



NCN: [2020] UKUT 95 (AAC)
Appeal No.T/2019/55

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

**IN AN APPEAL FROM THE DECISIONS OF
Nicholas Denton, Traffic Commissioner for
the West Midlands 18 August 2019**

Before:

**Her Hon. Judge J Beech, Judge of the Upper Tribunal
Stuart James, Specialist Member of the Upper Tribunal
John Robinson, Specialist Member of the Upper Tribunal**

Appellants:

**SAMRA FOODSERVICE LIMITED
HARDEV SINGH SAMARA**

In attendance: Ms Newbold of Counsel instructed by Smith Bowyer Clarke

Heard at: Field House, 15-25 Bream's Buildings, London, EC4A 1DZ

Date of hearing: 7 January 2020

Date of decision: 14 January 2020

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that the appeals be DISMISSED

SUBJECT MATTER:- Proportionality of disqualification; failure to invite submissions on the effect of disqualification.

CASES REFERRED TO:- 2009/225 Priority Freight & Paul Williams; 2002/217 Bryan Haulage No.2; T/2018/72 St Mickalos Co Ltd & Michael Timinis

REASONS FOR DECISION

1. This is an appeal from the decision of the Traffic Commissioner for the West Midlands (“the TC”) made on 18 August 2019 when he revoked the restricted operator’s licence of the First Appellant (“the company”) from 0001 hours on 19 September 2009 pursuant to s.26(1)(f) of the Goods Vehicles (Licensing of Operators) Act 1995 (“the 1995 Act”) and disqualified the company and the Second Appellant (“Mr Samra”) from holding or obtaining any type of operator’s licence in any traffic area and (in Mr Samra’s case) from being the director of any company holding or obtaining such a licence pursuant to s.28(1), (4) and (5) of the 1995 Act. This appeal is only in respect of the orders of disqualification.

The Background

2. The undisputed background relevant to the appeal can be found in the appeal bundle, the transcript of the hearing and the written decision of the TC and is as follows. Mr Samra was the sole director of Samra Foodservice Limited which supplied bread, dairy products and other food to convenience stores and institutions such as hospitals.
3. Prior to the company’s incorporation in 2007, Mr Samra held a restricted operator’s licence in his name trading as Samra Bakery. That licence was called to a public inquiry on 1 August 2008 for the TC to consider, amongst other matters, whether Mr Samra was complying with the rules on drivers’ hours and records. The outcome of the public inquiry is not contained within the appeal bundle.
4. In 2008, Mr Samra merged his business with Medina Dairy Limited which also held a restricted operator’s licence. That licence had been called to a public inquiry on 12 March 2007. The reasons for the call up and the outcome of the public inquiry is not contained within the appeal bundle.
5. On 23 July 2008, Samra Food Service Limited applied for a restricted operator’s licence and contained in the application was an undertaking that the above two licences would be surrendered. Because of the operator licence history of the two merged companies, the application was considered at a public inquiry on 26 June 2009. Ultimately, the company was granted a restricted operator’s licence authorising 15 vehicles which was subject to six additional undertakings, two of which related to drivers’ hours training for both the drivers and the operator and one being an undertaking that the company would join the Freight Transport Association (“FTA”) or a similar professional body.
6. In December 2018, Traffic Examiner (“TE”) Love commenced an investigation into drivers’ hours and records, following a report that drivers employed by the company were exceeding their permitted driving time. By that stage, the licence authorised 20 vehicles with 10 in possession. TE Love found that whilst the daily delivery routes enabled the drivers to take sufficient daily rest,

deliveries were made six or seven days a week and drivers needed to be properly scheduled in order to ensure that they did not infringe the weekly rest requirements. The company's failure to produce all the relevant records for September and October 2018, resulted in a second request for missing documents. The request resulted in records being produced which showed driver name changes on the face of the tachograph charts; missing charts were attributed to the failure of a former driver to hand in his tachograph charts. The majority of missing records related to days when a driver needed to take a full weekly rest. The tracker data provided contradicted a number of claims made by Mr Samra with regard to vehicle use. This included a vehicle for which no records had been produced but which had been used on a daily basis. Mr Samra also claimed that a driver had entered the wrong odometer reading on a tachograph chart (to justify a discrepancy between the trace and the odometer reading) when in fact the vehicle had been driven for longer than the tachograph recorded. Tachograph records were also produced for a vehicle which appeared not to have been used for a month. Mr Samra failed to give a plausible account for the records being in existence.

