



NCN: [2022] UKUT 00348 (AAC)  
Appeal No. UA-2022-000064-NT

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

**ON APPEAL from the DECISION of the HEAD of the TRANSPORT REGULATION  
UNIT**

**Dated 28 February 2022**

**Before:**

**Kenneth Mullan  
Mr Richard Fry  
Mr Martin Smith**

**Judge of the Upper Tribunal  
Member of the Upper Tribunal  
Member of the Upper Tribunal**

**Appellant:**

**Interbev Ireland Ltd**

**Attendances:**

For the Appellant: Mr Gerard Keenan

For the Respondent: None

**Type of hearing:** Face-to-face oral hearing

**Date of hearing:** 17 November 2022

**Date of decision:** 20 December 2022

**DECISION OF THE UPPER TRIBUNAL**

IT IS HEREBY ORDERED that this appeal be DISMISSED.

**SUBJECT MATTER:-**

Application for variation of a restricted licence; failure to comply with advertising requirements

**CASES REFERRED TO:-**

NT/2013/82 Arnold Transport & Sons Ltd v DOENI;  
NT/2013/52 & 53 Fergal Hughes v DOENI & Perry  
McKee Homes Ltd v DOENI [2013] UKUT 618 AAC,  
NT 2013/52 & 53; 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 Head of the Transport Regulation Unit ('TRU') to refuse the Appellant's application for a variation to a restricted goods vehicle operator's licence.
2. The TRU is part of the Department for Infrastructure ('the Department')

### Background

3. The factual background to this appeal appears from the documents and the Head of the TRU's decision and is as follows:-

- (i) The Appellant is the holder of a restricted goods vehicle operator's licence granted on 2 June 2014 and authorising 1 vehicle and 1 trailer.
- (ii) An application for a variation to the licence was received in the Department in November 2021. The variation application sought authorisation for 3 vehicles and 2 trailers.
- (iii) In correspondence dated 22 November 2021 the Department informed the Appellant that it considered that the application and requested additional documentation, as follows:

'There was no advertisement submitted in support of the application. You must provide evidence of publication of the advert in a local newspaper circulating within the vicinity of the nominated operating centre(s) on any one date between 29 October and 13 December 2021. The advert must be in the prescribed format or the application may be refused.

Please upload to the online application the relevant page of the newspaper so that the advert, name of newspaper and date of publication are visible on the uploaded image. If the name and date do not appear on that page, then also upload the front page of the newspaper.

**Please be aware that the Department has no discretion under the 2010 Act where the timing of adverts is concerned. If an advert has not been published by 13 December 2021 the application will be refused, regardless of whether you have replied to other matters.**

Clarification of the licence authority required. The application is for a new operating centre with the same address as the old one, with an authority of two creating a total authority of three vehicles.

Please supply an aerial image of the operating centre indicating its location and the parking for all vehicles.'

- (iv) In the file of papers which is before us is a copy of a page from a local newspaper which contains a copy of an advertisement relating to the Appellant's application. We return to this document below.
- (v) In correspondence dated 15 December 2021 the Department wrote to the Appellant again. In this correspondence the Department indicated that certain documentation remained outstanding. It also stated that the purpose of the correspondence was '... intended as a final attempt to resolve these issues by correspondence and you must now respond in

full by no later than 29/12/2021. If on that date the application remains incomplete, it will be refused. Should this happen, you will have to re-apply for a licence and meet again the application fee plus the cost of placing a fresh advertisement.’ The requested supporting documentation was as follows:

‘The advert wording was incorrect and will be submitted for decision.

Please supply an ariel image of the operating centre indicating its location and the parking for all vehicles.’

- (vi) The Department then forwarded three items of correspondence to the Appellant. The first was dated 12 January 2022 and the other two 28 February 2022. Each of these letters referred to the refusal of the Appellant’s application. We return to the specificity of the three items of correspondence below.
  - (vii) An appeal against the refusal of the variation application was subsequently received in the office of the Administrative Appeals Chamber (AAC) of the Upper Tribunal.
4. In his Notice of Appeal, the Appellant set out the following grounds of appeal:
- ‘I am appealing this decision as I feel I have returned all requested information in the time given. I have included letters and photographs to support this. I took the wording of the advertisement directly from the guidance notes supplied and sent picture [uploaded it onto system] Same week it was published in local paper - see date on paper for reference. Upon uploading the advert we received another request for aerial pictures in which I obtained and subsequently uploaded. All info attached.’

