



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

**Appeal No. T/2019/14
[2019] UKUT 177 (AAC)**

ON APPEAL from a DECISION of the TRAFFIC COMMISSIONER

Before:	A I Poole QC	Judge of the Upper Tribunal
	Mr M Farmer	Member of the Upper Tribunal
	Mr A Guest	Member of the Upper Tribunal

Appellant: Mrs Louise McVay – ACE Car Disposal & Spares Ltd

Reference: OM2005870

Date of Upper Tribunal Hearing: 5 June 2019

Heard at: George House, 126 George Street, Edinburgh EH2 4HH

Attendances:

For the Appellant: Mrs Louise McVay

Date of Decision: 7 June 2019

DECISION OF THE UPPER TRIBUNAL

The appeal is allowed. The decision of the Traffic Commissioner as communicated by letter dated 23 January 2019 is set aside. The case is remitted for rehearing and determination at a Public Inquiry.

Subject Matter: revocation of licence; financial standing; grounds of revocation; procedural fairness.

Case referred to: 2005/7 2 Travel Group Plc

REASONS FOR DECISION

Introduction

1. This is an appeal by Ace Car Disposal & Spares Ltd (“**Ace**”) against a decision dated 23 January 2019 of the Traffic Commissioner (the “**TC**”) which revoked Ace’s goods vehicle operator’s licence OM2005870. The decision letter referred to an earlier letter of 27 November 2018 notifying Ace that the TC was considering revoking the licence. The copy of the letter of 27 November 2018 contained in the papers before the Upper Tribunal set out the grounds for the proposed revocation under Section 26(1)(f) of the Goods Vehicles (Licensing of Operators) Act 1995 (the “**1995 Act**”). In summary, the grounds were that an undertaking attached to the licence had not been honoured. That undertaking was to provide financial evidence in the company name covering October, November and December 2017 by 31 January 2018, which had to show that the operator had continued to meet the required level of available finance during that period.
2. On the basis of the facts and reasons set out below, we have decided that the TC erred in law in making the Decision, and the case should be remitted for rehearing and redetermination before a Public Inquiry.

Background facts

3. Ace is a car and vehicle dismantling business based in East Lothian. Vehicles are bought, parts which can be re-used and sold on harvested, then the rest of the cars are scrapped and transported elsewhere. The business operates from an industrial estate on the edge of Kirknewton, part of which is classified as East Calder. When Ace started to operate there, the former owner advised that although the postal address was Unit 2/1 Camps Industrial Estate, Kirknewton EH27 8DF, the better address to use was Yard 1, Camps Yards, Camps Roads, Camps Industrial Estate, East Calder EH27 8DF, otherwise post did not always get delivered to the correct part of the industrial estate.
4. In about 2017 Louise McVay (“**LM**”), the director of Ace, decided to apply for a goods vehicle operator’s licence. She wanted to ensure Ace operated legally. The business was developing so that scrapped vehicles needed to be collected for processing and then the scrap be taken elsewhere, and Ace wished to develop its business to start transporting scrapped cars itself. She applied online for the appropriate licence. In the on-line form, drop down boxes were available to put in the business address. The options available restricted LM to providing the Unit 2/1 Camps Industrial Estate address set out above. However, there was a further box in which additional information could be provided, and LM recalls filling that in to explain that the better address to use was the Yard address set out above. LM recalls providing evidence of financial standing to support the application, and was aware that

provision of evidence of financial standing when requested was a requirement throughout the licence.

