



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

**Appeal No. UA-2024-000210-T
[2024] UKUT 267 (AAC)**

**ON APPEAL from a DECISION of a TRAFFIC COMMISSIONER for the WESTERN
TRAFFIC AREA taken on 29 January 2024**

Before: Mr E Mitchell, Judge of the Upper Tribunal
Mr S James, Specialist Member of the Upper Tribunal
Mr D Rawsthorn, Specialist Member of the Upper Tribunal

Appellants: (1) Nyanza Express Transport and Training Ltd; (2) Paul
Mboya

Commissioner's ref: OH2005035

Representation: Paul Mboya, for himself and the first Appellant

Heard at: Cardiff Civil Justice Centre, Park Street, Cardiff on 21
June 2024

Date of decision: 26 June 2024

DECISION OF THE UPPER TRIBUNAL

This appeal is dismissed.

Subject matter: Revocation of standard operator's licence; proportionality
of transport manager disqualification order

REASONS FOR DECISION

Background

1. Mr Paul Mboya was the sole director of, and designated transport manager for, Nyanza Transport and Training Ltd (“the operator”). The operator held a standard national licence, granted on 22 May 2018 under the Goods Vehicle (Licensing of Operators) Act 1995 (“1995 Act”) which authorised the use of three vehicles and three trailers.

2. A public inquiry held in April 2022 culminated in the Traffic Commissioner issuing a ‘formal warning’ and securing undertakings from the operator as to inspection frequency, roller brake testing and the carrying out of a systems compliance audit. The audit undertaking provided for the audit report to be supplied to the Office of the Traffic Commissioner (OTC) by 30 November 2022, which was subsequently extended to 31 March 2023. The audit report was provided late (in April 2023 according to Mr Mboya, in August 2023 according to the OTC).

3. On 15 September 2023, the OTC informed the operator that the Traffic Commissioner would hold a public inquiry to consider the proposed revocation of the operator’s licence. Mr Mboya was also informed that the public inquiry would consider whether he was to be disqualified from acting as a transport manager. The main reasons for the proposed regulatory action were “a further DVSA maintenance investigation that again identified major shortcomings along with potential fraud”, failure to comply with the undertakings given following the 2022 public inquiry, and that, in the words of a DVSA Vehicle Examiner, “the operator’s maintenance paperwork is an absolute shambles”. The apparent fraud was described by the Examiner as follows:

“There are PMI records for the same vehicle/trailer that have been duplicated (with the same identical faults) but with date changes, also date format shown on RBT print outs are inconsistent with correct format/font size and type.”

4. The public inquiry was held on 16 January 2024. On 24 January 2024, the Traffic Commissioner made the following decisions:

(a) the operator's licence was revoked pursuant to sections 26(1)(f) and 27(1)(a) and (b) of the 1995 Act;

(b) both the operator and Mr Mboya were ordered disqualified from holding or obtaining an operator's licence for a period of one year, under section 28 of the 1995 Act;

(c) Mr Mboya was ordered disqualified from acting as a transport manager for a period of three years, under paragraph 16(2) of Schedule 3 to the 1995 Act.

5. The Traffic Commissioner's decisions were based on a number of adverse findings the most significant of which were as follows:

(a) "vehicles had not been inspected every eight weeks". Each vehicle had been inspected only three, or possibly four, times annually and "many inspections had only a road test with no instrumented measurement of brake performance at all" (paragraph 19 of the Commissioner's reasons);

(b) "Outside MOT, I could find no trace of laden roller brake testing" (paragraph 19);

(c) "The undertakings upon which I relied in 2022 had not just been breached but almost ignored entirely" and "Mr Mboya had been put on notice by the auditor in October 2022 that the undertakings were being breached but he carried on regardless" (paragraph 19);

(d) "Facing a DVSA inspection, Mr Mboya turned to a friend who helped him create entirely false documents to try to hide the lack of inspections and brake tests. They were very amateur documents unlikely to fool anyone but that does not diminish the seriousness of their production, presentation to DVSA and inclusion in the operator's public inquiry evidence bundle" (paragraph 20);

(e) "The operator failed to comply with the [2022] public inquiry directions to produce compliance documents, a list of which was clearly set out. As a result, I can make no assessment of systems for complying with drivers' hours or working time rules" (paragraph 21);

(f) the operator's shortcomings were not "about just 'paperwork'". The encounter report showed a prohibition rate of 41% (from 17 encounters) compared to the industry norm

of 12.8%. The defects included one tyre so worn that “the base of the tread could not be distinguished” and “repeated failings with respect to load security” (paragraph 22);

(g) the operator had been issued with £700 worth of fixed penalty notices for drivers’ hours offence, and £400 of these were issued to Mr Mboya personally (paragraph 23). Mr Mboya was also issued with a £200 fine as the driver of a vehicle with a bald tyre (paragraph 24);

(h) regarding Mr Mboya’s exercise of his responsibilities as transport manager, the required paperwork was “completely missing”, there were “large gaps in inspection frequencies”, undertakings had been “largely ignored”, and in an attempt to hide breach of undertakings “he has falsified records and failed to cooperate with the tribunal process” (paragraph 24).

