



Neutral Citation Number: Applied for

Appeal No. T/2015/54

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

**ON APPEAL from the DECISION of
Sarah Bell, Traffic Commissioner
for West of England dated 24 August 2015**

Before:

Her Honour Judge J Beech, Judge of the Upper Tribunal
George Inch, Member of the Upper Tribunal
Andrew Guest, Member of the Upper Tribunal

Appellants:

RICHARD JOHN COX trading as R J COX & SONS

Attendances:

For the Appellants: Mr Over, solicitor of OTB Eveling LLP.

Heard at: Field House, 15-25 Bream's Buildings, London, EC4A 1DZ

Date of hearing: 26 January 2016

Date of decision: 2 February 2016

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that the appeal BE ALLOWED and the matter be remitted for re-hearing before a different Traffic Commissioner

SUBJECT MATTER:- adverse maintenance findings; breach of an undertaking to have two transport managers; revocation of licence and disqualification of the Appellant; breach of the rules of natural justice in preventing the Appellant from calling a recently nominated transport manager to give evidence.

CASES REFERRED TO:- Bradley Fold Travel Ltd & Peter Wright v Secretary of State for Transport (2010) EWCA Civ. 695; Priority Freight 2009/225; Bryan Haulage (No.2) 2002/217.

REASONS FOR DECISION

1. This is an appeal from the decision of the Traffic Commissioner for the West of England ("TC") made on 24 August 2015 when she revoked the standard operator's licence held by the Appellant ("Mr Cox") with effect from 23.59 on 15 October 2015 and disqualified Mr Cox from holding or applying for an operator's licence for a period of eighteen months. The orders were made as a result of adverse findings made under ss.26 and 27 of the Goods Vehicle (Licensing of Operators) Act 1995 ("the Act"), including loss of good repute and professional competence.

Background

2. The factual background to the appeal appears from the documents, the transcript and the TC's written decision. Mr Cox first held an operator's licence, trading as R J Haulage which was granted in about 2006. In September 2009, Mr Cox was called to a public inquiry for the TC to consider the merits of a variation application and to further consider whether regulatory action should be taken against Mr Cox. A list of eleven prohibitions which had been issued between 2006 and 2009 were attached to the call up letter along with details of a drivers' hours prohibition issued in 2009. There was also a schedule of convictions: two for unauthorised use of an operating centre; two for using more vehicles than permitted on the operator's licence; one for failure to produce tachograph records upon request at the operator's premises and one for diving whilst using a mobile phone. The TC also took into account adverse reports from a Vehicle Examiner and a Transport Examiner. Mr Cox's licence was revoked with effect from 25 November 2009 following findings that Mr Cox had lost his good repute as an operator and transport manager. He was given a period of grace to allow him to carry out his transport manager duties until the date of revocation along with an interim licence to specify an additional operating centre also until the date of revocation.
3. Perhaps anticipating that his licence was going to be revoked, Mr Cox applied for a new standard national licence in October 2009. His application for seven vehicles and four trailers and three operating centres was granted on 31 December 2009 subject to the following undertakings: Mr Cox and his transport manager (Mr Puddy) were to attend a one day seminar on operator licensing compliance; a full systems audit along with inspection of four vehicles was to take place by a recognised trade association in May 2010, the report to be

available upon request by the Office of the Traffic Commissioner (“OTC”) or VOSA (now DVSA).

