



Delivery Demons Ltd.
[2021] UKUT 247 (AAC)
Appeal No. T/2021/06

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

ON APPEAL from a DECISION of the TRAFFIC COMMISSIONER for London and South East of England

Decision dated: 11 December 2020
Appeal dated: 7 January 2021
Before: Judge Rupert Jones: Judge of the Upper Tribunal
Mr A Guest: Member of the Upper Tribunal
Mr S James: Member of the Upper Tribunal
Appellant: DELIVERY DEMONS LTD
Reference: OK 2026056
Attendances: Jonathan Adams and Margaret Pike for the Appellant
Heard at: Rolls Building, 7 Rolls Buildings, London, EC4A 1NL
Date of Upper Tribunal Hearing: 14 September 2021
Date of Decision: 30 September 2021

DECISION OF THE UPPER TRIBUNAL

The appeal against the Traffic Commissioner's decision dated 11 December 2020 refusing to vary the Appellant's Goods Vehicle Operator's Licence is dismissed.

Subject matter:

Variation of Operator's licence: application for variation of licence refused on grounds it failed to fulfil the requirements of Section 13C(5) and (6) of the (as applied by Section 17) Goods Vehicles (Licensing of Operators) Act 1995. The six vehicles and trailers sought to be parked at a new operating centre would have exceeded the maximum appropriate capacity which could be accommodated at the site.

REASONS FOR DECISION

Introduction

1. The Appellant appeals to the Upper Tribunal from a decision of the Traffic Commissioner (TC) made on 11 December 2020 by notice of appeal dated 7 January 2021. The TC's decision refused to vary the operator's licence of the Appellant as the application failed to fulfil the requirements of Section 13C(5) and (6) (as applied by Section 17) of the Goods Vehicles (Licensing of Operators) Act 1995.

The TC's Decision

2. On 22 June 2020 the Appellant applied to change its operating centre and to increase the numbers of vehicles authorised on the licence. By letter dated 11 December 2020 the TC informed Mr Lawrence Dixon, managing director, of the Appellant that the application to vary its operator's licence to allow for further vehicles and trailers to be parked at a new proposed operating centre of Bon Accord House, Castle Road, Sittingbourne was refused.
3. The reasons for refusal were contained in the letter:

'I refer to your application to vary your operator's licence and my colleague's letter dated 5 November 2020 which advised you of the Traffic Commissioner's extant concerns in this case.

The time period stated in that letter was given to allow the operating centre situation to be regularised. Within that time, we have received correspondence from the site owner. Unfortunately, the authorities held by operators at the operating centre have not altered to allow further grant of applications for the premises. In view of the visit conducted by a DVSA traffic examiner, it is understood that the operating centre is currently at capacity and does not allow for further vehicles or trailers to be parked there.'

The Grounds of Appeal

4. Mr Lawrence Dixon, on behalf of the Appellant, set out the grounds of appeal against the TC's decision in the Notice of Appeal:

'I want to appeal against the decision by the TC to reject my application to change my operating centre and to increase the numbers of vehicles authorised on the licence.

.....

We have been working with the landlord of the site as there is a number of operators that still have licences registered at Bon Accord House that have actually left. The landlord has been working with the OTC [Office of Traffic Commissioners] to contact these operators to update their licences and the deadline for this was 4/1/21.

We have increased the available size of the area we have rented at our own expense to make this more suitable.

We have enclosed a plan of the site indicating the spaces we are proposing to use. The container on this plan has been moved now which has also increased the available space. There is also an issue with the scaling on this plan which was provided by the landlord as

the bay on the other side of the gate look bigger than they are, as all the lorries that currently park there do not come out beyond the gates.

We have also been advised that the Sunderland House site [the Appellant's existing operating centre] has been earmarked for demolition.

Bon Accord House is in a commercial industrial estate and is more suited to our growing needs.

We were also advised that a Traffic examiner would be contacting us regarding a site visit and we did not hear anything and he turned up out of the blue so were not able to address any question or concerns.'

5. The Notice of Appeal enclosed an A4 plan titled 'Fast Forward International [the landlord] Bon Accord House Parking Allocation.' The Plan indicated that there were 43 Bays at the site. Bays 1-22 and 31-42 were marked as used by other operators with bays 23 & 25-30 (in the bottom right hand corner of the plan) proposed to be used by the Appellant.

