Appeal No. T/2014/78

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER
TRAFFIC COMMISSIONER APPEALS

ON APPEAL from the DECISION of Nick Denton TRAFFIC COMMISSIONER for London and the South East of England
Dated 3 November 2014

Before:

Kenneth Mullan	**Judge of the Upper Tribunal**
Mr S. James	**Member of the Upper Tribunal**
Mr A. Guest	**Member of the Upper Tribunal**

Appellant:

AR COOK and Sons (Plant Hire) Ltd

Attendances:
For the Appellant: Mr D. Phillips QC

Heard at: Field House, 15-25 Bream's Buildings, London, EC4A 1DZ
Date of hearing: 16 March 2015
Date of decision: 6 July 2015

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that this appeal be ALLOWED, in part. We exercise our power under paragraph 17(2)(a) of the Transport Act 1985, as amended, and make the following order. The Appellant's goods vehicle operator's licence is suspended for a period of two weeks from 0001 hours on 6 October 2015 until 2359 hours on 19 October 2015, pursuant to section 26(1)(f) of the Goods Vehicle (Licensing of Operators) Act 1995. The remainder of the decision of the Traffic Commissioner dated 3 November 2014 is confirmed. Accordingly, while we allow the appeal to the extent that we find that the Traffic Commissioner committed a procedural error, our substituted order is such that the effect of the Traffic Commissioner's decision is confirmed, save that the effective date of the period of suspension is deferred for a period of three months. In all other respects, the decision of the Traffic Commissioner is endorsed.

SUBJECT MATTER:- Drivers' hours and tachographs, Suspension, Procedure, Miscellaneous

CASES REFERRED TO:- Recycled Packaging (Scotland) Ltd (2007/133), A Cooper trading as C-FARE (OBAB) (2002/167), NR Evans (2005/56)

REASONS FOR DECISION

The decision under appeal to the Upper Tribunal

1. This is an appeal from the decision of the Traffic Commissioner for London and the South East of England dated 3 November 2014.

2. The factual background to this appeal appears from the documents and the Traffic Commissioner's decision and is as follows:-

   (i) The Appellant has held, since December 1996, a restricted goods vehicle operator's licence authorised for twenty-five vehicles with ten vehicles in possession.

   (ii) A formal warning letter was issued on 23 March 2005 for an overload conviction and 'use outside one month grace.'

   (iii) On 13 November 2009 a warning letter was issued due to the Appellant's failure to notify two convictions.

   (iv) On 6 August 2014 a 'strong' warning letter was issued and the operator accepted an undertaking to have rolling road brake tests every six months. This was due to an unsatisfactory fleet inspection which found a number of shortcomings including inspection records with missing mileages.

   (v) A report was received from a Traffic Examiner who carried out an investigation on 26 June 2014 following the stopping of one of the company's vehicles with consequent infringements. The report of the Traffic Examiner found the following shortcomings:

   - Systems were not in place to download or analyse the driver digital tachograph cards.
   - Systems were not in place to analyse the downloaded data from the vehicle digital tachographs.
   - Systems were not in place to ensure action on drivers' hours infringements.
   - Systems were not fully in place to record working time.
   - Systems were not fully in place to store downloaded data or printouts.
   - In relation to the Working Time Directive there were no systems in place overall and no specific systems in place for night workers.

   (vi) An analysis of the tachograph records found that there were 15634 missing kilometres for the period from April to June 2014 and that there had been driving for a total of sixty-two hours and thirty-one minutes without a card inserted.

   (vii) In an interview with the Traffic Examiner the Company Secretary and Director of the company admitted that the downloading of drivers' digital cards had not been done for around two years and that the download of vehicle units had been done but 'not all of them.' She indicated that she thought that a maintenance fitter was responsible for analysing the downloaded data. The Traffic Examiner interviewed the fitter who indicated that it was not his responsibility to download or

analyse driver cards but he had been downloading cards from vehicles from February 2014.

(viii) Due to these matters, the Traffic Commissioner decided to call the operator to a Public Inquiry.

(ix) The Public Inquiry took place on 31 October 2014. During the course of the Public Inquiry the Appellant's representative submitted that the Appellant did not seek to deny the breaches which had occurred.