4. In August 2012, a maintenance inspection was carried out by a traffic examiner which was marked “unsatisfactory”. A warning letter dated 21 November 2012 was issued to Mr Cox which referred to the PG13G letter setting out the operational shortcomings of Mr Cox’s business and his response to it. Neither of those documents were included in the Tribunal’s appeal bundle.
5. Mr Cox then applied to increase his vehicle authority to ten vehicles and seven trailers. That was refused on 3 January 2013. However, the application was considered again and in April 2013, following an undertaking being given by Mr Cox that two transport managers would be nominated on Mr Cox’s licence at any one time and that both would attend a two day CPC refresher course. Mr Cox was then accepted as one of those two transport managers.
6. On 15 February 2014, one of Mr Cox’s trailers was issued with an “S” marked prohibition for one immediate and two delayed items: wiring was found to constitute a fire risk; the ABS warning light was inoperative and the anti-lock braking system itself was inoperative. Later that day, a PG9 variation notice was issued for the ABS warning light and for the ABS system being inoperative. These prohibitions caused Vehicle Examiner (“VE”) Ford to carry out a maintenance investigation on 1 May 2014 which was marked “unsatisfactory” for the following reasons:
 - PMI sheets were sent to Mr Cox with the invoices and not with the vehicles.
 - Brake test results on PMI sheets were either ticked or endorsed as “satisfactory on road test” (“SORT”) even after new brakes had been fitted. There were no roller brake test records.
 - The standard of the handwriting on the PMI sheets was unacceptable;
 - Some of the vehicles were covering very high mileage between PMI inspections (as much as 25,000kms in six weeks).
 - There were no wheel nut torquing or re-torquing procedures in place.
 - The forward planner wall chart only showed the next inspection.
 - There were two PMI records missing.
 - Two vehicles and two trailers were inspected. One Offence Rectification Notice was issued for a tachograph which was out of calibration and a PG35EC was issued for an ABS warning light being in-operative.
 - The driver defect books were “totally unsuitable” and there were many defects recorded on the PMI records which drivers should have noted during their daily walk round checks.

- There was a high MOT failure rate: 38% initial fail rate over 5 years (national average 25%); 15% final fail rate (national average 14%); 57% initial fail rate over 2 years (national average 22%); 6% final fail rate (national average 13%);
 - There did not appear to be a second transport manager.
7. In response to the PG13G form, Paul Carless, Transport Consultant, wrote to VE Ford on 13 May 2014. He indicated that he and Mr Cox had met with “Wayne” of West Trucks Limited (the maintenance provider) and the following points were dealt with:
- The standard of hand writing on the PMI records would be raised with the fitters working for West Trucks Limited.
 - The lack of proper recording of any brake testing would be remedied.
 - PMI sheets would be emailed to Mr Cox before the vehicles were returned to the operating centres;
 - A new maintenance contract was to be drawn up and sent to VE Ford.
 - Inspection intervals for the tractor units with high mileage would be reduced to 5 weekly or 20,000kms.

The response further advised that the forward planner was now complete for 2014; tachodisc driver defect report books had been introduced; the services of a Mr Helps to instruct in driver defect reporting systems had been engaged and it was expected that a short “seminar” would be held within two or three weeks; Mr Helps continued to analyse 100% of the tachograph records; a new torquing procedure had been introduced; one PMI sheet had been found, the absence of the other was the result of the vehicle being off the road; the tachograph calibration was rectified; the services of a second transport manager had been “acquired” and one David Tossal was expected to start work in early July 2014. It was also anticipated that a member of the office staff would sit the CPC examinations; the maintenance provider had been left “in no doubt” about the seriousness of the poor annual test pass rate and had “promised” to investigate the matter”.

8. In his public inquiry report dated 7 January 2015, VE Ford noted that it appeared that the services of a second transport manager had ceased from about March 2014 and as of December 2014, no second transport manager had been in post despite the operator’s response to the PG13F&G notice. He went on to comment that the operator’s shortcomings had been missed by not one transport manager but two. It was difficult to see where any day to day effective transport management had taken place. Mr Cox had engaged the services of a transport consultant to respond to the PG13F&G notice but that should have been unnecessary had the transport manager exerted effective and constant control. The systems in place were not sufficiently robust and it was in this area that the operator must improve by improvement of the systems themselves and monitoring.

9. In the interim, a continuation check list dated 21 November 2014 was sent to the OTC. It informed the TC that the nominated transport manager, Mr Veryard had died and the document was annotated “see covering letter” although that letter is not within the appeal bundle. It would appear that a period of grace for the appointment of a second transport manager was requested but was refused and on 8 December 2014, Mr Carless made an application to nominate Christopher Jones as the second transport manager with immediate effect. His nomination was duly accepted.