The Background

6. On 27 September 2019 the Appellant was granted a standard International Licence currently authorising 5 vehicles and 4 trailers at the Sunderland House site in Tonbridge.
7. On 22 June 2020 the Appellant applied for a variation to its operator's licence to permit it to operate from Bon Accord House as a new operating centre. The total number of vehicles proposed was recorded to be an increase from 5 to 8 vehicles and from 4 to 8 trailers. However, by email dated 15 July 2020 Mr Dixon confirmed that the Appellant was only requesting for 6 vehicles and 6 trailers at Bon Accord House and the other 2 would be based at the Tonbridge site.
8. On 29 June 2020 the OTC acknowledged the Application to vary its goods vehicles operator's licence and informed the Appellant that it would be now listed in the applications and decisions list due for publication on 2 July 2020. The OTC requested the Appellant provide further information by 13 July 2020 – namely an advertisement as proof of publication that the application had been advertised and a site plan of the operating centre showing clear distinct parking where the Appellant would park its vehicle and trailers and photos highlighting the available space for 8 vehicles and 8 trailers.
9. On 15 July 2020 Mr Dixon, on behalf of the Appellant, provided further information in support of the variation application. This included a letter from Lee Davison the Depot Manager of Fast Forward International the landlord of Bon Accord House. He confirmed that the Appellant had permission to park up to 6 vehicles at the premises.
10. On 27 August 2020 the OTC wrote to the Appellant stating 'The Deputy Commissioner has now considered your application and has concerns that there is insufficient capacity at the proposed operating centre to accommodate any further vehicles. As a result he has asked that a Traffic Examiner visit the site to assess its capacity before a final decision is made. Your application is therefore held in abeyance pending the outcome of the visit....'

11. The OTC's licensing submission noted that Bon Accord currently had 33 Vehicles and 31 trailers authorised at the site whose landlord was Fast Forward International. The Application was to add a further 6 vehicles and 6 trailers (and there was another application outstanding from a different operator to add further 2 vehicles and 2 trailers). Following the Traffic Examiner's site examination, on 14 October 2020 the OTC's caseworker noted that:

'The Traffic Examiner [TE] has stated that the site appears to be well managed but the maximum amount of vehicles is already at the site (33 vehicle spaces) for it to be operated safely and any additional vehicles at the site would not be appropriate, the TC also states that if all operators were using their full authorisations at the site it would add 15 spaces making a total of 48 and the site would not be suitable for this and it would be over crowded.

I recommend that this application for 6v6t and the other application [] are both refused due to insufficient capacity at the proposed operating centre, and also the site owner informed that any future application at the site will not be granted until the number of vehicles being parked at the site is reduce to 33 spaces which the TE states is the maximum amount of vehicles.'

12. On 14 October 2020 it was recommended that further information be requested from the Appellant to allow an opportunity for the site owner and other tenants to address the issues highlighted in the TE report – the actual capacity, based on the TE findings. This led to the letter dated 5 November 2020 as addressed above.

13. On 5 November 2020 the OTC wrote to the Appellant including the following statements:
'A Traffic Examiner visited the proposed operating centre following concerns that there is insufficient capacity at the site to accommodate any further vehicles.

The report confirmed the site is suitable for up to 33 vehicles, however if all existing operators were keeping their full authorisations at the site, the number of vehicles would total 48. For this reason the site does not have sufficient capacity to accommodate any further vehicles based on the current authorised numbers.

It was noted that not all operators appeared to be using their full authority however if they did, there would be insufficient capacity and the site would be overcrowded.

The Traffic Commissioner has decided to hold your application in abeyance for one month to allow an opportunity for the site owner and other tenants to address the issues highlighted. The onus is on you to solve this matter with the site owner. If, after a month, relevant applications to reduce authority have been made by other tenants, your application may be granted if the numbers will allow it.'

