



KLC Transport Ltd
[2023] UKUT 158 (AAC)

Appeal No. UA-2023-00009-NT

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

**ON APPEAL from the DECISION of the HEAD of the TRANSPORT REGULATION
UNIT**

Dated 13 December 2022

Before:

Kenneth Mullan	Judge of the Upper Tribunal
Mr David Rawsthorn	Member of the Upper Tribunal
Ms Kerry Pepperell	Member of the Upper Tribunal

Appellant:

KLC Transport Ltd

Attendances:

For the Appellant: Mr McNamee

For the Respondent: None

Heard at: Tribunal Hearing Centre, Royal Courts of Justice, Belfast.
Date of hearing: 7 June 2023
Date of decision: 10 July 2023

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that this appeal be ALLOWED.

SUBJECT MATTER:- Proposal to revoke correspondence not received;
fairness of proceedings

CASES REFERRED TO:- NT/2013/52 & 53 Fergal Hughes v DOENI & Perry
McKee Homes Ltd v DOENI; 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 Head of the Transport Regulation Unit, (“Head of the TRU”) to revoke the Appellant’s goods vehicles operator’s licence.
2. The factual background to this appeal appears from the documents and the Head of the TRU’s decision and is as follows:-
 - (i) KLC Transport Ltd has been the holder of a Standard International Goods Vehicle Operator’s licence, authorised for 3 vehicles and 2 trailers specified at the time of revocation.
 - (ii) DVSA notified the Department of six Most Serious Infringements (MSI) all committed within 2022. As a result the Department requested DVA to carry out a full audit of systems and procedures to ascertain how the licence was being continuously and effectively managed. The audit was undertaken in August 2022 and concluded with an unsatisfactory rating in every area, apart from Establishment. A further MSI infringement was reported to the Department in November 2022.
 - (iii) Following assessment of the compliance audit the Department issued a letter to the operator, dated 26 September 2022, proposing to revoke the licence on account of that audit coupled with the 6 MSIs. The Department offered an opportunity to make written representations for the Department’s consideration by 18 October 2022.
 - (iv) The letter of 26 September advised "If no request for a public inquiry is received by this date [18 October 2022) your operator's licence will be revoked". In the absence of a response to this letter or a request for a public inquiry to be held, as per Section 24 of the 2010 Act, the decision was taken by the Department to revoke the licence. A letter informing the operator of the decision to revoke, and the reasons for that revocation, was issued on 13 December 2022.
 - (v) On 12 January 2023 a UT12NI Appeal Form was received in the Department. The Appellant was represented in the appeal by Mr McNamee.
 - (vi) The notice of appeal included an application for a stay of the effect of the decision of 13 December 2022. On 19 January 2023 the application for a stay was refused by the Head of the TRU.
 - (vii) The application for a stay of the effect of the decision dated 13 December 2022 was renewed before the Upper Tribunal. On 21 January 2023 the further application for a stay was refused by Upper Tribunal Judge Hemingway.

General principles on the operation of the Act and Regulations

3. At paragraphs 10 to 13 of the decision in NT/2013/82 Arnold Transport & Sons Ltd v DOENI, the Upper Tribunal set out the following general principles in the operation of the legislative provisions in Great Britain and Northern Ireland:

'Some General Principles

10. An operator's licence can only be granted if the applicant satisfies the Department that the relevant requirements, set out in s. 12 of the 2010 Act as amended, have been met. [The expression Department is used in the legislation but for the purposes of the decisions required to be taken under the legislation it is the Head of the TRU who takes them]. The relevant requirements are now set out in Paragraph 17(5) of the Goods Vehicles (Qualifications of Operators) Regulations (Northern Ireland) 2012, ("the Qualifications Regulations), which substitutes a new s.12 and adds ss. 12A-12E to the 2010 Act. The Qualifications Regulations also contain important provisions in relation to Good Repute, Professional Competence and Transport Managers.
11. The grant of an operator's licence does not mean that an operator can then proceed on the basis that the requirements that must be met in order to obtain a licence can thereafter be disregarded. In our view it is clear both from the terms of the 2010 Act and from Regulation 1071/2009 that these are continuing obligations, which an operator is expected to meet throughout the life of the licence. It is implicit in the terms of s. 23, which gives the Department power to revoke, suspend or curtail an operator's licence, that this can take place at any time and for any reasonable cause, including matters covered by the requirements of s. 12 as amended. It is explicit in s. 24, which provides that a standard licence shall be revoked if at any time it appears that the licence-holder is no longer (i) of good repute, (ii) of appropriate financial standing or, (iii) professionally competent. The underlining, in each case is ours. First, we wish to stress that once it appears that the licence-holder is no longer of good repute, or of appropriate financial standing or professionally competent the licence must be revoked because the Act makes it clear that there is no room for any exercise of discretion. Second, the use of the expression 'at any time' makes the continuing nature of the obligations crystal clear.
12. The Tribunal has stated on many occasions that operator's licensing is based on trust. Since it is impossible to police every operator and every vehicle at all times the Department in Northern Ireland, (and Traffic Commissioners in GB), must feel able to trust operators to comply with all relevant parts of the operator's licensing regime. In addition other operators must be able to trust their competitors to comply, otherwise they will no longer compete on a level playing field. In our view this reflects the general public interest in ensuring that Heavy Goods Vehicles are properly maintained and safely driven. Unfair competition is against the public interest because it encourages operators to cut corners in order to remain in business. Cutting corners all too easily leads to compromising safe operation.
13. It is important that operators understand that if their actions cast doubt on whether they can be trusted to comply with the regulatory regime they are likely to be called to a Public Inquiry at which their fitness to hold an operator's licence will be called into question. It will become clear, in due course, that fitness to hold an operator's licence is an essential element of good repute. It is also important

for operators to understand that the Head of the TRU is clearly alive to the old saying that: “*actions speak louder than words*”, (see paragraph 2(xxix) above). We agree that this is a helpful and appropriate approach. The attitude of an operator when something goes wrong can be very instructive. Some recognise the problem at once and take immediate and effective steps to put matters right. Others only recognise the problem when it is set out in a call-up letter and begin to put matters right in the period before the Public Inquiry takes place. A third group leave it even later and come to the Public Inquiry with promises of action in the future. A fourth group bury their heads in the sand and wait to be told what to do during the Public Inquiry. It will be for the Head of the TRU to assess the position on the facts of each individual case. However it seems clear that prompt and effective action is likely to be given greater weight than untested promises to put matters right in the future.’

The proper approach on appeal to the Upper Tribunal

4. In NT/2013/52 & 53 Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI, the Upper Tribunal said the following, at paragraph 8 of its decision, on the proper approach on appeal to the Upper Tribunal:

‘There is a right of appeal to the Upper Tribunal against decisions by the Head of the TRU in the circumstances set out in s. 35 of the 2010 Act. Leave to appeal is not required. At the hearing of an appeal the Tribunal is entitled to hear and determine matters of both fact and law. However it is important to remember that the appeal is not the equivalent of a Crown Court hearing an appeal against conviction from a Magistrates Court, where the case, effectively, begins all over again. Instead an appeal hearing will take the form of a review of the material placed before the Head of the TRU, together with a transcript of any public inquiry, which has taken place. For a detailed explanation of the role of the Tribunal when hearing this type of appeal see paragraphs 34-40 of the decision of the Court of Appeal (Civil Division) in Bradley Fold Travel Ltd & Peter Wright v Secretary of State for Transport [2010] EWCA Civ. 695. Two other points emerge from these paragraphs. First, the Appellant assumes the burden of showing that the decision under appeal is wrong. Second, in order to succeed the Appellant must show that: “*the process of reasoning and the application of the relevant law require the Tribunal to adopt a different view*”. The Tribunal sometimes uses the expression “*plainly wrong*” as a shorthand description of this test.’