#### **Relevant legislative provisions**

5. Sections 2(1)-(4), 12(2)-5), 12C, 12D, 12E and 17 of the Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010 (‘the 2010 Act’) provide:

#### **2. “Standard” and “restricted” licences**

- (1) An operator's licence may be either a standard licence or a restricted licence.
- (2) A standard licence is an operator's licence under which a goods vehicle may be used on a road for the carriage of goods—
  - (a) for hire or reward, or
  - (b) for or in connection with any trade or business carried on by the holder of the licence.
- (3) A restricted licence is an operator's licence under which a goods vehicle may be used on a road for the carriage of goods for or in connection with any trade or business carried on by the holder of the licence, other than that of carrying goods for hire or reward.
- (4) Notwithstanding subsections (2) and (3), a company may use a goods vehicle on a road for the carriage of goods for hire or reward under a restricted licence instead of a standard licence if (but only if) the goods concerned are the property of a company which is—
  - (a) a subsidiary of the first company,
  - (b) a holding company for the first company, or

- (c) a subsidiary of a company which is a holding company both for that subsidiary and for the first company.

(d) if the Department thinks fit, whether the requirement of section 12D is satisfied.

## **12. Determination of applications for operators' licences**

- (1) On an application for a restricted licence the Department must consider—
  - whether the requirements of sections 12B and 12C are satisfied; and
  - if the Department thinks fit, whether the requirement of section 12D is satisfied.
- (2) Subsections (1) and (2) are subject to sections 10 (publication of application) and 47(2) (payment of application fee).
- (3) In considering whether any of the requirements of sections 12A to 12D are satisfied, the Department must have regard to any objection duly made under section 11(1)(a) in respect of the application.
- (4) If the Department determines that any of the requirements that it has taken into consideration in accordance with subsection (1) or (2) are not satisfied, it must refuse the application.

### **12C Requirements for standard and restricted licences**

- (1) The requirements of this section are that it must be possible (taking into account the Department's powers under section 14(3) to issue a licence in terms that differ from those applied for) to issue a licence in relation to which subsections (2) to (6) will apply.
- (2) There must be satisfactory arrangements for securing that the following are complied with in the case of vehicles used under the licence—
  - (a) Article 56 of the Road Traffic (Northern Ireland) Order 1981 (drivers' hours); and
  - (b) the applicable Community rules, within the meaning of Article 2 of that Order.
- (3) There must be satisfactory arrangements for securing that vehicles used under the licence are not overloaded.
- (4) There must be satisfactory facilities and arrangements for maintaining the vehicles used under the licence in a fit and serviceable condition.
- (5) The licence must specify at least one place in Northern Ireland as an operating centre of the licence-holder, and each place so specified must be available and suitable for use as an operating centre of the licence-holder (disregarding any respect in which it may be unsuitable on environmental grounds).
- (6) The capacity of the place specified as an operating centre (if there is only one) or both or all of the places so specified taken together (if there is more than one) must be sufficient to provide an operating centre for all the vehicles used under the licence.
- (7) In considering whether the requirements of subsections (2) to (6) are satisfied, the Department may take into account any undertakings given by

the applicant (or procured by the applicant to be given) for the purposes of the application, and may assume that those undertakings will be fulfilled.

- (8) In considering whether subsection (5) will apply in relation to a licence, the Department may take into account any conditions that could be attached to the licence under section 20(1)(a) (conditions of licences) and may assume that any conditions so attached will not be contravened.
- (9) In considering whether subsection (5) or (6) will apply in relation to a licence, the Department may take into account whether any proposed operating centre of the applicant would be used—
  - (a) as an operating centre of the holders of other operators' licences as well as an operating centre of the applicant; or
  - (b) by the applicant or by other persons for purposes other than keeping vehicles used under the licence.

#### **12D. Further requirement for standard and restricted licences**

The requirement of this section is that the provision of the facilities and arrangements for maintaining the vehicles in a fit and serviceable condition is not prejudiced by reason of the applicant's having insufficient financial resources for that purpose.

