



Neutral Citation Number: [2018] UKUT 0438 (AAC)

Appeal No. T/2018/46

**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 dated 3 August 2018**

Before:

**Her Hon. Judge J Beech, Judge of the Upper Tribunal
Stuart James, Specialist Member of the Upper Tribunal
John Robinson, Specialist Member of the Upper Tribunal**

Appellant:

MARK CLINTON

In attendance: The Appellant did not attend and was not represented

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

Date of hearing: 4 December 2018

Date of decision: 19 December 2018

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that the appeal be DISMISSED

SUBJECT MATTER:- Good repute of Appellant as transport manager. Whether a finding of loss of good repute with a resulting order of disqualification for a period of six months together with a requirement that the Appellant attend a two-day refresher course prior to his nomination as a transport manager in the future were proportionate decisions.

CASES REFERRED TO:- Ladd v Marshall (1954) 1 WLR 1489; 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 of the Traffic Commissioner for the West Midlands (“the TC”) made on 10 May 2018 when he found that the Appellant (“Mr Clinton”) had lost his good repute as a transport manager and ordered that he be disqualified from acting as a transport manager for a period of six months together with a requirement that he attend a two day CPC refresher course if he wished to be nominated as a transport manager in the future. The order was made under paragraphs 1 and 16(2) of Schedule 3 of the Goods Vehicles (Licensing of Operators) Act 1995 (“the 1995 Act”).

The Background

2. Arrow Environmental Services Limited (“AESL”) is a specialist waste processing company. It has held a standard national operator’s licence authorising 12 vehicles and 10 trailers since 1992. It has 6 vehicles in possession. Mr Clinton became a director of the company in 2012, the managing director in the latter part of 2014 and its transport manager in or about October 2015. He had obtained his certificate of professional competence in 2006. Martin, Wayne and Andrew Arrowsmith were directors of AESL along with Andrew Hingley-Smith who was also the company secretary and accountant.
3. On 16 July 2013 (when Mr Clinton was managing director), AESL pleaded guilty to three offences under the Water Industry Act 1991, the offences arising out of the unlawful discharge of waste into the sewage system. It was fined £8,600 and ordered to pay costs of 3,300. Then on 19 May 2015 (when Mr Clinton was managing director), AESL pleaded guilty to four similar offences and was fined £47,000 and ordered to pay costs of £13,707. Then on 5 February 2018, (when Mr Clinton was managing director and transport manager) the company appeared before Wolverhampton Crown Court and pleaded guilty to four further, similar offences. The company was fined £43,750 and ordered to pay £80,000 in costs. All of the convictions were for “serious offences” within the meaning of paragraph 2 of Schedule 3 of the 1995 Act. The TC was not notified of them by either the company or Mr Clinton.
4. On 13 May 2018, Mr Clinton wrote to the TC in the following terms:

“I am currently Transport Manager at Arrow Environmental Services Ltd ... I would like to give notification to remove my name as the CPC holder as I cannot guarantee total compliance with my duties due to my absence from 20th February 2018”.

Mr Clinton’s letter caused the TC to be concerned that AESL may be operating without a transport manager. At about the same time, the convictions set out in paragraph 3 above came to the TC’s attention and as a result, he determined that a public inquiry should be held on 9 July 2018.