At paragraph 4, the Upper Tribunal had stated:

‘It is apparent that many of the provisions of the 2010 Act and the Regulations made under that Act are in identical terms to provisions found in the Goods Vehicles (Licensing of Operators) Act 1995, (“the 1995 Act”), and in the Regulations made under that Act. The 1995 Act and the Regulations made under it, govern the operation of goods vehicles in Great Britain. The provisional conclusion which we draw, (because the point has not been argued), is that this was a deliberate choice on the part of the Northern Ireland Assembly to ensure that there is a common standard for the operation of goods vehicles throughout the United Kingdom. It follows that decisions on the meaning of a section in the 1995 Act or a paragraph in the Regulations,

made under that Act, are highly relevant to the interpretation of an identical provision in the Northern Ireland legislation and vice versa.'

The decision under appeal

5. The decision of 13 December 2022 was in the following terms:

'I refer to the above Act and the Propose to Revoke letter issued by the Department on 26 September 2022 notifying you that the Department was considering revoking your goods vehicle operator's licence.

In the absence of a response to this letter or a request for a public inquiry to be held the Department is now making a direction under Section 23(1) and Section 24(1) of the above Act to revoke the company's operator's licence with immediate effect (from 23:45 on 16 December 2022) on the following grounds:

Section 23(1)(b) - Subject to the following provisions of this section and the provisions of section 26, the Department may direct that an operator's licence be revoked, suspended or curtailed (within the meaning given in subsection (9)) for any reasonable cause including that the licence-holder has contravened any condition attached to the licence; namely failing to notify an event that affects your good repute.

Section 23(1)(b) - Subject to the following provisions of this section and the provisions of section 26, the Department may direct that an operator's licence be revoked, suspended or curtailed (within the meaning given in subsection (9)) for any reasonable cause including that the licence-holder has contravened any condition attached to the licence; namely failing to notify a change in the maintenance and safety inspections arrangement.

Section 23(1)(e) - Subject to the following provisions of this section and the provisions of section 26, the Department may direct that an operator's licence be revoked, suspended or curtailed (within the meaning given in subsection (9)) for any reasonable cause including that any undertaking recorded in the licence has not been fulfilled; namely failing to keep motor vehicles and trailers, including hired vehicles and trailers, fit and serviceable.

Section 23(1)(e) - Subject to the following provisions of this section and the provisions of section 26, the Department may direct that an operator's licence be revoked, suspended or curtailed (within the meaning given in subsection (9)) for any reasonable cause including that any undertaking recorded in the licence has not been fulfilled; namely failing to keep (for 15 months) all driver defect reports, all safety inspections, routine maintenance and repairs to vehicles and trailers and these are made available on request.

Section 23(1)(g) - Subject to the following provisions of this section and the provisions of section 26, the Department may direct that an operator's licence be revoked, suspended or curtailed (within the meaning given in subsection (9)) for any reasonable cause including that since the licence was issued or varied there has been a material change in any of the circumstances of the licence-holder that were relevant to the issue or variation of the licence; namely that the licence holder is no longer of good repute as required by Section 12A(2)(b).

Section 24(1)(a) - The Department shall direct that a standard licence be revoked if at any time it appears to the Department that the licence-holder no longer satisfies the requirements of section 12A(2)(b), namely to be of good repute.

Section 24(1)(a) - The Department shall direct that a standard licence be revoked if at any time it appears to the Department that the licence-holder no longer satisfies the requirements of section 12A(3)(b), namely to be professionally competent.

The Head of the Transport Regulation Unit, David Mullan has provided the following reasons for the decision:

The concerns of the Department were set out in the Propose to Revoke Letter dated 26 September 2022 and the operator has failed to provide any response, any representations or any mitigations. In light of that I must take an action based on the information available to me.

In the absence of any evidence to contradict the Department's concerns I conclude that the Department must, in line with section 24 of the act particularly, now revoke this operator's licence. Under the circumstances, as we have no sight of how road safety concerns are being managed, that this licence is revoked with immediate effect.'

The Appellant's initial response

6. The Appellant's initial response was immediate. In relation to the substantive decision, the Appellant made the following submissions:

'In relation to the issues raised by the department and Mr Davey regarding the compliance audit carried out at our premises we wish to disclose the measures we have put in place from the time of Mr Davey's visit.

