



NCN: [2021] UKUT 12 (AAC)
Appeal No. T/2020/24

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

ON APPEAL from the DECISION of the TRAFFIC COMMISSIONER

Before: M Hemingway: Judge of the Upper Tribunal
S James: Member of the Upper Tribunal
D Rawsthorn: Member of the Upper Tribunal

Appellant: Baljit Singh Atwal

Reference: PD1143801

Date of Hearing: 15 December 2020 (on the papers)

DECISION OF THE UPPER TRIBUNAL

This appeal to the Upper Tribunal is dismissed.

REASONS FOR DECISION

Introduction

1. On 18 March 2020, following a public inquiry (PI) of 25 February 2020, the Traffic Commissioner for the West Midlands traffic area (the TC) decided that the appellant, Mr Baljit Singh Atwal, had lost his good repute as a transport manager pursuant to Schedule 3 of the Public Passenger Vehicles Act 1981 (the 1981 Act) and disqualified him from acting as a transport manager until such time as he has re-taken and passed the transport manager Certificate of Professional Competence (CPC) examination. Insofar as it might be thought relevant, the TC also suspended the public service vehicle standard national operator's licence belonging to Assist VIP Travel Ltd (the Operator), a company which had employed the appellant as its transport manager, for a fourteen-day period and granted it a period of grace in which to appoint a new transport manager. The appellant's appeal to the Upper Tribunal was made later than the permitted time. However, on 29 June 2020, the Upper Tribunal extended that time so as to admit the appeal.
2. The appeal was considered by a panel of the Upper Tribunal on the papers (that is to say without a hearing). That was the mode of disposal which the appellant had requested. We decided, having reminded ourselves of the content of rules 2 and 34 of

the Tribunal Procedure (Upper Tribunal) Rules 2008, that we could fairly and justly decide the appeal in this way and that it would in all the circumstances and particularly bearing in mind the appellant's stated preference, be appropriate for us to do so.

Some relevant legal provisions concerning transport managers

3. Section 14(1) of the 1981 Act mandates a TC to consider, upon an application for a standard licence, whether the requirements of sections 14ZA and 14ZC are satisfied. Section 14ZA(2)(d) requires a licence holder to be professionally competent. An operator who is not personally professionally competent can nevertheless satisfy that requirement if there is in place a transport manager who is both professionally competent and of good repute (see section 14 ZA(3)). Repute has to be demonstrated in accordance with paragraph 1 of schedule 3 which relevantly provides:

In determining whether an individual is of good repute, a traffic commissioner shall have regard to all the relevant evidence and in particular to –

- (a) relevant convictions of his and of his employees and agents; ...
- (aa) relevant fixed penalty notices issued to him and to his employees and agents and;
- (b) such other information as the commissioner may have as to his previous conduct, in whatever capacity, in relation to the operation of vehicles of any description in the course of a business...

4. Where a transport manager has substantially failed in his or her duty to maintain continuous and effective control of an operator's fleet of vehicles the remedy is to consider and where appropriate, find loss of repute as a transport manager (see T/2014/25 and 26 *H. Sivyver (Transport) Operator and Simon Sivyver (Transport Manager)* and T/2012/71 *Silvertree Transport Ltd*). Where a transport manager has lost his or her repute then disqualification is a mandatory consequence (see paragraph 7B(2) of Schedule 3 to the 1981 Act). That means there is no opportunity, after a finding of loss of repute, to consider whether or not disqualification is a proportionate response. Instead the question of proportionality has to be considered when a decision is being taken as to whether repute has been lost or not. So, to justify a finding of loss of repute, the matters found proved must be such that disqualification is a proportionate regulatory response (see T/ 2015/39 *Firstline International Ltd and William Lambie v Secretary of State for Transport*).

