Appeal No. UA-2022-000811-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 17 June 2022

Before:

Kenneth Mullan	**Judge of the Upper Tribunal**
Mr David Rawsthorn	**Member of the Upper Tribunal**
Dr Phebe Mann	**Member of the Upper Tribunal**

Appellant:

Deborah Marie Toner T/A DDT Haulage

Attendances:
For the Appellant: Mr McNamee

For the Respondent: Ms Jones

Type of hearing: Oral hearing
Date of hearing: 27 January 2023
Date of decision: 15 March 2023

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that this appeal be ALLOWED.

SUBJECT MATTER:- Standard international licence; revocation

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 revoke the Appellant's 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 standard international goods vehicle operator's licence authorising 4 vehicles and 10 trailers.

(ii) The Appellant attended a public inquiry on 19 May 2021 where the Head of the TRU made the following relevant findings, notified to the operator by way of a letter dated 03 June 2021.

> 'The operator's licence of (the Appellant) is suspended with immediate effect, with that suspension ending at 23:45 hours on Friday 2 July 2021.
>
> I record that the good repute of (the appellant) as TM to be lost. I find her unfit to act as a TM. I disqualify her from acting as a TM for a period of twelve months.
>
> I grant a period of grace for professional competence, ending Friday 30th July, to allow time to have a suitable transport manager nominated.'

(iii) The Head of the TRU applied the following undertakings on the licence for Deborah Marie Toner:

a) The operator is required to employ an external transport manager, who is not Damien Toner, and has no family links with Mr. Damien Toner.

b) The operator is required to ensure into a maintenance contract with a provider that is not Mr Damien Toner, and has no family links to Mr Damien Toner.

c) Mr Damien Toner is not to hold any position of authority or influence within the business.

d) The operator will arrange an independent audit to be carried out by the RHA, Logistics UK or other suitable independent body during July 2022.

(iv) On 10 June 2021 the Department received notice of appeal against the decision which placed conditions on the Appellant's operator's licence. The suspension, disqualification, and period of grace were not appealed. The Appellant also applied for a stay "as regards the conditions placed upon her operator's licence, pending the outcome of this appeal". That request for a stay was refused by the Department on 14 June 2021. Subsequently a stay request was submitted to the Upper Tribunal and refused by Judge Hemingway on 9 August 2021.

(v) An application to add a new Transport Manager, Mr A McP, dated 15 July 2021, was received on 23 July 2021. The application was

incomplete, and in line with standard procedure a letter was issued on 12 August 2021 requesting further information. A further, and final request for the provision of outstanding information was issued on 7 September 2021. Whilst a response was received from Mr McP this was followed on 30 October 2021 by a notice that he was not proceeding with the application process and asked that he be withdrawn with immediate effect.

(vi) Mr McP was never formally recorded as a Transport Manager against the Appellant's licence and the undertaking, therefore, remained outstanding.

(vii) On 9 November 2021, the Department served notice that it was considering revoking the licence held by the Appellant. That letter sought a response, and provided an opportunity to request a public inquiry, not later than 30 November 2021.

(viii) A response was received from the Appellant's solicitor on 29 November 2021 which included:

> 'We note that you have referenced our client's appeal which is listed for the 8th December 2021 and would ask that no action be taken that would compromise our client's licence or interfere with our client's appeal rights. To this end we would seek an extension to the grace period to allow our client to identify and engage a different transport manager".

