



Ana Cartland and Juan Carlos Rivera t/a LMT London Magical Tours
[2023] UKUT 227 (AAC)

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Appeal No.UA-2023-000113-T

On appeal from the Traffic Commissioner for London and the South East of England

**Ana Cartland and Juan Carlos Rivera
t/a LMT London Magical Tours**

Appellant

Before: Upper Tribunal Judge Ward, Mr G.Roantree and Mr M. Smith

Hearing date: 25 July 2023

Representation:

Appellant: Mr John Rivera

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision whether or not to revoke the operator’s licence is remitted back to the Traffic Commissioner to consider afresh in the light of the panel’s findings of fact below. If the new decision following remitting is not to revoke, the Traffic Commissioner will need to address the outstanding application to renew made by the operator by email dated 23 September 2022.

REASONS FOR DECISION

1. The operator had held a public service vehicle operator’s licence, which was due for renewal in November 2021.

2. The licence was revoked with effect from 17 January 2023 under section 17(3)(e) of the Public Passenger Vehicles Act 1981 (“the Act”). Section 17 so far as relevant provides:

“(2) Without prejudice to subsection (1) above, a traffic commissioner may, on any of the grounds specified in subsection (3) below, at any time—

(a) revoke a PSV operator's licence ;

...

(3) The grounds for action under subsection (2) above are—

...

(e) that there has been since the licence was granted or varied a material change in any of the circumstances of the holder of the licence which were relevant to the grant or variation of his licence.

...

(4) A traffic commissioner shall not take any action under subsection (1) or (2) above in respect of any licence without first holding an inquiry if the holder of the licence requests that an inquiry be held .”

3. The stated ground was that “the licence holder is no longer contactable on the basis they have failed to respond to correspondence from the “Central Licensing Office” to renew or surrender the licence.”

4. Direct evidence of the consideration given to the matter by the Traffic Commissioner is not before us. Helpfully, in a “cards on the table” approach appropriate to a public body facing scrutiny of its decision, there is within the bundle an email from Lee Betts, Team Leader – PSV Licensing, to the Traffic Commissioner following a request from the Upper Tribunal to provide the bundle, saying:

“At this time the licence has been revoked due to the fact the operator failed to continue the licence. The decision to revoke this licence was made following a bulk revocation request, and date set 17 January 2023 on VOL. I need to highlight, that within the appeal application supplied by the operator, I can see an email that does not appear or saved to VOL. This email refers to sending the completed checklist in September 2022. However, the bundle does show attempts made by the licensing team, and no reply or contact received. Also, the case worker who received the emails has now left DVSA and the email account closed.”

5. Also in evidence is an extract from what appears to be an internal case management system. At this stage, it suffices to note that there is only one entry (dated 21 September 2022) in the period between 5 December 2016 and 13 December 2022.

6. Mr Juan Carlos Rivera and Ms Ana Cartland are husband and wife and trade as a partnership. They are assisted in the running of their business by their son, Mr John Rivera, who very ably represented them in the hearing before us, which was held at Field House, London EC4 on 25 July 2023. Juan Carlos Rivera is a Spanish speaker, whose English is at best very limited, with the consequence that John Rivera provided summaries of the proceedings in Spanish for his father at intervals and had the opportunity to obtain further instructions from him.

7. One of John Rivera’s roles in the business was to make telephone calls in English and to prepare emails in the name of his father, in accordance with the latter’s instructions. Where below we refer to emails sent by “Mr Rivera”, we mean emails prepared by John Rivera but sent in the name of his father.

8. There is evidence before us which was not before the Traffic Commissioner:

a. email traffic between Mr Rivera and Mr Matthew Ukandu, who then worked for the Office of the Traffic Commissioner (“OTC”), and others

b. oral evidence given to us at the hearing by John Rivera, in particular about his role in the business and about telephone conversations he had had on behalf of his father.

