[2017] UKUT 441 (AAC)

IN THE UPPER TRIBUNAL **Appeal No. T/2017/36**
ADMINISTRATIVE APPEALS CHAMBER
(TRAFFIC COMMISSIONER APPEALS)

ON APPEAL from the DECISION of the TRAFFIC COMMISSIONER for the South Eastern and Metropolitan Traffic Area dated 16 May 2017

Before:	**Mark Hemingway: Judge of the Upper Tribunal** **Leslie Milliken: Member of the Upper Tribunal** **George Inch: Member of the Upper Tribunal**
Appellant:	**S C COUSINS SCAFFOLDING LTD**

Attendances:

For the Appellant:	Carolyn Evans: Solicitor with CE Transport Law

Heard at:	Field House, 15-25, Bream's Buildings, London, EC4A 1DZ
Date of Hearing:	12 September 2017
Date of Decision:	11 November 2017

DECISION OF THE UPPER TRIBUNAL

The appeal of SC Cousins Scaffolding Ltd, from the decision of the Traffic Commissioner of 16 May 2017 to revoke operator's licence OF1O96000 is allowed. We remake the decision in these terms: The operator's licence permitting the operation of three motor vehicles is curtailed such that the vehicle bearing the registration GN58LWY is removed from the licence and is not to be specified on any other licence, for a period of six months, such period to commence seven days after the date this decision is issued. The previous terms of the licence are then to be restored subject to the appellant informing the Traffic Commissioner, for information purposes, that the relevant vehicle is being put back into use.

Subject matter:

Proportionality

Cases referred to

Bryan Haulage (No.2) (2002/217)
Bradley Fold Travel Ltd and Peter Wright v Secretary of State for Transport [2010] EWCA Civ 695

REASONS FOR DECISION

Introduction

1. This is an appeal from the decision of the Traffic Commissioner for the South Eastern and Metropolitan Traffic Area ("TC") made on 16 May 2017 whereupon she revoked the operator's license of SC Cousins Scaffolding Ltd ("the company"). She did so on the basis that, in the light of adverse findings under section 26(1)(b), (c)(ca), (f)(h) of the Goods Vehicles (Licensing of Operators) Act 1995, it no longer met the requirements of section 13B of that Act in relation to fitness. The TC went on to grant a stay of her decision pending this appeal to the Upper Tribunal.

Background circumstances

2. The factual background is not complex. SC Cousins Scaffolding Ltd was incorporated on 11 August 2009 with two directors (also equal shareholders) being one Lee Clark and one Paul Seabrook. The main business of the company related to scaffolding (as of course its name suggests) rather than transportation. But it wished to operate its own vehicles in order to assist it to pursue its main business enterprise.

3. The company, accordingly, applied on 31 March 2010 for a restricted operator's license for a single vehicle. That was granted on 26 May 2010 and subsequently obtained authorisation enabling it to operate a total of three vehicles. At all material times with which this appeal is concerned the company has actually operated three vehicles being one 18 tonne lorry and two significantly smaller 7.5 tonne vehicles. All were used incidental to the supply, erection and dismantling of scaffolding. As Ms Evans has pointed out compliance with tachograph rules was required in relation to the 18 tonne lorry only.

4. It appears that the company continued in business without incident for a period in excess of four years. However, in 2014 some scaffolding which the operator had erected on a building site collapsed. It was accepted in subsequent criminal proceedings that there had been a breach of regulations 4 and 5 of the Work at Height Regulations 2005 in consequence of which the above directors were fined and ordered to pay court costs. The incident seems to have come to the attention of the Office of the Traffic Commissioner who, on 1 November 2015, wrote to the directors about it.

