



Neutral Citation Number: [2019] UKUT 419 (AAC)

Appeal No. T/2019/11

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

**IN AN APPEAL FROM THE DECISION OF
John Baker, Deputy Traffic Commissioner for
London and South East of England dated 28 January 2019**

Before:

**Her Hon. Judge J Beech, Judge of the Upper Tribunal
George Inch, Specialist Member of the Upper Tribunal
John Robinson, Specialist Member of the Upper Tribunal**

Appellant:

**V LARKIN LTD trading as OLYMPIC SCAFFOLDING
ON POINT CONSTRUCTION LIMITED
VINCENT LARKIN**

In attendance: Mr Carless, Transport Consultant of SPC Transport Consultancy Service on behalf of all Appellants

Heard at: Field House, 15-25 Bream's Buildings, London, EC4A 1DZ

Date of hearing: 9 April 2019

Date of decision: 18 April 2019

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that the appeals be DISMISSED

SUBJECT MATTER:- Proportionality of disqualification

CASES REFERRED TO:- T/2013/26 Vince Larkin Limited; 2009/225 Priority Freight & Paul Williams; 2002/217 Bryan Haulage No.2; 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 Deputy Traffic Commissioner for London and the South East of England (“the DTC”) made on 28 January 2019 when he revoked the operator’s licence of V Larkin Ltd; refused an application for an operator’s licence made by On Point Construction Ltd and disqualified Vincent Larkin (“Mr Larkin”) from 18 February 2019 from holding or obtaining an operator’s licence and from being a director of a company that does so for a period of two years.

The Background

2. The background relevant to this appeal can be found in the appeal bundle, the transcript of the hearing, the decision of the DTC and the previous decision of the Upper Tribunal: *T/2013/26 Vince Larkin Limited* and is as follows. Mr Larkin has a significant history of regulatory non-compliance with respect to the operation of vehicles under restricted operator’s licences. He was the sole director of Vince Larkin Limited which was granted a restricted operator’s licence in 2006. The company was authorised to operate four vehicles and it had three vehicles in possession. In June 2007, a maintenance investigation was marked as “unsatisfactory” as a result of significant failings in relation to maintenance record keeping, prohibitions and a poor MOT history. As a result of a letter in response to the findings written by Mr Larkin, giving explanations for the findings and giving assurances as to the future, a formal warning was issued by the Office of the Traffic Commissioner (“OTC”).
3. In December 2008, the company was called to a public inquiry as a result of a further maintenance investigation which was marked as “unsatisfactory” as a result of significant failings in the company maintenance systems. The result of the public inquiry was that the company’s licence was suspended for four days although its vehicle authorisation was increased by one.
4. In January 2013, the company was called to a second public inquiry as a result of a third maintenance investigation which had been marked as “unsatisfactory”. The result of the public inquiry was that a further formal warning was issued to the company and Mr Larkin was warned that a further public inquiry would result in severe regulatory action. Rather surprisingly, the company’s authorisation was again increased by one.
5. In the interim, an unannounced maintenance investigation took place in November 2012 as a result of an “S” marked prohibition having been issued to one of the company’s vehicles. The investigation was marked as “unsatisfactory” as a result of significant maintenance failings and the lack of available maintenance and drivers’ hours records, despite Mr Larkin having been given time to produce the relevant documentation. At a public inquiry in January 2013, the company’s licence was revoked and an appeal to the Upper Tribunal was dismissed (*T/2013/26 Vince Larkin Limited*).

6. An application for a new restricted licence was made by Mr Larkin in 2013 and was considered at public inquiry. The application was refused in November 2013, the Traffic Commissioner finding that Mr Larkin demonstrated little knowledge of the drivers' hours rules. At that hearing, a link was made to Da Vinci Scaffolding Limited which was then called to a public inquiry. That licence was revoked in April 2014 on the grounds that the sole director of the company was Mr Larkin's father who had no real involvement with the business and that in fact, Mr Larkin was the true operator.
7. An application for a licence was then made by V Larkin Limited in 2015 and was granted subject to a number of undertakings, including a training requirement for a Mr Humphries who was a director of the company along with Mr Larkin and a systems audit which was subsequently carried out by Enzo Antinoro.
8. On 27 December 2017, Traffic Examiner ("TE") Stewart Evans wrote to the company requesting production of all documents necessary for him to undertake a desk top assessment of the company's maintenance and drivers' hours systems for the period 1 January 2017 to 31 December 2017. The documents were to be produced by 26 January 2018. None were produced by that date although TE Evans did receive an email from Enzo Antinoro of The Road Transport Consultancy Limited indicating that he was acting on Mr Larkin's behalf and requesting an extension of time of one week to allow him to collate all of the documentation requested. The extension of time was granted.
9. On 1 February 2018, Mr Antinoro emailed some drivers files to TE Evans "*for you to be getting on with*" and highlighting that there appeared to be a number of drivers hours infringements, "*the usual scaffolder stuff – not taking enough weekly rest .. some daily rest issues and insufficient working time breaks on occasion*". He considered that a "*little education*" was all that was required. He went on:

