



NCN: [2021] UKUT 88 (AAC)  
Appeal No. T/2020/55

**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

**Appellant:** URA Ventures Limited

**Reference:** OF2035510

**Date of Hearing:** 30 March 2021 (remote hearing via BT Meet Me)

**DECISION OF THE UPPER TRIBUNAL**

This appeal to the Upper Tribunal is dismissed.

**SUBJECT MATTER**

Publication of notice of application for a licence.  
Requirement to have a transport manager.

**CASES REFERRED TO**

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

**REASONS FOR DECISION**

1. This appeal to the Upper Tribunal has been brought by URL Ventures Ltd (the Operator) from a decision taken on behalf of the Traffic Commissioner for the East of England, embodied in a letter of 9 September 2020, to refuse its application for a standard national goods vehicle operator's licence.

2. I held an oral hearing of the appeal via BT Meet Me. No objection was made as to the mode of hearing. I heard the appeal sitting alone. No objection was made to my doing so. The issues raised by the appeal were such that the valuable assistance provided by Specialist Members of the Upper Tribunal was not required. I am satisfied that the hearing was fair and that Mr Martin Callaway who spoke for the Operator was able to make and did make the same points with the same force and clarity, at the remote hearing, as he would have done had there been a traditional face-to-face hearing. Indeed, I am grateful to him for his helpful contribution.

3. The Operator's completed licence application form was signed by one of its directors on 24 July 2020. It was indicated that the licence was being sought to enable it to use one vehicle only, that it was intended to provide evidence that the licence application had been advertised in a newspaper in accordance with statutory requirements (see below) at a later date, and that the transport manager was to be Mr Callaway. The precise date of receipt of the application is recorded as being 24 July 2020 (see page 29 of the appeal bundle). On 6 August 2020, the Office of the Traffic Commissioner (OTC) wrote to the Operator (specifically to Mr Callaway) at the address which the Operator had provided to it for correspondence purposes. In that letter a request was made for further information and evidence including evidence that the making of the application had been properly advertised during the period specified by statute and that the proposed transport manager had the appropriate qualifications. Form TM1 (a form which confirms who the transport manager is to be and which is required to be signed by that person and also by a person acting on behalf of the Operator) was asked for. The Operator was given until 20 August 2020 to provide the requested information and material. According to the OTC, an electronic copy of the letter was sent too. If it was, then it would almost certainly have been sent to e-mail address [mcallaway@gkluk.com](mailto:mcallaway@gkluk.com) which, like the postal address just mentioned, had been supplied by the Operator when the application was made. But Mr Callaway, in a later e-mail communication, had used a different e-mail address.

4. The OTC did not receive a response to the letter of 6 August 2020 (and Mr Callaway does not say one was sent). So, on 21 August 2020 it sent a second letter addressed in the same way as before. Once again it is the OTC's position that an electronic copy was sent too. The letter sought the same evidence and material as had previously been requested. But importantly, it was indicated in the letter that a failure to satisfactorily respond by 4 September 2020 would result in the application being refused. On 4 September 2020 at 15:54, the OTC received an e-mail from Martin Callaway. It was stated in the e-mail that the letter had only just been received. As to the transport manager situation, Mr Callaway explained "*I will be the nominated transport manager, but as yet do not have the necessary qualifications, but as we do not intend to buy a vehicle until next year, and I was hoping to get the qualifications nearer the time of purchase*". As to the advertisement, he supplied evidence that one which complied with most of the requirements had been placed with and published by an appropriate newspaper. However, what he supplied also showed that the advertisement had been published on 28 August 2020 which was one day after the period for publication specified by the OTC in the two letters referred to above had expired.

5. It is clear from the content of a document which appears at page 64 of the bundle, that the application was considered by the OTC and that it was decided it had to be refused. That was because of the lateness of the advertisement and the lack of an appropriately qualified transport manager. The decision to refuse the application was then communicated by letter of 9 September 2020. With respect to the advertisement this is what was written:

“The stated deadline for submitting proof in the form of the full page of the newspaper containing the advertisement has now expired. I must advise you that as you failed to advertise in the local paper within the given deadline of 27 August 2020, the Traffic Commissioner has refused your application under Section 18(1) of the Act”.

6. Pausing there, the reference to Section 18 is erroneous and is an intended reference to Section 11, but nothing turns on that. As to the transport manager aspect this was written:

“You are also advised that the application would also fail under Section 13A(2)(d)- professional competence, as the proposed transport manager does not hold the requisite qualification”.

7. It is, at this stage, appropriate to say something about the law. The OTC’s reference to “the Act” is, in fact, a reference to the Goods Vehicles (Licensing of Operators) Act 1995. I too shall now simply call it “the Act”. Section 11 of the Act makes refusal of an application for a licence mandatory without a consideration of the merits where notice of the application has not been published in the locality affected by the application “*within the period beginning 21 days before the date on which the application is made and ending 21 days after that period*”. There is no flexibility with respect to the period. As to the transport manager aspect, Section 13A(2)(d) of the Act imposes a mandatory requirement that an applicant for a licence is professionally competent. Schedule 3 to the Act links an operator’s professional competence to that of its transport manager: “*a company satisfies the requirement as to professional competence if, and so long as it has a transport manager ...who is of good repute and professionally competent*”. Professional competence is demonstrated by the possession of a Certificate of Professional Competence acquired by passing a compulsory written examination or by some other officially recognised means.