The background circumstances

5. The Operator was granted its licence on 12 April 2016, authorising the use of twenty vehicles. On 16 January 2018 an application was made to the Office of the Traffic Commissioner (OTC) to have the appellant added to the licence as a transport manager. It was indicated within completed form TM1 that, if approved, he would be an internal transport manager. It was also indicated that he possessed the requisite CPC qualification. The application was accepted and the licence was varied accordingly. That being so, the appellant commenced his duties.
6. Regulatory concerns emerged and came to the attention of the Driver and Vehicle Standards Agency (DVSA). That led to an investigation and to the preparation of three written reports. The first two of those reports, dated 3 April 2018 and 10 September 2019 respectively, were prepared by one Paul Matthews, a Traffic Examiner for the DVSA. A third report, dated 11 December 2019 was prepared by one Tracy Love, also a Traffic Examiner with the DVSA. It is fair to say that the content of the reports indicated the detection of a large number of failures with respect to the Operator's

maintenance systems and its procedures. A concern was also noted as to what appeared to be difficulty in contacting the appellant in order to discuss various of the concerns which had been identified. It was noted that he worked twenty-two hours per week but not at regular times and that he had “*personal circumstances*” which precluded him from working to a regular pattern. Ultimately though, despite what were said to be the difficulties in contacting him, the appellant did turn up to a meeting to discuss matters with Ms Love concerning the operator’s procedures, record-keeping, disciplinary processes and monitoring processes with respect to drivers, licence checks, training and record-keeping. Ms Love concluded her report of 11 December 2019 with this:

“Assist VIP Travel Ltd have a Standard National Licence granted in 2016. They are authorised to operate twenty vehicles and have at least eleven in possession.

They operate one school contract and private hire, they do not run scheduled services.

Having made two visits to the operating centre and made requests for tachographs and supporting documents I have not been provided with all the requested data and am unable to properly analyse the data I do have. I have made multiple attempts to speak to the Transport Manager, he cancelled one appointment and twice failed to attend the other meetings. I met with him only after he was instructed to attend by his Director.

Each visit to the operating centre left me unable to discuss the systems in use (or otherwise) to ensure compliance as, I was told, there is no member of staff on site that deals with these. It later transpired that the woman carrying out admin duties and one of the drivers possibly carry out the majority of the work around downloading and speaking to drivers as well as scheduling the work.

I have been told that the Transport Manager will answer his phone should the drivers need advice, but I have no evidence to support this, having tried myself and been present when colleagues have attempted to contact him.

I have identified a number of occasions when the company vehicles are driven with no card, and potentially the driver is hiding drivers’ hours offences. I have also identified a driver coming back on duty less than five hours after finishing. The transport manager claims to have known about it, although he later accepted he could not have known, and he has claimed to have investigated one incident of driving with no card and found his driver/yardman/support had done nothing wrong other than allow a mechanic to carry out the walk round inspection. The transport manager has not followed that up and found out who did drive the vehicle whilst his colleague recorded a minimum legal rest on his card, or how that driver met the vehicle. I doubt the findings of the company. No apparent investigation has been carried out regarding any of the other dates when a vehicle was driven with no card.

In a meeting with the Director he accepted that, having given instructions on the systems he wanted used, he had not made proper checks his instructions had been carried out, and he relied on his transport manager doing what he said he was doing.

In a meeting with the transport manager he admitted that he does not check for missing mileage and was not aware of a driver who had lost his driver card. He believed the Director had been involved in the production of paper-work to me, as it had been dealt with by the time he was aware of it. He admitted delegating duties to office staff and a driver, and making no checks that the work had been done correctly. He made a record of his usual duties and the time spent on each, and showed tachograph analysis to be a very small part of his week.

The two vehicle units produced to me with raw data appear to have missed the 90-day maximum for downloading and the cards are not being downloaded in accordance with the 28-day legal maximum. There is no indication of any card downloads conducted prior to April/ May of this year.

The trail of correspondence with the company left me unable to accept that the author of the emails is, in fact, the Director or transport manager. The response to the TEVR deals with mainly denial of the issues reported and amending the verbal evidence given by the transport manager during the meeting.

The Director and transport manager accepted that they had not written the responses, this had been delegated to office staff. In the interest of reported fact, the Director was offered time to submit a report of his own. The transport manager was reminded he was to also submit a report of his own. Neither party has taken the opportunity to revise a response to the shortcomings found.

As a consequence, it is considered that the operator is not complying with the Statement of Intent with regard to the undertakings submitted at the time of application for the Operator's licence. I would also suggest that the nominated transport manager, Baljit Singh Atwal does not have continuous and effective management of the Transport Business".

