



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

**Appeal No. T/2016/32
NCN: [2016] UKUT 498 (AAC)**

**ON APPEAL from the DECISION of Deputy Traffic Commissioner Miles Dorrington,
TRAFFIC COMMISSIONER for the North West of England Traffic Area.**

Dated 23 May 2016

Before:	Mr M R Hemingway	Judge of the Upper Tribunal
	Mr L Milliken	Member of the Upper Tribunal
	Mr D Rawsthorn	Member of the Upper Tribunal

Appellant: Mr Darren Gerard Brooks
Trading as GTO Machines and Metals

Attendances:

For the Appellant: No attendance

For the Respondent: No attendance

Heard at: Field House, London

Date of Hearing: 4 October 2016

Date of Decision: 4 November 2016

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that this appeal be DISMISSED

Subject matter:

Restricted licence; fitness; whether revocation proportionate.

Cases referred to:

Bradley Fold Travel and Peter Wright v Secretary of State for Transport [2012] EWCA
Civ 695

REASONS FOR DECISION

Introduction

1. This is an appeal to the Upper Tribunal brought by Darren Gerard Brooks (trading as GTO Machines and Metals) from a decision of the Deputy Traffic Commissioner for the North West of England Traffic Area made on 23 May 2016 and communicated by letter of 24 May 2016. The decision of the Deputy Traffic Commissioner was to revoke Mr Brooks' restricted operator's licence pursuant to section 26(1)(c)(iii), (f) and (h) of the Goods Vehicles (Licensing of Operators) Act 1995.

The background

2. The appellant had been granted a restricted operator's licence on 23 January 2014. The licence authorised him to operate a maximum of two vehicles. It appears that, for the most part at least, he used only one. He operated as a sole trader engaged in skip hire work. He has pointed out during the course of the appeal process that he has dyslexia which understandably impairs his ability to read and write and that he has, at least in recent times, been engaged in looking after his mother who is said to have advanced Alzheimer's disease.

3. On 5 August 2014 a maintenance investigation was conducted by the Driver and Vehicle Standards Agency (DVSA). That was triggered by the failure of Mr Brooks to attend a new operator's seminar. The investigation was conducted by one Paul Snelson a vehicle examiner. According to Mr Snelson's written report, Mr Brooks had, throughout the process, displayed little understanding of what was required of him in the context of the applicable regulatory regime. It was noted that he was relying upon others to manage his maintenance procedures. He told Mr Snelson that a person he had previously employed as his transport manager had attended a new operator seminar on 19 May 2014. Mr Snelson recorded that he had "strongly advised" Mr Brooks to attend a new operator seminar himself as soon as possible. Pausing there, it is apparent that he never did so. Mr Snelson noted shortcomings in the maintenance systems used by the operator and, worryingly, discovered that a vehicle bearing the registration FJO5XTW was out of MOT. The outcome of the investigation was marked as being unsatisfactory and an official notice recording the specific concerns (a PG13G Notice) was issued for these reasons:

- “1. RBT/Road test section left blank on inspection record.
2. No vehicle safety inspection dates on forward planner.
3. Vehicle FJO5XTW MOT expired”.

4. Shortly after the above visit Mr Brooks wrote to the DVSA indicating, amongst other things, that the vehicle had now passed an MOT and that a new “yard manager” had been appointed and had attended a seminar.

5. On 20 January 2015 Mr Brooks was stopped when driving the above vehicle by a traffic examiner, one Lorna Dooley. It was found that his driver licence had expired and the vehicle was, accordingly, seized by the police. It was also established, during this encounter, that he did not hold a Driver Certificate of Professional Competence (CPC) which, as a driver of large goods vehicles, he was required to hold. Pausing there, he has consistently asserted

that he was either unaware of the need to hold one or that he does not believe he is required to do so. However, there is no doubt that that requirement does apply to him (see Council Directive 2003/59/EC and The Vehicle Drivers (Certificates of Professional Competence) Regulations 2007). In view of various concerns identified Mr Brooks was invited to a meeting at the Office of the Traffic Commissioner on 9 July 2015 but he failed to attend.

