



NCN: [2021] UKUT 215 (AAC)

Appeal No. NT/2020/71

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

**ON APPEAL from the DECISION of the HEAD of the TRANSPORT REGULATION  
UNIT**

**Dated 23 November 2020**

**Before:**                      **Kenneth Mullan**                      **Judge of the Upper Tribunal**  
   **Mr Andrew Guest**                      **Member of the Upper Tribunal**  
   **Mr David Rawsthorn**                      **Member of the Upper Tribunal**

**Appellant:**                      **J Owens Transport Ltd**

**Attendances:**

For the Appellant:                      The appellant did not participate in the remote oral hearing and was represented by Mr McNamee

For the Respondent:                      None

**Type of hearing:**                      Remote oral hearing via Sightlink

**Date of hearing:**                      22 June 2021

**Date of decision:**                      19 August 2021

**DECISION OF THE UPPER TRIBUNAL**

IT IS HEREBY ORDERED that this appeal be DISMISSED.

**SUBJECT MATTER:-**                      Revocation; repute; failure to nominate a transport manager

**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;

## REASONS FOR DECISION

1. This is an appeal from the decision of the Head of the Transport Regulation Unit ('TRU') to revoke the Appellant's goods vehicles operator's licence. The TRU is part of the Department for Infrastructure ('the Department')
2. The factual background to this appeal appears from the documents and the Head of the TRU's decision and is as follows:-
  - (i) The Appellant is the holder of a Standard International goods vehicles operator's licence which authorises the use of six vehicles and one trailer from an operating centre in Co Armagh Northern Ireland. The company has held their licence since 19 December 2017 and there is no adverse history on the licence.
  - (ii) The Head of the TRU has submitted that on 23 September 2020 a letter was 'auto-generated as the licence no longer had a transport manager as required under section 12A(2)(d) of the 2010 Act'. The Head of the TRU has also submitted that this letter was issued to the Appellant by email and 'to all known addresses by post' and outlined the steps to be taken to add a replacement transport manager. The letter also reminded the Appellant of the requirement to inform the Department of a change in circumstances within 28 days, as required by the conditions on the licence. The letter also stated that 'it is important that even if you apply to nominate a transport manager using the online facility you must still provide a response to this letter not later than the deadline specified.' The Appellant was provided with an opportunity to request a period of grace to allow for a new transport manager to be found and an opportunity to request a public inquiry if so desired. A deadline for response was set as 14 October 2020 and the Appellant was informed that a 'failure to provide a response to this letter by 14/10/20 will result in the Department revoking this licence.'
  - (iii) The Head of the TRU has submitted that on 22 September 2020 the Appellant sent an email to the NI Licensing Team to advise that he had lost his Self Service log in password. The NI Licensing Team responded to state that this had been forwarded to the appropriate team for action. The Head of the TRU noted that the response to the Appellant held a footnote with the following narrative:

'NI Licensing staff are currently working from home. Please email me and I will respond ASAP.

Important changes due to coronavirus (COVID-19) response. The NI Licensing Team is currently running an adapted service as the majority of staff are working from home in line with Executive guidance on Coronavirus (COVID-19).

Most correspondence from the NI Licensing Team will now be sent to you by email. There will be a reduction and possible delays on correspondence sent by post.

The best way to reach us at the moment is digitally. Please upload documents through your VOL user account or email us. There may be delays if you send correspondence to us by post. If you have any questions relating to your roads transport operations contact the Transport Regulation Unit by emailing [TRU@Infrastructure-NI.gov.uk](mailto:TRU@Infrastructure-NI.gov.uk)

If you are an existing operator without a VOL user account and you would like one, please email [Notifications@vehicle-operator-licensing.service.gov.uk](mailto:Notifications@vehicle-operator-licensing.service.gov.uk) and a member of staff will contact you as soon as possible to arrange this. You will need to answer some security questions.'