3. On 3 November 2014 the Traffic Commissioner made a decision to the following effect:

> 'Having heard the evidence, I decided to suspend the licence for two weeks from 0001 hours on Saturday 29 November 2014 until 2359 hours on Friday 12 December 2014, pursuant to section 26(1)(f) of the Goods Vehicle (Licensing of Operators) Act 1995. The licence is curtailed from 25 to 14 vehicles, for an indefinite period, under section 26(1)(c)(iii). Under section 26(6), I direct that the operator's vehicles may not be used under any other operator's licence during the period of the suspension. The following undertakings will be added to the licence:
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> (i) Lauren Shoebridge will attend an operator licence management course, run by a trade association (FTA/RHA/BAR/CPT), a professional body (IoTA/CILT/SOE/IRTE), or an OCR-approved exam centre offering the transport manager CPC qualification in goods, by 31 January 2015. A copy of the certificate of attendance will be sent to the traffic area office in Eastbourne within seven days of the course taking place.
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> (ii) An independent audit of the operator's systems for maintenance and drivers' hours and the effectiveness with which those systems are implemented will be carried out by the RHA, FTA or other suitable independent body, by 31 March 2015. The audit should cover at least the applicable elements in the attached annex. A copy of the audit report, together with the operator's proposals for implementing the report's recommendations, must be sent to the traffic commissioner within 14 days of the date the operator receives it from the auditor.'

4. The Appellant was notified of the decision of 3 November 2014 by way of correspondence on the same date.

The application for a stay

5. By way of e-mail correspondence dated 4 November 2014 an application was made for a stay of the decision of the Traffic Commissioner.

6. On 5 November 2014 the Appellant's representative was notified the application for a stay was granted by the Traffic Commissioner save that the Commissioner was satisfied that the curtailment of the licence to fourteen vehicles should stand.

The appeal to the Upper Tribunal

7. On 27 November 2014 an appeal to the Upper Tribunal was received in the office of the Upper Tribunal.

8. In the original appeal, the Appellant set out the following Grounds of Appeal:

(i) The Traffic Commissioner had failed to recognise that a number of the movements that he found to be infringements were, in fact, derogated work in that they fell within the highway maintenance exemption. If he

had so recognised the TC would have found fewer breaches and would, therefore, have given greater weight to the positive features. In that event he would have recognised that as at the date of the hearing the operator was operating in substantial compliance and he would not have curtailed or suspended the licence.

(ii) In any event, the suspension was a disproportionate penalty because of the irreparable commercial impact that it would cause. Having decided not to revoke the licence the TC should not have imposed a suspension, the effect of which in practical terms would be to put the operator out of business.'

9. Before the oral hearing in the Upper Tribunal, Mr Phillips submitted a Skeleton Argument for which we were very grateful. Mr Phillips submitted that the Appellant now appealed only against the decision to suspend. It did not pursue the appeal against curtailment and did not seek to rely on the 'derogation' ground. In summary the basis of the appeal was:

(i) The company operates specialist vehicles and employs specialist staff.

(ii) Its transport operation cannot practicably be sub-contracted.

(iii) The decision to suspend would have a disproportionate impact upon the company's business and continued economic viability.

(iv) The Commissioner failed to invite submissions on the effect of suspension; and in the decision failed to address the peculiar impact of suspension on the company's business.

(v) The Tribunal may, therefore, substitute its own decision on the question of suspension.

10. Mr Phillips expanded on the grounds of appeal, as follows:

(i) The hearing (Public Inquiry) was short and was conducted in a relatively informal manner. The impression from the transcript was that the Commissioner had mastered the facts and had reached a provisional view not to revoke the licence. See, for example, *'... I will have one or two questions on what has happened since, just to reassure myself that things are going in the right direction.'* The progress of the hearing appeared to have been clarification from the Traffic Examiner, from Mr Cook and Mrs Shoebridge.

(ii) The decision was succinct and to the point. It properly itemised negative and positive features. The reason for answering the *Bryan Haulage No. 2* (tab 4) in the company's favour is made clear. Similarly, the reasons for imposing the conditions (which had been offered by the company) and for imposing the sanctions are also made clear – the Commissioner understandably wished to be satisfied that the company's existing level of compliance would continue.

(iii) There are a variety of authorities directed to the circumstances in which a Commissioner should alert the operator to the possibility of a suspension so as to enable the operator to adduce evidence/make submissions on the question. Reference was made to *A Cooper* (2002/167), *NR Evans* (2005/56) and *Recycled Packaging (Scotland)* (2007/133).

