

Neutral Citation Number: [2018] UKUT 0036 (AAC)

Appeal No. T/2017/45

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

**IN AN APPEAL FROM THE DECISION OF
Kevin Rooney, Traffic Commissioner for the
WEST OF ENGLAND TRAFFIC AREA dated 19 June 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**

Appellant:

GILDERS TRANSPORT LIMITED

Attendances:

For the Appellant: Mark Laprell of Counsel instructed by Langley Wellington LLP

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

Date of hearing: 9 January 2018

Date of decision: 1 February 2018

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that the appeal be ALLOWED and the matter be remitted for further consideration by the Traffic Commissioner

SUBJECT MATTER:- Whether inexperience of CPC holder equates to lack of good repute. Lack of reasoning for taking regulatory action. Whether regulatory action justified.

CASES REFERRED TO:- None

REASONS FOR DECISION

1. This is an appeal from the decision of the Traffic Commissioner for the West of England Traffic Area (“the TC”) made on 19 June 2017 when he:
 - a) Found that the good repute of Shaun Grantham Gilder as a transport manager was lost and disqualified him from acting as such for a period of three years;
 - b) Granted the Appellant (“the company”) a period of grace until 18 July 2017 to establish professional competence, failing which, the company’s operator’s licence would be revoked;
 - c) Curtailed the company’s authorisation on licence OH0154121 to 25 vehicles with effect from 18 July 2017 for an indefinite period not less than six months from that date. The company could request that the curtailment be spread over its three operator’s licences with an overall reduction of 8 vehicles. The action was taken under ss.26(1)(c)(i) and (ii) and s.26(1)(f) of the Goods Vehicles (Licensing of Operators) Act 1995 (“the 1995 Act”);
 - d) Refused an application for an increase in fleet size being satisfied that the company had failed to satisfy ss.13A(2)(d) and 13A(3) of the 1995 Act.

Background

2. The background to the appeal can be found within the papers and the TC’s written decision and is as follows: The company is the holder of three standard international operators licences authorising 33 vehicles and 30 trailers in the West of England, 6 vehicles and 6 trailers in the West Midlands and 3 vehicles and 3 trailers in Wales. There is no margin on any of the licences.
3. The company specialises in the transportation of livestock, refrigerated meat and machinery transportation using low loaders for the Ministry of Defence. The directors of the company are Grantham Gordon Gilder (“Gordon Gilder”) and his wife, Judith Gilder who both hold grandfather rights and are active within the business. Their son, Shaun Gilder was the transport manager although it was believed that he held that position jointly with his parents whose nomination had in fact fallen by the wayside by reason of their failure to complete the necessary forms in 2011. Additional transport manager experience was provided by Paul Carroll (who Shaun Gilder incorrectly believed was also a nominated transport manager) and he was responsible for vehicle maintenance. Christine Gilder, the daughter of Gordon and Judith, was responsible for driver training (being an approved RHA driver CPC course trainer) and for drivers’ hours and records compliance. Her sister,

Samantha Shea, worked within the company in the accounts department whilst other members of the family worked in various positions within the company, including driving.

4. On 7 August 2014, Vehicle Examiner (“VE”) Belford, commenced a drivers’ hours and records investigation at the company’s Gretton Fields operating centre and requested the records for the period 28 April to 29 June 2014. The outcome of the investigation was that 122 offences were identified committed by 15 drivers (one of whom did not work for the company (Hayden) but whose driver’s card was used by Jason Treharne (who did work for the company) to hide drivers’ hours offences. There were 40 false record offences, 21 false instrument offences, 17 offences of failing to make a record and 12 offences of allowing another to use their drivers card. Quite apart from Treharne using Hayden’s card, he was also using the cards of drivers employed by the company (Stephen Johnson and Piotr Klin). It appeared that many of the offences took place once drivers had arrived at their destinations (mainly livestock markets and abattoirs and in particular the Rungis livestock market in Paris) and when the drivers were out of hours. Driving would take place to facilitate unloading and cleaning of trailers in and around the relevant premises with the driver’s card removed. No driver made a record of why the driving was not recorded or of the identity of the person who did drive the vehicle, if not themselves in order to explain their failure to record all vehicle movements.
5. None of the offences had been identified by Christine Gilder and it is accepted by the company that whilst she collected in the drivers’ tachographs and ensured that the data from the driver’s cards and vehicle units was downloaded, she did not undertake any analysis of the data whatsoever.
6. VE Belford arranged interviews for all of the drivers and Gordon Gilder but all refused to answer questions, providing prepared statements instead. Gordon Gilder’s statement informed VE Belford that as far as he was concerned, all of the required compliance procedures were in place and that there should not have been any infringements. Neither Judith Gilder nor Catherine Gilder were interviewed. Shaun Gilder was interviewed and gave answers to all questions asked.
7. VE Belford concluded that in the absence of any analysis of the driver and vehicle data, the company could not have detected the offences and in particular, the large number of occasions when vehicles were driven for short periods, whilst no driver’s card was inserted into the vehicle unit. Further, the company was unable to detect the use of a driver’s card belonging to a driver who was not employed by them and the use by Mr Treharne of other driver’s cards who were employed by the company. VE Belford was also sceptical of some of the explanations put forward by drivers to explain unrecorded driving. For example, he considered it to be convenient to assert, once summonses had been issued, that whilst driving single manned, the drivers were in fact accompanied by another employee of the company who was not an LGV driver but who would undertake the driving once at their destination. He was also sceptical of the assertion that drovers and other staff at markets would

