



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

**NCN: [2020] UKUT 255 (AAC)
Appeal No. T/2020/19**

ON APPEAL from a DECISION of the TRAFFIC COMMISSIONER

Before: Mr M Hemingway: Judge of the Upper Tribunal

Appellant: Edward Berry

Reference: PD1047770

Decided on papers: 24 August 2020

DECISION OF THE UPPER TRIBUNAL

This appeal to the Upper Tribunal is dismissed.

Subject matter:

Transport managers

CASES REFERRED TO:

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

REASONS FOR DECISION

Introduction

1. This appeal to the Upper Tribunal has been brought by Mr Edward Berry and is directed towards a decision of a Traffic Commissioner (TC) who, on 22 November 2019 (the date of his written reasons), decided, following a public inquiry of 6 November 2019, as follows:

“The good repute of transport manager Edward Berry is lost. He is accordingly disqualified, pursuant to Schedule 3 of the 1981 Act, from acting as a transport manager under any operator’s licence. The disqualification is for an indefinite period of time”.

2. I have, with the consent of the appellant, decided this appeal without a hearing.

The role of the Upper Tribunal on an appeal from a decision of the Traffic Commissioner

3. Paragraph 17(1) of Schedule 4 to the Transport Act 1985 provides:

“The Upper Tribunal are to have full jurisdiction to hear and determine on all matters (whether of law or of fact) for the purpose of the exercise of any of their functions under an enactment relating to transport”.

4. The Upper Tribunal’s jurisdiction was examined by the Court of Appeal in *Bradley Fold Travel Ltd and Anor v Secretary of State for Transport* [2010] EWCA Civ 695. The Court of Appeal applied *Subesh and ors v Secretary of State for the Home Department* [2004] EWCA Civ 56; where Woolf LJ held:

“44....The first instance decision is taken to be correct until the contrary is shown...An appellant, if he is to succeed, must persuade the appeal court or tribunal not merely that a different view of the facts from that taken below is reasonable and possible, but that there are objective grounds upon which the court ought to conclude that a different view is the right one...The true distinction is between the case where the appeal court might prefer a different view (perhaps on marginal grounds) and one where it concludes that the process of reasoning, and the application of the relevant law, require it to adopt a different view. The burden which an appellant assumes is to show that the case falls within this latter category”.

5. I have been guided by the above in making my decision on this appeal.

The background circumstances

6. The circumstances concerning this appeal are closely linked with those concerning the relevant operator which “employed” the appellant as its transport manager during the relevant period with which this appeal is concerned. One of the two directors of that operator had also acted as its transport manager. All of those protagonists were called to the public inquiry of 6 November 2019. The Traffic Commissioner, in addition to the above adverse decision he made with respect to the appellant, also made adverse decisions with respect to those other parties. Specifically, he revoked the licence of that operator, he disqualified its two directors from holding or obtaining an operator’s licence for a period of three years, and he decided the director who had also operated as a transport manager had lost her good repute and she too was disqualified from acting as a transport manager for an indefinite period. Appeals made by that operator and its directors were ultimately unsuccessful.

7. The same TC who took the decision the appellant seeks to challenge in these proceedings, had held an earlier public inquiry concerning the operator, which had taken place on 18 September 2018. The appellant was not involved in any of the issues which had led to that public inquiry and indeed had not at that stage been nominated as its transport manager. But it is fair to say the TC had significant concerns (which were expressed quite firmly) regarding the way in which the director who had been acting as its transport manager had performed in that role. In order to meet those concerns, an undertaking was given by the operator and accepted by the TC to the effect that an alternative transport manager would be found by the operator and would be nominated by 5 November 2018.

8. It is apparent that Edward Berry was then approached by the operator. On 12 October 2018 the Office of the Traffic Commissioner (OTC) received from the operator a completed TM1 form nominating the appellant as transport manager. The form, which was signed by him, also indicated that he would be “an internal transport manager working forty hours per week Monday to Friday” (see paragraph 6 of the TC’s written reasons of 22 November 2019). It was also indicated in the TM1 form that the appellant did not himself hold an operator’s licence and was not the transport manager on any other licence. However, checks undertaken by the OTC showed that information to be incorrect in that he held a licence as an operator in partnership with another individual and was also a transport manager on a separate licence. The appellant, in response to enquiries made of him with respect to his non-disclosure of those matters, initially indicated that the two relevant businesses were both dormant but subsequently changed his position on 18 November 2018 when he confirmed that the partnership licence was in relation to an organisation which was still operating and was not, therefore, dormant.

9. Despite the above non-disclosure, the TC indicated that he was minded to accept the appellant as transport manager subject to his seeing a copy of the contract of employment made between the relevant operator and the appellant. That was requested of the operator on 19 December 2018 but it does not appear there was any response until 22 March 2019 when one of the operator’s directors indicated in an email that “Mr Edward Berry has agreed to be transport manager”. That, of course, was not in any sense an adequate response to the request for sight of the contract of employment. The matter was, therefore, further pursued by the OTC in April 2019 and that led to the operator providing a document headed “Contract Agreement” in which it was simply stated “This is an agreement that Mr Edward Berry will undertake the position of transport manager for George Young’s Coaches Ltd”. That was it. There was no other content.

