Appeal No.: T/2018/19
NCN: [2018] UKUT 277 (AAC)

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER
TRAFFIC COMMISSIONER APPEALS

IN AN APPEAL FROM THE DECISION OF:
KEVIN ROONEY, TRAFFIC COMMISSIONER FOR THE WEST OF ENGLAND
DATED 26 MARCH 2018

Before:

Judith Farbey QC, Judge of the Upper Tribunal
Stuart James, Specialist Member of the Upper Tribunal
John Robinson, Specialist Member of the Upper Tribunal

Appellants: **T.R. BENNEY TRANSPORT LTD &**
THOMAS ROBERT BENNEY

Attendance: Mr Thomas Robert Benney attended and was represented by Mr James Backhouse of Backhouse Jones Solicitors.

Heard at: Field House, 15-25 Bream's Buildings, London EC4A 1DZ
Date of hearing: 12 July 2018
Date of decision: 15 August 2018

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that the appeal be DISMISSED.

SUBJECT MATTER: Fairness; absence of transcript of public inquiry; disqualification

CASES REFERRED TO: *MME Services Ltd 2004/315*; *Bradley Fold Travel Ltd and Peter Wright v Secretary of State for Transport* [2010] EWCA Civ 695

REASONS FOR DECISION

Introduction

1. This is an appeal from the decision of the Traffic Commissioner for the West of England ('the TC') made on 26 March 2018. By that decision, the TC:

    a. Found that the operator T.R. Benney Transport Ltd did not meet the requirements of good repute and professional competence;

    b. Revoked the company's interim operator's licence;

    c. Disqualified the company and Thomas Robert Benney from holding or obtaining an operator's licence for 10 years from 21 April 2018;

    d. Found that Thomas Robert Benney had lost his repute as a transport manager;

    e. Disqualified Thomas Robert Benney from acting as a transport manager for ten years from 21 April 2018.

2. Other parts of the TC's decision relate to a second transport manager Colin Boyce. However, this appeal concerns only the company and Mr Benney. For convenience, we shall refer to Mr Benney as the appellant.

Background

3. We turn to the factual background to the extent that it is relevant to this appeal. The appellant and his family have a long history of association with adverse regulatory action by the traffic commissioners. It is not necessary to recite the entire history here. It suffices to note that the appellant had been sole director of T.R. Benney & Son Ltd whose operator's licence was granted in April 1999 and revoked in October 2002. He was granted a sole trader licence in May 2002 which was revoked at a PI in April 2012. He was disqualified (presumably from holding an operator's licence) for an indefinite period.

4. The appellant was previously a director of West Cornwall Haulage Ltd which was incorporated on 16 May 2013. His father Thomas Richard Benney ('Richard') was a fellow director. An application for an operator's licence was refused, following a PI, in May 2014 on the grounds that the operator was a 'front' for either or both Richard or the appellant.

5. In November 2014, a licence was granted to PM Bulk Agri Ltd with Philip Morley named as director. In October 2015, the appellant's son Thomas Ross Benney ('Ross') was appointed as a director aged only 18. The TC's decision records at paragraph 9:

> ‘A high turnover of transport managers and the discovery from a resigning transport manager that Robert Benney had a high degree of control over the operation saw the licence come to public inquiry before me where I revoked it due to lack of financial standing. I noted the extensive family history and the period since the last regulatory public inquiry. I challenged the family to put forward a fresh application with the controlling parties clearly visible’.

6. T.R. Benney Transport Ltd was incorporated on 28 April 2017. It was an agricultural haulage company based in Leedstown, Cornwall. The appellant resigned his directorship of West Cornwall Haulage. He became a director of T.R. Benney Transport, as did Ross. It seems that Richard remained in charge of West Cornwall Haulage.

7. In May 2017, the appellant applied on behalf of T.R. Benney Transport for a goods vehicle operator’s licence for 4 vehicles and 4 trailers. The case came before the TC at a preliminary hearing on 29 June 2017. The TC granted an interim international licence for 2 vehicles and 2 trailers. The appellant and Ross gave a number of undertakings. The appellant’s disqualification was lifted and the company began to operate.

8. On 31 August 2017, Ross was driving a 44-tonne articulated vehicle on the westbound carriageway of the A30 at Camborne when he was stopped by police at 01:53am. He produced his licence for driving motor cars but admitted that he had only a provisional licence for LGVs. He told police that he had delivered a cargo of potatoes to Holbeach in Lincolnshire. On 6 December 2017, he was convicted in Bodmin Magistrates’ Court of driving otherwise than in accordance with a provisional licence and of driving with no insurance (the latter conviction following from the former). He was fined £660 and his licence was endorsed with 6 penalty points. Ross resigned as a director of the company on 18 September 2017.

