



NCN: [2020] UKUT 374 (AAC)
Appeal No. T/2020/28

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

ON APPEAL from a DECISION of the TRAFFIC COMMISSIONER

Before: M Hemingway: Judge of the Upper Tribunal
S James: Member of the Upper Tribunal
D Rawsthorn: Member of the Upper Tribunal

Appellant: Gower Plant Hire Limited

Reference: OG1034471

Date of Hearing: 15 December 2020 (papers consideration)

DECISION OF THE UPPER TRIBUNAL

This appeal to the Upper Tribunal succeeds. The decision of the Traffic Commissioner as embodied in a letter of 30 March 2020 under reference OG1034471 is set aside. We refer the matter back to a Traffic Commissioner who has not previously dealt with this case for fresh consideration and decision.

CASES REFERRED TO

Bradley Fold Travel Ltd v Secretary of State for Transport [2010] EWCA Civ 695.

REASONS FOR DECISION

1. This appeal to the Upper Tribunal has been brought by Gower Plant Hire Limited (“the Operator”). It relates to a decision of a Traffic Commissioner (“TC”) embodied in a letter of 30 March 2020 refusing to grant its request for a variation of the terms of its goods vehicles operator’s licence. We have allowed the appeal and remitted. What follows constitutes an explanation as to why.

2. On 30 July 2019 the Operator signed and sent to the Office of the Traffic Commissioner (“OTC”) completed form GV81. That is a standard form used when variation of the terms of an existing licence is being sought. It was received, along with some supporting documentation, on either 1 or 21 August 2019 (the receipt stamp is unclear). Included in that supporting documentation, so far as we can tell, were bank statements in the name of the Operator concerning an account with a number which ended in 460 and also concerning an account with a number which ended in 806. We shall call them account 1 and account 2. The statements for account 1 covered a period from 21 February 2019 to 10 June 2019. The statements for account 2 covered the period from 30 April 2019 to 31 July 2019. The Operator sought variation to increase the number of vehicles and the number of trailers it was permitted to use under the licence. It simultaneously sought to add a Transport Manager (“TM”).

3. On 27 August 2019 the OTC wrote to the Operator acknowledging the variation application and seeking further information concerning issues relating to the Transport Manager (which since they were subsequently resolved and played no part in this appeal we shall say no more about) and finance. It was necessary for the OTC to evaluate the Operator’s financial standing because section 13A(2)(c) of the Goods Vehicles (Licensing of Operators) Act 1995 (“the 1995 Act”) provides that an applicant for a standard operator’s licence must be of appropriate financial standing as determined in accordance with the terms of Regulation (EC) No 1071/2009 of the European Parliament and of the Council. Since that is a continuing obligation, it fell to be satisfied on the variation application. There is no dispute as to the TC’s view that the above provisions necessitated the demonstration of access to a sum of £70,300 if authority were to be given to operate the number of vehicles the Operator wanted. What the OTC said in the above letter about the financial evidence provided thus far was that the bank statements were unacceptable “*as they are older than 2 months from the date we received your application*”. The Operator was asked to provide further original bank statements for account 1 covering “*the full month of July 2019*”. It occurs to us that the person who had evaluated the evidence and wrote the letter of 27 August 2020 might well have overlooked the bank statements relating to account 2. We say that because no mention was made of the bank statements relating to that account and because the period covered by those statements included a period which was not older than the date of receipt of the application. We would also observe that the account 1 statements did include a period which was within 2 months of the date of receipt of the application whichever, of the two possibilities identified above, the correct date of application was.