10. The OTC was then notified of various concerns regarding the operator and regarding matters touching upon vehicle maintenance and safety as well as the way in which its transport operations were being managed. It is not necessary for me to go into very much detail about that in this decision but, put simply, evidence was provided of a breakdown in relations between the operator and its maintenance provider. Evidence was provided as to safety concerns by a local authority which had a “school contract” with the operator. Further evidence of safety concerns was provided in a report by a vehicle examiner for the Driver and Vehicle Standards Agency. The local authority and the vehicle examiner both indicated that, whilst attempts had been made to contact the appellant in order to discuss the concerns, there had been significant difficulty in doing so. Indeed, the vehicle examiner was to tell the TC at the public inquiry that it appeared to him that the operator “had frozen out Mr Berry as transport manager”. On 25 September 2019 the appellant wrote to the OTC to say that he had resigned as transport manager on 19 September 2019 with immediate effect. In his letter the appellant explained that he had been the transport manager for “about three to four months” and had resigned because the working relationship with the director who had continued to operate as transport manager herself was “not working as she will not let me have any access to paperwork”.

11. It was the above concerns which led to the Traffic Commissioner deciding to hold the public inquiry of 6 November 2019 and deciding to call the appellant to it.

12. The appellant gave oral evidence at the public inquiry. He said, amongst other things, that he had been approached by the relevant operator in October of 2018, that he had completed the “paper forms” which must have been a reference to form TM1, that he had then heard nothing further until June 2019 when a friend had informed him, having discovered this “on the internet” that his name was on the operator’s licence as transport manager, that he had then approached the operator but, as he put it, had “come up against a brick wall” and had been refused “any access to paperwork”. He added that it had been made clear to him that the previous transport manager “was still in charge” and he observed “That’s where it stopped”. He then confirmed that, having been contacted by the Driver and Vehicle Standards Agency examiner referred to above, he had resigned his position. The impression he gave was that he had been discouraged or, essentially, prevented from acting as transport manager on the relevant operator’s licence. He had not, though, sought to contact the OTC between his signing the TM1 form and his writing to notify it of his resignation.

Some relevant legislative provisions and case law

13. A statutory requirement for a person seeking to be a transport manager is good repute (see section 14ZA(3)(a) of the 1981 Act). Good repute, with respect to transport managers, is determined in accordance with paragraph 1 of Schedule 3 to the Act. Schedule 3 relevantly provides:

Good repute

1(1) In determining whether an individual is of good repute, a traffic commissioner shall have regard to all the relevant evidence and in particular to –

(a) relevant convictions of his and of his employees and agents,

(aa) relevant fixed penalty notices issued to him and his employees and agents;
and

(b) such other information as the commissioner may have as to his previous conduct, in whatever capacity, in relation to the operation of vehicles of any description in the course of a business.

14. In *T/2014/50 Andrew Harris t/a Harris of Leicester*, it was said that an individual’s character, personality, ability and leadership qualities as relevant to an ability to ensure compliant operation and to effectively and continuously manage transport activities as a transport manager, would be relevant factors which could probably be taken into account when assessing good repute. Once a transport manager has lost good repute then disqualification from acting as a transport manager is mandatory. That is a result of the wording of paragraph 7B(2) of Schedule 3 to the 1981 Act. That means with respect to a transport manager, there is no opportunity, after a finding of loss of good repute, to consider whether or not disqualification is proportionate. But proportionality is required to be considered when deciding whether or not to actually make a finding that good repute has been lost (see paragraph 7B(1)). In other words, to justify a finding of loss of good repute, the matters found proved must be such that disqualification is a proportionate regulatory response.

The Traffic Commissioner's reasoning with respect to the appellant

15. The TC in providing his written reasons focused largely, and understandably, upon what he found to be failings by the relevant operator, its directors and the particular director who had also herself acted as the operator's transport manager or one of its transport managers. It appears that, in fact, with respect to the appellant, the TC accepted his account of his having been effectively blocked from acting as the operator's transport manager. But, in the view of the TC that did not exculpate him from blame but, rather, demonstrated significant concerns with respect to his reputation. So, it was not a question of the TC disbelieving the appellant or his concluding that he had dishonestly sought to minimise his own involvement in the failings of the operator. Rather, it was his very inaction which was, in his case, culpable. The TC said this of him:

“36. I find that former transport manager Edward Berry lacks good reputation. He must have known from the decision I issued in September 2018 that I attached weight to the appointment of a properly performing transport manager to the licence. In the TM1 form he signed in Oct 2018 he committed to work forty hours a week for the operator. For some reason he then sat back until June 2019 before approaching the operator about the task. He then went for 3 further months on the licence being refused access to paperwork and carrying out none of a transport manager's duties. He should have resigned the moment he was first rebuffed, as it should have been obvious that no reputable operator would treat its transport manager in this way. By falsely stating that he would be dedicating forty hours per week to the licence and by remaining on the licence long after it became clear that Mrs Young would not tolerate any interference, Mr Berry has given an outward veneer of professional competence to the licence when the reality was wholly otherwise. He deserves on this account to lose his reputation”.

