



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

**Appeal No. UA-2023-001389-T
[2024] UKUT 240 (AAC)**

On appeal from the Deputy Traffic Commissioner for the East of England

RW Gent Ltd

OF 2051804

Appellant

Before: Upper Tribunal Judge Ward, Mr R Fry and Mr G Roantree

Hearing date: 16 April 2024 (with post-hearing evidence and opportunity for submissions)

Representation:

Appellant: Mr D Stafford (Director) and Mr D Bowers (Company Secretary)

DECISION

The decision of the Upper Tribunal is to dismiss the appeal.

REASONS FOR DECISION

Introduction

1. The appellant appeals against a decision by the Deputy Traffic Commissioner (DTC) taken on 14 July 2023 and communicated on 17 July, revoking the appellant's operator's licence. The appeal had originally been made late and in incomplete form, but was subsequently admitted.
2. The appeal was heard at Birmingham Civil and Family Court on 16 April 2024.
3. The operator operated a single vehicle and had held an operator's licence since 1994. We say at the outset that as regards operational matters, there has never so far as we are aware been any criticism of it. The same cannot be said for its attention to regulatory matters. In 2015 regulatory action was taken because of delay in replacing its transport manager, which was eventually resolved by appointing a transport manager, and similar issues arose in 2021.

Events

4. The catalyst for the events which are the subject of the present appeal was that Mr Matthew Noon was removed as transport manager on 1 March 2023 on the Vehicle Operator Licensing (“VOL”) system, using Mr Stafford’s user ID (which he had had since 2016). Although an application was then made, using the same user ID, on 3 March to reinstate him, when supporting information was provided it appeared to show that Mr Noon would additionally be working 45 hours a week as a driver. Consequently, the Office of the Traffic Commissioner (“OTC”) was concerned that he might not have time to discharge the duties of Transport Manager adequately and asked for further particulars of how he would do so. By 14 July, a Friday, it appeared to the OTC that there had been no reply to enquiries it had sent out and so it could not be satisfied that the operator’s proposals for its transport manager were adequate. Consequently on 14 July the DTC took the decision under appeal which was notified to the operator on the following Monday morning, 17 July.

5. It is to the communications between March and July that we must now turn, in some detail, as the question arises whether a course of dealing between the OTC and the operator arises which might make the procedure adopted unfair. We begin with an explanation of the VOL system.

The VOL system

6. Evidence was volunteered by the OTC as to the operation of the VOL system. We were not entirely satisfied with the completeness or in some respects the accuracy of that evidence. Consequently an Order was issued seeking clarification on various points. The Order was not well handled administratively by the Upper Tribunal office but on 30 May a substantive response from the OTC was received. The operator was offered the opportunity to comment on the OTC’s response but did not do so. According to the OTC’s records, the operator had agreed to receive notification through the VOL system. The email address it held for that purpose was Mr Stafford’s. Mr Noon was also registered on the system, in his own right.

7. The evidence was that at the time of registration in July 2022 the operator had been asked if he wanted to receive correspondence electronically and he had indicated that he did. Although the evidence said that in such a case “all correspondence issued by this office is sent by email” it is clear from the context and subsequent clarification that what is meant is that it is sent through the VOL system. That is not itself an “email” but when a document is sent through the VOL system, an alert is sent by email on Day 1 to the registered user’s email address to inform them that a document has been uploaded on the system for their attention. It was Mr Stafford’s email address that the system was set to notify in the present case. If by Day 3 the document has not been accessed, the system sends a reminder email. If by Day 7 it has still not been accessed, the system prints off a hard copy letter, which is posted out on Day 8. A printout was in evidence of documents sent to the operator during the period in question.

8. Records indicated that a user using Mr Stafford’s user ID logged in on 1, 3 and 16 March and on 19 May 2023 (and on no other dates during the material period). 1 March was when Mr Noon was removed. 3 March was when the application to reinstate him

was started. There is no evidence of any steps having been taken on 16 March or 19 May.

Communications between the OTC and the operator

9. Following the removal of Mr Noon on 1 March, the OTC sent letters referring to the lack of a Transport Manager to all addresses associated with the operator. These were endorsed as “sent by Recorded delivery and email”. The letters were also sent through the VOL. On 20 March Mr Stafford emailed the OTC (using the address by which the VOL system issues notifications that a document is awaiting reading) saying that he had received the recorded delivery letter a couple of days before and that neither he nor Mr Noon had removed the latter, alluding to his data having been stolen from Twitter.

10. During the period March - early June 2023, Mr Stafford engaged with a Ms Wadsworth of the OTC. She was trying to obtain a completed Form TM1, needed to allow consideration of whether Mr Noon could be re-approved as transport manager. On 31 March she sent a letter by email (to Mr Bowers) and by post. It was not sent by VOL. On 20 April Ms Wadsworth sent a further letter, this time using only VOL, inviting the operator to provide a TM1 application to re-nominate Mr Noon. After some delays which do not need setting out here, a completed Form TM1 was lodged on 6 June, whereupon Ms Wadsworth emailed Mr Stafford to confirm receipt and to explain that the case was now being passed to a different section.