5. It appears that a restricted operator's licence was granted by the TC. However, the TC has not produced a copy of the restricted licence to the Upper Tribunal. This was an unfortunate omission. It is said in letters from the TC that the restricted licence contained an undertaking to produce financial evidence in the limited company name covering October, November and December 2017. In the experience of the members of the tribunal, such an undertaking is not a standard feature of a restricted licence. Ordinarily it would only be imposed if there was a particular reason for it, but there was nothing in the papers indicating what that might be. LM was unable to assist, because she recalled providing some evidence of financial standing at the time of the application.
6. After the licence was granted, there was then a series of correspondence as follows:
 - 30 May 2018 - TC wrote to Ace and LM saying that the goods vehicle operator's licence had been granted subject to an undertaking to provide financial evidence for October, November and December 2017. The deadline for doing so had been 31 January 2018. That deadline had passed and a further deadline was imposed of 13 June 2018 for submission of financial evidence. There was a warning that regulatory action might be taken against the licence if there was no compliance. This letter, as with all of the later letters from the TC set out below, was sent to Unit 2/1, Camps Industrial Estate, Kirknewton EH27 8DF.
 - 25 July 2018 - TC wrote further to Ace and LM imposing a deadline of 8 August 2018 for the financial evidence for October, November and December 2017 to be provided. The letter contained the same warning that regulatory action might be taken against the licence if there was a failure to comply.
 - 19 September 2018 - TC sent a recorded delivery letter to the Managing Director of Ace noting the failure to demonstrate evidence of financial resources. It warned that the TC was considering making a direction to revoke the operator's licence under Section 26 of the Goods Vehicles (Licensing of Operators) Act 1995 (the "**1995 Act**") and set out the grounds. It informed Ace of the right to request a public inquiry if the request was submitted in writing by 10 October 2018, and stated "If no request for a Public Inquiry is received by this date your operator's licence will be revoked".
 - 19 September 2018 - TC received financial evidence from LM relating to June, July and August 2018.
 - 4 October 2018 - TC wrote further noting the receipt of evidence for June, July and August 2018 but also noting that this was not for the

period of October, November and December 2017 and giving a further deadline of 18 October 2018 for receipt of that evidence.

- 8 October 2018 - TC received a letter dated 28 September 2019 from LM on behalf of Ace enclosing bank statements for July, August and September 2018.
 - 25 October 2018 - TC wrote to Ace pointing out that the bank statements submitted were not for the period covered by the undertaking and stating that bank statements for October, November and December 2017 should also be submitted. A further deadline of 8 November 2018 was given for submission of these and an explanation why this requirement was not complied with.
 - 27 November 2018 - TC sent a letter to the Managing Director of Ace noting the failure to demonstrate evidence of financial resources for October, November and December 2017. It warned that the TC was considering making a direction to revoke the operator's licence under Section 26(1)(f) of the 1995 Act and set out the grounds. It informed Ace of the right to request a public inquiry if the request was submitted in writing by 19 December 2018, and again stated "If no request for a Public Inquiry is received by this date your operator's licence will be revoked". The copy of the letter provided by the TC to the Upper Tribunal states that it was sent by recorded delivery and first class post, but there is no proof of posting in the papers before the Upper Tribunal.
 - 23 January 2019 - TC revoked Ace's licence, not having had a response to the letter of 27 November 2018.
 - 24 January 2019 - LM emailed TC, attaching financial evidence for October, November and December 2018 and asking the TC to hold off revoking the licence.
 - 14 February 2019 - LM produced bank statements for October, November and December 2017 as part of her request for a stay. These show Ace met the financial standing requirements throughout this period.
 - 15 February 2019 - TC refused stay of appeal. He acknowledged that the bank statements finally produced for 2017 showed adequate financial resources. However he remained concerned that there remained an unexplained failure to comply with the requirement to produce those bank statements despite multiple letters having been sent, other than a suggestion they had not been sent to a neighbouring address which had never been intimated to the TC.
7. For much of the period covered by this correspondence, and in between March 2018 and January 2019, LM was on maternity leave. She visited the office approximately once a week to check for correspondence. A system

was in place where two employees working at the business living near her would bring to her home any important correspondence delivered to the operating centre, such as recorded delivery correspondence. LM is now back at work six days a week. LM had received some, but not all, of the letters from the TC listed above. In particular, she had not received the letter of 27 November 2018, which was why no Public Inquiry had been requested.

Grounds of appeal

8. The appeal is brought on the basis that bank statements were submitted as requested, just for the wrong period because it was wrongly assumed the time period needed was the three most recent months. Eventually the correct ones were submitted. LM also states that she has been on maternity leave which had limited her time in the office but has returned to work full time. The letter of 27 November 2018 was not received by Ace because “sometimes we do not receive mail because the industrial estate is rather mixed up and I note that your letter dated 23 January is addressed to Unit 2-1, Camps Industrial Estate, Kirknewton, EH27 8DF. We are more likely to receive mail that is addressed to Yard 1, Camps Yards, Camps Roads, Camps Industrial Estate, East Calder EH27 8DF”. An apology is tendered and it is stated “I can promise I will continue to follow the requirements and keep and maintain my goods vehicle operator licence from the Traffic Commissioner”.