9. On 8 September 2017, a DVSA Traffic Examiner encountered a driver Mr Steven Coleman who said that he was an employee of T.R. Benney. Mr Coleman’s vehicle was laden with empty potato boxes on a journey from Holbeach to Leedstown.

10. This led to a Vehicle Examiner issuing an S-Mark roadworthiness prohibition. Mr Backhouse raised no challenge to the TC’s findings about why the prohibition was issued. The TC found (at paragraph 75):

> ‘The prohibition on 8 September 2017 was issued for two items. One was a tyre beyond the legal limit. It was measured at 0.12mm and 0.43 mm. The legal minimum is 1mm. The tyre, on the drive axle of a 44 tonne articulated combination, had tread less deep than the thickness of a fingernail. That defect was considered by the issuing officer to have been something that should have been detected at the last safety check as, indeed it was. But the operator took no action to correct it’.

11. The Vehicle Examiner found that part of the wing was missing from a nearside axle. Mr Coleman told him that he was aware of the missing wing as it had detached after a blowout on the adjacent tyre three weeks previously.

12. Matters did not end there. On 14 October 2017, the Road Fuel Testing Unit (part of HMRC's Fraud Investigation Service) visited the operating centre and tested 9 vehicles. Of those, 4 were found to contain red diesel. The appellant was the owner of at least one of those vehicles. According to the TC's notes of evidence, that vehicle had been untaxed for a period of 2 years and subject to a SORN. During that period, the vehicle was used to pull a fuel bowser around fields (which would not have been problematic). However, the appellant said in written correspondence to the TC that the vehicle had been used on a road at other times. HMRC found red dye in 2017 and it seems that the red diesel was put into the vehicle in about 2015. If this chronology is right, it is not clear how or when the vehicle was used on roads without red fuel. We need not reach a firm conclusion about this for our decision.

13. Meanwhile, a Traffic Examiner carried out a desk-based assessment of the company and made an 'unsatisfactory' finding as set out in the standard Traffic Examiner Operation Report dated 6 December 2017. We need not recite the details of the report here. On 13 December 2017, which was only a week after his convictions at Bodmin Magistrates' Court, Ross was stopped at a DVSA road check driving a 4-axle tipper with an expired MOT.

14. The Office of the TC issued call-up letters on 10 January 2018. The PI took place on 16 February. A number of witnesses gave evidence including Ross and the appellant. Ross explained why he had driven the tractor unit with no licence. One of the company's biggest customers had needed to transport a load of potatoes. Ross arranged for an agency driver but was let down at the last minute. Feeling under pressure of time to deliver a perishable load, he decided to do it himself. The appellant's evidence was that Ross informed him of the police stop in a telephone call at 4am. Following the incident, the appellant did not trust Ross and it was decided that he should resign as a director.

15. Regrettably, the recording equipment failed during the course of the PI at some stage after the lunch adjournment. There is no transcript of the appellant's evidence. The TC has supplied a typed version of those notes he took during parts of the inquiry that were not recorded, as well as a copy of the handwritten notes. They are by no means a complete record.

16. The TC's decision records that the requirement for financial standing was not met in relation to 4 vehicles but that the appellant volunteered to reduce the application to 2 vehicles. The TC accepted that amendment to the application and consequently found that the financial standing requirement was met.

17. In relation to other issues, the TC made numerous findings against the company and the appellant. He found that the appellant was responsible for both elements of the S-Mark prohibition. He found that, as transport manager, the appellant was responsible, either directly or through gross negligence, for events that led to Ross's conviction. He found that the appellant 'blatantly and cynically lied' in his

evidence about the use of red diesel. He found that the appellant lied or sought to mislead him in relation to the defective wing. The TC's findings of dishonesty played a significant part in his overall decision.

The way in which the appellant puts the case

18. In his grounds of appeal, the appellant's solicitors contended that the TC's decision was unfair because it relied on findings of fact about matters that had not been properly ventilated at the PI. This contention was developed in a skeleton argument which made the point, in particular, that any finding in relation to such a grave issue as dishonesty should be rooted in evidence that has been put to the operator at the PI.

19. It was further submitted in the skeleton argument that the appellant was inhibited from pursuing his appeal because he did not have the benefit of a full transcript. It was not possible to ascertain from the TC's notes what questions were or were not put to the appellant. In circumstances where the appeal turned on what was and was not asked, the appellant was inhibited in presenting his case.

