Neutral Citation Number: **[2019] UKUT 0327 (AAC)**

Appeal Nos. T/2019/49

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER
TRAFFIC COMMISSIONER APPEALS

IN AN APPEAL FROM THE DECISIONS OF
Nick Denton, Traffic Commissioner for
the West Midlands 8 July 2019

Before:

Her Hon. Judge J Beech, Judge of the Upper Tribunal
Stuart James, Specialist Member of the Upper Tribunal
Michael Farmer, Specialist Member of the Upper Tribunal

Appellants:

ROGER LLEWELLYN LIMITED

In attendance: Ms Newbold of Counsel instructed by Smith Bowyer Clarke

Heard at: Field House, 15-25 Bream's Buildings, London, EC4A 1DZ
Date of hearing: 15 October 2019
Date of decision: 22 October 2019

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that the appeal be ALLOWED to the limited extent that the orders of disqualification are set aside and that the issue of disqualification be remitted for further consideration by the Traffic Commissioner. Otherwise, the appeal is DISMISSED

SUBJECT MATTER:- Proportionality of revocation and disqualification; failure to invite submissions on the effect of disqualification.

CASES REFERRED TO:- 2009/225 Priority Freight & Paul Williams; 2002/217 Bryan Haulage No.2; Bradley Fold Travel Ltd v Secretary of State for Transport (2010) EWCA Civ 695; T/2018/72 St Mickalos Co Ltd & Michael Timinis

REASONS FOR DECISION

1. This is an appeal from the decision of the Traffic Commissioner for the West Midlands ("the TC") made on 8 July 2019 when he:

   a) Revoked the operator's licence of the Appellant ("the company") with effect from 0001 hours on 10 August 2019 under sections 26(1)(a), (c)(iii), (f) and (i) and 27(1)(a) of the Goods Vehicles (Licensing of Operators) Act 1995 ("the Act"); and

   b) Disqualified the company and its sole director Roger Llewellyn ("Mr Llewellyn") from holding or obtaining any type of operator's licence in any traffic area and in Mr Llewellyn's case, from being a director of any company holding or obtaining such a licence for a period of three years with effect from 10 August 2019 pursuant to s.28(1), (4) and (5) of the Act.

The Background

2. The background relevant to the appeal can be found in the appeal bundle, the transcript of the hearing and the written decision of the TC and is as follows. Mr Llewellyn had been involved in haulage since the 1970's, when he and his father were principally involved in agricultural haulage which was mainly incidental to the family farm. The fleet increased with time and the business branched out into general haulage. In 2008, a decision was made to separate the haulage side of the business from the farm and the present company was incorporated. It was granted a standard national operator's licence on 21 April 2008 authorising four vehicles and six trailers. The company's operating centre was at Lynwood Farm, Bishops Castle, Shrewsbury and its sole director and transport manager was Mr Llewellyn (who held a standard national CPC qualification).

3. In about 2012 (the date does not appear in the appeal papers), the licence was converted to a standard international licence. As Mr Llewellyn did not hold a standard international CPC, Mark Frankland was nominated as an additional transport manager to fulfil that requirement. In his TM1 form, Mr Frankland asserted that he would commit eight hours a week to the company and declared that he was the managing director of freight forwarding company, MJF Distribution Ltd. His nomination was accepted. As at the date of the public inquiry, the vehicle authorisation had increased to ten vehicles and twelve trailers with the same number of vehicles and trailers in possession.

4. On 22 November 2018, VRM KR59FRF was subject to a road side check at the Ewloe Weighbridge in Flintshire. An AdBlue emulator was found spliced into the SCR wiring loom behind the front grill of the tractor unit and an "S" marked delayed prohibition was issued, such a finding warranting a conclusion that "*poor workmanship should have been apparent to repairer*". "*Repairer*" in this context includes the person who had initially fitted the device.

5. Traffic Examiner ("TE") Yarranton and Vehicle Examiner ("VE") Williams then conducted maintenance and systems investigations. Both were marked as "unsatisfactory".

