

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

**ON APPEAL from the DECISION of Fiona Harrington,
DEPUTY TRAFFIC COMMISSIONER for the North East of England area.
Dated 6 November 2015**

Before:	Mr M R Hemingway	Judge of the Upper Tribunal
	Mr A Guest	Member of the Upper Tribunal
	Mr J Robinson	Member of the Upper Tribunal

Appellant: Lance Laws trading as Lotus Travel

Attendances:

For the Appellant:	In person
For the Respondent	No attendance

Heard at:	Field House, London
Date of Hearing:	8 April 2016
Date of Decision:	29 April 2016

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that this appeal be DISMISSED.

Subject matter:

Breach of an undertaking.
Material change in circumstances.

Cases referred to:

Bradley Fold Travel Limited and Peter Wright v The Secretary of State for Transport (2010)
EWCA Civ 659

REASONS FOR DECISION

Introduction

1. This is an appeal to the Upper Tribunal against the decision of the Deputy Traffic Commissioner for the North-East of England made on 6 November 2016 revoking the operator's Restricted Public Service Vehicle Operator's Licence with effect from 23.59 hrs on Sunday 15 November 2015. The decision was expressed in writing to the appellant in these terms:

“Decision

The traffic commissioner reached the following decision:

The operator's restricted PSV Operator's Licence is **Revoked** under the following provisions of the Public Passenger Vehicles Act 1981 (as amended) ('the Act') with effect from 23.59 hrs on Sunday 15 November 2015.

Section 17(3)(aa) – breach of the undertaking attached to this licence agreed by you that:

The operator shall, during the life of this restricted licence, keep records of time spent and income earned from all occupations to enable the primary evidence such as payslips, P60 document, invoices and tachograph records. Copies of the record shall be made available to DVSA or OTC officers on request.

Should income from or time spent on the minibus operation exceed that from all other sources for two consecutive months, the operator will apply for a standard national licence and/or

Section 17(3)(e).

That since the licence was granted there has been a material change in the following circumstances of the operator which were relevant to the grant of his licence namely:

- the breach of the undertaking cited above
- it appears to me that the operator no longer meets the criteria relied upon in granting this licence set out in section 13(3)(b)(ii) of the Act that the licence was to authorise the use of public service vehicles not adapted to carry more than 16 passengers when used by a person whose main occupations (sic) not the operation of public service vehicles adapted to carry more than 8 passengers.

A short period of continued operations has been accommodated within this decision so as to enable written notification to be made to the operator and arrangements made to cease operating under the authority of this licence.”

2. There are some small typographical errors in the above but the meaning is, in all respects, entirely clear. Having made that decision, and in light of the appellant having lodged his appeal to the Upper Tribunal, the Deputy Traffic Commissioner subsequently granted the appellant's request for a stay of her decision pending resolution of the appeal.

The background

3. A Restricted Public Service Vehicle Operators Licence may be granted for public service vehicles not adapted to carry more than 16 passengers when used by a person whose main occupation is not the operation of public service vehicles adapted to carry more than 8 passengers. Mr Laws applied for such a licence by completing and submitting to the Traffic Commissioners Office the requisite form. In completing that form he indicated, amongst other things, that he would be a sole trader, that he would trade under the trading name Lotus Travel, that he intended to operate vehicles adapted to carry 9-16 passengers, that he was fully aware of and would comply with restrictions under the terms of a restricted licence, that he had not previously held or applied for any other goods or public service vehicle operators licences and that he proposed to operate a single vehicle. He signed that form on 3 September 2013.

4. The Traffic Commissioners Office sought and obtained some further details from the appellant and then, on 12 December 2013, wrote to inform him that the application would be granted if he were to agree to the undertakings set out in that letter which were:

“ 1. The operator shall, during the life of the restricted licence, keep records of time spent and income earned from all occupations to enable the primary occupation to be determined. Records shall be supported by primary evidence such as payslips, P60 document, invoices, and tachograph records. Copies of the record shall be made available to VOSO or OTC officers on request.

2. Should income from, or time spent on, the minibus operation exceed that from all other sources for two consecutive months, the operator will apply for a standard national licence.”