The Public Inquiry Hearing

10. On 9 February 2015, the OTC received an application from Mr Cox to increase his vehicle authorisation by four vehicles and two trailers. It was that application in combination with the adverse maintenance inspection report that caused the TC to determine that Mr Cox should be called to a public inquiry which took place on 21 July 2015. VE Ford was in attendance as was Mr Cox who was represented by Mr Carless. Brett Durant, Mr Cox’s proposed second transport manager was also present. The TC was informed that Mr Jones had ceased his employment as transport manager on 17 July 2015 and that Mr Durant’s nomination had been submitted to central licensing unit (“CLU”) but had not been processed.
11. It was indicated from the outset that TE Ford’s public inquiry report was accepted in its entirety. TE Ford then proceeded to give the TC a compliance update along with his observations upon two sets of vehicle records that had been produced that morning by Mr Cox. Since May 2014, the annual test initial pass rate had increased to 100%. There had been four roadside encounters with three PG9’s issued (they were not included in the appeal bundle). In February 2015, a delayed PG9 was issued for a badly torn wing to the tractor unit and the trailer was issued with a PG9 for an inoperable ABS warning light. In September 2014, a PG9 was issued for an ABS warning light being defective, a leaking exhaust system, a fuel leak, a brake disc fouling on the brake calliper and a corroded quick release valve. During the same encounter, the driver, Mr Jones, (who later became the second transport manager) was issued with a traffic prohibition for failing to produce drivers’ hours records. As for the two sets of vehicle records inspected by TE Ford, they “left a lot to be desired”. The records were still being endorsed “SORT” (satisfactory on road test). On two of the PMI records, the brakes section was blank. On two records, a rear tyre was noted to have 2mm of tread left but it was not marked as a defect. There were many defects noted on the PMI records which should have been picked up by the drivers during their daily walk round check, for example, a PMI record noted that one tyre had “0mm” tread, yet the tyre had been ticked as satisfactory on the previous daily driver’s report; on another PMI record, a rear inner tyre had blown out but this had not been mentioned on the previous daily driver’s check. TE Ford

also noted that on three PMI records, the dates had been wrong. The standard of writing on the PMI records had not improved although the forward planner was satisfactory and a new maintenance contract had been produced. TE Ford noted that the driver defect report books were in order but he was concerned about the effectiveness of the daily checks.

12. Mr Cox then gave evidence and told the TC that after TE Ford's visit in May 2014, he had had a meeting with "Wayne", an office clerk at West Trucks Limited and the issues raised by TE Ford had been resolved. However, Wayne was sacked four weeks later and the company did not "stick to what they were going to do". Nevertheless, Mr Cox thought that there had been an improvement in the PMI records. He had repeatedly asked Mr Keepwell of West Trucks Limited to undertake roller braking testing on his fleet but Mr Keepwell had refused to do so, stating that such tests were unnecessary. Mr Cox acknowledged that some of his vehicles which had been servicing a Lidl contract were covering significant distances but that the contract was being terminated because it did not pay and as a result the overall mileage of the fleet had reduced by about 30%. Brett Durant had started work "pretty well full time" as the second transport manager the day before the hearing. He and Mr Helps would be training every driver in driver defect reporting and from the first week in August, all of the vehicles would be fitted with telephones which would send emails to the office which included information such as starting and finishing hours, mileage, fuel and defects. Mr Durant would monitor the use of the phones and the information derived from them. One of the office staff (Claire) had already taken the CPC examinations but had failed part two and was awaiting the results of her re-sit.
13. Mr Cox acknowledged that most of the defects recorded on the PG9 notices since TE Ford's visit should have been detected by the drivers during their checks. The reason why two defects in ABS lights were identified during roadside encounters was because Mr Cox had bought some trailers and it transpired they had been "hotwired" and had to be sorted out. As for the "badly torn wing", Mr Cox doubted whether that was "anything more" than a hole that could accommodate a fist. He accepted that he needed to oversee everything. He had allowed West Trucks Limited to provide a "bad service" because the annual test results had improved and "time flies". Claire was responsible for the filing of PMI records and if anything needed to be done following an inspection, Mr Cox would receive a call. Every Sunday, Mr Cox would visit his other two operating centres (a Lidl depot and a quarry) and check the vehicle's tyres and top up the oil and water.
14. Mr Cox was taken to a PMI record dated 20 January 2015. He accepted that most of the eleven defects recorded should have been identified by drivers of the vehicle. Mr Cox considered that matters would improve once the vehicles undertaking high mileage had stopped servicing the Lidl contract and the new phone system had

