



NCN: [2022] UKUT 94 (AAC)

IN THE UPPER TRIBUNAL

Appeal No. JA-2021-002173-T

ADMINISTRATIVE APPEALS CHAMBER

T/2021/41

(TRAFFIC COMMISSIONER APPEALS)

ON APPEAL from a DECISION of the TRAFFIC COMMISSIONER for NORTH WEST ENGLAND

Decision dated: 26 May 2021
Appeal dated: 9 June 2021
Before: Judge Rupert Jones: Judge of the Upper Tribunal
Mr D Rawsthorn: Member of the Upper Tribunal
Mr S James: Member of the Upper Tribunal
Appellant: ALPS Scaffolding Ltd
Reference: OC2034180
Attendances: Sean Coulton in Person for the Appellant
Heard at: Remotely by CVP video
Date of Upper Tribunal Hearing: 17 March 2022
Date of Decision: 22 March 2022

DECISION OF THE UPPER TRIBUNAL

The appeal against the Traffic Commissioner's decision dated 26 May 2021 that the Appellant's Operator's Licence be revoked is dismissed. The decision is confirmed with immediate effect. The stay of the revocation decision, granted by the Tribunal on 13 July 2021, ends with immediate effect.

Subject matter:

Revocation of Operator's Licence: section 26(1)(f) of the of the Goods Vehicles (Licensing of Operators) Act 1995 – breach of undertaking; section 26(1)(h) - lack of financial standing.

REASONS FOR DECISION

1. The Appellant (ALPS Scaffolding Ltd) appeals the decision of the Traffic Commissioner (TC) dated 26 May 2021 to revoke its operator's licence.
2. The TC's decision was contained in a letter dated 26 May 2021. The letter referred to a previous letter dated 26 April 2021 notifying the Appellant that the TC was considering revoking its goods vehicle operator's licence and to other correspondence received. The TC's letter stated that 'In the absence of a request for a public inquiry to be held, the Traffic Commissioner has revoked your operator's licence with effect from Wednesday 26 May 2021 in accordance with the grounds stated in our letter.'
3. The grounds for revocation stated in the TC's 'minded to revoke' letter dated 26 April 2021 were as follows:

'I refer to the company's good vehicle operator's licence and the following undertaking attached to the licence:

1. "ALPS Scaffolding Ltd will provide financial evidence in the name of the limited company covering the months of September, October and November 2020, to the Central Licensing Office in Leeds by no later than 31 December 2020. This must show that the operator has continued to meet the required level of available finance through the period by reference to an average balance, dependant on the rates applicable at that time."

I also refer to our letter dated 22 December 2020 regarding the above undertaking and the email correspondence received between 4-12 January 2021 with the attached bank statements. Finally, I refer to our email correspondence dated 14 January 2021.

The Traffic Commissioner has been informed that the company has apparently failed to fulfil the above undertaking and apparently does not meet the financial standing requirements attached to the licence. The Traffic Commissioner is also aware that an email dated 14 January 2021 has been sent regarding this matter and no response has apparently been received.

In view of the above the Traffic Commissioner is considering making a direction under Section 26(1) of the Act to revoke your operator's licence on the following grounds:

- Under section 26(1)(f) of the Act, that any undertaking recorded on the licence has not been fulfilled, namely that the operator has apparently not provided financial evidence in the name of Alps Scaffolding Limited covering the months of September, October and November 2020.
- Under Section 26(1)(h) of the Act, that there has been, since the licence was issued or varied, a material change in any of the circumstance of the licence-holder, that were relevant to the issue or variation of the licence, namely the company apparently does not meet the financial standing requirements attached to the licence.

In accordance with section 29(1) the Traffic Commissioner shall not give a direction to revoke an operator's licence without first holding a public inquiry if the holder of the licence requests. Therefore if you wish to request that a public inquiry is held you must submit a request in writing to this office by Monday 17 May 2021.

If no request for a public inquiry is received by this date your operator's licence will be revoked. You will be required to return your operator's licence and disc to this office on or before Monday 24 May 2021.'

The Appeal

4. In a notice of appeal to the Upper Tribunal dated 9 June 2021 (received on 17 June 2021), David Ruth, the director of the Appellant, appealed on the following grounds:

'License is being revoked as the commissioner stated we were unable to meet financial level requirements, however we had problems with our bank regarding requesting paper statements and for them to change the bank account name to our new company name. We do have the financial means to maintain the terms of the operator's license and can show this with evidence, as all problems with obtaining evidence is now sorted. We are a small family business, significantly hit by the Covid-19 pandemic and losing our operator's licence would mean our business would not survive.