6. The Traffic Commissioner found that the mandatory grounds for revocation in sections 27(1)(a) and (b) of the 1995 Act were made out. In the case of section 27(1)(a), by reference to the licence-holder no longer satisfying the requirement for professional competence and no longer being of good repute. In the case of section 27(1)(b), by reference to the transport manager failing to manage effectively and continuously the operator’s transport business (paragraph 24 of the Commissioner’s reasons). We note the point made in paragraph 25 of the Commissioner’s reasons that “when the transport manager is the sole director, it is difficult to distinguish between the good repute of each”.

7. The only matter going to Mr Mboya’s credit was that “he openly admitted these failings in public inquiry” but “last minute honesty is not enough to offset any of the negatives”. The Traffic Commissioner had trusted the operator and Mr Mboya following the 2022 public inquiry but “that trust was almost immediately broken and I am entirely unable to trust him now”. Mr Mboya had lost his good repute as a transport manager “and the falsifications mean that an extended period of disqualification from that role is appropriate”. (Paragraph 24 of the Commissioner’s reasons.)

8. The Traffic Commissioner also found that a period of disqualification was justified in respect of the operator. The Commissioner placed particular weight on the fact that “in twelve years as a Traffic Commissioner, I can count on the fingers of one hand the number of times I have come across falsified roller brake test printouts”. Such “fraudulent activity is rare within this important industry” and supported a

disqualification order in respect of the operator (paragraph 26 of the Commissioner's reasons).

9. The Traffic Commissioner set one year as the period during which the operator and Mr Mboya would be disqualified from holding or obtaining an operator's licence under the 1995 Act. But, in relation to Mr Mboya in his capacity a transport manager, the Commissioner directed that he be disqualified from acting as such for three years. The reasons giving for selecting these periods of disqualification were relatively brief: "in setting the period, I do have regard to Mr Mboya's difficult personal circumstances and I adopt the lower end of the scale" (paragraph 26 of the Commissioner's reasons). From the case advanced by Mr Mboya before the Commissioner, we think that 'difficult personal circumstances' probably referred to Mr Mboya's illness.

Legal framework

10. Section 26(1)(a) of the Goods Vehicles (Licensing of Operators) Act 1995 sets out the grounds on which a Traffic Commissioner may direct that "an operator's licence be revoked, suspended or curtailed". These include that "any undertaking recorded in the licence has not been fulfilled" (section 26(1)(f)).

11. Section 27(1) of the 1995 Act sets out cases in which a Traffic Commissioner must revoke a standard operator's licence. A Commissioner must revoke a standard licence if at any time it appears to the Commissioner that the licence-holder no longer satisfies a requirement of section 13A (section 27(1)(a)) or the designated transport manager no longer satisfies a requirement in paragraph 14A of Schedule 3 to the Act (section 27(1)(b)).

12. Where a Traffic Commissioner revokes an operator's licence, the Commissioner may also order the holder of the licence to be disqualified from holding or obtaining an operator's licence. The period of disqualification is to be indefinite or for such period as the Commissioner thinks fit (section 28(1) of the 1995 Act). Where the licence holder is a company, the power to make a disqualification order under section 28(1) is also exercisable "in relation to any director of that company" (section 28(5)).

13. The requirements of section 13A of the 1995 Act include:

(a) a Traffic Commissioner is satisfied that the operator is of good repute as determined in accordance with paragraphs 1 to 5 of Schedule 3 (section 13A(2)(b));

(b) a Commissioner is satisfied that, in the case of an operator who is not an individual, the operator has designated an individual (a transport manager) who satisfies the requirements in paragraph 14(A)(1) and (3) of Schedule 3 to the Act (section 13A(3)(B)). Those requirements include that the transport manager must be of good repute, professionally competent and able to manage effectively and continuously the operator's transport service.

