NCN: [2022] UKUT 00287 (AAC)
Appeal No. UA-2022-000841-T

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

ON APPEAL from a DECISION of the TRAFFIC COMMISSIONER for the NORTH WEST of ENGLAND

Before: M Hemingway: Judge of the Upper Tribunal
A Guest: Member of the Upper Tribunal
G Roantree: Member of the Upper Tribunal

Appellant: Shift-It Groundworks (North West) Ltd

Reference No: OC2044230

Representation:

For the appellant: No attendance

Heard at: Bradford

Date of Hearing: 28 October 2022 (on papers)

Date of Decision: 2 November 2022

DECISION OF THE UPPER TRIBUNAL

This appeal is dismissed.

Subject matter: Financial Standing

Cases referred to:

Bradley Fold Travel Ltd & Anor v Secretary of State for Transport [2010] EWCA Civ 695.
Ladd v Marshall [1954] EWCA Civ 1

REASONS FOR DECISION

1. This appeal to the Upper Tribunal has been brought by Shift-It Groundworks (North West) Ltd ("the appellant") in the person of Mr Christopher Brown ("Mr Brown"), its sole director. The appeal is directed towards a decision of the Traffic Commissioner ("the TC") embodied in a letter of 4 July 2022 to revoke its standard national goods vehicle operator's licence with effect from 30 June 2022.

2. The appeal had been listed for an oral hearing scheduled to take place at Bradford on 28 October 2022. However, on 27 October 2022 the Upper Tribunal received an e-mail from Mr Brown in which he expressed disenchantment with the decision to revoke the above licence but stated "*I will not be attending the hearing on Friday 28th October at Bradford Tribunal Courts*". The e-mail did not, on its wording, constitute notice of withdrawal so, having reminded ourselves of the content of rule 2 and rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008, and having satisfied ourselves that we were able to justly decide the appeal on the written material before us, we determined the appeal without a hearing.

3. It is worth setting out something of the history. Mr Brown was previously the sole director of a company called Shift-It Plant Hire (North West) Ltd. That company too held a standard national licence. It was called to a public inquiry ("PI") as a result of concerns regarding its satisfaction of the financial standing requirements as contained at Section 13A(2)(c) of and paragraph 6A of Schedule 3 to the Goods Vehicles (Licensing of Operators) Act 1995 ("the Act"). Following the PI, which took place remotely on 20 April 2021, the TC revoked the licence and disqualified that company from holding any type of operator's licence for a period of 12 months. A formal warning was recorded against Mr Brown as director.

4. On 14 July 2021 the appellant was granted its licence. Various undertakings were recorded as having been given by the appellant including one to send the Office of the Traffic Commissioner ("OTC") evidence of its finances covering the full period from the start of October 2021 to the end of November 2021, to be provided by the end of December 2021. It was a component of that undertaking that the evidence would demonstrate compliance with the financial standing requirements. Pursuant to the formula prescribed in the legislation, and since the appellant was only operating and had only sought authority under the licence for a single vehicle, it was required to show it had at its disposal at all times (to use the wording in Schedule 3) the sum of £8,000. Given the terms of the undertaking it needed to demonstrate available funds at that level, on average, over the above 3-month period. Such a requirement is in accordance with what is said in the Senior Traffic Commissioner Statutory Document No 2: Finance, which is a document in the public domain, and which is issued pursuant to Section 4C of the Public Passenger Vehicles Act 1981 and which provides information as to the way in which the Senior Traffic Commissioner believes TC's should interpret the law in relation to the financial standing requirements.

5. The appellant, having been granted its licence, commenced trading. It did provide financial evidence, in the form of bank statements for its business bank account, which covered a 3-month period. However, when the OTC made a calculation as to the average availability of

funds for the period covered, it arrived at a figure of £7,790, which fell short, albeit not by a significant amount. It had been appreciated on behalf of the appellant that the evidence might not demonstrate the necessary compliance and, on 11 January 2022 an e-mail was sent to the OTC stating the appellant "may not" have met the requirements and seeking "an extension". The request found favour, and, on 8 February 2022, the OTC wrote to the appellant explaining that the TC had decided to allow the licence to remain in force until 15 May 2022 in order to permit the appellant to "rectify matters". It was said that prior to that date the appellant was required to provide evidence of the availability of £8,000 on average, over a consecutive 3-month period from 1 February to 30 April 2022. It was also indicated that failure to do so would mean "the licence will be revoked without further notice". Thus, the letter made it entirely clear what was now sought and what the consequences of failure would be. The giving of further time on the basis it was given constituted the grant of a "period of grace" which is authorised under Section 27(3A) of the Act as a means of avoiding what would otherwise be mandatory revocation.

6. The appellant, once again, provided financial evidence in the form of bank statements and, indeed, did so for the required period. The OTC, once again, carried out a financial calculation. But, once again, there was a shortfall with respect to the average available sum over the 3-month period covered. This time the average available amount came to £7,291. Thus, on this occasion the shortfall was greater than it had been when the previous calculation had been undertaken. The calculation was made on 7 June 2022.

