

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

Appeal No. T/2016/59

**ON APPEAL from the DECISION of Traffic Commissioner Mr Nicholas Denton,
TRAFFIC COMMISSIONER for London and the South East of England Traffic Area.**

Dated: 22 September 2016

Before:	Mr M R Hemingway	Judge of the Upper Tribunal
	Mr G Inch	Member of the Upper Tribunal
	Mr Michael Farmer	Member of the Upper Tribunal

Appellant: Mr Adrian John Dalton

Attendances:

For the Appellant: In person

For the Respondent: No attendance

Heard at: Field House, London

Date of Hearing: 2 February 2017

Date of Decision: 14 February 2017

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that this appeal be dismissed.

Subject matter:

Duties and obligations of the Transport Manager; loss of repute.

Cases referred to:

Bradley Fold Travel Limited and Another v Secretary of State for Transport; [2015] UKUT 0668 (AAC).

REASONS FOR DECISION

Introduction

1. This is an appeal to the Upper Tribunal brought by Mr Adrian John Dalton (the appellant) from a decision of the Traffic Commissioner for the London and the South East of England Traffic Area made on 22 September 2016. The Traffic Commissioner decided that the appellant had lost his good repute as a Transport Manager and that he was to be disqualified from being a Transport Manager on any licence for an indefinite period until he has passed the Transport Manager CPC examination.

The background

2. This appeal arises out of dealings the appellant has had with a company called ETS (Garment Distributors) Limited.

3. On 30 March 2009 a standard national goods vehicle operator's licence was granted to L A and Z Leonida (hereinafter "the Leonida brothers") trading as ETS. The licence authorised the use of 12 vehicles. The Transport Manager was one G Flynn. The business was involved in the distribution of clothing. The Leonida brothers, ETS and Mr Flynn fell foul of the regulatory regime and, on 24 March 2014, a Deputy Traffic Commissioner decided that the repute of the operator had been severely tarnished in consequence of breaches of section 26(1)(c)(iii), (ca) and (f) of the Goods Vehicle (Licensing of Operators) Act 1995. The licence was suspended for a period of 21 days and the repute of the Transport Manager was lost. That action was taken in consequence of concerns regarding vehicle maintenance. At the same Public Inquiry the Deputy Traffic Commissioner dealt with an application for a similar licence by ETS (Garment Distributors) Ltd. The directors were the Leonida brothers. The proposed Transport Manager, with respect to that licence application, was the appellant. It is worth noting, at this stage, that he had, on 4 December 2013, signed standard form TM1 concerning his proposed appointment as Transport Manager. The form contained a number of standard declarations including the following:

"External transport manager's declaration:

I confirm that:

I am resident in the European Community;

I shall perform my tasks solely in the interests of the licence holder/applicant;

I shall be the transport manager for a maximum of 4 operators, with a combined maximum fleet of 50 vehicles; and

I have a contract with the licence holder/applicant which specifies the task I must perform as Transport Manager. These include:

The making of arrangements to ensure that drivers comply with driver's hours and tachograph rules and with speed limits;

The making arrangements to ensure that the vehicles are maintained properly, including the inspection of vehicles at the appropriate time and the action taken to remedy defects found;

The reporting and recording of vehicle defects by drivers;

The method of compilation and the accuracy of all records, which must be kept for a period of not less than 15 months;

The making of arrangements to ensure that the vehicles are not overloaded;

Ensuring that authorised vehicles will be kept at the authorised operating centres when not in use;

Where appropriate, notifying the relevant Traffic Commissioner (in writing) of all prosecutions and convictions concerning the operator, the drivers and me within 28 days of the court hearing; notifying the relevant Traffic Commissioner of my resignation; and

Any role that I have in;

Verifying contracts and documents;

Basic accounting;

Any other role in safety procedure.”

4. Finally, immediately above where the appellant had signed the form there appeared this wording:

“Should I fail to meet any of the above requirements I understand that the Traffic Commissioner has the power to disqualify me from being a Transport Manager in any European Union country.”

5. It is right to say that, in completing that form, the appellant had indicated that he would only be pursuing his duties as a Transport Manager for ETS for seven hours each week. He ticked a box to indicate that he would be an external Transport Manager.

6. The Deputy Traffic Commissioner decided to grant the licence application for ETS (Garment Distributors) Ltd with the appellant being named as the prospective Transport Manager, though it was decided that it would not come into effect until the suspension concerning the previous licence relating to ETS had been served.

