



NCN: [2021] UKUT 178 (AAC)  
Appeal No. T/2020/38

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

**ON APPEAL from the DECISION of the TRAFFIC COMMISSIONER**

**Before:** M Hemingway: Judge of the Upper Tribunal  
S James: Member of the Upper Tribunal  
D Rawsthorn: Member of the Upper Tribunal

**Appellant:** Verdi Transport Ltd

**Reference:** OF2019451

**Considered on the papers:** 11 May 2021

**DECISION OF THE UPPER TRIBUNAL**

This appeal to the Upper Tribunal is dismissed.

**SUBJECT MATTER**

Transport Managers  
Periods of Grace

**CASES REFERRED TO**

*Bradley Fold Travel Ltd & Anor v Secretary of State for Transport* [2010] EWCA Civ 695.

**REASONS FOR DECISION**

**Introduction**

1. This appeal to the Upper Tribunal has been brought by Verdi Transport Ltd (the appellant), through its director Alexander Kartachev, from a decision of the Traffic Commissioner for the East of England (the TC) embodied in a letter of 15 July 2020 revoking its standard international goods vehicle operator's licence.

2. This appeal has been decided, on the papers, by a Panel comprising one Judge of the Upper Tribunal and two Members of the Upper Tribunal. Consent was given on behalf of

the appellant for the appeal to be decided on the papers. Indeed, that was the appellant's clearly expressed preference. We are satisfied, giving weight to the views expressed on behalf of the appellant, that it is fair and appropriate for us to decide the appeal in that manner. We would also point out that the appellant has been sent copies of the file of papers produced by the OTC and has been given an opportunity to comment upon them prior to this appeal being decided.

### **The background and relevant history**

3. By way of background, the above licence came into force on 24 January 2019. The terms of the licence authorised the use of 3 vehicles and 3 trailers. Thereafter, the appellant applied for a variation to authorise the use of one additional vehicle and one additional trailer. But on 30 December 2019 it was decided to hold that matter in abeyance pending a decision on Alexander Kartachev's repute as transport manager on a different licence held by a different operator called Extend Beyond Ltd. Following a Public Inquiry (PI) he lost his repute as transport manager and the decision of the TC in that case relevantly stated: *"The transport manager had been in the role for about 2 years before he resigned. He accepted he had failed to continuously and effectively manage the transport operation. He allowed all of the non-compliance to take place on his watch. His resignation as a TM is far too late to protect him. He lost his repute as a TM a long time ago and as at today it remains lost. He is disqualified as a TM for 2 years with immediate effect. The disqualification ends at 23:59 hours on 7 January 2022"*. The PI which led to that decision took place on 8 January 2020.

4. On 28 January 2020, presumably in consequence of the disqualification of Alexander Kartachev, who had also been the transport manager for the appellant, an application was made to the Office of the Traffic Commissioner (OTC) for a person we shall call "TM1" (it is unnecessary for us to name the various intended transport managers) to become the appellant's transport manager. The variation application and the application for TM1 to become transport manager raised a number of issues of concern for the OTC. In particular, it was thought the appellant may not satisfy requirements relating to financial standing, it was thought that TM1 might not be capable of devoting sufficient time to the role as transport manager for the appellant given his commitments in the same capacity on another licence belonging to another operator, and it was noted that TM1 was himself facing an upcoming PI, scheduled for 16 March 2020, at which his own competence and repute as a transport manager was due to be examined. There was also concern about the appellant's repute given that its director had been found to have lost his repute as transport manager on a different licence. It was decided that the variation application should not be considered in isolation and that it should only be decided after TM1's PI had taken place and after the result of that was known. Troublingly, since the appellant no longer had a transport manager, it now lacked professional competence (see below). It is not apparent that the appellant had, at that stage, asked for a period of grace (see below) to enable it to lawfully continue to operate under the terms of its existing licence.

5. On 17 February 2020, the TC, indeed in this case the Chief Traffic Commissioner, decided that the appellant should be called to a PI. The issues to be looked at were said to include repute, financial standing and professional competence. It appears from internal memoranda that the TC had particular concerns about the fitness of Alexander Kartachev as a director given the adverse findings and the disqualification for a two year period concerning his status as a transport manager, as well as concerns regarding the nomination

of TM1 as the appellant's transport manager given the issues he was facing. On 5 March 2020 the TC made an adverse finding under section 27(1)(a) of the Goods Vehicle (Licensing of Operators) Act 1995 concerning the appellant's professional competence. Given the lack of a transport manager, that was inevitable. But the appellant had by now sought a period of grace (the request having been made by letter of 4 March 2020) and the TC decided to give a period of grace to the date of the PI or to 7 July 2020 (whichever proved the shorter) which enabled the appellant to continue to operate lawfully.

