



[2022] UKUT 00114 (AAC)
Appeal No. UA-2021-000204-T

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

**ON APPEAL from the DECISION of the TRAFFIC COMMISSIONER for
the SOUTH EASTERN and METROPOLITAN TRAFFIC AREA**

Before: M Hemingway: Judge of the Upper Tribunal
D Rawsthorn: Member of the Upper Tribunal
G Roantree: Member of the Upper Tribunal

Appellants: Kent Solutions UK Limited and David Coburn
Licence No's: OK1142377 and OF2040057
Heard at: Field House in London
On: 10/03/2022
Date of decision: 21/04/2022

DECISION OF THE UPPER TRIBUNAL

The appeals of Kent Solutions UK Limited and David Coburn are dismissed.

SUBJECT MATTER

Good repute.
Professional competence.

CASES REFERRED TO

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



Appeal no: UA-2021-000204-T

REASONS FOR DECISION

1. This is an appeal to the Upper Tribunal brought by Kent Solutions UK Limited (“the Operator”) and David Coburn (“Mr Coburn”), who is the Operator’s sole director and transport manager. The appeal is directed towards decisions of the Traffic Commissioner for the South Eastern and Metropolitan Traffic Area (“the TC”), delivered orally on 8 September 2021 and confirmed in written reasons of 9 September 2021, to revoke both standard international goods vehicle operators licences which it held under reference numbers OK1142377 and OF2040057, to decide Mr Coburn had lost his good repute as a transport manager and to disqualify him from acting as such on any operator licence for an indeterminate period.

2. The appeal was considered at a traditional face to face hearing which took place at Field House in London on 10 March 2022. Mr Coburn was in attendance and was represented by Ms H Newbold who, as we understand it, is in-house Counsel with Smith Bowyer Clarke, Solicitors. We are grateful to Ms Newbold for her straightforward approach, her clear oral submissions and her helpful skeleton argument.

3. By way of background, the above licences had been granted on 20 January 2016 and 11 February 2021. However, on 2 February 2021, one PC Anstead of the Metropolitan Police Commercial Vehicle Unit, observed a heavy goods vehicle (HGV) which was, at the time, specified on licence OK1142377 hauling a blue flatbed semi-trailer loaded with the body of a weighbridge. An accompanying vehicle was driven away upon a police presence being noted. Concerns noted by PC Anstead included a broken axle fitting, a defective front nearside indicator, and ratchet straps being in poor condition, and the fact that the load had moved as a result of its being on the trailer bed at an angle. Further, once tachograph information had been downloaded the driver of the HGV was given warnings and fixed penalty notices in consequence of breaches of rest and driving hours rules and for carrying a dangerous load. It also transpired that the HGV did not have a current valid MOT certificate. PC Anstead, having taken all that action, made a follow-up visit to the Operator’s premises on 3 March 2021. At that visit Mr Coburn asserted that he had misinterpreted a letter which had been sent to him by the Driver and Vehicle Standards Agency regarding MOT requirements and that the events of 2 February 2021 had been a consequence of the irresponsibility of the HGV driver. Mr Coburn also explained that he had had some “personal issues” which he was dealing with. He was given time to rectify record keeping defects relating to brake tests, to sort out the MOT failings and to improve his working knowledge of Special Types General Orders regulations relating to the carriage of unusual loads. It was indicated that there would be a further visit.

4. On 10 May 2021, PC Anstead and a colleague observed a different HGV hauling a flatbed semi-trailer loaded with a tracked excavator/digger on a motorway. The vehicle was stopped. Concerns included what appeared to be an oversize and over-weight load, the load



not being adequately secured, and the trailer unit having an air leak. Multiple tachograph infringements were subsequently discovered. The HGV involved in this incident was not specified on any licence, but the driver indicated he was working for the Operator and/or Mr Coburn. The HGV had been specified on licence OK1142377 until 2 February 2021. The vehicle was registered to a different Operator, that Operator having Mr Coburn as its nominated transport manager. On 11 May 2021 PC Anstead visited the Operator's premises (that is Kent Solutions premises) and informed Mr Coburn of the tachograph infringements.