20. The grounds of appeal and the skeleton argument challenged the TC's decisions in relation to both the appellant and the operator, maintaining that the decision was unfair as a whole and making no distinction between those aspects relating to revocation and those aspects relating to disqualification. However, Mr Backhouse refined his submission at the hearing. He conceded that the operator's licence had been properly revoked and that disqualification was in principle a reasonable outcome both in relation to the company and in relation to the appellant.

21. Nevertheless, Mr Backhouse emphasised that the TC's finding of dishonesty would have acute consequences for the appellant and his business interests. Not least, those findings would be likely to place the appellant at great disadvantage if he were to apply at any stage in the future for another operator's licence. Having lost his good repute, the findings of dishonesty would constitute a high hurdle to regaining good repute in the future. In the absence of a full transcript, the Tribunal could not fully be apprised of the evidence in relation to dishonesty which would undoubtedly have had a significant effect on the decisions to disqualify the appellant and his company. The decision as it related to disqualification was unfair.

22. Given Mr Backhouse's refined submission, we do not need to deal with the revocation decision and we do not interfere with it. We need only deal with the decisions to disqualify the company and the appellant.

The effect of the recording failure in this appeal

23. We are grateful to the TC for supplying his notes. However, they are more in the nature of an aide memoire than a record of proceedings. We make no criticism of the TC in this regard but the fact remains that we are inhibited from considering the merits of Mr Backhouse's refined submission because we have only a partial

record of the PI. The appellant's oral evidence was central to the fair determination of the PI; yet there is no transcript of his evidence other than the short closed session which dealt with finances. As we have indicated, there is no live issue about financial standing. This appeal concerns matters which could and should have been put to the appellant in the public session which was not recorded. We cannot be satisfied from the TC's notes that all relevant matters were put to the appellant.

24. The Upper Tribunal may be unable to consider an appeal fairly in the absence of a transcript of the PI (*MME Services Ltd 2004/315* at paragraph 3). In some cases, the absence of a transcript may present no problem in the Tribunal. If a TC makes findings of fact which do not depend to any significant degree on oral evidence, or where oral evidence would make no difference, the appeal to the Tribunal may proceed with no unfairness. However, in this case, the honesty of the appellant was in issue. It is quite impossible to say that the appellant's oral evidence to the PI was irrelevant: the TC's duty was in part to assess the appellant's honesty by hearing him give evidence.

25. As Mr Backhouse pointed out, the problem is compounded in this case because the TC undertook research for himself - in relation to family involvement in other transport companies - without apparently affording the appellant an opportunity to comment (paragraphs 94 and 95 of the TC's decision). It is possible that the product of this research played no significant part in the TC's overall view of the appellant's honesty, but we are left uncertain.

26. In these circumstances, we regard the decisions to disqualify the company and the appellant from holding a licence, and the decision to disqualify the appellant as a transport manager, as suffering from procedural flaw.

Disposal

27. We have considered whether to remit the case for the TC to take a fresh decision about disqualification. However, we were not asked to remit the case and we agree that it is not necessary to do so. The Upper Tribunal has full jurisdiction to hear and determine all matters whether of law or fact. We apply the approach in paragraphs 30-40 of the judgment of the Court of Appeal in *Bradley Fold Travel Ltd and Peter Wright v Secretary of State for Transport* [2010] EWCA Civ 695. An appeal before the Upper Tribunal takes the form of a review of the material before the TC. In order for an appeal to succeed, it is necessary to show that 'the process of reasoning and the application of the relevant law require the tribunal to adopt a different view'. Put another way, it might be said that an appellant has to demonstrate that the TC's decision (in this case, about disqualification) was 'plainly wrong'.

28. We consider that the TC was plainly right to disqualify the company and the appellant for 10 years. We have reached this decision without reaching any conclusions one way or the other about the appellant's honesty. Had we regarded the question of honesty as determinative, we would have remitted the case for

further findings of fact. However, we are able to determine the appeal by reference to other factors and, in the interests of finality, we do so.

29. Taking into consideration all the evidence, we recognise that there are some positive features that fall to be weighed in the balance. Ross is no longer a company director and, by the time of the PI, had gained his licence. A full and independent compliance audit report (completed on 4 January 2018) was disclosed to the TC even though the original requirement to submit such a report as a condition of the interim licence had been removed and even though the report showed several faults in the operation of the appellant's business. The appellant's willingness to disclose the report is some indication that he is able to be candid and co-operative in the regulatory process. His full participation in the PI process was also to his credit. The appellant now accepts that revocation was the right course, albeit that this concession was made very late in the proceedings. All these points count in the appellant's favour. However, there are significant negative factors which mean we are bound to uphold the ten-year disqualification period.

