NCN: [2020] UKUT 371 (AAC)

IN THE UPPER TRIBUNAL **Appeal No. T/2020/10**
ADMINISTRATIVE APPEALS CHAMBER
(TRAFFIC COMMISSIONER APPEALS)

ON APPEAL from a DECISION of the TRAFFIC COMMISSIONER

Before:	**Mr M R Hemingway: Judge of the Upper Tribunal**
Appellant:	**Progress Logistics Limited**
Reference:	**OF1124192**
Decided on papers:	**29 December 2020**

DECISION OF THE UPPER TRIBUNAL

The appeal is allowed. The decision of the Traffic Commissioner for the North East of England, communicated by letter of 17 January 2020, is set aside. Further, I substitute my decision to the effect that the financial standing requirements as contained in section 13A(2)(c) of the Goods Vehicles (Licensing of Operators) Act 1995 were met such that there were no grounds to revoke licence OF1124192. Further, I order that the Traffic Commissioner or the Office of the Traffic Commissioner shall take any necessary steps to implement this decision.

Subject matter:

Financial standing

Cases referred to:

Bradley Fold Travel Ltd v Secretary of State for Transport [2010] EWCA Civ 695.
Enviro Kleen (Scotland) Ltd: [2018] UKUT 0144 (AAC)
T/2012/17 NCF (Leicester) Ltd
T/2011/36 LWB Ltd

REASONS FOR DECISION

Introduction

1. This is an appeal to the Upper Tribunal, brought by Progress Logistics Limited (the appellant) from a decision of a Deputy Traffic Commissioner (DTC) embodied in a letter of 17 January 2020 which must be read with reference to letters of 15 January 2020 and 21 November 2019. The decision of 17 January 2020 was one to revoke the appellant's standard operator's licence.

2. Most appeals from decisions made by a Traffic Commissioner are decided by a Panel comprising a Judge of the Upper Tribunal and two Members of the Upper Tribunal. Further, most such appeals are considered at an oral hearing. I have, however, with the consent of the appellant, decided this appeal alone and without a hearing. The applicable legislation does not require a hearing, though I would almost certainly have directed one had the appellant asked me to, and the subject matter of the appeal does not require transport industry expertise such as to lead to a need for the valuable contribution which specialist members bring.

The role of the Upper Tribunal on appeal from a decision of a Traffic Commissioner

3. Paragraph 17(1) of Schedule 4 to the Transport Act 1985 provides:

> "… 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."

4. So far as matters of fact are concerned, 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 of Appeal 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."

5. The Upper Tribunal's powers of disposal on allowing an appeal are found in paragraph 17(2) of Schedule 4. The Tribunal may make "such order as it thinks fit" or remit the matter for "rehearing and determination".

The background

6. The appellant obtained its licence on 5 December 2013. It authorised the operation of 5 vehicles and 7 trailers. The granting of the licence was subject to compliance with undertakings. On 29 September 2014 the Office of the Traffic Commissioner (OTC) sent a warning letter to the appellant concerning late compliance with an undertaking. In 2014 and

again in 2015 prohibition notices were recorded against the licence but there have been no further prohibitions since.

7. The appellant's sole director was (and once again now is) James Reid. But according to records held at Companies House, one Gary Burdett was appointed as an additional director. In July 2019, shortly after his appointment, Mr Burdett contacted the OTC asking to be added to the licence as a director. That caused some concern because of aspects of Mr Burdett's history. Indeed, it might be thought that had Mr Burdett not been appointed these proceedings might never have taken place. The history giving rise to concern included his having been a director of two companies each of which had had its licence revoked administratively in consequence of entering into liquidation. He had also been discharged from bankruptcy.

8. It was decided to call the appellant to a public inquiry (PI). The call up letter of 10 October 2019 raised issues as to what was said to have been a material change in the appellant's circumstances (the appointment of Mr Burdett) and whether it remained of good repute and of appropriate financial standing given Mr Burdett's involvement. On 31 October 2019 Mr Reid wrote to the OTC, explaining that he had decided to "remove" Mr Burdett as a director and suggesting that he had not been fully aware of his relevant history at the time of his appointment. He (optimistically as it turned out) asked that, in these new circumstances, the PI be cancelled. It was not. During the course of preparations for the PI, the OTC contacted Mr Reid on two occasions pointing to what appeared to be a comprehensive lack of evidence as to the appellant's finances. His initial response was to submit some very limited documentary evidence but that was then followed by the provision of some bank statements.