- (iv) On 28 September the Appellant again sent an email to the NI Licensing Team to advise that they had still not received their password update. The Head of the TRU has submitted that 'system records' show that the password was reset on 28 September 2020. In addition the Appellant updated the licence to add a new vehicle on 18 October 2020.
  - (v) The Head of the TRU has submitted that the Department was unaware of any response to the original 23 September 2020 letter prior to the passing of the 14 October 2020 deadline. He noted, however, that due to the ongoing Covid-19 pandemic staff had been instructed to allow additional time for responses to communication. He asserted that as a result of this instruction, on 21 October 2020 a NI Licensing caseworker contacted the Appellant because no response had been received to the 23 September 2020 letter. The Head of the TRU submits that the Appellant returned the call on the same date and that no reference was made to any previous attempts to respond to the Department's written request.
  - (vi) The Head of the TRU has submitted that on 21 October 2020 a first application was created on the self-service system to register a transport manager and that the application remained incomplete and was not submitted.
  - (vii) On 23 November 2020 correspondence setting out the decision to revoke the operator's licence was sent to the Appellant.
  - (viii) On 26 November 2020 an application for a stay of the licence revocation was received from Mr McNamee.
  - (ix) On 4 December 2020 the application for a stay was refused by the Head of the TRU.
  - (x) On 11 December 2020 an appeal against the revocation decision of 23 November 2020 was received in the office of the Administrative Appeals Chamber of the Upper Tribunal. In the notice of appeal the application for a stay of the revocation decision was renewed.
  - (xi) On 15 December 2020 the application for a stay was granted by a judge of the Upper Tribunal.
3. In the notice of appeal, Mr McNamee set out the following grounds of appeal on behalf of the Appellant:

'The operator's licence has been revoked on the grounds that the operator does not have a transport manager in breach of section 24(1)(a).

The operator was informed on 20<sup>th</sup> October 2020 that the transport manager had resigned and had withdrawn from their responsibilities with the company. The company was given a period to find a replacement. The Company located a replacement and identified the replacement as EO. The company informed the Department that Mrs O was taking over as transport manager on behalf of the company.

Mrs O attempted to register as transport manager via the Department's website, however for some unknown reason the website would not accept the application.

The Department was informed of this attempt to register Mrs O as a transport manager. The Department however by letter dated 23 November 2020 informed the operator of a decision to revoke the operator's licence citing the reason that the company had failed to avail of the opportunity to nominate a new transport manager,

The operator would state that the Department is in error in this regard and the reason why the new transport manager was not registered was due to a fault within the Department's own registration system.

The operator encloses a screenshot of the attempt to have Mrs O registered as a transport manager which could not pass the stage identified in the screenshot. The company has made ongoing efforts to register Mrs O from that date and has received various confirmations that the site itself is not functioning. In these circumstances we would state that there are no proper grounds for revocation of the operator's licence.'

### **General principles on the operation of the Act and Regulations**

4. At paragraphs 10 to 13 of the decision in NT/2013/82 Arnold Transport & Sons Ltd v DOENI, the Upper Tribunal set out the following general principles in the operation of the legislative provisions in Great Britain and Northern Ireland:

#### 'Some General Principles

10. An operator's licence can only be granted if the applicant satisfies the Department that the relevant requirements, set out in s. 12 of the 2010 Act as amended, have been met. [The expression Department is used in the legislation but for the purposes of the decisions required to be taken under the legislation it is the Head of the TRU who takes them]. The relevant requirements are now set out in Paragraph 17(5) of the Goods Vehicles (Qualifications of Operators) Regulations (Northern Ireland) 2012, ("the Qualifications Regulations), which substitutes a new s.12 and adds ss. 12A-12E to the 2010 Act. The Qualifications Regulations also contain important provisions in relation to Good Repute, Professional Competence and Transport Managers.
11. The grant of an operator's licence does not mean that an operator can then proceed on the basis that the requirements that must be met in order to obtain a licence can thereafter be disregarded. In our view it is clear both from the terms of the 2010 Act and from Regulation 1071/2009 that these are continuing obligations, which an operator is expected to meet throughout the life of the licence. It is implicit in the terms of s. 23, which gives the Department power to revoke, suspend or curtail an operator's licence, that this can take place at any time and for any reasonable cause, including matters covered by the requirements of s. 12 as amended. It is explicit in s. 24, which provides that a standard licence shall be revoked if at any time it appears that the licence-holder is no longer (i) of good repute, (ii) of appropriate financial standing or, (iii) professionally competent. The underlining, in each case is ours. First, we wish to stress that once it appears that the licence-holder is no longer of good repute, or of appropriate financial

standing or professionally competent the licence must be revoked because the Act makes it clear that there is no room for any exercise of discretion. Second, the use of the expression 'at any time' makes the continuing nature of the obligations crystal clear.

