



Appeal No. NT/2018/52

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER (Transport)
TRAFFIC COMMISSIONER APPEALS**

**ON APPEAL from the DECISION issued on behalf of the HEAD of the
TRANSPORT REGULATION UNIT
Dated 21 August 2018**

Before:

Kenneth Mullan	Judge of the Upper Tribunal
Mr John Robinson	Member of the Upper Tribunal
Mr Andrew Guest	Member of the Upper Tribunal

Appellant:

Mr Stephen McKenna

Attendances:

For the Appellant: The Appellant was not present and was not represented

For the Respondent:

Heard at: Tribunal Hearing Centre, Royal Courts of Justice, Belfast.
Date of hearing: 29 November 2018
Date of decision: 23 January 2019

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that this appeal be DISMISSED.

SUBJECT MATTER:- Professional competence; failure to nominate a
Transport Manager

CASES REFERRED TO:- NT/2013/52 & 53 Fergal Hughes v DOENI & Perry
McKee Homes Ltd v DOENI; 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 issued on behalf of the Head of the Transport Regulation Unit, (“Head of the TRU”) to revoke the Appellant’s goods vehicles operator’s licence.
2. The factual background to this appeal appears from the documents and the Head of the TRU’s decision and is as follows:-
 - (i) The Appellant is the holder of a standard international goods vehicles operator’s licence, authorising the use of one vehicle from an operating centre at an address in Armagh.
 - (ii) By way of e-mail correspondence dated 6 June 2018, the Appellant’s nominated Transport Manager advised the Department that he had resigned from that role on 1 May 2018.
 - (iii) In correspondence dated 21 June 2018 the Appellant was advised that the Department had been informed that the former nominated Transport Manager had resigned from that role. Further, the Appellant was informed that as a consequence he, as the licence holder, might no longer satisfy the requirement to be professionally competent.
 - (iv) The Appellant was directed to make an application to add a replacement Transport Manager to the licence, to submit the original Certificate of Professional Competence (CPC) for the nominated person and complete the relevant nomination (enclosed with the correspondence) by 12 July 2018. The Appellant was also advised that if he was registered to use the online self-service system then he could apply to add a new Transport Manager and to upload the CPC electronically by the same deadline of 12 July 2018. The Appellant was also asked to provide an explanation as to why he had failed to comply with the condition to notify the Department of the change in professional competence.
 - (v) The Appellant was also informed that if he was unable to nominate a qualified Transport Manager within the deadline the Department might consider granting a period of grace to permit the Appellant to find a replacement. The Appellant was notified that the Department was not obliged to grant any such period of grace and that it was unlikely to do so unless the Appellant submitted ‘robust’ evidence as to how the requirements would continue to be met. The Appellant was given advice as to the manner in which an application for a period of grace should be made.
 - (vi) Finally, and most significantly, the Appellant was given a statement of the content of section 24(1) of the Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010 (‘the 2010 Act’), namely that the Department must direct that a standard licence be revoked if at any time it appears that the licence-holder no longer satisfies the requirement to be professionally competent. The Appellant was also advised that on the basis of information which was available to it, the Department considered that the Appellant no longer satisfied the requirement to be professionally competent and in accordance with section 24(3) of the 2010 Act was serving notice on the Appellant that it was considering the

revocation of his licence. The Appellant was advised of his right, under section 26(1) of the 2010 act, to request a Public Inquiry and was given the following warning:

'PLEASE NOTE: Failure to respond to this letter by the deadline date given will result in the Department revoking the licence. The revocation of the licence would render unlawful the operation of vehicles for which an operator's licence is required.'

