



**Clayton Francis Jones t/a Street Buses
[2023] UKUT 226 (AAC)**

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Appeal No.UA-2023-000215-T

On appeal from the Deputy Traffic Commissioner for Wales
Clayton Francis Jones
t/a Street Buses

Appellant

Before: Upper Tribunal Judge Ward, Mr G.Roantree and Mr M.Smith

Hearing date: 25 July 2023

Representation:

Appellant: In person

DECISION

The decision of the Upper Tribunal is to dismiss the appeal.

REASONS FOR DECISION

1. The operator appealed against a decision of the Deputy Traffic Commissioner (DTC) dated 15 February 2023 following a public inquiry.

2. A hearing was held at Field House, London EC4 on 25 July 2023. The operator attended with the support of two employees of the business. He attended in a wheelchair but save for asking to be excused from standing made no other request for reasonable adjustments.

3. The operator is the holder of a standard National Public Service Vehicle Operator's licence which at the time authorised 8 vehicles. The licence was granted following a public inquiry held on 7 December 2021. Following that inquiry, the operator agreed to (among other things) an undertaking to provide an independent audit on compliance systems by 13 September 2022.

4. As found by the DTC, and not in dispute:

“On 18 January 2022 the operator was granted 13 registered bus routes to commence operation with effect from 7 February 2022.

On 14 February the operator wrote to the Central Licensing Unit, Leeds, stating he wished to “suspend” 8 of the registered services, because of the failings of

others. There is no power in law to suspend services in the way the operator applied for and the operator conceded he was aware of that fact.

On 14 February Bus Compliance Officer, Sian Thomas, commenced routine observations of the newly registered routes in order to check punctuality compliance. The 12 routes checked were failing to operate and a punctuality monitoring exercise was carried out between 14 February and 6 May 2022.

The findings of the 499 observations were a 26.85% punctuality rate, with 68.14% of services failing to operate. This fell far short of the Senior Traffic Commissioner's target punctuality rate of 95% (Statutory Document No.14) and the call to public inquiry was initiated in December 2022."

5. The DTC:

- a. concluded that the operator had failed without reasonable excuse to operate services in accordance with the registered timetable and required him pursuant to Transport Act 1985, s.155 to pay a penalty of £400 per authorised vehicle, giving a total penalty of £3200;
- b. found that he had failed to provide the audit report mentioned above and curtailed his licence to 1 vehicle, having regard to the financial standing requirements under Public Passenger Vehicles Act 1981, s. 14ZA (2)(c); and
- c. formally warned Mr Jones as operator and transport manager as to future conduct and compliance.

6. The relevant legal framework in summary is set out below.

Transport Act 1985 s.6

7. The section applies to local services, subject to certain exclusions, none of which applies in the present case. By sub-section (2):

"(2) Subject to regulations under this section, no service shall be provided in any traffic area in which there is a stopping place for the service unless—

- (a) the prescribed particulars of the service have been registered with a traffic commissioner by the operator of the service;
- (b) the period of notice in relation to the registration has expired; and
- (c) the service is operated in accordance with the registered particulars."

(Where there is a quality contracts scheme or an enhanced partnership scheme, there are further requirements, but neither is the case here.)

8. Sub-section (4) limits the categories of person from whom an application for registration may be accepted, to, among others, holders of an unconditional PSV operator's licence. Sub-section (7) provides that "Any registration may be varied or cancelled on an application made by the operator of the service to which it relates." Sub-section (8) stipulates when the variation or cancellation of a registration shall become effective. Sub-section (9) confers a wide power to make regulations for the purpose of carrying the section into effect. Those regulations are the Public Service

Vehicles (Registration of Local Services) Regulations 1986/1671 (as amended). There are set periods of notice (56 days in Wales but 42 days in England) requiring to be given of (among other things) any application to vary a registration but by reg 7 traffic commissioners have a discretion to accept a shorter period in certain specified circumstances. By reg 7(2)(h), those circumstances include:

“(h) where an operator, due to circumstances which he could not reasonably have foreseen, failed to make an application in sufficient time for the period of notice applicable apart from this sub-paragraph to operate.”

Transport Act 1985, s.26

9. So far as material, this section provides

“(1) Subsection (1A) below applies in any case where it appears to a traffic commissioner, in relation to a person (“the operator”) who has been granted or to whom it is proposed to grant a PSV operator’s licence, that—

(a) the operator has failed to operate a local service registered under section 6 of this Act; or

(b) the operator has operated a local service in contravention of that section ...; or

...

