

IN THE UPPER TRIBUNAL

Appeal No. T/2021/46

ADMINISTRATIVE APPEALS CHAMBER

(TRAFFIC COMMISSIONER APPEALS)

ON APPEAL from a DECISION of the TRAFFIC COMMISSIONER for Scotland

Decision dated: 22 June 2021
Appeal dated: 7 July 2021
Before: Judge Rupert Jones: Judge of the Upper Tribunal
Mr A Guest: Member of the Upper Tribunal
Mr S James: Member of the Upper Tribunal
Appellant: JAMES REILLY
Reference: PM2003563
Attendances: Appellant in Person
Heard at: Remotely by telephone
Date of Upper Tribunal Hearing: 14 December 2021
Date of Decision: 16 December 2021

DECISION OF THE UPPER TRIBUNAL

**The appeal against the Traffic Commissioner’s decision dated 22 June 2021 that:
the Appellant no longer satisfies the requirements of Section 14ZA(3)(a) of the Public
Passenger Vehicles Act 1981 to be of good repute and that he be disqualified indefinitely
from engaging in the role of Transport Manager in any Member State with effect from
23:45 on 22 June 2021,
is dismissed. The decision is confirmed.**

Subject matter:

Disqualification of Transport Manager: loss of good repute; indefinite disqualification.

REASONS FOR DECISION

Introduction

1. The Appellant appeals to the Upper Tribunal from a decision of the Traffic Commissioner (TC) made on 22 June 2021 by notice of appeal dated 7 July 2021. The TC decided that the Appellant no longer had good repute and disqualified him indefinitely from acting as a Transport Manager.

The TC's Decision

2. The Operator James Thomas Flynn T/A Happy Days Minibus Hire Falkirk applied on 17 March 2021 to appoint Mr James Reilly, the Appellant, as transport manager.
3. A public inquiry was heard on 22 June 2021 at which the Traffic Commissioner (the 'TC' – Ms Claire Gilmore) gave an oral decision. The TC produced a decision in writing on 25 June 2021.
4. The TC refused the application from James Thomas Flynn T/A Happy Days Minibus Hire Falkirk (the operator) to appoint the Appellant as a transport manager on the operator's licence. Pursuant to an adverse finding under section 17(1)(a) of the Public Passenger Vehicles Act 1981 ('the Act'), the operator's licence was revoked with effect from 23.45 on 29 June 2021.
5. More importantly, as regards this Appellant, the TC decided that the Appellant no longer satisfied the requirements of Section 14ZA(3)(a) of the Act to be of good repute and that he be disqualified indefinitely from engaging in the role of Transport Manager ('TM') in any Member State with effect from 23:45 on 22 June 2021.

The Grounds of Appeal

6. The Appellant, set out the grounds of appeal against the TC's decision in a Notice of Appeal dated 7 July 2021:

'I am appealing against Mr S Jones ([a member of the Office of the] Traffic Commissioner['s]) Decision to withdraw [my] position as Transport Manager from United Coaches Ltd & Hays Coaches Ltd. I do think it is a bit unfair as I have had no problems with either of these companies. Therefore I really do agree with Mr S Jones to suspend my position from Happy Days Ltd as I was sorry I never looked more closely into this company, I would have been more aware of what was going on, and I'm really sorry I made a bad decision on this company. I would be very grateful if you would reconsider this decision and reinstate my position as Transport manager to United and Hays Coaches.'

