



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

**Appeal No. T/2019/9
NCN: [2019] UKUT 157 (AAC)**

ON APPEAL

from a DECISION of the TRAFFIC COMMISSIONER

dated 7 January 2019

Before: **A I Poole QC** **Judge of the Upper Tribunal**
 Mr L Milliken **Member of the Upper Tribunal**
 Mr D Rawsthorn **Member of the Upper Tribunal**

Appellants: **ABSOLUTE BUSINESS SERVICES (SCOTLAND) LTD**

Attendances: **Mr Bryan Timmons**

Heard at: **George House, 126 George Street, Edinburgh EH2 4HH**
Date of Hearing: **7 May 2019**
Date of Decision: **10 May 2019**

Reference: **0M1107082**

DECISION OF THE UPPER TRIBUNAL

The appeal is DISMISSED. The stay granted on 7 February 2019 is lifted and the operator's licence OM1107082 is revoked with effect from 10 May 2019.

Subject Matter: professional competence; failure to nominate a transport manager; procedural requirements before revocation

REASONS FOR DECISION

Introduction

1. This is an appeal against a decision of the Traffic Commissioner (the “**TC**”) intimated to the Appellant, Absolute Business Services (Scotland) Ltd (“**ABSSL**”) by letter dated 7 January 2019 (the “**Decision**”). By the Decision the TC revoked ABSSL’s goods vehicle operator’s licence OM1107082 with effect from 5 January 2019. There was no public inquiry before this Decision was made, for reasons explained below. The Decision is appealed against, and ABSSL asks that it be permitted a public inquiry.
2. The Decision itself did not set out detailed reasons for revocation, but referred to a letter dated 27 November 2018 notifying ABSSL that the TC was considering revoking its goods vehicle operator’s licence. The reasons for the revocation are apparent from the letter of 27 November 2018. The revocation was made on the basis that the TC considered that ABSSL no longer satisfied the requirement to be professionally competent set out in Section 27(1) of the Goods Vehicles (Licensing of Operators) Act 1995 (the “**1995 Act**”).
3. A short chronology of correspondence between ABSSL and the TC gives the background:
 - 27 July 2018 - ABSSL writes to TC to say that that the external Transport Manager has resigned with immediate effect and therefore requests a period of grace to operate while a replacement is found.
 - 9 August 2018 - TC writes to ABSSL saying that it has been brought to her attention that Mr Chris Conaboy, currently specified on the operator’s licence as transport manager, is no longer in employment and as a result ABSSL may no longer satisfy the requirement to be professionally competent. The letter stated that there must now be an application to add a replacement transport manager, and an explanation as to why ABSSL failed to inform the TC. It warned in bold type that a failure to respond to the letter would result in the TC revoking the licence. The letter was sent by recorded delivery and email.
 - Undated document - There is an unsigned and undated application form to vary a Goods Vehicle Operator’s Licence which gives the company name ABSSL and seeks to add Steven Wales as the new transport manager (p6-8).
 - 5 September 2018 - TC writes to ABSSL referring to the operator’s licence and the request to add a new transport manager to the licence. The letter appears to be in response to the unsigned and undated application. It states “In order for us to process the addition of the new transport manager on to your licence please complete and return the

enclosed TM1 form. Please ensure the above information is received in this office not later than the 19 September 2018”.

