



NCN: [2021] UKUT 223 (AAC)
Appeal No. NT/2021/23

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

**ON APPEAL from the DECISION issued on behalf of the HEAD of the
TRANSPORT REGULATION UNIT
Dated 18 February 2021**

Before:

Kenneth Mullan Judge of the Upper Tribunal

Appellant:

KMC Transport Ltd

Attendances:

For the Appellant: The appeal was determined on consideration of the papers

For the Respondent: The appeal was determined on consideration of the papers

Type of hearing: The appeal was determined on consideration of the papers
Date of decision: 31 August 2021

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that this appeal be DISMISSED.

SUBJECT MATTER:- Application; failure to provide information required by
the Department

CASES REFERRED TO:- NT/2013/52 & 53 Fergal Hughes v DOENI & Perry
McKee Homes Ltd v DOENI; Bradley Fold Travel Ltd &
Peter Wright v Secretary of State for Transport [2010]
EWCA Civ. 695;

REASONS FOR DECISION

1. This is an appeal from the decision issued on behalf of the Head of the Transport Regulation Unit, (“Head of the TRU”) to refuse the Appellant’s application for a goods vehicles operator’s licence. The TRU is part of the Department for Infrastructure (“the Department”).
2. The factual background to this appeal appears from the documents and the Head of the TRU’s decision and is as follows:-
 - (i) On 8 September 2020 an application for a goods vehicle operator’s licence was received in the Department.
 - (ii) On 11 September 2020 correspondence was sent to the Appellant by a caseworker in the Department. The correspondence contained the following:

‘Before your application can be considered by the Department it must be complete in terms of both the information provided in your application form and also documentation required in support of your application. The outstanding information or documentation in respect of your application is listed in the appropriate section later in this letter and you must respond in full by no later than 23 September 2020.’
 - (iii) The ‘appropriate section’ of the correspondence dated 11 September 2020 contained the following:

‘You appear to have a middle name. Please confirm your full name as stated on your birth certificate.

Your company was incorporated in Februar1 2019 but you are only applying for the licence now.

Please confirm who will analyse your digital tachograph.

Please confirm if your vehicle and trailers will be inspected at different intervals to the declared 10 week intervals.

Please confirm if you would like NM added as a transport consultant on your licensing record and that you give your permission for the Department to liaise with her to discuss licensing issues.

Vehicle HXZ 1221 is listed on licence ON1156588. Please provide clarification.

Please arrange for your nominated transport manager to confirm how many hours he will dedicate to his role as transport manager on licence ON 1156588.

Please duly sign the highlighted section on your returned transport manager application declaration. This has incorrectly been signed by your transport manager. A hard copy of the declaration will arrive in the post within the next few working days.’
 - (iv) On 19 October 2020 further correspondence was sent to the Appellant by the Departmental caseworker. The correspondence contained the following:

‘I refer to our recent letter requesting additional documentation in support of your application for a good vehicle operator’s licence.

I note that the additional documentation listed in the attached annex remains outstanding. This letter is intended as a final attempt to resolve these issues by correspondence and you must now respond in full by no later than 2 November 2020. If on that date the application remains incomplete, it will be refused. Should this happen you will have to re-apply for a licence and meet again the application fee plus the cost of placing a fresh advertisement.'

(v) The annex contained the following:

'Internal searches reveal the following offences recorded against your nominated transport manager:

Transport Manager Fixed Penalty Data - 5 Years: (In addition to Operator Penalties)

Date issued	Notice type	Offence	Amount
19/11/2017	Non-endorsable	Failure to ensure proper use of the recording equipment	£120
19/11/2017	Non-endorsable	Driving or keeping a vehicle without required registration mark	£30
07/10/2017	Non-endorsable	Failure to ensure proper use of the recording equipment	£120

Please arrange for Mr McC to explain the circumstances leading to each of the above offences and what measures, if any, have been implemented to prevent reoccurrence. He should also explain why he failed to declare the above offences on the submission for the application/

You appear to have a middle name. Please confirm your full name as stated on your birth certificate.

Your company was incorporated in February 2019 but you are only applying for the licence now.

Please confirm who will analyse your digital tachograph.

Please confirm if your vehicle and trailers will be inspected at different intervals to the declared 10 week intervals.

Please confirm if you would like NM added as a transport consultant on your licensing record and that you give your permission for the Department to liaise with her to discuss licensing issues.

Vehicle HXZ 1221 is listed on licence ON1156588. Please provide clarification.

MX07XGA is not registered to you. Please provide clarification.

Please arrange for your nominated transport manager to confirm how many hours he will dedicate to his role as transport manager on licence ON1156588.

Please duly sign the highlighted section on your returned transport manager application declaration. This has incorrectly been signed by your transport manager. A hard copy of the declaration will arrive in the post within the next few working days.