9. The PI took place on 14 November 2019. Amongst the attendees were Mr Reid and Mr Burdett. The appellant was represented by Mr D Bright of counsel. As the DTC observed, the fact Mr Burdett was now no longer a director meant that many of the initial areas of concern were now "redundant". But he looked closely at matters relating to vehicle maintenance and finance. As to the former, whilst expressing a degree of concern, he did not find it necessary to take any significant formal regulatory action. As to the latter, he had before him the bank statements referred to above and which spanned the period from 2 September 2019 to 14 November 2019. He correctly observed that, for much of the period covered by those statements, the appellant's business account had been overdrawn. He said that the appellant was required to demonstrate, in order to show that it continued to meet the financial standing requirements, and based on guidance contained in Senior Traffic Commissioner: Statutory Document 2: Finance, ("SD2"), that it had available to it the sum of £25,800 over "the past three months". He said that, whilst the statements indicated an overdraft facility, "technically" he should not take it into account because of the absence of a letter from the bank confirming it. Mr Reid informed the DTC that the appellant had been experiencing some financial problems which it was now overcoming. He also pointed out that the appellant had a "reserved account", which was a different bank account to the one previously mentioned, with a credit balance of £27,000. That was evidenced by a bank statement showing that sum.

10. The DTC stated his intention to make an adverse determination as to financial standing under section 27(1)(a) of The Goods Vehicles (Licensing of Operators) Act 1995 ("the 1995 Act"). In other words, he was concluding that it had not been shown that the appellant still had the requisite financial standing. But he announced that he would permit the appellant a two-month period of grace to rectify matters. He told the appellant "*What this means is at the moment, I am letting you carry on when you have not demonstrated appropriate financial*

standing in accordance with the three month averaging exercise. You have demonstrated though a snapshot that shows, as at that date, there is money available. That allows me to follow on in the appeal case of Duncan McKee to conclude that it is beyond mere hope and aspiration that a return to appropriate financial standing can occur in the near future. Therefore, I am giving you a two month period of grace to do that…and to demonstrate by the end of that period, which expires at 23.59 hours on 14 January 2020, documents in accordance with statutory document number 2. So, original bank statements". The TC went on to stress that in the event of the appellant not complying, "*your licence is revoked*" and that in such event there would or should be "*no ifs, no buts, no crying*".

The Decision Letters and subsequent events

11. What the DTC had decided, rather than being put into the form of a separate decision document, was embodied in a letter of 21 November 2019 which the OTC sent to the appellant. The pertinent part informed the appellant, consistent with what the DTC had said at the PI, that an adverse determination had been made concerning financial standing and that the two-month period of grace would expire at 23:59 on 14 January 2020. The letter went on to state "If the Operator does not provide any documents that satisfy Statutory Document 2 and show adequate financial standing then this licence will be revoked on the 15th January 2020". Mr Reid responded by sending to the OTC a bank statement relating to what he had called the reserved account which demonstrated, for the period from 6 November 2019 to 9 December 2019 (the final date covered by the statement) a credit balance of £27,000.

12. On 15 January 2020 the OTC wrote to the appellant stating, in effect, that it had not responded to the letter of 21 November 2019 and that its licence was being revoked. But clearly the author of that letter was unaware that the bank statement for the reserved account had been sent and received. When Mr Reid pointed out that he had sent it, it was then looked at but, on 17 January 2020, the OTC wrote to the appellant, once again, to say that the licence was revoked. It was pointed out in the letter that the bank statement relating to the reserved account covered only a one-month period. It was said that no information or further statements had been provided with respect to the other bank account held in the name of the appellant. Reference was made to the "original document" by which I think is meant the PI call up letter of 10 October 2019 and the indication contained within it that the appellant was required to "show access to an average of £25,800 over the last three months" and that certain specific items of evidence wold be required. Reference was made to SD" and it was said that what had now been provided was insufficient to enable a calculation as to the appellant's financial standing over a three-month period to be undertaken. Hence the revocation. The appellant (via Mr Reid) was informed of the right of appeal.