- 26 September 2018 - TC writes to ABSSL noting there has been no response and giving a further opportunity to complete a TM1 form and return it by 10 October 2018.
- 27 November 2018 - TC writes a warning letter to ABSSL saying she is considering making a direction under Sections 26(1) and Section 27(1) of the 1995 Act to revoke the licence on the basis ABSSL no longer satisfies the requirement to be professionally competent. The letter notes the resignation of the transport manager on 3 August 2018 and that letters of 9 August and 5 September 2018 had not been responded to. The letter invites representations in writing and informed ABSSL of the right to request an oral hearing. It states it has been sent by first class and recorded delivery post to all known addresses. There were three different addresses to which it appears to have been sent. The recorded delivery slips for two of the three state that Royal Mail were unable to deliver and the box ticked was “addressee gone away”. This included the operating centre. It is clear from pages 57 to 60 of the bundle that the third letter was delivered and signed for. It had been sent to 5 Royal Exchange, Glasgow, a business address used by ABSSL.
- 7 January 2019 - TC writes to ABSSL saying that in the absence of a response she has revoked the licence with effect from 5 January 2019, and setting out that this had been done under Sections 26(1) and 27(1) of the Act. These letters were sent to two of the addresses previously used, and again the recorded delivery slips state that Royal Mail were unable to deliver and the box ticked was “addressee gone away”.
- 16 January 2019 - Steven Wales on behalf of ABSSL emails the TC saying no correspondence had been received and asking for information and how to resolve.
- 18 January 2019 - TC indicates that the licence has been revoked under Section 26(1)(h) and Section 27(1) of the 1995 Act.
- 1 February 2019 - Application made by ABSSL for a stay of the decision of the TC until the UT appeal is heard.
- 7 February 2019 - TC grants a stay reluctantly, saying she considers that the requirements for sending notices to an operator in terms of the Goods Vehicles (Licensing of Operators) Regulations 1995 have been met and that indeed wider addresses than strictly necessary were used. Further it seems that service has failed on the two addresses which the appellant has used or nominated as operating centres, which

begs the question as to why correspondence properly sent does not reach or is not heeded by ABSSL.

Grounds of Appeal

4. The appeal is brought on the basis that the operator did not receive the letter of 27 November 2018 referred to in the revocation letter of 7 January 2019. The operator has therefore been denied a public inquiry. The grounds of appeal fall broadly into two heads;
 - 4.1 the operator was not provided with the reasons for revocation.
 - 4.2 when only one attempt at communication was made by the TC it was disproportionate to revoke.

Governing provisions

5. Section 26(1) of the 1995 Act provides that, subject to the following provisions of the section and the provisions of Section 29, a TC may direct that an operator's licence be revoked, suspended or curtailed on listed grounds. One of those grounds is:
 - “(h) that since the licence was issued or varied there has been a material change in any of the circumstances of the licence-holder that were relevant to the issue or variation of the licence”.
6. Section 27(1) provides
 - “A traffic commissioner shall direct that a standard licence be revoked if at any time it appears to him that:
 - (a) the licence-holder no longer satisfies the requirements of Section 13A(2)...”
7. Section 13A(2) sets out requirements for standard licences. The first requirement is that the TC is satisfied that the applicant has an effective and stable establishment in Great Britain, is of good repute, has appropriate financial standing, and is professionally competent. The second requirement is that the TC is satisfied that the applicant has designated a transport manager.
8. There are procedural requirements before there can be revocation. Before there can be revocation under Section 27(1), a notice in writing must be given that the TC is considering giving a direction to revoke, inviting written representations. Directions under both Sections 26 and 27 are subject to Section 29. Section 29(1) provides that a TC shall not give a direction under Sections 26(1) or 27(1)
 - “without first holding an inquiry if the holder or the licence requests that an inquiry be held.”
9. The TC refers to statutory provisions about the giving of notice to a public inquiry in Schedule 4 of the Goods Vehicles (Licensing of Operators) Regulations 1995. These are provisions governing notification of an inquiry

and are about written notice of the date, time and place fixed. They are not directly applicable because in the event there was no inquiry in this case, but they provide guidance as to what is likely to be found sufficient in terms of the means of communication preceding revocation by the TC with bodies holding licences. Their effect is that where post is sent to the proper address of a company, it is deemed to be delivered. Paragraph 6 of Schedule 4 governs notices 'sent under this schedule' and provides, insofar as relevant:

“(1) A notice required or authorised to be sent to a person under this Schedule may be effected by-

(a) delivering it to him at an address which is his proper address; or
(b) sending it to him by post to an address which is his proper address;

or

(c) transmitting to him a facsimile copy of it by means of electronic signals.

(2) A notice sent under paragraph (1) shall, for the purposes of this Schedule, be deemed to have been sent when it would have been delivered in the ordinary course of post notwithstanding that-

(a) the notice was returned as undelivered or was for any reason not received; or

(b) was in fact delivered or received at some other time.