Issues highlighted in bold - responses below

- There is no evidence of any preventative maintenance history for the company or scheduling of such going forward.
- It is impossible to confirm if safety inspections and brake testing of the vehicles and trailers is taking place since there is no administrative filing system in place for maintenance records.

Whilst there was no evidence of the preventative maintenance history and scheduling at the time of the Audit, all the records have since been stored on file at the premises and a new wall planner has been erected in the office, showing all maintenance and brake testing dates (please see attachment "Wall Planner")

Please see attached example copies of maintenance records kept on file and an agreement with a company named Tru-Cert to carry out 16-week interval brake tests (please see attachment "Brake Testing Contract & Maintenance records"). Maintenance checks provided in the sample have been carried out by our own inhouse Mechanic, namely Cormac Grant, who is listed on our Haulage License as the Safety Inspector. I have also attached Maintenance Contract with Toal Truck Services, who carries out Tachograph maintenance and repairs along with regular truck repairs and breakdowns.

- No systems in place to evidence that drivers are instructed to complete vehicle first use checks.

Company handbooks which cover all the company policies were introduced. Please see attached copy of the handbook signed by one of the drivers. We

have also attached "Truck Employee Handbook" that the driver always carries in the truck.

We also introduced a drivers daily walk around check via an app with our fuel provider Velocity. All drivers are using this daily while on duty. Please see attached ZIP file called "Velocity Fleet Management - Louise" which shows screenshots of the driver's app and the admin control panel.

- The business does not currently have any software to enable tachograph analysis to be performed.

The business has employed the services of an outside contractor Mallon Transport Services Ltd to provide tachograph analysis. Please see attached signed agreement between KLC Transport Ltd and Mallon Transport Services Ltd.

- The transport manager is not effectively and continuously performing this role for KLC Transport Ltd.

While I can agree that they were areas that I have allowed slippage in relation to record keeping and maintenance planning, I can now firmly say that following on from the audit things have changed dramatically in this area. Mr Davey was very informative regarding what needed to be done and I can say with confidence that I have undertaken all the advice given and used the audit as the wakeup call that was needed. For this I would like to thank the department and Mr Davey for providing this insight into an area which I had allowed poor practice to slip in.

As a company, we have put several systems in place since the audit and would be happy to partake in a follow up audit in order for the department to assess these systems that are currently operational.

In the event the department do not find the above responses and evidence suitable, we would request the opportunity of a public enquiry to discuss with the department the issues raised and to put across our responses.

We appreciate your co-operation in extending the deadline and we hope that this email, and the evidence provided will highlight the extensive work that has been carried out by KLC Transport Ltd, and that you will look favourably upon this in order to allow us to continue operations.'

7. The Appellant, on 13 December 2022, also forwarded email correspondence to the TRU stating that the correspondence on 26 September 2022 (the 'proposal to revoke' letter) had not been received and a copy of this was requested. In a response the office of the TRU provided a copy of the relevant letter, and proof of delivery and signature on delivery. In a further response, the Appellant stated:

'Thank you for sending on yesterday- that is the first time we have seen a copy of that letter. The signature provided is not from anyone at this address so whether it was signed by a Royal Mail member of staff or what happened I can't confirm that. This is not just our work address, it is our family home and I can assure you it was not signed for at this property. Royal Mail when signing would normally ask for your first name as clarity so it seems odd that it was signed for as "Grant".

That aside, whenever I got a chance to review this letter yesterday evening this was all the topics that had been brought up at our inspection in August. After our inspection held at 14 Legmoylin Road, we where advised that someone would be back to us with regards that meeting, from which we have

never heard anything. We had taken on board all that was raised at that meeting and had implemented measures, policies and procedures as was advised and was expecting further contact in order for someone to come out and review this.

Due to the severity and last minute notification of your email on 13th December, we are now liaising with TCTS Limited in order to get this rectified. We wish to appeal this decision with immediate effect and would request an extension on this decision to Revoke our license. We currently have 2 vehicles in Europe, one in the South of France (which is currently badly delayed due to heavy snow) and the other one is in transit from Spain – we wouldn't even have these vehicles back at our operating centre before the deadline of 23.45 on 16 December 2022.