- (vii) The Department has submitted that the correspondence of 21 June 2018 was forwarded by recorded delivery on 25 June 2018. The Department has noted that the recorded delivery correspondence was 'signed for' on 27 June 2018. Further the Department has submitted that the Department's electronic record (VOL) shows that the Appellant's self-service account was accessed by the Appellant on 21 June 2018 and has asserted that this access was prompted by the e-mail correspondence forwarded on that date.
 - (viii) The Department did not receive a response to its recorded delivery or e-mail correspondence.
3. In the bundle of papers which was before the Upper Tribunal, is a copy of a document which is headed 'Licensing (G) Submission'. It is prefaced with the statement that 'This is an OFFICIAL document and is not for disclosure to any third parties without the specific consent of the Department.' It is clear that this document is from the Department's internal case management system and sets out the various stages of the processing of the application leading to the decision to refuse that application.
4. In one decision making section of the document, the following entry has been made:

'I agree with the recommendation to revoke the licence. Our letter issued on 21 June 2018 made clear the consequences of failing to apply to add a new TM or to request a period of grace by 12 July 2018.

There is no requirement for the Department to prove receipt of a letter by an operator and the recorded delivery is sufficient to confirm that the letter was sent. It was also sent by email and VOL records show that the self-service account was accessed by (the Appellant) on 21 June 2018, presumably as a result of email notification that a document was available to view. It can be difficult to write a clear signature on the mobile units used when post is delivered by recorded delivery and it is also possible that there was no attempt to write an accurate signature. A copy of the signature was not attached to this submission but can be obtained if required. However, as proof of delivery is not required, it should not affect the decision made in this case.

I therefore agree with the recommendation to revoke the licence and that it take immediate effect as (the Appellant) has had ample notice of the need to nominate a new TM.

...

Legislation:

Section 23(1)(g) – That since the licence was issued or varied there has been a material change in any of the circumstances of the licence holder that were relevant to the issue or variation of the licence.

Section 24(1)(a) – The licence holder no longer satisfied the requirement to be of professional competence under the provisions of section 12A(2)(d) (as determined in accordance with regulations and Article 8 of the 2009 Regulation).’

5. In a further decision making section of the document, the following entry is made:

‘I agree that the operator has had ample time to request a period of grace to appoint another TM or make some representation to the Department. In light of no response I am content that the licence is revoked with immediate effect as per the vires cited below.

Legislation:

Section 23(1)(g) – That since the licence was issued or varied there has been a material change in any of the circumstances of the licence holder that were relevant to the issue or variation of the licence.

Section 24(1)(a) – The licence holder no longer satisfied the requirement to be of professional competence under the provisions of section 12A(2)(d) (as determined in accordance with regulations and Article 8 of the 2009 Regulation).’

6. As was noted above, a decision letter was issued to the Appellant on 21 August 2018. The substantive part of the decision letter was as follows:

‘The Department considers that you have failed to continue to meet the requirements for holding an operator’s licence and has decided to **revoke your licence with immediate effect** under the provisions of section 24(1) of the 2010 Act on the following grounds:

- Section 24(1)(a) as the licence holder no longer satisfied the requirement to be of professional competence under the provisions of section 12A(2)(d) (as determined in accordance with regulations and Article 8 of the 2009 Regulation) in view of an apparent failure to nominate a transport manager.

...

There is a right of appeal against the Department’s decision.’

7. On 24 August 2018 an appeal against the decision dated 21 August 2018 was received in the office of the Administrative Appeals Chamber (‘AAC’) of the Upper Tribunal. The Appellant set out the following grounds of appeal:

‘The letters that were sent from yourselves were posted to a house that was registered to the yard, however there is a postbox allocated to my shed as the yard is rented. Therefore I did not receive the letters and was unaware of the timescale.

Please note I was not operating at this time however I have now no other means of income and have a family to support.

I do have a transport manager ready to work with me if I could possibly be granted a stay in my operator’s licence.

I do intend on obtaining the transport manager course.

Please consider my appeal and I look forward to hearing from you.

I can ensure that the postal situation will be corrected so I do not miss important information like this again.’