5. The letter also indicated that there would be a review conducted in July 2014 and observed that the appellant should have his form P60 available by that time. The appellant was invited to confirm, in writing, as to whether or not he agreed to the undertakings. Pausing there, it is clear that a purpose of the undertakings was to ensure that if there was a material change of relevance the appellant would apply for a standard national licence as opposed to the restricted licence he had sought and another purpose was to ensure that relevant documentation would be available to the Traffic Commissioners Office.

6. The appellant confirmed his willingness to provide the undertakings and he received his licence.

7. The appellant had a main source of income additional to the income he was generating as a result of the grant of the restricted licence. That was from his employment with a company called Select Window Systems. However, as he put it in his grounds of appeal to the Upper Tribunal “this job did not work out”, and due to a lack of work within the company he was working for, his employment was terminated. At the hearing before us he explained he had been working for “a window firm” but that that job had ceased some time around April or May 2016. He did not give a precise date. He says, though, that having lost that source of income he obtained some new work, on a self-employed basis, as a driver with an organisation called South Tyneside Taxis Agency. He acknowledges that he did not, at the time of these

events, inform the Traffic Commissioners Office of the various changes regarding his employment/self-employment situation as set out above.

8. The Traffic Commissioners Office, at that time unaware of the above changes, decided to conduct an audit to ensure that the appellant was continuing to meet the criteria to hold a restricted licence which was foreshadowed when the licence was granted with effect from 12 December 2013. As part of that process he was written to, on 17 June 2014, and asked to forward his P60 for the year ending 5 April 2014. It appears that there was some subsequent communication between the appellant and the Traffic Commissioners Office but, on 16 September 2014, the appellant wrote to that office to explain that when he had been granted his restricted licence he had been working for Select Window Systems but that, after a short period, he had been “laid off due to lack of work”. Although the phrase “laid off” does not necessarily mean this, it is clear that his employment had ended. He went on to explain that he had then been “offered a contract to carry a school run, transporting children to and from school” which was a reference to the work he said he had been given by South Tyneside Taxis Agency. He explained that he wished to continue with that work because “I am working less than 25 hours each week (approx 15 hrs) and therefore working within the regulations of my restricted licence”. He added that he had enquired about taking a course which would lead to his obtaining what he described as “a full International Managers Operators Licence” and said that he was waiting for details about that. It appears that the Traffic Commissioners Office did not respond to the provision of that information, or at least substantively so, until 26 February 2015 when it asked him for an update. His response, of 6 March 2015, was to the effect that he was still waiting for a place on a course and an opportunity to take an examination in order to apply for a full operators licence. Thereafter, on 3 August 2015 the Traffic Commissioners Office wrote to him observing that it appeared that since he no longer had a main occupation (that is to say a primary occupation in addition to the work he was undertaking as a result of the grant of the restricted licence) he no longer met the criteria for possession of that restricted operator’s licence and had not adhered to the undertakings given when he had sought that licence. He was informed that consideration was being given to the revoking of his licence in accordance with regulation 9 of the Public Service Vehicle (Operator Licensing) Regulations 1995 and he was being given the opportunity to request a Public Inquiry. He did request such a Public Inquiry which was scheduled to take place on 4 November 2015. He was sent, on 8 September 2015, notification as to the time, date and place of that Inquiry.

9. The appellant did not, in fact, attend the Public Inquiry. In the circumstances that might be thought to be surprising. Although there is no record of this in the papers before us, the appellant said, in his grounds of appeal to the Upper Tribunal, that he had made a request for an adjournment because of an inability to attend due to “work commitments”, such request having been made some four days prior to the scheduled date for the Inquiry, but had been told verbally by one Andrew Wilkinson, who is a member of staff at the Traffic Commissioners Office, that the Deputy Commissioner had refused to adjourn. At the hearing before us the appellant said that there had never been any paperwork generated by his adjournment request and that he had simply asked for it over the telephone when speaking to Andrew Wilkinson who had then phoned him back, some 30 minutes later, to say that the application had been refused.

10. In any event, whatever the position was regarding an adjournment request, it is clear that there was no such adjournment and that the Public Inquiry went ahead as scheduled although the appellant made no appearance. In his absence it is clear that, in fact, the Deputy Traffic Commissioner went on to consider the issues on the basis of the material before her and that she reached the decision set out above which was communicated to the appellant by letter of 6 November 2015 signed by the aforementioned Andrew Wilkinson. The terms of the decision have already been set out above but the reasoning of the Deputy Traffic Commissioner is also set out, in the same letter, in these terms:

“Considerations and findings

The Central Licensing Unit of the Office of the Traffic Commissioner carried out an audit of PSV Licensing compliance during 2014. In response to a request made by the CLU dated 17 June 2014 for the operator’s P60 for the year ended 5 April 2014, the operator wrote to the CLU on 16 September 2014 advising he no longer had a main occupation. When he had applied for and been granted the licence on 19 December 2013, his main occupation was employment with Select Window Systems. On 16 September 2014 he advised the OTC that:

‘After a short period of time, I was laid off due to the lack of work’.