#### **17.— Publication of notice of applications for variation in any locality affected**

(1) Subject to subsection (4), the Department shall refuse an application for any of the directions mentioned in subsection (2) without considering the merits unless it is satisfied that subsection (3) has been complied with in respect of each locality affected by the application.

(2) The directions referred to in subsection (1) are—

- (a) any direction under section 16(1)(a) that a maximum number specified in a licence under section 5 be increased;
- (b) any direction under section 16(1)(c) or (e);
- (c) any direction under section 16(1)(g) that a new place be specified in a licence as an operating centre of the licence-holder; and
- (d) any direction under section 16(1)(h) or (i) which might result in a material change in the use of any operating centre of the licence-holder.

(3) This subsection has been complied with in respect of a locality affected by an application if, within the period beginning 21 days before the date on which the application is made and ending 21 days after that date, notice of the application in such form and containing such information as may be prescribed has been published in one or more local newspapers circulating in the locality.

(4) The Department is not required by this section to refuse an application if—

- (a) it is satisfied as mentioned in subsection (1), except that the form or contents of the notice of application as published in any newspaper did not comply with the prescribed requirements; and
- (b) it is satisfied that no person's interests are likely to have been prejudiced by the failure to comply with those requirements.

(5) For the purposes of this section a locality is affected by an application for the variation of an operator's licence if—

(a) it contains any place that will be an operating centre of the licence-holder if the application is granted; or

(b) it contains an existing operating centre of the licence-holder and—

(i) the granting of the application would or could result in an increase in the number of vehicles, or the number of vehicles above a certain weight, that have that centre as their operating centre; or

(ii) any undertaking recorded in, or condition attached to, the licence that the application seeks to have varied or removed relates to that centre.

6. Paragraphs 1 and 2 of Schedule 2 to the Goods Vehicles (Licensing of Operators) Regulations (Northern Ireland) 2012 (the '2012 Regulations') provide:

'1. The information to be given in the notice of application is—

(a) name of applicant;

(b) trading name, if any;

(c) address for receipt of correspondence;

(d) whether the application is in respect of a new licence, or the variation of a licence;

(e) the place or places proposed to be used as an operating centre or centres (including, if available, the postal address or addresses);

(f) the number of motor vehicles and trailers proposed to be kept at each operating centre or centres;

(g) the number of motor vehicles and trailers now kept, if different; and

(h) in respect of an existing licence, details of any proposed changes to or removal of existing conditions or undertakings affecting an operating centre.

2. Every notice shall contain the following wording—

"Owners or occupiers of land (including buildings) near the operating centre(s) who believe that their use or enjoyment of that land would be affected, should make written representations to the Department stating their reasons, within 21 days of this notice. Representors must at the same time send a copy of their representations to the applicant at the address given at the top of this notice. A Guide to making representations is available from the Department"

### **General principles on the operation of the Act and Regulations**

7. At paragraphs 10 to 13 of the decision in NT/2013/82 Arnold Transport & Sons Ltd v DOENI, the Upper Tribunal set out the following general principles in the operation of the legislative provisions in Great Britain and Northern Ireland:

#### 'Some General Principles

10. An operator's licence can only be granted if the applicant satisfies the Department that the relevant requirements, set out in s. 12 of the 2010 Act as amended, have been met. [The expression

Department is used in the legislation but for the purposes of the decisions required to be taken under the legislation it is the Head of the TRU who takes them]. The relevant requirements are now set out in Paragraph 17(5) of the Goods Vehicles (Qualifications of Operators) Regulations (Northern Ireland) 2012, (“the Qualifications Regulations), which substitutes a new s.12 and adds ss. 12A-12E to the 2010 Act. The Qualifications Regulations also contain important provisions in relation to Good Repute, Professional Competence and Transport Managers.

