



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

**NCN: [2020] UKUT 291 (AAC)
Appeal No. T/2020/21**

ON APPEAL from a DECISION of the TRAFFIC COMMISSIONER

Before: Mr M Hemingway: Judge of the Upper Tribunal
Mr D Rawsthorn: Member of the Upper Tribunal
Mr S James: Member of the Upper Tribunal

Appellant: EBF International Ltd

References: OB2019262 and OM2004652

Date of Hearing: 29 September 2020

DECISION OF THE UPPER TRIBUNAL

This appeal to the Upper Tribunal is dismissed.

CASES REFERRED TO:

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

REASONS FOR DECISION

Introduction

1. This appeal to the Upper Tribunal has been brought by EBF International Ltd ('the appellant') and is directed towards a decision made by the Traffic Commissioner for the North-East of England ('the TC'), made on 19 February 2020 to revoke two restricted goods vehicle operators' licences held by it. We held an oral hearing of the appeal at Field House in London on 29 September 2020. The appellant was represented before us by Mr R Berinde. He is not a legally qualified person but he is an employee of the appellant and we accept he had been authorised by the appellant to do so.

The background circumstances

2. The appellant has two directors both of whom, as we understand it, are Romanian nationals and are resident in Romania. In addition to the two restricted licences with which we are concerned, the appellant had previously applied for two other licences. However, one such application was withdrawn and, whilst the other resulted in the granting of a licence, it was not subsequently taken up. Be that as it may, the appellant was granted a restricted licence under reference OM2004652, authorising two vehicles, on 21 July 2017 and it was granted a restricted licence under reference OB2019262, authorising two vehicles on 25 February 2019. More latterly, the appellant has not made use of licence OM2004652 and indeed, at all relevant times for the purposes of this appeal, no vehicles were being used under its authorisation. But, at those times, a single vehicle had been operated under licence OB2019262.

3. It is not disputed that, with respect to licence OB2019262, the appellants' directors had been twice invited to attend a new operator seminar. However, nobody had attended on behalf of the appellant. As a result of that failure, the Driver and Vehicle Standards Agency conducted a pre-arranged maintenance investigation on 17 October 2019. The outcome of that investigation was an unsatisfactory grading. Concerns were picked up regarding an inadequate frequency of safety inspection checks; a change of maintenance contractor which had not been notified to the regulatory authorities; a failure on the part of relevant drivers to correctly follow the defect reporting system; the use of only a very basic year planner; and, of course, the failure to attend the seminars. On 4 November 2019 there was a follow up inspection, conducted by the same vehicle examiner again on behalf of the Driver and Vehicle Standards Agency, which revealed a failure on the part of the appellant to remedy the shortcomings. The concerns came to the attention of the Office of the Traffic Commissioner ('OTC') and the appellant was called to a Public Inquiry ('PI') with respect to each licence. As to licence OB2019262 the call up letter of 13 January 2020 raised issues concerning an apparent breach of the conditions of the licence constituting a failure to notify the OTC of a change of maintenance provider; a failure to abide by statements made when applying for the relevant licence concerning the intended frequency of maintenance inspections and the identity of the maintenance provider; a failure to honour an undertaking that any vehicles operated under the licence would be kept in a fit and serviceable condition; and a failure to honour an undertaking that defects or symptoms of defects detected by drivers would be promptly reported and recorded. Concern was also expressed that, since the licence had been issued, there had been material changes in the circumstances of the appellant in that it no longer appeared to be fit to hold an operator's licence, it no longer appeared to have 'the appropriate financial standing' and it had failed to attend the above seminars. As to licence OM2004652, a separate call up letter of the same date was issued, expressing concerns regarding material change (including with respect to fitness and finance). The powers of the TC, including the power to revoke a licence, were set out in the respective call up letters.