7. TE Love concluded that Mr Samra had given contradictory explanations during the two meetings he had attended and had found himself in a position where he had to admit that he had written his name over the names of drivers on charts which would otherwise show that those had failed to take a full weekly rest. He was also aware that his son, Jatinder Samra, had driven vehicles when he did not hold a CPC entitlement to do so and as a result, Mr Samra had written his name over that of his son's on other tachograph charts. Mr Samra had lied repeatedly about a vehicle for which he had not produced tachographs saying firstly that it had been sold, then that it was used for recovery of broken down vehicles which he thought was exempt from the requirement to keep records and finally that the driver was abusive and refused to hand in charts. The driver denied this when spoken to by TE Love and his digital records showed that he was keeping records even though they showed weekly rest offences.
8. TE Love's report was summarised by the TC in his decision in this way:
 - i) *drivers were not correctly filling in tachograph centrefields;*
 - ii) *there were substantial numbers of missing records;*
 - iii) *some tachograph charts had been over-written with Hardev Samra's name, in an apparent attempt to disguise driving by a) a driver who should have been taking weekly rest; and b) by his son Jatinder Samra who did not possess the required driver certificate of professional competence;*
 - iv) *driver digital tachograph cards had not been downloaded or therefore analysed;*
 - v) *a vehicle not specified on the licence had been used;*
 - vi) *Hardev Samra had offered various explanations for the missing tachograph charts: firstly that recovery journeys were exempt; then (when tracker data showed that one of the vehicles in question had been used to make deliveries) that the registration number must be wrong; then finally that the driver of the vehicle had simply refused to*

hand over the tachograph charts. Hardev Samra had also finished by admitting that he had written over charts to try to disguise regular six day per week driving by one driver and driving without a CPC by Jatinder Samra."

The public inquiry

9. In attendance at the public inquiry held on 3 July 2009 was TE Love on behalf of the DVSA and Mr Samra, accompanied by an interpreter and represented by Tim Nesbitt QC. A substantial written submission had previously been submitted on behalf of Mr Samra although it remained unsigned because of "interpretation difficulties", not otherwise explained. The submission was summarised in this way by the TC:

"5. .. This explained that the over-writing of his name on various tachograph charts was because some drivers were in the habit of pre-populating the centrefield in preparation for the next day's driving. In the event, he had acted as a relief driver and had simply used their charts, over-writing his name.

6. Mr Samra's submission also stated that 50% of Samra Foodservice Ltd was owned by Medina Holdings Ltd. A check of Companies House records however revealed this to be incorrect: 50% of Samra Foodservice was owned by Mr Samra and the other 50% by Taibraiz Hussain (who was also a director of Medina Holdings Ltd). This was relevant because, later in the submission, it was clear that Samra Foodservice Ltd was praying in aid a financial guarantee from Medina Holdings Ltd in order to demonstrate sufficient financial resources.

7. In his submission Hardev Samra accepted that he had taken his eye off the ball in relation to tachograph analysis. The reason for this was the unfortunate and untimely death in December 2017 of the person who had been responsible for checking tachograph data, Sarbjit Singh. David Love had then been brought in as "Fleet Manager" but somehow no one had told him that he was expected to oversee compliance with drivers' hours rules: as a result he had not done anything in this area until after Tracey Love had investigated. Since January 2019 analogue charts had been analysed by Tachomagic and digital analysis had been carried out by Green Man. The intention was for Tachomagic to handle both analogue and digital analysis".

10. TE Love gave evidence, speaking to her report and was cross examined. It was suggested that she had misunderstood Mr Samra's explanation for why his name was over-written on the tachographs of other drivers as a result of Mr Samra's language difficulties. TE Love was clear that she had made a correct note of what had been said to her and that she had not had any difficulty in communicating with Mr Samra at the time. She still considered the digital tachograph analysis undertaken by the company to be unsatisfactory as one driver's card had not been downloaded since 30 May 2019.

11. The TC summarised the evidence that Mr Samra gave in answer to questions put by the TC in this way:

"I asked Mr Samra how the drivers who had pre-populated their tachograph charts the previous evening had apparently managed also to pre-populate the end mileage on those charts, since that had also been written in the same handwriting. Mr Samra stated that, although he had driven the vehicles in question, the drivers had helped him out by writing in the end mileage. In the case of the charts which recorded driving by Jatinder Samra, Jatinder Samra had over-written them with Hardev Samra's name because he (Jatinder) had been worried that his driving without a CPC might be detected. Hardev Samra had known nothing of this deception until Tracey Love drew it to his attention. I noted that this explanation differed both from the one offered to me in the submission and the one previously offered to Tracey Love".

12. Mr Samra also informed the TC that he had attended an operator licence management course in English since receipt of the call up letter and David Love, the fleet manager and Jatinder Samra had attended a transport manager CPC refresher course (although the latter does not hold a transport manager CPC). All of the company's drivers had recently attended driver CPC training modules paid for by the company and Jatinder Samra had been issued with a final warning for driving without a driver CPC and altering tachograph charts to conceal this. Finally, Mr Samra informed the TC that whilst the company had initially joined the FTA in compliance with the undertaking upon grant of the licence, the membership had lapsed several years ago. He did however, also aver that he was not aware that such membership was a requirement for holding a licence.