8. In the file of papers there is a copy of an exchange of e-mails which were made during the period immediately following the receipt of the notice of appeal. In one e-mail a Departmental caseworker was forwarding the notice of appeal and associated application for a stay of the Department's decision. In this e-mail the caseworker notes that she had spoken to the Appellant and that the proposed Transport Manager referred to by the Appellant in his notice of appeal was his former Transport Manager. The caseworker followed up this assertion by contacting the former Transport Manager. In an e-mail dated 24 August 2018 the former Transport Manager wrote that he had not been approached by the Appellant to provide him with Transport Manager services since his resignation from his former role as Transport Manager on 1 May 2018. The former Transport Manager also noted that he had resigned as the Appellant '... was to nominate a family member once they qualified.'
9. In the file of papers there is also a copy of e-mail correspondence which the Appellant forwarded to the Department on 30 August 2018. In this correspondence, the Appellant made the following submissions:

'Further to discussions regarding the revocation of my licence I am writing to inform you as to the events that occurred resulting in this action taking place.

My property is located at the end of the connecting road and provisions were in place for the Royal Mail to deliver any mail into a box provided at the main entrance. My business address is also the same address as the private dwelling in the same location which has clearly caused some confusion when delivering post.

The correspondence sent from yourselves had to be signed for and unfortunately the mail delivery personnel approached the private dwelling, which the resident is an elderly lady, of no connection to me and has a different surname also. The mail was signed for by this lady but unfortunately did not make its way to me until after your designated timescale.

My previous Transport Manager has confirmed to me that he is willing to remain employed by me in this role, until such time as I complete the relevant CPC Transport Manager's course and conduct of the relevant exams scheduled for Friday 14th September 2018. I am currently attending the course and have arrangements in place with ... and have registered with them for the exams.

As I understand from your correspondence, my Operator's Licence was revoked due to me not having a Transport Manager currently employed. I am aware that this is a serious breach of the Operator Licence conditions, but I am employing (*sic*) you to please reconsider your decision on this matter.

Without this licence, I am unable to work which in turn supplies me with an income to support my family. In addition, my employees are also out of work.

I am fully aware and do take part of the responsibility of what has happened, but was unaware of the seriousness of having my licence revoked. As previously stated I am attending the course where it was brought to my attention by the Tutor, of the process, implications and seriousness of this matter.

Attending this course is also highlighted to me the impact this has made and you have any assurances, that this situation will never rise again as I am now in possession of the correct information as to how I should be acting as an owner operator.

I sincerely apologise my part in this action being taken, but had I have been aware of the correspondence being sent to me, I would certainly have acted on it at the time.

Please consider all the information I have provided to you to reconsider your initial decision, and to grant me back my licence.'

10. In correspondence dated 14 September 2018 the Appellant was informed that his application for a stay of the Department's decision had been refused and a copy of the refusal determination was sent to him.
11. The appeal was listed for oral hearing on 29 November 2018 and was called for 10.30 a.m. By 11.00 a.m. the Appellant was not present nor had he left any message with the Tribunal staff either to explain his absence or to request an adjournment. In those circumstances we decided to hear and determine the appeal in his absence.
12. At the oral hearing, the Respondent was not represented.

The relevant legislative provisions

13. Sections 12A 20(1)(b) and 24(1) of the 2010 Act provide:

' 12A. Requirements for standard licences

(1) The requirements of this section are set out in subsections (2) and (3).

(2) The first requirement is that the Department is satisfied that the applicant—

(a) has an effective and stable establishment in Northern Ireland (as determined in accordance with Article 5 of the 2009 Regulation);

(b) is of good repute (as determined in accordance with regulations and Article 6 of the 2009 Regulation);

(c) has appropriate financial standing (as determined in accordance with regulations and Article 7 of the 2009 Regulation); and

(d) is professionally competent (as determined in accordance with regulations and Article 8 of the 2009 Regulation).