drive the company's vehicles in order to load and unload them whilst the company's driver took rest and that these individuals would be expected to operate lifting decks, pen gates and other vehicle equipment without the driver being present when in fact, the driver had the overall responsibility for his vehicle and his load. A letter from Gloucestershire County Council Trading Standards dated 4 December 2014 made it clear that the transportation processes were the drivers' responsibility as well as the company's and gave an example of an animal that required euthanasia as a result of being incorrectly loaded with a bull. TE Belford further noted that since the period covered by the investigation, two drivers' hours and tachograph prohibitions had been issued to company drivers (16 July 2014 and 19 December 2014); one overloading prohibition (19 February 2015) and 4 mechanical prohibitions (20 October 2014, 7 January 2015 and two on 19 February 2015). There then followed a further, immediate overloading prohibition on 6 June 2016.

8. On a date which is unclear from the public inquiry brief, the company pleaded guilty to nine offences relating to the handling of animal by-products and was fined a total of £11,000 along with costs of £4,662.
9. On 23 November 2016, the company made an application to increase its vehicle authorisation in the West of England by seven vehicles and ten trailers.
10. On 3 May 2017, the company, Shaun Gilder and seven drivers were called to a conjoined public inquiry. The delay in the hearing was the result of the intervening magistrates court proceedings and in the case of Mr Treharne, a committal for sentence to the Crown Court. Shaun Gilder was the principal witness for the company although the TC also heard briefly from Gordon Gilder and Catherine Gilder and Samantha Shea who had both recently obtained their transport manager CPC qualifications although Mrs Shea remained in the accounts department and had not gained any practical experience in transport management. It was proposed that the sisters be added to the operator's licence as nominated transport managers to assist Shaun Gilder.
11. In his written decision dated 19 June 2017, the TC found that the drivers had committed serious offences and in particular, falsification offences. The offending was widespread and he placed significant weight upon the offending and gave one example from Mr Treharne's driver conduct hearing where Mr Treharne was on duty for 85 hours with no qualifying daily rest between 7 and 10 May 2014.
12. Whilst the company had been issued with a small number of mechanical prohibitions (one of which, we note was "S" marked") the TC was not aware of any serious maintenance shortcomings. He therefore did not attach any weight to these matters. What was of concern was the behaviour and integrity of Shaun Gilder. The TC found that Shaun Gilder had sought to mislead him during the course of the hearing about the circumstances of the overloading prohibition issued on 6 June 2016. He had also allowed Mr Carroll to mislead VE Belford about the whereabouts of the driver card

belonging to Mr Heydon and Shaun Gilder had lied to TE Belford in interview about the card. Neither had he been “*straight*” with the TC about what happened to the card during the course of the hearing. The TC further took account of the fact that Shaun Gilder had “*presided as transport manager and Chief Operating Officer*” of the company when regular falsification of records and drivers’ hours offences were being committed. Whilst the evidence indicated that the company’s systems had improved, Shaun Gilder’s good repute as transport manager was lost (and there is no appeal against that finding).