13. An appeal was lodged with the Upper Tribunal. The DTC was asked to stay the effect of his decision but declined to do so. However, on 27 January 2020 a stay of the implementation of the TC's decision to revoke the licence, pending the determination of this appeal, was granted by a Judge of the Upper Tribunal. The view was expressed that there might have been confusion and a breakdown in communications rather than any genuine lack of financial standing. It was, it seems, the expression of that view which caused the DTC, unusually, to send to the Upper Tribunal a document headed "Clarification Following Concerns Expressed by the Upper Tribunal". In that document the DTC explained that he had "been asked to clarify the decision communicated to the appellant". He stressed, quite properly, that he was not seeking "to interfere with the jurisdiction of the Upper Tribunal"

(something which I accept unreservedly) but went on to say he had provided Mr Bright with a copy of SD2 prior to commencement of the PI, and that he had explained "in great detail to Mr Reid, director, and to Counsel what the granting of a period of grace meant". None of this, though, is really relevant because my task is to make up my own mind as to the merits of this appeal irrespective of the merits or otherwise of the grant of the stay. But I mention it because, in submissions provided to me in response to directions, I have been invited to disregard the document sent by the DTC. I do not disregard it because, in fact, what is said about the implications of the grant of a period of grace having been made clear is readily apparent from my reading of the PI transcript and because, in any event, I do not consider the content to be material to the issues I have to consider in deciding the appeal. Put another way, it does not add anything.

The grounds of appeal

14. The grounds were drafted by the appellant's representatives at HTEC Commercial Services Ltd. It was argued that the DTC's decision communicated in the letter of 21 November 2019 had been "opaque", that sufficient evidence of funds had been provided, that the decision to allow only a two-month period of grace had effectively debarred the appellant from providing three months' worth of evidence of financial standing, that the letter of 21 November 2019 had not fully or properly set out what the DTC was seeking, and that the decision to revoke was not proportionate.

15. In further submissions, the appellant's representative reiterated that the terms of the letter of 21 November 2019 had been unclear. He suggested that this point alone should lead to the allowing of the appeal. The letter of 17 January 2019 is criticised as being "an attempt by the Office of the Traffic Commissioner to correct their misdirection of the 15 January 2019". I was urged to set aside the DTC's decision and substitute my own decision in favour of the appellant.

Decision and reasoning

16. Section 13A(2)(c) of the 1995 Act provides that an applicant for a standard operator's licence must have "appropriate financial standing "as determined in accordance with Article 7 of the 2009 Regulation". The reference to the "2009 Regulation" is, in fact, a reference to Regulation (EC) No 1071/2009 of the European Parliament and of the Council of 21 October 2009. That Regulation makes it clear that the requirement for appropriate financial standing is an ongoing one. It was observed, in *T/2012/17 NCF (Leicester) Ltd*, that the test cannot be satisfied "by evidence of a snapshot of the financial position on a particular day". Rather, what is needed is evidence to show sufficient funds are consistently available to satisfy the requirement. The purpose of the financial standing requirement is to ensure that an operator has the financial wherewithal to ensure the establishment and proper administration of the business to be carried on under the licence (see *T/2011/36 LWB Ltd*). The amount required for a standard licence is worked out on the basis of a formula contained in the 2009 Regulation and relates to the number of vehicles operated. Revocation of a licence for breach of the financial standing requirement is mandatory but section 27(3A) of the 1995 Act permits the giving of a period of grace where revocation would otherwise be the proper course but where it is thought an operator might realistically be capable of rectification within a specified time period. Where a TC or DTC does afford a period of grace, revocation is not then permitted should the terms have been complied with within that time period.

17. SD2, referred to above, is guidance issued by the Senior Traffic Commissioner under section 4C of the Public Passenger Vehicles Act 1981. As the appellant's representative points out, the guidance itself is not part of the law. But its stated purpose is to provide information as to the way in which the Senior Traffic Commissioner believes that TC's (and so of course DTC's) should interpret the law in relation to the requirements for financial standing. It points out that a reliable indicator of available finance is money held in a bank account and it suggests that existing licence holders will be expected to "show that they have met the continuing duty by producing evidence over a 3-month period".

