



NCN: [2022] UKUT 00204 (AAC)
Appeal No. UA/2021/000573/T

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

ON APPEAL from a DECISION of the TRAFFIC COMMISSIONER for the West of England Traffic Area.

Before: M Hemingway: Judge of the Upper Tribunal
R Fry: Member of the Upper Tribunal

Appellant: Agri-Tel (Devon) Limited (Keith Lerwill)

Reference no: OH247279

Heard at: Field House in London

Date of hearing: 19 July 2022

Date of Decision: 26 July 2022

DECISION OF THE UPPER TRIBUNAL

This appeal is dismissed.

SUBJECT MATTER

Restricted Licences
Financial Requirements

CASES REFERRED TO

Bradley Fold Travel Ltd and Anor v Secretary of State for Transport [2010] EWCA Civ 695

T/2012/46 Pradeep Kumar Sharma t/a RS Fruitstore: [2012] UKUT 421 (AAC)

NT/2015/15 Peter Martin Haughey: [2016] UKUT 0046 (AAC)

T/2013/77 Hughes Bros Construction ltd

T/2019/76 Armthorpe Skips Ltd: [2020] UKUT 0160 (AAC)

T/2021/51: Belistore Limited: [2021] UKUT 0271 (AAC)

REASONS FOR DECISION

Introduction

1. This is an appeal to the Upper Tribunal brought by Agri-Tel (Devon) Limited, in the person of Mr Keith Lerwill (“the appellant”). The appeal is directed towards a decision of a Traffic Commissioner (“the TC”) made on 12 December 2021, to refuse the appellant’s application for a restricted goods vehicles operator’s licence.

2. The appeal was listed to be heard before a panel comprising a Judge and two Members of the Upper Tribunal. However, shortly prior to the date of the hearing, the appellant sent a communication to the Upper Tribunal in which he indicated that he did not propose to attend. The matter was left in the hearing lists in case the appellant should change his mind. On the morning of the hearing, it became clear that one of the Members would not be able to travel to London due to significant disruption to the National Rail Network caused by excessively warm weather. It also became clear (since he did not attend) that the appellant had not changed his mind. The remaining panel members decided the appeal on the basis of the written material before it. As to that, there is nothing in legislation or any Practice Direction which actually requires a three-person panel to determine an appeal such as this and we felt able to justly do so because the issues we had to resolve in order to decide the appeal were relatively clear and straightforward.

Some relevant legislation

3. Section 2 of the Goods Vehicles (Licensing of Operators) Act 1995 (“the Act”) sets out a general rule that no person shall use a goods vehicle on a road for the carriage of goods for hire or reward or for or in connection with any trade or business carried on by him, except under a licence issued under the Act. Section 3 of the Act provides for the granting of standard licence or a restricted licence. Section 13A of the Act contains requirements for standard licences and included is a requirement that an applicant for such a licence “*has appropriate financial standing (as determined in accordance with paragraphs 6A of Schedule 3)*”. Section 13B contains requirements for restricted licences. Section 13C contains further requirements for both standard and restricted licences. Section 13(2) of the Act provides:

(2) On an application for a restricted licence a Traffic Commissioner must consider

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(a) whether the requirements of Section 13B and 13C are satisfied, and

(b) if the commissioner thinks fit, whether the requirement of section 13D is satisfied.

4. Section 13D provides:

“13D. Further requirements for standard and restricted licences

The requirement of this section is that the provision of the facilities and arrangements for maintaining the vehicles in a fit and serviceable condition (see Section 13C (4)) is not prejudiced by reason of the applicant’s having insufficient financial resources for that purpose.”

The background and the TC's decision

5. The appellant applied, on behalf of his business, for a restricted goods vehicle operator's licence. He submitted supporting documentation which included a bank statement in the appellant's own name (not in the name of Agri-Tel (Devon) Limited) which showed a debit balance of £74,275.61 as at 9 June 2021 and a debit balance of £74,805.56 as at 2 July 2021. It was indicated on the bank statements that the appellant had an overdraft limit of £85,000.