6. On 10 March 2020 the appellant withdrew its application to have TM1 as its transport manager. The appellant's rather terse letter of 11 March 2020, confirming this, did not offer an explanation though Mr Kartachev has told the Upper Tribunal it was because TM1 had himself decided to withdraw. A copy of a "*screenshot*" has been sent to the Upper Tribunal which is said to be a copy of an e-mail TM1 sent to the appellant on 5 March 2020 saying he wished to withdraw his nomination and referring to his own difficulties and the delay which had been caused to the appellant. Instead, application was made to have a different individual ("TM2") as the transport manager on the licence. The impact of the coronavirus pandemic then began to bite and, on 24 March 2020, the scheduled PI was postponed (albeit that no new PI was subsequently scheduled). The proposed appointment of TM2 was not unproblematic. Checks carried out by the OTC revealed a poor regulatory compliance record on the part of an operator who's licence he had been acting as transport manager for. Further, there was a history of his having been nominated as transport manager with such nomination being subsequently withdrawn, by two other operators. A caseworker for the OTC in an internal memorandum, described his proposed appointment as transport manager for the appellant as being "*no less controversial than the initial application by [TM]*". But it is right to say that although he had received a warning as to his performance as a transport manager for the company with the poor regulatory compliance record, he had not been disqualified as a transport manager. He was though, according to OTC records, transport manager on two other licences and a nomination as transport manager was pending in relation to a third licence. This raised concerns as to whether he would have sufficient time available to properly act as transport manager for the appellant.

7. On 16 April 2020 the OTC wrote to the appellant reminding it that the period of grace was due to expire on 7 July 2020. The appellant was required to provide details as to how TM2 would meet the professional competence requirements and to provide details of relevant training he had had. Perhaps surprisingly since it was its licence which was at stake, the appellant did not itself reply. Mr Kartachev has subsequently suggested to the Upper Tribunal that he had thought if TM2 was dealing with matters it would have been mere duplication for the appellant to simply do so as well. But TM2 did reply. He provided some information as to how he would manage his proposed commitments alongside his existing commitments as well as some rather fleeting details as to how he keeps up-to-date with developments relevant to his professional duties as a transport manager. There was further correspondence resulting in TM2 indicating his willingness to "*give an undertaking to complete a more formal two-day Transport manager CPC Refresher Training Course*" albeit that he had initially expressed some degree of reluctance to attend a refresher course because of the cost and because he thought other less formal ways of keeping abreast of relevant developments to be more efficacious. On 10 June 2020 the OTC wrote to the appellant, once again reminding it that that the period of grace was due to expire on 7 July 2020. It was said that a PI would be held but that a date could not yet be fixed due to the ongoing impact of the coronavirus pandemic. It said that specific areas of concern related to financial standing, professional competence, and good repute. The appellant then, on 14

June 2021, forwarded evidence of financial standing. More information as to finance followed on 3 July 2020. On 10 July 2020, after the date of the period of grace, the OTC informed the appellant that the application to have TM2 added to the licence had not been accepted because the requirements of Article 4 of Regulation (EC) No 1071/2009 of the European Parliament and of the Council and section 13(A)(2)(d) of the Goods Vehicles (Licensing of Operators) Act 1995 had not been met. The appellant was told that the period of grace had been extended to 14 July 2021 and that, if no transport manager was appointed by that time, the licence would be revoked. The appellant then applied to have a third candidate, TM3, added to the licence as transport manager. However, according to information held by the OTC, she had links to two other licences which were said to be “under investigation”. The TC commented again in internal memoranda “*I do not appear to be in a position to accept [TM3]. On the above information [the information we think being that relating to her involvement on two other licences] there appear to be real questions in respect of Article 4 around her nomination*”. Her nomination was not accepted either so, on 15 July 2020 and on the instructions of the TC, the OTC wrote to the appellant informing it that neither the nomination of TM2 or TM3 had been accepted and that, since the period of grace had expired, the licence was revoked. The appellant was informed of its right of appeal to the Upper Tribunal. Further, whilst all the above was happening, the OTC had written to the appellant on 10 June 2020 to tell it that its application for a variation concerning the number of vehicles and trailers authorised under the licence had been refused because financial standing and professional competence had not been demonstrated. No attempt to appeal that decision was made at that time.

8. The appellant asked the TC to grant a stay of the effect of his decision. On 21 July 2020, the OTC wrote to further explain and to maintain the logic of the decision of 15 July 2020 but a short stay was granted so as to permit the appellant to pursue an application for a stay to the Upper Tribunal in conjunction with his appeal. On 13 August 2020 the Upper Tribunal granted a stay which has remained in place whilst the appeal has been pursued and considered.