(iv) As a general proposition, there is no universally applicable rule: each case will turn on its own facts. There is, however, a recognised distinction between specialist operations (where sub-contracting during

the period of suspension may be difficult or impossible) and non-specialist operations (where sub-contracting can be presumed to be readily practicable). The correct approach could be seen from paragraph 4 of *Recycled Packing (Scotland) Ltd*:

> 'We agree that the Tribunal has stated in some cases that it is desirable that a warning of the likely order should be given so as to enable evidence of consequences to be obtained. However, a distinction is to be made between operators of non-specialist vehicles, where sub-contractors are likely to be readily available, and operators of specialist vehicles, where (substantial) suspension may be tantamount to revocation (see the cases reviewed in 2007/167 A Cooper t/a C-Fare (Oban) and see also 2006/171 Black & White Motorways Ltd.

(v) It was submitted that the Appellant carried on a specialist operation. It required the use of specialist vehicles which meant that sub-contracting of the work was not possible. It employed specialist railway-authorised staff who could not be replaced by sub-contract labour. This was, therefore, a case in which the Commissioner should have alerted the company to the possibility of suspension, and in which he should have sought information about its likely consequences.

(vi) It was submitted that the Commissioner knew that the company's principal source of work was railway related. The closing submissions on behalf of the Appellant at the Public Inquiry made reference to the specialist nature of the operation and referred in general terms to the potential impact of suspension. It was at that stage that the Commissioner should have told the Appellant that he was considering suspension and should have given the Appellant an express opportunity to address the Commissioner on the detail of the potential impact. The Commissioner did not do so and the Appellant was entitled to regard the Commissioner's silence as an indication that suspension was not being considered.

(vii) It was submitted that the decision showed that the Commissioner had not properly understood the practical consequences of suspension. He could not have done so because he had not given the warning so that the relevant details were not adduced.

(viii) Mr Phillips submitted that the Upper Tribunal was entitled to set aside the Commissioner's decision on suspension and to substitute his own. He submitted that had the Commissioner given the appropriate warning the company would have introduced in evidence detail of the consequences of suspension. Mr Phillips submitted that such evidence was given in a further witness statement from Mr Anthony Cook, a Director of the Appellant company, which he invited us to read.

(ix) Mr Phillips submitted that the appropriate decision, given the specialist nature of the operation and the impact that Mr Cook showed that suspension would have on the business, was for there to be no suspension.

11. At the oral hearing of the appeal Mr Phillips expanded on the submissions made in his Skeleton Argument. In addition he provided us with the statement from Mr Anthony Cook referred to above and invited us to take oral evidence from Mr Cook and Mrs Shoebridge. We accepted into evidence the statement from Mr Cook and did take oral evidence from Mr Cook and Mrs Shoebridge.

We did because we accepted the submission from Mr Phillips that were we to find that the decision of the Traffic Commissioner to be in error, we might find it appropriate to exercise our discretion to give the decision which the Traffic Commissioner ought to have given. We were of the view that we could not give any such decision without adducing evidence on two matters (i) the nature of the business undertaken by the Appellant i.e. whether it was, or was not 'specialist, in nature and (ii) the potential impact on the Appellant's business of an order of suspension. Mr Phillips made further submissions on both of those matters, arguing, as he had done in his skeleton argument, that the appropriate decision was for there to be no suspension. In the alternative he argued that an immediate suspension would also be disproportionate and wrong and that a period of suspension might be mandated but deferred to permit the Appellant company to make plans for it.

Mr Phillips also gave an assurance that the undertakings added to the operator's licence were being addressed.

The reasoning of the Traffic Commissioner

12. The reasoning of the Traffic Commissioner was set out in his decision after his balancing of the 'negative' and 'positive' aspects of the case, and was as follows:

> 'I have just stopped short of revoking this licence. The level of non-compliance has been shocking, sustained and serious. Road safety and fair competition have been severely compromised. A meaningful suspension is entirely proportionate, even though this will cause financial and operational difficulties. A more token action would send entirely the wrong signal about the seriousness of total failure to abide by drivers' hours and tachograph rules. I am also curtailing the licence to the current number of vehicles in possession, because I want to be sure that the operator is capable of operating at this level of compliance for a sustained period, before allowing any increase in activity from this level.'

Our analysis

13. We agree with the submissions made by Mr Phillips and, for the reasons which have been set out by him in his written and oral submissions, agree that the decision of the Traffic Commissioner should be set aside.

14. The judicial authorities on the requirement of a Traffic Commissioner to alert an operator of the potential for a licence to be suspended for the purpose of permitting the operator to adduce evidence and/or make submissions on the consequences of such a suspension, were accurately summarised by Mr Phillips in his skeleton argument and further oral submissions.

