



Neutral Citation Number: [2020] UKUT 0234 (AAC)

Appeal No. T/2019/69

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

**IN AN APPEAL FROM THE DECISION OF
Simon Evans, Traffic Commissioner for
the North West of England dated 31 October 2019**

Before:

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

Appellant:

**GS COURIERS (NOTTINGHAM) LIMITED
RICHARD GETTINGS-SMITH
LOUISE GETTINGS-SMITH**

In attendance by telephone: Patrick Sadd of Counsel instructed by Rothera Sharp Solicitors; Chris Powell, solicitor of Rothera Sharp Solicitors; Richard Gettings-Smith, director of the Appellant

Heard at: Preston Combined Court Centre, Ringway, Preston, PR1 1LL

Date of hearing: 24 March 2020

Date of decision: 6 July 2020

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that the appeal be ALLOWED and the matter be remitted for rehearing before a different Traffic Commissioner

SUBJECT MATTER:- Good repute of operator and directors; employment of a man who purported to be a qualified transport manager; disqualification of the directors; refusal of application for an operator's licence in a different traffic area

CASES REFERRED TO:- 2002/217 Bryan Haulage (No.2); 2009/225 Priority Freight; T/2019/54 Bridgestep Ltd & Tom Bridge; 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 Traffic Commissioner for the North West of England (“the TC”) made on 31 October 2019 when he revoked the standard national operator’s licence held by the First Appellant (“the company”), disqualified the two directors of the company Richard Gethings-Smith (“RGS”) and Louise Gethings-Smith (“LGS”) and refused an application for a further licence under ss.13A(2)(b), 27(1)(a) and 26 of the Goods Vehicles (Licensing of Operators) Act 1995 (the Act). The grounds for taking such action were as follows:
 - a) The company had operated from inception to June 2019 without a transport manager and had therefore lacked professional competence;
 - b) By reason of the above and the surrounding circumstances, neither the company nor the directors were of good repute;
 - c) By reason of the above, the company’s licence was revoked with effect from 23.45 on 15 November 2019 and both directors were disqualified from holding or obtaining an operator’s licence in any traffic area for a six month period;
 - d) The application for an operator’s licence in the North East of England authorising seven vehicles was refused, the company and RGS being unable to demonstrate good repute.
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 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, a stay of the TC’s decision having been granted and so the company continued to operate vehicles. 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 TC’s written decision and is as follows.

The North West Operator's Licence ("NWOL")

4. By an application received by the Central Licensing Office ("CLO") on 1 February 2018, the company made an application to the North West Traffic Area for a standard national operator's licence authorising three vehicles. The application was signed by RGS and it proposed Jamie Bogg as transport manager. A TM1 form accompanied the application. Jamie Bogg did not attach a CPC certificate to the form. On 19 February 2018, Jamie Bogg wrote to the CLO stating that his CPC certificate had been lost by his former employer and that he had requested a replacement from OCR, the relevant examining board. On 6 April 2018, Jamie Bogg informed the CLO that OCR could not find his CPC certificate. In substitution, Mark Scholey was nominated and his CPC certificate was provided. He was approved as transport manager by the TC and an interim licence was granted. A full licence was granted on 18 May 2018. In fact, Mr Scholey had not agreed to be nominated as transport manager and did not become aware that he had been so nominated until he received the calling-in letter. On 10 May 2019, an application to add Jamie Bogg as transport manager to the NWOL was submitted. Enclosed with his details was a contract of employment with the company together with a CPC certificate in his name.
5. In the meanwhile, Traffic Examiner ("TE") Cotgreave commenced a routine compliance investigation in respect of the NWOL on 7 May 2019. He dealt with Jamie Bogg and requested the raw data for the three vehicles specified on the licence as well as the drivers' digital data. His investigation revealed that the company was in fact running nine vehicles; it was using an unauthorised operating centre in the North East of England; the company had no control over the planning of journeys as this was left to the customers; agency drivers were used but there was no system for downloading their digital cards. Despite these findings, TE Cotgreave marked his investigation (rather surprisingly) as "*mostly satisfactory*".