7. According to internal OTC memoranda produced for the purposes of this appeal, the TC decided, on 29 June 2022, that the licence should be revoked on the basis of the failure to supply satisfactory evidence of finance. On the same day, and again seemingly in anticipation of difficulties, the appellant sent an e-mail to the OTC stating "…*we actually have access to £10,000 worth of business credit in the form of our Capital-on-Tap business credit card. I can supply proof of this if need be, I would like to hope that this gives us enough financial standing to meet the regulations*". However, no actual evidence such as a copy of an agreement or corroborative written evidence from Capital-on-Tap was actually provided.

8. The content of the e-mail was brought to the attention of the TC but, again according to the internal memoranda he maintained his view as to revocation, noting that the period of grace had expired and that no additional evidence (the view seemingly being taken that the e-mail of 29 June 2022 was assertion rather than evidence) had been provided. It was in light of and because of the appellant's failure to demonstrate the requisite available finance for the period from 1 February 2022 to 31 April 2022 that the letter of 4 July 2022 confirming revocation was sent. The basis for refusal, as indicated in that decision letter was the failure to meet the financial standing requirement and the failure to comply with the undertaking to provide evidence of compliance for the required period.

9. The appellant appealed, in time, to the Upper Tribunal. In the written grounds of appeal reliance was placed on the credit facilities said to be provided by Capital-on-Tap. It was asserted (though not evidenced) that the appellant had agreements in place with garages and tyre providers which would enable it to meet financial liabilities to such organisations on a later date than that upon which liability would arise such that repairing the vehicle operated under the licence would not be a problem. It was also said that financial hardship would result from the loss of the licence. The grounds of appeal were accompanied by a copy of an e-mail of 23 June 2022 from Capital-on-Tap to the appellant indicating the availability of credit facilities in the amount of £10,000.

10. As to the approach we must take with respect to an appeal such as this, paragraph 17 of Schedule 4 to the Transport Act 1985 (as amended) provides that the Upper Tribunal "*are to have full jurisdiction to hear and determine all matters whether of law or of fact for the purpose of the exercise of their functions under an enactment relating to transport*". However, it was explained by the Court of Appeal in *Bradley Fold Travel Ltd & Anor v Secretary of State for Transport* [2010] EWCA Civ 695 that the Transport Tribunal (now the Upper Tribunal) will not be required to rehear all the evidence by conducting what would, in effect, be a new first instance hearing. Rather, it has the duty to hear and determine matters of fact and law on the basis of the material before the TC (though see below) but without having the benefit of seeing and hearing from witnesses. The appellant assumes the burden of showing that the decision appealed against was wrong. In order to succeed an appellant must show that the process of reasoning and the application of the relevant law requires the adopting of a different view. Further, paragraph 17(3) of the same Schedule provides that in deciding an appeal 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. As to the reliance upon fresh evidence before the Upper Tribunal but which was not before the TC, the rules set out in *Ladd v Marshall* [1954] EWCA Civ 1 so that, if an appellant does wish to rely upon new evidence at the Upper Tribunal stage it must be shown, amongst other things, that the evidence could not have been obtained with reasonable diligence for use at the PI.

11. As to disposal, the Upper Tribunal has power, if allowing an appeal, to make such order as it thinks fit or to remit the matter back to the TC for rehearing if it considers such a course to be appropriate.

12. The need to show available finance in the sum of £8,000 has not been disputed and, in any event, follows from the wording of the legislation. The appellant has twice provided evidence in the form of bank statements for a continuous 3-month period but, on each occasion, the evidence did not show available funds, on average, throughout the period. The OTC's methodology in carrying out the calculation was in accordance with the Senior Traffic Commissioner Statutory Document No 2: Finance, and no issue has been taken with respect to the appropriateness of that methodology nor the mathematical accuracy of the actual calculations. Thus, the appellant twice failed to show the financial standing requirement was met.

13. The failure to comply with the financial standing requirement represents a mandatory ground for revocation. But such was initially avoided by the giving of a period of grace. The appellant did not rectify matters within the period of grace given. Revocation followed logically from that failure. The Capital-on-Tap credit facilities were not properly evidenced before the TC whether those facilities were available before or (as seems to be the case) only after the period of grace had expired. The TC cannot be faulted for not taking into account what was only a bare assertion as to the availability of such finance in the form of an e-mail from the appellant to the OTC. We cannot take into account the e-mail from Capital-on-Tap to the appellant because the *Ladd v Marshall* requirements are not satisfied with respect to it. In particular, the e-mail could have been supplied to the TC but, for whatever reason, it was not. Whilst it may be that the appellant had arrangements with garages and the like for repair works on the licensed vehicle to be undertaken immediately with payment to follow later, that does not obviate the need to satisfy the specific financial standing requirements as contained in the Act. We understand that revocation has the capacity to cause hardship. Indeed, it is

unfortunate when that happens. But again, the mandatory requirements contained within the legislation referred to above do have to be met for a licence to continue.

14. In light of the above we can find no basis upon which this appeal may be allowed. Accordingly, we have to and do dismiss it.

M Hemingway
Judge of the Upper Tribunal

A Guest
Member of the Upper Tribunal

G Roantree
Member of the Upper Tribunal

Authorised for issue on 2 November 2022