*".. Mr Larkin will be checking his post again tomorrow morning for his new company card and I will let you know if anything arrives.
Also, he is supposed to be scanning over his inspections and relevant defect sheets over to me tonight.
I will keep you posted"*.
10. On 8 February 2018, Mr Antinoro emailed TE Evans attaching a working time summary for the relevant period, having managed to retrieve the data from the company's vehicles. He had included in his summary a front end missing mileage report. He was still waiting for the maintenance and driver defect report sheets. On 9 February 2018, TE Stewart responded, advising Mr Antinoro that as six weeks and two days had passed since the original request letter, he would be commencing his assessment of the company's systems on 14 February 2018. No further documentation was provided to him.

11. The desk-based assessment took place on 20 February 2018. Drivers' hours records for two drivers and two vehicles had been provided to TE Evans. Analysis of those records revealed one weekly rest offence and two instances of missing mileage. The working time summary prepared by Mr Antinoro appeared to be based on digital tachograph data, not taking account of other work (yard work for example) that may have been carried out. In keeping with scaffolding work, the vehicles spent a lot of time stationary during the day with the tachographs switched to break/rest (rather than other work). As no other documentation had been provided, the assessment was marked as "unsatisfactory".
12. On 26 February 2018, TE Evans wrote to the company requesting comments upon his findings by 9 March 2018. None were forthcoming. However, by that stage, the OTC had received an application for a restricted operator's licence from On Point Construction Limited ("OPCL"), nominating the same operating centre as that of V Larkin Limited. The sole director of OPCL was Sohayla Imanpour (Mr Larkin's partner), Mr Larkin having resigned his directorship on 23 January 2018. He remained the sole shareholder. In answer to a letter enquiring about the apparent links between OPCL and V Larkin Ltd, Ms Imanpour stated in an email that OPCL was a new construction company working out of the same office as V Larkin Ltd. Mr Larkin had resigned as a director of OPCL because they had realised that they could not work together and she assured the OTC that Mr Larkin would not have any involvement in the management of the licence.

The Public Inquiry

13. On 3 December 2018, the two companies were called to a public inquiry. The hearing was adjourned to 22 January 2019 as Mr Larkin had failed to produce most of the documentation set out in the call up letter. Mr Larkin told the DTC that as he was not getting any younger, he had set up the new company for his partner so that she could have a role in the business and to provide a future for their baby son. He considered that V Larkin Ltd had been stigmatised despite the lack of any prohibitions or convictions in the previous three years. He wanted to focus on OPCL. He stated that he could not recall receiving the production letter of 27 December 2017. The DTC made clear to Mr Larkin that the issue of whether OPCL had been set up as a "front" for Mr Larkin would be considered at the next hearing and this was confirmed in a supplementary call up letter dated 10 December 2018.
14. At the adjourned hearing, the parties were represented by a transport consultant, Paul Lyon who told the DTC that he had been trying to help V Larkin Ltd "*sort things out*" for a couple of years and that "*as of today*" Mr Larkin would become a director of OPCL. Mr Larkin asserted that he was not aware that TE Evans had not been provided with all of the documentation he had requested in the production letter despite the fact that this issue was raised in the call up letter. Mr Lyons told the DTC that there were problems with the maintenance contractor providing the paperwork and as a result, a change of contractor was being considered. Mr Lyon thought that the maintenance contractor was to blame for the missing maintenance

documentation although he believed that all the tachograph downloads were up to date. Mr Larkin asserted that he did not remember being asked for information by Mr Antinoro and that Mr Humphries may have been dealing with the request (he had retired as a director in April 2016). The DTC referred to the email correspondence between TE Evans and Mr Antinoro indicating that Mr Larkin was in communication with Mr Antinoro about the production of documents, Mr Larkin denied that he had been asked to provide information by Mr Antinoro and that the latter's emails to TE Evans must have been "*made up*". He had produced the following documents for the DTC to consider: the company's operator's licence along with some correspondence relating to the licence; the company's insurance policy; some driver's declarations; a small number of driver defect reports and some PMI sheets that post-dated the period referred to in TE Evans' production letter.