The TC's reasons for his decision

7. The TC found that the application on behalf of the operator (James Flynn T/A Happy Days) dated 17 March 2021 to appoint the Appellant as TM did not disclose another licence upon which the Appellant was appointed as TM and another current application to appoint him as one (at [4] of the decision). The TC continued: 'Further....a letter signed by Mr Reilly was received setting out some detail of his intended duties, but still without information in relation to other licences'.
8. The TC noted at [9] of her decision: 'Neither Mr Reilly....attended the [public] inquiry. Mr Reilly emailed my office on 18 June 2021 advising that he was unable to attend but gave no reason for that. He failed to respond to follow up correspondence asking him to provide reasons and reminding him of the potential consequences of failure to attend.'
9. The TC addressed at [11] the evidence which Mr Flynn gave at the public inquiry [PI]: 'His [Mr Flynn's] evidence was that he had genuinely attempted to engage Mr Reilly. He had been given Mr Reilly's name by another driver in the industry. He advised that he had an initial meeting with Mr Reilly and had been with him when he drafted the letter setting out how he would undertake his duties. However, Mr Reilly had only advised him [Mr Flynn] of his employment with Hays Coaches. He had not mentioned any others. Mr Flynn advised that he did have a contract with Mr Reilly but he had not brought it with him. The contract only set out the money he would be paid but nothing else.'
10. The TC continued at [12] 'Since receipt of the call to inquiry, Mr Flynn had been unable to contact Mr Reilly. He advised that he had tried calling and had been to Mr Reilly's house but he was not there....'
11. The TC found at [18]: 'Mr Reilly did not attend inquiry to explain his action, nor was I satisfied on the basis of the evidence before me that he intended to exercise continuous and effective management of Mr Flynn's transport operation. I therefore refuse Mr Flynn's application to have him [the Appellant] appointed as transport manager and make the further findings set out at paragraph 25 and 26 of this decision.'
12. The TC found at [25]-[26]:

'25. I was prepared to accept that Mr Flynn may genuinely have intended for Mr Reilly to act as transport manger. However, I have concluded from the evidence before me of his actions, that Mr Reilly was not so committed. He failed to attend the inquiry without adequate reason. He failed to explain his alleged non-engagement with Mr Flynn, or why he had not declared his other transport manager commitments. I was satisfied that he was on notice of his requirement to attend inquiry, and of the potential consequences of his failure to do so.

26. Mr Reilly's actions are not those of a responsible transport manager. It is proportionate in the circumstances, therefore, to find that he has lost his reputation. The being the case I must disqualify him from acting as such. I do so indefinitely. Given Mr Reilly's failure to attend, I am without the benefit of any evidence which would support the imposition of a rehabilitation measure. None, is therefore set.'

Relevant legislative provisions

Application for an operator's licence

13. Under section 14 of the Public Passenger Vehicles Act 1981 on an application for a standard licence a traffic commissioner must consider whether the requirements of section 14ZA and 14ZC are satisfied. Section 14ZA provides:

'14ZA. Requirements for standard licences

(1) The requirements of this section are set out in subsections (2) and (3).

(2) The first requirement is that the traffic commissioner is satisfied that the applicant—

(a) has an effective and stable establishment in Great Britain (as determined in accordance with Article 5 of the 2009 Regulation),

(b) is of good repute (as determined in accordance with paragraph 1 of Schedule 3),

(c) has appropriate financial standing (as determined in accordance with Article 7 of the 2009 Regulation), and

(d) is professionally competent (as determined in accordance with paragraphs 3, 4 and 6 of Schedule 3).

(3) The second requirement is that the traffic commissioner is satisfied that the applicant has designated a transport manager in accordance with Article 4 of the 2009 Regulation who—

(a) is of good repute (as determined in accordance with paragraph 1 of Schedule 3),

(b) is professionally competent (as determined in accordance with paragraph 6 of Schedule 3), and

(c) in the case of a transport manager designated under Article 4.2 of the 2009 Regulation—

(i) is not prohibited from being so designated by a traffic commissioner, and

(ii) is not designated to act as transport manager for a greater number of road transport operators or in respect of a greater number of vehicles than the traffic commissioner considers appropriate, having regard to the upper limits in Article 4.2(c) of the 2009 Regulation, or such smaller number as the commissioner considers appropriate (see Article 4.3 of the 2009 Regulation)