18. As noted, the DTC decided, as stated in the letter sent by the OTC on 21 November 2019, to afford a period of grace. It was said by the DTC at the PI that he was making an "adverse determination" under section 27(1)(a) of the 1995 Act. That was also stated in the letter. The letter informed the appellant that it had a right of appeal against that decision. However, no attempt to appeal it was made. But insofar as it might be relevant it does not seem to me that there was a right of appeal which could have been exercised at that time anyway. As to that, section 27(1)(a) requires a TC to direct revocation where it appears the licence holder no longer meets the requirements set out in section 13A(2). Relevantly for the purposes of this appeal, section 13A(2)(c) contains the appropriate financial standing requirement. But the DTC did not actually, at that stage, direct revocation. Section 37 of the 1995 Act sets out which type of decisions made in connection with an operator's licence may be appealed to the Upper Tribunal. Included is a right to appeal against any direction given under section 27(1). But what the DTC had decided and what was communicated in the letter of 21 November 2019 fell short of a revocation direction. None of the other types of decision specified under section 37 fit the bill. So, the decision communicated on 21 November 2019 was not itself an appealable decision notwithstanding the appellant being told that it was.

19. So, what of the decisions of 15 January 2020 and 17 January 2020? It seems to me, despite what might be a contrary suggestion made on behalf of the appellant, that the only sensible way to look at things is to say that, in effect, the decision of 17 January 2020 effectively replaced the decision of 15 January 2020 which had been made without knowledge of the additional financial evidence which had been sent to the OTC on behalf of the appellant. But even if the letter of 17 January 2019 is to be taken merely as amounting to a refusal to reconsider the decision of 15 January so that the decision of 15 January 2019 stands (and the letter of 17 January 2019 can be read in that way) it makes no practical difference. The appeal can be treated as being directed to one, the other, or both. The DTC's decision was explained, in the letters and particularly in the letter of 17 January 2019, as being one to the effect that since the appellant had failed to provide what was required of it during the period of grace given, revocation must follow. The list of appealable decisions in section 37 does not include anything along the lines of "a direction to revoke a licence due to a failure to comply with conditions which had to be complied with during a period of grace". But it seems to me that what the DTC was effectively doing was to direct revocation due the appellant's failure to show that it continued to meet the requirement of financial standing. So, the decision was to be characterised as one taken under section 27(1) such that a right of appeal arose under section 37(2).

20. I have felt it necessary to undertake the above analysis in order to enable me to properly identify what it is I am meant to be deciding. I did, initially, think I might simply be required to decide whether or not the DTC had been plainly wrong in deciding the appellant had not

provided what had been asked of it during the period of grace. But I have decided that I need to take a wider approach. Since I have characterised the decision of 17 January 2019 as being one made under section 27(1) to direct revocation with reference to 13A(2)(c) then it seems to me that I must ask myself whether the DTC erred in law or was otherwise plainly wrong in deciding to direct revocation on the basis that the financial standing requirement was no longer met. That can potentially include a consideration as to the merits of the unappealable decision of 21 November 2019 because it is intrinsically linked to the appealable decision of 17 January 2020. That is the way in which I approach the grounds of appeal.

21. It is easy to dispose of two of the arguments contained in the grounds of appeal quite quickly. First of all, I see no scope for an argument based upon proportionality given the mandatory requirement to revoke. And in any event, even if an argument based upon proportionality were to be available in principle, insufficient has been said in the grounds to support any viable contention based upon it. Secondly, the terms of the DTC's decision did not debar the appellant from providing financial evidence over a three-month period. The argument seems to be based upon an understanding that the DTC had only sought evidence of finance for the 2-month period from the date of the PI to 14 January 2020. But he had asked for evidence in accordance with the content of SD2. SD2 contains guidance to the effect that evidence as to the availability of necessary funds for a period of three months has to be shown. So, runs the argument, the DTC was inviting the appellant to do the impossible because it was inviting it to provide three months' worth of evidence from a two-month period. But I think the answer is to interpret the DTC's requirement, though I accept it was not explained in this way, as being one to provide evidence of three months compliance from 14 January 2020 counting backwards.

22. The ground which alleges imprecision on the part of the DTC as to what was expected during the period of grace is more difficult. I have explained why the Upper Tribunal is able to examine the terms of the decision of 21 November 2019, even though that decision was not appealable and even if I am wrong about that was not actually appealed. It is intrinsically linked to the decision which has been appealed. I have set out what appears in the PI transcript along with the additional information provided in the DTC's clarification document referred to above and in the letter of 21 November 2019.

