Unlicensed operators operate at an unfair commercial advantage to those who operate compliantly and who ensure that the necessary financial reserves are always available to meet the requirement of financial standing.

41. This was a bad case of unlawful operation over a period of five years aggravated by the following: the continued operation of the vehicles

previously operated by MWL once the company had been wound up and its operator's licence revoked on 22 April 2015 without the TC being notified of the same. The DTC was plainly right to dismiss the explanations for why the Applicant company continued to operate vehicles in those circumstances and without any attempt to regularise the position. Then on 10 June 2015, TC Rooney considered the company's position. His decision could not have been clearer in setting out what the company needed to do. It was a lifeline for the company, bearing in mind that it was already operating vehicles without authority. Despite that, the TC gave the company an opportunity to apply for a licence with an interim authority. The officers of the company chose not to make that application and the DTC was plainly right to find that the explanations for not doing so did not and could not amount to justification for such conduct which could lead to the finding that the company was not unfit to hold a licence. The DTC was plainly right to find that M White was a transport manager and all the officers of the company were aware of the need to apply for a licence. The DTC summarised the explanations she had been given and found that they did not withstand close scrutiny and that determination is beyond challenge. The suggestion that the company was forced into the unlawful operation of vehicles by reason of the unlawful actions of HMRC and the Environment Agency and that no "*fault"* can be attributed to the company or its officers is misconceived. When the company finally decided to regularise its vehicle operations and apply for an operator's licence, it continued to operate unlawfully without any cessation of its activities pending the outcome of its application for an interim licence. Mr White described the suggestion that the company should have ceased operating as *"nonsensical"* for commercial reasons. It is clear that the company's commercial interests remained paramount throughout the period of unlawful operation with regulatory compliance playing no part at all in the company's decision-making process until it applied for a licence; even then regulatory compliance came a very poor second to commercial considerations.

42. In *Aspey Trucks Ltd* (supra) the Tribunal was concerned with an application for a standard national licence. However, the decision is equally applicable to applications for restricted licences. At paragraph 10, the Tribunal determined:

> *"In a case such as this, the Deputy Traffic Commissioner was .. deciding whether or not to give his official seal of approval to a person seeking to join an industry where those licensed to operate on a Standard National or Standard International basis must, by virtue of S.13(3), prove upon entry to it that they are of good repute. In this respect, Traffic Commissioners are the gatekeepers to the industry – and the public, other operators, and customers and competitors alike, all expect that those permitted to join the industry will not blemish or undermine its good name, or abuse the privileges that it bestows. What does "Repute" mean if it does not refer to the reasonable opinions of other properly interested right-thinking people, be they members of the public or law-abiding participants in the industry"?*

The DTC was plainly right to find that the company could not be trusted to comply with the regulatory regime and was therefore unfit to hold a restricted licence. In the circumstances, Grounds A, C and J are without merit.

43. Turning then to the issues of the adequacy of the call up letter and the failure of the DTC to offer an adjournment upon the issue of unlawful operation, the starting point is that it was for the company to establish that it was not unfit to hold a licence (the burden being on the Applicant at all times) and it should have prepared its case accordingly. It was not for the OTC to investigate the company to see if anything could be discovered which may have adverse consequences for its application and the bank statements, whilst showing a trading company, did not flag up the fact that the company was operating vehicles in excess of 3.5 tonnes. The call up letter raised that which was known and which may cause the DTC concern. In any event, the letter clearly referred to the revocation of the MWL licence and the written decision of TC Rooney was set out in full. It should have been plain and obvious to the officers of the company (if it was not) that they would be required to explain the nature of the company's operations between June 2015 and March 2019 and why it had not applied for a licence with an interim authority as per the decision of TC Rooney in June 2015. It was inevitable in the circumstances, that the issue of unlawful operation would need to be addressed by the company. This is a commercial jurisdiction and applicants are expected to have some insight as to what is expected of them. The description of the DTC's approach to the unlawful operation of vehicles as an "*ambush*" is misconceived. In any event, the officers of the company and in particular, Mr White, were able to provide various explanations for the unlawful operation which the DTC rightly rejected. Mr White submitted during the course of the appeal hearing that if an adjournment had been offered to the company in order to deal with the point, he would have provided every legal document and order relating to all of the various appeals and proceedings that he and the company had been involved in and which were relied upon to justify the failure to apply for a licence. With respect to Mr White, such documents would not have taken matters any further because the DTC did not question the accuracy of the evidence about the company and Mr White being involved in various complicated appeals and legal proceedings. The issue was whether they could amount to a sufficient explanation for operating unlawfully for a period of five years. There was no unfairness in the way that the DTC dealt with this issue or any unfairness resulting from her failure to offer an adjournment. Indeed an adjournment was not appropriate in the circumstances. Ground B is rejected.

