

Appeal No. T/2017/29

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

**ON APPEAL from the DECISION of the DEPUTY TRAFFIC COMMISSIONER for
the East of England
Dated 8 April 2017**

Before:

Kenneth Mullan	Judge of the Upper Tribunal
Mr M. Farmer	Member of the Upper Tribunal
Mr J. Robinson	Member of the Upper Tribunal

Appellant:

Fawcett Transport Limited

Attendances:

For the Appellant: Mr Adrian Lamb, Director, attended in person and was not represented

Heard at: Field House, 15-25 Bream's Buildings, London, EC4A 1DZ
Date of hearing: 19 September 2017
Date of decision: 19 December 2017

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that this appeal be ALLOWED. We substitute, however, our own decision which is to the following effect:

- (i) The Standard National Operator's Licence OF1120395 is suspended as the licence does not have a nominated Transport Manager;
- (ii) The suspension is for a period of two months from the date of the issue of this decision;
- (iii) The licence will be RESTORED to the Appellant Company if, during the period of suspension, a Transport Manager is nominated on the licence and the nominated Transport Manager is acceptable to the Traffic Commissioner;

- (iv) It is permissible for the Appellant Company to nominate Mr Adrian Lamb as Transport Manager but it will be for the Traffic Commissioner to determine whether he is acceptable as such;
- (v) If at the date of the expiry of the suspension period, a Transport Manager who is acceptable to the Traffic Commissioner has not been nominated on the licence, then the licence will be REVOKED.

SUBJECT MATTER:-

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; T/2015/36 W. Martin Oliver Partnership

REASONS FOR DECISION

The decision under appeal to the Upper Tribunal

1. This is an appeal from the decision of the Deputy Traffic Commissioner for the East of England dated 8 April 2017.
2. The factual background to this appeal appears from the documents and the Traffic Commissioner's decision and is as follows:-
 - (i) The Appellant Company is the holder of a Standard National Licence Operator's Licence with authorisation for three vehicles and which was valid from 15 July 2013.
 - (ii) On 6 January 2017 correspondence was received in the Central Licensing Office from Mr Rowan Kingsley Robert Harris, who was the nominated Transport Manager on the Appellant's Operator's Licence and another licence in which he stated:

'I ... wish to inform you that on 8th December 2016 I resigned all responsibility for the above-mentioned O-licences and as from this date cannot accept responsibility for the above mentioned O-licences or their management.'
 - (iii) On 19 January 2017 correspondence was forwarded to Mr Adrian Lamb at the Appellant Company from the office of the Traffic Commissioner to the following effect:

'It has been brought to the attention of the Traffic Commissioner that Mr RH currently specified on your licence as transport manager, is no longer in your employment.

One of the conditions under which your licence was issued requires that you notify the Traffic Commissioner of any changes in your circumstances which were prevailing at the time the licence was granted. For the licence to remain in force you have to remain professionally competent. To achieve this you must hold the required qualifications or employ a suitably qualified person as your transport manager.

You must provide details of the arrangements you have made to nominate a replacement transport manager. This information must be received by 02/02/2017, after which I will refer this matter to the Traffic Commissioner for consideration.
 - (iv) On 24 January 2017 e-mail correspondence was received in the office of the Traffic Commissioner from a firm of Transport Consultants to the following effect:

'Further to our telephone conversation I have been asked by the Director of Fawcett Transport Ltd Mr Adrian Lamb to request the office of the Traffic Commissioner if a grace period be allowed for around three months to allow him to replace his Transport Manager Mr RH.

MR H has joined another company where he has been given full-time employment.

The grace period will allow the time to source a replacement Transport Manager once adverts and interviews are done.

Meanwhile, as his Transport Consultants, we shall ensure that he remains fully compliant at all times pending the arrival of a new TM.'

- (v) In the bundle of documents which is before us is a copy of what obviously were internal case management notes from the office of the Traffic Commissioner. In these notes there are details of the operator's licence held by the Appellant Company followed by a record of the receipt of the correspondence from the outgoing Transport Manager, Mr RH, and the e-mail correspondence from the Transport Consultants. There then follows a note to this effect:

'... you will note the position above. Mr H has left the company due to having a new role. There has been a slight delay in notifying this office of matters. A period of grace is sought.