15. Mr Larkin told the DTC that a year ago things "*had gone wrong*". However, he was trying his best and wanted the opportunity to make OPCL work. It was not a smokescreen; he just wanted a chance to win new construction work for that company whilst Vince Larkin Ltd continued with scaffolding. He was unaware of the content of Ms Imanpour's email to the OTC advising that she and Mr Larkin "*could not work together*". Mr Larkin stated that they would not be working together in any event as she would work from home and he would be out on site. Ms Imanpour had mechanical experience, having helped her father in his MOT test centre and she was a good administrator, which Mr Larkin needed.
16. Mr Lyon assured the DTC that he was helping Mr Larkin to deal with his administration; he was training the drivers and downloading the vehicle units. V Larkin Ltd was "*in a different place to a year ago*". Mr Lyon wanted to train Ms Imanpour so that she could deal with the administration. He would continue to "*look after*" Mr Larkin and he offered to undertake an audit of the businesses after three months. Ms Imanpour could also attend the Operator's Licence Awareness Course. Mr Lyons suggested that the application of OPCL be granted with a two vehicle authorisation and that the authorisation on the licence of V Larkin Ltd be reduced to one vehicle as the combined licences did not require four vehicles and there was insufficient financial standing for the latter's authorisation in any event. As for OPCL, that company was operating using smaller flatbed vehicles and required a period of grace to demonstrate finances for two vehicles. Mr Larkin had only produced bank statements for OPCL as he thought that the DTC was only going to be considering the OPCL licence application.
17. Ms Imanpour then gave evidence. She had previously been employed as a publican, a mechanic (three or four years ago) and a beauty therapist. She told the DTC that whilst initially she and Mr Larkin had decided that she should operate the OPCL on her own (because they could not work together), she now considered that the timing was not right for her to take an active role in the company and she needed some leadership from Mr Larkin. She was hoping to take on an administrative role whilst learning the day to day operation of the business. She had already dealt with some invoices. She did not know the laws on drivers' hours and records.

The Deputy Traffic Commissioner's decision

18. The DTC found that it was inevitable that his decision would be made within the context of Mr Larkin's poor compliance history. He had been given numerous opportunities to demonstrate that he could be a compliant operator, including the grant of a licence following a previous revocation. It would be expected that Mr Larkin would be vigilant in ensuring that compliance levels were high and DVSA requests for evidence would be responded to promptly and fully. The reality was at the other end of the spectrum. TE Evans' request produced inadequate records and compliance concerns were found in relation to those which were produced. The DTC did not believe Mr Larkin's assertions that he was not aware of the production letter and it was highly unlikely that Mr Antinoro did not ask Mr Larkin for the documents. This conclusion was supported by the email exchange between TE Evans and Mr Antinoro. It was telling that Mr Larkin claimed at the public inquiry not to be aware of the DVSA request until he heard about it during the hearing. If this were true, it meant that Mr Larkin had not read the call up letter and public inquiry brief and if he had literacy problems, that he did not ensure he was informed of their contents. Further, he did not bring the documentation set out in TE Evans' request to the hearing; neither did he bring evidence of financial standing for V Larkin Ltd.

19. The DTC found breaches of section 26(1) (c) (f) and (h) of the 1995 Act including the failure to provide evidence of financial standing. He struggled to find any positive factors in the case apart from the recent involvement of another transport consultant and the production of some relevant documentation at the hearing. He referred to the Statutory Document 10: The Principle of Decision Making and the Concept of Proportionality issued by the Senior Traffic Commissioner and concluded that the case fell into the category of Serious to Severe, taking account of the very poor previous history and the blatant disregard of the valid request made by TE Evans in December 2017. The DTC then went on to ask the Priority Freight question: how likely is it that this operator will operate in compliance with the operator's licensing regime? His answer was an "*emphatic no*". Mr Larkin had been given so many chances and had failed to live up to promises made. He appeared to manage a limited level of compliance as long as someone was "*chasing him*" (Mr Lyon's words) but without that, compliance fell away. He could not be trusted going forwards and the answer to the Bryan Haulage No.2 question: does the operator deserve to be put out of business, was "yes". The operator's licence of V Larkin Ltd was revoked with effect from 18 February 2019. The DTC further determined that disqualification of Mr Larkin was appropriate and proportionate and made such an order for a period of two years during which time it was hoped that Mr Larkin would think carefully about what he needed to do and change should he decide to apply for a licence in the future. He had in the past attempted to circumvent the legislation by operating under a licence held in his father's name and when that licence was revoked, Mr Larkin was warned he should not attempt

anything similar in the future. The DTC also ordered that Mr Larkin shall not be a director of any company that holds an operator's licence for two years.

