

[2018] UKUT 0151 (AAC)
T/2018/003

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Appellant: Yvonne BARTRAM
On Appeal From: Traffic Commissioner for the East of England
Reference: TM 0893
Decision Dates: 6th September and 20th December 2017
Public Inquiry: 19th December 2017 Cambridge
Appeal to UTAAC: 15th January 2018
UTAAC Hearing: 18th April 2018

**DECISION OF THE UPPER TRIBUNAL
ON APPEAL AGAINST THE TRAFFIC COMMISSIONER**

Upper Tribunal Judge H. Levenson

100.8 (Transport Managers: Loss of Good Repute)

**DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)
ON APPEAL AGAINST THE TRAFFIC COMMISSIONER FOR THE EAST
OF ENGLAND**

Decision and Hearing

1. This appeal encompasses two decisions by Traffic Commissioners, one made administratively and notified in a letter of 6th September 2017, the other made following a public inquiry held at Cambridge on 19th December 2017 held by Deputy Traffic Commissioner Marcia Davis (“the Commissioner”), which was notified in a decision letter of 20th December 2017. Rule 23(2)(b) of The Tribunal Procedure (Upper Tribunal) Rules 2008 requires an appellant to provide a notice of appeal to the Upper Tribunal so that it is received within one month after the date on which notice of the decision to which the appeal relates was sent to the appellant. Rule 5(3)(a) empowers the Upper Tribunal to extend the time for complying with any rule. In respect of the earlier decision I extend the time so as to give the Upper Tribunal jurisdiction to deal with the matter.

2. In a technical sense only this appeal succeeds in respect of both decisions and I set aside both of them. However, in accordance with the provisions of paragraph 17(2)(a) of Schedule 4 to the Transport Act 1985 I substitute my own decision. This is that the appellant has lost her good repute as a transport manager consequent upon sustaining the criminal convictions referred to below and is disqualified from acting as a transport manager for an indeterminate period.

3. I held an oral hearing of this appeal at Field House (London) on 18th April 2018, sitting alone. The appellant attended in person and was represented by Simon Clarke solicitor of Smith, Bowyer, Clarke. I am grateful to them for their assistance and to Mr Clarke for his prior written submissions. There were no other parties to the appeal.

The Relevant Statutory Provisions

4. The Goods Vehicle (Licensing of Operators) Act 1995 (as amended) is the principal legislation in relation to applications and grants of goods vehicle operators’ licences and related matters. Transport managers, as that term is used in the legislation, are required to be of good repute. The following provisions of Schedule 3 are particularly relevant in the present case (references are to paragraph numbers):

1(1) In determining whether an individual is of good repute, a traffic commissioner may have regard to any matter but shall, in particular, have regard to –

(a) Any relevant convictions of the individual or of his servants or agents; and ...

2 Without prejudice to the generality of a traffic commissioner’s powers under paragraph 1 to determine that a person is not of good repute, a commissioner shall determine that an individual is not of good repute if that individual has –

(a) More than one conviction of a serious offence ...

3(1) A person has a conviction of a “serious offence” if –

- (a) he has been convicted of any offence under the law of any part of the United Kingdom ..., and
- (b) on such conviction there was imposed on him for that offence a punishment following within sub –paragraph (2).

3(2) The punishments are -

- (a) a sentence of imprisonment for a term exceeding 3 months; ...

5(2) For the purposes of paragraphs 1 to 4 –

- (a) convictions which are spent for the purposes of the Rehabilitation of Offenders Act 1974 shall be disregarded; and
- (b) a traffic commissioner may also disregard an offence if such time as he thinks appropriate has elapsed since the date of the conviction.

5. There will come a time when the appellant’s convictions (see below) will be spent for the purposes of the 1974 Act but that will not be until towards the end of 2022. There is no automatic procedure for the restoration of good repute once the relevant convictions are spent but it will be possible to make a fresh application to the traffic commissioner at the appropriate time on that basis. The question in this appeal is what should be done at this stage. The general rule in paragraph 2(a) of Schedule 3 to the 1995 Act is binding on the traffic commissioner in the defined circumstances. This is subject to paragraph 5(2)(b), which creates a discretion which, although limited, and based on the date of the conviction (not the date of the offence) must be considered in each relevant case. Relevant provisions of EU law must also be considered.

The Relevant EU Law

6. I refer to Regulation (EC) No 1071/2009 of The European Parliament and of The Council of 21st October 2009 establishing common rules concerning the conditions to be complied with to pursue the occupation of road transport operator. Paragraph 9 of the preamble includes the following:

The good repute of transport managers is conditional on their not having been convicted of a serious criminal offence ...