7. On 20 June 2020 the OTC wrote to the appellant calling him to a PI. The call-up letter made reference to the above reports of the two traffic examiners, set out certain written material which it was said the TC would consider and indicated an opportunity would be given to the appellant to explain what he was doing to improve compliance with the regulatory requirements. It was made clear that the TC would look into the question of the appellant's good repute and professional competence. It was also pointed out that the Operator had also been called to the same PI.
8. The PI proceeded, as scheduled, on 25 February 2020. The appellant was in attendance and was represented. It was indicated at the outset, by the appellant's representative (who was also the representative for the Operator) that whilst a number of regulatory failings were accepted, it was to be contended that there had been recent improvement and that certain of the failings had occurred prior to the appellant's appointment as transport manager.
9. Traffic examiner Love gave oral evidence which included some concessions but which was largely in line with the content of her report. The appellant gave oral evidence too. He was closely questioned (entirely appropriately) by the TC regarding a number of aspects of his evidence. In closing remarks, the representative indicated that the operator and the appellant appreciated there was a need for improvement if the licence were to continue and that the appellant accepted he would require further training with respect to computer systems and other matters. It was pointed out that he had recently undertaken a two-day transport manager refresher course.

The Traffic Commissioner's decision

10. It is fair to say that the TC's written decision of 18 March 2020 is relatively brief. Succinctness of itself, though, is not to be criticised and we shall address the question of the adequacy of the reasoning below. The TC confirmed, in his decision, that with respect to the appellant he was finding that he had lost his good repute as a transport manager and that he was disqualifying him from acting as a transport manager until such time as he has re-taken and passed the CPC examination. As to why he had so decided, the TC said this by way of explanation:

“5. The reasons for the decision are as follows:

- a. The operator has failed to fulfil its undertaking to ensure the observance of rules relating to drivers' hours and tachographs. The operator has failed to identify and investigate missing mileage. A driver started duty after less than five hours daily rest. Vehicle units have not been downloaded within the 90-day deadline and driver cards have not been downloaded within the 28-day deadline. Analogue tachograph charts show continuing centre field and mode switch errors which were clearly not being picked up or dealt with by the transport manager. Digital tachograph data seems only to have been produced in the days immediately preceding the public inquiry.
- b. The operator lacks effective systems to deal with breaches of the drivers' hours rules by drivers. One driver has received four verbal warnings for significant drivers' hours offences. Another driver is still driving without a card.
- c. Transport manager Baljit Singh Atwal has failed to exercise continuous and effective management. He has delegated duties to office staff and a driver and has not checked to ensure that they have carried out these duties correctly. He has clearly failed to identify drivers' errors in completing analogue charts and has little or no understanding of the digital tachograph analysis system used. Although he has been on a two-day CPC refresher course, it does not seem to have led to any practical improvement. Mr Atwal has also been elusive, cancelling one appointment with DVSA and failing to attend two other meetings;
- d. Director Satpal Bains has relied on his transport manager to implement effective systems but failed to check that this was being done.

6. I conclude that the operator's conduct falls within the "serious to moderate" category defined in the Senior Traffic Commissioner's Statutory Guidance Document no. 10. A suspension for fourteen days is therefore an appropriate and proportionate outcome.

7. While I accept that transport manager Baljit Singh Atwal has not deliberately set out to fail to comply, I am in no doubt that he has been a semi-detached presence and has failed to exercise the required continuous and effective management of the transport activities of the business. He has been too ready to delegate duties to unqualified and unsuitable people and has failed to check whether these duties have been carried out. Many of them have not. His knowledge of the digital tachograph analysis system remains poor. He has been elusive throughout much of DVSA's investigation. I have no confidence that he will be able to ensure compliant operations. I am therefore concluding that he lacks the good repute necessary for a transport manager. Because Mr Atwal's failings are such that the mere passage of time is unlikely to remedy, I am disqualifying him from acting as a transport manager for an indefinite period of time. However, he may re-establish his good repute by taking and passing the CPC transport manager examination".

11. As already indicated, an appeal followed.

The grounds of appeal

12. In his grounds of appeal to the Upper Tribunal the appellant advanced a number of propositions. He asserted that he had made considerable efforts to improve his own knowledge and competence and that he had secured improvements in the way the Operator went about things. He had recently attended the refresher course and would have attended such a course earlier had it not been for a postponement. Given the improvements he had brought about in the Operator's procedures the decision by the TC that he had lost his good repute was "*too harsh a penalty*". The adverse decision with respect to him had the potential to rob him of his livelihood. He had made mistakes and there had been failings on his part but he had been seeking to rectify them. Whilst he was not "*greatly*" disputing the content of the TC's written reasons (which he referred to as "*the TC's overall statement*") he was not aware of a driver still driving without an appropriate card. He suggested, in effect, that the TC might have got that wrong. The TC

had attached too much importance to centre-field errors which were, in truth, only very minor errors. The TC had been unfair in concluding that his attendance on the CPC refresher course had not led to practical improvement because he had only attended that course a matter of days before the PI. He had not been elusive in his interactions with the DVSA.