14. On 10 December 2020, a caseworker recommended refusal of the licence. The reasons were set out in the updated submission:

'..slightly more than a month as been afforded to the applicant and site owner to regularise the position since your last decision in the case. During that time we have received correspondence from both parties, though the situation does not appear to be in a position

which allows for grant. As of 1600hrs today, the total existing goods vehicle authority for the site stands at 33 vehicles and 31 trailers (with two vehicles under a PSV licence still authorised). Each of the four applications [including applications other than the Appellant's] would increase the site subscriptions above the maximum capacity as recommend by the TE.

The lease holder for the site, Mr Lee Davison, contacted CLO in November asking for an updated list of site users according to our records, and one was provided. In response Mr Davison has provide a plan and list of operators with some comments included.....In total we have 43 parking spaces, which is for a mixture of vehicles sizes". He added that "several firms have left our site over the years and recently these include Abbey, BIFFA & Stephen Marchant" I note from searches that Biffa's authority at the site is not listed on VOL, and even with the removal of that from the Abbey Logistics and Mr Marchant's licence (a joint 4v 5t), this would not free up enough space for the four existing applications. I note from Mr Davison's plan that the spaces allocated to Delivery Demons is one block, apparently sufficient for five vehicles. This does not appear to be the case, and access for those vehicles to the area, even without the parking of "HWC" vehicles in their allocated spaces, seems difficult if not implausible. Despite the earlier suggestion that the site appears to be well-organised and run, there are several discrepancies between the site owner's documentation and VOL records...

Despite the clear opportunity afforded to the applicant to regularise the position with the site owner from your previous decision, it appears the site is still not organised to allow grant, and I would recommend the applications are now refused as the applicants have failed to fulfil the below legislative requirements.....'

15. On 11 December 2020 the TC confirmed the decision to refuse the application, which decision was communicated in the decision of that date.

Relevant legislative provisions

Application for an operator's licence

16. Under section 2 of the Goods Vehicles (Licensing of Operators) Act 1995 a person shall not use a goods vehicle on a road for the carriage of goods for hire, reward, or in connection with any trade or business carried on by them unless that person possesses an Operator's Licence. Section 13 sets out some requirements which an operator must meet when a licence is sought:

'13 Determination of applications for operators' licences

(1) Subject to sections 11 and 45(2), on an application for a standard licence a traffic commissioner shall consider—

- (a) whether the requirements of subsections (3) and (5) are satisfied, and
- (b) if he thinks fit, whether the requirements of subsection (6) are satisfied.

(2) Subject to sections 11 and 45(2), on an application for a restricted licence a traffic commissioner shall consider—

- (a) whether the requirements of subsections (4) and (5) are satisfied, and
- (b) if he thinks fit, whether the requirements of subsection (6) are satisfied.

(3) For the requirements of this subsection to be satisfied the traffic commissioner must be satisfied that the applicant fulfils the following requirements, namely—

- (a) that he is of good repute,
- (b) that he is of the appropriate financial standing, and
- (c) that he is professionally competent;

and the traffic commissioner shall determine whether or not that is the case in accordance with Schedule 3.

(4) For the requirements of this subsection to be satisfied the applicant must not be unfit to hold an operator's licence by reason of—

- (a) any activities or convictions of which particulars may be required to be given under section 8(4) by virtue of paragraph 1(e) or (f) of Schedule 2, or
- (b) any conviction required to be notified in accordance with section 9(1).

(5) For the requirements of this subsection to be satisfied it must be possible (taking into account the traffic commissioner's powers under section 15(3) to issue a licence in terms that differ from those applied for) to issue a licence on the application in relation to which paragraphs (a) to (e) will apply—

- (a) there are satisfactory arrangements for securing that—
 - (i) Part VI of the Transport Act 1968 (drivers' hours), and
 - (ii) the applicable Community rules, within the meaning of that Part, are complied with in the case of the vehicles used under the licence;
- (b) there are satisfactory arrangements for securing that the vehicles used under the licence are not overloaded;
- (c) there are satisfactory facilities and arrangements for maintaining the vehicles used under the licence in a fit and serviceable condition;
- (d) at least one place in the traffic commissioner's area is specified in the licence as an operating centre of the licence-holder, and each place so specified is available and suitable for use as such an operating centre (disregarding any respect in which it may be unsuitable on environmental grounds);
- (e) the capacity of the place so specified (if there is only one) or of both or all the places so specified taken together (if there are more than one) is sufficient to provide an operating centre for all the vehicles used under the licence.