7. There was, in fact, an appeal brought by the operator to the Upper Tribunal from the Deputy Traffic Commissioner’s decision. Whilst it is not necessary for us to address the Upper Tribunal’s findings in any detail it is fair to say that the appeal did not find favour at all.

8. The new company went on to trade under the new licence, once it had been activated, and with the appellant as its nominated Transport Manager. However, once again, concerns regarding regulatory issues were raised.

9. In this context, in April 2015, it was found that one of the operator’s drivers had taken insufficient daily rest. In March 2016 a Traffic Examiner encountered a vehicle belonging to the operator which was being driven by a driver who did not hold the appropriate category C1 licence enabling him to drive that class of vehicle. On 6 June 2016 a follow up visit was made by one Michael Cheeseman, a Traffic Examiner at the Driver and Vehicle Standards Agency. On that occasion it was said that the appellant was not available (and of course Mr Cheeseman had wished to speak to him in his capacity as Transport Manager) because he had a hospital appointment. During the course of that visit it appeared to the Traffic Examiner that there was

an insufficiently robust system for the checking of tachograph discs. It was noted that, although it was said that driver licences were checked every 12 months, had such a check been properly carried out it would have revealed that the driver who had been stopped in March 2016 no longer possessed the appropriate licence. It was also noted that in the previous two years there had been 28 roadside traffic and 16 roadworthiness encounters with the operator and that those had resulted in two driver hour prohibitions and seven roadworthiness prohibitions.

10. In the above circumstances it was decided to call the Directors of ETS (Garment Distributors) Ltd and the appellant (in his capacity as Transport Manager) to a Public Inquiry.

The Public Inquiry

11. The Public Inquiry was held on 22 September 2016. Shortly prior to that, in fact on 8 September 2016, the appellant sent a letter to the Traffic Commissioner in which, in summary, he said that he had simply offered to help out until another Transport Manager could be found, that he had taken the view the Directors were “not novices” and were aware of what was needed to be compliant and that whilst he might have been “more diligent” he was now satisfied that there would be no further compliance issues in the future. With respect to what might be termed “the Transport Manager issues” the Traffic Commissioner heard quite extensive evidence from the appellant and also from Mr Cheeseman. The transcript of what was said at the Public Inquiry is extensive but, essentially, the appellant sought to make the points that he had been limited in what he could achieve because he had only been able to give seven hours per week to the task of being the operator’s Transport Manager; that he had believed much of the relevant work was being done by one of the Directors; and that he ought not to be held responsible for the failings of others. He acknowledged, under questioning from the Traffic Commissioner, that he had never had a written contract in his capacity as Transport Manager notwithstanding his having indicated in form TM1 that he did, that he might not have been as “on the ball as I should have been” and that he had not been “forceful enough” in ensuring the operator complied with regulatory requirements.

The Traffic Commissioner’s decision

12. The Traffic Commissioner decided to revoke the operator’s licence. As to the appellant before us, he decided he had lost his good repute as Transport Manager pursuant to paragraph 1 of Schedule 3 to the Goods Vehicles (Licensing of Operators) Act 1995. Under paragraph 16 of that Schedule he disqualified him from being a Transport Manager on any licence for an indefinite period of time and until he has retaken and passed the Transport Manager CPC examination. By way of explanation the Traffic Commissioner said this:

“... The background to the revocation is as follows. The previous partnership licence received a 21 day suspension in 2014 because it had an ineffective and absent Transport Manager, and because partly as a result, there were a number of serious shortcomings. The Leonida brothers were criticised by the Upper Tribunal (Paragraph 4 of Appeal T/2014/24) for endeavouring to fulfil the role of Transport Manager themselves without any clear understanding of what the role involved.

Almost unbelievably I find that the same pattern of circumstances is repeated today. Transport Manager Adrian Dalton has no contact with the operator (despite signing an application form in December 2013 stating that he had one). He received no payment for his service as

Transport Manager, which meant that not even an implied contract can have existed. He has adopted an almost completely hands-off approach which has consisted, at best, of offering advice from time to time which he never checked to see was followed up (it wasn't) and inspecting a few documents on a very few occasions. He did not regularly inspect tachograph records, driver defect reports or preventative maintenance inspection sheets. He did not check driving entitlements, with the result that a driver was stopped in March 2016 without the necessary C1 driving entitlement. The operator's poor record of 7 roadworthiness prohibitions from 16 encounters should have alerted him to the fact that things were not as they should be. Incredibly, despite the Upper Tribunal's observations about the inadequate understanding of the Leonida brothers, Mr Dalton has stated today that he simply assumed that they must be looking after matters properly as they have been in the business for 30 years.