5. In preparation for the hearing, AESL produced a bundle of documents which included:
- (i) The prosecution opening note for the sentencing hearing on 5 February 2018 (the appeal bundle only contains the odd numbered pages of that document);
 - (ii) Information held by Companies House relating to AESL;
 - (iii) A chronology of events from the date of the sentencing hearing. This informed the TC that Mr Clinton had commenced his sickness absence on 15 February 2018. The chronology makes plain that a dispute had arisen between AESL and Mr Clinton shortly after the sentencing hearing of 5 May 2018 and that the dispute related to the handling of that prosecution by Mr Clinton. After 15 February 2018, Mr Clinton attended work on a sporadic basis. When Mr Clinton notified the TC of his resignation as transport manager on 13 May 2018, he did not notify AESL of his resignation. Neither did he notify the company when he attended a grievance meeting on 22 May 2018. He did however notify the company on the following day. The call up letter was received on 24 May 2018 and the company then applied to the TC for a period of grace to nominate an alternative transport manager. The dispute between the company and Mr Clinton has not been resolved;
 - (iv) An audit from Andrew Miles, transport consultant in which he concluded that the company had "*many good features*" and was in a better state than many he had seen called to a public inquiry recently. In respect of the role of the nominated transport manager ("NTM") he found a "*woeful*" lack of robust systems going back some considerable period. In fact, there was a lack of evidence that Mr Clinton had ever been the NTM. Basic errors had been made, for example, the filing of the vehicle discs upon renewal of the operator's licence in 2017 rather than placing them in the disc holders in the vehicle cabs. As a result, the vehicles were displaying expired licence discs. Such errors demonstrated either a lack of understanding, knowledge or commitment and a lack of spot checks on the vehicles. It was left to the maintenance contractor to notify the company when vehicles were due for PMIs which had resulted in slippage in the PMI intervals on occasion. There was no VOR policy leading to an impression that a vehicle had missed a PMI. As for the passwords to enable access to the OTC's operator licence database, Mr Clinton had refused to provide them to the other directors. Mr Miles did not find any evidence that Mr Clinton had undertaken any driving licence checks "*on line*" with printouts retained. The company had recently rectified the problem. Whilst the systems for ensuring compliance with drivers' hours and records were to a good standard, they were overseen by persons other than Mr Clinton and there was no evidence of infringements being explained to drivers, discussions between Mr Clinton and the drivers or notes of advice and corrective actions. Similarly, there was no evidence of any supportive training nor any tachograph printouts or endorsements on the reverse of charts. Further, there were a few working time directive infringements that needed to be eliminated.

Finally, there was no evidence of PMI records being reviewed and roller brake testing printouts were not retained.

6. Prior to the public inquiry, Mr Clinton wrote to the Office of the Traffic Commissioner (“OTC”) enclosing a grievance letter dated 9 May 2018 addressed to the directors of AESL; emails to the OTC sent by him in 2015 in connection with his transport manager nomination; a letter addressed to “*whom it may concern*” pursuant to the Public Interest Disclosure Act 1998 asserting failures on the part of his fellow directors in completing driver defect reports during the period of Mr Clinton’s absence; printouts from the electronic driver defect notification system in support of his assertion; three text messages sent by him in 2017 reminding drivers to complete their driver defect reports. In his covering letter, Mr Clinton asserted that whilst offences under the Water Industry Act 1991 did not appear in paragraph 5 of Schedule 2 of the 1995 Act, he would nevertheless have notified the TC of the company’s recent conviction if he had not been absent from work due to stress related issues.
7. At the public inquiry on 9 July 2018, Martin, Wayne and Andrew Arrowsmith attended in their capacity as directors of AESL along with Keith Poston who was responsible for overseeing drivers’ hours and records compliance. The company was represented by Mr Clarke of Smith Bowers Clarke and Mr Miles was in attendance to speak to his audit report. Mr Clinton attended and was unrepresented. The TC heard evidence from Martin Arrowsmith, Mr Miles and Mr Clinton.
8. Mr Clinton told the TC that the reason for his resignation as transport manager from AESL was the number of occasions when directors carrying out driver duties had failed to complete their daily driver defect reports whilst he was absent from work. Mr Clinton contacted the OTC to seek advice and he was advised that non-compliance was his responsibility and so he resigned (the TC commented that he was unsure whether such advice would be given by the OTC). Mr Clinton accepted that he had delayed notifying the company of his resignation and in hindsight accepted that it was a mistake. In cross examination he gave the following evidence in relation to the delay:
 - (i) The delay was caused by him having to use a different email address to notify the company because he could not access his work email;
 - (ii) The delay was caused by him being “*off sick*”;
 - (iii) He did not tell the company of his resignation on 13 May 2018 because on 11 May 2018 he had received an email from the company saying that he would not be allowed to return to work which was contrary to the advice given to him by his GP that he could return provided reasonable adjustments were made;
 - (iv) He had nevertheless sent an email to the company on 18 May 2018 although it transpired that this had not been received by the company because it remained in Mr Clinton’s draft email box. He said that the reason why the email had not been sent was because there had been problems with his email provider although the documentation he produced in relation to that referred to problems commencing on 19