The North-Eastern application

6. On 21 January 2019, the company submitted an application for an operator's licence in the North East of England authorising fifteen vehicles with an indication that if granted, the NWOL would be surrendered. At the public inquiry, the application was reduced to seven and the offer to surrender the NWOL was withdrawn.
7. Initially Mr Scholey was proposed as transport manager but concerns were raised by the CLO about whether Mr Scholey had a genuine link to the operator and there were further concerns about the apparent provision of transport services by JFE Commercial Services (Jamie Bogg's trading name) as the correspondence and email addresses provided in the application were those of Jamie Bogg rather than those of the company. A decision was made to hold a preliminary hearing for the TC to consider transport management arrangements and this prompted an application on 10 May 2019 to add Jamie Bogg as transport manager to the application. A CPC certificate in his name

was provided (the same as that referred to in paragraph 4 above). The CPC certificate gave rise to serious concerns that it was not a genuine document: there were discrepancies in the fonts used and in the layout of the certificate and the certificate number which should incorporate the date of birth of the holder did not do so. The decision to hold a preliminary hearing was set aside and the company, Jamie Bogg and Mr Scholey were called to a public inquiry.

Public Inquiry

8. The hearing took place on 16 October 2019. RGS attended with Andy Akers, the company's general manager and Laura Pilliner, the proposed transport manager for the licence and the application. The company was represented by Mr Powell. Mr Scholey attended and was unrepresented. Jamie Bogg was absent but in a series of emails, having initially denied any wrongdoing, he belatedly accepted that he did not hold a CPC certificate; he had used Mr Scholey's identity without his knowledge having obtained his details during a FORS audit of Mr Scholey's company (which was accepted by the TC having heard evidence from Mr Scholey); GS Couriers was not aware of his wrongdoing.
9. The evidence of TE Cotgreave was accepted. RGS told the TC that the company was engaged in courier and delivery work, employing 26 people with a further 60 to 65 sub-contractors. He and LGS were directors although the latter was a director in name only. The company had operated using 3.5 tonne vehicles but when a new franchise was awarded to the company, larger vehicles were required and he was told that he would need an operator's licence. At that stage, his knowledge of licensing was "*non-existent*" and he was "*very badly*" prepared as a director of a licence holding company. He advertised for a transport manager and interviewed two candidates. Jamie Bogg was "*very credible*" and a "*glowing reference*" was given over the telephone by someone who purported to be a former employer of Jamie Bogg. RGS also looked at Jamie Bogg's website and read the reviews thereon. Jamie Bogg was taken on and was paid a considerable fee. RGS accepted with hindsight, that what he had been told was a "*complete lie*" and that Jamie Bogg was a "*fraudster and conman*". RGS told the TC that he had such confidence in Jamie Bogg that he did not look for positive evidence that compliance was being achieved whilst Jamie Bogg was purporting to be the transport manager and that at the time, RGS was "*firefighting*" in a different side of the business. He did not supervise Jamie Bogg and "*took everything at his word*".
10. RGS had no involvement with the NWOL application save for signing cheques and the last page of the application itself (it was observed during the appeal hearing that he also completed page three of the application). He did not read the application prior to signing it and as the TC observed in his decision, when asked to give an explanation for why he would do such a thing and how he could have honoured the declaration without reading it, he was unable to give a credible response. He did not normally sign documents that he had not read.

11. He told the TC that within a couple of weeks of the application being made, Jamie Bogg had informed him that an interim licence had been granted and so the company began operating large vehicles in February 2018. He only later became aware that the licence had not been granted until 18 May 2018 and that Jamie Bogg had never been the approved transport manager.
12. In May 2018, RGS asked Jamie Bogg to make a further application to increase the number of vehicles on the licence to fifteen. In late May 2018, Jamie Bogg informed RGS that the increased authorisation had been granted although the company did not operate more than nine vehicles. RGS had no appreciation of the requirement for vehicles to display an operator's licence disc in their cabs and was therefore unaware of the implications of only three discs being displayed in the company's vehicles.
13. In the summer of 2018, the company decided to withdraw from a franchise agreement which meant that the company had need for smaller premises. Jamie Bogg was asked to make all the arrangements and to change correspondence addresses to the new operating centre, which unbeknownst to RGS was in the North Eastern traffic area. He was unaware that a further application for another operator's licence was required. The company had used the new operating centre from that time until Laura Pilliner advised the company to cease in June 2019.
14. It then transpired that Jamie Bogg had asked Mr Akers to sign a second TM1 application form whilst RGS was on holiday. Mr Akers did so without having sight of anything more than the back page. This led to Mr Scholey being appointed as transport manager. RGS only became aware of this in March 2019 when he contracted the CLO. Jamie Bogg explained that he had sub-contracted his transport manager responsibilities to Mr Scholey because he, Jamie Bogg, was named as transport manager on too many licences. RGS accepted the explanation but demanded to meet Mr Scholey. When Mr Scholey failed to attend two meetings with RGS, Jamie Bogg then offered to become a part time transport manager with the company as his circumstances had purportedly changed.
15. In the interim, one of the company's clients wanted to see a copy of the company's operator's licence. Jamie Bogg "*fobbed him off*". He eventually provided a hard copy of a document which purported to be a licence issued on 18 April 2019, authorising fifteen vehicles in the North Eastern Traffic area. When provided with the document, Jamie Bogg directed RGS not to provide a copy of the document to anyone. RGS produced this document at the public inquiry and it was accepted that it was a forgery (and a bad one at that, as it was purportedly issued by the Office of the Traffic Commissioner for the East of England rather than the North East).
16. In June 2019, being aware that there was an issue with a suspected fraudulent document which was being investigated by the OTC, RGS lost his patience and confronted Jamie Bogg who denied any wrongdoing; his contract was nevertheless terminated and Laura Pilliner was appointed as his replacement. He had not reported Jamie Bogg to the police.