- (vi) On 29 October 2020 email and written correspondence was received from the Appellant which contained the following:

'My middle name is M

I have had to [sic] requirement for an international operator's licence until recently, thus my pending application

Mallon Transport Services will be responsible for transport analysis

Both vehicle (units) and trailers will be inspected at 10 week intervals

I agree to NM being my transport consultant, to discuss Department issues pertaining to my application

Vehicle HXZ 1221 is no longer required on this application

MX07XGA is now registered to KMC Transport Ltd

On licence ON1156588 Mr McC has the following RTM working hours
Tues 2 Thurs 2 Sun 4

Signed pages enclosed as requested

With regard to Mr K McC's failure to declare my 2017 convictions I was informed wrongly that only convictions within a two year period had to be declared. I sincerely apologise and hope that this mistake does not impact on my pending application.

Circumstances

After some maintaining work, I drove my vehicle not knowing that the reg plate had been temporarily removed, I will endeavour to make sure that I always check that all plates are in place in future. With regard to my two convictions for improper use of recording equipment, I had, at that time, one recording unit which after giving trouble over a two week period, had to be replaced as repairing the unit was not working and proving too expensive.'

- (vii) On 26 November 2020 correspondence was sent to the Appellant which contained the following:

'I refer to the company's application for a goods vehicle operator licence.

The application was referred to the Deputy Head of the Transport Regulation Unit who has directed that the following questions are put to you:

- What was the reason for K McC's resignation as director of KMC Transport Ltd?
- What kind of business relationship do you (CL) currently have with Mr McC following his resignation?
- What is Mr McC's current role within KMC Transport Ltd?
- Why did you submit this application just seven days after Mr McC's resignation as director of KMC Transport Ltd?
- What is the business relationship between KMC Transport Ltd and K McC as a sole trader holding an operators' licence?

Additionally, it is noted that Mr McC gained his CPC qualification over five years ago. Therefore please provide evidence that he has continued his professional development since obtaining his CPC qualification. This can include refresher courses, training workshops, conferences and events, or e-learning programs. If Mr McC is unable to provide this information, you should confirm if you accept the following undertaking on any granted licence:

Within three months from the date of grant of the application, K McC will either:

- i) **attend in person a two-day transport manager CPC refresher course**
- ii) **participate in a virtual online two-day transport manager CPC refresher course**

Courses must be run by a trade association (Logistics UK/RHA/BAR), a professional body (IoTA/CILT/SOE/IRTE), an OCR-approved exam centre offering the transport manager CPC qualification in goods transport, or an approved training provider accepted by the Department.

Virtual online courses must satisfy the criteria for such courses established by the Department. Whether attending in person or participating in an online course, proof of attendance must be sent to the Department at the above address within seven days of completion.

For information - not part of the formal undertaking:

The criteria for virtual transport manager CPC refresher courses are:

- the instructor and all course participants must be visible to each other and audible throughout the training
- participants must participate by means of a tablet, laptop, or PC with the necessary camera/microphone capability. Participation by smartphone is not acceptable unless it has the full functionality of the larger devices
- the course provider must be able to verify the identity of all participants and do so before the course commences

- the instructor must be able to interact with participants, display material and discuss it simultaneously
- the course must replicate as far as is possible the training which would have been delivered in a physical environment
- there must be some element of assessment at a point or points during the training, to verify that participants have actively engaged in the course while the virtual element of the course need not last 14 hours, total participation time for each attendee (including prior reading, completion of "homework" modules etc.) should be in this region

If you are in doubt as to whether a course fulfils these criteria, please check with the Department **before** booking it.

Please note that in offering the undertaking, the licence holder is required to ensure compliance with it and provide all evidence by the due date when requested. This office will not send you any reminders and failure to comply with the undertaking may lead to regulatory action being taken against the licence.

Please respond to the questions above and with regard to Mr McC's continuing professional development. A response is required by no later than 10 December 2020. Failure to meet this deadline may result in the refusal of your application. Please do not hesitate to contact this office with any queries.'

(viii) The correspondence of 26 November 2020 was re-sent to the Appellant on 22 January 2021 and the Appellant was given a further deadline of 4 February 2021 within which to reply.

(ix) On 18 February 2021 further correspondence was sent to the Appellant which contained the following:

'I refer to your company's application for an operator's licence and to our letters of 26 November 2020 and 22 January 2021 requesting additional supporting documentation.

The deadline set in our last letter has now expired. The application has been refused under Section 7(6) of the above Act, given that it remains incomplete. The information requested has not been received and no explanation was offered as to why you were unable to do so.'

(x) An appeal against the decision dated 18 February 2021 was subsequently received in the office of the Administrative Appeals Chamber (AAC) of the Upper Tribunal. The Appellant set out the following grounds of appeal:

'The company was incorporated in February 2019.

Because of the difficulties presented by the pandemic the former director did not have the resources to begin trading in the company. The administration was too much.

Mr McC resigned as Director on 1st September 2020 and CL was appointed in his place. Ms L has experience in office work and administration.