15. To the cited paragraph from *Recycled Packaging (Scotland)* Ltd, we would add the following, from paragraph 4 of *A Cooper trading as C-FARE (OBAB)* (167/2002):

> "Mr Whiteford's second submission was founded on the appeal *1997 J37 Galloway Refrigerated Transport Ltd* in which the Tribunal stated:-
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> > "It is apparent that the Traffic Commissioner took, and was entitled to take, a very serious view of the Appellants' conduct. Nevertheless, suspension of the licence as ordered would have had the effect that the whole fleet of 25 vehicles and 16 trailers was put off the road for 4 weeks, which we regard as action of the sort that few firms could be expected to survive. If the Traffic Commissioner intended so to

> suspend we think that in the particular circumstances it was incumbent upon him to have given warning of this or at least generally to have stated the options that he was considering so as to have enabled the Appellants to make representations about the effect of suspension on their business. Without such material we consider that the Traffic Commissioner was unable properly to decide on the appropriate length of suspension and whether it should have been total."

This appeal was the subject of comment in appeal *1999 L47 Hinchcliffe Bros Skip Hire 1985 Ltd:-*

> "In the course of argument Mr Ward expanded these assertions to include an argument, based on the decision of the Tribunal *in 1997 J37 Galloway Refrigerated Transport Ltd*, to the effect that the Deputy Traffic Commissioner should have investigated the likely financial effect of a suspension before imposing it. We do not regard the *Galloway* decision as having laid down a principle of universal application; much depends upon the particular circumstances of each case."

The *Galloway* case has also been referred to in two recent cases (81/2001 K Transport Services (Midlands) Ltd; and 144/2002 Abbeycheer Ltd) in which it is suggested that it is "incumbent" upon a traffic commissioner to make the appropriate enquiries as to the likely effect of his proposed action on the Appellant's business. The *Galloway* case is stated to be the basis for this assertion but we must emphasise that as is clear from its wording, and as is stated in the *Hinchcliffe* case, the *Galloway* case turned on its particular facts. It did not decide a principle of general application.

16. We agree with Mr Phillips that there is no universally applicable rule and that each case must turn on its own facts. Nevertheless, we are satisfied that there was sufficient evidence before the Traffic Commissioner that the operations of the Appellant company were suitably specialist in nature so as potentially to attract the protections afforded in the form of an adequate opportunity to adduce evidence and/or make submissions on the impact of suspension should the Commissioner have that form or regulatory action in contemplation. We have had the opportunity to hear evidence and submissions concerning the nature of the Appellant company's business and the possible impact that any order of suspension might have on the company. In our view, that is the sort of evidence which the Traffic Commissioner should have permitted to have been adduced before him and, if appropriate, he should also have allowed submissions on those issues. We find, as a fact, that the operations of the Appellant company are sufficiently specialist that the principles in the authorities cited above apply. To paraphrase the wording of *Galloway Refrigerated Transport Ltd,* quoted above, '... if the Traffic Commissioner intended so to suspend we think that in the particular circumstances it was incumbent upon him to have given warning of this or at least generally to have stated the options that he was considering so as to have enabled the Appellants to make representations about the effect of suspension on their business. Without such material we consider that the Traffic Commissioner was unable properly to decide on the appropriate length of suspension and whether it should have been total.'

17. Mr Phillips has submitted that were we to hold that the decision of the Traffic Commissioner was in error we should not remit the matter to the Traffic Commissioner for rehearing and determination but should make the decision which the Commissioner ought to have made. Mr Phillips submitted that we had, or could have, sufficient evidence before us, to determine whether

regulatory action in the form of an order for suspension was appropriate. As was noted above, we had the witness statement of Mr Anthony Cook, a Director of the Appellant company, and his and the oral evidence of Mrs Shoebridge, another Director of the company.

18. Their evidence is that suspension, whether immediate or delayed, would have serious consequences for the company's survival and that without the licence the company could not continue in business. As the workforce was specially trained, sub-contracting the transport side of the business was not possible during any period of suspension. The specialised vehicles which they utilised were not available for hire. The contracts under which they operated required the company to certify that individual workers placed on site were sponsored in the Network Rail Linkup scheme.

19. If the company was prevented from fulfilling its existing contractual commitments there would be significant losses arising to all parties in the contract due to the necessary infrastructure arrangements which had already been put in place. It would be unlikely that customers would be able to obtain the services from another contractor due to inevitable 'lead-in' times. The work would not take place leading to immediate financial losses to the company and a consequent loss of goodwill. That could, in turn, lead to a loss of 90% of the company's business meaning that the company could not survive in its present form.