14. If a Traffic Commissioner determines that a person who is a transport manager is no longer of good repute or professionally competent, the Commissioner must order the person to be disqualified from acting as a transport manager (paragraph 16(2) of Schedule 3). The disqualification is to be either indefinite or for such period as the Commissioner thinks fit. Before determining that a transport manager is no longer of good repute or professionally competent, the Commissioner must consider whether such a finding "would constitute a disproportionate response" (paragraph 16(1)).

Grounds of appeal

15. For the most part, Mr Mboya's grounds of appeal do not distinguish between the case advanced in his personal capacity and that advanced on behalf of the operator (the company of which he is the sole director).

16. Mr Mboya's case, advanced in writing and at the hearing of this appeal, is as follows:

(1) while he agrees with the Traffic Commissioner's findings and his decision was correct, it was also "rather harsh". The Commissioner should have suspended the operator's licence for six months, rather than revoked it. He wants to downsize to a single vehicle because running three vehicles is "too much of a problem". He has also been in poor health "due to covid issues". Suspension would have been fairer than revocation because he has never caused any accidents, never overloaded his vehicles nor allowed his drivers to cause any danger to other road users. Mr Mboya claims that there are worse operators 'out there' who are allowed to continue in business and "I

am just not good at covering my back with paperwork as other operators do". The fair thing would be to give him one "very, very last opportunity";

(2) the 'field officers' (which we take to mean DVSA Examiners) only passed on negative information to the OTC. Positive information was not drawn to the Commissioner's attention;

(3) he should be disqualified from acting as a transport manager for one year, rather than three years, because "we are all humans and we are always learning". A one year 'ban' will teach him a lesson and allow him to rectify the weaknesses illuminated by the Commissioner's decision. In relation to his disqualification as transport manager, Mr Mboya "can only accept the [Commissioner's] findings at 50%". He offered to provide access to his 'tacho records' but was told it was too late for that, he is willing to redo the CPC course and some of the fines issued to him personally were unnecessary and harsh because DVSA officials should have tried to educate rather than punish him;

(4) at the hearing before the Upper Tribunal, Mr Mboya argued that the operator carried out required vehicle maintenance, but he was not informed of the 'strict record-keeping requirements';

(5) at the hearing, Mr Mboya also argued that it was unfair of the Commissioner to have found that he falsified records. A more accurate description would have been duplication because roller test brake records carried out for one vehicle were presented as records of tests carried out on a different vehicle.

17. We should add that, at the hearing, Mr Mboya was unfailingly courteous towards the Upper Tribunal panel and fully accepted that he had made mistakes in the conduct of his transport business.

Determination of appeal

Ground 1

18. The first ground of appeal may be dealt with shortly. A Traffic Commissioner has no power to suspend or curtail an operator's licence where the Commissioner finds that a mandatory ground for revocation, as specified in section 27 of the 1995 Act, is

made out. In these cases, the Act requires the Commissioner to revoke the operator's licence. Suspension or curtailment of an operator's licence only arise as possible regulatory sanctions (along with revocation) where a Commissioner acts solely under section 26 of the 1995 Act. It is of course possible for a Commissioner to find that an operator has contravened both section 27 and 26 and that is what the present Commissioner did. But that did not modify the Commissioner's duty to revoke the operator's licence once he had found that a ground for revocation specified in section 27 was made out. The first ground of appeal cannot succeed. Once the Commissioner had found that a section 27 ground was made out, it was not open to the Commissioner to suspend or curtail this operator's licence.

Ground 2

19. In advance of the public inquiry hearing the Office of the Transport Commissioner (OTC) sent to Mr Mboya copies of all the documentation that would be placed before the Traffic Commissioner. The Commissioner recorded, at paragraph 11 of his reasons, that "Mr Mboya told me that he had more records and he thought that the Vehicle Examiner would have sent them through to me". We have read the transcript of the public inquiry before the Commissioner. As recorded at pages 2 and 3 of the transcript, Mr Mboya informed the Commissioner that he did have more information about maintenance of his vehicles and a recent SIPCAT report. The Commissioner pointed out that any further documentary evidence should have been sent in by Mr Mboya "two weeks ago".