5. The next incident of note occurred on 25 April 2016. On that day the 18 tonne vehicle whilst being driven by one Marlon Carr an employee of the company, was stopped by way of a random check carried out by Traffic Examiner Rossiter of the Driver and Vehicle Standards Agency ("DVSA"). He spoke to Mr Carr. A number of concerns were identified as follows; one of two persons being conveyed in the vehicle in addition to the driver was being carried in such a way that he was not seated and was hence unable to wear a seat belt; the operator's license identity disc lacked a single letter from the registration number (this was later confirmed to be an administrative error); analysis of digital data appeared to show that the driver card and head had never been downloaded (but see below); and there had been an

ongoing failure on the part of Marlon Carr, on the basis of information he willingly supplied, to take the required weekly rest which drivers have to take.

6. On 30 June 2016 Traffic Examiner Lesley Hunt carried out a follow up visit to the company. He spoke to Mr Seabrook who was, it appears to have been accepted by all concerned, frank and open. He acknowledged that downloading ought to have been carried out more frequently and suggested that, in the past, he had not appreciated the full extent of the relevant requirements. But he said that some downloading had taken place. It was said that there would be a further follow up visit in September of 2016 although, in fact, that visit did not take place.

7. The company was called to a Public Inquiry, the call up letter being dated 31 March 2017. Stated shortly it was said that, in light of the above, there were concerns arising regarding a failure to notify convictions, the convictions themselves, prohibition notices, fixed penalty notices, and a failure to honour undertakings (which appears to have related primarily to the observation of rules concerning driving hours and tachographs).

The Public Inquiry

8. This took place on 11 May 2017. It dealt with matters relating to Marlon Carr in addition to those relating to the company but it is only the latter with which we are concerned. It was attended by both Traffic Examiner Rossiter and Traffic Examiner Hunt. Paul Seabrook attended on behalf of the company. The company had legal representation but from a different firm to that which represents it now.

9. There is a transcript of the Public Inquiry. It is evident that the TC had understandable concerns about aspects of the company's compliance. There was, of course, an important safety issue concerning the transportation of an individual who had not been restrained by a seat belt and who had not, in fact, been in a seat when the vehicle had been stopped. There were concerns about only partial compliance with respect to tachograph requirements though it is important to point out that Traffic Examiner Rossiter acknowledged in oral evidence that downloading had taken place despite his initial concerns that there had been no downloading at all. The TC was concerned that the convictions regarding the collapsed scaffolding should have been notified. She was concerned that despite the company having been given what she referred to as "a huge amount of advice" by the DVLA, it had not satisfactorily put its house in order. It appears that at one point she might have been contemplating taking action short of revocation because there was some discussion between her and the company's legal representative regarding the possibility of curtailment of the license in particular in relation to the 18 tonne vehicle.

The Traffic Commissioner's decision

10. The TC gave a detailed oral indication of her judgement at the end of the Public Inquiry and then issued a written decision which is dated 16 May 2017. It is the written decision to which we have had regard in considering this appeal.

11. The TC's decision is, comparatively speaking, a short one. In it she notes the conviction of the operator in 2014 and the issues raised in consequence of the check carried out by Traffic Examiner Rossiter. She expresses concern that by the date of the Inquiry Marlon

Carr had still received no training in relation to driver hour obligations, tachographs or the Working Time Directive. She said the operator had breached undertakings given when the license was sought in relation to the observation of rules relating to such matters. She did recognise Mr Seabrook's candour and accepted that some training had now been organised though she expressed the view that such was inadequate. She then went on to say this;