Disqualification

14. Disqualification is mandatory following a finding that a Transport Manager is no longer of good repute or no longer professionally competent – see paragraph 16(1) of Schedule 3 to the Goods Vehicles (Licensing of Operators) Act 1995 Act ('the 1995 Act') which provides that if a Traffic Commissioner determines that a Transport Manager is no longer of good repute or professionally competent he must order that person to be disqualified:

16.(1) In proceedings under this Act or the 2009 Regulation for determining whether a person who is a transport manager is of good repute or professionally competent, a traffic commissioner must consider whether a finding that

the person was no longer of good repute or (as the case may be) professionally competent would constitute a disproportionate response.

(2) If the commissioner determines that the person is no longer of good repute or (as the case may be) professionally competent, the commissioner must order the person to be disqualified (either indefinitely or for such period as the commissioner thinks fit) from acting as a transport manager.

(3) While a disqualification under sub-paragraph (2) is in force—

(a) the person may not act as transport manager for any road transport undertaking;

(b) a certificate issued to the person under Article 8.8 of the 2009 Regulation (certificate of professional competence) is not valid.

(4) A person in respect of whom an order has been made under sub-paragraph (2) may appeal to the Upper Tribunal against the order.

(5) The traffic commissioner may direct that an order under sub-paragraph (2) is not to take effect until the expiry of the time within which an appeal may be made to the Upper Tribunal against the order and, if such an appeal is made, until the appeal has been disposed of.

(6) If the traffic commissioner refuses to give a direction under sub-paragraph (5), the person in respect of whom the order has been made may apply to the Upper Tribunal for such a direction.

15. A Transport Manager's Certificate of Professional Competence ('CPC') is to be treated as 'not valid' while the disqualification is in force. It is open to a Traffic Commissioner to impose a 'rehabilitation measure' under paragraph 17(2) of Schedule 3 to the 1995 Act. The effect is to prevent the disqualified person from applying to cancel or vary the disqualification before the measure has been complied with. At the end of a fixed period of disqualification a CPC regains its validity and any rehabilitation measure ceases to have effect.

16. In the course of her decision T/2014/42 Brian Robert Cutmore the TC for Scotland said of the Appellant, in his capacity as transport manager: "*I cannot think of any rehabilitative measure which would restore the attitude of mind and fortitude towards compliance which is an essential characteristic for a transport manager*". The Tribunal upheld the TC's finding the Appellant had failed in his duty to maintain continuous and effective control of the operator's fleet of vehicles and had, thereby, lost his good repute as transport manager. It upheld an indefinite disqualification, pointing out the right to apply to have it cancelled or varied. The provisional view expressed by the Tribunal was that an indefinite period of disqualification may be the only effective method of ensuring that the rehabilitation measure was complied with.

Length of Disqualification

17. In deciding the appropriate length of a disqualification, it is important to take into account the distinction between good repute and professional competence. Good repute is not automatically restored at the end of a disqualification. The validity of a CPC is automatically restored when a fixed term disqualification ends – see T/2014/50 Andrew Harris t/a Harris of Leicester (paragraph 16). Given the different ways in which a CPC

can be acquired there may be cases in which a Traffic Commissioner has concerns as to both good repute and professional competence, even though the holder of a CPC is deemed to be professionally competent while not disqualified. In a case in which disqualification is appropriate the only way in which concerns about the professional competence of a CPC holder can be met is by imposing an indefinite disqualification and adding, as a rehabilitation measure a requirement to re-qualify as a CPC holder - T/2014/50 Andrew Harris t/a Harris of Leicester (paragraph 19).

The Upper Tribunal's jurisdiction

18. Paragraph 17 of Schedule 4 to the Transport Act 1985 provides:

“(1) The Upper Tribunal are to have full jurisdiction to hear and determine all matters (whether of law or of fact) for the purpose of the exercise of any of their functions under an enactment relating to transport”.

