



Appeal No. UA-2022-000035-NT
Neutral Citation number: [2022] UKUT 00324 (AAC)

**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 29 December 2021

Before:

Kenneth Mullan	Judge of the Upper Tribunal
Mr David Rawsthorn	Member of the Upper Tribunal
Dr Phebe Mann	Member of the Upper Tribunal

Appellant:

Land of Dream Bedding Ltd

Attendances:

For the Appellant: Mr Dean Wilson

For the Respondent: None

Type of hearing: Face-to-face oral hearing

Date of hearing: 3 November 2022

Date of decision: 5 December 2022

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that this appeal be ALLOWED.

SUBJECT MATTER:- Application for a restricted licence; fitness of applicant;
traffic offences sustained;

CASES REFERRED TO:- NT/2013/82 Arnold Transport & Sons Ltd v DOENI;
NT/2013/52 & 53 Fergal Hughes v DOENI & Perry
McKee Homes Ltd v DOENI [2013] UKUT 618 AAC,

NT 2013/52 & 53; 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 refuse the Appellant's application for a restricted goods vehicle operator's licence.
2. The TRU is part of the Department for Infrastructure ('the Department')

Background

3. The factual background to this appeal appears from the documents and the Head of the TRU's decision and is as follows:-

(i) An unsigned and undated application for a restricted goods vehicle operator's licence was received in the Department from the Appellant. The application sought authorisation for 1 vehicle and four trailers. The application was made on behalf of the appellant company by Mr Dean Wilson.

(ii) In the application, the applicant declared a conviction on 1 November 2020 for the offence of the misuse of a tachograph card. The applicant provided the following further details:

'I used my father's driver card on a journey from Belfast to Manchester in a large goods vehicle. I was in a rush to get my vehicle unloaded in Manchester and knew that I may have difficulty using my driver's card as I would have been slightly over my hours so I made the incorrect decision to use my father's card. I received a £300 fine, no court appearance and no penalty points. I now realise that that was a bad decision and I do apologise. I assure you that this will not happen in the future.'

(iii) On 20 October 2021 the Department wrote to the applicant acknowledging receipt of the application and seeking information. The information sought was as follows:

- 'It is noted that large payments to Diesel Card Ireland have been made. Please explain what these payments are for. If the payments are for fuel for vehicles, please list all the vehicles including the gross plated weights.
- A completed application declaration. Please log in to your online account and print, sign, and date the declaration from the application overview. The declaration must be signed by one of the company's directors and returned to this office by post. We cannot accept an electronic version of the signed declaration.
- Further details about the conviction declared on the application. Please include the circumstances that led to the offence, the type of vehicle being driven and remedial action that has been taken.
- A written explanation, with supporting evidence, about how the company has been meeting its transport needs since its incorporation on 05/08/2015. The response should include the weight of vehicles used or details about which third party operator it has been using.

- It is noted that as per Companies House Land of Dream Bedding Limited's accounts are overdue. Please confirm what action has been taken to rectify this.'
- (iv) In correspondence in reply dated 25 October 2021, the applicant stated the following:
- 'All payments to Diesel Card Ireland were made purchasing fuel for my existing 3½ tonne vehicle which I have had since 2015 ...
 - Details of declared conviction enclosed
 - My accounts are at this time with our accounts and will be filed with Companies House within two weeks of the above date
 - Completed application declaration – signed and enclosed.
- (v) The 'details of declared conviction' were as follows:
- 'I was on a journey from Belfast to Manchester. I was booked in for collection and was 15 minutes late as I was on my daily rest. I put someone else's card in to be there in time. I am deeply sorry for this and can assure you that this won't ever happen again.'
- (vi) On 12 November 2011 the Department wrote back to the applicant seeking further information. The information sought was as follows:
- 'Internal searches show that the following offence(s) have been recorded against the below vehicle, which were not declared on the application form:
- Date Vehicle Offences
15/09/2019 04DL6820
- No number plate
- Using or keeping HGV on a road when Levy not paid
- Action Taken £30 GPN £300 GPN
- Sanction Issued To Operator
- Please provide an explanation of the circumstances that led to the offence(s), including the type of vehicle being driven, along with details of any action taken to prevent reoccurrence. Please also explain why you failed to declare the offence(s) on the application. If this information is incorrect please confirm this.'
- (vii) In undated correspondence, the applicant replied as follows:
- 'I apologize for not declaring the offence that you pointed out in your last correspondence. In all honesty it had slipped my mind and I did not recall this offence at the time I made the application.
- The number plate of my lorry had fallen off at the back without my knowledge. I have been more careful of this since and check it regularly.
- In regards to the levy, at the time I was not aware that a levy had to be paid. I am now fully aware of this after the offence so this will not happen again.
- I apologize for these offences and I assure you that they will not happen again.'