11. The grant of an operator’s licence does not mean that an operator can then proceed on the basis that the requirements that must be met in order to obtain a licence can thereafter be disregarded. In our view it is clear both from the terms of the 2010 Act and from Regulation 1071/2009 that these are continuing obligations, which an operator is expected to meet throughout the life of the licence. It is implicit in the terms of s. 23, which gives the Department power to revoke, suspend or curtail an operator’s licence, that this can take place at any time and for any reasonable cause, including matters covered by the requirements of s. 12 as amended. It is explicit in s. 24, which provides that a standard licence shall be revoked if at any time it appears that the licence-holder is no longer (i) of good repute, (ii) of appropriate financial standing or, (iii) professionally competent. The underlining, in each case is ours. First, we wish to stress that once it appears that the licence-holder is no longer of good repute, or of appropriate financial standing or professionally competent the licence must be revoked because the Act makes it clear that there is no room for any exercise of discretion. Second, the use of the expression ‘at any time’ makes the continuing nature of the obligations crystal clear.
12. The Tribunal has stated on many occasions that operator’s licensing is based on trust. Since it is impossible to police every operator and every vehicle at all times the Department in Northern Ireland, (and Traffic Commissioners in GB), must feel able to trust operators to comply with all relevant parts of the operator’s licensing regime. In addition other operators must be able to trust their competitors to comply, otherwise they will no longer compete on a level playing field. In our view this reflects the general public interest in ensuring that Heavy Goods Vehicles are properly maintained and safely driven. Unfair competition is against the public interest because it encourages operators to cut corners in order to remain in business. Cutting corners all too easily leads to compromising safe operation.
13. It is important that operators understand that if their actions cast doubt on whether they can be trusted to comply with the regulatory regime they are likely to be called to a Public Inquiry at which their fitness to hold an operator’s licence will be called into question. It will become clear, in due course, that fitness to hold an operator’s licence is an essential element of good repute. It is also important for operators to understand that the Head of the TRU is clearly alive to the old saying that: “*actions speak louder than words*”, (see paragraph 2(xxix) above). We agree that this is a helpful and appropriate approach. The attitude of an operator when

something goes wrong can be very instructive. Some recognise the problem at once and take immediate and effective steps to put matters right. Others only recognise the problem when it is set out in a call-up letter and begin to put matters right in the period before the Public Inquiry takes place. A third group leave it even later and come to the Public Inquiry with promises of action in the future. A fourth group bury their heads in the sand and wait to be told what to do during the Public Inquiry. It will be for the Head of the TRU to assess the position on the facts of each individual case. However it seems clear that prompt and effective action is likely to be given greater weight than untested promises to put matters right in the future.'

### **The proper approach on appeal to the Upper Tribunal**

8. In NT/2013/52 & 53 Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI, the Upper Tribunal said the following, at paragraph 8 of its decision, on the proper approach on appeal to the Upper Tribunal:

'There is a right of appeal to the Upper Tribunal against decisions by the Head of the TRU in the circumstances set out in s. 35 of the 2010 Act. Leave to appeal is not required. At the hearing of an appeal the Tribunal is entitled to hear and determine matters of both fact and law. However it is important to remember that the appeal is not the equivalent of a Crown Court hearing an appeal against conviction from a Magistrates Court, where the case, effectively, begins all over again. Instead an appeal hearing will take the form of a review of the material placed before the Head of the TRU, together with a transcript of any public inquiry, which has taken place. For a detailed explanation of the role of the Tribunal when hearing this type of appeal see paragraphs 34-40 of the decision of the Court of Appeal (Civil Division) in Bradley Fold Travel Ltd & Peter Wright v Secretary of State for Transport [2010] EWCA Civ. 695. Two other points emerge from these paragraphs. First, the Appellant assumes the burden of showing that the decision under appeal is wrong. Second, in order to succeed the Appellant must show that: "*the process of reasoning and the application of the relevant law require the Tribunal to adopt a different view*". The Tribunal sometimes uses the expression "*plainly wrong*" as a shorthand description of this test.'

At paragraph 4, the Upper Tribunal had stated:

'It is apparent that many of the provisions of the 2010 Act and the Regulations made under that Act are in identical terms to provisions found in the Goods Vehicles (Licensing of Operators) Act 1995, ("the 1995 Act"), and in the Regulations made under that Act. The 1995 Act and the Regulations made under it, govern the operation of goods vehicles in Great Britain. The provisional conclusion which we draw, (because the point has not been argued), is that this was a deliberate choice on the part of the Northern Ireland Assembly to ensure that there is a common standard for the operation of goods vehicles throughout the United Kingdom. It follows that decisions on the meaning of a section in the 1995 Act or a paragraph in the Regulations, made under that Act, are highly relevant to the interpretation of an identical provision in the Northern Ireland legislation and vice versa.'