44. Turning to Ground D, the central finding of the DTC was that the company and its officers had knowingly operated vehicles without a licence, whether interim or full. Her findings, which covered the whole period of unlawful operation, were that the company had the requisite knowledge. That was a plain and obvious finding upon the evidence that she had heard and it is beyond criticism. As for the submission that the warnings contained in the correspondence sent to the company once applications for a licence and interim authority had been made were nothing more than standard, cut and paste documents which did not convey, in the circumstances, that the

company did not have an interim licence is misconceived. The absence of a refusal to grant an interim licence could not reasonably have been interpreted as demonstrating that an interim licence had been granted. The warnings were clear in their terms and if the company had any doubts about that, the company should have contacted the OTC for clarification. Ground D is rejected.

45. Grounds E, G and I concern the proportionality of the decision and the balancing exercise conducted by the DTC. There is no merit in these grounds. The DTC conducted an appropriate and balanced exercise and weighed up the positives and the negatives. Her finding that unlawful operation in the circumstances of the case outweighed the positives was plainly right and entirely proportionate. The question of whether the DTC's decision will have the effect of putting an applicant out of business is not one which need be asked in relation to a company which has built up its business on inexcusable and unjustifiable unlawful operation of vehicles. Finally, Mr White suggested that conditions could have been attached to a restricted licence (he did not suggest which conditions might be appropriate) but in any event, it is difficult to see how conditions could address the issue of trustworthiness as they presuppose that the operator will be compliant.

46. Grounds F and H: there is nothing in these complaints. There is no evidence that the DTC exceeded her authority nor is there evidence that she was hostile or had pre-determined the issues and for the avoidance of doubt there was no "*procedural corruption"* in either the application process or the hearing. Public inquiries are inquisitorial in nature and the DTC was required to ask searching questions which should be answered in a straightforward way. There is no procedural unfairness in a TC/DTC questioning the evidence given by or on behalf of applicants and continuing to probe issues when the evidence given is unsatisfactory.

47. Turning then to Mr White's final point, the Priority Freight and Bryan Haulage questions (supra) are asked in cases where an existing operator with an operator's licence is facing severe regulatory action and in particular, licence revocation. Whilst the Priority Freight question is in the same or similar terms to the question that TC/DTCs would ask themselves in any event when considering whether to grant an application for a licence, whether restricted or standard, the Bryan Haulage question is not relevant to such applications as the TC/DTCs are deciding whether or not to give their official seal of approval to an Applicant seeking to join an industry. It is plainly wrong to suggest that the Bryan Haulage question should be asked when considering licence applications made by applicants who have been operating unlawfully. They, as with other operators must simply satisfy the requirements of s.13 of the Act and in particular, s.13B and unlawful operation is a very significant consideration when determining whether a company can be trusted in the future. The company did not satisfy the requirements of s.13B in this case.

Conclusion

48. None of submissions made on behalf of the company have merit and in the circumstances, the Tribunal is satisfied that the DTC's decision was not plainly wrong in any respect and that neither the facts or the law applicable in this case should impel the Tribunal to allow this appeal as per the test in *Bradley Fold Travel & Peter Wright v Secretary of State for Transport (2010) EWCA Civ.695.* The appeal is dismissed.

Her Honour Judge Beech
30 April 2020