I would advise that the operator is advised that the Traffic Commissioner will grant a period of grace until 23.59 on 31 March 2017. The Traffic Commissioner has noted that Mr H left his role on 8 December 2016, and therefore must assume that the company was already on notice that a replacement was needed. This is why only two months have been allowed to remedy the position. The company are reminded of the importance of notifying matters in a timely manner.

Operator to be advised that in light of the application for a period of grace, the Traffic Commissioner makes an adverse finding on this licence under Section 27(1)(a) of the above Act, in that the operator cannot presently satisfy the requirement of professional competence.

If by 31 March 2017, the operator does not have a valid and qualified CPC holder accepted onto the licence, then it will be revoked under Section 27(1)(a) as per Article 13 of EC 1071/2009. It is therefore recommended that the operator appoints a qualified CPC holder to the licence as soon as possible so that the application can be received in this office and processed.

The variation should be able to proceed as normal given the decrease in authority sought, provided that no other issues arise during the process.

- (vi) The next note in the case management records has been entered by the Deputy Traffic Commissioner and is to the following effect:

'Agreed. PoG granted until 2359 hours on 31 March 2017 and as a result an adverse determination is made under s. 27(1)(a) that the operator is not professionally competent. Please advise the operator as recommended regarding revocation of the O/L if a CPC holder has not been approved and added to the O/L before the expiration of the PoG.'

- (vii) On 7 February 2017 correspondence was forwarded to the Appellant Company from the office of the Traffic Commissioner to the following effect:

I write in response to your period of grace request, which has been referred to the Deputy Traffic Commissioner for his consideration.

In light of your application for a period of grace, the Commissioner makes an adverse finding on this licence under Section 27(1)(a) of the above Act, in that the operator cannot presently satisfy the requirement of professional competence.

Under paragraph 10 of Schedule 3 to the above Act the Commissioner has decided to allow your licence to remain in force until 31 March 2017 without a specified replacement transport manager. This is felt a sufficient period for you to regain your professional competence. Before this deadline you must complete the form TM1 and return it to this office with your nominated transport manager's original certificate of professional competence in road haulage operations.

You must continue to ensure ongoing compliance with all of the terms and conditions under which your licence was granted, including vehicle maintenance, scheduled safety inspections and the retention of associated records, which must remain available on request.

If by 31 March 2017 you do not have a valid and qualified CPC holder accepted onto your licence by the Traffic Commissioner, then it will be revoked under Section 27(1)(a), as per Article 13 of EC 1071/2009. It is therefore recommended that you appoint a qualified CPC holder to the licence as soon as possible so that the application can be received in this office and processed.'

3. On 8 April 2017 the Deputy Traffic Commissioner made a decision to the following effect:

'I refer to my colleague's letter dated 7 February 2017 in which a period of grace was granted until 31 March 2017. The letter made it clear that if no application was received to add a replacement transport manager before that date then the licence would be revoked under Section 27(1)(a) as per Article 13 of EC 1071/2009.

As that deadline has now passed, I must inform you the operator's licence has now been **revoked** and the variation application refused as the licence is no longer professionally competent.

...

You are reminded that you cannot lawfully operate goods vehicles with a gross plated weight exceeding 3.5 tonnes for the carriage of good in connection with your trade or business or for hire or reward until you either submit a fresh application which is granted by the Traffic Commissioner, or you lodge an appeal to the Upper Tribunal which succeeds in overturning the original application decision.'

4. The Appellant was notified of the decision of 8 April 2017 by way of correspondence of the same date.

The appeal to the Upper Tribunal

5. On 9 May 2017 an appeal to the Upper Tribunal was received in the office of the Upper Tribunal.
6. The Appellant has set out the following Grounds of Appeal:

'I would like to formally appeal to the Upper Tribunal against the Traffic Commissioner's decision to revoke my Operator's Licence under section