6. On 22 September 2015 the above vehicle, clearly no longer in the possession of the police, was stopped once again. Mr Brooks was the driver. On this occasion the traffic examiner concerned was one Ms Squire. She recorded that when she asked him for his CPC he replied that he did not need one because he was only transporting his own goods. What he was transporting, at the time, was a load of metal shavings which he was hoping, in due course, to be able to sell. Ms Squire noted that Mr Brooks did not qualify for an exemption from the requirement to hold a CPC and she also recorded that the vehicle's MOT certificate had expired (once again) on 31 August 2015. In light of the seriousness of those matters it was arranged for Mr Brooks to be interviewed under caution. There were some difficulties in arranging that interview because he cancelled on the first occasion explaining that his wife had been taken ill and, on a second occasion, he was not present for the interview to take place despite its having been arranged to conduct it at his own home.

7. On 9 March 2016 the Office of the Traffic Commissioner sent a "call-up" letter to Mr Brooks. That letter made reference to the maintenance investigation and the two incidents when his vehicle had been stopped all of which are referred to above. It also mentioned his failure to attend a meeting at the Traffic Commissioner's Office on 9 July 2015 and a further failure to attend another meeting which had been scheduled to take place on 9 November 2015.

8. The Public Inquiry was originally scheduled to take place on 15 April 2016. However, one day prior to that, Mr Brooks sent an e-mail to the Office of the Traffic Commissioner indicating he would not be able to attend because his mother had suffered a fall. The Public Inquiry was postponed but Mr Brooks was informed that it was unlikely any further postponement/adjournment would be granted. The Public Inquiry was rescheduled for 23 May 2016 and Mr Brooks was notified of this by letter of 19 April 2016. However, he once again sent an e-mail saying that he would be unable to attend because he was looking after his mother. He said that she did not trust anyone else to care for her and that she required round the clock attention.

9. Deputy Traffic Commissioner Dorrington decided that the Public Inquiry should proceed on 23 May 2016 in the absence of Mr Brooks. In deciding to proceed he noted a previous history of a failure on the part of Mr Brooks to attend meetings. He expressed the view that he had been given sufficient notice as to the date of the Inquiry and that he would, had he wished, have been able to make alternative arrangements concerning the care of his mother such as would have enabled him to attend. He heard oral evidence from the aforementioned Ms Squire. The Deputy Traffic Commissioner considered various matters of concern regarding Mr Brooks conduct of his business.

The Deputy Traffic Commissioner's decision

10. Having considered matters and having heard from Ms Squire the Deputy Traffic Commissioner gave the following extempore decision:

“The operator – who in this case is Mr Darren Gerard Brooks trading as GTO Machines and Metals, holder of Restricted Operator Licence No. OPC112219 – did not attend the Inquiry today, and I was satisfied, for the reasons given in the Public Inquiry, that I could deal with this case fairly in the absence of the Operator.

After considering all of the papers and after hearing from Traffic Examiner Squire, I made the following findings on the balance of probabilities:

- (a) The Operator had failed to provide any evidence that it met the requirement to be of sufficient financial resources.
- (b) The Operator drove Vehicle FJO5XTW on 20 January 2015 when the Operator’s driving licence was revoked and when the Operator had no valid driver CPC when one was required for that journey.
- (c) The Operator drove Vehicle FJO5XTW on 22 September 2015 when he had no driver CPC and when he knew that one was required for that journey.
- (d) The Operator drove Vehicle FJO5XTW on 22 September 2015 when the MOT for that vehicle had expired on 31 August 2015.
- (e) The Operator was properly served with a Driver and Vehicle Standards Agency production letter dated 2 February 2016 and failed to respond to that letter as required by law.
- (f) The Operator has failed to co-operate with both the Driver and Vehicle Standards Agency and the Office of the Traffic Commissioner to the standard that is required of all operator licence holders.

I accepted the evidence presented by DVSA as being credible, cogent and persuasive, and in that respect, Mrs Squire, I was particularly impressed with your evidence. I accepted it as credible, cogent and persuasive and am grateful for the time and trouble that you went to in preparing all of the evidence in the written documents that you provided because it demonstrated the length and breadth of your investigation and the opportunity that you have given Mr Brooks to answer the points that were raised by DVSA.