- (viii) In further correspondence dated 6 December 2021, the Department made the following request:

‘Please provide further information regarding the tachograph infringement noted on your application. An explanation is required of who you was [sic] driving for, including licence number and name of operator at the time of the Tachograph infringement. If you were operating the vehicle yourself please confirm how long you have been operating Heavy Goods Vehicles.

With regard to vehicle VS00 BST, confirmation is required in regards to what use have you given to the vehicle in the past 12 months. Have you been operating this vehicle yourself or driving it for a different operator. Please include operators name and licence number in your response.’

- (ix) In undated correspondence in response the applicant stated the following:

‘Further to your recent correspondence, I would like to confirm that I was indeed driving for myself at the time of the tachograph infringement. I do not often operate heavy goods vehicles myself up until now, although I do plan to if/when this application has been approved. The reason that I was driving at this particular time, is because I was let down by two of the operators I would have normally used, and at the time, I seen this as an emergency situation. I have actually only operated on very few separate occasions. I now see the dangers of this, and as stated in my application, I apologise and rest assured that this will never happen again.

In regards to vehicle VS00 BST, it has actually been operational due to COVID, so while I was waiting, I decided to use this time to acquire my operator's license. I am actually sitting my Road Haulage Transport Managers exams today with CILT, and I hope that this shows my willingness to comply with all legislation, and my eagerness to learn, even though I am only applying for a restricted license at present.’

- (x) In correspondence to the applicant dated 29 December 2021 the Department stated the following:

‘The Department considers that the apparent long-term unauthorised use of a vehicle coupled with a misuse of a tachograph card offence shows a disregard for the legislation. Further offences were recorded against you in 2019 for no number plate and keeping HGV on a road when no levy paid. There was also a considerable delay in you applying for a licence after the tachograph card infringement.

The Department has therefore determined that you are not fit to hold an operator's licence has therefore refused the application under the provisions of Section 12(5) on the basis that the provisions of Section 128 of the 2010 Act have not been met.’

- (xi) An appeal against the decision dated 29 December 2021 was subsequently received in the office of the Administrative Appeals Chamber (AAC) of the Upper Tribunal.

Grounds of appeal

4. In the notice of appeal, the applicant identified the following grounds of appeal:
- ‘In response to your offer of an appeal DfI’s decision of the refusal of my operator’s licence, I would like to offer an explanation. The issues brought to your attention happened during a time in my life when both personal business lives were in turmoil. This period does not reflect my sincere commitment towards running a legal and competent haulage business in the future, if authorised. I am, at present, finished my certificate professional competence course and have passed paper one. I resit paper two on Tuesday 8th of February. The information I have gleaned from this course would prove invaluable if my appeal is considered and my licence granted. I hope this shows a genuine and sincere willingness to run my proposed business as required by your Department. I would ask that you review your decision and allow me the opportunity to prove my work in the future.’

Relevant legislative provisions

5. Sections 2(1)-(4), 12(2)-5), 12C, 12D and 12E of the Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010 (‘the 2010 Act’) provide:

2. “Standard” and “restricted” licences

- (1) An operator's licence may be either a standard licence or a restricted licence.
- (2) A standard licence is an operator's licence under which a goods vehicle may be used on a road for the carriage of goods—
- (a) for hire or reward, or
 - (b) for or in connection with any trade or business carried on by the holder of the licence.
- (3) A restricted licence is an operator's licence under which a goods vehicle may be used on a road for the carriage of goods for or in connection with any trade or business carried on by the holder of the licence, other than that of carrying goods for hire or reward.
- (4) Notwithstanding subsections (2) and (3), a company may use a goods vehicle on a road for the carriage of goods for hire or reward under a restricted licence instead of a standard licence if (but only if) the goods concerned are the property of a company which is—
- (a) a subsidiary of the first company,
 - (b) a holding company for the first company, or
 - (c) a subsidiary of a company which is a holding company both for that subsidiary and for the first company.
- (d) if the Department thinks fit, whether the requirement of section 12D is satisfied.