The approach of the Upper Tribunal on an appeal such as this

13. Paragraph 17(1) of Schedule 4 to the Transport Act 1985 provides:

“The Upper Tribunal are to have full jurisdiction to hear and determine on all matters (whether of law or of fact) for the purpose of the exercise of any of their functions under an enactment relating to transport”.

14. Paragraph 17(3) of that Schedule provides that the Upper Tribunal may not take into consideration any circumstances which did not exist at the time of the determination which is the subject of the appeal. The Upper Tribunal’s jurisdiction was examined by the Court of Appeal in *Bradley Fold Travel Ltd and Another v Secretary of State for Transport* [2010] EWCA Civ 695. It was stated therein that the Upper Tribunal has a duty on an appeal to it, to determine matters of fact and law on the basis of the material before the TC but without the benefit of seeing and hearing from witnesses. It was further stated that the burden lies on an appellant to show, in order to succeed on appeal, that the process of reasoning and the application of the relevant law requires the Upper Tribunal to adopt a different view to that taken by a TC. In other words, it must be shown that the TC was plainly wrong.

Our reasoning on the appeal

15. Although the appellant asserted in his written grounds that he did not greatly dispute what the TC had to say in the written reasons, he did point out some areas of dispute and it is to those which we turn to first of all.

16. The TC decided that the appellant had been “elusive” during the investigation being carried out by the DVSA. The appellant says that is not right. There is no doubt that traffic examiner Love considered that he had been difficult to get hold of. As noted above, she stated in her report of 11 December 2019, that she had made multiple attempts to speak to him, that he had cancelled an appointment and had twice failed to attend other meetings. She also noted that while she had been assured that he would answer his telephone should any drivers telephone him for advice, she was not persuaded that that was so having herself tried to telephone him without success. We do note, as recorded at pages 99 and 100 of the appeal bundle before us, that it was explained to traffic examiner Love that the appellant has “personal circumstances” which prevent him from working regular hours and which has led to his working week consisting of only twenty-two hours, but it is nevertheless the case, as the TC effectively points out, that a transport manager is required to exercise continuous and effective management of the operator’s transport functions. Whilst it might be that one or two specific failed attempts at contact referred to by Traffic Examiner Love can be explained, in our view what emerges is a picture, in general terms, of troubling inaccessibility to the transport manager who is, after all, a pivotal person within the context of the operator’s functions. In those circumstances we are not in a position to say that the TC’s conclusion on the point was plainly wrong or, indeed, wrong at all. So, we resolve that matter against the appellant.

17. The TC, in his written reasons, expressed concern regarding the lack of effective systems in place to deal with breaches of drivers’ hours rules, a matter which lies within the

province of an operator's transport manager (see paragraph 5b of the written reasons). Whilst the appellant has in fact not sought to dispute in general terms, the lack of effectiveness of such systems, and whilst he has not sought to dispute the observation made by the TC disapprovingly, that one driver had received four verbal warnings for significant such offences (the implication being that disciplinary action should have been escalated given the successive breaches) he did dispute the TC's finding that a different driver was "*still driving without a card*". The matter was, in fact, raised at the PI (see page 311 and page 312 of the appeal bundle before us) and concerned a specific driver. The evidence of the Traffic Examiner was that he had removed his card, driven for a distance, and then re-inserted it on a particular day. The TC enquired of the appellant whether he had investigated the allegation. The recorded reply is "*Yeah, we ask him. He said, "No I didn't"*". That incident was said to have occurred on 10 January 2019. Traffic examiner Love's evidence was that there was a further such incident on 21 September 2019 involving driving without a card for a whole day though whilst that offence can be related to the vehicle it is not entirely clear it can necessarily be related to the same specific driver. Whilst it might be that there was not the evidential basis to enable the TC to conclude, with certainty, that such conduct was still ongoing as at the date of his written decision, there was clearly evidence, of such having occurred in the past and not having been appropriately dealt with. Accordingly, we conclude that the TC was right to be concerned about such breaches of driver hours rules and to conclude, as in effect he did, that the appellant and the operator had not dealt appropriately with such incidents.