There was no persuasive evidence from Mr Brooks to rebut the findings of the Driver and Vehicle Standards Agency. Those are the findings of Traffic Examiner Squire, and also there are findings from Vehicle Examiner Snelson in the Public Inquiry statement and other documents within the file from DVSA, but I am satisfied that there is no persuasive evidence to rebut that evidence which I have already said I found to be credible, cogent and persuasive.

After undertaking a careful balancing exercise, I have found very little meaningful credit to give to Mr Brooks other than that he did get the revocation of his driving licence removed – that is between the January stop and the next stop in September – and that he did attend the interview under caution on 1 December 2015. I add that I had to really think hard about anything that I could give any meaningful credit for and, in respect of those matters that I have just mentioned, very little credit, very little weight has been given.

The negatives in this case substantially outweigh the positives as at the date of the Public Inquiry.

The Operator is no longer fit to hold an operator’s licence. That is a proportionate determination after undertaking my balancing exercise. I add there that the failure to co-operate with the Driver and Vehicle Standards Agency alone would be enough to lose

fitness. Production letters are important documents; they must be complied with. Your investigation was frustrated (which is a legal term) by the failure to receive the information that you required, and I am satisfied that Mr Brooks had every opportunity to do so and did not do so. This is a serious matter. All of the things collectively are extremely serious matters and that just is not acceptable.

The Operator's Licence is, therefore, revoked – because it is mandatory that I do so under section 26(1)(h) – due to the loss of fitness, which, as I have said, is a proportionate determination. It is also proportionate to revoke the Operator's Licence under my discretionary powers; namely, section 26(1)(c)(iii) which is prohibitions, (f) breach of undertakings, and (h), which is the lack of sufficient financial resources.

All orders of revocation will take effect at 23:59 hrs on 22 June this year, which allows a timely winding up of the transport operation for this Operator ...”

11. Mr Brooks asked the Deputy Traffic Commissioner to grant a stay pending an appeal to the Upper Tribunal but that application was refused. He appealed to the Upper Tribunal concerning the decision of the Deputy Traffic Commissioner to revoke his licence.

The proper approach on appeal to the Upper Tribunal

12. The jurisdiction and powers of the Upper Tribunal when hearing an appeal from a Traffic Commissioner are governed by Schedule 4 to the Transport Act 1985 as amended. Paragraph 17(1) provides that the Upper Tribunal is to have full jurisdiction to hear and determine all matters whether of law or fact. However, it is necessary to bear in mind that such an appeal is not, for example, the equivalent of a Crown Court hearing an appeal against conviction from a magistrate's court, where the case effectively begins all over again and is simply reheard. Instead, an appeal before the Upper Tribunal takes the form of a review of the material before the Traffic Commissioner. In this context we have taken full account of the valuable guidance to be found in a passage from paragraphs 30-40 of the judgment of the Court of Appeal in *Bradley Fold Travel Ltd and Peter Wright v The Secretary of State for Transport* [2012] EWCA Civ 695. We also note that the appellant bears the burden of showing that the decision under appeal is wrong and that, in order to succeed, he must show that “the process of reasoning and the application of the relevant law require the tribunal to adopt a different view”. Put another way, it might be said that in order to succeed an appellant has to demonstrate to the Upper Tribunal that a decision of the Traffic Commissioner was “plainly wrong”.

The proceedings before the Upper Tribunal in this appeal

13. Mr Brooks submitted written grounds of appeal. He said, therein, that he needed to continue his business and generate an income because his family are reliant upon him. He explained he had been guilty of oversights because of his inability to read and write and the need for him to care for his mother. He explained that, due to other financial commitments, he had not been able to afford to pay for a lawyer to assist him.

14. The appeal was listed for an oral hearing which was scheduled to take place on 4 October 2016. The appellant was sent a questionnaire requiring him to confirm his intention to attend the hearing but that questionnaire was not returned. He did not attend the

hearing. We received no message from him concerning any inability to attend nor did we receive any adjournment request. In the circumstances there was no reason to think that if we did adjourn to a different date the position regarding attendance would be any different. That was especially so bearing in mind the background of previous non-attendance before the Deputy Traffic Commissioner. We considered that, in the circumstances, it would be fair and just to proceed on the basis of the documentary evidence before us and that is what we have done.