(6) For the requirements of this subsection to be satisfied the provision of such facilities and arrangements as are mentioned in subsection (5)(c) must not be prejudiced by reason of the applicant's having insufficient financial resources for that purpose.'

9. Section 13C provides the requirements that must be satisfied for standard and restricted licences:

13C Requirements for standard and restricted licences

(1) The requirements of this section are that it must be possible (taking into account the traffic commissioner's powers under section 15(3) to issue a licence in terms that differ from those applied for) to issue a licence in relation to which subsections (2) to (6) will apply.

(2) There must be satisfactory arrangements for securing that the following are complied with in the case of vehicles used under the licence—

- (a) Part 6 of the Transport Act 1968 (drivers' hours);
- (b) the applicable Community rules, within the meaning of that Part.

(3) There must be satisfactory arrangements for securing that vehicles used under the licence are not overloaded.

(4) There must be satisfactory facilities and arrangements for maintaining the vehicles used under the licence in a fit and serviceable condition.

(5) The licence must specify at least one place in the traffic area concerned as an operating centre of the licence-holder, and each place so specified must be available and suitable for use as an operating centre of the licence-holder (disregarding any respect in which it may be unsuitable on environmental grounds).

(6)The capacity of the place specified as an operating centre (if there is only one) or both or all of the places so specified taken together (if there are more than one) must be sufficient to provide an operating centre for all the vehicles used under the licence.

[Emphasis Added]

17. Section 17 governs applications for variation of licences:

17 Variation of operators' licences.

(1)Subject to section 18, on the application of the holder of an operator's licence, a traffic commissioner may vary the licence by directing—

(a)that additional motor vehicles be specified in the licence or that any maximum number specified in it under section 6 be increased;

(b)that any vehicle cease to be specified in the licence or that any maximum number specified in it under section 6 be reduced;

(c)that any provision in the licence such as is mentioned in section 5(2) cease to have effect;

(d)that a provision such as is mentioned in section 5(2) be included in the licence;

(e)that any provision in the licence such as is mentioned in section 6(1)(b) or (2)(b) cease to have effect;

(f)that a provision such as is mentioned in section 6(1)(b) or (2)(b) be included in the licence;

(g)that a new place in the same traffic area be specified in the licence as an operating centre of the licence-holder, or that any place cease to be so specified;

(h)that any undertaking recorded in the licence be varied or removed;

(i)that any condition attached to the licence be varied or removed;

(j)in the case of a restricted licence, that it be converted into a standard licence or, in the case of a standard licence, that it be converted into a restricted licence;

(k)in the case of a standard licence, that it cover both international and national transport operations instead of national transport operations only, or vice versa.

(2)A person applying for the variation of an operator's licence under this section shall give to the traffic commissioner dealing with the application, in such form as he or another traffic commissioner may require, such information as he or another traffic commissioner may reasonably require for disposing of the application.

(3)Except in the cases mentioned in subsection (4), a traffic commissioner shall publish notice of any application for the variation under this section of an operator's licence, and shall do so in the manner prescribed for the publication of notices under section 10(1).

(4)The excepted cases are—

(a)where the application is for a direction under subsection (1)(a) that additional motor vehicles be specified in the licence;

(b)where the application is for a direction under subsection (1)(b), (d) or (f);

(c)where the application is for a direction under subsection (1)(g) that a place cease to be specified in a licence as an operating centre of the licence-holder;

(d)where the application is for a direction under subsection (1)(j) that a standard licence be converted into a restricted licence;

(e)where the application is for a direction under subsection (1)(k) that a licence cover national transport operations only, instead of both national and international transport operations;

(f)where the traffic commissioner is satisfied that the application is of so trivial a nature that it is not necessary that an opportunity should be given for objecting to it or making representations against it.

(5)Where notice of an application is published under subsection (3), the following provisions, namely—

(a)section 10(2),

(b)section 12(1)(a), (6), (8) and (9)(a),

(c) sections 13 to 13D, and

(d) section 15,

shall, with any necessary modifications and subject to section 19, apply in relation to that application as they apply in relation to an application for an operator's licence of which notice is published under section 10(1).