20. As for OPCL, its application was refused in the light of the decision to add Mr Larkin as a director. In any event, the DTC would have refused the application as Ms Imanpour had admitted that the business was run by Mr Larkin, she had "*done a few invoices*" and had very limited knowledge of the regulatory requirements for holding a licence. He found that it was more likely than not that the original application was an attempt to allow Mr Larkin to continue to operate with Ms Imanpour as "*a front*" following his failure to produce evidence of compliance to TE Evans. His findings were supported by Ms Imanpour's earlier explanation for Mr Larkin being removed as a director and the inadequate reasons for the change of mind. She should guard against applying for a licence in future on behalf of Mr Larkin.

The Appeal

21. At the hearing of the appeal, Mr Carless Snr of SPC Transport Consultancy appeared on behalf of the Appellants. There were three grounds of appeal:
- (1) Mr Larkin was not given any credit for the efforts he had made to comply with the Regulations. Whilst it was admitted that those efforts fell short of what was required, the shortcomings were largely due to Mr Larkin being misled by Mr Antinoro and Mr Lyon.
 - (2) Mr Larkin was not given any opportunity to remedy the situation. There were many conditions which could have been, and frequently have been, attached to licences in order to achieve compliance.
 - (3) Even if the above submissions did not succeed, a two-year disqualification was excessive and should be set aside. Mr Larkin did not have a bad maintenance record and appeared not to have any convictions.
22. Mr Carless expanded upon the grounds in his submissions. Mr Larkin did not feel that he had been given a "*fair crack of the whip*" during the hearing. He had been left "*in the lurch*" by Mr Antinoro who failed to attend the hearing and Mr Lyon who was "*little use*". Mr Carless was critical of the DTC for not "*making any effort to bring out the good points*" and for his subsequent refusal to grant an interim licence of OPCL on road safety grounds (the appeal bundle did not contain any documentation concerning an interim licence application). Mr Carless submitted that failure to produce records was not the same thing as having a poorly maintained fleet. Mr Carless considered that all issues could have been resolved on the day by the giving of undertakings by Mr Larkin and Ms Imanpour. However, Mr Carless did concede that he could not realistically address the Tribunal upon the basis that revocation was plainly wrong in this case. However, the two-year disqualification did not serve any purpose as any new application Mr Larkin chose to make would be closely scrutinised at a public inquiry. In any event, Mr Larkin was not a "*rogue*" and did not deserve such a long period of disqualification.
23. We are satisfied that the decision of the DTC is not open to criticism. Mr Larkin has a dreadful record of non-compliance with warnings, a suspension

and two revoked licences. His failure to comply with the request of TE Evans against that background, amounts to a serious and significant act of non-compliance and the DTC's determination that Mr Larkin would have known of the request cannot be challenged. The email thread between Mr Antinoro and TE Evans makes it clear that Mr Larkin was well aware of what was required of him and he chose not to comply. The DTC's determination that the new licence application by OPCL was, in all likelihood, a device to ensure that Mr Larkin could continue to operate in the event of regulatory action being taken against the licence of V Larkin Ltd was plainly right. There was no credible explanation for why Mr Larkin did not produce the maintenance records for the period requested by TE Evans and we disagree with the submission of Mr Carless that a failure to produce documents is not as serious as operating vehicles in an unroadworthy condition. The point is that in the absence of such records, it is impossible to make an assessment of the roadworthiness or otherwise of a fleet and it is an irresistible conclusion flowing from that failure that it either demonstrates a wilful or careless disregard for compliance or that the operator has something to hide. It was inevitable that the DTC would determine that Mr Larkin was not fit to operate vehicles and that the company deserved to be put out of business and in those circumstances, Mr Carless' concession that he could not really argue against the order of revocation was wisely made. Mr Larkin's word as to his future conduct and intentions cannot be trusted. As for Mr Larkin's disqualification, the suggestion that this could have been avoided was also unarguable. As for the length of the disqualification, that was well within the guidance given by Senior Traffic Commissioner in his Guidance Document no.10: The Principles of Decision Making and the Concept of Proportionality which at paragraph 100 suggests that the starting point for disqualification following a first public inquiry is one to three years. This was Mr Larkin's sixth public inquiry (including those to consider the licence of Da Vinci Scaffolding and the new application he made in 2013).

24. As for OPCL, Mr Carless did not pursue any points which were specific to the company. In reality, the company was a "front" for Mr Larkin and the application was bound to fail.
25. It follows that we are satisfied that the DTC's approach to the issues of fitness to hold a licence, revocation and disqualification was neither plainly wrong nor disproportionate. Further, we are not satisfied that this is a case where either the law or the facts impel us to interfere with the TC's decision as per the Court of Appeal decision in Bradley Fold Travel Ltd & Peter Wright v Secretary of State for Transport (2010) EWCA Civ. 695. The appeals are dismissed.



Her Honour Judge Beech
18 April 2019