IN THE UPPER TRIBUNAL **T/2018/050**
ADMINISTRATIVE APPEALS CHAMBER

Appellant:	**Diamond Bus Ltd**
On Appeal From:	**Traffic Commissioner for the West Midlands of England**
Reference:	**PD0001374**
Public Inquiry	**21st June 2018 Kidderminster**
Decision Date:	**1st August 2018**
Appeal to Upper Tribunal:	**21st August 2018**
Upper Tribunal Hearing:	**6th December 2018**
Upper Tribunal Decision:	**4th February 2019**

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

Upper Tribunal Judge H Levenson
Upper Tribunal Member G Inch
Upper Tribunal Member L Milliken

100.15 (Traffic Commissioner Appeals: Public Service Vehicles: Appropriate Penalty)

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)
ON AN APPEAL AGAINST THE TRAFFIC COMMISSIONER FOR THE SOUTH EASTERN AND METROPOLITAN TRAFFIC AREA

Decision

1. **This appeal does not succeed**. We confirm the decision of the Traffic Commissioner ("the Commissioner") given on 1st August 2018 under reference **PD0001374** to impose a financial penalty of £9075 on Diamond Bus Limited in respect of non-compliance with timetable obligations. On 20th August 2018 the Commissioner stayed the implementation of this decision pending the outcome of an appeal to the Upper Tribunal. That stay now lapses.

Hearing

2. We held an oral hearing of this appeal at Field House (London) on 6th December 2018. Diamond Bus Ltd, the appellant company, was represented by James Backhouse, solicitor of Backhouse Jones Solicitors. There were no other parties. The Chief Executive of the appellant company was unable to attend because of ill-health, but had not been expected to give oral evidence and the hearing proceeded in his absence. We are grateful to Mr Backhouse for his helpful written skeleton argument.

The Legal Framework

3. In general terms the Transport Act 1985 requires an operator of a local service to register that service with the Commissioner (section 6(2)). A local service is, subject to exceptions especially in relation to distances of 15 miles or more, a service using one or more public service vehicles for the carriage of passengers by road at separate fares (section 2(1)). The Public Service Vehicles (Registration of Local Services) Regulations 1986 as amended specify the particulars that are required for registration. These include a description and map of the route, a timetable indicating proposed times of individual services at principal points on the route (unless the proposed intervals are 10 minutes or less), and an indication of the stopping places where the vehicles will stand for longer than is required to pick up or set down passengers.

4. Sections 26 and 27 of the 1985 Act empower the Commissioner to take a wide range of regulatory actions where an operator fails without reasonable excuse to operate in accordance with the registered particulars. Section 155 of the Transport Act 2000 confers on the Commissioner power to impose financial penalties and sanctions where satisfied that an operator of a local service has, without reasonable excuse, failed to operate a registered service or comply with the requirements of the legislation or regulations. Section 155(1A) specifies the orders that the Commissioner may make, and other provisions in the section give further details as follows:

> **155(1A)** The orders are –
>
> (a) an order that the operator pay a penalty of such amount as is determined in accordance with subsection (3);

(b) an order that the operator expend such sum of money as is determined in accordance with subsection (3) in the manner mentioned in subsection (1B);
(c) an order that the operator provide compensation (see subsection 1C) to passengers of such description as is specified in the order;
(d) …

(1B) An order under subsection (1A)(b) may require the operator to spend money on or towards –

(a) the provision of specified local services or specified facilities to be used in connection with such services;
(b) specified improvements in such services or facilities.

In this subsection "specified" means specified in the order.

(1C) Compensation under subsection (1A)(c) –

(a) may take the form of payments of money, or
(b) may take such other form (including the provision of free travel or travel at a reduced price) as is specified in the order;

and shall be of such amount, or equivalent in value to such amount, as is determined in accordance with subsection (3).

(2) The amount of the penalty shall be such amount as the traffic commissioner thinks fit in all the circumstances of the case, not exceeding the amount determined in accordance with subsection (3).