20. When informing Mr Mboya that further documentary evidence should have been supplied two weeks before the day of the inquiry hearing, the Commissioner was referring to the instructions previously given to Mr Mboya by the OTC. The public inquiry 'call-up' letter sent to Mr Mboya on 15 September 2023 (p.29 of the OTC bundle) informed Mr Mboya that he should start to collect his own evidence and that "**before 18th October 2023**, you must submit any written evidence or representations that you want the Commissioner to see". Mr Mboya was sent a copy of the documents put before the Commissioner so that it should have been clear to him if a relevant document was missing. On 11 October 2023, the OTC wrote to Mr Mboya to inform him that the Commissioner had granted his postponement request, and that the public inquiry would now be held on 16 January 2024 (p.189 of the OTC bundle). This letter informed Mr Mboya that any further documentation on which he intended to rely should be sent to the OTC "14 days prior to the rescheduled date of 16th January 2024".

21. We are satisfied that Mr Mboya was given a fair opportunity to supply the Traffic Commissioner with his own documentary evidence. If he thought that the regulatory records provided to the Commissioner were incomplete, he should have addressed this well before the date of the public inquiry on 16 January 2024. The Commissioner did not act unfairly by proceeding to decide matters by reference to the documentary evidence before him. In any event, we are satisfied that, even if Mr Mboya had supplied documentary evidence that painted a more positive picture of recent maintenance activity, it would not have made a difference to the outcome. Mr Mboya accepted that his record-keeping fell below what was required, did not dispute that he had failed to abide by the undertakings given at the previous public inquiry nor that various penalty notices had been issued to him personally. And more recent maintenance evidence could not have diluted the severity of what seems to us to have been the key adverse findings made against the operator and Mr Mboya namely falsification of roller brake test print outs. We reject the second ground of appeal.

Ground 3

22. This ground is effectively an argument that the Traffic Commissioner's decision to disqualify Mr Mboya from acting as a transport manager for three years was disproportionate. The Commissioner's reasons do not refer to the requirement in paragraph 16(1) of Schedule 3 to the 1995 Act to consider whether a finding that a transport manager is no longer of good repute or professionally competent would constitute a disproportionate response. Since such a finding inevitably leads to a disqualification order under paragraph 16(2), paragraph 16(1) effectively asks a Commissioner to consider whether disqualification would be a disproportionate response.

23. Despite the Traffic Commissioner not having instructed himself by reference to paragraph 16(1) of Schedule 3 to the 1995 Act, we are satisfied that a three-year period of disqualification was a proportionate response. It was part of a set of regulatory sanctions that included a one-year disqualification from obtaining or holding an operator's licence. So, the Commissioner was effectively saying that, within one year, Mr Mboya (or Nyanza Transport) could seek an operator's licence but, if an operator's licence was sought, Mr Mboya could not be put forward as the designated transport manager for that licence for at least another two years. Someone else would have to be nominated as responsible for managing transport operations. This appears to us to

be a proportionate response, in the light of the adverse findings made by the Commissioner. On those findings, Mr Mboya's shortcomings as a transport manager were significant and went beyond mere disorganisation to include falsification of roller brake testing records. One does not have to be a transport specialist to understand that effective brakes are essential in order to prevent a goods vehicle from posing a very high risk to the safety of other road users. It is not disproportionate to prevent an individual who has sought to undermine such an important aspect of the regulatory regime for goods vehicles from managing transport operations for a period of three years especially when that same individual is only disqualified from obtaining an operator's licence for one year. In our view, the period of disqualification was in accordance with Annex D to the Senior Traffic Commissioner's Statutory Document No.10 *The Principles of Decision making and the Concept of Proportionality*. On the Commissioner's findings, this was a 'severe' case for the purposes of the Statutory Document because it involved "an attempt by the operator to conceal offences or failings".

24. Since we are satisfied that a three-year disqualification from acting as a transport manager was not a disproportionate response, ground three fails.

Ground 4

25. It is a designated transport manager's duty to make him or herself aware of the record-keeping requirements associated with that role. It is not clear whether the Commissioner was asked to take into account Mr Mboya's argument that he was not informed of the strict record-keeping requirements. However, if this was part of Mr Mboya's case before the Commissioner, the Commissioner's reasons were not deficient because they failed to address the argument. A Commissioner's reasons are not inadequate because they fail to deal with a hopeless argument.

Ground 5

26. This argument is semantics. Presenting vehicle 1's roller test braking records as if they recorded tests applied to vehicle 2 amounts to falsification of vehicle 2's records. The Commissioner was entitled to find that records had been falsified. This ground is rejected.

Conclusion

27. Since we have rejected each ground of appeal relied on by the Appellants, we must dismiss this appeal.

Mr E Mitchell

**Authorised for issue by the Upper
Tribunal panel on 26 June 2024.**

Given under section 37(2) of the
Goods Vehicles (Licensing of
Operators) Act 1995.