- May 2018, not the 18 May. When cross examined further about this, Mr Clinton said that he had nevertheless sent a similar email to the company also on 18 May 2018 but did not produce any evidence to confirm that and the company denied receiving it;
- (v) The purpose of the email to the OTC was to protect Mr Clinton from the “*falsifications and lies*” of the company. He accepted that he was aware that the delay in informing the company about his resignation was to put the company into immediate non-compliance although that was not his intention;
 - (vi) In any event, he had mentioned his resignation as transport manager in his grievance letter dated 9 May 2018 (although having considered that document, we note that this was not the case).
9. As for Mr Clinton’s evidence about his motivation for resigning as transport manager i.e because director drivers were failing to complete driver defect reports, he told the TC that he had introduced the electronic system, Quick Consign, for reporting defects in 2015. However, the system was not designed to prevent a driver failing to file an electronic report and simply proceeding to the next tab on their electronic device in order to view their work schedule for that day. This was refuted by the company. The TC asked Mr Miles whether he had looked at the system and he confirmed that the system did not allow a driver to proceed to their job sheets without filling in and electronically filing a driver defect report.
10. It was Mr Clinton’s case that having been appointed managing director and then transport manager, he had inherited systems of maintenance and drivers’ hours and records which had been delegated to others and that he had been denied access to those systems. Martin Arrowsmith was in charge of maintenance and the day to day running of the fleet as the Transport Director and Mr Clinton produced two pages of a seventeen page contract of employment in the name of Martin Arrowsmith which contained a number of provisions which were unlawful and a number of sections which were blank. Mr Arrowsmith denied that it was a document produced by the company and he had never seen it. The directors had share agreements rather than employment contracts. Mr Clinton denied that he had created this document and relied upon it to show that Martin Arrowsmith was in charge of the maintenance compliance systems.
11. Mr Clinton told the TC that he did not have access to the “r2c” system which allowed the maintenance contractor to email the PMI records to the company. Mr Clinton only saw these when they were printed off. The paper records were then kept in Martin Arrowsmith’s office which was locked when he was not there. This obstruction of his responsibilities as transport manager did not cause Mr Clinton to resign because he had a family and a mortgage. Meanwhile, whilst unhappy with the situation, he had taken the company forward with planning permission in place and new technology installed, including Quick Consign. He accepted that Quick Consign was a management tool which allowed Mr Clinton to monitor the mileage of vehicles, the defects reported by the drivers and the trailers being used. It also allowed for flexibility in the transportation of waste because jobs could be switched

between drivers depending upon their proximity to a particular load. The system did not assist with drivers' hours and records compliance or with driver licence entitlement. In cross examination, Mr Clinton conceded that he had never been refused access to the drivers' hours and records documentation, he simply had not been given an opportunity to look at the documentation. Neither had he asked to do so because it was part of the delegated duties given to Mr Poston. Mr Clinton could not say whether the company was compliant with the rules and he was unaware that there was missing mileage which was attributed to the use of shunters on the company's extensive site. He had expected those responsible for the systems to ensure compliance and to inform him of any problems. He accepted that he should have checked the systems which were in place "*more vigorously*". His explanation for the current vehicle discs having been filed rather than displayed in the vehicles was that this had occurred when he had been absent. However, Mr Miles told the TC that the discs had been issued in 2017 which pre-dated Mr Clinton's absences from work. Mr Clinton then suggested that the valid licence discs could have been deliberately swapped by his fellow directors with expired discs to place him in a bad light but Mr Miles told the TC that the new discs which had been filed had not been removed from their perforated housing.