(3) The amount mentioned in subsections (1A)(a) and (b) and (1C) is such amount as the traffic commissioner thinks fit in all the circumstances of the case, but must not exceed –

(a) £550, or
(b) …

multiplied by the total number of vehicles which the operator is licensed to use under all the PSV operator's licences held by him.

5. Other provisions in section 155 deal with collection and enforcement and create a right of appeal against the making of an order (section 155(6)). The right of appeal was originally to the Transport Tribunal but is now to the Upper Tribunal.

Guidance

6. Subject to certain limitations in relation to Wales and Scotland, section 4C of the Public Passenger Vehicles Act 1981 empowers the Senior Traffic Commissioner to give to the Commissioners guidance or general directions as to the exercise of their functions under any enactment. Such guidance is set out in a series of documents referred to as "Statutory Documents" and Statutory Document No 14 deals with

"Local Bus Services in England (outside London) and Wales". At the time of the Commissioner's decision in this case the version in force was that of March 2015. This was revised with effect from November 2018 but the changes made no difference to the matters relevant to this decision. Mr Backhouse also referred to the "Practice Direction: Standards For Local Bus Services" issued by the then Senior Traffic Commissioner and in effect from 1st January 2005. This is now in force only in Scotland and we make no further reference to it.

7. The particularly relevant parts of Statutory Document 14 of March 2015 state (references are to paragraph numbers):

> Standards
>
> 38. The relevant enforcement agency and third party monitors will record departure times from registered principal timing points except at final destination points where they will only check against late arrival times.
>
> Timetabled services
>
> 39. Bus operation is complex and susceptible to external factors (such as road works and congestion). A degree of flexibility (window of tolerance) has therefore been set when determining if services run on time. Buses should not depart from starting points and registered principal timing points more than one minute early or more than 5 minutes late, or arrive at the final destination point more than 5 minutes late. In general, 95% of buses should meet this standard.
>
> 40. It is acceptable for buses to arrive early at their final destination, but the traffic commissioners do not expect to find undue recovery time inserted in the timetable towards the end of a journey.
>
> Frequent services
>
> 41. Where the service interval is 10 minutes or less, 6 or more buses should depart within any period of 60 minutes and the interval between consecutive buses should not exceed 15 minutes. In general, 95% of buses should meet this standard.
>
> Public Inquiry
>
> 48. The traffic commissioner must make a finding on whether the operator has a reasonable excuse for the failures. A reasonable excuse could include. But is not limited to:
>
> - the impact of breakdowns, accidents and road closures and roadworks;
> - obstruction at bus stops;
> - severe weather conditions; and
> - the changing or closure of the road infrastructure without prior consultation.

Background

8. The appellant, Diamond Bus Limited, is a wholly owned subsidiary of Rotala PLC, which has a number of companies across England delivering coach and bus services. It is traded on the AIM (Alternative Investment Market). More details of the history and structure of the operation are to be found in the appellant's written submission prepared for the Public Inquiry held on 21st June 2018. Diamond Bus Limited operates at five sites – Tividale, Redditch, the Redditch engineering facility, Kidderminster and Lichfield. It had a PPV operator's licence authorising 228 vehicles. After a public inquiry in 2014 it was fined £57,000 by the Commissioner for failing to operate services according to timetable. This was reduced to £34,200 on appeal. A large number of complaints about the appellant's timekeeping and the condition of the vehicles continued to be made but the appellant requested an increase in authorisation to 323 vehicles. After another public inquiry on 30th November 2016 the Commissioner found that, after taking into account reasonable excuse(s), 91% or 92% of services were operated within the window of 1 minute early and 5 minutes late (the Statutory Document 14 of 2015 specified 95% minimum). The Commissioner took the view that progress had been made since 2014 and allowed an increase to 275 vehicles. The remainder of the increase requested would depend on further sustained improvements as shown by DVSA monitoring exercises. These exercises were carried out between May and September 2017 and suggested that 21% of over 1440 journeys were operated outside the window or were not operated at all. The Commissioner called another public inquiry, which took place in Kidderminster on 21st June 2018. "In the meantime my office continued to receive large numbers of complaints from the company's customers, particularly those in the Kidderminster area, about late or non-running services" (paragraph 4 of the Commissioner's decision of 1st August 2018).

