

Appeal No.: T/2018/17

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

**IN AN APPEAL FROM THE DECISION OF:
NICK JONES, TRAFFIC COMMISSIONER FOR THE WEST MIDLANDS
TRAFFIC AREA
DATED 21 MARCH 2018**

Before:

**Judith Farbey QC, Judge of the Upper Tribunal
Stuart James, Specialist Member of the Upper Tribunal
John Robinson, Specialist Member of the Upper Tribunal**

**Appellants: (1) NORTH WARWICKSHIRE TRAVEL LTD (No 2) and
(2) MICHAEL JAMES**

Attendance: Mr Mark Laprell appeared for the appellants instructed by Richard Nelson LLP

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

Date of hearing: 12 July 2018

Date of decision: 16 August 2018

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that the appeal be DISMISSED.

SUBJECT MATTER: Fairness; financial standing; agreement for a loan; period of grace

CASES REFERRED TO: *Bradley Fold Travel Ltd and Peter Wright v Secretary of State for Transport* [2010] EWCA Civ 695; *2 Travel Group plc 2005/7*; *LWB Ltd* [2011] UKUT 369 (AAC); *NCF (Leicester) Ltd* [2012] UKUT 271 (AAC)

REASONS FOR DECISION

Introduction

1. This is an appeal by North Warwickshire Travel Ltd, and its sole director and transport manager Michael James, from the decision of the Traffic Commissioner for the West Midlands Traffic Area ('the TC') made on 21 March 2018. Following a public inquiry ('PI'), the TC revoked the company's PSV operator's licence on the basis that the company no longer met the requirement to be of good repute and no longer met the requirement of financial standing. The TC disqualified both the company and director Michael James from holding or applying for an operator's licence for a period of 36 months. In addition, Michael James lost his repute as a transport manager and was disqualified from holding or applying for any transport manager position within the EU for a period of 36 months.
2. In grounds of appeal to the Upper Tribunal, it was contended that the TC had failed to make adequate or proper findings of fact, and failed to weigh all the relevant evidence. The Tribunal has been provided with a skeleton argument (for which we are grateful) which deals primarily with the transcript of the PI. Relying on the transcript, the main contention in the skeleton argument is that the TC had formed his view on the question of financial standing before hearing evidence or submissions on behalf of Mr James and the company. We have been asked to set aside the TC's decision and retake the decision ourselves or, alternatively, remit the case for a fresh PI before another TC. Before turning to the merits of the appeal, we turn to the factual background.

Factual Background

Mr James' regulatory history

3. Mr James has in recent years been a director of several companies which have had a PSV licence revoked. It suffices to set out only the most significant aspects of his poor regulatory history. Following a PI on 16 December 2013, the TC revoked the licences of Tamworth Coach & Bus Ltd, Heartlands Travel Ltd and Acorn Coach & Bus Ltd. Mr James was a director of each company. He was found to have lost his good repute and professional competence as a transport manager. He was disqualified from being a transport manager until he had passed a new CPC exam. At the same time, Vals Coach & Bus Ltd (of which Mr James was also a director) was issued with a formal warning with regard to its future conduct. An application to increase disc authorisation was withdrawn.
4. On 16 January 2015, Acorn Coach & Bus was again called to a PI following a bus monitoring exercise carried out by DVSA which had shown an unsatisfactory overall service provision of 53%. Vals Coach & Bus was also called. The PI took

place on 27 February 2015. The TC found that Acorn Coach & Bus no longer satisfied the requirement of good repute and no longer satisfied the requirement of professional competence. The company had failed to operate a local service, and had operated a service in contravention of section 6 of the Transport Act 1985. The TC revoked its operator's licence and disqualified it from holding a licence for 12 months. Mr James was disqualified from holding a licence, also for 12 months. The TC found that Vals Coach & Bus no longer satisfied the requirement of financial standing, revoked its licence and disqualified the company from holding a licence.