4. The PI was scheduled to take place on 19 February 2020. On 18 February 2020 the OTC received an email sent on behalf of the company (by the aforementioned Mr Berinde) requesting a postponement of the PI. The OTC responded by email, within two hours, requesting further information but making it plain that, on the basis of the information currently available, the postponement request was not being granted. Some further documentary evidence was then provided by Mr Berinde including a letter of 18 February 2020 which, on the face of it, appeared to have been signed by one of the appellant's directors

and appeared to authorise him to speak on behalf of the company with respect to its dealings with the TC. But it was to subsequently transpire that he had in fact, technically at least, forged the signature of that director.

5. Mr Berinde attended before the TC on 19 February 2020. There is a handwritten record of what was said. The TC explained to him that he did not consider him to have been properly authorised to speak for the appellant at a PI. It was confirmed that the directors were not currently in the UK. It became apparent that, whilst the appellant has an office in Glasgow the address of which had been supplied to the OTC for the purposes of the licences, that office had not been staffed for some time and correspondence (seemingly including the call up letters for the PI) had not been promptly dealt with as a result. The impression given was that the appellant had only become aware it had been called to a PI a day or two before that PI had been scheduled to take place.

6. In looking at the handwritten note of what was said in the exchange between the TC and R Berinde, we are satisfied that (although it is not quite expressed in this way) what happened was as follows:

(a) Mr Berinde attended before the PI at the time when the PI had been due to commence.

(b) The TC heard from him not as part of the PI but so as to enable him to consider whether to adjourn it, whether to proceed with him acting as the appellant's representative, or whether to proceed without his involvement (in effect whether to decide matters on the papers).

(c) The TC took the latter option, his not being satisfied that Mr Berinde was properly authorised to represent the appellant and his not being satisfied that grounds for an adjournment had been made out. Accordingly, the TC went on to make his decision on the papers. As already noted, he decided to revoke each licence.

Some relevant law

7. Subject to certain specific exceptions which do not apply here, no person shall use a goods vehicle on a road for or in connection with any trade or business carried on by him, except under a licence (Section 2 of the Goods Vehicles (Licencing of Operators) Act 1995, from now on simply referred to as 'the Act'). An applicant for or a holder of a restricted licence must not be unfit to hold one (Section 13B of the Act). A holder of either a standard or a restricted licence or an applicant for either sort of licence must, amongst other things, have satisfactory facilities and arrangements for maintaining the vehicles used under such a licence in a fit and serviceable condition. Further, the provision of facilities and arrangements for maintaining the vehicles in a fit and serviceable condition must not be prejudiced by reason of the operator having insufficient financial resources for that purpose (Section 13D of the Act). As to a TC's power to revoke a licence, that power may be exercised, amongst other reasons, where a licence holder has contravened any condition attached to the licence; where a licence holder made or procured to be made for the purposes of his application for the licence a statement of fact that, whether to his knowledge or not, was false, or a statement of expectation that has not been fulfilled; where any undertaking recorded in the licence has not been fulfilled; or where since the licence was issued there has been a material change in any of

the circumstances of the licence holder relevant to the issuing of the licence (Section 26(1) of the Act).

The Traffic Commissioner's decision

8. We do not have a transcript of the oral decision which the TC apparently gave on the 19 February 2020. But the decision letter of 20 February 2020 contains everything of relevance which the TC had to say.

9. First of all, the TC explained why he had decided not to postpone or adjourn the PI. Essentially, the request had been made very late, satisfactory evidence that the directors had been unable to attend had not been provided, those directors would have been able to attend had they seen fit to make the necessary arrangements, adequate notice of the hearing had been served and there was already evidence before the TC in documentary form. As to why Mr Berinde had not been permitted to represent the appellant, there was no evidence of proper authority having been given to him by the directors and he had made what was described as 'a clear attempt to replicate the signature' of one of those directors in what purported to be a letter of authority.