9. Traditionally the practice of the former Transport Tribunal was only to admit further evidence if the tests in *Ladd v Marshall* were met, that is to say:

- (i) The fresh evidence must be admissible evidence.
- (ii) It must be evidence which could not have been obtained, with reasonable diligence, for use at the public inquiry.
- (iii) It must be evidence such that, if given, it would probably have had an important influence on the result of the case, though it does not have to be shown that it would have been decisive.
- (iv) It must be evidence which is apparently credible though not necessarily incontrovertible.

10. Here, as will be seen, there was no public inquiry; the operator did not receive the correctly-addressed letter from the OTC which might have led it to request one. In those circumstances, and as we see no difficulty with conditions i, iii and iv, we would conclude that the conditions are met so far as might be necessary. In any event, the impact of proceedings being conducted under the Upper Tribunal's Rules of Procedure rather than those of the former Transport Tribunal is leading to an approach of treating the *Ladd v Marshall* criteria as persuasive authority as to how to apply the "overriding objective" in rule 2 of the Upper Tribunal's Rules to its discretion under Rule 15(2) to the admission of evidence: see the authorities referred to in the Appendix to T/2018/27 *Allen Transport Ltd and Daniel Allen*.

11. Rule 15(2)(a) provides:

- "(2) The Upper Tribunal may—
- (a) admit evidence whether or not—
- (i) the evidence would be admissible in a civil trial in the United Kingdom; or
- (ii) the evidence was available to a previous decision maker;... "

12. As is apparent from the email from Lee Betts referred to above and from the material before us, the issue concerning the availability of evidence arises substantially because of a failure within the OTC to link email traffic conducted by a former member of staff to its central systems and then to put it before the Traffic Commissioner. It would not be "dealing with [the case] fairly and justly" now to exclude that evidence on a technicality. Limbs (a) (b) and (c) of rule 2(2) (which concerns specific applications of the overriding objective) are engaged and we exercise our discretion in favour of admitting the evidence even if we were to be wrong in concluding that the *Ladd v Marshall* conditions are met.

13. The sequence of events disclosed by the evidence before us is set out below in summary form. Much of it is not referred to on what we have termed the case management system, where it appears somewhat haphazard which events are the subject of entries.

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22.10.21	OTC send checklist and request for current financial information to operator at 6 Lower Grosvenor Place ("6 LG Place").
25.10.21	Mr Rivera emails OTC (Mr Cook): a. no correspondence from OTC received – checking nothing gone astray as communal pigeonholes in building b. had been unable to trade for 18 months because of Covid lockdowns and impact on tourism.
16.11.21	OTC (Ms Oxford) sends reminder about checklist etc as nothing received by OTC in response to letter of 22.10.21.
7.12.21	OTC (Ms Oxford) writes to operator noting nothing received and sending the relevant form if operator does not want to renew.
17.1.22	Mr Rivera emails OTC (Ms Oxford) a. informing her that he had today received the letter of 16.11.21, which had been placed in the wrong pigeonhole and had gone to a closed business b. providing a copy of the email of 25.10.21 c. reiterating the query about possible concessions on account of the pandemic. d. asking to be emailed the checklist.
14.2.22	Mr Rivera emails OTC (Ms Oxford) following up the lack of reply to the email of 17.1.22.
20.9.22	Mr Rivera, on advice from "Tamara" at the customer service centre, emails Mr Matthew Ukandu of the OTC providing the email trail (and saying that several phone calls were also made) and asking about concessions because of Covid and the cost and timeframe of renewal.
21.9.22	Mr Ukandu emails Mr Rivera saying he has spoken to his team leader and what is required is to complete the continuation check sheet, confirming any changes in arrangements. He recommended additionally providing a cover letter for the Traffic Commissioner, explaining the events that had occurred and his intentions moving forwards.
23.9.22	Mr Rivera emails Mr Ukandu with the completed check list and the cover letter. Both the cover letter and the checklist are now in evidence. The cover letter basically summarises the above dealings and Mr Rivera's desire for a concession. Mr Rivera confirms the email address to be used to contact him and also states the new mobile number to be used, which has also been updated on the checklist.
29.9.22	Mr Rivera emails Mr Ukandu referring to a voicemail left for Mr Ukandu at the start of the week and asking him to confirm safe receipt and approximate timeframe for renewal.
5.10.22	Mr Rivera again emails Mr Ukandu, to similar effect.
6.10.22	Mr Ukandu emails Mr Rivera, apologising for late reply and stating "I have received your emails and I will put the information together and put it to the TC".
13.12.22 @1337	OTC (Ms Nicoll, Team Leader PSV Licensing) emails both Mr Rivera and Mr Ukandu: "Your licence was due for renewal in November 2021. It is not possible to renew over 12 months later. You will need to apply for a new licence..."