5. On 26 July 2021, PC Anstead having sent a written report to the Office of the Traffic Commissioner ("OTC"), the OTC wrote to the Operator and Mr Coburn calling them to a public inquiry ("PI"). The PI was held on 8 September 2021. Mr Coburn attended and gave oral evidence as did PC Anstead, the latter by way of video-link. The Operator and Mr Coburn were both represented by Ms Newbold. The TC went on to make her decision of 8 September 2021 and to confirm her reasoning in writing on 9 September 2021.

6. The TC, in her written reasons, indicated that having considered the written statement of PC Simon Anstead and having listened to him give oral evidence at the PI she found him to be "*a credible and persuasive witness*". She acknowledged the presence of some imperfections in his evidence but thought those not sufficient to offset her overall view regarding the veracity and accuracy of what he had had to say. She noted the concerns which had been evident from the roadside encounters of 2 February 2021 and of 10 May 2021. She also expressed concern regarding the failure of the Operator and Mr Coburn to properly respond to police enquiries. She noted imperfections with respect to maintenance documentation and procedures and observed that Mr Coburn, in his capacity as Transport Manager, had not been properly attending to such matters and that, even on his own account he had "*his eye off the ball*". She also noted, with some concern, that he had not properly understood the brake testing system.

7. The TC then went on to add:

"17. Everything I have said in relation to this Operator and Transport Manager is the same, every single aspect that is a fail is a fail of Mr Coburn. As a Director he should have been exercising quality monitoring and control of his transport operations and as a Transport Manager he should have been exercising continuous and effective management of the transport operations. The only time he has been diligent is making sure he gets behind the wheel of a vehicle when it suits him or someone else. It is for those reasons I believe it is inevitable that I find the good repute of the Operator and the Transport Manager is lost. It would send entirely the wrong message otherwise to other compliant and hard-working Operators who take the time to do their risk assessments and check them, who take the time to train their drivers, monitor their drivers and look at the paperwork.

18. I have stepped back, just, from a period of disqualification for the Company/Director which means it is open for a new application to be made. I have gone into some detail in this decision so that Mr Coburn can be left in no doubt that any future application needs to look very different to what PC Anstead and I have been dealing with. An application can be made but the burden of proof is on the applicant. You have to persuade me at a higher level. There is no guarantee that it will be granted. I have heard people sit here before and say if she is not going to



disqualify me then why doesn't she just let it continue? The answer is very easy- there is no guarantee you are getting another licence. You need to go away and think about this in the cool of your office with your teams. I have done the revocation from the close of business on the 30 October 2001 but what vehicles go out and when, what condition they are in and with which driver from this moment on will also inform your new application. It follows that you need to have a sit down and think as to whether any of those do go out tomorrow. That will be your judgement call”.

8. Grounds of appeal to the Upper Tribunal followed. In summary, ground 1 amounted to a contention that through delaying the coming into force of the revocation of the Operator's licences until 30 October 2021 yet leaving the door open for a fresh application to be made for a new licence, the TC had “*set the Operator up to fail*” because it would not have been possible to process a fresh application for an Operator's licence between the date of the TC's decision and the date the revocation was to come into force.

9. Ground 2 amounted to a contention that revocation of the licence had represented a disproportionate outcome and that the TC had failed to consider what other options short of revocation (such as to simply accept a surrender of one of the licences which had been suggested by or on behalf of the Operator) might be possible or appropriate.

10. Ground 3 amounted to a contention that the TC had acted unfairly through requiring the Operator (on the assumption it was to make a fresh licence application) to provide in support of any such application, evidence of financial standing covering a 3 month period as opposed to a 28 day period which is the normal requirement for new applicants.

11. Ground 4 asserted unfairness on the basis that the TC had seemed to suggest, during the course of the PI, that Mr Coburn might have connections with a person called Finbarr McMahon. It was suggested that the TC might have drawn adverse inferences from her apparent belief that there was such a connection without affording Mr Coburn a proper opportunity to meet the point and without explaining why she thought there was a connection or why any such connection might be of significance.