This had not been notified to the Traffic Commissioner until this point. The Traffic Commissioner determined that his office should issue a propose to revoke letter to the operator by reason of the apparent breach of the undertaking accepted when the licence was granted and also by reason that the operator no longer met the main occupation criteria. The operator requested the Public Inquiry in response to this letter by his e-mail to the Office of the Traffic Commissioner of 5 August 2015.

The Public Inquiry was listed for 4 November 2015 at 2.00 pm and the operator was notified of this by letter from the OTC dated 8 September 2015 sent by First-Class and Recorded Delivery mail.

In response to the calling in letter, the operator sent a ‘bank stamped’ printout of a savings account statement to the OTC to demonstrate the funds available to him to meet the financial standing requirements of this licence, but failed to send in the documents requested on page 3 of the calling in letter.

The operator failed to attend the Public Inquiry on the day of the hearing.

I have proceeded to make the decision at paragraph 1 in the absence of the operator based upon the documentation in the brief of the inquiry.

I find that the operator has failed since August 2014 to date, to satisfy the Traffic Commissioner, despite extended opportunity to do so, that the operation of PSV under the authority of this restricted licence is not his main occupation and that he as required has a main occupation which is not the operation of a PSV between 8 and 16 seats. I do not find the brief letter from South Tyneside Taxis dated 12 July 2015 at page 43 of the brief of the Inquiry of any value in the absence of the information required by the undertakings cited above concerning all of the operator’s income and occupations to determine his main occupation and in any event this letter refers to the operator’s carrying out a licence to carry school children which was the proposed use of the PSV.

The Operator has failed to produce to the traffic commissioner any of the records and supporting documents required to be kept and produced in accordance with the undertaking cited above and he has failed to attend the Inquiry today to address the matters under consideration. I am drawn to conclude that this licence must now be revoked as ordered in paragraph 1.

I note that during the course of correspondence with the Office of the Traffic Commissioner in response to the propose to revoke letter, Mr Laws has stated that he was studying for the transport CPC from 10 August 2015 to apply for a full standard national PSV licence.

Any future application for a PSV licence made by or linked to Mr Laws should be referred to the Traffic Commissioner for consideration in light of the above and that the request for a Public Inquiry which was not attended was merely a device to delay the determination now made.”

The proper approach on appeal to the Upper Tribunal

11. The jurisdiction and powers of the Upper Tribunal when hearing an appeal from a Traffic Commissioner (or as here a Deputy Traffic Commissioner) are governed by Schedule 4 to the Transport Act 1985 as amended. Paragraph 17(1) provides that the Upper Tribunal is to have full jurisdiction to hear and determine all matters whether of law or fact. However, it is necessary to bear in mind that such an appeal is not, for example, the equivalent of a Crown Court hearing an appeal against conviction from a Magistrates Court, where the case effectively begins all over again and is simply reheard. Instead, an appeal hearing before the Upper Tribunal takes the form of a review of the material before the Traffic Commissioner. In this context we take full account of the valuable guidance to be found in a passage from paragraphs 30 to 40 of the decision of the Court of Appeal in *Bradley Fold Travel Limited and Peter Wright v The Secretary of State for Transport* [2010] EWCA Civ 695. We also note that the appellant bears the burden of showing that the decision under appeal is wrong and that, in order to succeed, he must show that “the process of reasoning and the application of the relevant law require the Tribunal to adopt a different view”. Put another way, it might be said that in order to succeed the appellant has to demonstrate to the Upper Tribunal that the decision of the Traffic Commissioner was “plainly wrong”.