7. Relevant articles of the Regulation provide as follows (references are to article numbers followed in brackets by the paragraph number in the article; I have provided the emphasis in 6(2)(a)):

3(1) Undertakings engaged in the occupation of road transport operator shall:

- (a) have an effective and stable establishment in a Member State;

- (b) be of good repute;
- (c) have appropriate financial standing; and
- (d) have the requisite professional competence.

4(1) An undertaking engaged in the occupation of road transport operator shall designate at least one natural person, the transport manager, who satisfies the requirements set out in Article 3(1)(b) and (d) ...

6(1) Subject to paragraph 2 of this Article, Member States shall determine the conditions to be met by undertakings and transport managers in order to satisfy the requirement of good repute laid down in Article 3(1)(b) ...

The conditions ... shall include at least the following

- (a) that there be no compelling grounds for doubting the good repute of the transport manager ... such as convictions ...
- (b) that the transport manager ... [has] not in one or more Member States been convicted of a serious criminal offence ...

6(2) For [these] purposes:

- (a) where the transport manager ... has in one or more Member States been convicted of a serious criminal offence ... the competent authority of the Member State of establishment shall carry out in an appropriate and timely manner a duly completed administrative procedure ...

The procedure shall determine whether due to specific circumstances, the loss of good repute would constitute a disproportionate response in the individual case. Any such finding shall be duly reasoned and justified.

If the competent authority finds that the loss of good repute would constitute a disproportionate response, it may decide that good repute is unaffected ...

If the competent authority does not find that the loss of good repute would constitute a disproportionate response, the conviction ... shall lead to the loss of good repute.

Background and Procedure

8. The appellant was born on 3rd August 1962 and has been a qualified transport manager since late 1998. She has been the transport manager on a number of operator's licences, some but not all of which were connected with businesses run by her family. Until November 2010 she was the (non-medical) managing partner in a medical practice. As she put it (in her letter of 23rd March 2017) "I overdrew my capital account over 3 accounting periods due to over forecasting my profit share". It is not necessary to go into the precise details, but there was a police investigation, the appellant was interviewed by the police in September 2012 and she was subsequently

charged. Initially, she contested the allegations at her trial on indictment but, according to her account, about which there is no dispute (in the same letter):

“On the second day of my trial I was released in the afternoon to attend a hospital appointment following a routine mammogram. At this appointment I was told that I had breast cancer and that I needed an operation as soon as possible. I was devastated and afraid that if the case went against me and I was sent to prison, I may never see my family again. For this reason, and after much agonising, I changed my plea to guilty, having fought to clear my name for so many years ... I have since undergone surgery, chemotherapy and radiotherapy and have ongoing treatment ...”.

9. On 4th October 2016 the appellant was convicted at Cambridge Crown Court “upon her own confession” of three offences of theft and sentenced to two years imprisonment on each offence, to run concurrently, suspended for two years. It seems that there was also a proceeds of crime confiscation order of about £73,090.

10. At the hearing before me Mr Clarke accepted that the appellant was properly legally represented at the Crown Court with a proper opportunity to take advice before changing her plea(s). In my judgment there is no basis to go behind the convictions. There has also been some confusion (including on the part of the Deputy Traffic Commissioner) about the appropriate rehabilitation period under the 1974 Act. Mr Clarke has now agreed that it is four years after the expiry of the period of the sentence, so the convictions will be spent six years after 4th October 2016 (i.e. 4th October 2022).

11. On 10th October 2016 the appellant quite properly informed the Office of the Traffic Commissioner (OTC) about the convictions and on 16th March 2017 the OTC requested further detailed information from the appellant. She replied in her letter of 23rd March 2017. Why it had taken six months for the OTC to reply to the letter of 10th October 2016 is beyond my understanding, as is the fact that it then took nearly seven months for the appellant to receive a response to her letter of 23rd March 2017.

12. In fact the letter of 6th September 2017 that was sent to the appellant informed her that she had lost her good repute and would be disqualified from acting as a transport manager for an indeterminate period. In that letter reference was made to Schedule 3 to the 1995 Act (see above). No reference was made to the provisions of EU law.

13. Section 35 of and paragraph 15(1)(d) of Schedule 3 to the 1995 Act provide that a Commissioner may not make a finding that a transport manager is not of good repute unless the latter has been given the opportunity to request a public inquiry. This had not happened before the issue of the decision letter of 6th September 2017. At some stage this came to the attention of the Senior Traffic Commissioner, who instructed that the appellant be informed of her rights under those provisions. However, as far as Mr Clarke and I could tell, nothing had been done to set aside or revoke the decision referred to in the letter of 16th September 2017. That is why I have dealt with this matter in paragraphs 1 and 2 above.