6. By call up letters dated 23 May 2019, the company, Mr Llewellyn (as director of the company and as a driver) and Mr Frankland (as transport manager) were called to a public inquiry which was held on 27 June 2019. In the event, Mr Frankland was unable to attend because of a pre-booked holiday and the TC determined that he would be called to a further public inquiry at a later date for consideration of his good repute. Mr Harris and Mr Arrowsmith were also called to drivers' hearings although the latter was unable to attend because of an injury.

The public inquiry

7. In attendance at the public inquiry was TE Yarranton, VE Williams, Mr Llewellyn, David Parry, a transport consultant who was representing Mr Llewellyn and the company, Mr Morris, the proposed transport manager for the company and Mr Harris.

8. The evidence of TE Yarranton and VE Williams was undisputed. The TC heard from Mr Parry, Mr Llewellyn and Mr Morris with the drivers' hearings taking place separately. At the conclusion of the evidence, Mr Parry made closing submissions in which he acknowledged that some reduction in the authorisation on the licence may "*be in order".* A discussion then took place. The TC then stated as follows:

> Pg 394 E: "*.. Now the range of possible outcomes from an Inquiry go from no action or a warning on the less serious side of the scale to obviously revocation and disqualification for the most serious. Frankly, I am not thinking of dispensing with this by way of a warning or no action…*
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> *The realistic outcome to me at the moment seems to vary somewhere between very strong regulatory action of a suspension/curtailment nature or outright revocation of the licence. That is the territory we are in and that cannot come as a surprise to you. So assuming I do not revoke the licence, which is a very big assumption but let us just assume it for a moment, what would the effect on the operator be of significant curtailment or a significant period of suspension".*
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> A discussion then ensued between Mr Parry and the TC about the extent of any curtailment or alternatively a suspension. This caused Mr Llewellyn to become very heated. He announced that either would finish the business off and that he would be unable to operate: "*If you want to take the lot, take it".* He maintained that his work would be taken by competitors within a month. It is clear that his "*outburst",* as Mr Llewellyn later described his conduct in a letter of apology to the TC, distracted both Mr Parry and the TC from addressing the effects of the full range of regulatory action available to the TC. Matters were concluded by the TC in this way:

Pg 398 G: *"I am going to think whether to conclude, as a result of this Inquiry, that I can after all have confidence in Mr Llewellyn to comply in the future. It is not a no brainer for me there. Sometimes I can say immediately after an Inquiry or at the conclusion of one, "Yes, this is a person that I would have confidence in " and sometimes I can immediately say, "No, I have not confidence in you at all" and Mr Llewellyn, it seems to me, is somewhere between the two. I still do not think he quite understands the importance of keeping good records and actually applying the rules. Mr Morris I think does understand these things. ..*
Though the operation probably today is not perfect but at least it is in a better place today than it was six months ago. That is clear. So I need to consider whether I can trust Mr Llewellyn in combination with Mr Morris as a Transport Manager to comply in future (inaudible) what Mr Llewellyn is saying causes me to doubt that; so what Mr Morris was saying offers me some reassurance and I need to just reflect a bit longer and get the actual balance comes out at the end (sic)".

Mr Llewellyn then continued to remonstrate with the TC about the inevitability of the company closing if regulatory action was taken against it.

9. In a second letter to the TC following the public inquiry, Mr Llewellyn informed him that he would prefer a suspension of his licence rather than a curtailment.