(ix) On 6 December 2021 the Department wrote to the Appellant, stating, *inter alia*:

> 'The decision to disqualify (the Appellant) as transport manager, and allow a period of grace until 30 July, was communicated on 03 June 2021. Requests to stay the decisions from the public inquiry were refused by both the Department and the Upper Tribunal. Article 13(1)(a) of Regulation (EC) 1071/2009 sets a limit of six months on any period of grace for professional competency (allowing an extension only in cases of death or incapacity which are not relevant in this case). That six-month limit expired on 03 December 2021 and the period of grace cannot therefore be extended.
>
> In line with Section 24(1)(a) the department shall direct that a standard licence be revoked if any time it appears to the Department that the licence holder no longer satisfies the requirements of section 12A(2). The emphasis here is my own.
>
> This decision stands alone from the decision under appeal and is taken independently from it. I am therefore not persuaded that it interferes with the appeal rights of the licence holder.
>
> I therefore order that the licence is revoked 28 days from the date this decision is notified to the operator to allow an orderly closure of transport operations.'

(x) The Appeal against the Department's decision of 3 June 2021 to apply undertakings against the licence was heard on 8 December 2021. The appeal was disposed of by way of a Consent Order whereby the Upper Tribunal ordered that undertakings a & b (in paragraph (iii) above) were to be remade as follows:

a. The operator is required to employ an external Transport Manager who is not Mr Damian Toner. As required by the legislation, the name of the proposed Transport Manager Is to be forwarded to the Head of the TRU for his approval by 31 January 2022.

b. The operator is required to enter into a maintenance contract with an external provider who is not Mr Damian Toner. As required by the legislation, the name of the proposed maintenance contractor is to be forwarded to the Head of the TRU for his approval by 31 January 2022.'

(xi) As a consequence of the outcome of the appeal held on 8 December 2021 the Head of the TRU wrote to the operator on 15 December 2021 as follows:

> 'Whilst the decision to revoke the licence was based on the absence of an approved transport manager and the expiration of the allowable period of grace, I note the clear direction from the Upper Tribunal to allow until 31 January 2022 for a transport manager (and maintenance contractor) to be nominated. I am satisfied that the 6 December decision to revoke could (sic "not') have been reached with the new wording in place. In order to save the time and expense of appeal, and in agreement with you that the present decision is a nullity, I propose to now withdraw that direction to revoke.'

(xii) On 20 January 2022 the operator wrote to the Department enclosing an application to add transport manager Mr Hugh Toner. The Department considered the application to be incomplete and, accordingly and in line with standard procedure, wrote to the Appellant on 26 January 2022 requesting the following additional information:

> 'A hard copy of the transport manager application form (TM(NI)1) form posted to the Leeds office.
>
> The nominated transport manager's certificate(s) of qualification. Modular certificates are not acceptable. The full certificate shows a place and date of birth and refers to EC Regulation 1071/2009. If full certificate has not been received by the transport manager, they should contact the examining body and ask for the full certificate.
>
> Please upload the full page of the overall certificate to the online transport manager application.
>
> Confirmation of the full legal name of the proposed transport manager as there is indication he has a middle name.
>
> The number of hours Mr Toner will dedicate to his undeclared sole trader licence, ON1114128. If Mr Toner's hours as a mechanic also include his hours as a transport manager for his sole trader licence, please confirm this when you respond to this letter.

(xiii) By way of email correspondence dated 11 February 2022, the Department referred to undertaking b (as noted in paragraph (iii) above) and requested details as to compliance with it.

(xiv) The Appellant replied on 11 February 2022 to indicate that she had been unwell but would answer the queries which had been made on her return to the office.

(xv) In correspondence dated 14 February 2022, the Appellant made the following responses:

> 'I refer to your letter dated 26th January 2022.
>
> I have to apologise in advance for my late reply as I have been unwell and am only back in the office from Friday past, 11th February 2022.
>
> I reply as follows both by email & post.
>
> I attach/enclose a hard copy of Transport Manager application form (TM(NI)l, I have amended the Transport manage application, page 3, no 7. Hugh Toner is the holder of another licence. I have amended same on the application.
>
> Mr Toner is unable to locate his Transport Managers Certificates at this time but has made contact with the examining body to ask for his full Certificate.
>
> Mr Toner's full name is Hugh Francis Toner.
>
> He [*sic*] Toner will dedicate 2.5 hours per day to his own Sole Trader licence.'

