

Neutral Citation Number: [2018] UKUT 0011 (AAC)

Appeal No. T/2017/80

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

**IN AN APPEAL FROM THE DECISION OF
Nick Denton, Traffic Commissioner for the
WEST MIDLANDS TRAFFIC AREA dated 11 October 2017**

Before:

**Her Hon. Judge J Beech, Judge of the Upper Tribunal
Leslie Milliken, Specialist Member of the Upper Tribunal
David Rawsthorn, Specialist Member of the Upper
Tribunal**

Appellants:

**NORTH WARWICKSHIRE TRAVEL LIMITED
MICHAEL JAMES**

Attendances:

For the Appellants: Harry Bowyer, Counsel instructed by Cartwright King solicitors

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

Date of hearing: 9 January 2018

Date of decision: 16 January 2018

DECISION OF THE UPPER TRIBUNAL

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

SUBJECT MATTER:- The late arrival of an Operator at a public inquiry and the refusal of the Traffic Commissioner to set aside his decision once the Operator was in attendance.

CASES REFERRED TO:- Ocean Transport Limited 2009/524; 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 Traffic Commissioner for the West Midlands Traffic Area (“the TC”) made on 11 October 2017 when he:
 - a) Revoked the standard international PSV operator’s licence held by North Warwickshire Travel Limited (“the company”) with effect from 0001 on 7 December 2017, pursuant to ss 17(1)(a) and (b) and 17(3)(aa) of the Public Passenger Vehicle Act 1981 (“the 1981 Act”);
 - b) Determined that Michael James had lost his good repute as transport manager and disqualified him for three years, pursuant to Schedule 3 of the 1981 Act;
 - c) Disqualified Mr James from holding or obtaining any type of operator’s licence in any traffic area for an indefinite period and disqualified him from being a director of any company holding or obtaining such a licence for an indefinite period pursuant to s.28 of the Transport Act 1985 (“the 1985 Act”).

Background

2. The background to the appeal can be found within the papers and the TC’s written decision and is as follows: Mr James is no stranger to the PSV licensing system:
 - (a) He had been the director of Acorn Coach & Bus Limited (“Acorn”) when its licence was revoked at a public inquiry in February 2015. The company had previously received a formal warning at a public inquiry in December 2013. At the 2015 inquiry, there were significant maintenance shortcomings and the company had operated registered bus services in contravention of s. 6 of the 1985 Act. Mr James was also found to have lost his good repute and he was disqualified from holding a licence for 12 months;
 - (b) The licence of Vals Coach & Bus Limited was considered at the same public inquiry because of connections with Acorn (namely Mr James who was a director). Its licence was revoked at that inquiry for failing to satisfy financial standing requirements;
 - (c) He had been a director of Tamworth Coach & Bus Limited when its licence was revoked at a public inquiry in December 2013 for failing to satisfy financial standing requirements. The licence of Acorn was also considered at that public inquiry and Mr James lost his good repute as a transport manager as a result of his failures in relation to Acorn and he was disqualified from acting as a transport manager until he retook and passed the transport manager CPC qualification (which he did in March 2015).

3. In September 2016, D & DH Transport Limited submitted its licence checklist. David Harley was one of two transport managers and a director of the company along with Diane Harley. The other transport manager was Michael Granger. The licence authorised six discs with two vehicles specified. On 3 October 2016, Mr James became the sole director of the company; the Office of the Traffic Commissioner (“OTC”) was not informed of the resignation of David Harley as director (and presumably also not informed of Diane Harley’s resignation). It is unclear from the papers when Mr James became the sole, nominated transport manager.
4. On 1 July 2017, the company registered three bus services. On 14 July 2017, the Office of the Traffic Commissioner (“OTC”) received two complaints from members of the public that the three services had ceased to run. Then on 17 July 2017, the bus registration team in Leeds received three short notice applications from the company to cancel two of the services and vary the third. The reason given for the short notice request was “*unforeseen staff shortages*”. The TC refused the application as he considered that it was a basic function of an operator to ensure that it had the necessary staff to run registered services and that the three services had only been registered for sixteen days. The refusal letter sent to the operator made it clear that the company could not cancel or vary the services until 11 September 2017. However, the company’s website confirmed the cancellations had already taken place, stating that they were due to “*excessive and unforeseen staff shortages*” and that the services had been withdrawn “*with immediate effect*”.
5. On 31 August 2017, the company’s name was changed to North Warwickshire Travel Limited.
6. Call up letters were sent to the company and Mr James in his capacity as transport manager on 12 September 2017. The letters cited ss.14ZA and 17(1) and (3) of the 1981 Act, Article 4.1(a) of Regulation EC 1071/2009 and s.26 of the 1985 Act. The letters made clear the requirement that the operator and Mr James attend the public inquiry an hour ahead of the listed hearing time so that documentation could be reviewed and that any failure to adhere to the timescales set out in the letter could lead to a finding that the parties had not co-operated with the public inquiry. The letter further warned that the hearing would proceed if the parties failed to attend. The letter did not require the company to provide financial evidence in advance of the public inquiry and wrongly stated that the financial standing requirement was £12,200 rather than £29,600. However, Mr James was contacted prior to the hearing and was asked to send into the OTC evidence of financial standing for the correct amount. Two days before the hearing, the OTC received a single sheet of paper headed “*Annex 3: Finance Agreement*”. The agreement was between the company and Polesworth Motor Finance Limited although it was on the headed note paper of Polesworth Garage Limited. The document followed the template of a factoring agreement and purported to show that £50,000 was available to the operator. No other financial evidence was supplied.