(3) Any such document may-

(a) in the case of a body corporate, be sent to the secretary or clerk of that body;

(b) in the case of a partnership, be sent to any partner;

(c) in the case of an unincorporated association other than a partnership, be sent to any member of the governing body of the association.

(4) For the purposes of this paragraph and section 7 of the Interpretation Act 1978, the proper address of any person is his last known address (whether of his residence or a place where he carries on business or is employed) and also any address applicable in his case under the following provisions-

(a) in the case of a body corporate, its secretary or its clerk, the address of its registered or principal office in the United Kingdom;

(b) in the case of an unincorporated association (other than a partnership) or member of its governing body, its principal office in the United Kingdom”.

10. It is also worth noting the statutory guidance from the Senior Traffic Commissioner in Statutory Document No.4 “Operating Centres, stable establishments and addresses for service”. Paragraph 67 provides:

“An important aspect of the trust which lies at the heart of the operator’s licensing regime is that the traffic commissioner must be able to rely on an operator having in place:

□ addresses at which the operator and transport manager can reliably receive important correspondence (whether from the Office of the Traffic Commissioner, including the Central

Licensing Office, an enforcing authority or any other significant source); and

□ a system which ensures that correspondence is fully answered, within any time limit which has been set, or else within a reasonable time limit and if documents are requested that they are sent.

Failure to respond might justifiably lead to suspicion that there has been an unauthorised or un-notified change with the result that the traffic commissioner cannot actively regulate. If an operator has been given proper notice of a hearing and fails to attend the operator cannot justifiably complain at a later date”.

11. The powers of the Upper Tribunal in disposing of an appeal are (a) to make such order as it thinks fit; or (b) to remit the matter for rehearing and determination by the traffic commissioner (paragraph 17(2) of Schedule 4 to the Transport Act 1985).

The hearing

12. ABSSL was informed of the time, date and place of the hearing of the appeal on 7 May 2019 before the Upper Tribunal. It returned a form indicating that it would be present and represented by a solicitor from Smith Bowyer Clarke.
13. On 3 May 2019 Smith Bowyer Clarke wrote to the Upper Tribunal asking to be removed from the record in respect of the appeal hearing, citing professional reasons.
14. At the hearing on 7 May 2019 ABSSL was represented by its director, Mr Bryan Timmons. The hearing sat over half an hour later than the scheduled time to accommodate him, because he had arrived late from Edinburgh Airport.
15. Part of the way through the hearing Mr Timmons requested an adjournment because he wanted to consult his solicitor. Mr Timmons explained that he had taken his eye off the ball and wasn't well prepared for the hearing, and indeed had turned up without papers. His solicitor had written to the Upper Tribunal asking to be removed as Mr Timmons had overlooked paying his bill because he was busy with other business affairs. That could be resolved, and because Mr Timmons had been abroad working on his other businesses frequently over the last years he wished to speak with his lawyer about what had happened on the ground. The Upper Tribunal adjourned for a short period to consider the request. It decided to refuse an adjournment to another day because it was not in the interests of justice to grant it. The Upper Tribunal had regard to the overriding objective, and in particular the need to avoid delay so far as compatible with proper consideration of the issues, and dealing with the case in a proportionate manner. The case was not complex. It was not in dispute that ABSSL had properly been notified of the hearing and had received hearing papers. Mr Timmons' choice not to

prepare was not a good ground for adjournment. Grounds of appeal setting out ABSSL's basis for appealing had been drafted and so the company's position was before the Upper Tribunal. At page 30 of the bundle, there was a letter dated 17 January 2019 from Mr Timmons accepting that paperwork had not been returned due to oversight, which he confirmed he had sent, and so the facts in issue were limited. Mr Timmons was clearly an able man with multiple businesses in different locations; he was articulate and capable of representing ABSSL. In all the circumstances the Upper Tribunal considered that it was in the interests of justice to proceed. The Upper Tribunal provided Mr Timmons with a hearing bundle for the rest of the reconvened hearing to enable him to participate effectively.