6. The precise date the licence application was made is not clear but it was acknowledged by the Office of the Traffic Commissioner ("OTC") on 20 July 2021. On that date the OTC wrote to the appellant indicating that the application was considered to be incomplete. One of the concerns expressed was that the bank statements provided did not cover a full 28-day period. Another was that the bank statements were not in the name of Agri-Tel (Devon) Limited. Thus, it was said that the financial evidence provided was not acceptable. It was also indicated that the TC required evidence of available funds of £3,100 for a 28-day period the last date of which should not be more than 2 months from the date of receipt of the application.

7. It appears that the appellant did not immediately respond to that letter because, on 6 September 2021, the OTC again wrote to him once again, outlining the same concerns and requesting the same evidence. The appellant, seemingly by way of a response to that letter, submitted a bank statement relating to a different account, this one being in the name of Agri-Tel (Devon) Limited, which showed a credit balance of £701.85 as at 1 June 2021 and then, as a result of a single transaction on 26 July 2021, a credit balance of £3,201.85 on that date. It appears that nothing very much happened for some time but then, on 7 December 2021, the OTC wrote to the appellant indicating that the TC was proposing to grant the application so long as the appellant was able to provide "*bank statements in the name of Agri-Tel (Devon) Limited covering the full month of November 2021*". The appellant responded by providing a bank statement which was in the name Agri-Tel (Devon) Limited and which showed an opening balance of £3,164 on 1 November 2021 but a closing balance of only £126 on 29 November 2021, a withdrawal in the sum of £3,000 having been made on that date. Thus, that bank statement did not meet the TC's specified requirements.

8. On 12 December 2021 the OTC wrote to the appellant to inform him that the TC had refused his application. By way of explanation this was said:

"The financial information provided was not acceptable because funds have been withdrawn from the account in the November statement provided. Therefore, you have failed to demonstrate that you meet the requirements of Section 13D of the above Act, which requires that there are sufficient financial resources for maintaining vehicles in a fitting serviceable condition".

9. A little more of the TC's reasoning may be gleaned from an exchange of emails between the appellant and a member of staff at the OTC following the sending of that decision letter. In one of the emails sent by the OTC's staff member it was explained to the appellant "*the Traffic Commissioner refused the application as financial resource has not been demonstrated. The Traffic Commissioner noted that the nominated vehicle is 11 years old so found that Section 30D applies to cover its maintenance*".

The grounds of appeal to the Upper Tribunal

10. The appellant exercised his right of appeal to the Upper Tribunal. His grounds contained 3 contentions. The first (though this is not entirely clear) appears to be a contention that since he had shown he had a sum in excess of £3,100 for 28 days in November 2021, that should have been sufficient. The second contention was that he had provided sufficient financial evidence via the previous bank statements he had submitted. The third contention was to the effect that he has spacious and modern facilities for the maintenance of his vehicles.

Our approach on an appeal such as this

11. The Upper Tribunal, in an appeal of this sort, has the function of hearing and deciding on all matters whether of fact or law. But it may not take into consideration any circumstances which did not exist at the time of the determination which is the subject of the appeal. In *Bradley Fold Travel Ltd and Anor v Secretary of State for Transport [2010] EWCA Civ 695*, it was explained by the Court of Appeal that the Upper Tribunal has the 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 explained 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 the TC.

Our reasoning on the appeal

12. The OTC, in correspondence it sent to the appellant, sought evidence of available funds of at least £3,100, initially for a 28-day period, and then for the whole of November 2021. That figure was derived from a formula contained within the applicable legal provisions relating to the financial standing requirement which has to be met by an applicant for a standard licence. This appellant, of course, was seeking a restricted licence.