7. The public inquiry took place on 11 October 2017 and was listed for 10.00. The hearing commenced promptly. Observers from Staffordshire and Warwickshire County Councils, Route One Magazine, Centre Bus and Arriva were present. Mr James was not present. The TC noted that telephone calls to the company's land line and to mobile telephones numbers had been made by the OTC that morning which were not answered. He was satisfied that the operator and Mr James were aware of the hearing and that some financial information had been provided although it was insufficient. As the call up letter made clear that the company and Mr James should have attended the public inquiry at 9.00 and that the parties had been given every chance to attend but had chosen not to do so, he would proceed with the hearing. He was particularly concerned about financial standing in view of the short notice cancellations of the bus routes and because a recent company cheque payable to the OTC had been returned by the bank, suggesting lack of funds. He noted that Mr James had a *"long and undistinguished history of a series of revoked licences behind him"* and that he had lost his good repute in 2013 which he regained in 2015. At this point, the transcript of the hearing records that an unknown speaker is heard to say something. The TC then stated *"He is on his way and stuck in traffic"*. To which the unknown speaker responded *"he is literally just around the corner but there's a load of traffic, so ..."* at which point the TC determined that as Mr James had *"come all of the way from Tamworth .."* and as he was *"threatening"* or *"promising"* to arrive within fifteen minutes, the TC would adjourn for fifteen minutes precisely. The TC noted that he was *"extremely irritated"* that Mr James was late and had not attempted to contact the public inquiry until 10.05. The TC then adjourned for fifteen minutes.
8. At 10.20 the TC resumed the inquiry. Mr James had not arrived and had not contacted the inquiry further. The TC then summarised the evidence in respect of the operator and Mr James and indicated that he would produce a written decision and that it was very likely that the operator's licence would be revoked and that the TC would have to consider whether Mr James had lost his good repute as a transport manager not least because of his failure to co-operate with the inquiry process. The hearing then concluded at 10.25.
9. A few minutes later (and before 10.30), the TC's clerk informed him that Mr James had arrived in reception. He was being *"extremely aggressive, shouting and swearing and demanding that the inquiry be reconvened"* (which Mr James later apologised for). However, the TC determined that Mr James had had his chance to attend the inquiry in due time and date and had failed to take it. The inquiry had already concluded. The TC refused to re-open the public inquiry noting that traffic conditions in Birmingham were not unusual that morning and that there was nothing preventing Mr James attending at 09.00 as required of him. He further noted that all of the observers had attended the inquiry well before 10.00 including those from Staffordshire and Warwickshire councils.
10. In his written decision, the TC found that:

- a) the company lacked financial standing, incomplete evidence having been provided. He could not rely on the document purporting to be a finance agreement and the failure to submit bank statements meant that it was impossible to establish the true picture. He was satisfied that there was likely to be a problem with finances in view of the dishonoured cheque payable to the OTC;
- b) the company had operated in contravention of s.6 of the 1985 Act in cancelling and varying services without the required notice;
- c) in failing to submit financial evidence on time and in failing to attend the inquiry at 09.00, the company had failed to co-operate with the inquiry;
- d) in view of the findings set out in b) and c), the TC concluded that the company had lost its good repute. It had deliberately ignored the requirement to operate services until the due date. He did not regard the excuse of unforeseen lack of staff as sufficient as the services should not have been registered in the first place. It could have used agency staff or sub-contracted the services to another operator. By ceasing services on the very day it applied for short notice variation/cancellation and without waiting for the TC's decision, it showed its contempt for the registration and regulatory process. It then proceeded to treat the inquiry process with contempt by failing to submit documentation and failing to appear at the due time and date. Such an operator cannot possibly retain its good repute.

The TC then went onto make the orders set out at the beginning of this judgment.

11. The company and Mr James appealed and requested a stay. There are three criticisms of the TC's decision: the decision to proceed in Mr James' absence was "*unlawful*" and that knowing that Mr James was on his way, the TC should have waited a little longer; the decision breached his Article 6 rights; it was disproportionate. It was submitted that the TC must have been content that there were no road safety implications in granting a stay because he delayed the coming into effect of the revocation for 56 days. The TC refused the stay stating:

"I am refusing the request for a stay. The only reason I gave 56 days' notice of the revocation was so the operator could give the requisite notice of cancellation of its remaining local services, rather than just cancel them without notice as it did with the services which were the subject of the inquiry. The notice period does not imply any confidence in the operator. Indeed I would be very reluctant to see any further prolongation of operations, as the operator has provided no assurance on finances or its ability to operate local services compliantly in future. Experience suggests rather the reverse".