(xvi) On 2 March 2022 the Department considered that application remained incomplete and, in line with standard procedures, issued what it considered to be a final request for the following information which was to be received not later than 16 March 2022:

> 'The application is still incomplete and this a final request. You must now give this matter your urgent attention and provide the following information/document(s):
>
> A hard copy of the transport manager application form (TM(NI) 1) form posted to the Leeds office. So far we only received an emailed copy.
>
> The nominated transport manager's certificate(s) of qualification. Modular certificates are not acceptable. The full certificate shows a place and of birth and refers to EC Regulation 1071/2009. If full certificate has not been received by the transport manager, they should contact the examining body and ask for the full certificate.
>
> Please upload the full page of the overall certificate to the online transport manager application.
>
> We note that your proposed transport manager has not been listed on a licence within the previous five years and may have attained their CPC qualification more than 10 years ago - (agreement was sought for the proposed transport manager to attend a refresher course)
>
> You are required to upload details of any professional development Mr Toner has undertaken since obtaining their certificate. This can take the form of refresher courses, training workshops, conferences and events, ore-learning programs. If they have undertaken any of these please provide evidence of attendance/completion. If your proposed transport manager is unable to provide this information you should confirm whether you would accept the following undertaking on the licence:
>
> > **By three months from grant of the application, Mr Hugh Toner will either:**

i) attend in person a two-day transport manager CPC refresher course

ii) participate in a virtual online two-day transport manager CPC refresher course

Courses must be run by a trade association (Logistics UK/RHA/BAR), a professional body (IoTA/CILT/SOE/IRTE), or an exam centre approved by an accredited body to offer the transport manager CPC qualification in goods transport.

Virtual online courses must satisfy the criteria for such courses established by the Department. Whether attending in person or participating in an online course, proof of attendance must be sent to the Department at the above address within seven days of completion.

As Mr Toner's maximum declared weekly hours total is 54, please arrange for him to confirm whether he considers that as an external transport manager role and owner and transport manager of his own business, he is exempt from the Working Time Regulations or, if not, whether he will opt out of the Regulations if he is approved as transport manager for (the Appellant)

(xvii) In correspondence dated 16 March 2022, the Appellant made the following response:

‘Referring to your letter dated 2nd March 2022 regarding an application for the role of transport manager.

*A hard copy of the TM(NI)I has been posted to the relevant address stated on your previous letter.

*We have requested a copy of Mr Hugh Toner's transport certificates of qualifications, which I will forward to yourself as soon as I receive them.

*Mr Hugh Toner has agreed to participate in a virtual on-line two day transport manager CPC refresher course.’

(xviii) On 12 April 2022 the Department wrote to the operator to provide what it described as a further and final opportunity to provide the outstanding documentation not later than 26 April 2022. This letter concluded by stating that no further extensions would be granted.

(xviii) As no response was received to the Department's 26 April letter, in accordance with section 26(1) the Department wrote to the operator on 18 May 2022 to advise that it was considering making a direction to revoke the operator's licence. The reasons given for the proposed direction were as follows:

‘Section 23(1)(e) that any undertaking recorded in the licence has not been fulfilled, namely, the operator is required to employ an external Transport Manager who is not Mr Damian Toner. As required by the legislation, the name of the proposed Transport Manager is to be forwarded to the Head of the TRU for his approval by 31 January 2022.

Section 24(1)(a) as the licence holder no longer appears to satisfy the requirement to be of professional competence under the provisions of

> section 12A(2)(d) (as determined in accordance with regulations and Article 8 of the 2009 Regulation) in view of an apparent failure to provide evidence to ensure compliance with the undertaking to add an external transport manager to the licence.'

That letter sought a response, and provided an opportunity to request a public inquiry, not later than 08 June 2022.

(xix) On 8 June 2022 the Department received email communication from (the Appellant) advising that she had received the 26 April letter but had not received the previous letter dated 12 April 2022. The Department responded on the same day, by email, providing a copy of the 12 April letter. No further communication was then received from (the Appellant).