Our decision and reasoning

15. There is no doubt that the various concerns referred to above and which the Deputy Traffic Commissioner had in mind when he made his decision are serious ones. Driving vehicles without an MOT certificate, driving without the appropriate licence and driving without an appropriate qualification (the CPC) represent fundamental failures. The Deputy Traffic Commissioner clearly took that view and cannot be faulted for so doing. Indeed, we are of the view that those and the other failings identified by the Deputy Traffic Commissioner demonstrate that Mr Brooks has shown a wilful and reckless disregard for the requirement of operator licence compliance.

16. We note that in his grounds of appeal Mr Brooks has not sought to quibble with the Deputy Traffic Commissioner's factual findings. He has not continued to argue that he was not required to hold a CPC. He has acknowledged what he has described as oversights on his part which suggests, absent any indication by him to the contrary, that he accepts the findings. In any event, they have been clearly made after careful consideration of the documentary and oral evidence.

17. Essentially, the grounds, insofar as they might be thought to contain any criticism of the Deputy Traffic Commissioner's approach, can only be interpreted as so doing on the basis of a failure to take into account, in the balancing exercise relevant to the proportionality of revocation, the extent of his difficulties with literacy and his commitment to his mother because of her unfortunate illness. However, whilst we understand Mr Brooks difficulties in this regard and whilst we certainly sympathise with respect to his mother's illness and his corresponding need to look after her which we accept will be a burdensome task, we do not think that the Deputy Traffic Commissioner was required to specifically place those points in the scales when carrying out his balancing exercise because they have not been presented by Mr Brooks as temporary difficulties which may be overcome but, rather, as ongoing difficulties and commitments. So, if it was those matters which prevented his ability to comply with even fundamental requirements in the past, there was nothing before the Deputy Traffic Commissioner to suggest that that would not continue to be the case, at least for the foreseeable future if his licence were not to be revoked. Additionally and in any event, the Deputy Traffic Commissioner was clearly aware of those matters because they were clearly evidenced in the documentation before him. He found that Mr Brooks was no longer fit to hold an operator's licence and that, as he put it, such was "a proportionate determination after undertaking my balancing exercise". Against the above background and bearing in mind the very fundamental failings which Mr Brooks had been guilty of, we are very far from being able to say that his conclusion as to the balancing exercise was plainly wrong even taking full account of the literacy difficulties and the need Mr Brooks has to care for his mother. Although it is not necessary for us to go this far we would, in fact, conclude that the Deputy Traffic Commissioner's conclusion as to that was plainly right and it was certainly one very much open to him on the material available.

18. As to the remaining matter raised in the grounds of appeal, we understand Mr Brooks natural concern regarding his livelihood and his ability to support his dependants. However, we cannot see that that was a matter which was squarely raised with the Deputy Traffic Commissioner and, more importantly, nor can we see that even if it had been squarely raised with him it could conceivably have made any difference given the seriousness of the findings which had been made in respect of him. Further, no information was provided to the Deputy Traffic Commissioner or, for that matter, to ourselves to indicate excessive hardship or that other ways of earning a living would not be available or that, even failing that, the benefit system would not come to Mr Brooks and his family's assistance.

19. We have not limited ourselves to a consideration of the specific points raised in the grounds of appeal. We have undertaken our own assessment of the Deputy Traffic Commissioner's decision. However, we are unable to find fault with it. In our view all relevant matters were fully and fairly considered and appropriately decided. The failings identified were serious and the Deputy Commissioner was right to regard them as such. His reasoning is properly set out and is cogent and rational. We are not persuaded that his balancing exercise was such that this appeal should succeed.

20. In all the circumstances this appeal is dismissed.

Conclusion

21. The appellant's appeal to the Upper Tribunal is dismissed.

Signed

M R Hemingway
Judge of the Upper Tribunal

Dated:

4 November 2016