14. The appellant requested a public inquiry and this took place before Deputy Traffic Commissioner Marcia Davis on 19th December 2017. The Appellant appeared alone

and there were no other witnesses. The hearing took 34 minutes. From the outset the Commissioner demonstrated that she had misunderstood the nature of the proceedings by addressing the appellant as follows (page 33G of the transcript):

“Now, this is a little bit different to a case where I might be taking disciplinary action against the licence that’s existing, in which case I have to be satisfied in terms of the breaches. This is your application, madam. So this is for you to try and satisfy me that you have regained your repute because this is what this is all about. The process is inquisitorial”.

15. In his written submissions Mr Clarke has cited other comments to similar effect. I agree with his suggestion that the purpose of the inquiry should have been to ascertain whether in the circumstances the appellant’s repute was affected by the convictions, not whether she had regained her repute which, pending a lawful decision by a Commissioner, had not yet been lost. This is significant because Article 6(2) of the EU regulation in relation to proportionality applies where the issue is whether good repute is lost, but it does not apply when the issue is whether good repute is regained. At 38D the Commissioner stated:

“... in that period of time, until October 2018, you have no repute and I cannot change that because you are subject to a sentence of imprisonment”.

The Commissioner also stated that the appellant would have to wait until the convictions were spent (38E), which was inaccurately stated to be in 2020. I do not think that either of these statements would be correct as a matter of law (rather than the exercise of discretion) even if this had been an application to regain good repute.

16. The decision letter was issued on 20th December 2017. It made the same error about the date on which convictions would be spent. The Commissioner stated: “I do not find that Mrs Bartram’s repute has been regained. The disqualification remains”.

17. On 15th January 2018 the appellant appealed to the Upper Tribunal against the decision of the Commissioner. For the above reasons I find that both decisions were made in error and I set them aside as indicted in paragraphs 1 and 2 above. Mr Clarke accepts that the appellant has more than one conviction for a serious offence for the purposes of and as defined in Schedule 3 to the 1995 Act. He has not mounted any serious suggestion that the disregard referred to in paragraph 5(2)(b) can be activated, but for the sake of completeness I confirm that I am of the view that the short period of time that has elapsed since the conviction in October 2016 (less than 19 months) makes it inappropriate to disregard the offences for which three two year sentences were imposed, albeit suspended. That leaves the question of proportionality.

Conclusions

18. I note that doubts have been expressed as to whether article 6(2)(a) is binding in a case such as the present (see David King [2018] UKUT 0098 (AAC) at paragraphs 19 and 20) but I have proceeded on the basis that it does apply (there being no respondent to argue that it does not apply). To a large extent Mr Clarke relies on the following extract from the Commissioner’s decision letter of 20th December 2017 (page 47 of the hearing bundle):

“I have noted that Mrs Bartram expressed real pride in being a Transport Manager [TM]. She continues to work for the four operators she used to as TM ... whilst they seek to appoint new TM. She stated that she felt very passionate about it and has gained a reputation as a good TM. Other operators have approached her. Mrs Bartram instils in all operators the importance of the undertakings. She would never put her name to a licence if the operator was not cooperative. [Her] husband spends a good period of time looking over the vehicles in [their] yard. Acting as a TM has been a big part of her life and she very much regrets that she has lost her repute. Mrs Bartram keeps up to date and has recently attended the Managing Operators Licence course ... Mrs Bartram is not averse to seeking guidance and assistance from the DVSA and is a member of the RHA.

I am satisfied that Mrs Bartram is very committed to the role and responsibilities of a TM. I am also in no doubt that she very much misses the ability to effect change with operators that she is a TM for”.

19. Mr Clarke argued that the EU provisions do not limit the circumstances that may be taken into account, and in this context also referred to the appellant’s medical difficulties, the delays in responding to her disclosure (during which she was permitted to continue acting as a transport manager), and the fact that convictions had nothing at all to do with transport matters. I have taken all of these matters into account. I note that the regrettable delays in responding to the appellant’s notification of the convictions bite into the rehabilitation period and actually worked to her advantage by considerably extending the time that she was able to be a transport manager. I also note that some of the matters referred to by the Commissioner in the extract cited above are subjective on the part of the appellant.

20. When it comes down to it, the appellant pleaded guilty to serious offences of dishonesty by virtue of which she accepted that had stolen from her partners, to the extent of at least £73,000. These were really gross breaches of trust. Were it to be decided that the appellant had not lost her good repute, she would be at liberty to become a transport manager on any licence – not just on operations conducted by her own family or those she has known well for a long time.

21. I really cannot see that that a finding of loss of repute and an indeterminate disqualification in all of the circumstances of this case can be regarded as anything other than appropriate and proportionate responses.

H. Levenson
Judge of the Upper Tribunal
1st May 2018