



Appeal No.: T/2018/35
NCN: [2018] UKUT 0309 (AAC)

**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 21 MARCH 2018**

Before:

**Elizabeth Ovey, Judge of the Upper Tribunal
George Inch, Specialist Member of the Upper Tribunal
Michael Farmer, Specialist Member of the Upper Tribunal**

Appellants: RASHED MAHMOOD, trading as Rashed Travels

Attendance: The Appellant appeared in person.

Heard at: The Rolls Building, 7 Rolls Building, Fetter Lane, London EC4A 1NL

Date of hearing: 11th September 2018

Date of decision: 21st September 2018

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that the appeal be ALLOWED and the case be remitted for rehearing by the Traffic Commissioner who made the decision.

SUBJECT MATTER: Mandatory revocation; period of grace; failure to rectify situation within time specified; Public Service Vehicles (Operators' Licences) Regulations 1995, regulation 9

CASES REFERRED TO: *Bradley Fold Travel Limited and Peter Wright v. Secretary of State for Transport* [2010] EWCA Civ 695, [2011] R.T.R. 13; *LWB Limited* [2011] UKUT 358 (AAC)

REASONS FOR DECISION

Introduction

1. This is an appeal by Mr. Rashed Mahmood, trading as Rashed Travels, against the decision of the Traffic Commissioner (“the TC”) for the West Midlands Traffic Area revoking his public service vehicle operator’s licence with effect from 23.45 on 1st June 2018.

2. Mr. Mahmood was informed of the decision to revoke the licence by a letter dated 5th June 2018 stating that the revocation was on the ground set out in s.17(1)(a) of the Public Passenger Vehicles Act 1981 and specifically that he was no longer professionally competent. The decision followed Mr. Mahmood’s perceived failure to respond to a letter dated 18th April 2018 granting him a period of grace to regain his professional competence or to nominate a replacement transport manager.

The facts

3. Prior to the TC’s decision, Mr. Mahmood was the holder of a standard licence with a start date of 15th December 2017. The requirements which have to be satisfied before such a licence can be granted are set out in ss.14ZA and 14ZC of the Act and include a requirement in s.14ZA(2)(d) that the applicant for the licence is professionally competent, as determined in accordance with paragraphs 3, 4 and 6 of Schedule 3 to the Act. Under paragraph 4, an individual satisfies the requirement of professional competence if he has a transport manager of his business who is of good repute and is professionally competent.

4. Mr. Mahmood was not himself professionally competent but employed a transport manager who satisfied the statutory requirements. On 7th February 2018 she wrote to the Office of the TC stating that she was not employed as Mr. Mahmood’s transport manager with immediate effect.

5. Upon receipt of that letter, the Office of the TC wrote to Mr. Mahmood stating that it had been brought to the attention of the TC that the specified transport manager was no longer employed by him and that he might therefore no longer satisfy the professional competence requirement. The letter continued:

“Professional competence is a continuing and mandatory requirement of holding a licence, and is only met when a suitably qualified transport manager has been approved on a licence by the traffic commissioner. Therefore **you must now make an application** to add a replacement transport manager to your licence, providing the original Certificate of Professional Competence for the nominated person, and the enclosed TM1 Form, by **no later than 27/02/2018**.

PLEASE NOTE. A failure to specify a replacement transport manager means that the traffic commissioner MUST revoke the licence UNLESS a period of grace is applied for.”

The letter then gave further information about applying for a period of grace.

6. In response, by a letter dated 21st February 2018 Mr. Mahmood applied for a period of grace of three months, explaining that he would like to be the transport manager for his business and was currently studying the course materials. He hoped to complete the course and examination within four months.

7. Following internal consideration of the request, the Office of the TC replied on 18th April 2018 in the following terms:

“Thank you for your letter explaining the circumstances behind the cessation of employment of [the transport manager] named as your specified transport manager.

Having taken into account your explanation, the Traffic Commissioner has decided to allow your licence to remain in force until 31 May 2018 without a specified replacement transport manager, under Section 5 of Schedule 3 to the [Public Passenger Vehicles Act 1981 (as amended)], a period felt sufficient for you to regain your professional competence or nominate a replacement. Within this deadline, you must complete and return a TM1 application form, notifying details of your replacement transport manager, together with the original certificate(s) of qualification.

...

If, on expiry of the stated deadline, you remain unable to meet the requirement to be professionally competent, the Traffic Commissioner has stated the licence will be revoked on 01 June 2018 under Section 17(1) of the Act.”

8. What unfortunately happened was that Mr. Mahmood did not return a TM1 application form with details of a replacement transport manager and the original certificate of qualification. He explained in his grounds of appeal that there was no suitable examination date available and so he had looked for another transport manager. He was unable to find one until 29th May 2018, on which date he posted the paperwork and was told it should arrive the next day. Unhappily it was not in fact delivered until 5th June 2018. Mr. Mahmood has produced copies of his proof of posting, showing posting at 17.31 on 29th May 2018 and a stated delivery aim of the next working day, and of the record of delivery, showing that the paperwork was signed for at 8.01 a.m. on 5th June 2018.