5. Mr James is a director of Invincible Coaches Ltd whose application for a PSV licence was refused.

North Warwickshire Travel Ltd and its predecessor company

6. D & DH Transport Services Ltd was incorporated on 12 January 2006. On 3 October 2016, Mr James became a director. On 24 October 2006, the company was awarded a standard international PSV licence authorising six vehicles. Mr James became the transport manager. It seems that there were at some stage other transport managers. However, the precise chronology is not clear and does not matter for present purposes.
7. On 1 July 2017, D & DH Transport Services registered a number of bus services trading as Heartlands Bus. On 17 July 2017, the company made short notice applications to the Office of the Traffic Commissioner ('the OTC') to cancel two services and to vary one other service by amending the timetable. The reason for those applications was said to be driver shortage. Five drivers had left the company within a fortnight so that services had to be cut back.
8. In all three cases, the application for short notice was refused. The OTC reminded the company that it should wait the full 56 days (i.e. until 11 September 2017) before cancelling or varying the routes. The company was warned that it must continue to operate the registered services until then or face disciplinary action by the TC. Despite this warning, all three routes were withdrawn from service.
9. On 31 August 2017, D & DH Transport Services changed its name to North Warwickshire Travel Ltd.

Proceedings before the TC

10. In light of concerns about insufficient drivers, letters calling Mr James and the company to a PI were sent on (respectively) 12 and 13 September 2017. The PI took place on 11 October 2017. Mr James did not attend on time and the TC held the PI in his absence. The TC reached an adverse decision: he revoked the licence. He found that Mr James had lost his good repute, disqualifying him from acting as a transport manager for three years and from holding a licence indefinitely. The company and Mr James appealed. In a decision dated 16 January 2016, the Upper Tribunal allowed the appeal on the ground that the TC had acted unfairly when he did not wait longer for Mr James to arrive. The case was remitted for re-hearing before a different TC.

11. On 16 February 2018, call-up letters were issued for the fresh PI. On 12 March 2018, Mr James attended and was represented by counsel Mr Bowyer. In his written decision, the TC found that the company had failed to operate a registered bus service. He concluded that it no longer met the requirement to be of good repute and no longer met the requirement of financial standing. The operator's licence was revoked. Both Mr James (as director) and the company were disqualified from holding an operator's licence for 36 months. Mr James as transport manager was also found to have lost his repute and was disqualified from being a transport manager, also for 36 months.
12. It was a feature of this PI that the TC expressed his view of the case before hearing the evidence or hearing experienced counsel's submissions. The TC started the hearing by explaining that he wished to set out what he perceived to be the issues in the case for the assistance of counsel. There can be nothing wrong with that approach, which may help operators and others who attend PIs to understand and focus on the issues. However, the TC in this case went further than outlining the points on which he wished to be addressed. Numerous pages of the transcript are taken up with the TC's comments and views on a variety of issues before he had heard evidence or submissions. It suffices to mention only three instances.
13. First, towards the beginning of the hearing, he indicated that there was no financial standing for the operator's licence and commented: 'So that clearly is the case, as far as I am concerned' (p.302H). He reached that conclusion before hearing any evidence. The Tribunal does not understand how that may be said to have been a simple steer to counsel about the issues in the case.
14. Secondly, Mr Bowyer applied for the issue of financial standing to be considered in camera. The TC's response was: 'I thought we had dealt with it, have we not?' (p.303B). The comment conveys the impression that he may have determined the issue against the operator before hearing evidence and submissions on the subject.
15. Thirdly, the TC said that he would have to provide a written decision setting out his key findings on the basis that Mr James was unlikely to accept disqualification. He expressed the view that a written decision would be needed on the basis of what had been said up to that point and on the basis of Mr James's body language (p.308A-B). This sort of comment, which was made before hearing evidence and submissions, is apt to give the impression that a final decision has already been made.