9. Before the Public Inquiry was held discussions between DVSA and the appellant resulting in the DVSA accepting that the overall non-compliance figure was 11% of 1443 journeys (rather than 21%), but in the Kidderminster area the figure was 15%. The appellant also gave to the Commissioner written details of its measures taken to improve punctuality and reliability since 2016 including ticket machines and a phone app that enabled tracking, investment in newer vehicles, two way communication between operator and driver, and better communication with local authorities and customers.

The Public Inquiry and the Commissioner's Decision

10. At the Public Inquiry the appellant argued that if reasonable excuses were taken into account, the compliance rate would be 98%. These excuses included (a) the unpredicted effects and disruption caused by roadworks on the M5 (b) severe congestion in Stourport on sunny days (this was on the Areley Kings to Kidderminster route 3) such that the maximum achievable compliance rate was about 80% and (c) vehicle breakdown, although this resulted in a loss of only 0.4% of total timetabled vehicle miles.

11. It was argued that the Kidderminster services amounted to only 3% of the services provided across the West Midlands and adjoining counties. In the West Midlands

metropolitan area the overall compliance was well above the average of 82% (although it is not clear to us what this way of presenting the figures means). Huge recovery times could be built in, but that would mean longer journey times and waiting at stops for longer periods.

12. The Commissioner commented (paragraph 10):

> "I noted that the operator's claim of 98% of services running to time (if all its arguments for reasonable use were accepted) did not seem to correlate with the very high levels of dissatisfaction with the company's services which I was aware of through my postbag."

13. The Commissioner was told on behalf of the appellant that there were no competitors in the Kidderminster area because the routes were very challenging and that its solicitor had advised it to abandon route 3 as being more trouble than it was worth but it "had resisted doing so and had instead reviewed and revised the service" (paragraph 15).

14. The Commissioner noted that paragraph 22 of Statutory Document 14 of March 2015 stated that:

> 22. The window of tolerance takes account of many of the day to day problems which operators can face and that operators can, reasonably, be expected to have contingent plans to deal with other, foreseeable problems.

Nevertheless the Commissioner accepted that there were reasonable excuses in relation to the effects of the M5 roadworks, an abandoned car causing major congestion, a driver becoming ill during a previous journey, vandalism and a mirror cracking (paragraph 20). There were also some mistaken observations (paragraph 26).

15. However, in relation to other matters the Commissioner stated (paragraphs 21 to 25, 27):

> 21. I do not accept as a reasonable excuse the assertion that a service ran late because of congestion on a specific day, where the service normally otherwise ran on time. The fluctuation in congestion levels is covered by the flexibility inherent in the requirement to operate 95% of services within the 1 minute early to 5 minute late window.
>
> 22. I do not accept as a reasonable excuse the claim that a service has run late as a consequence of a previous service running late. The fact is that it was a late service.
>
> 23. I do not accept as a reasonable excuse instances where buses were delayed by having broken down or having had to wait for a part to be fitted. The reference to "breakdown" as a reasonable excuse in paragraph 48 of Statutory Document 14 is primarily a reference to the effect on bus services of other broken down vehicles, eg a lorry broken down in a bus lane, not a reference to the breakdown of the bus itself. The onus must be on operators to maintain their vehicles in a roadworthy and reliable condition so that they are capable