12. As for driving licence checks, Mr Clinton told the TC that these were undertaken every six months and he kept a spreadsheet of the results of those checks. The reason why Mr Miles did not find it on the company's system was because it was password protected. Following the hearing, Mr Clinton sent a schedule to the TC in support of the evidence he had given. The schedule showed that the last check on all driving licences had been 18 August 2016 (which we note was eighteen months prior to the point that Mr Clinton commenced his sickness absence).
13. As for his refusal or failure to provide the log in details for the OTC's operator licence database, Mr Clinton gave the following explanations:
 - (i) He had never declined to provide the log-in details. It was simply the case that he had been off work for three months;
 - (ii) He could not remember the passwords;
 - (iii) It was Mr Hingley-Smith who had asked for the passwords and Mr Clinton was not prepared to give the log in details to him because he was the company's accountant rather than a director. Whilst Mr Hingley-Smith attended board meetings, he did so in his capacity as an accountant. Under cross examination and upon being referred to the Company House details contained within the TC's brief, Mr Clinton accepted that Mr Hingley-Smith had been a director of the company since 2010 but that he, as managing director, had been unaware of Mr Hingley-Smith's status;
 - (iv) He accepted that he had also sent a letter to the company stating that he could not provide the log-in details because of data protection rules. The data he was referring to was his own work email address which was personal to him but known by the other directors and employees. He accepted that the log-in details belonged to AESL and that he had

told the company directors to contact the OTC to obtain their own log-in details.

14. Mr Clinton concluded his evidence by stating that in hindsight, being the managing director and transport manager for ten vehicles had caused him to spread himself too thinly. He had tried to do his best but he had not received any thanks and had been belittled.

The Traffic Commissioner's decision

15. The TC curtailed the operator's licence of AESL from twelve vehicles to six for a period of fourteen days under s.26(1)(c)(i), (f) and (h) of the 1995 Act for the following reasons:
 - (i) Failure to notify the TC of convictions for environmental offences;
 - (ii) Failure to request a period of grace in which to appoint an alternative transport manager from February 2018. Instead, two directors had sought to fulfil the transport manager duties when they were not qualified to do so;
 - (iii) Failure to identify instances of missing mileage, where vehicles had been driven without a tachograph chart;
 - (iv) Erratic driver defect reporting;
 - (v) An independent audit found no evidence of the transport manager's involvement even before he went on sick leave.

There had been significant improvement since the call up letter was sent to AESL and it was for that reason that regulatory action had not been stronger. Mr Miles was accepted as the new transport manager pending a more permanent solution.

16. As for Mr Clinton, the TC accepted that he suffered significant health issues which had contributed to preventing him from carrying out his duties correctly. But his conduct had not been beyond reproach:

"He failed to notify me of the company's convictions (he was the managing director as well as transport manager). He resigned as transport manager without telling the company for ten days. Even before going off sick he was failing to exercise the continuous and effective management of the transport side of the business which he was required to do, leaving matters to junior staff without checking that they were doing what they were supposed to be doing. He was oblivious to the vehicles' missing mileage. He declined to pass to the company details of the login passwords to the OTC's operator licence database, thereby preventing it from accessing the system. These are not the actions of a reputable transport manager. I understand that Mr Clinton is in an employment dispute with the company. It is not part of my remit to get involved in that. It is clear that it has affected his performance as a transport manager. But it should not have done.

Andrew Miles, a respected independent transport consultant, found during his audit of the operator no evidence of the transport manager's involvement. Neither did I in the public inquiry, beyond an email to the directors reminding

them of the need for drivers to carry out daily checks. I find that Mr Clinton failed to exercise continuous and effective management and that his involvement was only ever at a distance even before his illness and contractual dispute. I conclude therefore that he has lost his report as a transport manager ...”

The TC then went on to make the order set out in paragraph 1 above.