The TC's written decision

16. We turn to the TC's written decision which is in our view problematic in a number of respects. The section which purports to set out the evidence is upon analysis a mixture of evidence and comments. The section on findings of fact consists in the main of a series of comments on Mr James's psychology and character. The TC's findings sometimes lack logic; for example, he appears to have drawn a connection between Mr James's late arrival at the first PI and his loss of drivers. The Tribunal does not understand how the connection is drawn

(paragraph 37 of the decision). The TC would have done better to recite the main aspects of the evidence (written and oral) and then make findings of fact by reference to them.

The Tribunal's approach

17. In circumstances in which there were substantial errors in the conduct of the hearing and in the written decision, how should the Tribunal approach the case? The Upper Tribunal has full jurisdiction to hear and determine all matters whether of law or fact. However, we are not simply rehearing the case before the TC. We apply the approach in paragraphs 30-40 of the judgment of the Court of Appeal in *Bradley Fold Travel Ltd and Peter Wright v Secretary of State for Transport* [2010] EWCA Civ 695. An appeal before the Upper Tribunal takes the form of a review of the material before the TC. In order for an appeal to succeed, it is necessary to 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 an appellant has to demonstrate that the TC's decision was 'plainly wrong'.
18. How should the Tribunal apply *Bradley Fold*? Mr Laprell realistically accepted that Mr James did not present as an attractive operator to regulators but submitted that he was entitled like any operator to a fair hearing. We agree. The importance of TCs providing operators and transport managers with a fair hearing cannot be overstated. TCs must reserve their decisions on all questions that arise in PIs until after the evidence and submissions have been heard. Robust questioning is one thing. The impression of pre-judgment, even in cases that appear overwhelming, is entirely another thing and must be avoided. If it happens, the Tribunal is likely to overturn the decision.
19. On the other hand, in this case, the transcript shows that Mr Bowyer sought only to make short submissions. Significantly, he conceded that the requirement of financial standing was not met so that revocation of the licence was mandatory. The only issue, according to Mr Bowyer, was whether Mr James should be disqualified both as an operator and as a transport manager (p.322-323). We take the view that the concession casts matters in a different light. It will generally be very difficult for an appellant to complain to the Upper Tribunal in relation to issues which were conceded at the PI. In such circumstances, it will be very difficult to demonstrate that the TC's errors have caused an unjust or plainly wrong outcome.
20. Faced with this difficulty, Mr Laprell submitted that Mr Bowyer's concession was wrongly made. In order to consider whether the concession was correct, we need to consider the question of financial standing, and Mr Laprell's submissions on that question, in more detail.

Financial standing

21. Under section 14ZA(2)(c) of the Public Passenger Vehicles Act 1981, the operator of a standard licence must have appropriate financial standing. Loss of financial standing leads to mandatory revocation of the licence (section 17(1) of the Act). The purpose of this requirement is set out in paragraph 2(1) of Schedule 3:

‘Being of appropriate financial standing in relation to an application for, or holder of, a restricted licence consists in *having available* sufficient financial resources to ensure the establishment and proper administration of the business carried on, or proposed to be carried on, under the licence’ (emphasis added).

22. The Upper Tribunal has considered the meaning of the words ‘having available’ on a number of occasions. In *2 Travel Group plc 2005/7*, the Tribunal held that ‘available’ means ‘capable of being used, at one’s disposal, within one’s reach, obtainable or easy to get’. This definition was cited with approval in *LWB Ltd* [2011] UKUT 358 (AAC) in which the Tribunal held (at paragraph 10):

‘In our view when one takes into account the purpose of the requirement...the question is: *Can the holder of the operator’s licence make an immediate decision to spend the money in question or must it first ask someone else or some other company, (through its directors) to make the money available?* If the holder of the operator’s licence can take an immediate decision to use the asset in question, because it is under the sole control of the licence-holder, then it is capable of being ‘*available*’ to satisfy the requirement to be of appropriate financial standing. If the holder of the operator’s licence must first ask someone else or some other company to transfer the money then in our view it is not ‘*available*’ to the holder of the operator’s licence for the purposes of paragraph 2 of Schedule 3 to the 1981 Act’ (emphasis in the original).