(1A) A traffic commissioner may (on granting the licence or at any other time) attach [a condition falling within subsection (1B) below to any one or more of the following PSV operator’s licences (wherever granted)—

(a) the licence mentioned in subsection (1) above;

(b) any other licence held by the operator;

(c) where the operator is an undertaking, any licence held by a group undertaking in relation to that undertaking (see subsection (7) below).

(1B) The conditions are—

(a) a condition prohibiting the holder of the licence from using vehicles under the licence to provide any local service of a description specified in the condition;

(b) a condition prohibiting the holder of the licence from so using vehicles to provide local services of any description.”

Transport Act 1985, s.155

10. So far as material this section provides:

“(1) Where a traffic commissioner is satisfied that the operator of a local service has, without reasonable excuse—

(a) failed to operate a local service registered under section 6 of the Transport Act 1985,

...

he may make one or more orders under subsection (1A).

(1A) The orders are—

(a) an order that the operator pay a penalty of such amount as is determined in accordance with subsection (3);

...

(3) The amount mentioned in subsections (1A)(a) and (b) and (1C) is such amount as the traffic commissioner thinks fit in all the circumstances of the case, but must not exceed —

(a) £550, or

(b) such other amount as the Secretary of State (as respects England) or the National Assembly for Wales (as respects Wales) may by order specify,

multiplied by the total number of vehicles which the operator is licensed to use under all the PSV operator's licences held by him.”

Public Passenger Vehicles Act 1981, s.14ZA

11. This contains the financial standing requirement:

“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—

...

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

...”

Public Passenger Vehicles Act 1981 s.17(2) and (3)(aa).

12. The statutory provision for variation so far as relevant is:

“(2) Without prejudice to subsection (1) above, a traffic commissioner may, on any of the grounds specified in subsection (3) below, at any time—

...

(d) vary any condition attached under subsection (1) of section 16 of this Act to such a licence, or attach to such a licence (whether in addition to or in place of any existing condition so attached to it) any such condition as is mentioned in that subsection.

(3) The grounds for action under subsection (2) above are—

...

(aa) that any undertaking recorded in the licence has not been fulfilled;

...”

13. On appeal to the Upper Tribunal, the operator's submissions, both in writing and orally, were somewhat diffuse and quick to blame others in somewhat florid terms. On probing, however, it was established that:

- a. there was no dispute that he had failed to honour the undertaking, albeit he considered there were mitigating circumstances for that failure;
- b. as regards the curtailment imposed in respect of that failure, he had in any event asked to reduce the number of vehicles to 1 and had shown financial standing in respect of that vehicle only; and thus
- c. the main issue was the surrounding circumstances regarding the failure to operate services in accordance with the registered timetable and in particular whether the DTC was wrong to consider that none of them individually, nor any of them collectively, amounted to a reasonable excuse for the purposes of s.155.

14. He said that the formal warning “hurt”. In essence that part of the DTC’s decision depends on the other parts.

15. It is with the failure to comply with the registered timetables that we start. The relevant legislation is set out above. There is useful Guidance in the form of the “Local Bus Services Registration – Guide for Operators”,¹ published by DVSA which states:

“For all operators, before you apply to register the service you should check that your proposed route and timetable are achievable at all the times when you intend to run the service. You will also need to ensure that you have sufficient resources to provide the service at all times and check the general feasibility of the service.”

“When you register your service you are committing yourself to running it in the way you have described on the form. That is why it is very important to get the details of the service absolutely right when you apply.”

These, of course, reflect the importance to the travelling public of a reliable service.

16. Before the DTC and before us, the operator made complaints about the timing of the public inquiry. In barest summary, these amounted to the initial call-up letter having been issued when he was in Doha to watch the football World Cup and the schedule for submitting documents requiring action by him and his staff around the Christmas/New Year period. The panel finds it surprising that the proprietor of a business would not have suitable cover arrangements in place for absences of him and/or members of his staff. Mr Jones’s views as to what would amount to “best practice” on the part of the Office of the Traffic Commissioner (OTC) are not to the point: there is no suggestion that the OTC failed to meet relevant legal deadlines. He was, he says in consequence of the timing, late in submitting documents in support of his case. He handed a bundle to the DTC on the day of the public inquiry, which the DTC reviewed over lunchtime. As the DTC noted:

“The operator has not sought to paginate, summarise or provide an index to the 68 document bundles in his folder of evidence but I have considered the contents as evidence in making my findings.”