8. The Operator’s written grounds of appeal to the Upper Tribunal asserted that the OTC’s letter of 21 August 2020 had not been received until 2 September 2020 (I think the intention was to write 4 September). It was said that as much information as possible had then been e-mailed to the OTC. It was explained that the Operator’s intention was to acquire a vehicle to be used under the terms of the licence which had been sought “*next year*” and that, prior to that, it was hoped to “*get a member of staff to get the necessary qualifications before purchase of the vehicle*”.

9. As indicated, Mr Callaway spoke for the Operator at the oral hearing of the appeal. He did so in a way which was frank, open and clear. He confirmed that he is an officer of the appellant company but not a director. However, the directors had been happy for him to participate on the Operator’s behalf. Upon checking, he said the OTC’s letter of 6 August 2020 had been received but he was not sure when. The letter of 21 August 2020 had been received but not until 4 September 2020. Neither had been received electronically although he acknowledged that the latter letter contained an indication that it had been sent by e-mail as well as through the normal postal service. He had previously thought the advertisement had been published within the time given by the OTC but did not dispute the publication date of 28 August 2020 when it was put to him. Whilst it had been intended he would obtain the appropriate qualifications and become the transport manager it was now envisaged that a different employee would do so. He accepted that there was no transport manager in place when the application had been made or when the decision to refuse it had been taken. He

had not known, being unfamiliar with the regulatory system, whether it would be better to get a properly qualified transport manager first or whether to make the application first. He acknowledged he had made some mistakes and had been “naïve”. The Operator’s administrative systems had been impacted by the coronavirus pandemic but he did not wish to “hide behind that”. He urged me to consider trying to find a way which would afford the Operator some more time in order to have one of its employees qualify as a transport manager before any final determination of the appeal was made.

10. 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”.

11. 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 Traffic Commissioner 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 adopt different view to that previously taken.

12. There are some issues concerning the receipt of the OTC’s communications although I need not say too much about all of that. But the two letters which were sent via the postal service did arrive at the Operator’s postal address even if one or perhaps both might have been delayed. As to whether the electronic copies were sent, as I say, Mr Callaway says he did not receive them either via the e-mail address given on the licence application form or the different e-mail address which he had used on 4 September 2020. He seemed quite certain about that whilst acknowledging what he thought to be a very slim possibility that they might have “gone to spam”. Against that though, the OTC did have an e-mail address with which to send correspondence to the Operator. The letter of 21 August 2020 does state that it has been “Sent by e-mail” though the earlier letter does not have the same indication. The OTC’s internal document (page 64 of the bundle) suggests the OTC’s own records show that copies of both letters were sent electronically. It would have been natural for items of post to be sent electronically during the relevant period as a response to the coronavirus pandemic. The outcome of this appeal would have been the same anyway for reasons which I will set out below but I am inclined to conclude and do conclude that the letters were sent timeously by post and by electronic means.

13. As to the publishing of the advertisement, there is no doubt that it was published on 28 August 2020 because that is the date of the relevant copy of the newspaper supplied by Mr Callaway. But the OTC had stated in its correspondence that, in order to comply with the above statutory requirements, the window of opportunity for publication ran from 3 July 2020 to 27 August 2020. Indeed, in looking at the content of Section 11 of the Act it seems to me that whilst the OTC has correctly calculated the part of the window period prior to the date of the application (21 days counting back from the date of receipt) it has miscounted the post receipt period such as to be more generous to the Operator than was mandated. But even then, the Operator did not comply. So, on that basis, given that there is no statute based

flexibility with respect to compliance with the date of publication, the application simply had to be refused. That was an outcome dictated by law. It follows that I am unable to conclude that the law was incorrectly applied and I am similarly unable to conclude that the decision under challenge in this appeal was plainly wrong. I can, in the circumstances, only conclude that the decision was both correct and inevitable.

14. There is then the alternative basis of refusal concerning the transport manager issue. I suppose technically, the letter did not actually say the application was refused on this basis but rather that, had it not been refused on the publication basis, it would have been. There is no doubt that the Operator was required to have an appropriately qualified transport manager in place. There is no doubt it did not have. The requirement, as I have said, is a mandatory one. So, on this basis too, the licence application could never have succeeded and this appeal cannot either.

15. The above means that this appeal to the Upper Tribunal has to be dismissed. Having said the above though, I do accept that the application was not properly due to errors made in consequence of Mr Callaway not having the requisite experience or training to fully appreciate what was required of the Operator under the applicable regulatory regime. I also accept there was no bad faith at all. I rather suspect Mr Callaway was placed in a difficult position. But the point I am making is that there is nothing in the material before me which suggests that a fresh application, properly made with the relevant legislation in mind, might not succeed. But whether the Operator does make such an application and whether if it does it will be granted, are not matters for me.

16. The appeal is dismissed.

(Signed on the original)

**M R Hemingway**  
**Judge of the Upper Tribunal**  
**Dated: 30 March 2021**