17. As at the date of the hearing, the company was operating three large goods vehicles under the NWOL and was losing £20,000 per week as a result of the need to hire-in small vehicles and the additional fuel costs associated with double or triple runs. RGS was awaiting the result of transport manager CPC course he had taken (which he in fact passed) and Mr Akers was to take the same course shortly. RGS had taken a step back from other responsibilities to concentrate on the operator's licence. His management style had changed to "*questioning everything*".
18. Laura Pilliner told the TC that she joined the company on 7 June 2019 and that this was her first position as transport manager. It was she who discovered that the company did not have authority to operate more than three vehicles and immediately withdrew six vehicles from use. She described a good relationship with RGS with high levels of communication. On examination by the TC, Ms Pilliner accepted that none of the PMI records disclosed any measured brake testing and explained that it was her belief that such testing was only necessary at annual test. She assured the TC that the six weekly PMI regime was abided by but the following discrepancies were found: the PMI interval for one vehicle had been stretched to seven weeks on two occasions; one vehicle in use had never been specified on the operator's licence, no inspection record had been produced for the vehicle since 30 July 2019 and had a stretched PMI interval of four months; one vehicle had no PMI records after 26 July 2019 and was only removed from the licence on 26 September 2019. Ms Pilliner told the TC that she had passed her CPC examination in December 2018 and that she had been a vehicle examiner prior to that. When pressed, she changed her answer: she had been a driving examiner.
19. In his closing submissions, Mr Powell invited the TC to accept the explanations given by RGS including his acceptance that he had delegated too much and had lacked knowledge or experience of operator licensing. He had not had the confidence to challenge Jamie Bogg on what turned out to be his false assertions and explanations. Having undertaken the CPC examination, with Mr Akers to follow and with Ms Pilliner as the transport manager, it would now be judged that the company had full and detailed knowledge of its responsibilities and had placed compliance at the heart of the business. Past compliance failures had been without the knowledge of RGS. Mr Powell offered undertakings in respect of future brake testing and the commissioning of a compliance audit. A formal warning would be sufficient in circumstances which were "*quite unusual*".

The Traffic Commissioner's decision

20. In his written decision, the TC accepted the evidence of TE Cotgreave and Mr Scholey. He treated the written communications from Jamie Bogg with the "*utmost caution*" in the light of their contents and in the absence of any opportunity to question him. He accepted the evidence of Ms Pilliner. With regard to the evidence of RGS, the TC found the evidence of:

“RGS for the most part to be open and transparent. I do however conclude the he much underplays his responsibility and offers excuses, which only serve to evidence a clear abrogation of his responsibilities as the director of a licence holding business”.