We have had all checks and services carried out on our wagon and can assure the commissioner that we will continue to do so. To have to re-apply for a new licence would be financially detrimental to us. Please offer us some leeway during these difficult times and allow us to submit evidence of finances.'

5. On 13 July 2021, Upper Tribunal Judge Hemmingway granted a stay of the implementation of the revocation decision of the TC pending the determination of this appeal.

The hearing

6. With the consent of the Appellant through Mr Ruth its director, the hearing was heard remotely through internet enabled video technology (CVP). We were satisfied it was just and fair - in accordance with the overriding objective - to proceed in this manner. The Appellant received a reasonable opportunity to make its representations in writing and orally before and during the hearing.
7. Mr Ruth did not attend the hearing nor notify the Tribunal in advance in writing or by telephone that he would not be attending nor participating nor his reasons for this. We are satisfied that he, and the Appellant, had been properly notified in writing of the date of the hearing and it was in the interests of justice to proceed in his absence. This was all the more so given that Mr Ruth must have been aware of the date and had not sought an adjournment nor postponement of the hearing.
8. Nonetheless, Mr Coulton, the Appellant's former director, did attend and participate in the hearing. He attended by video, and then when he could not be heard on the video facility, he participated by telephone. Mr Coulton confirmed that he was content to proceed with the hearing by telephone. We were satisfied, based on his

submissions and answers to our questions, that he was fully able to engage in proceedings.

9. At our request, in emails sent at the outset of the hearing, Mr Coulton confirmed his identity and that he was instructed to represent the Appellant. He confirmed in those emails that he was a director of the Appellant company, although he later accepted he was not. The email address was the same one previously used in correspondence on behalf of the company. In any event, Mr Coulton explained that he was an employee of the Appellant - its manager who was responsible for its day to day operation - and that he was authorised to represent the company. He also explained that he continued to be a shareholder in the Appellant.
10. Mr Coulton further explained that Mr Ruth, his father in law in whose name the notice of appeal was filed, had been taken ill with breathing difficulties and was in hospital. Hence Mr Coulton stated Mr Ruth would not be able to attend the hearing and had asked him to act on the company's behalf. We noted that no medical evidence or any other independent evidence was provided in support of this suggestion.
11. Neither Mr Ruth nor Mr Coulton was seeking an adjournment nor postponement of the hearing. It was apparent that Mr Coulton had the full copy of the appeal bundle sent by the tribunal as well as having the signing in details for joining the hearing. We were satisfied it was in the interests of justice to substitute him for Mr Ruth as representative for the company on the basis that we accepted his assertion at face value that he was authorised to act by Mr Ruth and continued to be an employee (and former director) of the company.

The law

12. Section 26(1) of the of the Goods Vehicles (Licensing of Operators) Act 1995 gives a TC the power to direct a discretionary revocation of an operator's licence in the following terms:

26 Revocation, suspension and curtailment of operators' licences.

(1) Subject to the following provisions of this section and the provisions of section 29, a traffic commissioner may direct that an operator's licence be revoked, suspended or curtailed (within the meaning given in subsection (11)) on any of the following grounds—

(a) that a place in the traffic area to which the licence relates has, at a time when it was not specified in the licence as an operating centre of the licence-holder, been used as an operating centre for vehicles authorised to be used under the licence;

(b) that the licence-holder has contravened any condition attached to the licence;

(c) that during the five years ending with the date on which the direction is given there has been—

(i) a conviction of the licence-holder of an offence such as is mentioned in any of sub-paragraphs (a) to (i) of paragraph 5 of Schedule 2;

(ii) a conviction of a servant or agent of the licence-holder of any such offence, other than an offence such as is mentioned in sub-paragraph (c), (e) or (h) of that paragraph; or

(iii) a prohibition under section 69 or 70 of the Road Traffic Act 1988 (power to prohibit driving of unfit or overloaded vehicles) of the driving of a vehicle of which the licence-holder was the owner when the prohibition was imposed;

(ca) that during those five years a fixed penalty notice or conditional offer has been issued under Part 3 of the Road Traffic Offenders Act 1988 to the licence-holder in respect of an offence within sub-paragraph (i) of paragraph (c) or to a servant or agent of the licence-holder in respect of an offence within sub-paragraph (ii) of that paragraph;