12. Those grounds were maintained on behalf of the Operator and Mr Coburn by Ms Newbold before us. She also provided us with a helpful update as to the Operator and Mr Coburn's current circumstances.

13. As to the approach which the Upper Tribunal must take on an appeal such as this, 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 related to transport”.

14. Paragraph 17 (3) of that Schedule provides that the Upper Tribunal may not take into consideration any circumstances that did not exist at the time of the determination which is the subject of the appeal. The Upper Tribunal's jurisdiction was examined by the Court of Appeal in *Bradley Fold Travel Ltd & Anor v Secretary of State for Transport [2010] EWCA Civ 695*. It was explained that the Upper Tribunal has the duty, on an appeal



to it, to determine matters of fact and law on the basis of the material which had been before the TC but without the benefit of seeing and hearing from witnesses. It was further stated that the burden lies on 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 take a different view to that taken by the TC.

15. We shall address the four grounds of appeal in turn.

16. As to ground 1, we think that the ground conflates two issues. The TC made a decision to revoke the licences. What she then had to say about the facility for a possible future application (which she indicated, in effect, might or might not be granted) was irrelevant to that. In our judgement the TC was entitled to revoke the licences in view of the concerns she identified and that is so whether there was or was not, sufficient time for the Operator to have a fresh application determined before the revocation of the licences came into effect. Further, we see no reason to conclude that she was plainly wrong in doing so or that we are required to take a different view. We reject this ground of appeal.

17. As to ground 2, it is clear from the TC's decision, when read as a whole, that she took the view that, given her findings and concerns as expressed in the written reasons, revocation was the appropriate course and that nothing short of that would do. Again, in light of the serious failings discovered by PC Anstead and given that the TC found him to be a credible witness, we conclude that the decision was not disproportionate nor plainly wrong. We reject this ground of appeal.

18. As to ground 3, what is complained about here is not, in fact, an appealable decision (see section 37 of the Goods Vehicles (Licencing of Operators) Act 1995). But additionally, and in any event, what amounts to an administrative requirement regarding provision of financial evidence has no bearing upon the key issues regarding the appropriateness or otherwise of the decisions concerning revocation, loss of repute as a transport manager and disqualification as a transport manager. We reject this ground of appeal.

19. As to ground 4, it is right to say there was, according to the transcript of the PI, a brief exchange involving the TC and Mr Coburn regarding a person called Finbarr McMahon. We accept that there is no evidence of a connection between that individual and the Operator or David Coburn himself. It seems clear to us that the TC suspected that there might be and that she took it upon herself to explore that possibility but concluded that her exploration had not led her anywhere. It is perhaps unfortunate that she did not explain either at the PI or in her written reasons (or perhaps both) why she thought there might be a connection and why she thought that, if there was, it might be troubling or otherwise relevant to the issues she was called upon to decide. But, whilst we do understand why Ms Newbold pursues this as a ground of appeal, we are not able to detect anything in the decision of the TC or in her reasoning which suggests that she took any such suspicion into account in reaching the decisions that she did. Each decision she made has been explained and justified entirely without reference to Finbarr McMahon. In our view, therefore, no unfairness has been demonstrated. We reject this ground of appeal.

20. In light of the above we have concluded that none of the four grounds of appeal are made out. There is one further matter which we need to cover. The Operator and Mr Coburn



had sought a stay of the coming into effect of the decisions of the Traffic Commissioner and such had been granted by Upper Tribunal Judge Hemingway. We had wondered whether, in light of that, we would have to set a date when the stay would expire in order to permit an orderly winding up of the business. However, Ms Newbold informed us that the Operator was no longer trading and that, accordingly, such would not be necessary. So, the stay comes to an end with the issuing of this decision.

21. This appeal to the Upper Tribunal is dismissed.

M Hemingway: Judge of the Upper Tribunal
D Rawsthorn: Member of the Upper Tribunal
G Roantree: Member of the Upper Tribunal

Approved for issue by Upper Tribunal
Judge Hemingway on 21 April 2022