### **The legislation**

9. Section 2 of the Goods Vehicles (Licensing of Operators) Act 1995 (we will from now on simply call it “the Act”) provides that no person shall use a goods vehicle on a road for the carriage of goods for hire or reward without a licence issued under the Act (an “operator’s licence”). Other provisions of the Act set out requirements with which an applicant for a licence or a holder of a licence must comply. Section 13A of the Act includes requirements that an applicant/holder is of good repute; has appropriate financial standing; and is professionally competent (as determined in accordance with paragraphs 8-13 of Schedule 3 to the Act). Schedule 3 links an operator’s professional competence to that of its transport manager such that if it has a transport manager who is of good repute and professionally competent it is, itself, professionally competent. Section 17 of the Act authorises a TC to vary the terms of a licence. Section 27 of the Act mandates a TC to revoke a standard licence where it appears that the licence holder no longer satisfies the requirements of Section 13A(2) of the Act (this includes the requirements relating to good repute, financial standing and professional competence) or “the transport manager designated in accordance with Article 4 of the 2009 Regulation no longer satisfies the requirements of section 13A(3)”. Section 13A(3) requires the licence holder or licence applicant to have a transport manager who is of good repute and who is professionally competent. 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 referred to above. But we will from now on just call it the “EC Regulation”. Article 3 of the EC Regulation sets out requirements for engagement in the occupation of road transport operator and Article 4 requires a relevant undertaking to have, in place, a transport manager who “effectively and continuously manages the transport activities of the undertaking”. Section 27(3A) of the Act gives a TC a discretion, where revocation of a licence would otherwise be mandatory, to avoid that outcome (or at least avoid it for a time depending on what happens) by serving on the licence holder a notice setting out a time limit within which the failing which would otherwise lead to revocation must be rectified. The section says any time given is to enable the licence holder to “rectify the situation”. The provision was introduced due to the content of Article 13.1 of the EC Regulation. The time given in such a case is usually referred to as a period of grace and the discretion to grant one is triggered by a number of specified events which include the loss of a transport manager who has good repute and is professionally competent. A period of grace is initially for up to six months but may be extended, in the case of the death or physical incapacity of a transport manager for a further three months.

### **The appeal**

10. In his grounds of appeal, the appellant purports to appeal against both the decision of 15 July 2020 revoking the licence and the decision of 10 June 2020 refusing the variation application concerning the addition of one vehicle and one trailer. But the appellant had been notified of his right of appeal against the latter decision and, indeed, of the one-month time limit in which to lodge an appeal to the Upper Tribunal. As noted, it did not appeal the decision on variation at the time and since the current appeal was not received by the Upper Tribunal until 7 August 2020, it was out of time insofar as it related to that decision. Insofar as the grounds might be taken to incorporate an application for an extension of time in which to appeal the decision of 10 June 2020 (and no such extension is specifically sought), we would refuse it. That is because the letter of 10 June 2020 set out the applicable time limit with clarity; because the appellant could have appealed that decision in time had it wished to; and because no explanation for the delay has been given. So, what is before us is a single appeal against the decision to revoke. As to the content of the grounds, the appellant (in summary) asserts the following: Mr Kartachev sought to replace himself as transport manager on the licence as soon as his own disqualification had been confirmed; TM1 had decided to withdraw his application so he sought to appoint TM2; the “*refusal*” of TM2 had been senseless and without reason; the fact that TM2 had not been accepted had not been made known until after the original period of grace had expired; The TC had been wrong in not accepting TM3; Mr Kartachev had acted in good faith following his disqualification.

11. In a letter of 18 November 2020, Mr Kartachev, on behalf of the appellant, said he thought the decision to revoke should “*be halted*”, that he had not been told by the OTC what the various concerns about the nominated transport managers had been, that he had been given very little time in which to find a third transport manager, and that he wanted the Upper Tribunal to “*postpone the decision to revoke my licence*” so that he could have further time to find an alternative transport manager.

### **The approach of the Upper Tribunal to the appeal**

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

“The Upper Tribunal are to have full jurisdiction to hear and determine on 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”.

13. Paragraph 17(3) of that Schedule provides that the Upper Tribunal may not take into consideration any circumstances which did not exist at the time of the determination which is the subject of the appeal. The Upper Tribunal’s jurisdiction was examined by the Court of Appeal in *Bradley Fold Travel Ltd & Anor v Secretary of State for Transport* [2010] EWCA Civ 695. It was stated that the Upper Tribunal has the duty, on an appeal to it, to determine matters of fact and law on the basis of the material before the TC but without the benefit of seeing and hearing from witnesses. It was further stated that the burden lies on an appellant to show, in order to succeed on appeal, that the process of reasoning and the application of the relevant law requires the Upper Tribunal to take a different view to that taken by a TC.