10. Having dealt with the above matters, the TC turned to the substantive issues he was called upon to decide. He found that there was, in fact, no responsible person assigned to the task of overseeing adherence to licence undertakings and he determined that, for that reason, the fitness requirement was not met. There had, he concluded, been a relevant material change in that there was now no evidence to demonstrate adequate finance. There had been a failure to engage with the regulatory system through the failure to attend either of the new operator seminars. There was, it appeared, no reliable correspondence address for the purposes of the operation of the regulatory system. These matters, again concluded the TC, demonstrated material change. There had been a failure to rectify matters after the unsatisfactory Driver and Vehicle Standards Agency report of 17 October 2019. The driver defect recording system was ineffective. The appellant was no longer conducting (or possibly had never conducted) maintenance safety inspections at the promised six-week frequency. Nor was proper dynamic brake testing being undertaken. There had been a change in maintenance provider which had not been notified to the OTC but which represented a material change since the granting of the licence. All of those matters were taken into account by the TC with respect to licence OB2019262. In considering whether, in those circumstances, to revoke that licence, the TC asked himself whether he could trust the appellant with respect to future compliance and concluded, given the inactive role of the directors in seeking to secure compliance with the regulatory regime, that he could not. He asked himself whether the operator ought to be put out of business and concluded, in all the circumstances, that such was appropriate. He said he had '*no trust in the current arrangements of the company to hold an operators' licence*'. As to licence OM2004652, there was now no vehicle on the licence, but in any event, there was no evidence of previous compliance with regulatory requirements and there was a lack of evidence regarding finance. There was, again, no responsible person overseeing the licence and, on that basis, the appellant was no longer fit to hold such a licence. The TC did not expressly consider, with respect to that licence, whether the operator could be trusted to comply in the future or whether it was right to put it out of business but it is obvious that the same view was taken with respect to that licence as had been taken with respect to the other one.

11. In consequence, the TC decided to revoke each licence with effect from 17 March 2020. It is right to point out, though, that on 9 March 2020 the OTC notified the appellant that it had been granted a stay of the effect of its decision ‘*pending the appeal to the Upper Tribunal*’. It appears that the stay related to each licence although, in practical terms, since licence OM2004652 was not being used at all, it only related in practical terms to licence OB2019262.

The grounds of appeal to the Upper Tribunal

12. The appeal to the Upper Tribunal was received on 11 March 2020. Written grounds in the form of a document signed by Mr Berinde and a shorter document signed by one of the directors, Mr Georghe-Nelu Ciocan were provided. Essentially, it was said that neither of the directors are fluent in English but that nevertheless it was accepted that there had been significant failings. It was also said that Mr Berinde who had recently been appointed as the appellant’s general manager would implement changes and ensure future compliance with the regulatory regime. Further it was asserted that sufficient finance was available, that maintenance requirements would now be taken seriously, that mail redirection services were now in place to ensure that post would be promptly received and (where appropriate) responded to, and that the directors were now ‘*seriously looking to engage correctly and responsibly with the regulator*’.

13. Mr Berinde attended before us. We were satisfied, on the more recent and more extensive material before us than had been before the TC, that it was right to hear from him on behalf of the appellant. What he had to say was relatively brief and did not significantly add to what had been said, in support of the appeal, in writing. He was honest and straightforward in recognising that the appellant had not been ‘*prepared enough*’ with respect to the PI and with respect to its duties to comply with regulatory requirements. He said that he was not saying that the TC had ‘*got anything wrong*’ but he expressed the hope that a way could be found to permit the appellant to continue to operate under, at least, the licence it had been utilising.

The role of the Upper Tribunal on an appeal from a decision of a Traffic Commissioner

14. Paragraph 17(1) of Schedule 4 to the Transport Act 1985 provides:

‘the Upper Tribunal are to have full jurisdiction to hear and determine on all matters (whether of law or of fact) for the purpose of the exercise of any of their functions under an enactment relating to transport’.

15. The Upper Tribunal’s jurisdiction was examined by the Court of Appeal in *Bradley Fold Travel Ltd and Anor v Secretary of State for Transport* [2010] EWCA Civ 695. It was stated by the Court of Appeal in its judgement that the burden lies upon an appellant to show, in order to succeed on appeal, that the process of reasoning and the application of the relevant law requires the Upper Tribunal to adopt a different view to that taken by a TC. Further, the Upper Tribunal’s task is to determine matters of fact and law on the basis of the material which was before the TC. 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 before it.