23. It does seem to me that in the context of a decision-making process which might lead to revocation, clarity as to what is being sought is of very considerable importance. That might be thought to be especially so with respect to what is being required during a period of grace. The importance of such clarity, in the context of fairness and natural justice, was emphasised in *Enviro Kleen (Scotland) Limited*: [2018] UKUT 0144 (AAC).

24. Although reference was clearly made during the PI to the need for evidence to be provided in accordance with SD2, and I accept a copy had been given to Mr Bright who was then representing the appellant, no separate written decision drafted and then signed by the DTC was provided. The letter of 21 November 2019 did contain the reference to the need to provide evidence in accordance with SD2 as set out above. But it was not more specific than that. It does appear, and indeed I accept, that in sending the bank statement relating to what has been called the reserved account and which demonstrated funds in excess of £25,800 for the period from 6 November 2019 to 9 December 2019 Mr Reid erroneously thought he was providing what the DTC had in mind. Thus, there was a misunderstanding as, as it happens, had been suggested by the Upper Tribunal Judge who had granted the stay.

25. I would accept that, in principle, when specifying what should be provided in the form of supporting evidence, reference to the content of SD2 by way of incorporation is permissible in appropriate cases. In this case though, what the DTC was requiring was, in effect, bank statements or other clear evidence of available finance exceeding £25,800 covering a three month period ending on 14 January 2020. That could very easily have been stated, in terms, in a short decision document which could have been issued by the DTC following the PI, or in the letter from the OTC which was subsequently issued. That could have left the appellant in no doubt what the DTC was expecting from him. I rather suspect that, if that had been spelt out, the appellant would have complied and revocation would not, therefore, have followed. It was said in *Enviro Kleen* (cited above) that "*to refuse an application on the basis of failure to supply information, the request for which has not been adequately itemised is a breach of the rules of fair procedure and natural justice such as to amount to an error of law*". In my judgement, whilst this is really quite marginal, the DTC through simply referring to SD2 without being more specific in circumstances where specificity would have been undemanding and easy to achieve, did err in law. Accordingly, this appeal succeeds on that point and the decision of the DTC embodied in the letter of 17 January 2020 is set aside.

26. I must now decide to remake the decision myself making such order as I might see fit or whether to remit. It is some time since the DTC's decision was taken. If I am able to deal with matters without remitting then Mr Reid will know, sooner than would otherwise be the case, where he stands. There is financial evidence before me relating to the relevant time. The OTC may well, I suspect, be coping with something of a backlog of cases given the disruption which would have been caused to its administrative and adjudication processes by the impact of the coronavirus pandemic. Against that background I have decided it is not appropriate to remit.

27. The content of SD2, whilst most helpful, is not the law. Although the terms of the letter of 17 January 2020 suggest that this had been overlooked at the time the letter had been written, the DTC had been provided, at the PI, with evidence of the credit balance of £27,000 in the reserved account albeit that what was provided at that stage amounted to a snapshot only showing the balance as at 6 November 2019. Evidence of the availability of that amount to 9 December 2019 was subsequently provided. Further evidence in the form of further bank statements has now been provided to the Upper Tribunal (though not considered for the purposes of deciding whether to set aside the decision of the DTC) demonstrating the availability of £27,000 from 6 November 2019 to 9 October 2020. Bank statements concerning the other account were before the DTC as noted above. The bank statements themselves indicated the existence of an overdraft facility of £25,000 and it seems to me in remaking the decision I should accept the existence of the overdraft facility, since it is confirmed on the bank statements themselves and since the genuineness of those statements has not been doubted. There was a debit balance in the other account but it did not dip below the overdraft facility such that there was a varying figure when averaged out available to the appellant.

28. In light of the above I am satisfied that the appellant did meet the financial standing requirements as at the date of the decision of the TC under appeal. I am also satisfied, insofar as it may be relevant, that the appellant has continued to do so. In those circumstances, not only do I set aside the decision of the TC but I go on to substitute my own decision that the financial standing requirements were met. In consequence, I order the TC or the OTC to take whatever steps (if any) may be necessary to implement that decision.

29. This appeal to the Upper Tribunal succeeds.

Signed

M R Hemingway
Judge of the Upper Tribunal

Dated **29 December 2020**