13. Mr Nesbitt's closing submissions were summarised in this way by the TC:

"..Mr Nesbitt acknowledged that the operator was not blemish-free. Sarbjit Singh had exercised effective oversight of drivers' hours but things had gone wrong after his unexpected death in later 2017. Tachograph charts had not been reliably collected although there were only 11 missing charts rather than massive gaps. Hardev Samra had not communicated well with TE Love – some of his answers to her had been less than clear. He had been startled in the interview and had said the first thing which might explain missing records. Relating to the overwriting of charts, there was insufficient evidence to justify a finding of dishonesty. Pre-population of charts, although this should not take place, was the cause of this. It was accepted that the use of both Tachomagic and Green Man had not been a perfect response, and that some deadlines may have been missed, but there had nevertheless been improvements in tachograph data collection and analysis. The operator did not seek to resist a radical curtailment of its licence, possibly to around 10 or 11 vehicles. But revocation of the licence would put it out of business, affecting 33 jobs".

14. At the conclusion of Mr Nesbitt's submissions, he enquired as to whether he could assist further, which elicited the following response from the TC:

“Well, thanks very much, Mr Nesbitt; that is very clear”.

The Traffic Commissioner’s decision

15. In his written decision dated 18 August 2019, the TC found Mr Samra to be an *“unconvincing and unreliable witness”*. The TC noted that Mr Samra had originally accepted to TE Love that he had overwritten his name on some charts in order to conceal the fact that one driver had not taken his minimum weekly rest and that his son had driven without a CPC. In his written submission, Mr Samra stated that he had simply written his name over the names of drivers who had pre-populated their charts because he did not have any spares. In the hearing, this account was developed when the TC asked how the other drivers could forecast the end mileage of the vehicle the following day. Mr Samra then stated that the drivers had helped out by completing the mileage for him and with regard to his son, he had not pre-populated his charts at all, but rather had simply overwritten his father’s name over his own. The TC found that Mr Samra’s account seemed to change almost by the minute, as new problems with the previous account were found and his explanations grew ever more contrived and unlikely. The TC concluded that he could attach very little weight to Mr Samra’s evidence.
16. The TC found that Mr Samra had attempted to disguise offences by retrospectively superimposing his name on a number of tachograph charts. Even if the TC accepted that Jatinder Samra superimposed his father’s name on the charts that he (Jatinder) had used, there still remained other charts on which Mr Samra’s name had been overwritten and in any event, the company had permitted Jatinder Samra to drive a large goods vehicle without possessing the required CPC.
17. Further, the operator had failed to fulfil its undertaking to ensure the observance of drivers’ hours and tachograph rules throughout 2018. Whilst the death of Sarbjit Singh must have been a shock to Mr Samra, it should not have taken more than a year to make alternative arrangements. Even in 2019, there was evidence that the operator was still failing to download some drivers’ cards within the 28-day interval.
18. Finally, the operator had breached the undertaking given in 2009 that it would be a member of the FTA. Whilst the company did join the association, it left a few years later without requesting that the undertaking be removed from the licence. The TC considered that had the company continued with its membership, some of the errors found by TE Love might have been avoided.
19. The TC then undertook the necessary balancing exercise (which is not criticised in this appeal) and having considered *Priority Freight* and *Bryan Haulage* questions, he concluded:

“In this case we are talking of a restricted licence so the company might in fact be able to address its transport needs by using third party hauliers or by using smaller vehicles for its deliveries of (mainly) milk and bread to small shops. But if the consequence of the loss of its licence is that it goes out of business,

this will be an outcome merited by the deception that Mr Samra has attempted to practice. The operator licensing system is based on trust and Mr Samra has shown through his actions that he cannot be trusted”.

20. The TC then turned to the question of disqualification:

“For the reasons outlined above, and having performed the same balancing exercise described, I conclude that both Samra Foodservice Ltd and Hardev Samra should deserve be disqualified (sic) under Section 28 .. In deciding upon the length of disqualification, I have taken account of paragraph 100 of the STC’s Statutory Guidance 10. This posits a starting point of between one and three years for a first public inquiry. This is in fact the company’s second public inquiry, although the first in 2009 was to consider its application, Mr Samra’s record on drivers’ hours compliance having proved far from satisfactory with his previous sole trader licence. However, it is only since the start of 2018 that the company appears to have taken its eye off the ball and Mr Samra greatly compounded shortcomings by attempting to conceal evidence. On the whole, I consider that a disqualification of 12 months – at the lighter end of the scale therefore – is proportionate, and in line with the STC’s guidelines”.