12. Determination of applications for operators’ licences

- (1) On an application for a restricted licence the Department must consider—
- whether the requirements of sections 12B and 12C are satisfied; and

- if the Department thinks fit, whether the requirement of section 12D is satisfied.
- (2) Subsections (1) and (2) are subject to sections 10 (publication of application) and 47(2) (payment of application fee).
 - (3) In considering whether any of the requirements of sections 12A to 12D are satisfied, the Department must have regard to any objection duly made under section 11(1)(a) in respect of the application.
 - (4) If the Department determines that any of the requirements that it has taken into consideration in accordance with subsection (1) or (2) are not satisfied, it must refuse the application.

12C Requirements for standard and restricted licences

- (1) The requirements of this section are that it must be possible (taking into account the Department's powers under section 14(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) Article 56 of the Road Traffic (Northern Ireland) Order 1981 (drivers' hours); and
 - (b) the applicable Community rules, within the meaning of Article 2 of that Order.
- (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 Northern Ireland 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 is more than one) must be sufficient to provide an operating centre for all the vehicles used under the licence.
- (7) In considering whether the requirements of subsections (2) to (6) are satisfied, the Department may take into account any undertakings given by the applicant (or procured by the applicant to be given) for the purposes of the application, and may assume that those undertakings will be fulfilled.
- (8) In considering whether subsection (5) will apply in relation to a licence, the Department may take into account any conditions that could be attached to the licence under section 20(1)(a) (conditions of licences) and may assume that any conditions so attached will not be contravened.
- (9) In considering whether subsection (5) or (6) will apply in relation to a licence, the Department may take into account whether any proposed operating centre of the applicant would be used—
 - (a) as an operating centre of the holders of other operators' licences as well as an operating centre of the applicant; or

- (b) by the applicant or by other persons for purposes other than keeping vehicles used under the licence.

12D. Further requirement for standard and restricted licences

The requirement of this section is that the provision of the facilities and arrangements for maintaining the vehicles in a fit and serviceable condition is not prejudiced by reason of the applicant's having insufficient financial resources for that purpose.

General principles on the operation of the Act and Regulations

6. 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

7. 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.'

The oral hearing of the appeal

8. At the oral hearing of the appeal the Appellant limited company was represented by Mr Wilson. He informed us that he was supposed to have been represented by a solicitor but was content to proceed without a representative. He handed in correspondence from a transport adviser.
9. Mr Wilson gave oral evidence which we found to be honest and credible. His business was in the manufacture of pillows. We were told that he considered that he needed a restricted licence to keep his business going. At present he is using hauliers and as each delivery load required individual loads and, often, numerous stops, the price that he was being charged was exorbitant. His business was small to medium in size but he expected it to get bigger if he had a licence. He could expand in the United Kingdom. There were two employees in the company, himself, and his father. If he got a licence, he was intending to get a driver and employ someone in the office. He could then focus on transport and manufacturing. He confirmed that he had now passed both parts of the CPC.
10. In relation to the tachograph incident, it had occurred when he was in the area where he loads in Manchester. He described it as not in the safest of areas which he tried to avoid. There had been incidents in the past when possessions had been stolen from cabs. He had to be on time for the load as the loaders did not like drivers to be early or late. He was out of hours, and he used his father's card in order to get in and out. His father was not with him. He had his own card with him. He has access to one vehicle of his own. The company had a lorry background involving buying lorries at a cheap price and selling them on after doing them up. That would make him a 'handy few pound'. He only used these purchased lorries on 2 occasions when the tachograph incident occurred and when he was stopped and the number plate and levy matters were noted. There would always be a lorry about.
11. Mr Wilson stated that he had declared the tachograph offence but accepted that he had not declared the offences relating to the missing numberplate and the levy.
12. He was asked about the statement which he had made in undated correspondence to the Department that the vehicle which is the subject of the application has 'actually been operational due to Covid'. He replied that he had meant to state that it had not been operational. He stated that he had not used

the subject vehicle in his business. He stated that he only took this vehicle to motor shows. It was specified in the application as he was required to demonstrate access to a vehicle. In the meantime, he had taken the time to undertake his CPC examinations.