After considering the evidence I have made the following findings:

- (i) the operator has received 7 roadworthiness prohibitions from 16 encounters (section 26(1)(c)(iii) refers): several of these were for driver detectable defects. An examination of the preventative maintenance inspection sheets shows numerous driver detectable defects such as broken lights or non-functioning wipers, suggesting strongly that driver defect reporting was ineffective. Apart from that of one driver who reported regularly, driver defects books report no defects, even though the vehicles were mostly 8 or more years old. The operator has failed to fulfil its undertaking that drivers would report defects promptly in writing (section 26(1)(f) refers);
- (ii) the operator has failed to fulfil its undertaking to ensure that driver's hours and tachograph rules are observed. There was no system for analysing tachograph charts until two weeks ago, when an outside analysis company was engaged. The result was that mode switch and other anomalies were not identified and tackled. DVSA Traffic Examiner Mick Cheesman had previously visited the Company in April 2015 to interview a driver and director about two offences of failure to take daily rest (by a period of more than 2½ hours), so warning bells should have rung then with both Transport Manager and Director. They were not heeded;
- (iii) the Transport Manager Adrian Dalton has failed to exercise the required continuous and effective management of the Company's transport activities. He has no contract, was unpaid and took only a peripheral role in activities which he should have personally been responsible for. His neglect of his duties, and his failure to conclude from the evidence that things were not being well managed is serious enough to warrant the loss of his repute (section 27(1)(b) and Schedule 3 to the 1995 Act refer). He also made a false statement on his nomination form, when he confirmed that he had a contract with the operator when in reality he did not. I have found nothing of substance to put on the positive side of the balance;
- (iv) as Mr Dalton lacks good repute and can no longer act as Transport Manager, the operator lacks professional competence. I further find that as it had never had a contract with Mr Dalton and never paid him, the operator has never had professional competence. Revocation is therefore mandatory under section 27(1)(a).

Disqualification of Transport Manager

Because I have concluded that Mr Dalton has lost his repute as Transport Manager I must also disqualify him from acting as such on any licence. Because his failings are such that the simple passage of time cannot cure, I am making the disqualification indefinite. Before he can apply to be nominated as a Transport Manager again, he must retake and pass the Transport Manager CPC exam ..."

13. The appellant, dissatisfied with the outcome, appealed to the Upper Tribunal.

The proceedings before the Upper Tribunal

14. In his written grounds of appeal, which were contained within standard form UT1 and in a letter of 10 October 2016, the appellant asserted, in effect, that since his appointment “as part-time external Transport Manager for ETS” had been “approved” (that presumably being a reference to the decision which had been taken after the Public Inquiry of 10 March 2014) there had been unfairness on the part of the Traffic Commissioner. That was because the decision amounted to a criticism of him for failing to do more than he had indicated, when the licence had been sought, that he would be able to do. It would not have been possible for him to have undertaken the level of oversight and supervision the Traffic Commissioner had expected of him and had faulted him for not doing within 7 hours per week. He asserted that when agreeing to take on the position he had made it clear to the operator and, he said, to the Deputy Traffic Commissioner, that he had other full-time employment such that his commitment would necessarily be limited. He suggested that the Traffic Commissioner had failed to understand that he could not fulfil a comprehensive role as a Transport Manager whilst committing only 7 hours per week to the task. The intention had always been that the Leonida brothers would be managing the business. He disagreed that he had “adopted an almost completely hands-off approach” and said that he had undertaken some tasks in the limited time he had available but that suggestions he had made had not been acted upon.

15. At the oral hearing of his appeal Mr Dalton did not seek to add very much to his written grounds. He maintained, in particular though, the point about his application having been approved despite his indication of a limited hourly commitment. He also handed to us a magazine article which had been written after the author had interviewed the particular Traffic Commissioner who had decided he had lost his good repute. It should be noted that this interview took place after the Traffic Commissioner had made his decision in this particular case. He had highlighted a section of the article in which it had been noted that the Traffic Commissioner had commented that a lot of Transport Managers sign TM1 applications without properly reading and digesting the advice given in them. It was also said, in that part of the article, that the TM1 form had been redesigned to improve clarity and to set out exactly what Traffic Commissioners expect a Transport Manager to do. He explained that he thought that latter part supported the main point he was seeking to make with respect to his appeal.