The Appeal

21. At the hearing of the appeal, the company and Mr Samra were represented by Ms Newbold of Counsel who submitted a skeleton argument in advance of the hearing, for which we were grateful. One ground of appeal was advanced: that the decision to disqualify both the operator and director, Mr Samra was inconsistent with the principles set out by the Upper Tribunal in T/2018/72 St Mickalos Company Limited and Michael Timinis (2019) UKUT 0089 (AAC).
22. Ms Newbold first of all pointed to the extent of the closing submissions advanced by Mr Nesbitt QC on behalf of both Mr Samra and the company. They were focussed on persuading the TC that there was insufficient evidence to justify a finding of dishonesty; that the improvements that had been made in the field of drivers’ hours and records compliance were significant and sufficient and that in the circumstances, the appropriate level of regulatory compliance was a radical curtailment. Mr Nesbitt referred to the “dire consequences” which would flow from the revocation of the company’s operator’s licence as a result of the loss of business which in turn, would result in the loss of 34 jobs which would be “a real tragedy”. Unfortunately, Mr Nesbitt did not go further and specifically address the additional consequences of an order of disqualification. Neither did the TC invite submissions upon the issue. At the end of the hearing, Mr Samra had not been left with the impression that there could well be serious consequences for the company and for his standing as a director once the TC had considered the overall picture. The only mention of disqualification was in the call up letter.

Discussion

23. We cannot accept that Mr Samra would not have been aware of the possibility that the company's operator's licence was at risk during the course of the public inquiry. He was represented by a specialist solicitor and specialist Queen's Counsel. Revocation and disqualification would have been very much at the forefront of their minds in view of TE Love's findings and conclusions as set out in her report. It is a disappointment to find that despite that specialist representation, disqualification was not addressed before the TC and neither was it raised by him. We agree with Ms Newbold's submissions that it should have been raised at the conclusion of Mr Nesbitt's submissions.

24. We invited Ms Newbold to advance before the Tribunal, the submissions that would have been made had the issue of disqualification been raised at the public inquiry. Unfortunately, she did not have any instructions. Being mindful of the fact that we can substitute our own decision for that of the TC rather remit the matter to allow for further submissions to be made to the TC, we requested Ms Newbold to take the necessary instructions as to how this issue would have been dealt with if it had been raised. Following an adjournment of some ninety minutes, her instructions were that the business was not viable without an operator's licence as there was an inherent risk of overloading if the company was to use smaller, exempt vehicles. Mr Samra wished to avoid disqualification as he would like to explore the possibility of merging with a similar company in the same market or alternatively, he would like to establish a new business, making a fresh application for a new operator's licence, which he appreciated would be the subject of close scrutiny. If either option were open to him, there was a small chance that he might be able to retain some of the contracts that the company had serviced. Mr Samra was concerned that a forced period away from the food retail market would jeopardise his future in that market.

25. Having heard Ms Newbold's submissions on disqualification, we are in no doubt that for the reasons set out by the TC, that disqualification of the company and Mr Samra was justified in this case, the findings of falsification of tachographs being serious (amongst other issues) along with Mr Samra's repeated attempts to deceive not only TE Love but the TC during the course of the public inquiry. Further, in conducting himself as he did, he gained a competitive advantage over other compliant operators in the same market. Operator licensing is based on trust and there is no place in operator licensing for operators such as Mr Samra and we are satisfied that it is appropriate and proportionate to disqualify both the company and Mr Samra to allow him time to reflect upon his conduct and the steps that he would need to take in the future if he wished to return to operator licensing. We have considered paragraph 100 of the Senior Traffic Commissioner's Statutory Guidance Document 10 and we consider that the TC's approach to the period of disqualification was entirely proper and proportionate and in the circumstances, we endorse the period of disqualification of 12 months for both the company and Mr Samra. Indeed, a longer period of disqualification could have been justified. As neither the company nor Mr Samra have the benefit of a stay, the order of disqualification will have effect from 0001 hours on 19 September 2019 to 19 September 2020.

Conclusion

26. Whilst the TC's failure to invite or receive submissions as to the effect and length of orders of disqualification was an error, with the benefit of further submissions, we have felt able to substitute our own decisions for that of the TC upon the issue of disqualification and we endorse the orders made.
27. It is appropriate to take this opportunity to advise advocates (specialist and otherwise) that if they fail to address a TC upon the issue of disqualification and are not then invited to do so by a TC and if that failure is either the only or main ground of appeal before the Tribunal, then whoever represents the operator on appeal, must be prepared to make the necessary submissions as to the effect and length of disqualification before the Tribunal bearing in mind our jurisdiction to substitute our own decision for that of the TC in appropriate cases pursuant to paragraph 17(2)(a) of Schedule 4 of the Transport Act 1985.

A handwritten signature in black ink, appearing to read 'Judge Beech', with a stylized flourish at the end.

**Her Honour Judge Beech
14 January 2020**