21. The TC went on to find:

- a) The enforcement history of the company was limited to an immediate PG9 for a tyre cut to the cord in late 2018 and an offence prohibition for a tachograph not properly fitted. The MOT pass rate at first presentation was worse than the national average and OCRS score was Red/Red;
- b) Whilst vehicle safety was not the primary consideration in his decision, concerns included brake performance testing, the MOT pass rate and the stretching of PMI frequencies;
- c) Jamie Bogg nominated Mr Sholey as transport manager without admitting the true circumstances to RGS. It was believed that professional competence was being met by Mr Sholey’s appointment when it was not;
- d) Jamie Bogg gave a false indication to RGS that an operator’s licence had been granted in the North West in February 2018 when it was not granted until May 2018;
- e) Jamie Bogg gave a false indication to RGS in May 2018 that the company could operate vehicles from its new operating centre in the North East;
- f) The document purporting to be an operator’s licence granted in the North Eastern Traffic Area is a false document along with the CPC certificate in the name of Jamie Bogg (in all likelihood);
- g) The company had unlawfully operated up to six vehicles in excess of the authorisation on the NWOL between May 2018 and June 2019;
- h) As admitted by RGS, he had so little knowledge of operator licensing that he was *“manifestly ill-equipped to meet the undertakings he had signed up to, he exercised no supervision of Mr Bogg and never sought positive any affirmation (sic) about the grant of the licence .. I find his personal failure to exercise even the most basic checks of the application form, to allow his manager to take the same approach and to ignore the critical caption statement of business practice .. represent wholly reckless failures, entirely unbecoming of a licence holder and entirely reprehensible. I am satisfied his subsequent conduct and the failure to make proper enquiries were such as to allow himself to be duped by Jamie Bogg and to be “fobbed-off” for long periods, such that the holding of an operator’s licence obtained by a deception continued for much longer than ought to have been allowed to be the case. The prime example of this being when he found out that Mark Scholey was in fact the nominated TM yet still allowed the arrangement to persist for some weeks. I find his description of finding Mr Bogg’s explanation as being “feasible” as incredible when considered*

against the background of a misrepresentation which had continued from January 2018 to March 2019”.

- i) In the circumstances, there were grounds for taking action against the licence under s.26(1), (c), (iii), (e) and (f) of the Act.

22. The TC then turned to s.27 of the Act. He determined that this was a “*bad case. A licence has been permitted to operate unlawfully and anti-competitively through a deception for a long period. Whilst I find that Mr Gethings-Smith would probably have been unaware, at least initially, that he had taken on someone who would carry out the deceitful acts that he did, his inadequate business practices and subsequent repeated failures to get to the truth were such that he did not recover the position when he could have done.*” The TC determined that the case justified “severe action” in accordance with the STC’s Statutory Document No. 10 and went onto consider the positive features in the case:

“I have referred to the positive features above, including the absence of previous adverse history, albeit the circumstances raised here persisted from the very start of the licence. I take account of the fact that since soon after June 2019 the operator has been compliant with licence expectations and there is no suggestion that vehicles have operated unlawfully since then. I take at face value that there will have been a significant impact on profitability in that period. .. I acknowledge the director’s desire to continue to operate the business and provide employment for the staff”.

The TC determined that the negative features from the indicative list were relevant to his consideration:

- “a) deliberate and/or reckless act/s by operator and/or drivers that led to undue risk to road safety or unfair commercial advantage;
b) ineffective management control and insufficient or no systems and procedures in place to prevent operator licence compliance failings;
c) Insufficient and/or ineffective changes made to ensure future compliance”.*

The TC determined that the negatives outweighed the positives:

“My confidence in this operator to ensure compliance and uphold the expectations of a licence holder has been seriously undermined: I do not trust this operator to achieve licence compliance”.

He concluded that the good repute of the operator had been lost and he answered the Priority Freight question in the negative:

“the failings had been significant and the legitimate industry would rightly be concerned if in the circumstances outlined, an operator were able to retain its repute in such a case as this, where trust in an operator has been so undermined ... I am asked to conclude that the failures have been “cured” and that the licence may continue because the experience has been a seminal one, there is a much greater understanding of the operator licence regime (via

CPC qualification of the director) and a legitimate TM is now in post. I do not share the view that such a proposition is a valid one”.

The TC therefore concluded that it was right for the operator to be put out of business:

“The needs of road safety and fair competition in the business are such that this is the only proportionate decision that I may reach”.

He then concluded that the directors should be disqualified:

“If he (RGS) or the company do intend to seek to return to the industry at some future stage, I suspect that any Traffic Commissioner considering such an application would need to be satisfied that business structures are such as to allow for there to be the prospect of rigorous and active challenge at board level, basic yet fundamental business practices are in place including appropriate due diligence arrangements and that there is demonstrable learning from this fiasco”.

Finally, he refused the application for a licence in the North Eastern Traffic Area.

