



NCN: [2022] UKUT 163 (AAC)
Appeal No. UA-2022-000274-T

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

**ON APPEAL from a DECISION of the TRAFFIC COMMISSIONER for the North
East of England Traffic Area**

Before: M Hemingway: Judge of the Upper Tribunal
A Guest: Member of the Upper Tribunal
G Roantree: Member of the Upper Tribunal

Appellant: MDT European Ltd

Reference No: OB1115691

Heard at: Leeds Employment Tribunal Buildings

Date of Hearing: 31 May 2022

Date of Decision: 22 June 2022

DECISION OF THE UPPER TRIBUNAL

This appeal is dismissed.

Subject matter:

Financial standing
Professional competence

Cases referred to:

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

REASONS FOR DECISION

1. This is an appeal to the Upper Tribunal brought by MDT European Ltd (in the person of its sole director Mr Gary Davies hereinafter “the appellant”) from a decision of a Traffic Commissioner (“TC”) made on 10 February 2022 following a public inquiry (“PI”) of 8 February 2022, to revoke its standard international goods vehicle operator’s licence.
2. The appeal was listed for a traditional face-to-face hearing in Leeds, on 31 May 2022. The appellant failed to attend. No messages concerning his non-attendance were received prior to the hearing and no such messages have subsequently been received. Thus, the failure to attend remains unexplained.
3. By way of background, the above licence was granted on 10 April 2013 with authority to operate eighteen vehicles and twelve trailers. However, it appears that much fewer vehicles than that have been utilised at least in recent times. The nominated transport manager on the licence was Martyn Davies who is the father of the appellant. Martyn Davies was also a director of MDT European Ltd until 5 July 2021.
4. During the course of 2013, MDT European Ltd received some formal warnings as a consequence of an unsatisfactory maintenance investigation. Also in that year it received prohibition notices following a roadside stop relating to a vehicle which was not displaying a valid disc. More latterly, on 2 February 2020, following a roadside stop, a prohibition was issued with respect to a trailer due to a serious brake defect. On 30 November 2020 there was a further roadside encounter involving a vehicle driven by Martyn Davies, then the transport manager, at a time when he did not possess a Driver CPC qualification. Further, the vehicle did not have valid road tax. According to the TC’s written reasons, although Martyn Davies was told he would not be permitted to continue with his journey due to the above problems, he subsequently drove the vehicle away.
5. The Driver and Vehicle Standards Agency (DVSA) has subsequently indicated that it made multiple attempts to contact both the appellant and Martyn Davies in order to follow up on the incident of 30 November 2020. Gary Davies has subsequently asserted that, during the time when the DVSA was trying to contact him, he was in Italy and had found himself stranded there as a consequence of the coronavirus pandemic. He has explained that Martyn Davies was unwell and unavailable to be interviewed by the DVSA. However, due to the failure to interact with the DVSA and due to the serious nature of the above incidents, the Office of the Traffic Commissioner (OTC) became involved. A warning that the TC was minded to revoke the licence was issued on 8 April 2021. The TC’s concerns included compliance or otherwise with financial standing and professional competence requirements as well as concerns regarding vehicle maintenance. That led to a response emanating from the appellant who, on 12 April 2021, requested a PI.
6. There were, in fact, two PI hearings. The first one took place on 16 December 2021. The appellant attended alone and unrepresented. Martyn Davies did not attend. On 15 December 2021 (and so the day immediately prior to the PI) Martyn Davies had been removed from the licence as transport manager. The lack of attendance on his part was attributed to ill health. The PI was adjourned because documentary evidence said to have been sent by or on behalf of MDT European Ltd had failed to successfully make its way to the OTC. It was decided, at the time of the adjournment, that the DVSA would make a remote

assessment of compliance with maintenance requirements prior to the reconvened PI hearing. The TC granted periods of grace with respect to the financial standing and professional competence requirements until the date of the reconvened hearing.