11. On 7 June, Mr Blaza of that section wrote asking for further particulars of how Mr Noon would perform his duties, given his other commitments. The OTC did not receive a reply. There is no suggestion that this letter was sent by any means apart from VOL. On 3 July Mr Blaza wrote again in similar terms, seeking a reply by 10 July, failing which the matter would be referred to the Traffic Commissioner (“TC”). Again, there is no suggestion that the letter was sent otherwise than through VOL. On 11 July a hard copy of the letter was generated by the VOL system and posted to the operator, by second class post. On 13 July the matter was indeed referred to the DTC, who on 14 July took the decision under appeal. On the same day, Mr Stafford received through the post the hard copy of the letter dated 3 July. It is evident that by the time it was posted and even more so by the time he received it, the deadline in the letter of 3 July had already passed. On Saturday 15 July Mr Stafford emailed Mr Blaza pointing out that he had only just received the letter and that the deadline for reply had passed; he had never received the letter of 7 June; but the operator would now reply. The letter recording the DTC’s decision was sent to him on 17 July by recorded delivery and email and the same day he phoned Mr Blaza to explain what had happened. He claimed that he had by telephone requested the licence be switched from receiving mail electronically to receiving mail via post only, but this had not been actioned. Mr Blaza had said he would see if the decision could be withdrawn. However, when the matter was referred to the TC, he took the view that there was no power to do so and that the operator would have to appeal.

Mr Stafford's evidence

12. He gave evidence that he had become aware that his data had been hacked in January 2023. This had arisen when he had changed his internet security from Norton to McAfee and when the latter ran a full scan at the start of his subscription, it had informed him that some of his data had been compromised on 6 January. He had accordingly taken steps to change his password for banking purposes and had notified the police (though he had no documentary confirmation of having done so). He claimed to have informed by email dated 27 February a Mr Neil Robertson at OTC of the difficulties he had been experiencing accessing the VOL system but had received no reply: however, when in response to a request from the panel he produced on his phone the email he had sent, though the text was addressed to "Neil", the email was actually sent not to Mr Robertson but to Mr Bowers. Further, it did not inform "Neil" of any specific difficulty but simply asked for a "confidential discussion". Mr Stafford had from time to time been in the habit of accessing the VOL system for checking online reports. However, he had subsequently experienced difficulties obtaining access to the VOL system and, when it had emerged that Mr Noon was shown as having been removed as transport manager on 1 March, that had not been done by him. In the light of these difficulties, he had felt nervous and unable to engage with the VOL system thereafter and had asked the OTC to send paper documents in future. Shortly after the decision under appeal was taken, Mr Blaza had accepted that Mr Stafford had told the OTC this. Mr Noon had his (Mr Stafford's) details for accessing the VOL.

13. It is material to record that while we have seen no formal diagnosis, Mr Stafford indicated that he does have mental health issues, in particular with anxiety. He indicated that he was able to take part in the proceedings with the support of Mr Bowers.

Mr Bowers' evidence

14. Mr Bowers told the panel that Mr Noon had been removed as transport manager following the hacking. However, on 5 October 2023 he had emailed Mr Leech of the OTC categorically stating that it was Mr Noon who had removed himself as Transport Manager. He was unable to offer the panel any explanation of why, on the basis of what he was now telling the panel, he had told the OTC something that was plainly untrue. The following day the Upper Tribunal received an email from Mr Bowers stating:

"In my email to Mr. Andy Booth [in fact, Mr Leech], I accidentally misinterpreted the sentence where I stated the following:

"When Mr [Noon] accidentally removed himself as Transport Manager - He straight away tried to reinstate himself" I meant the following "Mr Noon, realised he had been removed and tried to reinstate himself".

Evaluation of the evidence

15. We did not find either Mr Stafford or Mr Bowers to be convincing witnesses and preferred written evidence where it existed and where it did not, were hesitant to accept their version(s) of events. There were inconsistencies and illogicalities in what we were being told which made it difficult to accept substantial parts of their evidence.

16. In Mr Bowers' case, it is not a question of having "misinterpreted" anything. He wrote it himself and what he wrote was inconsistent with his evidence to us. In Mr Stafford's case, we do not see any reason why Mr Noon should, as claimed, have had access to Mr Stafford's login user ID when Mr Noon had one of his own. This is especially so given that Mr Stafford had informed the OTC that "I am very safety conscious online and don't give passwords to anyone else not even Mr Noon as with my OCD I can't do that". Nor do we accept that Mr Stafford was unwilling to use his email address, given that Mr Bowers, who knew his circumstances very well, was emailing using that address for Mr Stafford in April and May 2023. His claimed inability to engage with the VOL system following the alleged hacking, which he knew about by at latest early March, is inconsistent with the occasions on which someone with his User ID had accessed the system on 16 March and 19 May and with his readiness to email the address used by the VOL system itself on 20 March.