> of performing their day's duties without breaking down. The same goes with punctures; buses do not travel over rocky or otherwise terrain [*sic*] and it should be a reasonable expectation that their tyres are sufficient to withstand a day's service on the roads. If a bus breakdown is caused by external forces (eg vandalism or an accident which is not the fault of the operator) then it be accepted as reasonable excuse …
>
> 24. I do not accept as a reasonable excuse the assertion that an unusually high number of passengers boarded the vehicle at a particular point, thus causing delay. In most instances where this was claimed, the number of passengers boarding still appeared to be fewer than 20 or so and the total boarding time was still within 3 minutes. Fluctuations in the numbers of passengers boarding is catered for by the flexibility of the 95% requirement (see above).
>
> 25. I do not accept as a reasonable excuse a driver going to the wrong place to collect the vehicle. Nor do I accept as a reasonable excuse a service operating late because a driver called in sick before the start of his shift. The company should have procedures and reserves in place to cover for sick drivers.
>
> 27. Overall, while the operator pleaded reasonable excuse for a further 118 of the 159 late/early/failed to operate services … I have accepted reasonable excuse for 30 of the 118. This gives a figure of 129 late/early/failed to operate services out of 1443, a compliance rate of 91.1%. This is more or less exactly where the company was when I last saw it at a public inquiry in November 2016 … Within this average figure are wide fluctuations, with route 3 from Areley Kings to Kidderminster having among the lower levels of compliance (some 80%).

16. The Commissioner concluded that despite the measures introduced the appellant company "has made very little progress on timetable reliability" (paragraph 28) and that "despite the operational difficulties encountered by Diamond, passengers in the Kidderminster area have been particularly poorly served" (paragraph 29). Acknowledging that the Guidance suggested a starting point of a £100 penalty per vehicle where timetable compliance is between 90% and 95% and that commissioners must also apply the principle of proportionality to ensure that any penalty reflects the scale of the failure, and that significantly unsatisfactory levels of compliance were concentrated on a relatively small part of the fleet, he concluded that the appropriate penalty was £33 per vehicle. Given that 275 vehicles were authorised, the total penalty was £9075. We observe that the statutory maximum in this case was £151,250.

17. The Commissioner also stated that he would hold discussions with the company as to how that amount could be applied to compensation for passengers, but he made no order in that respect. On 20th August 2018 the Commissioner stayed the implementation of his order pending appeal to the Upper Tribunal, and such appeal was lodged on 21st August 2018.

Ribble

18. Mr Backhouse referred to the decision of the Court of Appeal in Ribble Motor Services Ltd v Traffic Commission(er) for the North Western Traffic Area [2011] EWCA Civ 267.

19. That case appears to have been the first appeal from the Transport Tribunal (most of the functions of which have since been transferred to the Upper Tribunal) to the Court of Appeal on a point of law. It arose from a major monitoring exercise of the relevant bus services. Lord Justice Simon Brown delivered the lead judgment and the rest of the Court agreed with him. We note that in response to an argument that the Commissioner has no alternative but to consider each and every excuse put forward as a reasonable justification for the various failures to meet the timetable the Court disagreed and held that the Commissioner and Transport Tribunal were right to distinguish between everyday occurrences on the one hand and extraordinary ones on the other. This was not because these everyday occurrences taken singly are necessarily incapable of constituting a reasonable excuse for any given timetable failure but rather because, taken collectively, they cannot properly justify a failure rate whereby more than a proportion of journeys (5%) operate outside a (then) 12 minute window of tolerance (paragraph 40).

20. In relation to the burden of proof, Lord Justice Simon Brown said (paragraph 43),

> "… I would regard this as a classic case for holding that the burden lies squarely upon the operator to prove that he had reasonable excuse for his overall failure to meet the timetabling requirements. Three considerations to my mind combine to support such a view. First, even in a criminal case, if an ingredient of an offence relates to a matter peculiarly within the accused's own knowledge (as must existence of a reasonable excuse), the onus is generally on the accused to prove the exculpating fact. Secondly, throughout the law, there is a general rule that those who seek to rely on exceptions (which include excuses) must establish them (on the balance of probabilities). Thirdly, the Traffic Commissioner's jurisdiction is essentially inquisitorial rather than adversarial in nature, and, there being no one to adopt a prosecutor's role of seeking to disprove any excuses proffered, it should be for an operator to establish them".