### **Our reasoning on the appeal**

14. The appellant had been operating with Mr Kartachev as its transport manager. It was required to have a transport manager in place on the licence in order to enable it to fulfil the mandatory requirement of professional competence. But when he lost his repute as a transport manager as a result of his activities in that capacity on a different licence belonging to a different operator, it had the serious consequence for the appellant that its professional competence was lost such that, strictly speaking, revocation of its licence was mandatory (see section 27 of the Act). As will be apparent from the above, that situation brought into play the discretion to grant a period of grace to afford time for the matter which would otherwise lead to the revocation of the licence to be rectified (in other words to find a new transport manager who was both of good repute and professionally competent). But after the expiry of the period of grace and the short extension referred to above, there remained no such transport manager on the licence.

15. Now we accept that the OTC could perhaps, at various times, have been a little clearer in its communications with the appellant and with respect to the detail of its concerns regarding the prospective transport managers which the appellant had sought to have added to its licence during the period of grace. But it is also important to keep in mind that the period of grace had been given for the appellant to put itself in a position where it once again complied with regulatory requirements. That being so, the onus was upon it to do so and to rectify the matters which had led to the mandatory revocation provisions being satisfied.

16. The difficulties faced by the appellant were a direct cause of its director, then also its transport manager, losing his repute as a transport manager. We accept that, thereafter, Mr Kartachev did make efforts to recruit a replacement. The period of grace was given on 5 March 2020 (see above) when it was formally decided that the mandatory revocation requirements were met. By the expiry of that period, taking into account the limited extension given, there was no transport manager in place on the licence, so rectification had not been achieved and the appellant was still not professionally competent. Three potential transport managers had been put forward, but the TC had concerns, which we consider to be sound and justified ones as opposed to capricious or baseless ones. It is against that background that we approach the content and substance of the grounds of appeal.

17. As we say, we accept that Mr Kartachev made efforts to find a new transport manager. But there were clear difficulties with the proposed employment of Mr Smith as outlined above and indeed, as noted, it appears Mr Smith himself decided to withdraw from the process. We do not detect, in the grounds of appeal, any direct or substantial criticisms of the TC's handling of Mr Smith's proposed nomination and we are not able to detect any fault for ourselves. It might be thought, whilst we appreciate it may be difficult for at least some operators to find suitably qualified and appropriate transport managers, that the appellant had made a poor choice. It was for it to find suitable candidates who could properly be accepted on to the licence. There are some trenchant criticisms of the TC with respect to the treatment of the application of TM2. It was said in the grounds that his proposed nomination had "*been refused without a reason that made any sense*". But we do not regard the concerns on the part of the TC or OTC as summarised at paragraph 6 above to have been senseless. We accept, insofar as it may be relevant, that the detail of the concerns could have been usefully communicated to the appellant more speedily and more clearly and fully than was the case. But the OTC did write to the appellant on 16 April 2020 asking it to provide a "*full explanation of how [TM2] will meet the statutory duty of professional competence to satisfy the requirements of his licence*" as well as asking for information about training he had undertaken so the appellant was aware that the proposed nomination was under scrutiny. The appellant, as noted, did not offer its own reply to the OTC. In light of all the above, we are not able to say the TC was plainly wrong or was in some way wrong in law in having misgivings about the proposed appointment nor in ultimately not accepting the nomination. As to the proposed appointment of TM3, it is right to say that the appellant was, in the circumstances described above, given little time in which to find a third prospective candidate. But had it found a suitable one earlier the problem it faced would not have arisen. And again, that proposed appointment was not, on the face of it, problem free.

18. To some extent we have some sympathy with the appellant (in reality with Mr Kartachev). But the problems were of his own making, the appellant was the recipient of a discretionary period of grace, it was known to the appellant that revocation would follow if the concerns were not rectified within that period, it was within the power of the appellant to achieve rectification, and that had not been done by the date of the TC's decision under appeal before us.

19. In the above circumstances and for the above reasons we have decided that the TC was not plainly wrong and we have decided that the process of reasoning and the application of the relevant law does not require us to take a different view to that which he has taken. That being so, this appeal to the Upper Tribunal is dismissed.

### **The taking effect of this decision**

20. We are mindful of the fact that the appellant has been continuing its operations, under the terms of a stay granted by the Upper Tribunal such that an immediate coming into force of our decision to dismiss the appeal would lead to an abrupt cessation. That being so, we defer the effect of our decision until 23:59 hours on 19 September 2021 to allow an orderly winding down of the business.

**M R Hemingway**  
**Judge of the Upper Tribunal**  
**Dated: 19 July 2021**