The Traffic Commissioner's decision

10. In his written decision dated 8 July 2019, the TC made the following findings:

a) The company had been parking its vehicles at Boreton Grange Farm for many years without authorisation. In interview, Mr Llewellyn estimated the period to be ten years. Mr Llewellyn had been advised by TE Yarranton in December 2018 that Boreton Grange Farm was an unauthorised operating centre. No application was made to add the farm as an additional operating centre until 4 March 2019. As at the date of the hearing, the application had not been granted although the company continued to use Boreton Grange Farm as an operating centre;

b) Mark Frankland was nominated as transport manager because he held an international CPC. He was a transport manager in name only. He had not fulfilled any of the functions of transport manager; he was not paid; there was no contract of engagement. This was accepted by Mr Frankland when interviewed. It followed that the company had been without professional competence since 2013. This was only remedied on 9 May 2019 when Mr Morris was accepted as the new transport manager. In February 2019, Mr Llewellyn had attempted to nominate himself as transport manager but his nomination was rejected because he lacked the necessary international CPC qualification;

c) Until very recently, the company had "*completely failed"* to ensure that drivers' hours and tachograph rules were observed as no analysis of data

was undertaken. This failure was of long standing as the company had acquired its first digital vehicles in 2013. The reason given for the failure by Mr Llewellyn was that the operating centre was in an area where WiFi was a problem. This explanation was rejected by the TC as the issue had been rectified following the DVSA investigations and the engagement of Mr Parry, as transport consultant. WiFi problems could not be a valid excuse for failing to take any action over a period of six years;

d) The result of the failure to monitor drivers' hours and records was that three of the drivers were able to drive on occasion either without inserting their driver's card or after removing it. One of those drivers was Mr Llewellyn. TE Yarranton's investigation included analysis of tachograph and driver's card data for the period September to November 2018. As a result of that analysis, Mr Llewellyn subsequently pleaded guilty to three offences of unauthorised withdrawal of a driver's card; three offences of failing to use a driver's card; four offences of knowingly making a false record and one offence of driving in excess of ten hours. Mr Arrowsmith pleaded guilty to four offences of driving for more than 4 ½ hours without a break; three offences of knowingly making a false record; four offences of failing to use a driver's card and one offence of driving in excess of ten hours. Their cases had been committed to the Crown Court for sentence but had not heard at the date of the public inquiry.

e) Whilst Mr Harris had not been prosecuted for any driver's hours offences, he had been living in his tractor unit for several weeks at Boreton Grange Farm, thus committing weekly rest offences and he had also been driving the tractor unit during the weekends to go to the shops without his driver's card inserted in the unit;

f) The company did not have a system in place to check driver entitlement;

g) Mr Llewellyn had failed to ensure the lawful operation of vehicles. The TC stopped short of finding that the company was responsible for fitting the AbBlue emulator to VRM KR59FRF. However, he did find that Mr Llewellyn knew that the vehicle had not been consuming AdBlue since it was acquired in June 2017 as he was a regular driver of the vehicle and he must have seen that the AdBlue gauge did not move (he accepted that the vehicle was not consuming AdBlue as it should have been). He chose not to have the problem investigated, citing other vehicle repair priorities;

h) As for the failings in the company's maintenance systems:

    i. The PMI sheets recorded that all of the vehicles and trailers were inspected and signed off as being roadworthy on the same day. From the number and seriousness of the repairs recorded on the PMI sheets, VE Williams had concluded that this would not have been physically possible. There was no evidence as to when the inspections and the repairs did take place. Mr Llewellyn accepted that the repairs may have been undertaken in the week leading up to the date on the PMI sheets (there was a suspicion that the PMI sheets were not completed

contemporaneously with the preventative maintenance inspection as a different pen was used to fill in the mileage on each PMI sheet);

ii. The maintenance contractor (Mr Llewellyn's brother, Maurice), did not record tyre tread depths on the PMI sheets, simply ticking the boxes. Even at the date of the public inquiry, he continued to do this despite TE Yarranton drawing this to Mr Llewellyn's attention in interview in February 2019. This was particularly disappointing as prohibitions had been issued for illegal tyre tread depths in 2014 and February 2019;

iii. Inadequate brake tests had been performed and road tests falsely recorded (there was no movement recorded on the tachograph data);

iv. Driver defect reports were inadequate and many did not even record the date of the walk-round check;

v. From the records produced at the public inquiry, the TC noted that VRM DN61CUK had been used on at least two days in March 2019 between the expiry of its MOT on 28 February and 12 March 2019 when it was presented for test. The vehicle may have been used on other dates but the driver's failure to record the dates on many of his driver defect reports made it impossible to be sure.