9. The decision letter of 5th June 2018 states that “the Traffic Commissioner has revoked” the licence. As discussed further in paragraph 19 below, it is not clear on what date the TC’s decision was made. We infer from the terms of the letter, however, that even if it was made on 5th June 2018, Mr. Mahmood’s paperwork had not then made its way from the post room to the TC.

The law

10. The power to revoke a standard licence is contained in s.17 of the Public Passenger Vehicles Act 1981, which, as amended, reads as follows, so far as material:

“(1) A traffic commissioner must revoke a standard licence if it appears to the commissioner at any time that –

- (a) the holder no longer satisfies the requirements of section 14ZA(2) ...

(1A) Before revoking a standard licence under subsection (1), the traffic commissioner may serve on the holder a notice setting a time limit ,, for the holder to rectify the situation.

(1B) If the holder rectifies the situation within the time limit set under subsection (1A), the traffic commissioner must not revoke the licence.

...

(4) A traffic commissioner shall not take any action under subsection (1) or (2) above in respect of any licence without first holding an inquiry if the holder of the licence requests that an inquiry be held.”

11. The rights given to the holder of a licence under s.17(4) are made effective by regulation 9 of the Public Service Vehicles (Operators’ Licences) Regulations 1995, S.I. 1995 No. 2908, which reads as follows, so far as material:

“9. (1) Before –

- (a) any powers under section 17(1) or (2) are exercised in relation to a licence,

...

a traffic commissioner shall give notice to the holder or former holder.

(2) The notice shall state –

- (a) that one or more of such actions is under consideration;
- (b) the grounds on which that consideration is based;
- (c) that within 14 days of such notice the holder or former holder may make representations to him with respect to the action or actions being considered;

(d) that those representations shall be written; and

(e) either-

(i) that it is proposed to hold an inquiry in relation to the action or actions being considered and the date (being a date not less than 14 days from the notice) on which that inquiry will be held, or

(ii) that it is not proposed to hold an inquiry in relation to that action or those actions unless the holder or former holder, within 14 days of the notice, in writing requests that an inquiry be held.”

12. Paragraph 5 of Schedule 3 to the 1981 Act, to which the letter dated 18th April 2018 refers, was revoked with effect from 4th December 2011, that being also the date with effect from which s.17(1A) and (1B) were inserted into the Act. Immediately before its revocation, paragraph 5 read:

“5.(1) Where the holder of a PSV operator’s licence relies on a single transport manager to satisfy the requirement as to professional competence and that manager –

...

(b) ceases to work for the business

...

the holder shall nevertheless not be treated as failing to satisfy that requirement until the expiry of such period as in the opinion of the relevant traffic commissioner is reasonably required for the appointment of a new transport manager.”

13. Although s.17(1A) and (1B) are rather differently worded from Sch. 3 paragraph 5 and are much more general in their terms, in our view their practical effect for present purposes is the same: that is to say, they both address a situation in which it appears that the holder no longer satisfies the requirements for holding a licence, so that a ground for mandatory revocation exists, but time is allowed for the matter to be resolved. While the reasonable period is running or until the time limit has expired, as the case may be, the TC cannot revoke the licence, but when the period or time limit has expired, the TC, if not yet satisfied that there is no longer a ground for mandatory revocation, may proceed to consider whether the ground for revocation does in fact exist and, if it appears that that is the case, must revoke the licence.

14. The question then arises what is the test for determining whether the licence holder has appointed a new transport manager (to use the paragraph 5 language) and no longer fails to satisfy the requirement of professional competence or whether the situation has been rectified (to use the s.17(1A) language). This was considered by the Upper Tribunal in *LWB Limited* [2011] UKUT 358 (AAC), a case which had some similarities to the present in that the appellant’s transport manager had sent a letter of

resignation to the Office of the TC and the appellant relied on having appointed another transport manager shortly before the relevant public inquiry was held.

15. In that case, in which paragraph 5 was relevant, the Upper Tribunal said:

“15. The starting point for consideration of this issue is that in the case of an applicant for an operator’s licence, who nominates a transport manager, or the nomination of a new transport manager by an existing operator, it is for the applicant or operator to satisfy the Traffic Commissioner that the person concerned can fulfil the role of transport manager ...