Governing law

9. Section 26(1) of the 1995 Act provides that, subject to the following provisions of the section and the provisions of Section 29, a TC may direct that an operator’s licence be revoked, suspended or curtailed on listed grounds. The ground relied on by the TC in this case was:

“(f) that any undertaking recorded in the licence has not been fulfilled.”

10. There are procedural requirements before there can be revocation. Section 29(1) provides that a TC shall not give a direction under Section 26(1):

“without first holding an inquiry if the holder or the licence requests that an inquiry be held.”

11. The powers of the Upper Tribunal in disposing of an appeal are (a) to make such order as it thinks fit; or (b) to remit the matter for rehearing and determination by the traffic commissioner (paragraph 17(2) of Schedule 4 to the Transport Act 1985).

Discussion

12. The Upper Tribunal narrowly decided to allow this appeal. It is important that the TC is able to carry out statutory regulatory functions, and in order to do so must be able to correspond with licence holders effectively. The Upper Tribunal was unimpressed by LM’s failures to respond to letters sent by the TC, some of which she accepted receiving, by sending the correct documents

timeously. Nevertheless, the TC must act lawfully. The bundle of papers before the Upper Tribunal lacked relevant evidence establishing that the TC had done so. There were two errors in law, which meant that the Decision of the TC could not stand, as follows.

- 12.1 The Upper Tribunal is not satisfied on the evidence before it that the TC could properly rely on the specified ground of revocation. The ground relied on was Section 26(1)(f) of the 1995 Act, according to the Decision read together with the letter of 27 November 2018, and was that any undertaking recorded in the licence has not been fulfilled. There was no licence produced to the Upper Tribunal. The Upper Tribunal was unable to be satisfied that there was an undertaking recorded in the licence. The undertaking quoted by the TC in letters was not a standard undertaking for restricted operator's licences. The Upper Tribunal did not consider it appropriate in the particular circumstances of this case to assume that the undertaking set out in letters to Ace from the TC was in the licence.
- 12.2 Nor is the Upper Tribunal satisfied that the TC acted procedurally fairly before revoking the licence. The scheme of the 1995 Act is that under Section 29 an operator should ordinarily have an opportunity to request a public inquiry before a licence is revoked. This is to ensure that the operator is heard, before losing a possession of value (2005/7 2 Travel Group Plc at paragraph 14). In this case, there was no request for a public inquiry by Ace, but that appears to be because Ace did not receive the letter of 27 November 2018. In many cases, the Upper Tribunal might be satisfied that correspondence posted by the TC to licence holders was received, particularly having regard to the provisions relating to notice of public inquiries in Schedule 4 of the Goods Vehicles (Licensing of Operators) Regulations 1995. However, the Upper Tribunal was not so satisfied in this particular case partly because, unusually, the TC did not produce proof of posting to the Upper Tribunal; but also because of the evidence (not apparently considered by the TC) that the TC had been told at the time of the application that there was a more reliable address that should be used. What is clear is that Ace was not heard before the licence was revoked. In the particular circumstances of this case, there was procedural unfairness.
13. The Upper Tribunal observes that it was a legitimate concern of the TC that Ace had the necessary financial standing to operate. However, the TC has subsequently confirmed that documents produced by Ace after the Decision show that, at the relevant time, it did have the necessary financial standing. This was not a case where the operator produced no evidence in response to requests from the TC; rather, evidence was produced but for different periods from those requested. The TC's concerns about Ace's failure to respond appropriately to correspondence from the TC are also legitimate, but there is sufficient uncertainty about the contact details given to the TC for it to be appropriate that the matter of revocation should be explored at Public Inquiry.
14. Accordingly, because the TC erred in law in the ways set out in paragraph 12, the Upper Tribunal allows the appeal. The case is remitted to the TC to hold a Public Inquiry into whether Ace's goods vehicle operator's licence

OM2005870 should be revoked. Ace and LM should be aware that the TC will consider all matters afresh at that Public Inquiry, and in particular is likely to consider circumstances which gave rise to the imposition of any undertaking as to evidence of financial standing, and what the TC has been told about the correspondence address for Ace. It does not follow from success in this appeal that there will be success at the Public Inquiry. LM and Ace are reminded of their right to seek legal representation for the Public Inquiry from a solicitor experienced in transport law.

A I Poole QC
Judge of the Upper Tribunal
Date: 7 June 2019