



**NCN: [2020] UKUT 361 (AAC)
Appeal No. T/2020/27**

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

On appeal from the Decision of Richard Turfitt, Traffic Commissioner for the East of England dated 24th April 2020

N.A.P. Anglia Limited

Appellant

**Before: Upper Tribunal Judge Her Honour Judge Beech
Specialist Member of the Upper Tribunal Stuart James
Specialist Member of the Upper Tribunal Andrew Guest**

Hearing date: 8th December 2020

Representation:

Appellant: Carl Crysell, Transport Consultant, CJC Transport Consultants

DECISION

The appeal is DISMISSED

REASONS FOR DECISION

1. This is an appeal from the decision of the Traffic Commissioner for the East of England dated 23rd April 2020 when he refused the Appellant's application for a restricted operator's licence under sections 13B, 13C(5) and (6) of the Goods Vehicles (Licensing of Operators) Act 1995 ("the 1995 Act").
2. The background to this appeal can be found in the appeal bundle and decision letter dated 24th April 2020 and is as follows. By an application dated 13th January 2020, the Appellant ("NAP") applied for a restricted operator's licence authorising two vehicles with an operating centre at Daganya Farm, Eye

although also stated to be Daganya Farm, Nuttery Vale, Hoxne, Eye. The nature of the Appellant's business was described as "construction". Colin Arnold signed the application as a director of NAP. His home address was listed as the correspondence address. In signing the form, Mr Arnold confirmed that the contents of the application were correct. That was not the case. His email address was incorrect; the proposed operating centre address should have been Daganya Farmyard and under the heading "People" at section 5, he had failed to include the details of his wife and fellow director, Helen Arnold. Mr Arnold then answered "no" to the question in section 11 of the application form about whether any of those named in the application, including directors, had previously held an operator's licence and "no" to the question about whether any person named in the application including directors, had ever attended a public inquiry before a traffic commissioner.

3. The true position was that Mrs Arnold had previously held an operator's licence in her own name until 2004 when it came to light that the licence was unlawfully being used by NAP. The company was invited to apply for an operator's licence in its own name which it did not do and as a result, Mrs Arnold was called to a public inquiry at which the TC accepted the surrender of the licence. During the currency of the licence, the OTC had sent two warning letters to Mrs Arnold for failing to have a written driver defect reporting system.
4. The financial evidence submitted with the application was also inadequate as it did not list the transactions during the period covered by the bank statement.
5. By a letter dated 16th January 2020, the Office of the Traffic Commissioner ("OTC") wrote requesting: an aerial photograph of the site and where it was proposed the two vehicles would be parked; a full bank statement covering a 28 day period including transactions; a copy of the advertisement. The following were submitted:
 - a) An advertisement in the name of "CJ Arnold trading as NAP Anglia Ltd" for an operating centre at Daganya Farm, Nuttery Vale, Eye;
 - b) A full bank statement for the period 14th December to 13th January 2020 which showed payments of loans and fuel card payments with one significant payment of £2,512.53 for fuel.
6. By a letter dated 4th February 2020, the OTC asked again for an aerial photograph or Google map of the proposed operating centre with an indication of where the vehicles were to be parked. Then on 5th February 2020, the OTC received a valid representation against the application. The representors wished to remain anonymous. They complained that scaffolding vehicles were already being used at the proposed operating centre with work beginning as early as 5am, causing noise. Some vehicles were unable to turn on the site and were forced to reverse off the highway which caused further noise. The site had been granted planning permission in 2003 for redundant farm buildings to be converted into a joinery shop. The permitted working hours were 8am to 6pm Monday to Friday and 9am to 1pm on Saturdays with no work to be carried out on Sundays or Bank Holidays. The representors enclosed the relevant planning documents to confirm the position. The representation contained the first reference to a scaffolding business operating at the proposed operating centre.