Our reasoning on the appeal

16. We have asked ourselves whether there was any unfairness in the way in which the TC dealt with the postponement request and in the way in which he subsequently declined to hear from Mr Berinde as the appellant's representative. As to the first point, it is right to say that the postponement request was made very late. Written notice had been sent to the appellant's address in Glasgow on 13 January 2020 confirming that the PI would take place on 19 February 2020. But as noted, it was only on the 18 February 2020 that the postponement request had been made. The request did not afford a proper explanation as to why a letter which had been sent to the office it had supplied to the OTC giving notice of the PI had not been acted upon promptly. Nor was it made clear when either director might return to the UK if the PI was to be rescheduled. Against that background we consider it was obviously open to the TC not to postpone the PI and we further consider it cannot properly or realistically be contended that he was plainly wrong in declining to do so. As to his refusal to hear representations from Mr Berinde and his refusal to adjourn on the day of the PI, the position before him as to Mr Berinde having authority or approval from either of the directors to speak for the company was at best unclear. Further, although we would not characterise it as wholly culpable fraud, it was a case that Mr Berinde had sought to falsely replicate the signature of one of the directors on a purported letter of authority. Against that background, we consider it was open to the TC to decline to hear from Mr Berinde and to make his decision on the papers. He was not plainly wrong in doing either. There was no unfairness.

17. As to the substance of the decision, the TC identified a number of significant failings on the part of the appellant and its directors. We accept that, with respect to matters of vehicle maintenance and safety, the individual failings were not as serious as is sometimes seen in cases which come before the Upper Tribunal from decisions of a TC. But the underlying impression was that the appellant, through its directors, had either a comprehensive lack of knowledge as to what was required of it under the regulatory regime or a correspondingly comprehensive cavalier attitude towards such requirements. It might have been both. We cannot see there was ever any realistic prospect of any rational decision-maker taking a different view.

18. We were pleased to hear from Mr Berinde, whom we considered to be frank and helpful and perhaps not a little put upon. But as will be noted from what we have said above, the grounds and arguments put to the Upper Tribunal went no further than amounting to an apology for what had gone before and a promise to do better. But, again as has been indicated, we are assessing matters on the basis of the material which was before the TC when he made the decision and in light of an injunction not to take into consideration any circumstances which did not exist at time of the TC's decision which is the subject of the appeal (paragraph 17(3) of Schedule 4 to the Transport Act 1985) So, the grounds of appeal and arguments which have been offered are incapable of securing the result the appellant seeks. That means we must dismiss the appeal with respect to each licence.

19. There does remain the question of the stay. We asked Mr Berinde, at the hearing, what period of extension, if any, he would invite us to consider in the event of our dismissing the appeal. His primary response was simply that he did not want us to dismiss the appeal. Other than that, he was quite unspecific but we think it fair to say that he wanted us to provide as long a period as we felt able to. This is a case where it is not inevitable that the failure of the appeal will, in fact, put the appellant out of business. We say that because the licence and the need to operate a vehicle is incidental to the appellant's main business and, whilst it may be

an unwelcome business expense, it seems to us that a vehicle and a driver can be hired. Arrangements such as that ought to be capable of being put in place quite quickly. Further, if the business is to be wound up, we do not see why an especially lengthy period for the orderly doing so would be needed. In the circumstances we consider it appropriate to extend the period of the stay until 11:59pm on 20 November 2020 which is a period of 1 month from the date of issue of this decision.

Decision

20. The appeal to the Upper Tribunal is dismissed.

21. The stay of the effect of the TC's decision of 19 February 2020 to revoke licenses OB2019296 and OM2004652 is extended until 11:59pm on 20 November 2020.

M R Hemingway
Judge of the Upper Tribunal
20 October 2020