been installed. He averred that his tipper vehicles did not attract PG9 notices and were less problematic. The TC tested that assertion by looking at a PMI record for one of those vehicles. Mr Cox accepted that the defects recorded on that record were items which should have been spotted by the drivers. The TC rose for a short period to allow Mr Cox to give instructions to Mr Carless. Upon her return, Mr Cox accepted that his drivers were not doing their driver defect checks properly. Mr Cox offered an undertaking that Mr Helps and Mr Durant would train all of the drivers on daily checking procedure within four weeks and that written evidence of that training would be sent to the TC. He would include a new term in the drivers' contracts that failure to undertake driver defect checks would amount to gross misconduct. He would also ensure that roller brake tests would be undertaken on his vehicles even if West Trucks Limited would not do them and he would keep records of those tests for two years. He accepted that he had told the TC "what she wanted to hear" on previous occasions and that was the reason he had taken Mr Durant on so that he could oversee the systems and assist Mr Cox.

15. The TC then raised the apparent failure of Mr Cox to comply with the undertaking he had given that two transport managers would be nominated on his licence at any one time. He told the TC that the transport manager prior to Mr Jones had been unwell and for ten weeks he had been insisting that he would return to work but Mr Veryard had then passed away. Mr Jones had been rather a hasty appointment because the TC had refused to give Mr Cox a period of grace (there is no correspondence in the appeal bundle about this). The TC then pointed out that she had refused the request because of the history of the licence and because Mr Cox had already had plenty of time to nominate another transport manager and it would appear that even with two transport managers, his operation had continued to be non-compliant. In response, Mr Cox prayed in aid that he had only had an office (rather than a kitchen table for 15 months) and with Mr Durant as a full time transport manager, the operation was going in the right direction. The TC disagreed. Mr Cox then stated ".. I appreciate there have been failings .. but .. we don't have any accidents .. I know there have been problems with the brakes but .. we haven't killed anybody ..". The TC responded to this remark with understandable dismay and concern. She rose again for Mr Carless to take instructions.

16. Mr Carless then called Brent Durant to give evidence. Before Mr Durant was able to do so, the TC stated:

"Be very careful, Mr Carless. Due to the challenges with Mr Cox, I am giving you some leeway, but you do know my starting point is that transport managers that are yet to be considered in Leeds will not be considered by me by a backdoor PI ... I am not having Mr Durant be talked about (sic) and consider things and all this in a public inquiry like this. I am saying no doubt this will have given him things to reflect on,

but he must be allowed to go away and do things in quiet time. So I will allow the questioning to start, but I am not sure how far I am going to let it go”.

17. Mr Carless then asked Mr Durant about his experience as a transport manager. The TC then interjected and stated “it will be on the form in Leeds”. Mr Carless then asked whether Mr Durant had listened very carefully during the hearing and whether he was still willing to be nominated on the licence. The TC interjected again and stated “I said I want him to be given a bit of time to reflect on that before giving an answer today”. The hearing went on:

Mr Carless: “I will rephrase the question”

TC: “Try”

Mr Carless: “I will try, madam. Thank you. Have you ever been in front of a Commissioner before?”

Mr Durant: “No”

Mr Carless: “What is your impression of what happened at the inquiry?”

TC: “That is a bit of an unkind question too”.

Mr Carless: “It might be unkind, madam, but Mr Durant has never been here before”.

TC: “No, and I am sure –“

Mr Durant: “I don’t really wanna be either again”.

TC: “Nobody ever wants to come back. Nobody wants to be here, nobody wants to come back. What are you actually trying to achieve, Mr Carless?”

Mr Carless: “I am trying to establish that Mr Durant has a record, a good record –“

TC: “Well, all that will be dealt with through Leeds”.

Mr Carless: “Yes”.

TC: “I have read you evidence on that” (the Tribunal notes that there is no written evidence within the appeal bundle).

Mr Carless: “.. but that he is aware of his responsibilities –“

TC: “Well, he signed a form in Leeds to say that”.

Mr Carless: “Yes, that is true. You probably will not let me pursue this either, but I would like to pursue the matter with him of what a transport manager, any transport manager does if his advice is not heeded and if his instructions-“

TC: “Well he has signed that on the form”.