7. The OTC then wrote to Mr Arnold as follows:
 - a) Companies House listed Mrs Arnold as a director of NAP. Mr Arnold was asked to explain why this had not been declared on the licence application and Mrs Arnold was required to complete a new director form;
 - b) An explanation was required for the fuel card payments shown on the bank statements;
 - c) As the OTC had ascertained that there was a separate business called NAP Scaffolding (without an operator's licence), an explanation was required as to the business arrangements between the two businesses;
 - d) A copy of the V5C for the only vehicle listed on the licence application (VU58JNN) was required;
 - e) Confirmation was required of the correct and full address of the proposed operating centre;
 - f) As a result of a number of transactions described as loans in the bank statements and in particular "A Durrant loan", an undertaking was sought to provide financial evidence in the name of the operator should the application be granted;
 - g) A plan was required of the site along with any certificate of planning/documents confirming the lawful use of the premises as an operating centre in planning terms, including details of any planning conditions in place. If no planning was in place, confirmation was required that an application had been submitted;
 - h) Details of the frequency of vehicle movements in and out of the site were also required;
 - i) Proposed operating times were sought in the light of the representations having been received.
8. In response to the above requests, Gavin Whittaker, who described himself as "Manager NAP Scaffolding" responded by email:
 - a) He enclosed a new director's form completed by Mrs Arnold. He did not provide an explanation as to why her details had not been included on the licence application in the first place;
 - b) As for the fuel card payments, he stated that they were for "company vehicles in use by NAP Anglia";
 - c) The business arrangements between NAP Scaffolding and NAP Anglia were that they were the same company owned by both directors;
 - d) As for the address, he maintained that the address was Daganya Farm (without the "yard"), Nuttery Vale, Hoxne, Eye;
 - e) A financial undertaking would be given and he went on: "A Durrant loan is a loan to an employee who runs out of money before pay day";
 - f) Operating hours would be 7am and no later than 6pm seven days a week. Reversing signals "will be mainly in the evenings". More often than not, the vehicles would be back in the yard by 4.30pm;

- g) The reply was silent as to planning permission save to say “we have no council restrictions at the yard”.
9. There followed:
- a) a GV79E containing supplementary environmental information which again referred to the proposed operating centre as Daganya Farm and adding the details of another vehicle to be used under the licence: AY65PYT. This was signed by Mr Arnold;
 - b) the V5C for VU58JNN which described the vehicle as a refuse disposal vehicle;
 - c) some aerial photographs.
10. On 18th February 2020, the OTC caseworker (Jake Chappell) recommended that the application be refused. This recommendation was endorsed by Team Leader Jacob Jowitt. The reasons for refusal were as follows:
- a) Mrs Arnold’s undeclared previous licensing history;
 - b) The accounts available at Companies House for NAP consistently referred to motor vehicles, plant and other assets which may be relevant to operator licensing, as did the bank statements. Mr Whittaker had averred that the fuel card payments related to “company vehicles in use by NAP Anglia” which appeared to be an admission of unauthorised use, given the only V5C documentation accompanying these comments was for VU5JNN – a 28t refuse disposal vehicle. The company had not attempted to satisfy the TC that their ongoing operations were out of scope of operator licensing;
 - c) No adequate explanation had been given as to the loans and regular outgoings transactions on the bank statements;
 - d) Mr Chappell had identified that Mr and Mrs Arnold owned a scaffolding business and the representations made by representors indicated that a scaffolding vehicle was already in use at the site. It was unclear whether those vehicles movements were out-of-scope;
 - e) Whilst it was considered that the representation was valid, the lack of willingness on the part of the representors to attend a public inquiry may force the TC to attach limited weight to its content. However, it appeared from the planning documentation provided by the representors, that the correct address of the site was Daganya Farmyard. Nevertheless, it was recommended that the advertisement was accepted;

The statutory grounds for the refusal were under ss.13B and D of the 1995 Act with NAP being given fourteen days to request a public inquiry.

11. The TC required further information. He did not consider the representors to have met the regulatory requirements. Whilst the planning issues were outside his jurisdiction, reference was made to existing operations which may be the connected entity’s operation but they helped to illustrate the need for time restrictions. That entity did not have an operator’s licence either. It was unclear as to how operating centre capacity had been addressed. The TC required confirmation that the correct address had been included in the advertisement. The onus was on the applicant to satisfy the TC that the criteria were met. Where information suggested potentially adverse

consequences, it was incumbent on the applicant to assist. There were references which might suggest unauthorised operation. This should not come as a surprise to Mrs Arnold. The applicant will wish to explain which vehicles have been “in use by NAP Anglia” and whether VU58JNN has been used. It was envisaged that this would touch on the scaffolding business. The TC remained satisfied as to sections 13B and D. He gave a further opportunity to the representors to provide disclosable representations.