21. In response to an argument that it was unlawful to fix on the 95% benchmark, the answer was that it was not, nor was it unlawful in doing so to have regard to the general experience of the Commissioners who, with the Transport Tribunal, inevitably build up a body of experience in this field. Lord Justice Simon Brown said (paragraphs 50 and 51):

> "It seems to me quite unrealistic to suggest that they must put this aside when adjudicating on any particular case and confine themselves solely to such evidence as may be called in that case. Equally it seems to me unnecessary for them to notify the operator whose services they are investigating of the experience or information they have acquired or the particular approach they propose to adopt. In all these cases the operator knows in detail what the

> monitoring exercise has revealed. It is for him then to decide what evidence to call to escape penalty under the Act.
>
> It is not as if failure to attain the 95% benchmark inevitably triggered the statutory sanctions. Far from it [in this case] …".

22. However, Mr Backhouse drew particular attention to paragraphs 52 and 57 in which Lord Justice Simon Brown said:

> 52. In future … Commissioners may have to adopt a more sophisticated approach now that evidence is being made available on just what success rates are realistically achievable. Will it, one wonders, continue to make sense to fix any benchmark figure at all? The better approach may simply be to contrast the actual success rate with that (a) suggested by research evidence to be realistically available, and (b) achieved by other operators in comparable circumstances, and then simply apply the legislation by reference to those essential comparisons. That, however, is for the future. So far as this decision is concerned, I would not regard it as flawed merely because of the introduction of a 95% benchmark into its chain of reasoning.
>
> 57. … As already indicated, I recognise that the Commissioners' approach to the exercise of their … powers is likely in future to be more scientifically based than at the time of this decision. That, however, is not a criticism of earlier attitudes, merely a reflection of the operators' practice nowadays of adducing properly researched evidence at the inquiry. And I would add this. It remains important that these statutory powers should not be emasculated by an over-elaborate approach to the investigation or an unnecessary attention to detail. Ultimately, broad judgments have to be made as to the adequacy and reliability of an operator's published services. Commissioners should continue to impose sanctions on those who seriously fail the travelling public.

23. In paragraph 18 of his written skeleton argument, Mr Backhouse stated,

> 18. The anticipation was, therefore, that operators will put forward specific representations and evidence which, together with other information known to the Traffic Commissioner or in the public domain, will allow her/him to determine the question of "reasonable excuse" more accurately than an arbitrary window of tolerance.

The Appeal

24. Mr Backhouse pointed to the rarity of this kind of appeal, which means that there were issues that had not yet been settled. Very little in terms of regulation had changed since Ribble. He conceded that generally there is a level playing field, but there are different effects on different types of service. The service in Worcestershire/Kidderminster was a small proportion of the overall operation. In respect of it the guidance in the Statutory Document was not fit for purpose. Consultation by the Senior Traffic Commissioner had led to no new common view. He was not saying that there should be a move away from the 6 minute window. That

is arbitrary but it is reasonable and consistent and is widely understood. But that is only stage 1 of the process.

25. Stage 2 is the 95% target. That is arbitrary. There is a very tight window on longer routes and this poses difficulties. For example, on a timetabled 20 minute journey there would be a 25% tolerance, whereas on a timetabled 60 minute journey there would be a tolerance of less than 8.4%. The 95% should instead be seen a "stage setting target". Stage 3 is about reasonable excuse. It might be "perfectly reasonable" if the window of tolerance were sufficient for the particular operating environment. What is needed is a fair assessment of what is being done to reach that target in terms of the operator's management systems, resources and planning. The evidence in relation to route 3 was that operating a different timetable would make no difference.

