



Neutral Citation Number: [2019] UKUT 142 (AAC)

Appeal No. T/2018/82

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

**IN AN APPEAL FROM THE DECISION OF
Jayne Salt, Deputy Traffic Commissioner for
the North West of England dated 29 November 2018**

Before:

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

Appellant:

CBM CIVILS LIMITED

In attendance: Mr Christopher May on behalf of the Appellant, accompanied by Brian May

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

Date of hearing: 9 April 2019

Date of decision: 29 April 2019

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that the appeal be ALLOWED and the matter be remitted for re-hearing. In the interim, the Appellant's vehicle authorisation is reduced from five to three vehicles and the company is required to submit to the Office of the Traffic Commissioner, evidence of financial standing covering the period 1 February to 30 April by 4pm 13 May 2019

SUBJECT MATTER:- Refusal to adjourn; inadequate medical information; failure to attend the hearing with required documents; proportionality

CASES REFERRED TO:- Bradley Fold Travel Ltd & Peter Wright v Secretary of State for Transport (2010) EWCA Civ. 695.

REASONS FOR DECISION

1. This is an appeal from the decision of the Deputy Traffic Commissioner for the North West of England (“the DTC”) made on 29 November 2018 when she revoked the restricted operator’s licence of CBM Civils Limited (“the company”) with effect from 11 January 2019.

The Background

2. The background relevant to this appeal can be found in the appeal bundle, the transcript of the hearing and the oral decision of the DTC and is as follows. CBM Civils Limited holds a restricted operator’s licence granted on 22 December 2017 authorising five vehicles. There were three vehicles in possession. Christopher May (“Mr May”) is the sole director of the company. He and his brother, Brian May, are shareholders. The grant of the licence was subject to an undertaking that the company provide evidence of financial standing for three months by 31 March 2018. The company failed to provide the information by the due date and as a consequence, on 18 April 2018, the Office of the Traffic Commissioner (“OTC”) sent a letter to the company requesting original bank statements for a period of twenty-eight days by 2 May 2018. The company did not respond.
3. On 31 May 2018, the OTC sent a further letter, this time requesting the documents by 15 June 2018 for the period December 2017 to February 2018. There was no response. On 31 July 2018, the OTC sent a “*propose to revoke*” letter for a breach of s.26(1)(h) of the 1995 Act unless the company requested a public inquiry by 21 August 2018. Original bank statements were then sent by Mr May to the OTC which appear to have only demonstrated financial standing for three vehicles (none of the financial evidence is included in the appeal bundle). In email correspondence with a case worker, Mr May informed the OTC that he had been the victim of a serious physical attack on 9 April 2018 which had left him in a critical condition and in hospital for six weeks. He had only managed to return to work on 30 July 2018. He referred to substantial funds which he claimed were in the company’s business account (although he did not produce the bank statements). He requested a public inquiry.
4. On 16 August 2018, the OTC wrote to Mr May informing him that the Traffic Commissioner had reviewed his case and had made the following decision:

“I will not call the operator to a Public Inquiry if the operator agrees to a voluntary reduction in vehicles on their licence from 5 vehicles to 3 vehicles with immediate effect”.

Mr May was advised that if he agreed to the reduction he should return two discs and that if he was able to show financial standing over a minimum period of three months in the future, it could be possible for him to apply to increase his authorisation back to five. A further undertaking was required

that the company provide full finances for September to November 2018 no later than 15 December 2018. Mr May did not agree to the voluntary reduction of the company's vehicle authorisation. A public inquiry was therefore inevitable.