12. On 10th March 2020, Traffic Examiner (“TE”) Russell conducted an initial environmental visit at the proposed site and there met Mr Arnold. He informed Mr Chappell that the site appeared to be unsuitable although Mr Arnold had already commenced an upgrade of the site including widening the site entrance, improving the driveway surface, creating a loop of the site, creating a parking area and erecting a 6ft fence to limit noise and visual intrusion. TE Russell suggested that he re-inspect the site when the improvements had been completed. Mr Arnold was aware that the improvements did not guarantee a positive outcome for the application.
13. On 19th March 2020, Mr Chappell emailed a letter to the email address of Mr Whittaker explaining that further evidence was required. He had tried to send the letter directly to Mr Arnold but the email address on the application form was incorrect. Mr Whittaker was asked to confirm a direct email address for Mr and Mrs Arnold. The letter further required the following information by 2nd April 2020:
 - a) Evidence that the postal address of the proposed operating centre listed on the application form was correct;
 - b) Which vehicles were being referred to when in previous correspondence it was stated that the fuel payments were for “company vehicles in use by NAP Anglia”. Further, had VU58JNN been in use since coming into NAP’s possession?

No response was received.

14. On 16th April 2020, Mr Chappell again recommended that the application be refused. He summarised the contents of TE Russell’s email and confirmed that the representors would not permit a copy of their representation to be sent to NAP even if anonymised because of previous threats made. NAP had failed to provide the requested information and as a result, it remained unclear whether there had been any unauthorised use of in-scope vehicles without an operator’s licence, if the address listed was in fact correct. The recommendation was endorsed by Mr Jowitt. The TC agreed. He noted that more than the usual time had been given to respond and that electronic means of communication had been used due to the “current crisis”. He was therefore entitled to infer that the application was not being pursued. The representations were of limited use without them being disclosed to the applicant. Whilst plans were in place to upgrade the site, TE Russell had provided his assessment on suitability of the site and no action had been taken to persuade the TC as to technical suitability. The applicant had failed to answer the question of unauthorised operation and as a result, the TC remained to be satisfied under sections 13B and 13C(5) and (6) of the 1995 Act. In any event, finance was now dated and a further check would be

required under s.13D. The TC's decision was notified by a letter sent to Mr Arnold at his home address on 24th April 2020.

15. Mr Arnold emailed Mr Chappell on 27th April 2020. He complained that he and Mr Whittaker were unaware of the letter of 19th March 2020. His understanding from TE Russell's site visit was that no action would be taken until May 2020 when a further site visit would be arranged. The company had been shut down, Mr Whittaker had been furloughed and the work on the site had been delayed because of difficulties obtaining equipment. He required an explanation for the refusal of the application.

The appeal

16. Mr Arnold wrote to the Upper Tribunal and filed a notice of appeal. The combined content of those documents are as follows: Mr Arnold repeated the contents of paragraph 15 above and thought it strange that confirmation was needed of the address of the site when he had met TE Russell there. The work to the proposed operating centre was scheduled for completion in June. Mr Arnold was unsure why the use of the fuel cards was an issue. They had been used to run the fleet of vehicles operated by Nap Anglia, Nap Scaffolding and Waveney Valley Joinery. He averred that no scaffolding work had been carried out "during this period so most of the vehicles were not used" (he did not further clarify which "period" he was referring to). Only mandatory scaffold inspections were taking place. VU58JJN "was not in use". It seemed unreasonable that the application should be turned down because of a failure to do "two very simple items" when the company was following government guidelines. He averred that Mr Chappell had contacted Mr Whittaker on 19th March 2020 and asked for Mr Arnold's email address which was given to him. It was therefore assumed that Mr Chappell would be contacting Mr Arnold. Further, Mr Arnold did not appreciate that the work of the OTC was not considered to be "non-essential" and would therefore continue during the government restrictions. The company had been treated unfairly when it had otherwise dealt with all requests for information promptly.
17. At the hearing of this appeal, NAP was represented by Carl Crysell, Transport Consultant of CJC Transport Consultants. Mr Arnold was unavoidably delayed on a train but was content for the appeal to be heard in his absence. Mr Crysell confirmed that he had Mr Arnold's authority to seek leave from the Tribunal to represent the company, which we granted.
18. Mr Crysell began by explaining that Mr Arnold had delegated the responsibility for applying for an operator's licence to Mr Whittaker, the scaffolding manager, who only worked on Wednesdays and Thursdays. Mr Crysell submitted on behalf of Mr Arnold that by the time the email of 19th March 2020 was sent to Mr Whittaker, he had been furloughed. We explored that proposition. The email of 19th March 2020 (a Thursday, when Mr Whittaker would have been working) was sent at 11.32am. Indeed, it was asserted by Mr Arnold in his appeal documents, that Mr Chappell spoke to Mr Whittaker on that day requesting Mr Arnold's email address. Whilst Mr Arnold contends that Mr Whittaker was furloughed by that date, the furlough scheme did not commence until 23rd March 2020. The Tribunal does not accept that Mr Whittaker was unavailable to either read the email, respond to it or forward it to Mr Arnold for him to respond to it.