17. We want to make clear that we are not intending to suggest that either is wilfully dishonest but that they may have a tendency to construct a narrative which fits in with how they would like things to be. We consider that both have a rather inconsequential approach to matters of administration and perhaps something of a tendency to panic. As well as in the inconsistencies detailed above, powerful evidence of this is provided by the operator's failure to apply for a stay, first to the OTC and then if need be to the Upper Tribunal, despite this route having been clearly signposted to them by Mr Blaza on 31 July and again by Steve Mitton of the OTC on 12 and 14 September, and instead pursuing inconsequential correspondence. The approach we have described may in the case of Mr Stafford have its source in the matters at para.13, but whatever the cause may be, an operator does need to have a capacity for adequately cogent administration.

Findings

18. We find that the general position for any user who had agreed to accept electronic notification, was that it would take place through the VOL system (indeed that has become mandatory since 2023). Notwithstanding that, the OTC would additionally send some letters by post – by recorded delivery – and some might additionally be sent to personal email addresses, as happened in this case.

19. We note that Ms Wadsworth's letter of 31 March, sent relatively soon after the operator had informed the OTC of the claimed hacking, was not sent by VOL, but was sent to a personal email address and by post. That might be consistent with there having been an agreement that the normal method (VOL) would not be used. However, the same correspondent, Ms Wadsworth, only 3 weeks later, issued her letter of 20 April by VOL alone. There is no indication that when the operator eventually received the paper copy of that letter generated by the VOL system some days later, the operator took any steps to query why it had not been emailed or to remind Ms Wadsworth of any understanding that might have been reached.

20. On balance, we are not satisfied that the operator revoked their agreement to electronic notification. Save for that considered in the previous paragraph, there is no evidence capable of corroborating a revocation, either in the form of the OTC's records nor in the form of any correspondence from the operator. Contrary to the operator's

case, the evidence does not suggest that Mr Blaza accepted that that had been done – his note merely records that Mr Stafford had told him that that had occurred.

21. We are not satisfied as to the impact of whatever it was that happened to Mr Stafford's data in early 2023. We are no IT experts but find it hard to see how data being stolen from Twitter (as alleged) could impact upon Mr Stafford's email address or indeed be likely to have prevented logging onto the VOL as claimed. In any case, Mr Stafford continued to use the same email address as before, as did Mr Bowers when emailing him. He made no attempt to change his login details for the VOL. We do not accept that anyone other than Mr Stafford removed Mr Noon and subsequently applied to reinstate him. Notwithstanding the claimed difficulties, Mr Stafford was in fact able to access the VOL system in March and again in May 2023.

22. We find that emails were correctly sent by the VOL system advising Mr Stafford of letters set on 2 March, 20 April, 7 June and 3 July and further emails 3 days later when the first ones had not been opened. None were opened.

23. We accept that some items of correspondence were additionally issued by the OTC by recorded delivery post and others to the personal email addresses of Mr Bowers or Mr Stafford. In some other cases, the VOL system eventually generated a letter by second class post some days later.

Conclusion

24. It may be that the fact that some correspondence thus reached the operator without recourse to accessing the VOL system lulled the operator into a false sense of security. It may be that, affected by anxiety and worrying about the data breach his web security provider had alerted him to, Mr Stafford was disinclined to respond to the notifications from the VOL system we find he did receive. We are, though, of the view that he could have done so and by failing to do so, the operator was the author of its own misfortune.

25. We do not consider that the fact that the operator additionally received, by second class post, the letter requiring action for which the deadline (when the letter was sent by that method) had already expired can affect the position, given our findings that the operator had accepted, and not withdrawn, his agreement to electronic notification and that the relevant letter was correctly issued through the VOL and not accessed. The practice of later sending out a hard copy letter is, however, bound to create a degree of resentment in a case such as this and appears largely futile if the deadline will have passed by the time the intended recipient gets it by that method. That however is an operational issue for the OTC to review if they think fit.

26. The result of our decision dismissing the appeal is that the operator will have to apply for a new licence, if he is minded to do so. It is a pity that during the excessive time that has passed since the decision under challenge the operator has been unable to operate, but that might well have been avoided had it pursued the suggestions that it seek a stay (see para.17 above).

**C.G.Ward
Judge of the Upper Tribunal**

**Mr R.Fry
Member of the Upper Tribunal**

**Mr G.Roantree
Member of the Upper Tribunal**

Authorised for issue on 6 August 2024