The Appeal

17. At the hearing of the appeal, Mr Clinton did not attend and was not represented. We therefore considered his appeal in his absence. Prior to the hearing, Mr Clinton provided to the Upper Tribunal some additional documents which were not before the TC, for example, a further schedule of driver licence checks which recorded checks of all driving licences up to 4 September 2017. Mr Clinton did not provide any explanation for why he had produced a different schedule to the TC or why the one now produced had not been available at the public inquiry. Much of the other documentation went to the issue of when Mr Clinton became transport manager, the breadth of his responsibilities as managing director and transport manager and the role that Martin Arrowsmith played in the company as Transport Director. Apart from a number of emails which had been produced in one document by AESL as a result of a Freedom of Information request made by Mr Clinton to the company which was responded to on 22 July 2018, after the public inquiry, all other documentation was in existence and available to him at the time of the public inquiry and there is no application to adduce fresh evidence. We are satisfied that in respect of all of the fresh evidence save for the emails, the conditions set out in *Ladd v Marshall (1954) 1 WLR 1489* are not met. The emails themselves do satisfy the conditions and Mr Clinton is permitted to rely upon them.
18. Mr Clinton's grounds of appeal can be distilled into five grounds. The first relates to the conduct of the directors of AESL and of Mr Clarke during the public inquiry which, Mr Clinton asserts, demonstrated that the company was intent upon "*sullying and tarnishing*" Mr Clinton's reputation. By way of example, Mr Clinton points to an email dated 23 May 2018 from Jim Devereaux (director of AESL and former transport manager) to Mr Hingley-Smith which informed him that Mr Devereaux had "*just been onto the DVSA .. website and checked the licence. As at this time MC is still recorded as the Transport Manager despite his threat to resign*". Mr Clinton asserts that this is evidence that AESL did not need the passwords or log-in details from him in order to gain access to the OTC's operator licence database because they already had access to it.
19. We are satisfied that there is nothing in this point. It is unsurprising in the context of this case, that the company directors were aggrieved by Mr Clinton's conduct, not least by reason of him having informed the TC of his resignation without informing the company, but also as a result of the outcome of Mr Miles' audit. Further, the email of Mr Devereaux cannot assist Mr

Clinton on this point because it does not say that Mr Devereaux accessed the OTC's operator licence database rather than simply logging onto the DVSA website to check the details of the licence. Any interested person can make that check on-line without a password or log-in details and the information provided includes the identity of the nominated transport manager.

20. Mr Clinton's second ground relates to his evidence at the public inquiry that prior to his nomination as transport manager, all of the transport responsibilities had already been allocated to AESL staff and he was denied access to the records. He maintained that Martin Arrowsmith "*blatantly lied*" at the hearing when he denied that he was the Transport Director for the company. This was contradicted by the contract of employment that Mr Clinton had produced.
21. Again, we are satisfied that there is nothing in this point. Upon Mr Clinton's nomination as transport manager, he was responsible for effectively and continuously managing the company's regulatory compliance systems whether he had inherited those systems or not and his failure to do so cannot be excused by his assertion that he was obstructed and denied access to those systems. If that were the case, then he should have stood down as transport manager. We are satisfied that the issue of whether Martin Arrowsmith held the title of "Transport Director" is somewhat of a red herring. Whatever his title may have been, he was not a CPC holder nor the nominated transport manager. It was Mr Clinton's ultimate responsibility to ensure that the company's transport operations were compliant. We should record that during his evidence to the TC, Mr Arrowsmith did not deny that he was the Transport Director.
22. Mr Clinton's third ground was that he was not responsible for notifying the TC of the company's conviction in 2015 because he was not the transport manager at the time. In any event, it did not occur to him that waste pollution offences were reportable under the 1995 Act and neither did it occur to Mr Devereaux who was the transport manager at the time.
23. We are satisfied that a competent and reputable transport manager should be aware of the provisions of paragraph 2 of Schedule 3 of the 1995 Act and the definition of "*serious offence*" and that the TC should have been notified. Whilst Mr Clinton was not the nominated transport manager at the time of the convictions in 2015, he was a CPC holder and the managing director of the company. The TC was entitled in those circumstances, to make an adverse finding that Mr Clinton had failed to notify him of the convictions in both 2015 and 2018.
24. Mr Clinton's fourth ground was that the audit undertaken by Mr Miles took place without Mr Clinton's input and that the company "*would have led him through what goes on and would no doubt pin blame/discrepancies on a person who can't defend himself*". He relied upon an email from Mr Hingley-Smith dated 30 April 2018 to Mr Clinton with the subject "*Home Working*" which addressed the issue of Mr Clinton working from home, reminding Mr Clinton that he should only do so on "*very occasional and necessary times*". It