<p>13.12.22 @1356</p>	<p>Further email from Ms Nicoll, to Mr Rivera (only). "I have been advised you can ask the Traffic Commissioner if they will allow you to renew, but as so long has passed I cannot say if they will accept this. I understand my colleague Matt [i.e. Mr Ukandu] already sent you a checklist to complete in September but we still have not received anything. I note that you did not response [sic] to our 2 letters chasing your renewal dated 16/11/2021 and 07/12/2021.</p> <p>If you wish me to ask the Traffic Commissioner on your behalf if you can renew late, please complete and return the attached renewal form and return it with proof of financial standing e.g. bank statements, no later than 22 December 2022. Otherwise please complete and return the surrender form previously sent you.</p> <p>Please note the Traffic Commissioner is not obliged to grant any such request to renew late."</p>
<p>3.1.23</p>	<p>In absence of any reply to emails of 13.12.22 Ms Nicoll:</p> <ul style="list-style-type: none"> a. apparently sends an email (see the "case management system" though it does not itself appear in the evidence) b. sends proposal to revoke letters by recorded delivery to both 6 LG Place and to the address in SW19 [which is the operating centre] and indicating that any representation (by email if possible) and/or request for a public inquiry, must be made "by" or "on or before" 17.1.23.
<p>17.1.23</p>	<p>Ms Nicoll sends letter starting that the Traffic Commissioner has revoked the operator's licence with immediate effect (i.e. from 17.1.23).</p>
<p>20.1.23</p>	<p>Mr Rivera emails Mr Ukandu with copies of earlier communications, requesting an update. States Mr Ukandu's number has not been in service.</p>
<p>21.1.23</p>	<p>Mr Rivera, having received Ms Nicoll's letter "this morning", emails her, cc Mr Ukandu, referring to previous dealings with Mr Ukandu and attempts to follow-up. Reiterating that 6 LG Place is a shared building with pigeon holes for post to several offices and noting that although he had provided a phone number and email address to Mr Ukandu, nothing had been received.</p>
<p>22.1.23 (a Sunday)</p>	<p>Ms Nicoll emails Mr Rivera, reciting material sent by the OTC without response. As regards material sent by Mr Rivera, it merely notes "You then contacted us by email 20.09.22 and we responded" (no reference is made to Mr Rivera's email of 23.9.22 nor Mr Ukandu's of 6.10.22). "I can confirm that we did not received (sic) your renewal in September 2022, by post or email. Mr Ukandu no longer works at the Office of the Traffic Commissioner".</p> <p>The email indicates that the licence "was submitted to the Traffic Commissioner for revoke" and that "the Traffic Commissioner has no powers to reinstate the licence" and directs Mr Rivera to the possibility of appealing to the Upper Tribunal.</p>
<p>9.2.23</p>	<p>Mr Rivera emails Ms Nicoll, referring to the acknowledgment by Mr Ukandu that, contrary to Ms Nicoll's position, he had received the</p>