12. The Tribunal has stated on many occasions that operator's licensing is based on trust. Since it is impossible to police every operator and every vehicle at all times the Department in Northern Ireland, (and Traffic Commissioners in GB), must feel able to trust operators to comply with all relevant parts of the operator's licensing regime. In addition other operators must be able to trust their competitors to comply, otherwise they will no longer compete on a level playing field. In our view this reflects the general public interest in ensuring that Heavy Goods Vehicles are properly maintained and safely driven. Unfair competition is against the public interest because it encourages operators to cut corners in order to remain in business. Cutting corners all too easily leads to compromising safe operation.
13. It is important that operators understand that if their actions cast doubt on whether they can be trusted to comply with the regulatory regime they are likely to be called to a Public Inquiry at which their fitness to hold an operator's licence will be called into question. It will become clear, in due course, that fitness to hold an operator's licence is an essential element of good repute. It is also important for operators to understand that the Head of the TRU is clearly alive to the old saying that: "*actions speak louder than words*", (see paragraph 2(xxix) above). We agree that this is a helpful and appropriate approach. The attitude of an operator when something goes wrong can be very instructive. Some recognise the problem at once and take immediate and effective steps to put matters right. Others only recognise the problem when it is set out in a call-up letter and begin to put matters right in the period before the Public Inquiry takes place. A third group leave it even later and come to the Public Inquiry with promises of action in the future. A fourth group bury their heads in the sand and wait to be told what to do during the Public Inquiry. It will be for the Head of the TRU to assess the position on the facts of each individual case. However it seems clear that prompt and effective action is likely to be given greater weight than untested promises to put matters right in the future.'

### **The proper approach on appeal to the Upper Tribunal**

5. 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.’

At paragraph 4, the Upper Tribunal had stated:

‘It is apparent that many of the provisions of the 2010 Act and the Regulations made under that Act are in identical terms to provisions found in the Goods Vehicles (Licensing of Operators) Act 1995, (“the 1995 Act”), and in the Regulations made under that Act. The 1995 Act and the Regulations made under it, govern the operation of goods vehicles in Great Britain. The provisional conclusion which we draw, (because the point has not been argued), is that this was a deliberate choice on the part of the Northern Ireland Assembly to ensure that there is a common standard for the operation of goods vehicles throughout the United Kingdom. It follows that decisions on the meaning of a section in the 1995 Act or a paragraph in the Regulations, made under that Act, are highly relevant to the interpretation of an identical provision in the Northern Ireland legislation and vice versa.’

#### **Further submissions on behalf of the Appellant**

6. At the oral hearing of the appeal, Mr McNamee submitted that the Appellant did not receive the correspondence dated 23 September 2020 (which he described as the ‘proposal to revoke’ letter) and in which the Appellant was alerted to the potential of regulatory action being taken against him. The reason why the Appellant did not receive it was, firstly, that he no longer resided at one of the two postal addresses to which the letter was sent because of a fallout in his family which led to a breakdown in communication with other family members and that the correspondence, if received at that postal address was not forwarded to him. Secondly, while the second postal address to which it was sent was his operating centre, he had not visited the operating centre address because it was a yard attached to the property of his grandmother who was isolating or shielding because of greater potential of susceptibility to Covid-19. Mr McNamee submitted that the correspondence of 23 September 2020 was not received by the Appellant by email.
7. Mr McNamee submitted that the Appellant was unaware that the former transport manager had removed her name from the operator’s licence.
8. Mr McNamee asserted that the Appellant was first made aware of the potential of regulatory action being taken against him when he was contacted by the Departmental caseworker by telephone on 21 October 2020. Thereafter he had taken immediate steps to nominate a new transport manager but had been thwarted by technical problems and failures in the Department’s online ‘self-service’ system. Further when the Appellant attempted to contact the Department by telephone the response was an automated message indicating unavailability of the number.