23. The reasoning in *LWB* has essentially been incorporated into the Senior TC’s Statutory Document No 2 on Finance (‘SD No 2’). Paragraph 17 of SD No 2 states:

‘Financial resources must be at the disposal of or within reach of the operator so if the operator must first ask someone else to transfer the money then it is not available’.

24. The requirement to be of appropriate financial standing has always been considered to be a continuing requirement (*NCF (Leicester) Ltd*) [2012] UKUT 271 (AAC), paragraph 11). Operators must understand that TCs will only be prepared to take into account assets that are shown to belong to the operator (*NCF*, paragraph 17).

25. Mr James produced a number of documents relating to financial standing. A document entitled ‘Annex 3: Finance Agreement’ is dated 8 October 2017 and was produced for the first PI. It is signed by a director of Polesworth Garage Ltd and refers to the sum of £50,000 as the maximum available ‘under this agreement’

(p.278). We were told (and for present purposes we accept) that Mr James drafted the document to look like Annex 3 of SD No 2. Annex 3 is a pro forma document relevant to factoring agreements. As is now accepted, the Polesworth agreement is not a factoring agreement. In our view, this document does not advance Mr James' case. The same applies to the updated 'Annex 3: Finance Agreement' (at p.373).

26. The TC also considered a document entitled 'Loan Agreement' dated 1 November 2016. The agreement was between D & DH Transport Services and Polesworth Garage (p.333). Under the agreement, Mr James was required to pay £250 plus VAT upon signing and an annual continuation fee of £150 plus VAT. The annual interest rate was to be 'charged daily from advance of any sums'. The interest rate was in double figures. At the date of the hearing before us, Mr James had never used the facility.
27. The TC was provided with a letter from Polesworth confirming that a £50,000 funding facility had been in place since 2016 (p.372). Mr Laprell very properly let the Tribunal know that the director of Polesworth who signed the documents on its behalf was Mr James' landlord. The TC was not made aware of this link between Mr James and the lender, and we are grateful to Mr Laprell for letting us know. He acknowledged that it was a double-edged sword. On the one hand, it might mean that the lender was well-disposed towards Mr James as they were personally acquainted. On the other hand, it might mean that the lender was less independent and objective in his assessment about whether Mr James was good for the money.
28. We are not impressed that this relevant information about the lender was not disclosed to the TC. However, the principal point is that the financial facility promised by Polesworth has never been used. When Mr James was (on his own case) forced to shut down bus routes for lack of drivers, he could have decided to draw funds to resolve the situation but he did not do so. He was aware from the call-up letters in September 2017 that the company's financial standing was under scrutiny. It was open to him to draw funds to demonstrate to the TC that the loan agreement was affordable. He did not do so.
29. Faced with the hurdle that no funds had been drawn down, Mr Laprell asked us to treat the agreement like a bank overdraft facility or a credit card. He asked us to work on the assumption that Mr James could have negotiated an overdraft or used a credit card to demonstrate financial standing. He submitted that there was no relevant distinction to be drawn between such arrangements and the present loan agreement. Notably, each form of facility is known to come with steep rates of interest. It followed that it was not rational to regard the loan agreement as less probative of financial standing than the sorts of agreement which are – at least in principle - acceptable under SD No 2. He submitted that there was nothing inherently unacceptable in the Polesworth agreement. The TC in his written decision appears to have regarded the loan agreement as something other than genuine on account of the high interest rate which in his view indicated that there was never an intention actually to use the loan. Mr Laprell submitted that this draconian finding was not based on adequate evidence.