12. The application for a stay was renewed before the Upper Tribunal. In refusing the application, the Lead Judge determined that whilst the main ground of appeal was arguable, the prospects of success were not so great that an unreliable and potentially unviable business (with attendant risks to staff and public safety if there was inadequate finance for maintenance) should continue in operation at this stage.

13. The company and Mr James then made an application to the Administrative Court for permission to apply for judicial review of the Upper Tribunal's decision to refuse a stay along with an application for interim relief by way of a stay of the TC's decision. Mrs Justice Yip granted a stay on 5 December 2017 without granting permission to apply for judicial review but with an indication that the stay order could be challenged whether by the Upper Tribunal or any interested persons. Mrs Justice Yip was influenced by the failure of the TC to mention road safety either in his main decision or his refusal to grant a stay (although we note that he was in an invidious position being mindful as he was that the company continued to operate registered services that should only be cancelled on 56 days notice).
14. Before we consider the merits of this appeal, we should that we are doubtful whether the Administrative Court has any jurisdiction in relation to the Administrative Appeals Chamber of the Upper Tribunal (which is a superior court of record) with appeals being heard by the Court of Appeal and that if such an application were to be made in the future, it should include a fully reasoned argument to support the implicit assertion that the Administrative Court does have such jurisdiction.

The Appeal

15. At the hearing of this appeal, Mr Bowyer appeared on behalf of the company and Mr James. He referred the Tribunal to the skeleton argument that had been prepared by previous Counsel. However, his own submissions were commendably simple and can be summarised in this way: the TC was aware that Mr James was on his way to the hearing and that as a result he should have allowed more time for Mr James to attend the inquiry over and above the fifteen minutes he had indicated it would take him when he telephoned the OTC at 10.05. If the TC had given Mr James only an additional ten minutes, he would have been present when the TC resumed the hearing and that in failing to exercise his discretion in that way, the TC deprived the operator of an opportunity to put its case, however hopeless the TC thought it might be.

Discussion

16. The Tribunal should state at the outset that it has considerable sympathy with the TC. No adequate documentation had been made available to him by the company prior to the inquiry and certainly no adequate evidence of financial standing. We agree with the TC's assessment of the document purporting to be a finance agreement. Against the background of the adverse compliance history of Mr James who was the sole director and transport manager of the company, the TC was entitled to be sceptical about the prospects of Mr James being able to give satisfactory explanations for the shortcomings of the company (and in particular financial standing) to thus avoid mandatory revocation of the operator's licence at the very least. However, in the TC's own words, he was "*extremely irritated*" by the failure of Mr James to attend the hearing in good time or to alert the OTC that he was likely to arrive after 10.00 prior to 10.05 and his irritation undoubtedly influenced his approach to

the issue of allowing Mr James sufficient time to attend the hearing. Of course, there is an issue of proportionality in relation to how much time should be allowed in any given case (the decision of *Ocean Transport Limited 2009/524* is an example in which an appeal was dismissed against the decision of the TC who had waited for nearly an hour before proceeding with a public inquiry when the operator had not been in contact with the OTC at all) but we are of the view that to abide strictly to the fifteen minutes indicated by Mr James was not a proportionate approach. Mr James himself may have miscalculated how long the final part of his journey was going to take, the ease with which he would find a parking space and the length of time it was going to take him to walk to the public inquiry building. He may have had a plausible explanation for why he had not been able to attend in good time before the hearing. Further, the TC should, at the very least, have heard from Mr James once he had attended the building to consider his request for the public inquiry to be re-opened although best practice would be to simply set aside the previous decision and immediately start again. It is always preferable and in the interests of natural justice and fairness to make factual determinations for or against an operator upon the basis of evidence which the operator has had an opportunity to address in a hearing and with consideration being given to any evidence they wish to produce to the TC.

17. It is with reluctance that we allow this appeal because we are mindful that the company has failed to produce any reliable evidence of financial standing and thus any reliable evidence that the company is able to maintain its passenger carrying vehicles. It is not unusual when an application for a stay is made, when no reliable financial evidence had been produced to the TC at the public inquiry, for the operator to produce such evidence in support of the application to address any concerns about the risks to road safety by the granting of a stay. It is noteworthy, no such evidence has been produced in this case in support of the three applications for a stay and this does cause this Tribunal considerable concern. In the circumstances, we are hopeful that when this judgment is produced, that the OTC does not delay in fixing a new public inquiry date before a different TC or DTC so that any road safety risks are minimised.
18. To conclude, we are satisfied that this is a case where the law and the facts impel us to interfere with the DTC's decision as per the decision in *Bradley Fold Travel Ltd & Peter Wright v Secretary of State for Transport (2010) EWCA Civ. 695* and the appeal is allowed. The case will be remitted for reconsideration before a different Traffic Commissioner without delay.



**Her Honour Judge Beech
16 January 2018**