(2) On an appeal from any determination of a traffic commissioner other than an excluded determination, the Upper Tribunal is to have power-

(a) to make such order as it thinks fit; or

(b) to remit the matter to the traffic commissioner for rehearing and determination by the commissioner in any case where the tribunal considers it appropriate.

(3) The Upper Tribunal may not on any such appeal take into consideration any circumstances which did not exist at the time of the determination which is the subject of the appeal”.

19. The Upper Tribunal's jurisdiction was examined by the Court of Appeal in *Bradley Fold Travel Ltd and Anor v Secretary of State for Transport* [2010] EWCA Civ 695. The court applied *Subesh and ors v Secretary of State for the Home Department* [2004] EWCA Civ 56, where Woolf LJ held:

“44....The first instance decision is taken to be correct until the contrary is shown...An Appellant, if he is to succeed, must persuade the appeal court or tribunal not merely that a different view of the facts from that taken below is reasonable and possible, but that there are objective grounds upon which the court ought to conclude that a different view is the right one...The true distinction is between the case where the appeal court might prefer a different view (perhaps on marginal grounds) and one where it concludes that the process of reasoning, and the application of the relevant law, require it to adopt a different view. The burden which an Appellant assumes is to show that the case falls within this latter category.”

20. The Tribunal is not required to rehear all the evidence by conducting what would, in effect, be a new first instance hearing. Instead it has the duty to hear and determine matters of both fact and law on the basis of the material before the Traffic Commissioner but without having the benefit of seeing and hearing the witnesses.

21. The Appellant 'assumes the burden' of showing that the decision appealed from is 'plainly wrong' or at least 'wrong'.

22. In order to succeed the Appellant must show not merely that there are grounds for *preferring* a different view but that there are objective grounds upon which the Tribunal ought to conclude that the different view is the right one. Put another way it is not enough

that the Tribunal might *prefer* a different view; the Appellant must show that the process of reasoning and the application of the relevant law *require* the Tribunal to adopt a different view.

23. That is the approach which we have followed in deciding this appeal.

The Appellant's evidence and submissions

24. We held an oral hearing of the Appellant's appeal on 14 December 2021 by telephone. The matter had previously been listed for a remote video hearing at the Appellant's request but shortly before the hearing he requested a telephone hearing. We were satisfied in the circumstances that taking into account the party's preference and the overriding objective – what is just and fair – it was in the interests of justice to proceed remotely. We were satisfied that it was reasonable and proportionate in the time of a pandemic to avoid an unnecessary face to face hearing where the Appellant could address us orally by telephone without diminishing the quality or content of his oral submissions. He had also had the opportunity to address us in writing in his appeal grounds and before the hearing. We remind ourselves that the issue was not for us to re-decide the case and hear oral evidence but to hear argument as to why the TC's decision was 'wrong' or 'plainly wrong'.

25. The Appellant submitted that he welcomed the decision to refuse the application for him to be a transport manager ('TM') in respect of James Flynn / trading as Happy Days. He was sorry he had ever become involved with James Flynn and believed he had made a mistake when he was only trying to help out Mr Flynn. He believed that James Flynn was using him. Mr Flynn had rung him and appeared at his doorstep asking him to help him out. The Appellant agreed to help out Mr Flynn and be his TM on the basis that he had sufficient time to do so (giving the task 2 days a week) alongside his other roles as TM for two other companies, Hays Coaches Ltd and United Coaches Ltd. The Appellant told Mr Flynn that he would help him out for free at that stage as Mr Flynn was in financial difficulty, so Mr Flynn did not need to worry about paying the Appellant until he was able to.