The Upper Tribunal's jurisdiction

18. Paragraph 17 of Schedule 4 to the Transport Act 1985 provides:

“(1) The Upper Tribunal are to have full jurisdiction to hear and determine 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”.

(2) On an appeal from any determination of a traffic commissioner other than an excluded determination, the Upper Tribunal is to have power-

(a) to make such order as it thinks fit; or

(b) to remit the matter to the traffic commissioner for rehearing and determination by the commissioner in any case where the tribunal considers it appropriate.

(3) The Upper Tribunal may not on any such appeal take into consideration any circumstances which did not exist at the time of the determination which is the subject of the appeal”.

19. 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. The court applied *Subesh and ors v Secretary of State for the Home Department* [2004] EWCA Civ 56, where Woolf LJ held:

“44...The first instance decision is taken to be correct until the contrary is shown...An Appellant, if he is to succeed, must persuade the appeal court or tribunal not merely that a different view of the facts from that taken below is reasonable and possible, but that there are objective grounds upon which the court ought to conclude that a different view is the right one...The true distinction is between the case where the appeal court might prefer a different view (perhaps on marginal grounds) and one where it concludes that the process of reasoning, and the application of the relevant law, require it to adopt a different view. The burden which an Appellant assumes is to show that the case falls within this latter category.”

20. The Tribunal is not required to rehear all the evidence by conducting what would, in effect, be a new first instance hearing. Instead it has the duty to hear and determine matters of both fact and law on the basis of the material before the Traffic Commissioner but without having the benefit of seeing and hearing the witnesses.

21. The Appellant 'assumes the burden' of showing that the decision appealed from is 'wrong'.

22. In order to succeed the Appellant must show not merely that there are grounds for *preferring* a different view but that there are objective grounds upon which the Tribunal ought to conclude that the different view is the right one. Put another way it is not enough that the Tribunal might *prefer* a different view; the Appellant must show that the process of reasoning and the application of the relevant law *require* the Tribunal to adopt a different view.

23. That is the approach which we have followed in deciding this appeal.

The Appellant's submissions

24. At the hearing, the Appellant's transport manager, Margaret Pike and Jonathan Adams, operations manager and director, appeared for the Appellant. They submitted that there was sufficient space for them to park 6 vehicles and 6 trailers at Bon Accord House so that the Appellant should be granted a variation to be allowed to operate from there. They relied heavily on the suggestion that many of the operators who had previously been listed as operating from the site were no longer operating from there and therefore there were sufficient empty bays to allow the application for variation to be granted. They handed up a new plan and photographs of the site indicating that there was sufficient space for the Appellant to park 6 vehicles and 6 trailers in free bays.
25. They pointed to an email from Lee Davidson of 16 April 2021 stating that the operator Biffa was no longer operating from the site and confirming that that company no longer shows Fast Froward International as one of their operating centres. It stated Mr Davison would try and obtain clarification from Abbey regarding their operating centres as they also no longer parked at the premises.
26. They also relied on the written submissions stamped with the date 13 May 2021 which had been prepared by Mr Dixon on behalf of the Appellant. In the papers, Mr Dixon had relied on a number of bullet points such as:

'.....

- In the bundle from the OTC was a spreadsheet, the origin of this spreadsheet is unknown. Presumably this is from the OTC's records although this is not made clear in the papers. The spreadsheet shows 38 vehicles and 31 trailers authorised on the site, although a number of these are no longer parked there. From the licensing submission in the OTC bundle there is mention of a phone call to Lee but was advised that Lee was on furlough. Geoff advised the site can hold 30 vehicles. Katie was unsure if the site could fit the existing vehicles and suggested the pending applications be held in abeyance until a Traffic Examiner could be arranged to visit the site.
- We have checked the list of operators listed on the spreadsheet from the OTC's bundle and several of those have now moved their operating centres or surrendered their licences so current total based on those operators would be 22 vehicles and 19 trailers.
.....
- The environmental report also states that some companies have listed Bon Accord House as their operating centre but are not operating anymore due to failed business or retirement. The Traffic Examiner states that a large bus company have not used the site for some time, that he has spoken to a representative of the company and that they have no plans of removing the site from the licence.
- The environmental report also includes a section for an interview with the operator. No attempt was made by the Traffic Examiner to contact us to carry out the site inspection or an interview of any sort, either in person, phone or online.