27(1)(a). Initially I was granted a grace period until 31/03/17 to find a replace Transport Manager. I explained that I had been disappointed by the level of service given to me by external Transport Managers. I enrolled on a Certificate of Professional Competence for Transport Managers whilst in my grace period. I called the DVSA to inform them of my intentions and to let them know that I had already passed the first part of the course with a pass mark of 88% on 27/2/17. I explained that I was to sit the second part of the examination on the 3/3/17 but I wouldn't receive the results for at least 8-10 weeks. I was told that this would be ok, that the information would be passed on to my case manager and that I was to fill in a TM1 form when I had my results and that I would be able to continue to operate until I had received the result of my exam. I was appalled to receive a letter to say that my Operator's licence had been revoked without any contact, letters in spite of my call to the DVSA to keep them informed of my situation. I have since passed the Certificate of Professional Competence for Transport Managers and have received my certificate from OCR, the examining body. I would ask that this information be taken into account when considering reinstating my operator's licence.'

The oral hearing before the Upper Tribunal

7. As was noted above, Mr Adrian Lamb attended the oral hearing of the appeal and gave evidence to us. He stated that he had employed Transport Managers in connection with his goods vehicle operator's licence but that he had not obtained a very good service from them and that he found them to be too expensive. He noted that in two of the previous calendar months he had paid £550 per month for the services of a Transport Manager.
8. In December 2016 the Transport Manager nominated on his licence obtained a job offer elsewhere. Initially he had employed a firm of Transport Consultants to provide transport manager services to him. The Transport Consultants had written a letter to the office of the Traffic Commissioner to seek a period of grace in which to employ a new Transport Manager. He had been unable to find a suitable Transport Manager during the initial part of the period of grace and made a decision to undertake the Certificate of Professional Competence (CPC) course himself. The examination was in two parts. He had undertaken and passed the first part of the course on an on-line basis in February 2017 and took the second part of the examination on 3 March 2017. He had not realised, at that stage, that he would not obtain the results of the second part of the examination for at least another ten weeks.
9. Mr Lamb asserted that he had asked his mother to compose an e-mail on his behalf. He had done so because he was dyslexic. He provided us with a copy of correspondence dated 16 March 2017 which, he submitted, was the content of the proposed e-mail which he had dictated to his mother. It was to be sent to Mr DB who was the caseworker in the office of the Traffic Commissioner with whom he had been dealing. The correspondence of 16 March 2017 was to the following effect:

'Dear Mr B

I very much appreciate the period of grace you have given me. However, having been disappointed by the level of service I received from external Transport Managers, I have recently sat the Certificate of Professional Competence for Transport Managers. I passed the first part with a score of 88% and am awaiting the result of the second part which I sat on 3 March. I am informed that I have to wait 8 to 10

weeks for the result, which should be on 12 May at the latest. I would be grateful if you would extend my period of grace until that date.'

10. Mr Lamb stated the correspondence dated 16 March 2017 would have been sent to Mr DB by e-mail on the same date. He had retrieved a copy of it from his e-mail account's 'outbox'. He stated, with some candour, that he does not know what had happened to the e-mail correspondence. He asserted that when he had not received a reply and noting that it was getting very close to the date of the termination of the period of grace, he had decided to contact the office of the Transport Commissioner, and Mr DB in particular, by telephone.
11. The telephone number which he had called was 0300 123 9000 which was the number of the Driver and Vehicle Standards Agency (DVSA). He had chosen option 4 on the menu which, he had assumed was the 'transport' office. He did not know if he had ever telephoned that number before. Mr Lamb stated that he had made a freedom of information request to obtain a copy of his mobile telephone records for the period in question. He provided a copy of those records to us which set out details of all mobile telephone calls made by him from 1 March 2017 to 30 April 2017. Mr Lamb pointed to the record of a telephone call made to 0300 123 9000 with a duration of 4 minutes and 48 seconds on 29 March 2017.
12. Mr Lamb asserted that when his telephone call was answered on 29 March 2017 he asked to be put through to Mr DB. He stated that he did not speak to Mr DB but to another un-named person. He asserted that he explained to this other person that he had not received a reply to his e-mail of 16 March 2017 and explained, once again, that while had undertaken both parts of the CPC examination he would not obtain the results of the second part until a date after the expiry of the period of grace. Mr Lamb submitted that he was told not to worry and to carry on trading. He was informed that when he had obtained the result of the second part of the CPC examination he should fill in an appropriate form and return it to the office of Traffic Commissioner. He said he was told that he could continue to use his operator's licence in the interim. He had received his CPC some time later.
13. Mr Lamb stated that he had then received the correspondence from the office of the Traffic Commissioner dated 8 April 2017 informing him that the licence had been revoked. He asserted that on receipt of this correspondence he had telephoned the Traffic Commissioner's office but had been informed that his only option was to appeal. In support of this latter assertion, and after an adjournment to consider the content of his mobile telephone records, Mr Lamb pointed to the record of a relevant telephone call made to a specific number on 12 April 2017 and with a duration of 15 minutes and 9 seconds.
14. Mr Lamb provided evidence of his present working arrangements and submitted that he had pursued his appeal as he wished to have his operator's licence returned to him, 'on a point of principle'.