Mr Jones told us that “most” of the documents were about maintenance issues. Though such issues had been referred to in the call-up letter, the DTC did not in the

¹ <https://www.gov.uk/government/publications/local-psv-service-registrations-psv353a>

event examine them, much less make any adverse finding against the operator in respect of them, thus documents concerning them need not detain us further. The only document among those handed in to the DTC which he identified to us as not being about maintenance issues was a letter from Rhondda Cynon Taff Council about the closure of a bridge (see below). The letter was not in the bundle supplied by the OTC which had in turn been supplied to Mr Jones, nor had he seen fit to provide it to the Upper Tribunal before or at the hearing.

17. The burden was on the operator to establish “reasonable excuse” and is on the appellant to show that the DTC’s decision is wrong. As he was in substance arguing that by reason of one or more circumstances he had had a “reasonable excuse” for the very poor punctuality, the panel went through each of the circumstances which the DTC had considered but found, whether individually or collectively, not to amount to a reasonable excuse, inviting the operator to explain why the DTC’s conclusion on the point had been wrong. In evaluating those responses, the panel applies the approach in T/2018/50 *Diamond Bus Ltd*, where the Upper Tribunal said (paragraph 31):

“We agree that the question of reasonable excuse is built in to the analysis right from the beginning, but the question is what is to be counted as a reasonable excuse. The answer is (a) that everyday occurrences are taken into account by the application of the 6 minute window and the flexible 95% rule (rather than having a 100% rule, or a rule that failure to achieve 95% will inevitably result in sanctions) and (b) that extraordinary occurrences will be considered on their own merits. Rather than Mr Backhouse’s three stages, this really all amounts to one stage in which is decided how to apply the statutory defence of reasonable excuse. This is all in the context of there being timetables supplied by operators which they have initiated or to which they have agreed, with knowledge of how regulatory enforcement currently works, and from which they cannot then be allowed to depart at will.”

Supply of buses

18. The operator had ordered 9 new buses from a company, EVM Limited. He told us he had been told to expect delivery in August 2021, then November 2021, then February 2022. In the event only 3 arrived in February and were put into service. There does not appear to have been any documentary evidence before the DTC as to the terms of the contract or as to the difficulties which had apparently arisen. If Mr Jones had, as he said, supplied such material to the OTC, it was nonetheless his job to check that the bundle of papers for the public inquiry contained all the material he wished to be referred to. The matter is understood to be in the hands of the operator’s solicitors with a view to civil litigation and it is not for us to make findings about the rights and wrongs of the incomplete and delayed delivery without the evidence to do so. The panel observes that by the time of his application for the routes, which had been received by the OTC on 13 December 2021, the operator was well aware of difficulties with the supply of the buses he had ordered. In the face of those known difficulties, having regard to the Guidance cited above, his application appears likely to have been premature. When the difficulty materialised, as correctly found by the DTC:

“From the bus registrations perspective, the duty of the operator is either to source alternative vehicles before the timetable start date or to apply for short-notice cancellation using the prescribed documentation. By 7 February 2022 Mr Jones had done neither.”

Ticketing machines

19. The operator’s position before the DTC was not clearly expressed. The gist was that he had indicated that the ticket machines were required by 7 February 2022. His submission did not say how many, but that he had received only 3 and it later emerged (when he himself rode on one of the buses) that they were not able to take card payments or record concessionary travel, an issue that was not resolved until around mid-May 2022. There were additional delays in the machines for the 8 seater vehicles and they could not take credit cards.

20. The DTC dealt with this on the basis that:

“over 30 of the document bundles deal with the operator’s dealings with Caerphilly CBC regarding the ticket machines for his buses. Again, this is a dispute that I cannot be expected to make definitive findings on, but I note that in December 2021, the Transport Officer for Caerphilly CBC was writing to the operator stating that he had not supplied all the information required to allocate the ticketing machines. Again, I do not find the failure of the operator to have the vehicles ready for the registered service to be a “reasonable excuse” under the Act.

21. As it appears that the material not before us was one lever arch file, the reference to “over 30 of the document bundles” presumably refers to sub-sections of that lever arch file. The operator’s presentation of his case to us concerning the ticket machines did not make reference to those documents: as noted above, he referred to only one of the documents handed over late to the DTC as concerning anything other than maintenance.

22. In what he described as his skeleton argument, the operator takes no point about the ticket machines, though in oral submission he in essence reiterated the position made above in correspondence to the DTC.