16. Given my above summary of the relevant legislative provisions, it may be seen that since the TC had decided the appellant had lost his reputation, disqualification was mandatory. As to that, the TC said this:

“46. Having concluded that transport managers Gwendoline Young and Edward Berry have both lost their reputation, I must also disqualify them from acting as such in the future, under Schedule 3 of the 1981 Act. Both hold the transport manager qualification by virtue of acquired rights so have never taken the CPC examination or (in Mrs Young's case) ever undertaken any formal training. In my judgement, neither possesses the competence or knowledge which is expected of a modern-day competent and reputable transport manager. A time-limited disqualification would be unhelpful, since the mere passage of time is unlikely to rectify these shortcomings. I am thus disqualifying them for an unlimited period of time and consider it would be best if they now retired and did not seek to act as a transport manager again. I would only be prepared to consider an application for the re-establishment of reputation if the applicant had taken and passed the transport manager CPC examination”.

The appellant's grounds of appeal to the Upper Tribunal

17. In his written grounds the appellant asserted that he had worked in the transport business for fifty years with a clean record.

18. As to his involvement or viewed from one perspective lack of it, with the relevant operator, he said that in November 2018 he had had an interview to be the operator's transport manager but that no decision was made on the day of that interview. But then the application for approval as transport manager had been made to the OTC. The appellant says he was informed that the operator

would notify him as to the outcome but he did not subsequently hear anything. Then, in June or July of 2019, he was informed that the operator's website was indicating that he was now its transport manager. He says that that was done "without my knowledge". He says that the result of a visit to the operator's office was his being ordered out. He says he made several attempts to telephone one of the directors but was not able to make contact. In September of 2019, not having been permitted to act as transport manager and not having received any payment from the operator, he resigned. He observed that in light of all of that he does not feel that the decision to disqualify him is a fair one.

My consideration of the issues raised by this appeal

19. The argument pursued by the appellant is, in light of the above legislative provisions, perhaps best understood as amounting to a contention that the TC's decision that he had lost his reputation was a disproportionate one or was simply wrong.

20. The TC did not expressly say that he was actively undertaking a proportionality assessment when deciding whether reputation was lost. But in my judgment, that is very clearly the exercise he was undertaking at paragraph 36 of his written reasons which I have reproduced above. So, it cannot be said that he erred through failing to appreciate there was a proportionality exercise to be carried out or through failing to carry out such an exercise.

21. The thrust of the appellant's argument is that he did nothing wrong or little wrong because he was prevented from acting as transport manager by the culpable conduct of others. The TC did, indeed, accept the culpability of others and did not reject the appellant's factual account of events as told to him in the public inquiry and which has now been reiterated in the grounds of appeal. But in pursuing this appeal the appellant has not answered the specific concerns expressed at paragraph 36. It is right to say that he essentially "sat back" for a period of time having himself signed form TM1. He did not resign when, on his own account, he was rebuffed by the operator, his having approached it or its directors in June of 2019. It is clear that the TC thought he should have resigned at that point and also thought, more generally, that he should have been proactive in informing the OTC of the difficulties he was experiencing bearing in mind he had himself, through signing form TM1, informed the OTC that he was going to act as transport manager on the licence on a full-time basis. As the TC correctly and importantly observed, his actions gave an outward veneer of professional competence to a licence when the reality was very different.

22. In my judgment and against the above background it cannot be said that the TC's decision to the effect that the appellant had lost his good reputation was plainly wrong. That is so notwithstanding the appellant's previous lengthy involvement in the field of transport or the fact that others were at fault too.

23. As has already been said more than once, the finding of lost reputation meant disqualification as transport manager inevitably followed. It might be, although the appellant does not expressly say so, that he thought a time-limited disqualification (possibly a short one) would have been a more appropriate option than the indefinite disqualification which he received. As to the TC's explanation for the imposition of an indefinite disqualification, that may be found at paragraph 46 of his written reasons which, again, I have set out above. I am not sure that, in fact, the TC had a proper evidential basis for concluding that the appellant lacked "knowledge". But given the appellant's failings as identified at paragraph 36 of the written reasons it was, it seems to me,

permissible for him to conclude that there was a lack of competence and, indeed it cannot be said that such a conclusion was plainly wrong. That being so, the decision to disqualify for an indefinite period, which does not of itself preclude his working as a transport manager in the future if he can successfully persuade a decision-maker that his good repute has been established, was wholly justified.

24. The appellant has indicated that, in fact, it is his intention to retire as a transport manager. That was the course of action which the TC thought was probably best. So, it may well be the case that if the appellant had succeeded in these proceedings he would have derived no practical benefit from it. But that is not a consideration I have borne in mind in determining this appeal.

Conclusion

25. This appeal to the Upper Tribunal is dismissed.

M R Hemingway
Judge of the Upper Tribunal
24 August 2020