The proper approach on appeal to the Upper Tribunal

15. In NT/2013/52 & 53 Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI, the 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.’

16. The Upper Tribunal In NT/2013/52 & 53 Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI was considering an appeal to the Upper Tribunal against a decision of the Head of the Traffic Regulation Unit under the Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010. There is no doubt, however, that the principles set out by the Upper Tribunal in paragraph 8, are derived from parallel appeals, such as the one in the instant case, where the appeal is against a decision of a Traffic Commissioner under the Goods vehicles (Licensing of Operators) Act 1995 and Regulations made under that Act – see paragraph 4 of NT/2013/52 & 53 Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI.

The proper approach to fresh evidence before the Upper Tribunal

17. In T/2015/36 W. Martin Oliver Partnership, the Upper Tribunal said the following, at paragraphs 40 to 41 and 45 of its decision:
 - ‘40. We begin by considering the proper approach to be adopted when the Upper Tribunal, in an appeal against a decision of a Traffic Commissioner, is met with an application by a party to the proceedings to adduce new or fresh evidence. We have no hesitation in confirming that the proper approach is as set out in the decision of the then Transport Tribunal in Thames Materials and confirmed by the Upper Tribunal in Cornwall Busways Limited. We have already noted that the decision in Thames Materials has a conclusive basis in the decision of the Court of Appeal in Ladd v Marshall. Further, we have noted that the former Transport Tribunal has been consistent in its application of the principles in Thames Materials.
 41. The appellate structure in the transport jurisdiction was the subject of significant revision with the implementation of the Tribunals, Courts and Enforcement Act 2007. Appeals from decisions of the Traffic Commissioner lie to the Upper Tribunal – see Article 7(a)(viii) of the First-tier Tribunal and Upper Tribunal (Chambers) Order 2008. At that stage there was an opportunity to revisit the jurisprudence of the former Transport Tribunal to determine whether that jurisprudence remained appropriate or required revision in light of the new tribunal appellate structure or in light of other procedural developments. In respect of the procedure to be adopted for applications to adduce fresh evidence, the Upper Tribunal endorsed the former procedure of the Transport Tribunal relying on its consistency and coherency – see Cornwall Busways Limited.

...

45. For the record, therefore, we repeat that the test to be applied is whether the following conditions are met:
- (i) The fresh evidence must be admissible evidence.
 - (ii) It must be evidence which could not have been obtained, with reasonable diligence, for use at the public inquiry.
 - (iii) It must be evidence such that, if given, it would probably have had an important influence on the result of the case, though it does not have to be shown that it would have been decisive.
 - (iv) It must be evidence which is apparently credible though not necessarily incontrovertible.'
18. The appellant in T/2015/36 W. Martin Oliver Partnership sought permission to appeal against the Upper Tribunal's decision. In refusing the application, the Court of Appeal Judge (Rt Hon Lord Justice Flaux) gave the following reasons:
- "1. The sole ground of appeal is that the Upper Tribunal erred in law in applying the principles derived from *Ladd v Marshall* [1954] 1 WLR 1489 to its determination as to whether to allow fresh evidence to be adduced. The applicant argued before the Upper Tribunal and argues in its grounds of appeal and counsel's skeleton argument that a more flexible approach, somewhat akin to that adopted in criminal appeals under section 23 of the Criminal Appeals Act 1968 should have been adopted.
2. The Upper Tribunal and its predecessor the Transport Tribunal has consistently followed the principles of laid down by the Court of Appeal in *Ladd v Marshall* in considering application to adduce fresh evidence. The Upper Tribunal followed and applied those principles here. It was entirely correct to do so.
3. The ground of appeal is unarguably hopeless and totally without merit."