(d) that during those five years, on occasions appearing to the commissioner to be sufficiently numerous to justify the giving of a direction under this subsection, there has been a conviction of the licence-holder or a servant or agent of his of an offence such as is mentioned in paragraph 5(j) of Schedule 2 or an issue of a fixed penalty notice or conditional offer under Part 3 of the Road Traffic Offenders Act 1988 to the licence-holder or a servant or agent of his in respect of such an offence;

(e) that the licence-holder made, or procured to be made, for the purposes of—

(i) his application for the licence,

(ii) an application for the variation of the licence, or

(iii) a request for a direction under paragraph 1 or 3 of Schedule 4,

a statement of fact that, whether to his knowledge or not, was false, or a statement of expectation that has not been fulfilled;

(f) that any undertaking recorded in the licence has not been fulfilled;

(g) that the licence-holder, being an individual, has been made bankrupt or has had a debt relief order (under Part 7A of the Insolvency Act 1986) made in respect of him] or, being a company, has gone into liquidation, other than voluntary liquidation for the purpose of reconstruction;

(h) that since the licence was issued or varied there has been a material change in any of the circumstances of the licence-holder that were relevant to the issue or variation of the licence;

(i) that the licence is liable to revocation, suspension or curtailment by virtue of a direction under section 28(4).

[emphasis added]

The Upper Tribunal's jurisdiction

13. Paragraph 17 of Schedule 4 to the Transport Act 1985 provides:

“(1) The Upper Tribunal are to have full jurisdiction to hear and determine all matters (whether of law or of fact) for the purpose of the exercise of any of their functions under an enactment relating to transport”.

(2) On an appeal from any determination of a traffic commissioner other than an excluded determination, the Upper Tribunal is to have power-

(a) to make such order as it thinks fit; or

(b) to remit the matter to the traffic commissioner for rehearing and determination by the commissioner in any case where the tribunal considers it appropriate.

(3) The Upper Tribunal may not on any such appeal take into consideration any circumstances which did not exist at the time of the determination which is the subject of the appeal”.

14. The Upper Tribunal's jurisdiction was examined by the Court of Appeal in *Bradley Fold Travel Ltd and Anor v Secretary of State for Transport* [2010] EWCA Civ 695. The court applied *Subesh and ors v Secretary of State for the Home Department* [2004] EWCA Civ 56, where Woolf LJ held:

“44....The first instance decision is taken to be correct until the contrary is shown...An Appellant, if he is to succeed, must persuade the appeal court or tribunal not merely that a different view of the facts from that taken below is reasonable and possible, but that there are objective grounds upon which the court ought to conclude that a different view is the right one...The true distinction is between the case where the appeal court might prefer a different view (perhaps on marginal grounds) and one where it concludes that the process of reasoning, and the application of the relevant law, require it to adopt a different view. The burden which an Appellant assumes is to show that the case falls within this latter category.”

15. The Tribunal is not required to rehear all the evidence by conducting what would, in effect, be a new first instance hearing. Instead it has the duty to hear and determine matters of both fact and law on the basis of the material before the Traffic Commissioner but without having the benefit of seeing and hearing the witnesses.
16. The Appellant ‘assumes the burden’ of showing that the decision appealed from is ‘plainly wrong’ or at least ‘wrong’.
17. In order to succeed the Appellant must show not merely that there are grounds for *preferring* a different view but that there are objective grounds upon which the Tribunal ought to conclude that the different view is the right one. Put another way it is not enough that the Tribunal might *prefer* a different view; the Appellant must show that the process of reasoning and the application of the relevant law *require* the Tribunal to adopt a different view.
18. That is the approach which we have followed in deciding this appeal.

The TC’s reasons for revocation

19. The TC’s detailed reasons for revocation were set out in an internal memo (a VOL submission on 25 May 2021) that was not disclosed to the Appellant prior to revocation or its appeal. The detailed reasons were only provided to the Appellant as part of the appeal bundle. These reasons should have been provided to the Appellant at the time of revocation so that they could inform its decision as to whether to appeal and on what basis. All the Appellant received was the summary of reasons in the TC’s letter of 26 April 2021. We return to this topic below.
20. In any event, the detailed reasons for the revocation set out by the Office of the TC (‘OTC’) in the memo supporting revocation were as follows.
21. The operator’s licence was granted in August 2020 and the Appellant operator agreed an undertaking to provide financial evidence in the name of the limited company covering the months of September, October, and November 2020 by 31 December 2020. The terms of the undertaking additionally required that the evidence must show that the operator had continued to meet the required level of available finance throughout that period.