4. On 3 September 2019 the Operator wrote to the OTC enclosing “*The bank statement as requested*”. It, in fact, enclosed a bank statement for account 1 covering the period from 21 June 2019 to 9 August 2019, thus spanning the month of July 2019. During that period the credit balance was between £62,240 and £67,237. On 12 September 2019 the OTC wrote to

the Operator stating that the bank statements for the period from 21 June 2019 to 9 August 2019 demonstrated an average credit balance of £65,986 and hence, less than that which was required. But again, no mention was made of account 2. Further financial evidence was requested. The OTC also, very fairly, suggested the Operator might wish to reduce the number of vehicles it was seeking to have authorised under the licence by way of variation. Specifically, it wrote “*Alternatively, you may wish to reduce your requested authority to a level which the financial evidence we have on file would support. This would be 14 vehicles overall. If this is the case, please confirm this in writing and you will not need to provide further financial evidence in support of your application*”. Perhaps surprisingly, the Operator did not seek to remind the OTC of the bank statements it had sent relating to account 2 though it might have simply assumed (wrongly we suspect) that since they had been sent they must have been considered. It responded by sending the OTC a “Business Credit Card Statement of Account” showing available credit of £1,912 as at 2 September 2019 and available credit of £4,920 as at 3 October 2019. Those documents were accompanied by a rather short letter which reads “*Please find attached the only extra paperwork that I have in Gower Plants name. If this is not sufficient can I then only apply for 4 extra licenses to make 14 in total*”. In other words, the Operator was asking, in the event of the OTC still not being satisfied as to finance for the number of vehicles originally sought, to take advantage of the OTC’s offer.

5. There was then a temporary cessation of communications broken by a letter from the OTC to the Operator, of 3 March 2020, informing it that further financial evidence showing the availability of £70,300 during a 28 day period, the last day of which must be no more than two months from the date of the application, was required. It appears that the Operator, unlike when it had previously received such letters, did not reply at all. That resulted in a further letter being sent by the OTC on 30 March 2020, informing the Operator that its application had been refused. Neither letter made reference to the earlier offer to reduce the number of vehicles being sought by way of variation or the acceptance of it.

6. The Operator appealed to the Upper Tribunal. In doing so it suggested, in effect, that compliance with the financial standing requirement had been adequately evidenced (though it did not explain with precision and with reference to calculations why that was so) and that, in any event, it had accepted, by way of an alternative, a variation to 14 vehicles. In considering an appeal such as this, and bearing in mind what was said in *Bradley Fold Travel Ltd and Peter Wright v Secretary of State for Transport* [2010] EWCA Civ 695, the Upper Tribunal must determine matters of both fact and law on the basis of the material which was before the TC. The burden lies upon an appellant and in order to succeed such an appellant must show that the process of reasoning and the application of the relevant law require the Upper Tribunal to adopt a different view. The Upper Tribunal may not take into consideration any circumstances which did not exist at the time of the determination which is the subject of the appeal. It may, if allowing an appeal, make such order as it thinks fit or, if it thinks appropriate, remit.

7. It would seem that, in refusing the application, the TC or members of the OTC’s staff, simply overlooked the previous offer to reduce the number of vehicles to 14 and to accept the application on that basis, which the Operator had, in the event of the TC otherwise not being satisfied, accepted. In our judgement that resulted in unfairness. We think that remains so notwithstanding the Operator’s unexplained failure to reply to the OTC’s letter of 3 March 2020. On that basis alone, we set aside the TC’s decision. But we also conclude, on the material before us, that the TC (or the OTC’s staff) did not carry out a holistic evaluation of

the Operator's finances because it did not, so far as we are able to tell, take into account the bank statements relating to account 2. In fact, it is right to say that those statements do show that, for part of the time covered, account 2 was overdrawn. But the statements also indicate an overdraft facility of £45,000. So, that provides a further reason for us to set aside the TC's decision.

8. We have concluded remittal is appropriate because there needs to be a comprehensive consideration of the financial circumstances of the Operator and, assuming the Operator still wishes it, a consideration as to whether, if it is ultimately concluded the financial standing requirements are not satisfied for the full amount of vehicles sought, a variation of the terms of the licence providing for a reduced amount of vehicles, perhaps the 14 mooted, should be given.

9. So, this appeal to the Upper Tribunal is allowed on the basis and to the extent explained above.

M Hemingway
Judge of the Upper Tribunal
Dated: 29 December 2020