20. Lay-off of the company employees during any period of suspension would mean that they could leave on a permanent basis. It would be difficult to replace and train employees to the appropriate standard. Mr Cook accepted that while the long term consequences of an immediate suspension were, potentially devastating, a deferment of the suspension for a period of three months would mean that the company could plan not to take on any contractual commitments for the period of suspension. While that would minimise any impact on customers any suspension, even deferred, would expose the company to the real risk of losing experienced staff. There were several aspects of the specialist nature of their railway work which meant that it would be almost impossible to replace specialised staff in the short term.

21. Is a period of suspension mandated? We have no hesitation in determining that it is. In respect of his determination to order suspension as a form of regulatory action and the period of that suspension, the decision of the Traffic Commissioner cannot be faulted. His conclusions that the level of non-compliance has been 'shocking, sustained and serious' are wholly accurate and justified on the evidence which was before him. One of the negative factors set out in the balancing exercise was that there was:

> '... no tachograph analysis system at all, despite the fact that it has been many years since the company expanded into types of operation not exempt from EU drivers' hours rules; the company missed many opportunities over the years to correct this.'

22. The Traffic Commissioner could not disregard such overt disregard for the regulatory provisions for goods vehicle operators. Further, the Traffic Commissioner's conclusions that road safety and fair competition have been severely compromised are entirely appropriate. As he observed, token action would send out to the industry the wrong signal about the response to a serious failure to abide by drivers' hours and tachograph rules. In these circumstances the decision to mandate a period of suspension was rational and appropriate. It was undertaken following a careful balancing of the negative and positive factors, an exercise which could not be faulted.

23. Was the suspension period of two weeks appropriate? In our view, it was. We have noted that the Traffic Commissioner was giving serious consideration to the revocation of the Appellant company's licence. In those circumstances, discussions about the period of suspension, whether it should be immediate or deferred and the impact of a suspension on the viability of the company's business would not have been relevant. In our view, the level of non-compliance was such that regulatory action in the form of the addition of undertakings would not have been sufficient. The order for a period of suspension for two weeks was wholly appropriate and reflective of the disregard by the Appellant for the requirements of the regulatory scheme.

24. Should the period of suspension be immediate or deferred? It is in this aspect of the appropriate form of regulatory action that we differ from the Traffic Commissioner. We have had the benefit of written and oral evidence from those associated with the Appellant company on the likely impact of a period of suspension. The Traffic Commissioner did not have that advantage and it is our view that if he had he may have given consideration to the deferment of the period of suspension to permit the company to make sufficient preparations to cope with a suspension of the licence in order that the business would not fail. It is clear that while the Traffic Commissioner gave consideration to revocation it was not his intention that the company should, at this stage, go out of business.

25. We have no doubt that the period of suspension of two weeks will have an effect on the operations of the Appellant company. That, however, is the nature of the imposition of a regulatory sanction, following a determination of serious, sustained breaches of the drivers' hours and tachograph requirements, with a parallel failure, over a period of time, to address those breaches and, as a result, compromise road safety. We also accept that the imposition of a period of suspension with immediate effect would have a highly significant impact on the operations of the Appellant company. That impact was set out in some detail above. We are wholly satisfied, however, for the reasons which we have set out above, that a period of suspension is mandated in this case. Nonetheless, we are of the view that the deferral of the effective date of the commencement of the period of suspension will enable the directors of the company to manage the consequences of the suspension. The suspension will still have an impact but that is its purpose. The evidence of Mr Cook was that the impact can be managed by an appropriate period of deferment. We are satisfied that a period of deferment of three months is appropriate.

Disposal

26. The appeal is allowed, in part. We exercise our power under paragraph 17(2)(a) of the Transport Act 1985, as amended, and make the following order. The Appellant's goods vehicle operator's licence is suspended for a period of two weeks from 0001 hours on 6 October 2015 until 2359 hours on 19 October 2015, pursuant to section 26(1)(f) of the Goods Vehicle (Licensing of Operators) Act 1995. The remainder of the decision of the Traffic Commissioner dated 3 November 2014 is confirmed. Accordingly, while we allow the appeal to the extent that we find that the Traffic Commissioner committed a procedural error, our substituted order is such that the effect of the Traffic Commissioner's decision is confirmed, save that the effective date of the period of suspension is deferred for a period of three months. In all other respects, the decision of the Traffic Commissioner is endorsed.

Kenneth Mullan, Judge of the Upper Tribunal,
6 July 2015