26. He argued that although the Commissioner did take account of reasonable excuse, this was by way of mitigation whereas it should have been part of the original analysis. The law provided for reasonable excuse. It did not provide for the 95% rule. The focus should be on whether there was reasonable excuse, and that would take care of the irrationality and broad brush approach of the 95% rule. It would also enable account to be taken of the relevance of factors such as operating systems and management processes. This would be consistent with the content relating to examples of a good operation given in the Annex to the guidance in Statutory Document 14.

27. He also argued that the Commissioner had relied on complaints that were not in evidence with details as to times, dates and nature. We pointed out that there was evidence of complaints relating to buses not running or breaking down or being unable to get uphill. Mr Backhouse replied that there were about 120,000 departures during the period with over a million timing points, of which only 1400 had been monitored. In this context, complaints provided a very imprecise measure.

28. Mr Backhouse made detailed comments on the monitoring process but the appeal was not really based on factual disputes (nor was the proportionality of the penalty criticised). The grounds of appeal are really summed up in paragraph 31 of his written skeleton argument of 3rd December 2018:

> "Taking these points together it is now evident that the approach to regulatory enforcement and sanction needs more nuance and to actually work in the context of the actual real time [data] now available. To maintain an arbitrary approach as has happened here with regards to reasonable excuse is, it is submitted, to punish operators who are doing as well as can reasonably be expected of any operator in their network. This reduces confidence in the system and is unjust".

Conclusions

29. This is an appeal against a specific decision made by the Commissioner in relation to the shortcomings of the service provided by a particular operator over a specific period. It is not a policy review of the regulatory system (or part of it) and it is not a philosophical enquiry into the nature of regulatory enforcement.

30. It is certainly the case that the relevant provisions of the Transport Act 1985 refer to an operator failing to comply in various ways "without reasonable excuse", and do not refer to the 6 minute window or the 95% rule. However, unlike in some areas of the law which provide reasonable excuse as a defence, that is not the end of the story. As explained above, the Public Passenger Vehicles Act 1981 empowers the Senior Traffic Commissioner to give to the Commissioners guidance or general directions as to the exercise of their functions under any enactment. This is clear statutory authority for the issue of the Statutory Documents. The question of reasonable excuse must be read together with the guidance in the relevant document. We note the flexibility built into that guidance ("in general" 95% of buses should meet the target). In Ribble the Court of Appeal explicitly rejected the argument that it was unlawful to have the 95% rule.

31. We agree that the question of reasonable excuse is built in to the analysis right from the beginning, but the question is what is to be counted as a reasonable excuse. The answer is (a) that everyday occurrences are taken into account by the application of the 6 minute window and the flexible 95% rule (rather than having a 100% rule, or a rule that failure to achieve 95% will inevitably result in sanctions) and (b) that extraordinary occurrences will be considered on their own merits. Rather than Mr Backhouse's three stages, this really all amounts to one stage in which is decided how to apply the statutory defence of reasonable excuse. This is all in the context of there being timetables supplied by operators which they have initiated or to which they have agreed, with knowledge of how regulatory enforcement currently works, and from which they cannot then be allowed to depart at will.

32. Paragraphs 52 and 57 of the Court of Appeal decision in Ribble are interesting but speculative and do not give the Upper Tribunal authority to overturn the provisions of the Statutory Document just because it might find Mr Backhouse's approach more attractive. There are mechanisms for trying to achieve changes to the guidance, but this appeal is not one of them.

33. As far as we can tell, the Commissioner took into account everything that he should have taken into account and did not take into account anything that he should not have taken into account. He concluded that the appellant had made "little substantive progress on timetable reliability since the public inquiry in 2016 despite the measures it has introduced" (paragraph 28). We agree with that conclusion.

34. For the above reasons this appeal does not succeed and we confirm the decision made by the Commissioner.

H. Levenson
Judge of the Upper Tribunal
4th February 2019