(xx) In correspondence dated 17 June 2022 the Department informed the Appellant of its decision to revoke her operator's licence. The content of that decision letter is set out in more detail below.

(xxi) An appeal against the decision dated 17 June 2022 was subsequently received in the office of the Administrative Appeals Chamber of the Upper Tribunal.

(xxii) The notice of Appeal included an application for a stay of the effect of the decision dated 17 June 2022. On 4 July 2022 the stay application was refused by the Head of the TRU. The stay application was renewed before the Upper Tribunal and on 11 July 2022, was granted by Upper Tribunal Judge Hemingway.

The decision notice

4. The decision notice was in the following terms:

> 'I refer to our letter of 18 May 2022 proposing to revoke your operator's licence due to an apparent failure to comply with a licence undertaking and to meet the professional competence requirement as a result.
>
> The Department considers that you have failed to continue to meet the requirements for holding an operator's licence and has decided to revoke your licence with immediate effect under the provisions of Sections 23 and 24 of the 2010 Act on the following grounds:
>
> Section 23(1)(e) that any undertaking recorded in the licence has not been fulfilled, namely, the operator is required to employ an external Transport Manager who is not Mr Damian Toner. As required by the legislation, the name of the proposed Transport Manager is to be forwarded to the Head of the TRU for his approval by 31 January 2022
>
> Section 24(1)(a) as the licence holder no longer satisfies the requirement to be of professional competence under the provisions of section 12A(2)(d) (as determined in accordance with regulations and Article 8 of the 2009 Regulation) in view of an apparent failure to provide evidence to ensure compliance with the undertaking to add an external transport manager to the licence.
>
> The decision was made by the Head of the Transport Regulation Unit and his findings are below:
>
> > In this case we have previously provided some leniency due to an appeal being heard by the Upper Tribunal, and an agreement between the Department and the operator to have the undertakings amended by way of a consent order.

The impact of this consent order was to adjust two of the undertakings so that they read as follows:

'a. The operator is required to employ an external Transport Manager who is not Mr Damian Toner. As required by the legislation, the name of the proposed Transport Manager is to be forwarded to the Head of the TRU for his approval by 31 January 2022.

b. The operator is required to enter into a maintenance contract with an external provider who is not Mr Damian Toner. As required by the legislation, the name of the proposed maintenance contractor Is to be forwarded to the Head of the TRU for his approval by 31 January 2022.'

As at 31 January 2022 no external transport manager was approved by the Department, but leniency was granted as the process, delayed by the appeal, had commenced.

As of today, however, the situation is rather stark. Due to the failure of the operator to provide supporting material the TM application has been refused. A final letter requesting information was issued on 12 April 2022, and a subsequent letter proposing to revoke the licence was issued on 18th May 2022. Evidence of delivery was obtained and, further, an email copy was issued at the operator's request.

The letter proposing to revoke the licence specified the following grounds:

> Section 23(1)(e) that any undertaking recorded in the licence has not been fulfilled, namely, the operator is required to employ an external Transport Manager who is not Mr Damian Toner. As required by the legislation, the name of the proposed Transport Manager is to be forwarded to the Head of the TRU for his approval by 31 January 2022.
>
> Section 24(1)(a) as the licence holder no longer appears to satisfy the requirement to be of professional competence under the provisions of section 12A(2)(d) (as determined in accordance with regulations and Article 8 of the 2009 Regulation) in view of an apparent failure to provide evidence to ensure compliance with the undertaking to add an external transport manager to the licence.

A finding under Section 23(1)(e) can include revocation, but this is discretionary and other options for regulatory action such as suspension or curtailment are available, but I am reminded that in the case of a finding under Section 24(1)(a) the Department "shall" revoke the licence, and this action is mandatory rather than discretionary.