## Analysis

9. We do not accept that the Appellant was unaware that the former transport manager had removed her name from the operator's licence. The relationship between an operator and a transport manager is dynamic and integral to the successful operation of a transport business.
10. We accept, of course, that by way of undated handwritten correspondence received in the Department on 11 September 2020 the Appellant informed his Departmental caseworker that he had changed his postal correspondence address. There was no reference to any change in the postal address of the operating centre. The Appellant also made reference to a new email address.
11. We also accept that the correspondence from the Department of 23 September 2020 was addressed to (i) the Appellant's former postal correspondence address and (ii) the postal address of the Appellant's operating centre. We know that receipt of the correspondence of 23 September 2020 at the Appellant's former postal correspondence address was effected as there is a copy of a Royal Mail 'Proof of Delivery' confirmation in the bundle of papers which is before us.
12. We regard the explanations proffered by Mr McNamee for his assertion that the correspondence of 23 September 2020 was not received by the Appellant at either postal address to be implausible.
13. As noted above, we know that the correspondence was received at the Appellant's former postal correspondence address. It was 'signed for' at that address. On the Royal Mail 'Proof of Delivery' confirmation the signer is noted to be 'Owens' and we find that this was likely to be a member of the Appellant's family and very likely to be his father. The requirement for a postal item to be 'signed for' signifies that the item is important. We regard it to be improbable that someone would sign for an item and realising that it was of importance, fail to pass it on, even if there was a breakdown in relationships in the family.
14. We have no parallel 'Proof of Delivery' confirmation for the postal address of the operating centre. We know that the postal address of the operating centre did not change. As noted above, the reason why it is asserted that it was not received at this address was that the operating centre was a yard attached to the property of his grandmother who was isolating or shielding because of greater potential of susceptibility to Covid-19. Even if the grandmother was isolating this did not prevent receipt of postal items at the address. Further, she would have been permitted to have visitors for caring reasons and the social distancing rules in Northern Ireland in September/October 2020 were not as stringent as earlier in the year. Equally she could have alerted the Appellant, by telephone, for example, to the receipt of the correspondence and indicated that she would leave it in a safe place for him and where she would not be required to be present. Finally, it is difficult to accept that the Appellant would not have 'looked in' to check on her when he was there.
15. We turn to potential receipt of the correspondence of 23 September 2020 by email. The Department has not pointed to a copy of an email and attachment to the Appellant. We note, however, that if it was sent by email then it would have gone to the correct email address. As noted above, in the undated handwritten correspondence received in the Department on 11 September 2020 the Appellant made reference to a new email address. We know, however, that the

Appellant was in successful email correspondence with his caseworker on 22 September 2020 and on 28 September 2020, copies of which are in the bundle of documents before us, and that the email address which the Appellant was using on those dates was the one which had been notified in the handwritten correspondence received on 11 September 2020.

16. Accordingly, we do not accept the assertions that the Appellant was unaware that his former transport manager had removed her name from the operator's licence or was first made aware of the potential of regulatory action being taken against him when he was contacted by the Departmental caseworker by telephone on 21 October 2020. We conclude that inaction on the nomination of a new transport manager between 23 September 2020 and 21 October 2020 was as a result of failures on the part of the Appellant.
17. We do know that the Appellant was most certainly made aware of the potential for regulatory action being taken against him on 21 October 2020. This was as a result of the initiative of his caseworker (the same caseworker who had been in email correspondence with the Appellant on 22 and 28 September 2020) in contacting the Appellant to enquire why there had been no response to the correspondence of 23 September 2020. The immediate response of the Appellant was to create an application on the Departmental 'self-service' system. As was noted above, Mr McNamee has submitted that thereafter the Appellant had been thwarted by technical problems and failures in the Department 'self-service' system and that when he (and others) attempted to contact the Department by telephone the response was an automated message indicating unavailability of the number.
18. We accept that in the circumstances which prevailed in September/October/November 2020 communication with official agencies by telephone was problematic due, in the main, to the requirements to work from home and consequent reduction in personnel to respond to telephone calls. It is clear, however, that the Appellant had successful communication with his caseworker by telephone on 21 October 2020. It is also the case that the Appellant in both postal and email correspondence was advised that the best method of communication was by email. Further, it is clear that the Appellant knew of the benefits of email correspondence using this to communicate with his caseworker on 22 and 28 September 2020. It is not clear to us, and if the Appellant was not successful in communicating with the Department by telephone, why he did not turn to the alternative, and preferred by the Department, communication by email.
19. We also accept that online systems for registration and recording are susceptible to failures and that the Appellant may have encountered such malfunctions when attempting to nominate a new transport manager. Once again, however, the difficulties could have been communicated to his caseworker by email. Of much more significance, however, is the statement by the Head of the TRU in paragraph 14(c) of the determination on the application for a stay of the revocation decision that:

'System records show that as many as 47 transport manager applications were successfully submitted by other users between 23<sup>rd</sup> September 2020 and 23<sup>rd</sup> November 2020.'



20. We have given some credit to the Appellant for the fact that the company has held their licence since 19 December 2017 and there is no adverse history on the licence. It is clear, however, that the circumstances giving rise to the revocation arose because his own failures and omissions. We note, however, that we can see no reason why an application for a new operator's licence would not be successful subject, of course, to the application meeting the relevant legislative criteria including the nomination and acceptance of a qualified transport manager.
21. For these reasons, we have concluded that the decision of the Head of the Transport Regulation Unit was not plainly wrong. The appeal is, accordingly, dismissed.
22. We are of the view that the Appellant should be given an appropriate time for an orderly winding-up of the business. Accordingly, the revocation will take effect from 11.59 p.m. on 18 September 2021.

A handwritten signature in black ink, appearing to read "Kenneth Mullan", is centered on a light grey rectangular background.

**Kenneth Mullan, Judge of the Upper Tribunal,  
19 August 2021**