16. For a company to satisfy the requirement of professional competence it must come within the terms of Paragraph 3 of Schedule 3 to the 1981 Act which provides that: *“a company satisfies the requirement as to professional competence if, and so long as, it has a transport manager or transport managers of its road transport business who, or each of whom, is of good repute and professionally competent.”*

It follows, in our view, from the terms of paragraph 3 of Schedule 3, that the appointment of a new transport manager is, on its own, not enough to satisfy the requirement of professional competence. Instead the operator must go further and show that the person appointed is of “good repute” and “professionally competent” ... That is why notification by TM1(G) is so important, because it is the contents of this form, together with the original of the Certificate of Professional Competence, (or other proof of professional competence), the contract and the declaration by the new transport manager forming part of TM1(G), which enables checks to be made to confirm that paragraph 3 of Schedule 3 has been satisfied... ”

This explains why, in the letter dated 18th April 2018, Mr. Mahmood was required to complete and return a TM1 application and the original certificate of qualification.

16. We adopt that approach, noting that in *LWB Limited* the fatal flaw as respects professional competence was not the appellant’s failure to make a TM1 application and to provide the original certificate within a reasonable period, but that there was no sufficient evidence at the public inquiry that the new transport manager would have continuous and effective responsibility for the transport operations. In other words, a licence is not revoked on the ground that the TM1 application or certificate were not returned in time, but on the ground that in their absence the TC will not be satisfied that the holder has regained professional competence by having a new transport manager who is of good repute and professionally competent. In such circumstances, the TC will presumably be satisfied that because of the loss of the original transport manager, the holder no longer satisfies the requirement of professional competence and mandatory revocation will follow. If a TM1 application and certificate have been provided but checks still remain to be made, presumably the TC, although not yet satisfied that professional competence has been regained, will not be satisfied that it remains lost.

This appeal

17. Applying that approach to the present case, we conclude that the fact that Mr. Mahmood had appointed a new transport manager by 29th May 2018, within the time limit specified in the letter dated 18th April 2018, did not of itself mean that he had rectified the situation for the purposes of s.17(1B), with the consequence that the TC could not revoke the licence.

18. Further, even assuming in Mr. Mahmood's favour that the new transport manager is of good repute and professionally competent (and we have not seen the paperwork sent to the TC), we cannot say that the TC's decision was wrong if, because of a failure to supply the paperwork promptly, the relevant material was not available to the TC when the decision was made to revoke was made.

19. We do not, however, need to consider whether the material was in fact available to the TC, which might involve difficult factual issues as to when the decision itself was made. (Indeed, although the letter dated 5th June 2018 refers to the TC having revoked the licence, there is nothing in the papers to show any consideration of the matter by the TC at any point after 16th April 2018. There is no internal record such as that appearing at pp.8-9 in relation to the decision to grant a period of grace.) This issue does not arise because it does not appear that Mr. Mahmood was ever given a notice complying with reg. 9 of the 1995 Regulations. He therefore lost the opportunity of requesting a public inquiry at which he might have been able to adduce evidence that he did satisfy the requirements of s.14ZA(2) or even of responding to the notice by drawing attention to the paperwork which had been supplied without requesting a public inquiry. Although we can understand that it may have seemed to the TC that revocation was inevitable, in the absence of a response to the letter dated 18th April 2018, the fact remains that s.17(4) and reg. 9 entitled Mr. Mahmood to receive a notice offering him the opportunity to request a public inquiry and to have such an inquiry held. The letter itself clearly did not constitute such a notice.

20. In our view, in spite of the clear warning in the letter dated 18th April 2018 that the licence might be revoked, the statutory scheme required both a notice complying with reg. 9 and a subsequent decision by the TC as to whether, at the date of that decision, it appeared to him that Mr. Mahmood no longer satisfied the requirements of s.14ZA(2). Assuming that a decision was made subsequently to the letter of 18th April 2018, although we have not seen evidence of that other than the letter of 5th June 2018 itself, we conclude that the decision was plainly wrong, in the sense explained in *Bradley Fold Travel Limited and Peter Wright v. Secretary of State for Transport* [2010] EWCA Civ 695, [2011] R.T.R. 13, since the TC proceeded to make it although the statutory process had not been followed and Mr. Mahmood had been deprived of potentially significant protection.

21. We also note that the letter dated 18th April 2018 itself gives rise to certain difficulties. As we have said, the reference to paragraph 5 of Schedule 3 is outdated. Further, we do not think that it is clear that the reference to "returning" documentation is to be construed as a reference to the TC having received the documentation by 31st May 2018, as specified in the TC's internal document at p.9 of the bundle, although we recognise that Mr. Mahmood was in fact anxious to try to ensure that the paperwork was not only posted but also received. Finally, the warning about revocation of the licence is a warning of the consequence if Mr. Mahmood remains unable to meet the

requirement to be professionally competent by 31st May 2018, a requirement in relation to which the documentation being sought is evidential rather than conclusive, as explained in paragraph 16 above. If the letter adopted a standard form, we suggest that amendments should be considered.

22. For those reasons, in exercise of our powers under paragraph 17(2)(b)(i) of the Transport Act 1985 we remit the matter for rehearing to the TC. We express the hope that the matter can be considered further without delay.

(signed on the original)

E. Ovey
Judge of the Upper Tribunal
21st September 2018