Mr Carless: “Just to confirm that, madam-“

TC: “No, you are going behind the due process. I am entitled to see what Leeds has before I consider anything ... I have not got a clue what Leeds have got, or what checks they have done”.

Mr Carless: “There is one other question which I think you might allow me: What licence he holds, driving licences?”

TC: “No .. I do not see the relevance. I have never asked a transport manager what driving licences he holds. I do not need to hold a vocational driving entitlement to be an effective transport manager”.

Mr Carless: “No .. I accept that absolutely. I would never have suggested that, but-“

TC: "So what is the purpose of the question? .. I just do not see the point. It gives a false impression, or a glazed impression as to what is important ... He is here and he has heard everything .. That is the only point that you can really make. That is the one I was expecting."

Mr Carless: "Equally, if you had any questions for him .."

TC: "No, of course I do not".

The TC then thanked Mr Durant for attending the hearing and indicated that she was "really glad" that he had heard everything so that, moving forward, he would know exactly what the issues were so that he could form a view. He had to form a view in a "quiet time" and probably after a chat with Mr Cox. Reflection was required. Mr Carless was then invited to close his case.

18. In closing, Mr Carless indicated that the variation application was not being pursued. Mr Cox accepted that this was his last chance and it had taken this public inquiry for him to realise how much trouble he was in. He intended to get it right in the future and had already started to modify his operation for example by using the services of Mr Helps and Mr Durant, concentrating on the driver defect reporting system and a new driver rule that failure to undertake a daily check would result in a day's suspension from work. Mr Cox offered further undertakings that roller brake testing would be undertaken every three months and when brakes were changed and he would attend a two day CPC refresher course. Mr Carless asked the TC to find that Mr Cox's good reputation was tarnished but not lost.
19. Prior to the TC publishing her decision, Mr Carless made a request for a variation of Mr Cox's licence for parking purposes only as a result of his contract with Lidl coming to an end and he provided examples of paperwork created in relation to the new daily driver walk round regime.

The TC's decision dated 24 August 2015

20. The TC noted Mr Cox's surprise at finding himself at a public inquiry having attended previously, not least on two occasions in 2009. He relied heavily upon the 100% annual test pass rate to demonstrate improvements in his compliance systems. The TC described Mr Cox's evidence as "disquieting" causing her to adjourn on two occasions during the hearing. He was not a compelling witness and the TC was left with the impression that Mr Cox did not exercise an enquiring mind and had simply allowed his business to continue to operate without any meaningful management. It was obvious that the driver defect reporting system was not effective and it defied belief that having been told by a traffic examiner that roller brake testing was required, that Mr Cox continued with a contractor who refused to undertake such tests. There were a few positives. Mr Cox had engaged positively with the public inquiry process and a replacement second transport manager had been nominated in a timely manner in July 2015. However, she had also noted that Mr Cox had been without a second transport

manager between March 2014 and November 2014. This was a bad case. There was the previous compliance history and despite a “huge wake-up call” in May 2014, Mr Cox’s operation continued to suffer from significant shortcomings in July 2015. The TC had little confidence that Mr Cox would operate in a compliant manner moving forward and in answer to the question “is the conduct of the operator such that the operator ought to be put out of business” the answer was “yes” (the questions posed in *Priority Freight and Bryan Haulage No.2* supra). Mr Cox had failed to exercise continuous and effective management of compliance systems and had abdicated responsibility in relation to PMI inspections. It followed that his repute and professional competence as a transport manager was lost.

The Upper Tribunal Appeal

21. At the hearing of this appeal, Mr Over represented Mr Cox and submitted a skeleton argument for which we were grateful. He conceded at the outset that Mr Cox had failed to operate in a compliant manner. However, his failings could be rectified by the appointment of a robust transport manager. It followed that Mr Over’s first ground of appeal was that the TC was wrong to effectively prevent Mr Carless from calling Mr Durant to give evidence when his nomination as transport manager was relied upon by Mr Cox to persuade the TC to give him another chance. Mr Over was not aware that the TC had a “starting point” or that she followed the practice of not hearing evidence from proposed transport managers when they had not been formerly nominated or when the CLU had not had an opportunity to undertake the statutory checks as to professional competence and compliance. Indeed it is often the case that operators when faced with a public inquiry assemble a new compliance team including one or more consultants and/or transport managers when the names of the transport managers have not been formally nominated or checked. It is for the TC in any given case to hear the evidence from the proposed team and to then assess their professionalism and robustness and to determine whether they could turn a non-compliant operation into a compliant one, to further determine what weight to place upon their evidence and how the TC’s findings affect the balancing exercise. The TC in Mr Cox’s case refused to allow Mr Cox to put his case before her and as a result she breached the rules of natural justice.