Unfortunately as a result of a breakdown in communication she did not receive the letters seeking further information from DFI.

The application was refused because it was deemed incomplete.

The information requested is available and can be forwarded to DFI without further delay.'

The relevant legislative provision

Section 7 of the Goods Vehicles (Licensing of Operators Act (Northern Ireland 2010 ('the 2010 Act') provides:

'7. Application for operators' licences

(1) An application for an operator's licence shall be made to the Department.

(2) A person may not at any time hold more than one operator's licence.

(3) An application for an operator's licence shall be made in such form, and include such declarations and information, as may be prescribed.

(4) Without prejudice to subsection (3), regulations under that subsection shall require the applicant to provide prescribed particulars as to—

- (a) the motor vehicles proposed to be used under the licence;
- (b) any trailers proposed to be used under the licence;
- (c) each place which will be an operating centre of the applicant if the licence is issued.

(5) The Department may require an applicant to furnish, in such form as the Department may require, such further information as the Department may consider necessary for dealing with the application.

(6) If a person fails without reasonable excuse to furnish information when required to do so under subsection (5), the Department may decline to proceed further with the application and refuse to grant the licence.'

The proper approach to appeals to the Upper Tribunal

13. In NT/2013/52 & 53 Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI, Upper Tribunal said the following, at paragraph 8 of its decision, on the proper approach on appeal to the Upper Tribunal:

'There is a right of appeal to the Upper Tribunal against decisions by the Head of the TRU in the circumstances set out in s. 35 of the 2010 Act. Leave to appeal is not required. At the hearing of an appeal the Tribunal is entitled to hear and determine matters of both fact and law. However it is important to remember that the appeal is not the equivalent of a Crown Court hearing an appeal against conviction from a Magistrates Court, where

the case, effectively, begins all over again. Instead an appeal hearing will take the form of a review of the material placed before the Head of the TRU, together with a transcript of any public inquiry, which has taken place. For a detailed explanation of the role of the Tribunal when hearing this type of appeal see paragraphs 34-40 of the decision of the Court of Appeal (Civil Division) in Bradley Fold Travel Ltd & Peter Wright v Secretary of State for Transport [2010] EWCA Civ. 695. Two other points emerge from these paragraphs. First, the Appellant assumes the burden of showing that the decision under appeal is wrong. Second, in order to succeed 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 expression *“plainly wrong”* as a shorthand description of this test.’

14. At paragraph 4, the Upper Tribunal had stated:

‘It is apparent that many of the provisions of the 2010 Act and the Regulations made under that Act are in identical terms to provisions found in the Goods Vehicles (Licensing of Operators) Act 1995, (“the 1995 Act”), and in the Regulations made under that Act. The 1995 Act and the Regulations made under it, govern the operation of goods vehicles in Great Britain. The provisional conclusion which we draw, (because the point has not been argued), is that this was a deliberate choice on the part of the Northern Ireland Assembly to ensure that there is a common standard for the operation of goods vehicles throughout the United Kingdom. It follows that decisions on the meaning of a section in the 1995 Act or a paragraph in the Regulations, made under that Act, are highly relevant to the interpretation of an identical provision in the Northern Ireland legislation and vice versa.’

Analysis

15. I have no hesitation in upholding the decision of 18 February 2021.
16. As was noted above, section 7(5) of the 2010 Act provides that the Department may require an applicant to furnish, in such form as the Department may require, such further information as the Department may consider necessary for dealing with the application. Accordingly, the Department was permitted to issue the letter of 26 November 2020 which required the Appellant to provide certain information and documentation supplementary to what had been stated in the formal application for the licence. The Appellant failed to respond to the correspondence of 26 November 2020. The Appellant was given a second opportunity to respond when the letter of 26 November 2020 was re-sent on 22 January 2021. Once again, there was a failure to respond. In my view the Appellant has demonstrated a complete indifference to the regulatory requirements relevant to the applying for a goods vehicles operator’s licence.
17. As was also noted above, section 7(6) of the 2010 Act provides that if a person fails without reasonable excuse to furnish information when required to do so under subsection (5), the Department may decline to proceed further with the application and refuse to grant the licence. The Appellant, in the notice of appeal, has submitted that the reason for the failure to respond was due to a breakdown in communication. That does not, in my view, amount to a reasonable excuse to furnish the information which the Department required.

18. For these reasons we are satisfied that the decision issued on behalf of the Head of the TRU was not plainly wrong and is confirmed. The appeal is, accordingly, dismissed.
19. I have noted that Appellant's assertion that the information which the Department required is readily available. It is a matter for the Appellant but it seems to me that the most appropriate way forward is for the Appellant to make a new application for a goods vehicles operator's licence.

A handwritten signature in black ink, reading "Kenneth Mullan". The signature is written in a cursive style and is positioned above the typed name and date.

**Kenneth Mullan, Judge of the Upper Tribunal,
31 August 2021**