7. The reconvened PI hearing took place on 8 February 2022 when the appellant attended alone and unrepresented. He had provided evidence to the TC, in advance of the hearing, which included what were described as “*Phone screen shots of a new Company bank account*” and “*a single uncertified Mettle bank statement*” along with an undertaking from Martyn Davies not to be a transport manager in the future. There was some discussion concerning other evidence which the appellant had claimed to have sent to the OTC by post but which the OTC had not received. The TC, in his written decision, made reference to that matter in this way:

“16. Mr Davies stated that a USB drive and a number of original safety inspection records were in the A4 envelope, however, further scrutiny of the proof of postage and envelope showed that the weight at time of postage was a mere 0.016 Kg. This pointed to the envelope being empty at time of postage. [Referral to the indicative weight on the Royal Mail website suggests that an A4 envelope with twenty sheets would weigh in the region of 160g. A standard DL envelope with four sheets of A4 could be expected to weigh 44g – this was brought to Mr Davies’ attention in advance of the hearing]. Mr Davies stated that he had not taken copies of the safety inspection presented as could reasonably be expected. He could provide no explanation of the weight discrepancy for the envelope at postage, insisting that records and a USB storage device had been sent and therefore blaming a post office error as the only plausible explanation. Although tenuous, I will accept this explanation and accordingly I row back against any associated finding against good repute”.

8. Notwithstanding the TC’s possibly quite generous view as to the missing evidence, it is fair to say that he found the evidence of financial standing which had been both sent and received to be underwhelming and unpersuasive. He put it this way:

“9. Financial evidence submitted for the reconvened hearing was incomplete. The following observations/issues relating to the requirement for financial standing were discussed with the Operator:

“i. Phone screen shots and a single online Mettle statement for a new account were provided, the latter had not been certified with the guidance and directions in the Senior Traffic Commissioner’s Statutory Document Number 2 Finance. There was no evidence in the screenshots of any transactions that would relate to the running of a transport undertaking (fuel, drivers, customer payments, etc.). The balance shown on the phone app screenshot as of 7 January (year not stated) was purportedly £28,300, however there was no account number or sort code to in anyway align this to the Mettle account. Indeed, the uncertified Mettle online statement from 1-31 January 2022 did not indicate any such injections of cash and showed a balance of only £308.76. Therefore, evidence of the transfer of the funds promised was not provided.

ii. At a previous hearing, statements for a Virgin account xxx4220 were provided up to 14 December 2021. Mr Davies stated that this account was now closed, although there was no evidence to this effect. I am therefore further denied a view of the company finances with regard to the payments for fuel, drivers etc. but especially with regard to regular maintenance of the two vehicles or, indeed, customer payments.

iii. I note that the company accounts are still showing as overdue at Companies House. Mr Davies previously stated that they were being finalised by the accountant at the moment. This is against the backdrop of the ongoing consideration of voluntary liquidation of the company, which was stated as an option at the initial hearing. This was discussed and still an option due to ongoing disputes with the bank and insurance claims (again not evidenced).

iv. Therefore, in accordance with the requirements of Statutory Document Number 2, I have not been provided with evidence of financial standing for the operator's five-vehicle authority".

9. As to the evidence concerning professional competence the TC said this:

10. "The previous Transport Manager Mr Martyn Davies was called to the Public Inquiry for consideration of his good repute. At the initial hearing Mr Davies said that his father had been ill for some time. Evidence via a doctor was provided, although the note was not dated and gave no indication of fitness to attend a hearing. Mr Davies stated that his father had now been removed from the licence and would in all likelihood not be well enough to attend a re-convened hearing. I indicated that if this was the case, I would take into account any written submissions including the offer of a personal undertaking not to be a TM again in the future. A letter to this effect, purportedly from Mr Martyn Davies, was e-mailed the evening before the re-convened hearing.

11. Mr Davies conceded at the initial hearing that in practical terms his father, although paid a nominal £40 per month, had not performed the TM role for some time. The Operator had not informed the Office of the Traffic Commissioner of this material change. He informed that he has a Standard National qualification although given the Standard International status of this licence, he could not be added as TM. I note that I have never been presented with evidence of this qualification or indeed, any evidence of continuous professional development".

10. As to his findings with respect to financial standing, professional competence, and other matters the TC said this:

"20. I make the following findings:

i. The Operator failed to inform the Office of the Traffic Commissioner of the material change in professional competence. Mr Davies (senior) due to ill health had not performed the TM role for some time, and at least through 2021 (the period during which the DVSA were attempting to conduct an assessment).

ii. A company vehicle had been driven by a driver (TM at the time, Mr Martyn Davies) on 30 November 2020 without valid CPC qualification or in date Vehicle Excise Duty. The driver left the scene with the vehicle against DVSA direction.

iii. The operator has not provided satisfactory evidence that the mandatory requirement of financial standing is met (Period of grace expires at today's hearing).