13. The TC then went onto consider whether the company could be trusted to operate compliantly in the future. He was content that the “*non-DVSA convictions*” were of no relevance to the company’s repute and the company’s maintenance appeared to be good. There was no significant previous compliance history. Gordon Gilder remained a major presence within the company and the TC was impressed with his evidence and was also impressed by the commitment of Catherine Gilder and Samantha Shea. However, the TC was concerned as to their “*individual and combined ability to manage the fleet as its current size*” although he believed that they could be trusted to run a smaller fleet compliantly. With a reduction in size, the operator’s repute remained intact although badly tarnished. He did not doubt Catherine Gilder’s ability to manage drivers’ hours and records compliance but he had concerns as to her ability to manage the fleet at its current size particularly when taking account of the complexity involved in livestock and STGO operations. As for Samantha Shea, she was completely new to the role and he did not find that she was capable of exerting continuous and effective management of the transport operation “*that is to say that she has not yet established she is of good repute as a transport manager*”. He considered that she needed a period of time in a wider range of roles with proper authority before that could be the case.
14. The TC then considered the way forward and whether regulatory action was necessary. He reminded himself of the research relating to deaths caused by drivers who were asleep and referred again to the serious offences committed by the drivers over a number of months. The TC then concluded that it was not his intention to put the company out of business (hence the period of grace) to allow Catherine Gilder to submit an application to become transport manager but because of his concerns about her wider competence, for a smaller fleet.
15. The TC then concluded:

“Due to continuing concerns over professional competence and due to the need to take regulatory action, the licence is curtailed by 20%, or 8 vehicles. I will apply that reduction to the Western licence unless the operator requests otherwise. It is a significant reduction and I allow a period of 28 days for it to come into effect. The curtailment will remain in force indefinitely and, in any event for a minimum period of 6 months. Any application to remove the curtailment will require a demonstration of professional competence for the full fleet and continuing compliance meanwhile. For the avoidance of doubt, that

greater degree of professional competence may include Mrs Shea. However it is constructed, it will be necessary to demonstrate that the full range of transport manager responsibilities can be delivered”.

The variation application was refused as the company had failed to satisfy the TC of its professional competence for that size of fleet.

The Appeal

16. The company appealed and applied for a stay of the TC's decision. Following a hearing which took place on 17 July 2017 with evidence being called, the TC granted a stay upon the company undertaking that Foster Tachographs would provide monthly reports upon drivers' hours and tachograph compliance, the reports to include a summary to be sent to the Office of the Traffic Commissioner. In relation to professional competence, the TC accepted the nomination of Catherine Gilder, Samantha Shea, Peter Tucker and Andrew Lee as transport managers with the period of grace extended to allow for their applications to be processed. We understand that the applications have not as yet been processed by Leeds Central Licencing Unit.
17. Mr Laprell described the issue of professional competence to have been overtaken by events to some extent although of course, that is not something we can take into account. However, Mr Laprell's point was that the TC's approach to the issue of professional competence and good repute in relation to Samantha Shea was flawed in that he confused the lack of transport manager experience with lack of good repute which was clearly incorrect. Mr Laprell further suggested that the TC had considered the professional competence of both applicants separately (although we are satisfied that this was not the case). Mr Laprell submitted that the company accepted the TC's concerns about the inexperience of the two proposed transport managers but he failed to factor in the fact that the future operation was to be overseen by Gordon Gilder with whom he was impressed. Further, it was unclear how the TC's conclusions upon professional competence and the size of fleet that Catherine Gilder could oversee influenced his approach to the decision to curtail the licence and the extent of that curtailment.
18. Mr Laprell accepted on behalf of the company that there were clearly substantial failings in relation to drivers' hours and tachographs and that some regulatory action was justified; the company was not arguing for a "*slap on the wrist*". The difficulty was that it was unclear how the TC came to the conclusion that a curtailment of 20% of the fleet was appropriate in terms of regulatory action when he appeared to be taking his concerns about professional competence into account at the same time. Further, it would appear that he did not take account of the fact that there was no margin over the three licences, that the company was a family business rather than a large concern with remote shareholders and that the repute of Shaun Gilder had been lost. It was submitted that Shaun Gilder's loss of repute was sufficient regulatory action in the circumstances of this case and if the TC was not of that view then he should have set out his reasons.

19. Mr Laprell submitted that the Tribunal should not remit the matter for rehearing because the TC had found that the facts did not warrant revocation, the criminal offences were committed 3 ½ years ago and Shaun Gilder was no longer in position as transport manager. If the matter were to be remitted, the TC would be faced with an operation that was professionally competent and the sanction of loss of repute relating to Shaun Gilder had not been challenged. The company was concerned that if the Tribunal were to remit the case to the TC, then that would give the TC an opportunity of having a “*second go of doing it properly second time around*”, bearing in mind that his findings of fact were “*less than detailed*”. That would not be fair to the company and it should not be put through the process again. Mr Laprell urged the Tribunal to allow the appeal and grant the application to increase the vehicle and trailer authorisation.