We are small family run business, whereby myself, my husband and my step son all work within the business. A decision to revoke our license with less than 10 days before Christmas will leave us in a very vulnerable position both emotionally and financially, along with the well being of our employees and their families.

I would ask you to consider this as a matter of urgency, and please take into account the time of year and the current difficulties we are all facing in these challenging economic times.

8. In email correspondence dated 15 December 2022, the Appellant was informed that a new revocation date of 12 January 2023 had been set.

The initial grounds of appeal

9. Mr McNamee set out the following initial grounds of appeal:

'By letter dated 26th September 2022 the Department for Infrastructure communicated a proposal to revoke in relation to the Operator's Licence signed by Mr Stephen Molloy. This proposal notified the Operator that it had the right to make representations by 18th October 2022 and that it had the right to request a Public Inquiry up to 18th October 2022. Absent either representations or a request for a Public Inquiry the Licence was to be revoked and there was a requirement to return all disks by 28 October 2022.

This letter whilst sent out by special delivery was not delivered to KLC Transport Ltd. The track and trace documentation was signed with the name Grant. Neither the Operator nor the Transport Manager nor any officer of the company received this letter.

Further this letter was sent by email to ... Unfortunately and for no reason that the Operator can explain, this email went to junk mail and was not picked up by the Operator.

The letter dated 13th December 2022 was sent by recorded delivery and email, again to ... This letter was delivered by Royal Mail on 19th December 2022. Further the email communicating this letter was received by KLC Transport Ltd on 13th December 2022 at 12.24. The Operator is at a loss to understand why the first TRU email went directly to junk mail. The Operator searched his emails and can confirm that the 26th September 2022 letter was emailed however it went directly to junk mail.

Upon receipt of the December correspondence, the Operator took immediate action and went into direct correspondence with the TRU and obtained a 28 day extension in which to lodge an appeal. This appeal is lodged within that timeframe.

The Operator further contacted two Transport Consultants, one TCS and one Mallon Transport Services. It is understood that the Transport Consultant was in constant contact with the TRU in relation to supplying the information sought.

The contrast between the position of the receipt of the letter dated 13th December 2022 and inaction after the letter dated 26th September 2022 should be immediately apparent. The Operator states that an appeal in this matter and a request for a stay should have been submitted much earlier in the process however the Transport

Consultant Mr Phillip Mallon had believed that the matter could resolve through direct communications both by phone and email with the TRU. This did not turn out to be the case. The Operator has on the afternoon of 12th January 2023 contacted this office.

It is submitted on behalf of the Operator that given that the Operator has attempted to provide all of the documentation requested by the TRU to address their concerns in relation to the issues raised in the 26th September 2022 letter, and acted in what it believed was an extremely prompt and competent manner, that a decision to maintain the revocation of its Licence is unjustified.'

The further ground of appeal

10. At the oral hearing of the appeal before us, Mr McNamee made the following additional submissions:

'This Appellant submits that the central criticism against the Operator appears to be the non-response to the correspondence dated 26 September 2022, being the request for an explanation in relation to a number of MSIs. The Tribunal will note the Appellant's position in this regard to the effect that this correspondence was not received. The non-response to this correspondence resulted in an immediate revocation by way of letter dated 13 December 2022.

The grounds for the revocation are set out at page 46 and include "The Department shall direct that a standard licence be revoked if at any time it appears to the Department that the licence holder appears to no longer satisfy the requirements of Section 12A(3)(b) namely to be professionally competent". It is submitted on behalf of the Appellant that this is a recital of the condition in Section 12A(2)(d) which has been omitted from the legislation and was no longer in force at the time of the Decision.