goes on: *“It may be that the 460 odd emails you have to address may be one of these occasions. The Board may well ask why these could not have been addressed today if they so urgently required your attention. Defect reports are surely the responsibility and for the attention of Martin in any event? What needs to be done that Martin has not dealt with or cannot deal with?”*

25. We have had the benefit of reading the extensive audit report prepared by Mr Miles. It is clear that he had the opportunity of considering all of the documentation that did exist. It is difficult to see how Mr Miles could have been misled by the directors of the company in those circumstances. As for the email that Mr Clinton relies upon, we do not take it to mean that Mr Clinton was being told that he should not undertake his functions as a transport manager but rather that he should be prioritising his work. We note in any event, that on 30 April 2018, Mr Clinton was signed off as unfit to work.

26. The final ground of appeal is that the finding of loss of good repute resulting in the inevitable order of disqualification was disproportionate and that the disqualification period of six months together with a requirement that Mr Clinton attend a two-day CPC refresher course were also disproportionate orders on the facts. Mr Clinton relied upon the burden of his responsibilities as both managing director and transport manager at AESL and a previous decision of the TC reported in the Transport Engineer on 25 October 2012 concerning another transport manager whose good repute remained intact following a public inquiry into maintenance failings. Mr Clinton also asserts that the AESL were intent upon dismissing him and he relies upon an email dated 3 May 2018 from Mr Deveraux to Mr Hingley-Smith, giving him advice about a draft letter which was intended for Mr Clinton. Mr Deveraux advised:

“Basically all MC needs to know is that his behaviour is unacceptable and although not mentioned in this letter, he is putting his job at risk. The threat must be put to him so that it sinks in without ambiguity. It now needs to be said....

The threat of dismissal is absent from the draft and needs to spelled out now that we appear to have dispensed with the delicate niceties of the welcome back and rehabilitation into full time duties. Recriminations regarding the Severn Trent case and it's cost to the business are not for this wake up call but for later “ammunition” ..”.

27. We are satisfied that Mr Clinton has failed to appreciate or has lost sight of the important role that a transport manager plays in a transport operation. He further fails to appreciate the adverse findings in the report of Mr Miles (and for the avoidance of doubt, we do not accept that his report is the result of manipulation by the company directors). Whilst it may very well be the case that he was over-burdened as managing director and transport manager, he should have appreciated that and taken steps to ensure that the position he was in did not affect his over-riding responsibilities as transport manager. His failures more than justified a finding of loss of repute and the modest period of disqualification ordered by the TC along with the requirement to attend a refresher course. The article in Transport Engineer is of no assistance to Mr Clinton. Each case that comes before the TC is fact sensitive and it cannot

assist an Appellant, unless some over-arching point of principle has been determined by a TC in a particular case, to attempt to compare decisions. As for the email written by Mr Deveraux, as the TC rightly found, there was an employment dispute ongoing between Mr Clinton and AESL in the lead up to the public inquiry, which had not resolved and it is not surprising that discussions were taking place between directors about Mr Clinton's future with the company and the best approach to the situation.

28. It follows that we are satisfied that the TC's approach to the issues of good repute and disqualification was neither plainly wrong nor disproportionate. Further, we are not satisfied that this is a case where either the law or the facts impel us to interfere with the TC's decision as per the Court of Appeal decision in Bradley Fold Travel Ltd & Peter Wright v Secretary of State for Transport (2010) EWCA Civ. 695. The appeal is dismissed.

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

Her Honour Judge Beech
19 December 2018