	renewal papers and indicating that the relevant email would be forwarded (as it was). He apologised for not having received the email of 13.12.22, indicating that it was possible it may have incorrectly gone to spam. He had however provided a phone number but no calls had been received. As Ms Nicoll had advised, the operator had appealed to the Upper Tribunal.
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14. It is not to the operator's credit that there is such difficulty in contacting them reliably. The case management system refers to difficulties with post for the operator at 6 LG Place as long ago as September 2011. It is surprising that the same manner of handling incoming post appears to be still in place more than a decade later. Further, if emails sent to an email address provided by the operator to the OTC were not received, on the presumed basis that they went to spam, that too is unimpressive. That such is the fate of the occasional incoming email will be familiar to many but if the email address is being used for business correspondence, one would expect the spam folder to be checked from time to time, even if, having been advised by Mr Ukandu that there was a backlog and that such applications were taking a while to deal with, they were not particularly expecting to hear from the OTC.

15. On behalf of the operator it was submitted that they did provide an email address and a mobile number. For the reasons above, the email address proved to be of limited assistance to the OTC, while the mobile number appears to have been contained only within an email to Mr Ukandu and its accompanying checklist and thus fell foul of the failure within the OTC to process that material.

16. Such difficulties could be avoided by use of the Vehicle Operator Licensing online service. John Rivera did not appear to know what we were referring to (although much email traffic from the OTC invites people to apply for an account for the VOL system and to upload application-related documents through it). The panel strongly urges the operator to explore this option with a view to taking it up.

17. Having said that, it is clear that the operator did take the steps to renew their licence which they had been advised and that renewal has never been adjudicated upon. Mr Ukandu was held out by "Tamara" and by himself as being the person to deal with on behalf of the OTC for that purpose. The relevant material was submitted and acknowledged, but never processed. In particular, its receipt was not recorded on the case management system, which showed only Mr Ukandu sending out the continuation checklist on 21 September. This is likely to account for why Ms Nicoll, writing on a Sunday- and so very possibly working remotely – wrongly asserted that the OTC had not received the renewal in September 2022 by post or email, as that is how it would have appeared to her.

18. The panel is also concerned that when an employee such as Mr Ukandu leaves, who has apparently had authority to deal with members of the public, his email account should be "closed", without any suggestion of there being any ability to recover emails he may have sent or received. We are mindful that there may well have been changes in working practices during the Covid pandemic, some of which may have persisted. If they resulted in increased use of email, that only serves to heighten our concern about undocumented and unretrieved email traffic.

19. Mr John Rivera indicated that what the operator was seeking was for the renewal application which they had submitted to be adjudicated upon. That seems only fair, subject to the point that the licence has been terminated in any event, but on the basis of incomplete information having been put before the Traffic Commissioner and so wrongly. In our view, therefore, the appropriate disposal is for the decision on termination to be remitted to the Traffic Commissioner to take a fresh decision in the light of knowledge of the full facts. If the decision is not to terminate the licence, the Traffic Commissioner will then be in a position to consider the outstanding application for renewal. In case material sent to Mr Ukandu's email address is now definitively unavailable to the OTC, we will arrange for the Upper Tribunal office to send by post with this decision a copy of the checklist as submitted to Mr Ukandu which was put in evidence before us.

20. John Rivera also indicated, somewhat as an afterthought, that the operator would like costs. The background is that the operator, whose business is in the tourist trade, had hoped to have successfully renewed its licence in time for the 2023 Spring season, a hope that was frustrated by the events in this case. The legal position regarding whether the Upper Tribunal has any power at all to make an order for costs in this type of case is obscure. If it exists at all, the circumstances in which it could make one are extremely limited. Most fundamentally, on any view the Upper Tribunal has no power to compensate a party for loss of business as a result of a regulator's action, which appears to be what is being claimed: there is no suggestion that the operator has incurred costs in relation to the proceedings themselves. While if the operator makes an application in writing under rule 10 of the Upper Tribunal's Rules, it will need to be formally considered, the panel offers the operator no encouragement in this regard.

C.G.Ward
Judge of the Upper Tribunal

Mr G.Roantree
Member of the Upper Tribunal

Mr M.Smith
Member of the Upper Tribunal

Authorised for issue on 1 August 2023