This operator has had ample notice of the competency requirements - particularly as the necessity to have an external transport manager was reaffirmed by the Upper Tribunal - and has been given appropriate notice of the Department's proposal to revoke due to the failings. Revocation is therefore inevitable in this case. As I have received no submissions from the operator that might justify a delay in applying the revocation, to allow operations to be brought to an orderly close, I find immediate revocation of the licence in this instance, due

to the absence of professional competence, as being wholly proportionate.'

The notice of appeal

5. In the notice of appeal, Mr McNamee set out the following grounds of appeal:

> 'The Appellant Ms Deborah Marie Toner applies for leave to appeal and to appeal the Decision of 17 June 2022, which revokes her Operator's Licence. The basis for this application is that the decision-maker has made an arbitrary, unlawful and entirely disproportionate decision as regards the revocation of our client's Licence.
>
> The decision-maker has had to artificially conjoin two of the statutory requirements in order to come to an entirely unjustifiable decision to revoke our client's Operators Licence without providing for a winding down period.
>
> The artificiality of the decision can be seen on the face of the letter dated 17 June 2022 where the decision-maker notes that regulatory action under Section 23(1) is discretionary whereas that under 24(1) is mandatory. The decision-maker obviously cognisant of this fact uses a purported-breach of undertaking under Section 23(1) to ground a finding of breach of Section 24(1) hence professing to be obliged to revoke the Operator's Licence.
>
> This is an obvious and artificial construct to attempt to justify an immediate revocation of our client's Licence. Without prejudice to the above, the direction given by the Upper Tier Tribunal in the case NT/2021/50 was that the Operator nominate a Transport Manager who is not Mr Damian Toner. This direction was complied with fully by the Operator.
>
> The Appellant Operator states that it is no coincidence that the revocation of her Licence has occurred with a direction to return all documentation by Friday 1 July 2022, given the comment made by the Judge of the Upper Tier Tribunal indicating that she herself would be able to apply to become Transport Manager at the end of the period of her loss of repute which of course would be l July 2022.
>
> The Operator states that it should be obvious on the face of this decision that the intention is to revoke her Licence and to prevent her from making such an application in her own right as was suggested by the Upper Tier Tribunal.
>
> In all of the circumstances we believe that the decision to revoke the Licence is without proper lawful or factual basis and should be struck down.'

The Department's initial response

6. In its response to the application for a stay of the effect of the decision of 17 June 2022, the Department set out the following:

> '25. The grounds for appeal, summarised at paragraph 22 above, submit that a decision was arbitrary, unlawful and entirely disproportionate, but offers little grounds or evidence to support this. The appeal relies on an assertion that I have artificially conjoined two statutory requirements. In fact these are two separate findings. The point is being made, and clearly noted, that whilst one of those findings allows the Department to consider revocation, the other (under provisions of section 24) directs that the Department **shall** revoke an operator's licence.
>
> 26. The appeal goes on to state that the direction of the Upper tribunal was "that the operator nominate a Transport Manager who is not Mr Damien Toner" and that this was complied with. In fact the direction

from the Upper Tribunal was that – in line with standard procedure - the name of the proposed Transport Manager is to be forwarded to the Head of the Transport Regulation Unit for his approval by 31 January 2022. Only those approved by the Department can be listed as a Transport Manager, and in this instance neither of the two proposed Transport Managers could be approved as the operator failed to complete the application process on each occasion.

27. I also fail to understand the relevance or logic of the inference that this process was timed to correspond with a date of 1 July, at which point Mrs Toner would be able to apply in her own name to be a Transport Manager. It would be for the Upper Tribunal to determine whether delaying until July 2022 was the operator's intention, and perhaps this might explain the relaxed approach taken to the completion of the previous two nominations, but in truth Mrs Toner's twelve-month disqualification commenced from the notice of the Department's decision which was 3 June 2021. The disqualification of Mrs Toner expired two weeks before the decision to revoke the licence. The direction to return the licensing documentation is standard wording used by the administrative team and is not part of my direction on revocation.