30. We propose to follow the approach of the Tribunal in *LWB*. We ask the question: Can Mr James make an immediate decision to spend the money promised to him under the loan agreement or must he first ask someone else to make the money available? On the evidence, the answer is plain: he has no immediate access to funds but must first ask Polesworth to provide them. The Polesworth agreement is (at its highest) a promise to pay funds. There is no immediate access.
31. There is good reason to reject the Polesworth agreement as evidence of financial standing. Save for the fees which we have mentioned above, Mr James has not assumed the burden of using it. Those who are prepared to carry the burden of paying for immediate access to funds (whether by interest payments or otherwise) would be put at unfair financial disadvantage if others were permitted to operate in the marketplace without that burden. Such a result would not be in the interests of fair competition.
32. Nothing else in the documents persuades us that the requirement of financial standing was or could be met. Indeed, the evidence impels us to conclude that it was not met by a wide margin. In short, the concession at the PI as to financial standing was properly made. Revocation was mandatory. Flaws in the conduct of the hearing or in the written decision were immaterial.
33. Mr Laprell submitted that, if we were to reach this conclusion, we should permit Mr James a period of 7 days to draw funds under the agreement which would demonstrate that he could afford the high interest rate and satisfy the financial standing requirement. He submitted that the TC was unreasonable not to allow a period of grace, or at least a fixed short period of time on an ‘unless’ basis. It was disproportionate not to allow a short period to draw on the loan agreement when the outcome would otherwise be that Mr James’ business would shut down.
34. Mr Laprell was instructed that Mr James would be willing to reduce his services to three vehicles. This lesser number would mean that he would need to show access to lesser funds, making the financial requirement easier to meet under the agreement. It would be open to the OTC to monitor whether he drew funds within the allotted period of grace. The Tribunal could remit the case for that purpose.
35. Mr Laprell was instructed that, if permitted a period to draw funds, Mr James would be willing to accept an indefinite prohibition on registering bus services or being associated with, or transport manager for, any company operating registered bus services. Such a sanction would provide greater protection to the public than simply dismissing the appeal.
36. These submissions had not been advanced in writing either in the grounds of appeal or in the skeleton argument. No good reason was put forward as to why Mr James had not drawn funds before now, whether for three or some other number of vehicles. By the time of the PI, Mr James had had ample opportunity to draw funds under the agreement. He chose not to do so. We see no good reason for the TC to have granted a grace period or other fixed period; nor is there good reason for us to do so.

37. We appreciate that, from Mr James's perspective, it appears a small step for the Tribunal to grant a period of grace and, if we do not do so, Mr James will lose his business. In assessing the proportionality of our decision, we have born in mind the serious consequences for Mr James. However, we are entitled to have in mind the interests of the administration of justice. We would need to remit the case to the OTC to oversee whether or not Mr James drew funds. The OTC is a public body with limited resources. Its resources are not appropriately spent monitoring non-compliant operators who have failed to take steps which could have been taken.
38. It is not in the interests of justice that an operator should be able to refrain from drawing funds at the PI stage, wait for an adverse decision, and then seek to re-open the matter before the Tribunal. Granting a period of grace in such circumstances might serve to encourage a strategic approach to the Tribunal and would be contrary to the co-operation and openness which the TC and the Tribunal expect in this regulatory sphere.
39. In any event, Mr James has been associated with two other companies whose licences have been revoked on grounds of lack of financial standing within the last five years (Heartlands Travel on 16 December 2013 and Vals Coach & Bus on 27 February 2015). Nothing that we have seen or heard persuades us that the TC was wrong to refuse time to draw funds and we decline to grant time. Mr Laprell made short submissions on good repute but accepted that the question of repute was only material if the financial standing requirement could be met. As we have found that the financial standing requirement could not be met, there is no need for us to deal with repute. There was likewise no discrete challenge to disqualification and it was not submitted that the period of disqualification was too long.
40. For these reasons, this appeal is dismissed. Should Mr James seek in the future to apply for a licence, he will need to demonstrate clearly that he can achieve financial compliance.

(signed on the original)

JUDITH FARBEY QC
Judge of the Upper Tribunal
16 August 2018