Our analysis

19. In the file which is before us is a document headed 'Document Bundle Checklist from the Office of the Traffic Commissioner (East of England) to the Upper Tribunal'. In short this is an index to the main appeal submission. We have noted, however, that the summary of the document which is at page 14 of the submission is as follows:

'08/04/2017 – It is noted from the comments of the Appellant in the grounds of appeal that he refers to calling 'DVSA'. It remains unclear from the Appellant who he has spoken to. Provided is a screen shot of the internal '*case note*' function used by the CLO to record relevant telephone conversations with a licence holder. As can be seen, there is no note of a telephone conversation recorded with the CLO and/or the Office of the Traffic Commissioner. If a telephone conversation did take place it does not appear to have been with a member of staff at the CLO. It is noted that there is no record of this telephone conversation being followed up in writing by the Appellant or with an email, which had previously been used by the Appellant as a method of communicating when discussing the grant of a period of grace.'

20. The document which is at page 14 of the submission is as described in the summary.
21. Having heard from and seen Mr Lamb, we found him to be an honest and credible individual and we have no hesitation in accepting his oral evidence to us. Mr Lamb's own oral evidence does not, of course, require corroboration. Nonetheless, and as was noted above, we have been provided with a copy of the Appellant's mobile telephone records which corroborates his oral evidence that he made two telephone calls, the first to DVSA on 29 March 2017 and the second to the office of the Traffic Commissioner on 12 April 2017.
22. We accept, therefore, that from the moment when the nominated Transport Manager on the Appellant Company's operator's licence, decided to remove his nomination from that licence, Mr Lamb made ongoing efforts to ensure that the licence could satisfy the requirement for professional competence. These efforts included the employment of a firm of Transport Consultants to continue with the provision of transport management services to the company and the seeking of a period of grace from the Traffic Commissioner during which a new Transport Manager could be nominated. When it became clear that the task of recruiting a new Transport Manager was proving to be problematic, Mr Lamb sought to rectify the position by undertaking the CPC examination himself and to complete the process within the period of grace.
23. Most crucially, when it became evident that the results of the second part of the CPC examination, undertaken by Mr Lamb on 3 March 2017, would not become known for some time and, would not be likely to be known before the expiry of the grace period on 31 March 2017, we accept that Mr Lamb attempted to alert the office of the Traffic Commissioner to that position and to seek advice as to how to proceed. The first of those efforts was to attempt to forward e-mail correspondence to the Traffic Commissioner's office. When it had become apparent that something was amiss, in that no reply had been received, Mr Lamb, conscious that the grace period time was running out, attempted to telephone the case worker (Mr DB) responsible for managing his case.
24. It is unclear to us why Mr Lamb did not, on 29 March 2017, telephone the direct line number on the headed period used by Mr DB in his correspondence to Mr Lamb – in, for example, the correspondence dated 7 February 2017, which had advised Mr Lamb that the period of grace had been granted. Mr Lamb stated to us that he preferred to use general DVSA telephone numbers and through which he would reach the relevant office.
25. There is no doubt that Mr Lamb did telephone DVSA on 29 March 2017 and we accept that his purpose was as described above, that is to alert the office of the Traffic Commissioner to the problems arising from the delay with obtaining the results of the second part of the CPC examination, undertaken on 3 March 2017 and to seek advice as to how to proceed. We also accept the Mr Lamb's evidence that he was told 'not to worry, to await the examination result and, significantly, that he could continue to trade under his licence. In these circumstances, we can understand why Mr Lamb did not take further action, even though the period of grace was about to expire, and chose to await the examination result.
26. We also accept that Mr Lamb, on receipt of the correspondence dated 8 April 2017, informing him that the Appellant Company's operator's licence was revoked, did contact the office of the Traffic Commissioner. That telephone conversation took place on 12 April 2017 and we also accept that the advice which was proffered to Mr Lamb on that date was that he had no other option

**Kenneth Mullan, Judge of the Upper Tribunal,
19 December 2017**