The proceedings before the Upper Tribunal in this appeal

12. The appellant drafted his own grounds of appeal. In summary form, he said that once he had lost his employment he realised that he “did not meet the criteria for my restricted licence” and that he had, therefore, attempted to obtain a place on a training course, in order to equip him to apply for a national licence, as soon as he could. He asserted, as noted above, that he had attempted to have the Public Inquiry adjourned. He asserted that information he had provided regarding his employment and earnings had not been taken into account by the Deputy Commissioner. He denied using “delaying tactics” with respect to his request for a Public Inquiry. Those were the matters in the written grounds which we identified as having potential relevance. We do note, though, that he did also express a concern that his details appeared to have been passed on to a firm of solicitors without his knowledge. In order to underline that point he provided to us a copy of a letter written to him on 16 October 2015 by that firm in which they offered to assist him with respect to the Public Inquiry if he wanted such assistance.

13. Though unrepresented, the appellant attended the hearing before us. He provided helpful information in support of his grounds and in response to questions we put to him. For clarity, we do not regard the information he gave to us as amounting to evidence but, rather, to a process of his building upon the grounds upon which he sought to rely.

14. In that context, he gave the explanation regarding the background to the claimed adjournment request as set out above. He said that had he attended the Public Inquiry, or had he attended one on a different date if an adjournment had been given, he would have pointed out to the Deputy Traffic Commissioner that he was “further down the line” with his bid to equip himself with the qualifications to apply for a national licence. He would have explained that he did not wish to be unemployed and that he was a victim of circumstance. He accepted that he ought to have kept the Traffic Commissioners Office fully informed and that he had not done so. When he had referred to evidence regarding his employment and income having been overlooked he had in mind only a brief letter which had been written by the South Tyneside Taxis Agency on 12 July 2015 and which said that he was working for them, for 30 hours per week, and being paid £65.00 per day. Pausing there, that does seem to sit unhappily with the appellant’s assertion as noted above that he had not been working over 25 hours per week in that capacity.

15. In response to questions put by the specialist members of the Upper Tribunal, he confirmed that he had now made an application for a standard licence though it had taken until January 2016 for him to do so. He is now awaiting the outcome.

The Upper Tribunal’s reasoning

16. We would wish to place on record that we are grateful to the appellant for his frankness before us regarding his failure to keep the Traffic Commissioners Office informed of developments as required. We also accept that, in some respects, it might be thought when matters are looked at from a certain perspective, that he had found himself in a somewhat invidious position having lost his job with Select Window Systems and having to face the no doubt unwelcome prospect in those circumstances of losing his restricted licence and, hence, his other source of income. Nevertheless, and insofar as it might be relevant to what we have to decide, we cannot think of any reason why he could not, in such circumstances, have simply surrendered the licence, searched for work as an employed driver and still continued to work towards placing himself in a position to apply for a standard licence if that is what he wished.

17. Be all of that as it may, we now turn to the decision taken by the Traffic Commissioner and the appellant’s grounds of appeal as set out in writing and as amplified before us.

18. First of all, we have given consideration to the claimed adjournment application. We do not find what the appellant has had to say about all of this to be persuasive. It seems to us that if there had been a clear application for adjournment made by the appellant, even if not in writing, there would be some sort of record of it and its refusal in the papers before us and there would have been some mention of it in the decision letter of 6 November 2015. We do not say that the appellant has been dishonest to us about this but we do think, having had the opportunity of meeting him and listening to him, it may be that there has been some confusion on his part.

19. Further, and in any event, we note that correct notification as to the time, date and place of the Public Inquiry was served upon the appellant by letter of 8 September 2015 such that he had just under two months advance notice. That, in our view, was clearly sufficient for him to have ensured that whatever other work commitments he might have, he would be able to attend the Public Inquiry. Even giving him the benefit of the doubt and assuming that he did make a verbal request for an adjournment, he had provided nothing in the form of documentary evidence (such as a letter from the claimed employer) confirming he had work commitments from which he could not extricate himself. Nor did he seek to introduce any documentary evidence to us about that. We would conclude, therefore, that even if there had been a request for an adjournment, which we do not accept for the reasons set out above, bearing in mind the short notice and the lack of corroborative evidence of the difficulties which the appellant said he could not extricate himself from, refusal would have been inevitable.

20. In these circumstances we do not consider that there was any unfairness to the appellant surrounding the claims he has made regarding the adjournment request.