22. The Appellant operator failed to supply any financial evidence by 31 December 2020. This immediately meant it had failed to fulfil the undertaking.
23. In January 2021, bank statements were submitted by Sean Coulton, who then was the sole director. The statements were in the name of Coulton Scaffolding Limited. This was the operator's previous name up to 21 July 2020 (the name change occurring before the licence was granted). Analysis of the statement showed the average balance fell well short of the £3,100 required.
24. The operator claimed that it was struggling to persuade its bank to change the company name on the account. Despite several exchanges of correspondence with the OTC, the operator failed to provide any evidence to support that claim.
25. As a result, propose to revoke letters were issued to the operator on 1 March 2021. These cited the operator's failure to fulfil the undertaking and also the failure to notify a material change, namely the operator's lack of financial standing.
26. A response was received dated 13 March 2021 from Mr Coulton. The response did not contain a request for a public inquiry. However, Mr Coulton asked for some leeway to be provided given the difficult trading circumstances the operator had encountered (during the pandemic).
27. Whilst this response was being considered, it was noted that on 3 April 2021 Mr Coulton's removal as director with effect from 1 February 2021 had been recorded at Companies House. He also ceased to be a person with significant control of the operator from that time. The sole director of the company after 1 February 2021 was recorded as being Mr David Ruth. This change had never been recorded with the OTC and Mr Coulton remained named as the sole director on the licensing system. This was despite the issue being flagged up in correspondence by the OTC.
28. The OTC directed that the propose to revoke letters should be reissued addressed to the director (Mr Ruth). Mr Coulton again purported to respond but this was rejected as he was not a director of the company. On 16 May 2021, Mr Coulton sent a further email attaching a copy of a letter purportedly in the name of Mr Ruth.
29. This letter contained a verbatim repetition of the contents of Mr Coulton's earlier letter dated 13 March 2021 and repeated the request for leeway. It did not contain any request for a public inquiry which the operator was specifically invited to consider in the propose to revoke correspondence.
30. The operator had not provided any explanation for the change in its directorship and apparent ownership nor for its failure to notify the OTC of those changes.
31. The OTC found that the grounds cited in the propose to revoke letter (of 26 April 2021) were made out. The operator did not provide the financial evidence it had undertaken to provide by 31 December 2020. The evidence provided subsequently

was not acceptable as it was not in the correct entity name. Most significantly, it showed the operator had lacked financial standing for a large part of the period covered by the undertaking and this had not been drawn to the OTC's attention.

32. The OTC had considered the operator's request for some leeway to be given. The OTC did not consider that it was appropriate given the issues that had now emerged in relation to the unexplained changes in the directorship and ownership. It found that this was not an operator who could be trusted to be compliant in the future due to the range of non-compliance it had shown to date. For that reason the OTC could see no argument in favour of setting aside the PTR process and calling a public inquiry (noting that the operator had not requested such a hearing). Revocation should therefore follow.

Discussion

33. We remind ourselves that we must consider whether the TC's decision of 26 May 2021 was wrong, based on the material evidence that was before it at the time.
34. We are not satisfied that the TC's decision was wrong. He was entitled to find that there had been a range of non-compliance by that time such that the operator could not be trusted to comply in the future and that the sanction of revocation was proportionate such that the operator may be put out of business (see *Bryan Haulage No.2* and *Priority Freight* questions).
35. We took Mr Coulton through the OTC's detailed reasons, set out above, during the hearing and gave him the opportunity to comment on each given that the reasons had not been sent to the Appellant prior to revocation (although the minded to revoke letter summarised the grounds relied upon). Further, the Appellant had had sufficient notice of the detailed reasons as part of pursuing the appeal and receiving disclosure such that any procedural unfairness had been cured.
36. Mr Coulton did not disagree with any of the detailed reasons as being inaccurate, but he provided further explanations by way of mitigation.
37. He explained that the Appellant company changed its name from Coulton Scaffolding to ALPS Scaffolding Ltd at the same time as it applied for the operator's licence. It had heard nothing from the bank regarding the name change on the bank account because of the pandemic. The Appellant's office was shut and letters had been delivered to the office. That was the reason why the name took a while to get changed on the bank statements by the bank. Mr Coulton believed this happened some time in 2021 but he could not explain when despite stating that he would be able to provide the evidence to the tribunal, including current bank statements. At no time before had he provided such evidence.
38. Mr Coulton explained that the bank account held insufficient funds in September to November 2020 because the business had only just started up and had trouble