28. The facts of this case are simply, despite the long background, that the operator failed to meet the ongoing and mandatory requirement to satisfy the Department that it meets the professional competency requirement. This was despite previous notice, a clear direction from the Upper Tribunal, and a patient and lenient approach from the Department during protracted, but incomplete, application processes.

29. To allow a stay would be seen as condoning the continuation of an operation which, in my view, is clearly in breach of the legislative requirements in terms professional competency. Professional competency is vital for assurance that transport operations are being appropriately and effectively managed. Failure to do so can create risk to road safety and creates an unfair playing field as others spend money to obtain their own qualification or hire in such expertise. In considering this request to stay this decision I note that I have no information as to how transport operations are being, or have been managed.'

The oral hearing of the appeal

7. The appeal was listed for oral hearing on 27 January 2023. The Department had made an application to be joined as a party to the appeal and was represented by Ms Jones of Counsel. The Appellant was represented by Mr McNamee.

Relevant legislative provisions

8. Sections 2(1)-(4), 12(2)-5), 12A, 12C, 12D, 12E, 17, 23(1)(e) and 24(1)(a) 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.

Determination of applications

Requirements for standard licences

12A.—(1) The requirements of this section are set out in subsections (2) and (3).

(2) The first requirement is that the Department is satisfied that the applicant —

(a) has an effective and stable establishment in Northern Ireland (as determined in such manner as may be prescribed);

(b) is of good repute (as determined in such manner as may be prescribed

and

(c) has appropriate financial standing (as determined in such manner as may be prescribed);

...

(d) is professionally competent (as determined in accordance with regulations and Article 8 of the 2009 Regulation).

(3) The second requirement is that the Department is satisfied that the applicant

...

(a) is an individual who—

(i) is professionally competent (as determined in such manner as may be prescribed) and

(ii) has designated a suitable number of individuals (which may include the applicant) who satisfy such requirements as may be prescribed, or

(b) if the applicant is not an individual, or is an individual who is not professionally competent, has designated a suitable number of individuals who satisfy such other requirements as may be prescribed.

(c) . . . . . .

(4) For the purposes of subsection (3), a number of designated individuals is suitable if the Department is satisfied it is proportionate to the maximum numbers of motor vehicles and trailers that may be used by the applicant in accordance with section 5 if the standard licence is issued.

(5) In this Act, "transport manager" means an individual designated under subsection (3)(a)(ii) or (b).

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.

23.— Revocation, suspension and curtailment of operators' licences

(1) Subject to the following provisions of this section and the provisions of section 26, the Department may direct that an operator's licence be revoked, suspended or curtailed (within the meaning given in subsection (9)) for any reasonable cause including any of the following—

…

(e) that any undertaking recorded in the licence has not been fulfilled;

24.— Revocation of standard licences

(1) The Department shall direct that a standard licence be revoked if at any time it appears to the Department that

(a) the licence-holder no longer satisfies the requirements of section 12A(2),

General principles on the operation of the Act and Regulations

9. 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

10. 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

11. We can deal with one aspect of this appeal in short order. As noted above, in the decision notice forwarded to the Appellant on 17 June 2022, the Department set out the following:

> 'The Department considers that you have failed to continue to meet the requirements for holding an operator's licence and has decided to revoke your licence with immediate effect under the provisions of Sections 23 and 24 of the 2010 Act …'

12. In relation to the applicability of section 24 of the 2010 Act, the decision maker added the following:

> 'Section 24(1)(a) as the licence holder no longer satisfies the requirement to be of professional competence under the provisions of section 12A(2)(d) (as determined in accordance with regulations and Article 8 of the 2009 Regulation) in view of an apparent failure to provide evidence to ensure compliance with the undertaking to add an external transport manager to the licence.
>
> …
>
> … I am reminded that in the case of a finding under Section 24(1)(a) the Department "shall" revoke the licence, and this action is mandatory rather than discretionary.
>
> This operator has had ample notice of the competency requirements - particularly as the necessity to have an external transport manager was reaffirmed by the Upper Tribunal - and has been given appropriate notice of the Department's proposal to revoke due to the failings. Revocation is therefore inevitable in this case. As I have received no submissions from the operator that might justify a delay in applying the revocation, to allow operations to be brought to an orderly close, I find immediate revocation of the licence in this instance, due to the absence of professional competence, as being wholly proportionate.'