Discussion

16. The position of Mr Timmons at the hearing was that because he had been abroad and working on his other businesses, he had taken his eye off the ball with the haulage company. The haulage company was an investment he had made on the advice of a friend of his father. He had invested without fully understanding the procedures and was inexperienced in the area; his background was hospitality. For example he did not know of the Senior Traffic Commissioner's Guidance, although when the passage set out above was read to him he responded that it was common sense, and wished he had been more diligent. He had been living in Dubai for the last couple of years, and had been busy with bars, restaurants and other businesses in the last 18 months, but now he was back in Scotland and wanted to make a go of the haulage business. Because he was here now, more attention would be given in the future. The business was not currently active. He accepted that there had been a lack of due diligence and apologised for what had happened. The problem for Mr Timmons is that this position did not address the tests for intervention by the Upper Tribunal with a decision of the TC. The only bases on which the Upper Tribunal could allow an appeal against a decision of the TC would be if it found the TC had erred in law, or the TC was plainly wrong on the facts. Mr Timmons' position was that things would be better in the future, but that did not address what was wrong with the TC's decision on the basis on which it was made. Further, under paragraph 17(3) of Schedule 4 to the Transport Act 1985 the Upper Tribunal may not take into consideration any circumstances which did not exist at the time of the determination which is the subject of the appeal; Mr Timmons' return from Dubai to Scotland and plans he was now making for the business were new circumstances.
17. Looking next at the grounds of challenge contained in the grounds of appeal, the Upper Tribunal did not accept that ABSSL was not provided with the reasons for revocation of the licence. Those reasons were set out in full in the TC's letter of 27 November 2018, and incorporated by reference into the revocation letter dated 7 January 2019. It is true that the revocation letter dated 7 January 2019 appears to have been marked by Royal Mail as "addressee gone away" from each of the three addresses to which it was sent. But even leaving to one side the deeming provisions in Schedule 4 of the Goods Vehicles (Licensing of Operators) Regulations 1995, there is

evidence accepted by the Upper Tribunal at pages 57-60 of the bundle that the letter of 27 November 2018 was delivered and signed for at 5 Royal Exchange Square, Glasgow G1 3AH. Mr Timmons accepted that this was used as a business address for ABSSL, among other family businesses. There is a track and trace confirmation of delivery on 28 November 2018 for item KS811125581GB. The records which follow that confirmation show it related to delivery of the letter of 27 November 2018 to the 5 Royal Exchange Square address. Accordingly reasons were in fact provided to ABSSL. Having regard to the Senior Traffic Commissioner's Guidance set out above, it was not open to ABSSL to fail to make arrangements to deal adequately with its correspondence, and then seek to argue that those failures mean that the TC has somehow erred in law in not providing reasons. As far as the argument that revocation was disproportionate because only one attempt had been made to contact ABSSL is concerned, that clearly fails on the facts. In fact, multiple attempts were made by the TC to communicate with ABSSL, at all known addresses ABSSL had provided. First, ABSSL was given opportunities to complete the appropriate forms to nominate an alternative transport manager, by the TC's letters dated 9 August 2018, 5 September 2018, and 26 September 2018. ABSSL did not respond. Second, the TC wrote formally on 27 November 2018, in terms which complied with the procedural requirements under Section 27(1) and 29(1) of the 1995 Act set out above. That letter was delivered and signed for at an address used by ABSSL, and sent to two others. Even though the letter had been received, there was no response to the letter. No public inquiry was requested. There having been no request for a public inquiry, and nothing in the particular circumstances of the case suggesting one was necessary fairly to decide the case, the TC was entitled to revoke the licence without a public inquiry under Sections 26 and 27 of the 1995 Act. She informed ABSSL by letters sent recorded delivery to addresses provided to her by ABSSL. The TC did not behave in a disproportionate manner.

Conclusion

18. The Upper Tribunal was accordingly unpersuaded by the grounds of appeal advanced. There were no grounds to interfere with the TC's decision to revoke ABSSL's goods vehicle operator's licence OM1107082, and the appeal fell to be dismissed. As far as the date of revocation was concerned, Mr Timmons confirmed at the hearing that ABSSL was not currently trading. As the TC had previously granted a stay, with the effect that the revocation had not taken effect pending the determination of these proceedings in the Upper Tribunal, the Upper Tribunal considered it appropriate that the revocation should take effect from the date of this decision.

A I Poole QC
Judge of the Upper Tribunal
10 May 2019