Discussion

20. It is clear that the TC’s approach to the nomination of Samantha Shea as a transport manager was flawed as he confused the concepts of lack of professional experience with being found (having performed the functions of a transport manager) to be practically wanting, resulting in loss of good repute. We are satisfied that the lack of any professional experience in transport management alone should not result in a finding of loss of repute. We do not consider however, that much rests on the point as the TC clearly considered the individual and combined ability of the sisters to manage the company’s fleet at its current size and rightly had concerns. He was faced with one proposed transport manager with no experience whatsoever and another who had been responsible for drivers’ hours and records compliance who had completely failed in that role. As a result, his determination that the two sisters together did not provide him with any comfort in relation to continuous and effective control of the transport operations of a fleet the size operated by the company is not one which is open to criticism.
21. We now turn to the TC’s determination that “*Due to continuing concerns over professional competence and due to the need to take regulatory action, the licence is curtailed by 20%*”. We agree with Mr Laprell, that it is difficult to disentangle the influence the TC’s conclusion had that Christine Gilder was capable of managing a smaller fleet from his determination that a curtailment of 20% was necessary for regulatory purposes. It may very well be that the TC concluded that the necessary regulatory action was a curtailment of 20% for six months and that thereafter, the curtailment should continue in view of his concerns about professional competence. With the greatest of respect to the TC, his reasoning on this point is at the very least difficult to follow and at most, it is wanting. The TC failed to explain why curtailment was the appropriate regulatory action and why he had determined that 20% was the appropriate figure and by reason of that failure, this appeal succeeds.
22. We cannot accept Mr Laprell’s submission in relation to regulatory action that as a result of the uncontested decision of the TC that Shaun Gilder be disqualified as transport manager, that we should simply allow this appeal and

in addition grant the application for an increased vehicle and trailer authorisation. We do not agree that the disqualification of Shaun Gilder is sufficient regulatory action in the circumstances of this case, not least because, in all likelihood, he has and will continue to be the Operations Manager for the company and has and will continue to fulfil many if not all of the roles he had fulfilled prior to the public inquiry. His disqualification in the context of a tight knit, family company will have little practical impact particularly as it had already been accepted that two additional transport managers were required to operate the fleet. We therefore agree with the TC's implicit determination that further regulatory action was required.

23. The issue is the extent of the regulatory action required. In the circumstances of this case, we do not feel able to endorse the TC's decision that 20% curtailment was appropriate, if that was his finding. Neither do we feel able to substitute our own decision for the TC's for the following reasons:

- a) The TC failed to undertake any meaningful forensic analysis of the evidence placed before him by the company;
- b) He appeared to take at face value the company's assertions that unrecorded driving was undertaken by unknown members of staff at various destinations when this was something that VE Belford had flagged up as being worthy of scepticism on the facts and when no records existed as to who had undertaken the unrecorded driving even when it was asserted that it was a fellow employee who had either accompanied the driver or who just happened to be at the market or abattoir in question;
- c) He appeared to take at face value the company's assertions that driver Treharne was in effect, working with a livestock agent in isolation from the company in South Wales and that it was in those circumstances, that he was using Heydon's driver's card. That could not begin to explain how it was that Mr Treharne was also using the driver's cards of two drivers employed by the company. None of the company's witnesses were asked about this;
- d) He appeared to take at face value, the company's explanation that the reason for Christine Gilder failing to undertake her responsibilities for drivers' hours and records (which was that there had been an inadequate hand over of those responsibilities to her by Paul Carroll). Such an explanation ignores the fact that Christine Gilder was an RHA driver CPC trainer undertaking that role within the company and that she should have been fully aware of what she and the drivers were supposed to be doing irrespective of what was described as an inadequate hand over and the existence of out of date tachograph analysis equipment;
- e) The TC found that Gordon Gilder's evidence was impressive and in coming to that decision, the TC failed to consider the fact that during the period of offending, Gordon Gilder and Shaun Gilder believed that they were joint transport managers along with Judith Gilder. It would have been prudent to have asked Gordon Gilder about what he was doing in

furtherance of his perceived obligations as a joint transport manager at the material time.

The above points are not exhaustive. But we must make clear that upon review of all of the evidence, our conclusions about the company's failings are less favourable than those of the TC. We do not feel able in the circumstances, to do anything other than remit this matter for further consideration by the TC. We accept that upon his findings of fact, that it would be difficult for him to impose more serious regulatory action and that in all likelihood, that would be unfair but nevertheless, he must, to use ordinary language, sort this matter out by way of clarification or otherwise.

24. We are satisfied that this is a bad case of lack of compliance with the regulatory regime and that significant regulatory action was clearly called for. This appeal is allowed to enable the TC to provide proper reasons for his decision in respect of regulatory action and to provide clarity in respect of his approach.

A handwritten signature in black ink, appearing to read 'Judge Beech', written in a cursive style.

Her Honour Judge Beech
1 February 2018