13. The legal basis for the refusal is stated to be that the requirement in section 12A(2)(d) of the 2010 Act is not satisfied. Section 12A(2)(d) of the 2010 was omitted by regulation 1(b) and 82(1)(e) of the Goods Vehicles (Licensing of Operators) Amendment Regulations 2022 (S.I. 2022/293), with effect from 17 March 2022. Accordingly, section 12A(3)(c) could not be used as the basis for the refusal decision of 17 June 2022. It is axiomatic, therefore, that this aspect of the decision of 17 June 2022 is plainly wrong.

14. We cannot ignore, however, that the decision notice also refers to section 23 of the 2010 Act in the following terms:

> 'Section 23(1)(e) that any undertaking recorded in the licence has not been fulfilled, namely, the operator is required to employ an external Transport Manager who is not Mr Damian Toner. As required by the legislation, the name of the proposed Transport Manager is to be forwarded to the Head of the TRU for his approval by 31 January 2022.
>
> …
>
> A finding under Section 23(1)(e) can include revocation, but this is discretionary and other options for regulatory action such as suspension or curtailment are available, **but** …

15. On first consideration, therefore, it could be argued that the Department has applied section 23(1)(e) in the alternative to section 24(1)(d) and has exercised its discretion to revoke the Appellant's licence. We reject that contention. The emphasised 'but' at the end of the section 23(1)(e) statement is followed by:

> > '… I am reminded that in the case of a finding under Section 24(1)(a) the Department "shall" revoke the licence, and this action is mandatory rather than discretionary.
> >
> > This operator has had ample notice of the competency requirements - particularly as the necessity to have an external transport manager was reaffirmed by the Upper Tribunal - and has been given

> appropriate notice of the Department's proposal to revoke due to the failings. Revocation is therefore inevitable in this case. As I have received no submissions from the operator that might justify a delay in applying the revocation, to allow operations to be brought to an orderly close, I find immediate revocation of the licence in this instance, due to the absence of professional competence, as being wholly proportionate.'

16. It is obvious that the decision maker was intent on applying section 24 because revocation following application of that section was mandatory. Support for this conclusion is to be found in the fact that there was no further discussion about how and why the discretionary section 23 was permitted and how and why the alternative sanctions mentioned in that section – suspension or curtailment were not explored. Further, in the determination refusing the application for a stay, the Head of the TRU stated:

> 'The facts of this case are simply, despite the long background, that the operator failed to meet the ongoing and mandatory requirement to satisfy the Department that it meets the professional competency requirement. This was despite previous notice, a clear direction from the Upper Tribunal, and a patient and lenient approach from the Department during protracted, but incomplete, application processes.'

17. We conclude, therefore, that the aspect of the decision which purports to rely on the application of section 23 is also plainly wrong.

18. In these circumstances, the appeal is allowed, and the decision of 19 June 2022 is set aside. We remit the matter to the Department for reconsideration. We are of the view that a hearing - either in public or private - is mandated.

19. We add the following. This is not the first case in which the Department has purported to apply legislative provisions which have been repealed to the detriment of an operator. This practice is redolent of carelessness on the part of the decision makers and has only been uncovered because the affected operators have exercised a right of appeal. We wonder how many parallel decisions have been made in this way where the affected operators have not sought redress.

Kenneth Mullan, Judge of the Upper Tribunal,
15 March 2023