In relation to the issue of correspondence between the Department and the Operator, the Department appears to have confused the identity of the Director/Transport Manager of KLC with identity of the Transport Manager of the Operator PDF Services Ireland Ltd and the Applicant for PDF Services IRE Ltd. The Department, in the same timeframe that their enquiries were ongoing in relation to the Appellant Company, were also making enquiries into the Operator's Licence ON2059435 and the application ON1139688, being clearly of the opinion that all of these licences were connected, and that Louise Murphy was the same person. The Tribunal is referred to pages 50 and 256 of the bundle, wherein emails being sent to Louise Murphy appear to be the email address of Louise Murphy of PDF Services Ireland Ltd and PDF Services IRE Ltd. This misapprehension on behalf of the Department carried on through into January 2023 when in the annex in the Call-Up letter in relation to PDF Services Ireland Ltd and PDF Services IRE Ltd the Operator and Applicant are asked to account for their connection with the Appellant's

Operator's Licence Number. I have appended to this speaking note a small sample of docs from the PDF bundle to illustrate the confusion which appears to have arisen (with the consent of PDF).

It is submitted on behalf of the Appellant that this confusion clearly factored into the considerations of the Department as regards whether or not correspondence was received and would have impacted upon considerations such as repute. It is accepted that it is impossible to state exactly the effect this might have had on the decision makers considerations, but it is submitted that there is clearly a potential for this error of fact to have impacted upon the considerations of repute.

In such circumstances the appellant would submit that the present appeal should be allowed, and this matter remitted back for a Public Inquiry to deal with the issues which arose in the correspondence dated 26 September 2022.'

The oral hearing

11. At the oral hearing of the appeal before us, Mr McNamee expanded on his written grounds of appeal.
12. Ms Louise Murphy attended the hearing and gave oral evidence. She told us that she was a director of the Appellant company which was relatively small with authorisation for three vehicles and was family run. She stated that the company had not received the correspondence of 26 September 2022. She confirmed that the postal address to which the correspondence had been sent was her family home. She did not know where the letter had gone and it had not been signed for by anyone she knew. She asserted that the email correspondence had gone into her junk email folder. She did not check this folder on a regular basis as hundreds of emails were received. She noted that she had responded immediately and asked why would she ignore it and leave the company in such a vulnerable position. She did not know what had happened. She had discovered that there was another Louise Murphy who was involved in the transport industry and that issues relating to that individual had been raised with her by mistake. She provided various documents which confirmed this position.

Analysis

13. We can deal with this appeal in short order. On the basis of all of the evidence which is before us, we accept that the correspondence of 26 September 2022 (the 'proposal to revoke' letter) was not received by the Appellant. The primary basis for that conclusion is that having heard from and seen Ms Louise Murphy we found her evidence to be honest and credible.
14. Her accepted oral evidence does not require corroboration, but what we find to be compelling is the action which she took immediately on receipt of the correspondence of 13 December 2022. We have no doubt that had the correspondence of 26 September 2022 been received then she would have taken the same immediate action in terms of a response to the substantive issues raised by the Head of the TRU, the submission of the plethora of evidence and documentation which were sent to the TRU and the request for a Public Inquiry. As she put it herself, why would she fail to take action after 26 September 2022 if that omission would put her company in such a vulnerable position.

15. We also cannot ignore that there is definitive evidence that there is a second Louise Murphy involved in the transport industry in Northern Ireland and who is interacting with the regulatory authorities. In these circumstances the potential for confusion is enhanced.
16. We are satisfied that, without anyone being at fault, a procedural or other irregularity capable of making a material difference to the outcome or the fairness of proceedings has occurred.
17. The appeal is, accordingly, allowed.
18. We remit the case to the Department for reconsideration and recommend that in line with the Appellant's wishes, a Public Inquiry is held.
19. We would add the following. We have noted that it is now common practice for the TRU to communicate with operators by email as well as by post. If, as was the case here, email accounts are failing to direct emails from the TRU to an operator's inbox but are diverting them to a 'junk email' folder then it would be apposite for operators to be vigilant in checking 'junk email' folders to ensure they do not miss vital correspondence. In our view, having a reliable email system is as important a part of having a "stable establishment" as having a letter box where postal correspondence can be securely delivered.

A handwritten signature in black ink, appearing to read 'Kenneth Mullan', is displayed on a light grey rectangular background.

**Kenneth Mullan, Judge of the Upper Tribunal,
10 July 2023**