(3) The second requirement is that the Department is satisfied that the applicant has designated a transport manager in accordance with Article 4 of the 2009 Regulation who—

(a) is of good repute (as determined in accordance with regulations and Article 6 of the 2009 Regulation);

(b) is professionally competent (as determined in accordance with regulations and Article 8 of the 2009 Regulation); and

(c) in the case of a transport manager designated under Article 4.2 of the 2009 Regulation—

(i) is not prohibited from being so designated by the Department, and

(ii) is not designated to act as transport manager for a greater number of road transport undertakings or in respect of a greater number of vehicles than the Department considers appropriate, having regard to the

upper limits in Article 4.2(c) of the 2009 Regulation, or such smaller number as the Department considers appropriate in accordance with Article 4.3 of the 2009 Regulation.

20 Conditions of licences

(1) On issuing an operator's licence, or on varying such a licence under section 16, the Department may attach to the licence such conditions as it thinks fit—

(b) for requiring the holder of the licence to inform the Department of the occurrence of any event of a kind specified in the licence which affects the licence holder and which is relevant to the exercise by the Department of any power in relation to the licence

24 Revocation of standard licences

(1) The Department shall direct that a standard licence be revoked if at any time it appears to the Department that

(a) the licence-holder no longer satisfies the requirements of section 12A(2), or

(b) the transport manager designated in accordance with Article 4 of the 2009 Regulation no longer satisfies the requirements of section 12A(3).'

The proper approach to appeals to the Upper Tribunal

13. In NT/2013/52 & 53 Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI, Upper Tribunal said the following, at paragraph 8 of its decision, on the proper approach on appeal to the Upper Tribunal:

'There is a right of appeal to the Upper Tribunal against decisions by the Head of the TRU in the circumstances set out in s. 35 of the 2010 Act. Leave to appeal is not required. At the hearing of an appeal the Tribunal is entitled to hear and determine matters of both fact and law. However it is important to remember that the appeal is not the equivalent of a Crown Court hearing an appeal against conviction from a Magistrates Court, where the case, effectively, begins all over again. Instead an appeal hearing will take the form of a review of the material placed before the Head of the TRU, together with a transcript of any public inquiry, which has taken place. For a detailed explanation of the role of the Tribunal when hearing this type of appeal see paragraphs 34-40 of the decision of the Court of Appeal (Civil Division) in Bradley Fold Travel Ltd & Peter Wright v Secretary of State for Transport [2010] EWCA Civ. 695. Two other points emerge from these paragraphs. First, the Appellant assumes the burden of showing that the decision under appeal is wrong. Second, in order to succeed the Appellant must show that: "*the process of reasoning and the application of the relevant law require the Tribunal to adopt a different view*". The Tribunal sometimes uses the expression "*plainly wrong*" as a shorthand description of this test.'

14. At paragraph 4, the Upper Tribunal had stated:

'It is apparent that many of the provisions of the 2010 Act and the Regulations made under that Act are in identical terms to provisions found in the Goods Vehicles (Licensing of Operators) Act 1995, ("the 1995 Act"), and in the Regulations made under that Act. The 1995 Act and the Regulations made

under it, govern the operation of goods vehicles in Great Britain. The provisional conclusion which we draw, (because the point has not been argued), is that this was a deliberate choice on the part of the Northern Ireland Assembly to ensure that there is a common standard for the operation of goods vehicles throughout the United Kingdom. It follows that decisions on the meaning of a section in the 1995 Act or a paragraph in the Regulations, made under that Act, are highly relevant to the interpretation of an identical provision in the Northern Ireland legislation and vice versa.'