The appeal to the Upper Tribunal

23. At the hearing of this appeal, Mr Sadd represented the company and attended by telephone having earlier submitted a skeleton argument for which the Tribunal was grateful. The grounds of appeal can be summarised in this way:
- a) The central criticism of the TC’s decision was that he was over-critical of RGS’s reliance upon Jamie Bogg when in the circumstances it had been reasonable for RGS to rely on the purported expertise and professional qualification of Jamie Bogg and when there was no reason to call into question either his representations or his capability. The TC set the bar too high and when identifying the ways in which RGS had been deceived by Jamie Bogg. The TC should have asked himself the question: *“was it reasonable in the circumstances for the operator to have relied on what the transport manager was indicating and to have relied on his advice”*. If he had asked that question, the answer would have been “yes”. When RGS did become aware of Jamie Bogg’s deceit, he appointed a new transport manager and, upon her advice, reduced the fleet to three once it became apparent to her that the company only had an authorisation of three vehicles;
 - b) The TC’s balancing exercise was flawed in that he underplayed the positive features of the case including TE Cotgreave’s assessment of the systems that were in place at the time of his visit, the immediacy with which RGS sought to remedy the issues he had found, RGS’s CPC qualification and the positive relationship that RGS and Ms Pilliner described, which was not called into doubt and finally, the frankness of RGS during the hearing and when speaking to TE Cotgreave;

- c) Whilst RGS admitted to: serious incompetence in failing to check the application form for the licence; failing to check the TM1 form; the lack of diligence and proper oversight in not questioning Jamie Bogg's management and approach, his conduct could not properly be described as reckless or dishonest. Further, the steps taken to put things right, were taken prior to the call up letter. In the circumstances, revocation was too harsh. The Priority Freight question should have been answered in the affirmative and the Bryan Haulage No.2 question should have been answered in the negative. In all the circumstances, the action taken was disproportionate.

Discussion

24. The Tribunal's starting point is that this was a very bad case of a company which prioritised turnover and profitability over compliance with the regulatory regime. No one within the management structure of the company had any knowledge in or experience of operating large goods vehicles or of licence compliance. Rather than take even the most basic of steps to familiarise themselves with the regulatory regime and the responsibilities that the company would be accepting in applying for a licence, the directors abdicated all responsibility for operator licencing to Jamie Bogg. Even the most cursory of enquiries (as can be made on the internet) would have alerted the directors to their responsibilities which cannot be abdicated to a transport manager (whether genuine or not). The conduct of the directors, and in particular RGS (who in reality was the only director purporting to discharge his statutory functions as such) was reckless in the extreme. He was far more interested in growing the business. Any director keen on (or even with a superficial regard to) good governance and corporate responsibility and oversight would have:
- a) Made some enquiries about the obligations and responsibilities that were involved in holding an operator's licence;
 - b) Required the provision of a written reference for Jamie Bogg which was capable of verification rather than simply telephoning a number and speaking to someone whose identity RGS could not be sure of;
 - c) Required sight of the full application form for an operator's licence before signing it and without any knowledge of the obligations and responsibilities the company was signing up to;
 - d) Ensured that the management systems in place at the company did not allow for an employee to sign a TM1 form (or indeed any form) without reading it and understanding what it entailed;
 - e) Put in place a system of oversight to ensure that Jamie Bogg was discharging his functions as transport manager.

In conducting himself in the way that he did, RGS demonstrated that he lacked business competence and integrity even to the extent that when Jamie Bogg was exposed as a “*fraudster*”, RGS failed to report the matter to the police. On any view, there was compelling evidence of three separate offences of forgery (the CPC certificate, the operator’s licence and the signature on the TM1 form in the name of Mr Scholey) and at least one offence of obtaining by deception (the fees Jamie Bogg was paid and the subsequent part time employment whilst holding himself out to be a qualified international transport manager). There was no explanation for this omission. In short, the findings of fact that the TC made in respect of the “*fiasco*” as he correctly described what had taken place between January 2018 and June 2019 are not capable of being undermined.

25. The real issue in this appeal however, is the ultimate balancing exercise conducted by the TC and the reasons that he gave for the decision that he came to. On the face of the evidence, RGS had acted promptly once there was a suggestion that a forged document had been submitted to the OTC. He had appointed a new transport manager (albeit one who had never held the position before and who had described her previous employment as that of “*Traffic Examiner*” when in fact she was a Driving Examiner and who had not appreciated that brake testing was required more than once a year at annual test). RGS had described his change in management style and to his credit, had taken and passed the CPC transport manager examination and there was of course some mitigation in the fact that Jamie Bogg was a rogue. Good repute must be judged as at the date of the public inquiry and whilst the failings of the company through RGS were serious, the TC failed to give an adequate explanation for why at the date of the hearing, the TC could not step away from a finding of loss of good repute and the severest of regulatory action. By way of example:
- a) when weighing up the positive features of the case, the TC stated “*I have referred to the positive features above, including the absence of previous history .. since soon after June 2019 the operator has been compliant .. there is no suggestion that vehicles have operated unlawfully since then .. there will have been a significant impact on profitability in that period*”. The use of the word “*including*” implies that there were other positive features that the TC had taken into account but he does not specifically set them out in the passage quoted or elsewhere. It is therefore difficult to ascertain what he did view as positive features and why;
 - b) There is no reference in the TC’s decision under the heading “*Findings, consideration and conclusions*” to the fact that RGS had taken and passed the CPC transport manager qualification and it follows, there is no determination as to why that feature could not be considered to be a positive feature;
 - c) The TC did not state why the appointment of Ms Pilliner did not assist him in being satisfied that the company would be compliant in the future;