The Tribunal’s determination

22. Paragraph 5 of Schedule 4 of the Goods Vehicles (Licensing of Operators) Regulations 1995 reads as follows:

“(1) Except as otherwise provided in this Schedule, the traffic commissioner shall determine the procedure at an inquiry.

(2) Subject to sub-paragraph (5), a person entitled to appear at an inquiry in accordance with paragraph 3 of this Schedule shall be entitled to give evidence, call witnesses ...

(3) The giving of evidence, the calling of witnesses .. shall be at the traffic commissioner's discretion. ...

(5) Without prejudice to sub-paragraph (3), the traffic commissioner may refuse to permit –

(a) the giving or calling of evidence ...

which he considers to be irrelevant, repetitious, frivolous or vexatious.

23. It is clear from paragraph 5 of Schedule 4 of the 1995 Regulations that the TC does have a discretion to refuse an operator permission to call a witness. However, the discretion must not be exercised so as to prevent an operator from presenting a crucial aspect of his case when such presentation does not fall foul of paragraph (5)(5) of Schedule 4. The Tribunal has quoted from the transcript of the interaction between the TC and Mr Carless at length at paragraph 17 above because it is clear that whether for policy reasons or otherwise, the TC refused to allow Mr Cox to put his case. Clearly, Mr Durant's proposed involvement in Mr Cox's operation was Mr Cox's only or main hope of persuading the TC that he should be given another chance. This he was denied. We agree with Mr Over that it is not unusual for Traffic Commissioners to hear evidence from newly recruited consultants and transport managers at public inquiries when an operator has sought to address its shortcomings only following receipt of a call up letter. We do not agree with the TC that to hear evidence from a newly nominated transport manager would be "going behind due process". It is perfectly proper for an operator to ask a TC to hear the evidence of a proposed transport manager, subject to the results of the CLU checks so that the TC can make his or her own assessment of the transport manager's abilities and experience over and above the holding of a certificate of professional competence and in particular their credibility in giving evidence as to the compliance steps they are proposing to take and their ability to steer an otherwise non-compliant operator into compliance. We are satisfied that an operator should have the opportunity of being able to walk away from a public inquiry in the knowledge that their reasonable case has been fully put before the TC irrespective of whether that case is sufficient to avoid serious regulatory action. Mr Cox was denied that opportunity in this instance.

24. We agree with the TC that this is a bad case of non-compliance and that Mr Cox, who has a poor regulatory history, has failed to heed warnings and advice. We have had to ask ourselves whether the evidence of Mr Durant would have made any difference to the TC's findings and whether the appeal should nevertheless be dismissed? Reluctantly, we have concluded that we cannot answer that question in the affirmative because we do not know what Mr Durant would have said and what impression he would have made upon the TC. It may

very well be that his evidence would not have made any difference to the TC's assessment of Mr Cox and his ability to operate compliantly with or without a robust transport manager, but we cannot say. As a result, this appeal is allowed and the matter is remitted for re-hearing before a different TC or deputy. It may very well be that a further report from a traffic examiner would assist the TC in determining the position as at the date of the new hearing.

25. Mr Over was also critical about the way that the TC conducted the public inquiry in a number of respects. Those criticisms we do not uphold. Further, he submitted that the TC had fallen into error when she found that Mr Cox had been without a second transport manager from about March 2014 to December 2014. We are satisfied that upon the basis of the unchallenged report of TE Ford, the TC's finding was one which she was clearly entitled to make.
26. To conclude, we are satisfied that as a result of a breach of the rules of natural justice, the Tribunal is impelled to allow this appeal as the test in Bradley Fold Travel Ltd & Peter Wright v Secretary of State for Transport (2010) EWCA Civ. 695 is satisfied.



Her Honour Judge J Beech
2 February 2016