> "5. There are some cases where it is only necessary to set out the conduct in question to make it apparent that a Licence should be revoked and the Operator put out of business, as per *2012/034 Martin Joseph Formby t/a G&G Transport, 2012/020 A+ Logistics Ltd*. On the face of the chronology above as set out this is such a case because of the almost instantaneous breach of trust by failing to have in place the appropriate systems to ensure road safety and fair competition from the minute this Operator first put a vehicle on the road when the Licence was granted. That is still the system here today. It follows it has put commercial interests before compliance. Time spent out getting in business, expanding and developing the business, was time that should have been spent making sure systems were in place and getting the necessary education. While its competitors were doing that, this Operator was out trying to get their business. Such conduct puts at risk the Operator Licensing regime.
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> 6. The positive matters that I have set out only bear a small weight to counterbalance the Operator's conduct since 2010. In this context Mr Seabrook asked me to accept his word that the Operator will now comply.
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> 7. The Upper Tribunal helpfully set out the marker in *2009/225 Priority Freight Limited & Paul Williams* that '*Promises are easily made, what matters is whether these promises will be kept: actions speak louder than words'*. I remind myself of the extended principle set out by His Hon. Michael Broderick, Principal Judge for Traffic Commissioner Appeals in *NT/2013/82 Arnold Transport & Sons Limited* '*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. 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.*'
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> 8. When I pose the question, helpfully suggested in the *Priority Freight* case, *"How likely is it that those before me will, in future, operate in compliance with the operator's licensing regime?"* the answer must be that I cannot be satisfied on balance that it will be, in light of the failures to heed the clear warnings from the 2 DVSA interventions in 2016. That was the time for the Operator to keep its promises and to put matters right. If failed to do so. I see no good reason why I should believe it today.
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> 9. When I pose the question is revocation disproportionate in the circumstances of this case the answer is 'no'. Revocation is not disproportionate where, in the absence of any objective justification and excuse, there have been long term, sustained and repetitive deficiencies: *2009/410 Warnerstone Motors t/a The Green Bus Service.* Despite the DVSA involvement, it

> has failed to improve compliance in relation to driver's hours and it has failed to improve its knowledge on Operator Licence compliance. It may be therefore, that along with everything else, Mr Seabrook may be taken by surprise that I have revoked the Licence; he should not be. Upper Tribunal Appeals on Traffic Commissioner's Decisions and the Guidance that Traffic Commissioners work to is all in the public domain. I remind myself that revocation may be justified even at the first Public Inquiry where the Operator has already had the opportunity to put things right: *2011/041 Tarooq Mahmood t/a TM Travel.* It should be right at the first time by if you make a mistake you remedy it and your remedy it quickly and you remedy it and review things across the board. You did none of that.
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> 10. I turn then to the question, *"Is the conduct of the operator such that the operator ought to be put out of business?"* as per *2002/217 Bryan Haulage No.2* in my judgment the answer is "yes". When I pose the question whether other operators would expect me to remove the Operator from the system, I am satisfied on the balance they would say "absolutely". Whilst the proportionality principle requires Traffic Commissioners to make decisions that are commensurate with the merits of the case the decision must focus on the impact to road safety and fair competition that flows from the factual findings, regardless in which order the questions above are posed.
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> 11. I do not trust Mr Clarke and Mr Seabrook at this moment in time. They have had a year to get themselves ready such that potentially this point would never have been required. It was in the Operator's own hands and it failed. Accordingly, I have found that this Operator is no longer fit to hold a Licence. I do not have any evidence before me in relation to contingency arrangements and therefore I formed the view that I would give them until 12 July 2017 to arrange run-off."

12. So, the Operator's Licence was revoked, thus effectively, subject to this appeal, putting the company out of business.

The proceedings before the Upper Tribunal

13. The company appealed to the Upper Tribunal. Three separate grounds of appeal were offered. In short, it was argued that the Traffic Commissioner had wrongly taken into account the above convictions (it was said that they were neither notifiable nor admissible); had arrived at a decision to revoke the licence which was disproportionate; and had failed to carry out a proper balancing exercise before concluding that revocation was appropriate. There is, to some degree at least, an overlap between the second and the third of those grounds.

14. We held an oral hearing at the request of the company. It was represented before us by Ms Evans. She developed her written grounds and urged us to set aside the TC's decision. As to remedy she canvassed the possibilities of our remitting with guidance or remaking the decision ourselves. There was some discussion about the company's former representative's exchange with the Traffic Commissioner regarding possible curtailment of the licence rather than revocation.