23. In the panel’s view, if the operator submits paperwork to the DTC late and does not rely on that paperwork before the Upper Tribunal, which has had no opportunity to consider it, he cannot demonstrate that the DTC’s decision on the point was plainly wrong. In any event (a) the lack of ticketing machines was not causative of the punctuality issues, as even if they had been supplied and had better functionality than the operator claims, the 12 routes could not have been run with no more than 3 buses and (b) as noted by the DTC, in December 2021 (i.e. when the applications for the routes were being submitted) the evidence before him indicated that the operator at least contributed to the delay.

Rhondda Cynon Taff Council

24. Mr Jones makes much of the impact of the closure of the White Bridge in Pontypridd. The DTC rejected this as providing a “reasonable excuse” on the basis that the Road Closure Order was issued on 12 May 2022 and the closure was to run from 16 May 2022 to 30 January 2023. That meant that the period of closure post-dated the period covered by the bus monitoring exercise. Mr Jones accepts that but, he says, difficulties were caused by the preliminary works. These are not in evidence (whether via the letter from the local authority said to have been handed to the DTC but not produced to us or otherwise). In any event, if their likely impact was foreseeable at the time of applying for the registration of the routes, the operator should have taken it into account in the proposed timetables. If the impact only became evident subsequently, a formal application under s.6(7) of the 1985 Act, should have been made for variation of the timetables affected.

Monmouthshire County Council

25. We can do no better than repeat the DTC’s two reasons for rejecting this as constituting a “reasonable excuse”, with which we agree:

“This issue relates to the Council’s delegated responsibility to allocate bus funding in South East Wales on behalf of the Welsh Government...[I]t is clear from the letter sent to the operator (at section 45 of the operator’s bundle) that the Bus Funding Management Group considered that the operator failed to meet the published criteria and that he should have carried out due diligence as to eligibility to public funding before registering the services.

Again, the decision on funding was apparently not published until July 2022 so has no bearing on the February-May 2022 monitoring exercise and the operator’s action to cancel all services after the July announcement was a commercial decision and not a “reasonable excuse”.

Reasonable excuse – general considerations

26. The DTC also took into account that the 1985 Act provides for bus timetables to be cancelled or changed at short notice in certain prescribed circumstances, but that the operator had made no compliant application at the relevant time. The operator’s actions (such as putting notices on bus stops stating that “the operator had temporarily suspended all services with immediate effect”) were considered to pay insufficient regard to the bus users in the local community.

27. In our judgment, for those events which were foreseeable at the time of the applications, the operator ought to have considered them more carefully before applying; for those which emerged subsequently he ought to have availed himself of the statutory mechanisms for variation insofar as he could; and for those which emerged only after the period of very poor punctuality relied upon, they could not conceivably amount to a reasonable excuse for the performance during that period.

Sanctions

28. The penalty imposed, £400 per authorised vehicle, was at the lower end of the range of £400-£500 provided as a starting point in Senior Traffic Commissioner’s Statutory Document No.14, as the DTC was prepared to accept that the non-delivery of the newly-purchased buses and the problems with the ticketing machines amount to mitigating circumstances. We did briefly stop to consider whether there was any inconsistency in holding that those matters did not amount to a “reasonable excuse” but nonetheless constituted “mitigating circumstances”, concluding that there was not: the existence of a discretion as to penalty necessarily implies that some instances where there is not a “reasonable excuse” will be more serious than others.

29. The curtailment to one vehicle was both what the operator asked for and what he demonstrated financial standing for.

30. Given the non-compliance with both section 26 of the 1985 Act and section 17 of the 1981 Act, there were other sanctions which the DTC might have imposed, including those available under s.26(1A) and(1B) and/or a finding of loss of repute. In the panel’s view, the DTC was more sympathetic to the operator than the operator gives him credit for. He accepted that there had been a genuine attempt to run the services and that there were some mitigating circumstances; however:

“whilst I have determined that loss of good repute would be disproportionate on this occasion, the operator still needs to demonstrate that he can work effectively within a regulated industry. It is the operator’s responsibility to see that formal applications are made on the prescribed forms within correct timescales. Similarly, communications need to be timely, relevant and manageable and this has not been evidenced, for example in the large file of documents brought along on the morning of the public inquiry.”

For that reason he formally warned Mr Jones with regard to his future conduct as an operator and transport manager.

31. The warning may, as Mr Jones told us, “hurt”; however, it was undoubtedly proportionate, for the reasons the DTC gave, which the panel endorses. A warning should be seen as an encouragement to Mr Jones to raise his game in the respects identified.

C.G.Ward
Judge of the Upper Tribunal

Mr G.Roantree
Member of the Upper Tribunal

Mr M.Smith
Member of the Upper Tribunal

Authorised for issue on 30 August 2023