30. First, the company permitted Ross to drive a 44-tonne tractor unit without a licence. This was a serious regulatory failure exacerbated by the fact that Ross was a company director at the time. The journey from Cornwall to Lincolnshire and back again took hours. Ross is the appellant's son and still a young man. The appellant as one of the company's transport managers failed to exercise continuous and effective control of the operation.

31. Mr Backhouse agreed that Ross's behaviour was plainly unacceptable and unlawful but submitted that his actions were a one-off act of immaturity. No parent can prevent all immature actions that their children may decide to take. We are not impressed by that argument. Ross on his own account got into a panic by about 6pm. It was not until 1.53am that the police stopped him and (on the appellant's evidence) not until 4am that Ross called his father. The appellant was a company director and a transport manager. Yet, even taking his account at its highest, he was not aware of the location of the vehicle for many hours.

32. There was some discussion at the appeal hearing about the extent of the appellant's responsibility for the acts of his son. It does not matter whether Ross's criminal conduct came about through lack of proper systems in the company or from a working culture which led Ross to break the criminal law. We accept that Ross resigned his directorship as a result of the incident. However, we query whether it was ever sensible for him to have assumed the duties of a director when he was susceptible to pressure and immaturity. Public safety was put at risk. Fair competition in the marketplace is harmed when a company seeks to gain commercial advantage by using a driver who does not have the appropriate licence.

33. Secondly, the S-Mark prohibition is of serious concern, denoting that in the view of the examiner there had been a significant failure of roadworthiness compliance. In his oral submissions, Mr Backhouse accepted that there had been a significant failure in maintenance systems in relation to the tyres. He said (with some understatement) that it was not sensible for the vehicle to have been used. The

appellant’s evidence was that he had made reasonable efforts to solve the problem with the tyres. That may or may not be so. It does not matter. The vehicle was on the road with significant defects.

34. Thirdly, from the regulatory perspective, we regard the overall context of these breaches as significant. The company and the appellant were operating under an interim licence. They knew that the licence would be reviewed. They were on notice of the regulator’s interest in what they were doing. They should have known that good repute was an issue. The TC had given the appellant another chance to prove that he could be trusted to operate vehicles by granting the interim licence and by lifting the disqualification. Neither the company nor the appellant repaid the TC’s trust.

35. Mr Backhouse did not address us on the appropriate length of any disqualification, but he reminded us that it should not extend longer than would be necessary to achieve the appellant’s rehabilitation. He observed that the company had got off to a bad start and had faced challenges but submitted that a ten-year disqualification was too long in the absence of reliable findings of fact about dishonesty.

36. We allowed time after the hearing for the appellant’s representatives to make any further written submissions as to why a ten-year disqualification period was too long, bearing in mind that the appellant had previously been subject to an indefinite disqualification (which had been lifted as recently as June 2017) and bearing in mind the relevant statutory guidance which had not been addressed before us. The appellant’s representatives chose not to make further submissions.

37. We have nevertheless reminded ourselves of the Senior TC’s Statutory Document No 10 on the Principles of Decision Making & the Concept of Proportionality. Various passages of that document deal with disqualification but we need only cite paragraph 93 which says:

    > ‘Serious cases, where, for example, the operator deliberately puts life at risk and/or knowingly operates unsafe vehicles…may merit disqualification of between 5 to 10 years or in certain cases for an indefinite period…’.

    In our view, this is a serious case.

38. Mr Backhouse made a number of submissions at the hearing about the relevance of an operator’s history. He reminded us that regulatory history is not decisive in determining whether any particular regulatory action is proportionate: past history must be weighed in its proper context. He submitted nevertheless that an operator’s regulatory history is relevant to the assessment of whether a particular regulatory outcome is likely to be effective. We agree. In the present context, the previous indefinite disqualification was not effective to prevent further serious regulatory failings. This shines a light on the extent of regulatory action that is now necessary. We have concerns that a short disqualification would provide insufficient protection for the public.

39. On the other side of the scales, we have considered whether we should reinstate the indefinite disqualification which was set aside for the purposes of an interim licence which has now failed. However, we do not regard 10 years as plainly wrong; and we see no reason to disagree with the TC's decision.

40. In short, applying the test in *Bradley Fold*, we see no reason to interfere with the ten-year disqualification periods either in relation to the company or in relation to the appellant. This appeal is dismissed.

(signed on the original)

JUDITH FARBEY QC
Judge of the Upper Tribunal
15 August 2018