- d) The TC included in his negative features “*insufficient and/or ineffective changes made to ensure future compliance*”. The TC does not state why the changes which had been made were insufficient or for example, why undertakings would not be sufficient to ensure future compliance in maintenance terms, for example, in relation to minimum brake testing intervals and a systems audit;
- e) The TC concluded that having weighed up the positive and negative features, he concluded that he “*did not trust this operator to achieve compliance*”. Such a statement requires an explanation against the background of positive steps having been taken to ensure compliance;
- f) The TC did not give an explanation as to why, when answering the Priority Freight question he concluded “*I find that I cannot answer that question positively*”;
- g) Mr Powell submitted that the failures of the company had been “*cured*” and that the licence may continue because the experience had been a seminal one; there was a greater understanding of the licensing regime (via RGS’s CPC qualification); and a legitimate transport manager was in post. In response, the TC determined that “*I do not share the view that such a proposition is a valid one*”. Whilst this point may overlap with one or more above, it is nevertheless worth making: the company was entitled to know why the TC did not consider the proposition to be valid as at the date of the public inquiry.

If this were a case where the operator by its directors or controlling minds had been seriously dishonest rather than reckless, then it may be possible to conclude that no proffered rehabilitation or changing of mindsets would be sufficient to satisfy a TC that the company could be trusted in the future. But this was not such a case. The company was entitled to know the full reasons why the TC did not consider that the company could be trusted as at the date of the hearing.

26. There are however, other issues which were not dealt with by the TC either in the public inquiry or in his decision:
- a) TE Cotgreave recorded in his report that it was the company’s clients who planned the journeys of the company’s drivers and vehicles rather than the company and that the latter did not even have sight of the proposed routes. As TE Cotgreave’s report was accepted by the company, this serious failing in supervision and control of the drivers was also accepted. It is surprising that in the circumstances, this matter was not raised at the hearing and/or evidence adduced that route planning and drivers’ hours were now firmly in-house and closely monitored and supervised. Whilst this matter should have been raised in the call up letter, it was adequately flagged up in the report of TE Cotgreave;
 - b) The evidence of RGS was that the company employed twenty-five members of staff and sixty to sixty-five drivers who drove the company’s

vehicles and who were sub-contractors of the company. It is well established that unless a driver is an owner-driver, it will be a very rare case in which the HMRC will conclude that the driver is legally self-employed (See T/2019/54 Bridgestep Ltd & Tom Bridge). Those companies who purport to use self-employed drivers on a sub-contracting basis if the position is not genuine, are operating at a competitive advantage over those operators who employ their drivers and pay national insurance, sick pay, holiday pay and pensions. This is a matter that may go to good repute and should have been raised in call up letter;

- c) TE Cotgreave recorded in his report that there was no system in place to download the digital data of agency drivers used. This again should have been explored;
- d) Finally, the role of LGS should have been considered. It was accepted that she does not discharge any of the statutory functions of a director which begs the question: why is she a director? Her appointment may give others a false impression as to the governance of the company.

27. In the light of the matters set out in paragraphs 24 to 26 above, the Tribunal is satisfied that these appeals should be allowed and the matter be remitted for rehearing before a different Traffic Commissioner as it is understood that TC Evans has now retired. The TC conducting the rehearing will benefit from an up to date report prepared by a Traffic Examiner and a new call up letter will be required to reflect the matters set out in paragraph 26 above (if the TC considers it appropriate) and any matters arising from the new report.

Conclusion

28. The Tribunal is satisfied that the TC's approach to the balancing exercise was either flawed or that inadequate reasons were given for the final conclusion and that as result the Tribunal should 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 allowed.



Her Honour Judge Beech
6 July 2020
Corrected on 21 July 2020