19. Mr Crysell submitted that the reason for making the application was to bring NAP Scaffolding “in house”. However, it was the Applicant’s case and accepted by Mr Crysell that NAP Scaffolding and N.A.P. Anglia were one and the same company (see paragraph 8(c) above). This begs the question: what type of vehicles had been and were being used by NAP Scaffolding whilst it operated without a licence? Hence the reasonable enquiry about the use of the fuel cards.
20. Whilst Mr Crysell submitted that NAP did not have an adequate opportunity to provide the information required in the letter of 19th March 2020, he accepted that he could not point to any failings on the part of the OTC. He further accepted that the email address recorded for Mr Arnold on the application form was incorrect and that the OTC had otherwise used those lines of communication provided to it by the applicant.

Discussion

21. This application for an operator’s licence was handled very badly by NAP. It failed to provide to the OTC any description of the nature of the application or an explanation for the application being made which might have clarified some matters at an early stage. It was not even identified, until the representors pointed it out, that the application was for vehicles to carry scaffolding and that the operating centre was going to be used as a scaffolding yard when planning permission related to a joinery shop which operated within strict times permitted by the planning consent. Whilst TCs do not involve themselves with planning issues, the combined effect of s.14(3) and s.34(2)(a) of the 1995 Act and Regulation 15(1) of the Goods Vehicles (Licensing of Operators) Regulation 1995 is that in making any determination with respect to the suitability of any place on environmental grounds which has not previously been used as an operating centre, the TC is entitled to take into account any information about any planning permission or application for planning permission relating to the land. Whilst the existence of planning permission is not determinative of the issue of suitability on environmental grounds, it is of relevance (see T/2029/39 Uprite Scaffolding Limited). It is for this reason, no doubt, that a request was made in the terms set out in paragraph 7(g) above for documentation relating to planning. None was provided by NAP save for a bare assertion that there were no “council restrictions” on the site. This failure does not support Mr Arnold’s assertion that all requests were dealt with promptly. This enquiry was not dealt with at all.
22. The next issue is the failure of Mr Arnold to include Mrs Arnold’s directorship on the application form. An explanation for that failure was required at an early stage but was never given. In the absence of an explanation, a reasonable adverse inference could be drawn that a decision was taken not to include Mrs Arnold’s directorship so as to avoid declaring her previous operator licence history and that of NAP bearing in mind that it was the latter which was unlawfully using Mrs Arnold’s sole trader licence. Whilst Mrs Arnold’s licence was surrendered at a public inquiry in 2004, which is some time ago, this history was nevertheless relevant when considering fitness to hold a licence. Moreover, the question arises, what type of vehicles have been used since 2004 in the scaffolding operation?

23. The issue of the fuel cards is linked to the question posed above. What type of vehicles were being operated by NAP? The response set out in paragraph 8(b) above was inadequate and raised more questions than it answered. Mr Arnold's letter to the Upper Tribunal raises further questions by asserting that the fuel cards are used not only by NAP and NAP Scaffolding but also by Waveney Valley Joinery.
24. The requirement to provide evidence of the correct address was not fanciful or unreasonable. It is crucial that an applicant accurately sets out the full address of a proposed operating centre to ensure that the TC and any prospective representors know the precise location. By way of example, there might be two separate properties, one called Daganya Farm and the other called Daganya Farmyard. Mr Arnold owns the site and will therefore be under no illusions as to the correct address which appears to be "Daganya Farmyard". It is unknown why the full and correct address has not been used in the application or the advertisement.
25. As for the email of 19th March 2020, it is clear that Mr Whittaker was working on that day and would have received it. The failure to respond to it is not the result of any error or failing on the part of the OTC. An attempt was made to send the same email to Mr Arnold directly to the email address that he had incorrectly confirmed was his valid email address when signing the licence application form.
26. In all the circumstances we are not satisfied that the TC's decision was plainly wrong in any respect and neither the facts or the law applicable in this case should impel the Tribunal to allow this appeal as per the test in Bradley Fold Travel & Peter Wright v Secretary of State for Transport (2010) EWCA Civ.695. The appeal is dismissed.
27. We were informed by Mr Crysell at the conclusion of the appeal hearing, that NAP is preparing to make a further application for a licence. No doubt, all of the above issues will be explored in a public inquiry in due course.



HHJ Beech

Judge of the Upper Tribunal

**Signed on the original
14 December 2020**