11. Other matters that the TC failed to mention were that there was no adequate forward planner for maintenance and there was no maintenance contract.

12. In conducting the inevitable balancing exercise, the TC found that all of the findings set out in paragraph 10 weighed negatively in the balance. On the positive side, Mr Llewellyn had co-operated with both investigations; tachograph downloads and analysis were now taking place (albeit that driver infringements and missing mileage were still being detected); the maintenance contract had now been signed although only five days before the public inquiry; there was a qualified transport manager in place, who with the help of Mr Parry had made improvements (although as the vehicle out of MOT and the poor state of the driver defect reports demonstrated, there remained more work to be done); the fact that Mr Parry had been called in to assist in late 2018, not just a few days before the public inquiry; driver licence entitlements were now being checked every three months; the operator was prepared to offer an undertaking to be audited in about six months.

13. The TC concluded that the positive factors were heavily outweighed by the negative. The nomination of a standard international CPC holder as transport manager as a "*flag of convenience" under which to gain and continue to run a standard international licence, was an act of serious and continuing dishonesty".* So were the instances of Mr Llewellyn driving without a driver's card. His failure to investigate the non-consumption of AdBlue over a seventeen-month period was turning a blind eye to the obvious i.e that the vehicle must have been fitted with an emulator of some kind. The excuse of poor WiFi to justify a lack of tachograph analysis over a six-year period was feeble in the extreme. For ten years, an unauthorised operating centre was used and a further three months went by after the DVSA visit before an application was made. The TC concluded that the operator was not of good repute. Mr Llewellyn had shown repeatedly that he could not be trusted to comply with the rules and regulations when he believed it was in the interests

of his business to ignore them. His evidence at the public inquiry did not suggest to the TC that he quite understood the seriousness of his conduct e.g. Mr Frankland had been nominated as an international CPC holder, so what was the problem? Mr Llewellyn had clearly not looked at the PMI sheets to check that the failings identified by VE Williams had been corrected. Nor had he checked that his vehicles were in MOT. No one listening to or seeing Mr Llewellyn at the hearing could conclude that he had the necessary persona, drive and commitment to ensure a compliant operation in the future.

14. The TC answered the Priority Freight question in the negative. He concluded that the company's operation without a properly qualified transport manager for seven years and from an unauthorised operating centre for ten years and without analysing drivers' hours and when the director himself had falsified tachograph records, meant that the Bryan Haulage question was answered in the affirmative. The TC revoked the company's operator's licence with effect from 10 August 2019 and determined that both the company and Mr Llewellyn "*deserved to be disqualified".* He considered paragraph 100 of the Senior Traffic Commissioner's Statutory Guidance Document No. 10 and having determined that "*the seriousness and wide-ranging nature of the non-compliance, and its lengthy duration, make disqualification appropriate"*, the TC determined that a period of three years, which was at the upper end of the scale for a first inquiry, was proportionate and appropriate.

The Appeal

15. At the hearing of the appeal, the company and Mr Llewellyn were represented by Ms Newbold of Counsel who submitted a skeleton argument in advance of the hearing, for which we were grateful. There were two grounds of appeal:

    a) That the decision to revoke the operator's licence was disproportionate; and

    b) That the decision to disqualify both the operator and Mr Llewellyn did not meet the test set out by the Upper Tribunal in the case law.