18. The TC noted that the appellant had attended a two-day transport manager CPC refresher course. Prior to referring to the attendance on that course, the TC noted that the appellant had delegated duties to other staff and had then failed to check that they had carried them out correctly; had failed to identify drivers' errors in completing analogue charts; and had lacked understanding of the digital tachograph analysis system. Having made those points (which have not been specifically disputed by the appellant) the TC went on to opine that the attendance on the refresher course had not led to "*any practical improvement*". We accept the appellant's contention that there had not been sufficient time between his attendance upon the refresher course and the taking place of the PI for there to have been a proper opportunity for him to demonstrate improvement. In fact, it appears from an exchange at the PI (see page 300 of the appeal bundle) that he had only attended the course something in the region of a week prior to the PI taking place. In our view therefore, the TC was wrong to take a point against the appellant to the effect that there had been a lack of evidence of improvement in that short period. But the real point the TC was seeking to make was that there had been a range of troubling failures on the part of the appellant as identified above, and, as we say, he does not appear to specifically dispute those. As such, the TC's failure to appreciate, when preparing his decision, that there had only been a very short period between the attendance on the course and the PI taking place, was not an impactful one.

19. There are then some points made in the grounds of the appeal which might properly fall within the category of mitigation. As to those, the appellant says that he has made improvements, both in the context of his own knowledge regarding transport manager functions and in the Operator's systems. He stresses that he did attend a refresher course. He acknowledges that there has been some degree of fault on his part but asserts that he is seeking to rectify any shortcomings. Those sorts of points had been made to the TC by the appellant's representative at the PI. It is clear, however, that the TC considered the failings of the appellant as identified in the written reasons to be so significant as to outweigh them. In our judgment it cannot seriously be contended that the TC was plainly wrong in that conclusion.

20. In terms of the weight to be attached to various failings, the appellant contended that the TC had attached too much weight to what are described as “*centre-field errors*”. Certainly, the TC made mention of those (see paragraph 5a of the TC’s written reasons) but such was mentioned as one feature within a package of failings. In our view it cannot properly be said that the TC had focused on centre-field errors in particular or had attached too much weight to them.

21. The appellant made points relevant to proportionality. He said that the decision as to repute had been “*too harsh*” and that it had the potential to rob him of his livelihood. As noted, there is a requirement to consider proportionality as a component of the decision as to whether or not good repute has been lost. There is not, though, an opportunity for proportionality to be considered in the context of disqualification once it has been concluded that good repute has been lost. The TC did not expressly indicate that he had considered proportionality as a component of his decision on repute. But in our judgment, it is sufficiently clear from what was said at paragraph 7 of his written reasons, that the TC did undertake a consideration as to the proportionality aspect in the context of his adverse finding on repute. Indeed, on the plus side from the appellant’s perspective, he accepted that he had not deliberately set out to fail to comply. He did not actually mention the impact of the decision upon the appellant’s ability to earn a living but he did make it clear that his decision with respect to disqualification left it open to the appellant to re-establish his good repute. He also, in the same paragraph, summarised the failings of significance which he had detected. We have concluded, therefore, that the TC did correctly consider proportionality as a component of his decision as to repute and that the view he reached as to it was not plainly wrong.

22. We did have some concerns (though not specifically raised by the appellant) regarding the adequacy of the TC’s written reasons given the brevity with which the TC expressed himself. But we do not set our caps against succinctness and, as was stressed in 2008/130 *Lorna Eddie* it is not necessary for TCs, when producing written reasons, to rehearse the entirety of the evidence that has been put before them nor to repeat and determine every point that has been raised. We do think the written reasons might have been more complete had there been references to specific passages in the above reports or to certain of the evidence given at the PI which underpinned the TC’s primary findings. But it is obvious from a perusal of that evidence why it is that the TC reached the conclusions he did. That being so we have decided that, against the background of the evidence before him, the TC’s reasoning was sufficient.

Decision

23. This appeal to the Upper Tribunal is dismissed.

M R Hemingway
Judge of the Upper Tribunal
Dated: 20 January 2021