26. The Appellant accepted that he had signed the application form (TM1) for him to be appointed a TM for James Flynn but did not read what Mr Flynn had filled in. The Appellant genuinely intended to faithfully carry out the role of TM. In late May 2021, after the application for him to be added as TM was submitted, the Appellant found out more about Mr Flynn (such as his poor maintenance record). At this point the Appellant realised he had made a mistake, no longer wanted to be associated with Mr Flynn and wanted to rescind the application to be added as TM. He spoke to his other employers at Hays Coaches and United Coaches who told him it was too late to withdraw the application and he should just wait until the application was determined.

27. The Appellant stated that on the day of the Public Inquiry ('PI') in June 2021 he was suffering from Covid and had a track and trace alert and could not travel to the hearing but had to self-isolate. He stated that he had emailed and telephoned the secretary to the

TC in advance of the PI to explain he was suffering from Covid and that was the reason he would not be able to attend.

Analysis and determination

28. We have no hesitation in rejecting the Appellant's grounds of appeal and his oral submissions. We are satisfied that they do not demonstrate that the TC's decision was wrong or plainly wrong.
29. We are satisfied that the TC was entitled to make the findings at [25]-[26] of his decision that he did, that the Appellant had lost his repute, his actions were not those of a responsible transport manager and thereafter disqualify him.
30. We are satisfied that the Appellant failed to disclose important matters on the TM1 form which was the application to add him as a Transport Manager to the operator's licence of James Flynn. The form was dated 15 March 2021 and was signed by the Appellant as well as James Flynn. The form made clear (at internal pages 1 and 5) that it was to be completed by the nominated transport manager, then passed to the licence holder/applicant for them to complete their declaration and returned to the OTC. At internal pages 5/6 the form made clear to the Transport manager that they were confirming that they would perform their tasks solely in the interests of the licence holder / applicant and be the transport manager for a maximum of 4 operators, with a combined maximum total fleet of 50 vehicles and that should they fail to meet any of the above requirements they understood that the traffic commissioner had the power to disqualify them from being a transport manager in any European Union Country.
31. The form as signed by the Appellant contained at least two material non-disclosures. First, it only declared the Appellant as being the TM for Hays Coaches but did not declare that he was also currently TM for United Coaches Ltd (see question 8). Second, the Appellant failed to declare on the TM1 that just two days earlier (on 15 March 2021) in a separate application he had requested to be nominated as TM for Sparrowapp Ltd. Sparrowapp was based in Solihull but the Appellant lives in Scotland and that application stated he would work 20 hours per week on that licence.
32. Further, the form stated the Appellant had never been involved with an operator whose licence had been revoked. However, the Appellant was previously nominated as a Transport Manager for James Brown who held a Standard International Licence for the period 29 July 2009 to 3 March 2011 but whose licence was revoked with effect from 21 May 2012 following a Public Inquiry – albeit that this occurred after the Appellant left that company. We are prepared to accept that the Appellant may have been unaware of this – he stated he believed that James Brown had simply closed after he left.
33. In light of this further information being discovered by the OTC, a further letter was issued by Central Licensing Office on 13 April 2021 seeking further information concerning the nomination of the Appellant as he would be nominated on four licences if the two applications were granted for James Flynn and Sparrowapp.
34. A letter was received from the Appellant on 22 April 2021 along with a table of the hours he proposed to work in a week. The Appellant stated he was semi-retired and only proposed to work part time and would be visiting Hays Coaches and James Thomas Flynn once a week for a period of 4 hours per visit. His intended plan was to visit Hays Coaches on a Monday and James Flynn on a Thursday, however he would be carrying out

unplanned visits to both sites. The TC noted there was no reference made by the Appellant in his letter or table concerning the weekly hours of work received on 22 April 2021 of his intention to be nominated as a TM for Sparrowapp Ltd or his nomination as sole TM for United Coaches Ltd.