16. Ms Newbold expanded on the above. With respect to ground a), she submitted that it was important to bear in mind that neither the company or Mr Llewellyn were legally represented. Whilst the TC had referred to the range of regulatory action available to him (at pg 394 E of the transcript - see paragraph 8 above), he had nevertheless clearly considered the case to be on the borderline (see pg 398 G of the transcript – see paragraph 8 above) nor "*clear-cut"* and the benefit of any doubt must lie with the Appellant. Further, there was no mention of the possibility of revocation or disqualification. The fact that he had asked about the effect of suspension and curtailment during submissions, was tantamount to giving an indication as to the nature of the action he was considering. Ms Newbold accepted that Mr Llewellyn's "*outburst"* had distracted the TC and Mr Parry and that it had, in effect, brought the public inquiry to an end. It was however a *"knee jerk reaction"*

and it should not have deprived the company or Mr Llewellyn of the opportunity to make representations as to the consequences of revocation.

17. With respect to ground b), whilst disqualification was mentioned in the call up letter, it was only mentioned once by the TC at pg 394 E. There was no opportunity to make representations. Ms Newbold referred the Tribunal to the Upper Tribunal case of *T/2018/72 St Mickalos Company Limited and Michael Timinis (2019) UKUT 0089 (AAC).*

Discussion

18. This was a bad case of longstanding non-compliance in virtually all areas of operator licensing along with dishonesty on the part of Mr Llewellyn, the sole director of the company. We do not need to repeat the findings and conclusions of the TC. They were well made out including his assessment of Mr Llewellyn as a witness. We are satisfied that in relation to ground a), revocation was inevitable despite the concluding words of the TC. We recognise that it is often the case, after a particularly long and difficult public inquiry, that it is only when the TC is able to step back in order to consider all of the evidence and marshal their thoughts in the cool of the retiring room, that the outcome of the balancing exercise becomes clear. What is of note, is that neither the grounds of appeal nor the skeleton argument or the oral submissions of Ms Newbold, point to any failures in the balancing exercise leading to the revocation of the licence, for example, failing to mention something positive which should be weighed against the negative. It should have been abundantly clear to the company and Mr Llewellyn that the licence was in danger of being revoked. The call up letter advised Mr Llewellyn to obtain competent legal or professional help as "*these are serious matters. Your licence and therefore your business are at stake".* The letter also sets out the full range of regulatory action available to the TC including revocation and disqualification. Finally, the TC did make it clear that revocation was a very real outcome (see paragraph 8 above). Against that background, if Mr Llewellyn did not appreciate that the company's licence was in danger of being revoked, then it is further evidence of his lack of appreciation or understanding of the seriousness of the non-compliance in this case and that in turn, supports the TC's determination that Mr Llewellyn cannot be trusted at present, with or without support, to operate compliantly.

19. With respect to ground b), we agree that the TC should have given Mr Parry an opportunity to make submissions upon the effect and length of an order of disqualification. We have considerable sympathy with the TC in failing to give Mr Parry that opportunity in view of Mr Llewellyn's "*outburst"* which undoubtedly distracted the TC from the usual enquiries as to the effect of the full range of regulatory action available to him. We do not go so far as to say that an order of disqualification was disproportionate in principle as we are satisfied that it was not. It would be an affront to other compliant and law-abiding operators if, in a case such as this, an order of disqualification was not made and it would certainly send the wrong message out to the industry. The issue is the length of the disqualification.

20. We should say something about Ms Newbold's submission that we should have regard to the fact that the Appellant was not legally represented. First of all, it was Mr Llewellyn's choice to be represented by Mr Parry. But in any event, Mr Parry is a very experienced transport consultant and being represented by a transport professional with detailed knowledge of the transport industry cannot amount to a ground of appeal or be used to support other grounds of appeal.

21. Finally, we wish to record that we were very impressed by the clarity, quality and detail of the interviews conducted by TE Yarranton in this case. They represent excellent examples of how interviews of operators and drivers should be conducted and he is to be commended.

Conclusion

22. We are satisfied that the TC's failure to invite submissions as to the effect and length of the orders of disqualification was an error which must be rectified by him by inviting written submissions from the company and Mr Llewellyn and giving them an opportunity to appear at a further public inquiry if they wish. It follows that the orders of disqualification are set aside and the issue remitted to the TC for further consideration. Otherwise the appeal is dismissed.

Her Honour Judge Beech
22 October 2019