13. Mr Wilson stated that he was committed to the 'lorry' industry. He understood the significance of public safety. The CPC course had reinforced that. He gained the knowledge of what was required to 'run lorries'. His intention was to employ a driver. He would then go with him, or his father would. He would have a 'better track, on what the driver was doing and plan for what the driver would do. He made reference to the tachograph system which would be installed by his traffic consultant. If he was granted a licence it would not be in his interest to cut corners. That is why he wished to put a driver in place. Risking any granted licence would be stupid. He had mistakes in the past but had learned from them. He was confident in the relationship which he had with the traffic consultant which would be ongoing. He owned his own trailers. He would use the vehicle which he presently owned for the first three months and then purchase a new vehicle for operating.

Analysis

14. As noted above, the basis for the Department's decision was that for the purposes of section 12B of the 2010 Act, Mr Wilson was unfit to hold an operator's licence. The evidence which underpinned that conclusion was:
 - (i) The apparent long-term unauthorised use of a vehicle;
 - (ii) An offence involving the misuse of a tachograph card; and
 - (iii) Two further offences for (a) not having a number plate and (b) keeping an HGV on the road when no levy had been paid.
15. We also have observed that the decision notice also made reference to 'a considerable delay in applying for a licence after the tachograph infringement.'
16. We begin by addressing 14(i) above. It is apparent that the Department relied on a statement which Mr Wilson had made in undated correspondence to the Department that the vehicle which is the subject of the application has 'actually been operational due to Covid'. Mr Wilson addressed this statement in his evidence to us. He indicated, and we accept the indication, that he meant to state that it had not been operational, that he had not used the subject vehicle in his business, that he only took this vehicle to motor shows and that it was specified in the application as he was required to demonstrate access to a vehicle. In our view, he has provided an adequate explanation and we accept that there was not, in fact, long-term unauthorised use of a vehicle.
17. In relation to 14(ii) above, an offence involving the misuse of a tachograph card did occur. Mr Wilson did accept that. He outlined the background circumstances in which the offence took place which provide a degree of mitigation, albeit at a minimal level. More importantly, Mr Wilson was contrite in accepting that what he had done was wrong and that he had learned from his error. Further, he recognised and understood the significance of safety in the haulage industry. He had undertaken a CPC course and examinations and had engaged a transport consultant and would install a tachograph analysis system. He realised that he would be very unwise to risk losing an operator's licence if one was granted to him. While not condoning the offence which occurred, and the disregard for the legislative requirements on that occasion,

we are of the view that Mr Wilson has demonstrated a commitment to adherence in the future.

18. In relation to 14(iii), we are of the view that these offences are not at the more serious end of the scale. We do not place the same emphasis on the delay between the tachograph offence and the making of the licence application.
19. In these circumstances, the appeal is allowed.
20. We make the following Direction:

'The decision of the Department was that one of the legislative provisions governing the requirements for the grant of a restricted goods vehicle operator's licence was not satisfied. For the reasons which we have set out above, we have determined that the decision was wrong and, inherent in that determination is an acceptance that the relevant legislative provision was satisfied. We have not seen any evidence to suggest that the remaining legislative requirements for the grant of a licence are not satisfied but we cannot be certain of that. We remit this case to the Head of the TRU himself to re-decide the licence application in light of our conclusions above. We would add that it is our view that if a restricted licence is granted, then in addition to the usual restricted licence undertakings it would be appropriate there should be an undertaking that Mr Wilson will commission an independent audit of his operation six months after the date of the grant of the licence and that a report of that audit will be forwarded to the Head of the TRU for his consideration.'



**Kenneth Mullan, Judge of the Upper Tribunal,
5 December 2022**