iv. The Operator does not currently meet the requirement to have a professionally competent transport manager. (Period of grace expires at today's hearing).

v. I am not assured that the Operator has effective maintenance systems in place for driver defect reporting, safety inspection, forward planner, wheel retorque records, invoices of work etc have not been provided. The

Operator's initial failure rate at annual test is above the national average (25.71% vs 14.38%), as is the prohibition rate (41.94% vs 23.82%).

vi. The Operator conceded that brake testing was not being conducted in accordance with the Guide to Maintaining Roadworthiness.

vii. I am not assured that the Operator had systems in place to ensure adherence to drivers' hours regulations (no evidence provided including infringement reports and missing mileage analysis).

viii. I am not assured of any systems for driver management are in place (no licence checks and training evidenced)."

11. Perhaps unsurprisingly on the basis of the above analysis and findings, the TC concluded, in effect, that revocation of the licence represented the only rational and logical outcome.

12. The appellant appealed to the Upper Tribunal. In doing so he contended, in effect, that he had demonstrated he had sufficient finance to run his business; that whilst he did not have a transport manager in place that was only because he had been thinking about whether to attempt to do the job himself or whether to employ an external transport manager; that the TC had misunderstood "*some significant facts of the case*;" that the TC had failed to properly consider the facts; that the TC had provided an inadequate explanation for his decision; and that the TC had been biased towards him because he resented the fact the appellant lives in a "*large expensive house*".

13. As already explained, the appellant did not attend the hearing of his appeal. That being so, he has not added to or amplified what was asserted in the written grounds of appeal.

14. The Upper Tribunal, in appeals such as this, has the function of hearing and deciding on all matters whether of fact or law. But it may not take into consideration any circumstances which did not exist at the time of the determination which is the subject of the appeal. 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. It was stated that the Upper Tribunal has a duty, on an appeal to it, to determine matters of fact and law on the basis of the material before the TC but without the benefit of seeing and hearing from witnesses. It was further stated that the burden lies on an appellant to show, in order to succeed on appeal, that the process of reasoning and the application of the relevant law requires the Upper Tribunal to adopt a different view to that taken by the TC.

15. This is not a case where we have found it necessary to spend a great deal of time analysing the merits of the arguments advanced by the appellant.

16. Section 13A(2)(c) of the Goods Vehicles (Licensing of Operators) Act 1995 requires a licence holder to have appropriate financial standing as determined in accordance with paragraph 6A of Schedule 3 to the same Act. A licence holder is also required, again under the same Act, to be professionally competent as determined in accordance with section 13A(3) and Schedule 3, the professional competence of an operator being linked to that of its transport manager. Those requirements apply not

only for the purposes of obtaining a licence but throughout the lifetime of that licence. Further, they are mandatory requirements.

17. Financial standing may be demonstrated through a variety of means. But the TC clearly found the evidence which had been submitted to him to be unpersuasive and uninformative. We find ourselves in agreement with his analysis. The appellant's response is no more than a bare assertion that sufficient funding was in place but the imperfections in the financial evidence presented and which were identified by the TC in the above passage are not addressed. It is very difficult indeed to see how the TC could have rationally reached any conclusion other than that the financial standing requirement had not been met. We take the same view with professional competence given that the previous transport manager had not, on the appellant's own evidence, been performing his role "*for some time*" and given that no alternative appointment had been made.

18. As to the rest of the TC's findings, which essentially relate to maintenance issues, we have been offered nothing of significance in the way of evidence or argument to find that such findings might have been unsound or unreasonable.

19. Turning then to the specific points made in the grounds of appeal we have already dealt with the questions of financial standing and professional competence. No proper explanation has been given as to why it is thought that the TC had misunderstood the factual background or had failed to properly consider the particular facts of this case. Having read his decision it seems to us that the TC fully understood the facts and fully considered them. The TC's explanation as set out in the written reasons of 10 February 2022, is cogent and complete. As to the bias allegation, there is, quite simply, nothing whatsoever to underpin it.

20. We have not, in deciding this appeal, taken a point against the appellant for his unexplained failure to attend the oral hearing of his appeal. But it has to be said that his failure to do so has hardly helped him.

21. We dismiss this appeal.

M Hemingway
Judge of the Upper Tribunal

A Guest
Member of the Upper Tribunal

G Roantree
Member of the Upper Tribunal

Authorised for issue on 22 June 2022