-
- Licencing submissions... stating space allocated to us is apparently sufficient for 5 vehicles but the parking of a neighbouring vehicle would make this implausible, conversation with the Traffic Examiner at the site visit would have allowed opportunity to discuss this.
-
- Email received for Lee Davison on 13/04/2021 stating that Go-Ahead Bus Company had removed Bon Accord House from their O licence in November 2020 despite the Traffic Examiner stating they had no plans to remove the site from their licence. Also, on this email was a letter from the Traffic Commissioner noting that Watkins Transport had reduced their licence down to 1 space.
 - Email received from Lee Davison dated 16/04/2021 confirming that Biffa no longer have Bon Accord House as their operating centre.

Issues

- Number of changes of case worker....
 - Difficulties in getting hold of case workers...
- ...
- No interview conducted by Vehicle Examiner or contact of any kind
- ...
- We have measured the available space and there is 714sq ft and also an additional parking space.'

Analysis and determination

27. We have no hesitation in rejecting the Appellant's grounds of appeal. We are satisfied that the TC was not wrong in fact nor law in deciding to refuse to vary the Operator's Licence to permit it to operate from Bon Accord House with 6 vehicles and 6 trailers.
28. The TC applied the correct test in law and gave sufficient reasons within the decision letter of 11 December 2020 and earlier letter of 5 November 2020. Those reasons were expanded upon within the caseworker's reasons of 10 December 2020.
29. At the time of the decision there was no independent evidence, record or confirmation that the total number of vehicles authorised to operate from the site had been reduced in the way the Appellant suggests such as to allow its application to be granted.
30. The Appellant was given a reasonable opportunity to present evidence to the OTC that there was sufficient space for the Appellant to be permitted to operate from Bon Accord. It failed to do so by 11 December 2020 and the independent evidence and records confirmed that at the time the site was only authorised as safe and appropriate to park 33 vehicles and 31 trailers.
31. Granting the Appellant's application for 6 vehicles and 6 trailers would mean that the authorised capacity for number of vehicles at the site, as determined by the Traffic Examiner, would be exceeded.
32. We must decide this appeal as at the date of the OTC's decision in December 2020 and not based on subsequent events. At that time, there was no sufficient and independent evidence that other operators had ceased to register their vehicles at the site and sufficient bays had been vacated to allow the Appellant to operate its vehicles from the site without

exceeding the authorised number. The TC was entitled to base her decision on the confirmed records and independent evidence available at that time. The Appellant has not demonstrated that this decision is wrong.

33. We are satisfied that there has been no breach of procedural justice – the Appellant was given a fair opportunity to present further evidence between 5 November and 10 December 2020, specifically to evidence the assertion that there was sufficient space at the site for the application to be granted. It did not do so.
34. We are satisfied that the TC’s decision, based on the TE’s report, was correct that the total number of vehicles and trailers that should be authorised to operate from the site is 33 trailers and 31 vehicles. We are satisfied that the decision regarding the capacity is reasonable and the Appellant does not challenge the total number of vehicles authorised to operate from the site. Even if it did, it provides no reasons why the TE’s assessment as to the maximum capacity is wrong.
35. Further, the subsequent evidence provided on behalf of the Appellant in 2021 after the decision was made still does not independently confirm which operators have ceased to register their vehicles to operate from the site. Neither does it demonstrate that the total number of vehicles registered is below the authorised number so as to allow the Appellant’s application for variation to be granted. It is based on hearsay statements in emails rather than independent records.
36. In any event, the TC was required to make a decision based upon the evidence then available and we could not take into account a subsequent change in circumstance even if reasonable and sufficient evidence of such was now available.
37. The Appellant remains entitled to make a fresh application for a variation of its licence to the TC. It would be well advised to seek advice and assistance so that it is able to provide good evidence (from the landlord and other operators) confirming the number of operators and vehicles authorised to operate from the site and the number of available spaces being sufficient for its application to be granted.

Conclusion

38. We dismiss this appeal to the Upper Tribunal.

Authorised for release

Rupert Jones
Judge of the Upper Tribunal

Dated: 30 September 2021