getting money in. However, it was only about a couple of hundred pounds short of the minimum threshold. The company had to pay the wages of the staff working for it at the time. If one were to look at the finances of the company now, Mr Coulton stated he could send statements and balances to clarify that it is now doing reasonably and had funds above the £3,100 required in the account. He believed the company had done everything asked, acted reasonably and it was unfair to revoke based on the detailed grounds. He repeated the request for leeway given difficulties trading during the pandemic.

39. Mr Coulton accepted that the company had not provided evidence to support the contentions in its notice of appeal – evidence of its current financial standing - but it had since assembled everything together and was able to provide it. He also explained that he had not informed the OTC of the change of directorship with Mr Ruth taking over because he did not know the company needed to. He was new to the business and apologised for any misunderstanding. The reason why his father in law, Mr Ruth, had taken over as director was because Mr Ruth had given the company a loan to tide it over and Mr Coulton had given him the directorship in return.
40. Mr Coulton explained his background. He had worked offshore for 6-7 years previously to starting the business. He had taken a little risk and started his own company. He realised the regulatory requirements were the law but it had been so hard to get the business up and running and he asked for some leeway. Since the revocation, and despite not being aware the company had been granted a stay of the revocation decision, the Appellant had not been operating the wagon (its heavy goods vehicle). The vehicle had been maintained, taxed and insured but not used.
41. Therefore, the company had continued in business without using its operator's licence since May 2021. In order to keep trading the Appellant had been operating two transit vans since July 2021. The company had gone through hard times but was starting to pick up. He explained that it would be costly to have to reapply for a new licence if the revocation were confirmed but the company would have the bank accounts in the correct name and these would prove it now had sufficient financial standing.
42. It is to be noted that the Appellant had also provided bank statements to the OTC for the period January to April 2021, demonstrating sufficient funds in its bank account at that time, albeit that they continued to be in the name of Coulton Scaffolding Ltd.
43. We were disappointed to note that the OTC had provided these bank statements for the appeal bundle but not the relevant bank statements from September to November 2020. Nonetheless, Mr Coulton had accepted that there were insufficient funds in the account at this time and that it had breached its undertaking and financial standing requirement.

Conclusion

44. We were satisfied that, notwithstanding our sympathy for Mr Coulton and the Appellant and its subsequent improvement in fortunes, that the decision of the TC in May 2021 was not wrong. The TC was entitled to find there was serious non-compliance by the Appellant in terms of a failure to comply with the undertakings, have sufficient financial standing and failure to notify a change of directorship. There were repeated opportunities given by the OTC at the time for the Appellant to demonstrate compliance and the TC was entitled to take the view at that time that the Appellant could not be trusted to be compliant. The decision was rational and proportionate.
45. We are not satisfied that the Appellant was required to have been given further leeway at that time by the TC. We are not satisfied that it would be unduly onerous for the Appellant to reapply for a fresh licence. If, as is suggested, the company now has a bank account in the correct name which also demonstrates a current level of financial standing then the moderate costs of a fresh application are not disproportionate. Further, according to Mr Coulton, the Appellant has been able to continue to operate without an operator's licence since July 2021 through using its transit vans. The Appellant will also need to demonstrate that its vehicle has been properly taxed, insured and maintained (it is said that the vehicle maintenance has continued with this paid for in cash but maintenance records will be required).
46. It follows that we dismiss the appeal against revocation and confirm the TC's decision. Further, the stay of the revocation which the Upper Tribunal previously granted should come to an end with immediate effect.

Postscript

47. We repeat our observations that the OTC should provide its full reasons for its decision in writing to the licensee at the time or before any revocation decision. The operator needs these reasons in order to decide whether to appeal and on what grounds. It is a fundamental requirement of natural justice and procedural fairness for full reasons to be given at the time.
48. Further the OTC should have provided to the Tribunal the company's relevant bank statements for September to November 2020 which it relied upon against the Appellant. It so happened that there was no issue in dispute arising from them but the OTC should make no assumption that this would be the same in any other case.

Authorised for release

**Rupert Jones
Judge of the Upper Tribunal**

Dated: 22 March 2022