21. We next turn to the appellant's contention that the Deputy Traffic Commissioner had disregarded evidence he had sent concerning his employment and earnings. The first point to make here is that the appellant himself accepted, as he had to in truth, that he had failed, in general terms, to keep the Traffic Commissioners Office informed regarding the variations in his employment situation and, in particular, had failed to notify it to the effect that he had ceased to have a main occupation which was, of course, relevant to the type of licence he was required to possess in respect of the operations he was carrying out when trading as Lotus Travel. We had originally wondered whether, having read his written grounds, he had lodged some documentation which had not found its way to our appeal bundle but, in fact, as he was able to clarify at the hearing before us, that was not the case. All he had in mind which he said had been disregarded was the letter of 12 July 2015 from the South Tyneside Taxis Agency and which is referred to above.

22. The Deputy Traffic Commissioner did not ignore that letter because it is referred to in the decision letter of 6 November 2015. What was said about it was that it was brief (that is certainly true its content running to only two lines) and that, in effect, it was not of any value. We have already noted the apparent contradiction between what was said in the letter about the hours of work and what the appellant had to say about his hours of work at the time but it is clear that, whatever point the appellant saw in his producing the letter, the Traffic Commissioner did not think it had any bearing on the question of whether he had been in breach of undertakings which required very much more of him than he had ever provided. We would have to agree with the Traffic Commissioner's approach in that regard.

23. As to the main thrust of the Deputy Traffic Commissioner's decision, there is no doubt that the appellant was in breach of undertakings and it is not disputed by him that there had been a material change in his circumstances, which had not been notified, as a result of his loss of employment, such that he no longer met the criteria relied upon when his licence was granted. The Deputy Traffic Commissioner clearly took a dim view of his having failed to maintain the necessary documentation and we note that there is no evidence he did ever produce the P60 document, his failure to keep the Traffic Commissioners Office informed of clearly relevant developments and his failure, when his circumstances changed, to apply for a standard national licence or, we suppose, to simply surrender his restricted one. In this context, as has been stated by the Upper Tribunal and in earlier days by the Transport Tribunal

on many occasions, operators licensing is based on trust. It is not possible to police every operator and, against that background, Traffic Commissioners and those who work for and under them, must feel able to trust operators to comply with all relevant parts of the operator's licensing regime. The appellant clearly failed to do that and, in consequence, the Deputy Traffic Commissioner was clearly entitled to reach the decision that she did. We cannot say at all that she was plainly wrong in so doing. Accordingly, the appeal to the Upper Tribunal must fail.

Observations

24. Although not relevant to the issues we have been called upon to decide, we note the appellant's concern, and he clearly was very concerned, that he had received the unsolicited letter referred to above from a firm of solicitors. The letter commences with the sentence:

"I have been informed by the Office of the Traffic Commissioner that you have been called to attend a Public Inquiry on 04 November 2015."

25. The letter does simply state it is making the appellant aware of the relevant services which that firm of solicitors is able to offer and we do not at all suggest any form of wrongdoing by anyone. The letter does appear to suggest, though, that some information regarding the appellant was passed by the Traffic Commissioners Office to that firm. Of course, we have not heard from the Traffic Commissioners Office nor the firm of solicitors about this but we simply wonder, on the material before us, whether it might not be appropriate to ask a prospective attendee at a Public Inquiry (assuming such is not asked) whether he/she would like such details forwarding to potential legal representatives or not prior to that being done. That is all we have to say about that matter.

26. Finally, by way of observation, we have noted that the appellant is currently awaiting the outcome of his application for a standard licence. Whilst we have found against him in this appeal, but insofar as it might be considered relevant by anyone, we did not detect anything which we think should positively preclude him from being granted a standard licence though, of course, that will be a matter for the Traffic Commissioner and not for us.

The stay

27. It will be recalled that the Deputy Traffic Commissioner granted the appellant a stay. He confirmed to us that he has continued to operate under the authority of the restricted licence during the course of these proceedings. Since we have found against him in this appeal, though, the stay which had been granted expires with this decision. In our view, given that the appellant is trading but that his operation is a relatively small one, it is reasonable to give him 14 days notice of the date upon which revocation is to take effect with an allowance for the time it will take for the decision to be served. We, therefore, direct that the revocation is to take effect from 0001 am on Wednesday 18th May 2016.

Conclusion

The appeal to the Upper Tribunal is dismissed.

The revocation of the restricted licence is to take effect from 0001 am on Wednesday 18th May 2016.

Signed:

M R Hemingway
Judge of the Upper Tribunal

Dated:

29 April 2016