## Analysis

9. As was noted in paragraph 3(vi) above, the Department forwarded three items of correspondence to the Appellant each stating that his variation application had been refused. The first letter, dated 12 January 2022 stated the following:
- ‘I refer to your application to vary your operator's licence and to our recent letter warning of the consequences should you fail to provide proof that you have placed a valid newspaper advertisement as required under Section 17(3) of the above Act.
- The stated deadline for submitting proof in the form of the full page of the newspaper containing the advertisement has now expired. The adverts published were out of the prescribed time period, your application has been refused under Section 17(1) of the Act.’
10. The second letter dated 28 February 2022 stated the following:
- ‘I refer to the recent decision by the DHTRU to refuse your application.
- In decision [*sic*] he has directed that a future application should be subject to a site assessment by the OVA. The rationale being that articulated vehicles would be unable to turn around within the confines of the centre and will have to reverse in.’
11. In the third and final letter, also dated 28 February 2022, the Department stated:
- ‘I refer to your application for an operator's licence and to our letter of 12 January 2022 stating that the application had been refused due to the timing of the advert.
- The application was refused under Section 17(1) of the 2010 Act because the content of the advert did not contain all mandatory wording as set out below and I am sorry for any inconvenience caused.
- The advert should contain the following wording:
- Owners or occupiers of land (including buildings) near the operating centre(s) who believe that their use or enjoyment of that land would be affected should make written representations to the DfI at Central Licensing Office, PO Box 180, Leeds, LS9 1 BU stating their reasons within 21 days of this notice. Representors must at the same time send a copy of their representations to the applicant at the address given at the top of this notice. A Guide to Making Representations is available from the website [infrastructure-ni.gov.uk](http://infrastructure-ni.gov.uk)
- The wording in bold was omitted from the advert. That wording is mandatory, which means the Department has no discretion to accept an advert without it’.
12. At the oral hearing of the appeal before us, the Appellant observed that he was perplexed about the precise reason why the variation application was refused. Given the divergent content of the three items of correspondence informing him of the refusal we can understand why he was somewhat bewildered.
13. We turn to the letter of 12 January 2022 which gave as a reason for the refusal of the variation application that the advertisement had not been published within the prescribed time limits. In the Department's correspondence of 22 November 2021, (see paragraph 3(iii) above), the Appellant was informed that the time limit for the publication of the advertisement was 13 December 2021. We observed that in the bundle of papers which is before us is a copy of a page from a local newspaper which contains a copy of an advertisement relating to the Appellant's application. The copy is not focused and the date of

the edition of the newspaper is not at all legible. At the oral hearing of the appeal, the Appellant indicated that he could and would provide another copy of the page containing the advertisement with an accurate depiction of the date of the paper's edition. He did so and we note that date of the edition is 9 December 2021, well within the Department's stipulated time limit. We observe, accordingly, that had the principal reason for the refusal of the variation application had been the failure to publish the advertisement been that the advertisement was not published within the time limits, then the appeal would have been allowed, both on the ground that the time limit had been met but also on the basis that the Department expected the Upper Tribunal to accept evidence which could not be read.

14. It is the case, however, that the Department has confirmed, in its second item of correspondence of 28 February 2022, that the actual basis on which the variation application was refused was that the wording did not comply with the requirements in paragraph 2 of Schedule 2 to the 2012 Regulations. The wording of paragraph 2 of Schedule 2 is mandatory ('shall contain') and this advertisement did not contain the precise wording which is mandated. At the oral hearing, the Appellant stated that he had copied wording from another published advertisement. Further, the Appellant was not able to produce any advertisements with such wording in evidence. We conclude, therefore, that the Department's decision cannot be said to be 'plainly wrong'.
15. In these circumstances, the appeal is dismissed.
16. We make the following additional observations. While the decision is not 'plainly wrong', it is somewhat technical and punitive. We are of the view that the Department could have and should have engaged with the Appellant about the narrowness of the legislative requirement and given advice as to how he might comply with it. We cannot and do not give advice to the Appellant but is open to him to make a further application for a variation to his licence. In this regard we note the Appellant's evidence that he has some further engagement with the Department and his expectation might be that this will continue.



**Kenneth Mullan, Judge of the Upper Tribunal,  
20 December 2022**