13. The claimant contends that he did provide evidence of available funds through the bank statement for the account in his own name, for the period from 9 June 2021 to 2 July 2021. Whilst it is true that the statement revealed a large debit balance throughout that period, it is right to say that there was never a point where the gap between the debit balance and the overdraft facility was less than £3,100. So, it might be said that the statement demonstrated the availability of the required sum for the limited period it covered. But the period covered, as the OTC had pointed out in its correspondence to the appellant, did not extend to 28 days. Further and perhaps more importantly, as again the OTC had pointed out in correspondence, the account was in the appellant's own name and not in the name of the relevant limited company applicant.

14. The request for evidence of available financial resources in the sum of £3,100 for a 28-day period was in line with statutory guidance contained in Senior Traffic Commissioner: Statuary Document No 2: Finance. Further, when a licence is sought by a limited company (as here) money in the personal bank account of a director is not “available” because it is not money which belongs to the company. Such was made clear in (*T/2013/77 Hughes Bros Construction Ltd*). The principle was applied with respect to restricted licences in *T/2019/76 Armthorpe Skips Ltd*. Further, if there were any doubt as to whether the principle extended to restricted licences the matter was put beyond doubt in *T/2021/51 Belistore Limited*. Quite

simply, the bank statements covering the period from 9 June 2021 to 2 July 2021 did not assist the appellant at all because they were not in the company name. The TC was clearly entitled to proceed on that basis.

15. There is then the statement covering the period from 1 July 2021 to 26 July 2021 referred to above. That statement revealed a balance below the required amount for most of the period it covered and did not exceed it until a single payment of £2,500 made on 26 July 2021. It did not cover the 28-day period which the TC had asked for. For those reasons the TC was entitled to disregard that bank statement, as he obviously did, as evidence of available funds notwithstanding that it was, unlike the first statement, in the name of the relevant limited company.

16. There is then the bank statement for November 2021. The TC had made a simple and straightforward request of the appellant which was for evidence of available funds of £3,100 or more throughout the whole of November 2021. Against that background it is very surprising that there was withdrawal of £3,000 on 29 November 2021, thereby reducing the credit balance from £3,126 to £126 shortly prior to the end of that month. The reason for that, on the face of it, rather puzzling withdrawal has not been provided in the grounds of appeal and does not appear to have been provided to the TC prior to his making his decision.

17. Had we been dealing with a standard licence the position would have been entirely straightforward. We say that on the basis that the appellant did not comply with reasonable requests to properly evidence the £3,100 sum required for the periods sought by the TC. However, the “*financial standing*” requirement is one which applies, as we have already observed, to standard licences but not to restricted licences. What does potentially apply with respect to restricted licences is the test set out in Section 13D of the Act (see above). But it is necessary, first of all, for the TC to decide, in his or her discretion, to apply that provision. The different nature of the requirements for financial standing and sufficiency of financial resources has been emphasised by the Upper Tribunal in *NT/2015/15 Peter Martin Haughey* and *T/2012/46 Pradeep Kumar Sharma t/a RS Fruitstore*.

18. In this case the decision letter of 12 December 2021, whilst making it clear that the TC had applied Section 13D of the Act, did not make it clear that discretion to apply it had been exercised and did not explain why such discretion had been exercised. In our view it should have done. But we do accept, in this case, that the TC did consciously exercise discretion given the content of the email referred to above and given the specific reference to the provision in the decision letter. He clearly took the view that, whilst it will not necessarily follow in all cases, it would be right to require the appellant to properly evidence over a reasonable period the financial resources of a level equating to that which would have been required of him under the financial standing test applicable to those seeking or holding standard licences.

19. In the above circumstances, whilst we do think more by way of explanation as to the TC’s reasoning could usefully have been provided, the decision was not made in error of law nor was it otherwise plainly wrong. The consequence of that is that this appeal must fail. However, we see no reason on the material before us as to why a fresh and better evidenced application for a restricted licence might not succeed. But, of course, that is not a matter for us.

Decision

20. This appeal to the Upper Tribunal is dismissed.

M Hemingway
Judge of the Upper Tribunal

R Fry
Member of the Upper Tribunal

26 July 2022