35. We are satisfied that the TC would have been entitled to conclude that the Appellant's non-disclosures relating to both United Coaches Ltd and Sparrowapp Ltd in the TM1 form and the subsequent letter were deliberate. There was a consistent and intentional non-disclosure in order to obtain the nomination as TM for James Flynn. The Appellant told us that he is an experienced TM who has acted as a TM since at least 2004 and he told us that he obtained his CPC in 1984 or 1987. The TM1 form is clear that the TM must complete it and sign to verify its accuracy.
36. In any event, we are satisfied that the TC was entitled to conclude that the Appellant failed to disclose material matters that he was obliged to and this went to his repute. Even on the account that the Appellant gave to us, that he simply signed the form completed by Mr Flynn, the Appellant would have acted recklessly in signing a form completed by Mr Flynn when it was his responsibility to complete it and in failing to read the form which contained important inaccuracies.
37. We do not accept the Appellant's explanation that he subsequently wished to withdraw the application for him to be TM for James Flynn, because of the things he had discovered about Mr Flynn, but did not do so because he had been told by others at Hays Coaches and United Coaches Ltd that it was too late to do so once the application had been made. It is inherently unlikely that a reasonable TM would not contact the OTC and at least ask to withdraw the application if they believed they were being asked to act as TM for a disreputable company.
38. Further, the Appellant's evidence or submission is contradicted by the fact that he did subsequently ask to withdraw his application to be TM for Sparrowapp (the application being made on 15 March 2021). The Appellant accepted he had withdrawn the Sparrowapp application prior to finding out about Mr Flynn in late May 2021 and wanting to withdraw the James Flynn application at that time.
39. Further, we do not accept the Appellant's explanation for his failure to attend the PI and account for his non-disclosures. As the TC recorded, the Appellant did not provide any explanation at the time for his non-attendance. He simply emailed to state he would not be attending. We directed the Appellant, and he agreed, to send a copy of the email that he sent the TC to the Upper Tribunal on the day following the appeal hearing (15 December 2021). By the expiry of that deadline the Appellant had not provided us any copy of the email he sent the TC – therefore there is no evidence of him giving Covid as the reason for non-attendance at the PI.
40. We are satisfied that the TC was entitled to find that the Appellant failed to attend the PI without adequate reason and was not so committed to genuinely act for Mr Flynn as a TM and has failed to explain his non-engagement with Mr Flynn and why he had not declared his other TM commitments. We are satisfied that the Appellant was on notice of his requirement to attend the PI and the of the potential consequences of his failure to do so.
41. In terms of the length of the disqualification – it being indefinite, the TC was required to make a decision based upon the evidence then available and we could not take into account a subsequent change in circumstance even if reasonable and sufficient evidence

of such was now available. In any event, the Appellant has not provided any mitigation to us, as he failed to provide to the TC. The fact that he had previously been a TM for many years without any previous failing and that disqualification has left him unemployed and unable to work as a TM must be weighed against the fact that he has made no admissions as to his misconduct, not acknowledged it, demonstrated no insight nor proposed any remedial activity of measure. Instead he has maintained his original and inherently unreliable account regarding the application to be a TM for Mr Flynn. We are not satisfied that his apology for making a mistake represented genuine insight – the Appellant was seeking to lay blame and responsibility at the door of Mr Flynn rather than accept the nature of his own conduct. The Appellant offered no rehabilitation measures that he would seek to implement or reason that would suggest a lesser period of disqualification would be proportionate.

42. We are therefore satisfied that the TC was entitled to make a finding that the Appellant had lost his repute and that no rehabilitation measures had been put before her. It follows from this that we are satisfied that the TC was entitled to disqualify the Appellant from acting as a TM indefinitely.
43. The Appellant may be entitled to make a fresh application to be a TM if he has a sponsoring company and attends a PI before the TC. However, it will be for the Appellant to persuade the TC that he has sufficient repute in light of this decision and that of the TC in this case (and any other subsequent circumstances).

Conclusion

44. We dismiss this appeal to the Upper Tribunal.

Authorised for release

Rupert Jones
Judge of the Upper Tribunal

Dated: 16 December 2021