Our reasoning

16. The jurisdiction and powers of the Upper Tribunal when hearing an appeal from a 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 a conviction from a Magistrate’s Court, where the case effectively begins all over again and is simply reheard. Instead, an appeal before the Upper Tribunal takes the form of a review of the material before the Traffic Commissioner. In this context we have taken full account of the guidance to be found in a passage from paragraphs 30 to 40 of the judgment of the Court of Appeal in *Bradley Fold Travel Limited and Peter Wright v The Secretary of State for Transport* [2012] 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 an appellant has to demonstrate to the Upper Tribunal that a decision of the Traffic Commissioner is “plainly wrong”.

17. The appellant had described himself as being an external Transport Manager. As such, rather than indicating to the Office of the Traffic Commissioner when he applied to be Transport Manager, that he would effectively and continuously manage the transport activities of the operator he had indicated that he would perform his tasks as a Transport Manager with a commitment to the licence holder of 7 hours per week. He had also signed to say that that he would perform the various tasks specified in the declaration contained within form TM1 and set out above. Indeed, as a Transport Manager he was obliged to undertake those tasks. That was his responsibility whatever his hourly commitment was. Similarly, whilst a Transport Manager is permitted to delegate tasks, (and he has argued in effect that he was delegating tasks to the Leonida brothers) it remained his obligation to ensure that relevant tasks were properly carried out. That is what he signed up to do.

18. As to the loss of his repute, the Traffic Commissioner attached weight to his having indicated that he had a contract with the operator when he did not. The appellant accepted, at the Public Inquiry, that he did not have such a contract despite his indicating in form TM1 that he did. The Traffic Commissioner attached weight to the appellant’s failure to carry out the necessary checks in order to properly perform a Transport Manager’s tasks. He noted a number of failings which were a consequence of relevant tasks not being carried out properly, not least an improperly licensed driver driving a vehicle which was subject to the licence.

19. We note the appellant’s reliance upon the fact that he was only performing his duties as a Transport Manager for 7 hours per week. There may be something in what he says as to a failure on the part of the regulatory authorities to pick up on the fact that 7 hours might not be sufficient. However, the point is that as a Transport Manager he had statutory responsibilities and he had committed himself, in form TM1, to fulfilling those responsibilities. It is not open to him now, in those circumstances, to protest that the hours he was committing to the task were insufficient to enable him to fulfil those responsibilities. If he felt that they were he could have, for example, increased his input or resigned as Transport Manager. He did neither nor did he find any other solution to the problem.

20. Further, whilst a Transport Manager is of course permitted to delegate, the Traffic Commissioner explained why, given the previous adjudication background, significant delegation in the particular circumstances was not appropriate. In any event, delegation does not shift responsibility in the sense that a Transport Manager remains responsible for ensuring that delegated tasks are properly carried out. So, it is not open to the appellant to rely upon any alleged failings by the Leonida brothers with respect to what are properly to be regarded as a Transport Managers tasks.

21. There may be legal issue as to whether, given the appellant’s apparently voluntary status as supposed Transport Manager, he could properly be regarded as having been the operator’s Transport Manager at all bearing in mind the reasoning in *Tacsi Gwynwd Limited* [2015] UKUT 0668 (AAC) but that need not be a matter which we have to formally resolve in this appeal. The appellant had indicated he would perform tasks and had failed to do so. It was, in these circumstances, clearly open to the Traffic Commissioner to decide that he had lost his repute and, indeed, we think he was right to do so. Certainly, we cannot at all say that

he was plainly wrong. Similarly, it was open to him to disqualify in the terms he did and, again, we are quite unable to say that he was plainly wrong.

22. Of course, all is not necessarily lost for the appellant. Under the terms of the disqualification if he is able to go on to pass the Transport Manager CPC examination, then he can reapply to be a Transport Manager. However, for the above reasons his appeal to the Upper Tribunal is dismissed.

Signed

M R Hemingway
Judge of the Upper Tribunal

Dated:

10 February 2017