Analysis

15. It is, in our view, self-evident that the Appellant wished to instigate a change of the Transport Manager nominated on his operator's licence. The evidence which is before us is unambiguous that the previous Transport Manager contacted the Department, by way of e-mail correspondence dated 6 June 2018, that he had resigned from that role on 1 May 2018. The further evidence of the previous Transport Manager, which we have no hesitation in accepting, is that the reason for his resignation was that the Appellant wished to nominate a family member as the new Transport Manager, once that family member had achieved the necessary qualifications to act as Transport Manager.
16. We observe, at this point, that in paragraph 22 of the determination of the Head of the TRU on the application of his decision to revoke the Appellant's operator's licence, that the Head, whilst acknowledging that the licence was not revoked on the grounds of repute, has made reference to the issue of repute by noting that the Appellant had failed to contact the Department in connection with the resignation of the former Transport Manager. The Head of the TRU noted that it was a condition of the Appellant's operator's licence that he notify the Department within twenty-eight days of any changes or issues that affected the licence. On that basis, the Head of the TRU asserted, in paragraph 22 of his determination, that the Appellant no longer satisfied the requirement to be of good repute pursuant to section 12(a)(2)(b) of the 2010 Act. We are not pursuing the issue of repute any further. This is because the decision to revoke the Appellant's operator's licence was not grounded on repute but on the basis that the Appellant no longer satisfied the requirement to be of professional competence under the provisions of section 12A(2)(d) (as determined in accordance with regulations and Article 8 of the 2009 Regulation) in view of an apparent failure to nominate a transport manager. That makes no difference, however, to our outcome decision which is that the decision of the Head of the TRU to revoke the Appellant's operator's licence on those other grounds was correct.
17. We accept, of course, that the Appellant was wholly entitled to change the Transport Manager nominated on his operator's licence. What he was not entitled to do was to ignore the requirement to ensure that the legislative requirements for his operator's licence were met during the currency of that licence. We are satisfied, on the basis of the evidence which is before us, that the Appellant did receive the correspondence dated 21 June 2018 from the Department. The contents of that correspondence are summarised in subparagraphs (iii) to (vi) of paragraph 2 above and do not need to be repeated here. The substance and purport of the correspondence is unambiguous in setting out the steps which the Appellant was required to undertake, providing practical guidance on how to carry out the necessary actions, allowing for the possibility of a period of grace if the time-limit for action could not be met and,

most significantly of all, in setting out, by reference to the relevant legislative provisions, the consequences for his licence of a failure to respond.

18. We have noted the Appellant's assertion that he did not receive the correspondence of 21 June 2018 because of problems with the receipt of post at the address ascribed in the Department's records for his operator's licence and have noted the submission of the Head of the TRU that proof of posting is sufficient to meet the legislative requirements. We are satisfied that the correspondence was sent by recorded delivery post and that someone signed for it.
19. More importantly, we are also satisfied that the relevant correspondence was sent to the Appellant by e-mail and was, on the balance of probabilities, received by him. We have noted the submission by the Department that the 'VOL records' show that the self-service account (as described above) was accessed by the Appellant on 21 June 2018, and agree that the likely reason for this was that as a result of the e-mail notification it was signposted that a document was available to view. That the Appellant was quick to respond to e-mails from the Department is evidenced by the flurry of e-mail activity to the Department instigated by the Appellant on receipt of the notice of appeal.
20. In our view the Appellant has demonstrated a complete indifference to the regulatory requirements relevant to the holding of a goods vehicles operator's licence. When alerted to the requirement to nominate a new Transport Manager, after being given practical advice as to how those requirements were to be met, after being notified of the required timescale for nomination together with the possibility of a further period of grace and, most importantly, after being informed of the consequences of a failure to take action, the Appellant's response was to do nothing. To repeat, this is redolent of apathy and disinterest.
21. We have also noted that the submission by the Appellant in his e-mail correspondence of 30 August 2018, which post-dated the decision under appeal, that the Transport Manager previously nominated was willing to continue to act in that capacity until the Appellant achieved the CPC qualification was clearly erroneous in that the previously nominated Transport Manager confirmed to the Department that this was not the case.
22. For these reasons we are satisfied that the decision issued on behalf of the Head of the TRU was not plainly wrong and is confirmed. The appeal is, accordingly, dismissed.



**Kenneth Mullan, Judge of the Upper Tribunal,
23 January 2019**