Our decision and reasoning

15. We have reminded ourselves of the function of the Upper Tribunal when considering an appeal from a TC. In that context the jurisdiction and powers of the Upper Tribunal are governed by Schedule 4 to the Transport Act 1975 as amended. Paragraph 17(1) provides that the Upper Tribunal is to have full jurisdiction to hear and determine all matters whether of law or fact. However, it is necessary to bear in mind that such an appeal is not, for example, the equivalent of a Crown Court hearing an appeal against a conviction from the Magistrate's

Court where the case effectively begins all over again and is simply reheard. Instead, an appeal before the Upper Tribunal takes the form of a review of the material before the TC. We have taken full account of the valuable guidance contained within a passage from paragraphs 30-40 of the judgment of the Court of Appeal in *Bradley Fold Travel Ltd and Peter Wright v the Secretary of State for Transport* [2010] EWCA Civ 695. We have also noted that an appellant bears the burden of showing that the decision under appeal is wrong and that, in order to succeed, it is necessary to show that "the process of reasoning and the application of the relevant law require the tribunal to adopt a different view". Put another way, it might be said that in order to succeed before the Upper Tribunal an appellant has to demonstrate that the decision of the TC was plainly wrong.

16. We have not found it necessary to consider Ms Evans' first ground of appeal. That is because, whatever might be made of that, we are satisfied that the second ground should succeed in that the TC, on this occasion, reached a decision which was disproportionate to the extent that it was plainly wrong.

17. In this context, there were undoubtedly failings on the part of the company. The 2014 conviction had not been reported to the Office of the Traffic Commissioner, but even assuming there had been a legal duty to do so, there is no finding to the effect that the company had taken an informed, deliberate and dishonest decision not to do so. The concerns stemming from the random check carried out by Traffic Examiner Rossiter were concerning but, according to the transcript of the Public Inquiry, and as noted above, he had accepted that some downloading had been taking place. Mr Seabrook had given evidence, seemingly not disbelieved, that he had not previously been aware (until the stop by Traffic Examiner Rossiter) that the company had been breaching driver's hour's requirements. Seemingly Mr Seabrook had erroneously thought that such would not apply, or at least not with any rigour, given that only short journeys to and from sites were scaffolding would be erected and dismantled and incidental to the main business of the company, were ever undertaken.

18. So, in our view, what emerges is not a picture of dishonesty or the deliberate flouting of rules and requirements. What does emerge is certainly properly to be characterised as incompetence along with a lack of diligence in ascertaining what rules are applicable in relation to driving notwithstanding that the company is involved in scaffolding rather than transportation for profit. Such incompetence and lack of diligence is no doubt serious and might potentially have most unfortunate consequences from a safety perspective. Nevertheless, in our view, this is not by any means the most serious case of its type and there was evidence before the TC to the effect that the directors had been frank in acknowledging failings and had taken some steps to rectify matters.

19. In our view if the Traffic Commissioner had stepped back and taken an overall view she would have recognised, as do we, that revocation was simply a step too far in the particular circumstances of this case. Put another way, it was not a case where the conduct of the Operator had been such that it ought to be put out of business (see Bryan Haulage (No 2) (2002/217)) and it was not a case where it could properly be said that it was likely that the Operator would not comply in the future.

20. As we say though, we do conclude that there have been failings and indeed, at least to an extent, Ms Evans acknowledged that as she had to. We accept this is an appropriate case for the Upper Tribunal to remake the decision because there is no factual dispute of

significance, because matters are relatively straightforward and because we cannot see that a TC on remittal will necessarily be in a better position than we are today in deciding matters. In remaking the decision we have decided that the failings have to be met with a response which demonstrates that such is not acceptable. So, in remaking the decision we have decided to curtail the licence in the way set out above. Such will mark out the seriousness of the failings and will, for a time, have an adverse impact upon the business. But, in looking at what was said on behalf of the company at the Inquiry, and we did not understand Ms Evans stance to be dissimilar, we do not think it will put the company out of business. So what we have decided constitutes a proper and proportionate outcome.

21. This appeal to the Upper Tribunal, then, is allowed and the decision is remade in the above terms.

Signed:

M R Hemingway
Judge of the Upper Tribunal

Dated: **11 November 2017**