5. On 10 August 2018, Traffic Examiner ("TE") Johannah Groom commenced a full compliance investigation following two road side encounters. On 22 February 2018, TE Groom was on duty at a check point on the M62 when she spoke to the driver of one of the company's vehicles DA60 BWG (Michael Corbett). On inspection of the driver's driving licence, she noted that the driver only had a category B entitlement when a C1 entitlement was required to drive the vehicle. Mr Corbett requested that he be interviewed at a later date.
6. On 12 March 2018, TE Groom was on duty on the M62 when she spoke to the driver of vehicle HX10 ADZ. Checks on the vehicle revealed that the vehicle MOT had expired on 31 January 2018. An immediate PG9 was issued to the vehicle for a tyre on a twin fitment, with a hole in it causing the tyre to be seriously under inflated.
7. TE Groom contacted Mr May on 9 May 2018 to arrange an appointment to discuss the two encounters. She was informed that he was in hospital having suffered serious injuries from an unprovoked attack made on him and would be unavailable for "*probably six to eight weeks*".
8. On 2 July 2018, HX10 ADZ received an immediate PG9 for a tyre with damage to the side wall with cord exposed and for an inoperative stop lamp. A delayed PG9 was also issued for a malfunctioning indicator lamp.
9. TE Groom visited Mr May on 10 August 2018 at the operating centre. In an interview under caution, Mr May explained that he had borrowed vehicle DA60 BWG from a neighbouring company because the company's own hot box vehicle was off the road and a job had to be finished. Mr Corbett was an employee of the company who Mr May had assumed, had grandfather rights to drive C1 vehicles. As for HX10 ADZ, the vehicle had been acquired in January 2018 along with another (MX57 SZN) and at the time, he had been told that both vehicles had the benefit of a full MOT for twelve months. When he received the paperwork for the vehicles, the MOT for HX10 ADZ was missing. He now undertook DVS checks on driving licences on line and all MOT test dates were listed on his forward planner, five months in advance and he also received reminders from "*the MOT people*" as well as reminders on his phone. He told TE Groom:

"I am a new small company doing it all by myself I am learning all the time. Having come across these two issues it has made me put better systems in place."
10. TE Groom's systems investigation was marked "*mostly satisfactory*", the unsatisfactory aspects being driver licence checks and a missed MOT. Mr

May had also failed to attend a New Operator's Licence Seminar on 17 September 2018.

The Public Inquiry

11. On 4 October 2018, the company was called to a public inquiry listed for 29 November 2018. Mr May attended along with his brother, Brian and Anthony Lowe, Supervisor. Mr May produced a hospital admission summary which recorded that he had been the victim of a serious assault with machetes and baseball bats on 10 April 2018. He had suffered bilateral open fibia fractures ("*two broken legs*"), a distal ulna fracture ("*broken arm*"), a deep wound over the sacrum and multiple lacerations to the upper and lower limbs. The expected discharge date was 3 May 2018. Mr May also submitted a letter which informed the DTC that in relation to the PG9 issued on 12 March 2018, he believed that the puncture of the tyre had occurred in transit or in attendance at sites and tips with debris on the ground. The tyre was changed by Tyresave at the check point and the PG9 removed immediately. He enclosed the daily driver defect report for the vehicle for that day and the invoice from Tyresave. As for the PG9 issued on 2 July 2018, whilst he was not fit to work on that date, his brother (Brian) and the supervisor, Anthony Lowe, had investigated the incident. The daily driver defect report was attached and the conclusion was the same as for 12 March 2018. The tyre and the wiring were dealt with at the check point and the PG9 was lifted immediately. Once Mr May had returned to work, he implemented the following:

- a) Additional driver instruction on the quality of daily walk round checks along with a viewing of the DVSA DVD on HGV driver daily walk round checks;
- b) Graham Mellor, the nominated maintenance contractor, now checked the tyres and bulbs of the entire fleet every Saturday morning;
- c) Additional tyre checks were carried out after every site visit where debris may be present on the ground before the vehicle returned to the highway;
- d) Brake testing every six weeks performed by Stockport Trucks;
- e) Tool box talks to all members of staff on a fortnightly basis;
- f) Wall charts with duties and inspection dates visible in the communal office.

Mr May also produced a document entitled "Driver's Roles and Responsibilities" setting out the same and signed by S Pennington on 13 August 2018. Mr May acknowledged that the two PG9's were unacceptable. He assured the Traffic Commissioner that he would continue to ensure that no further incidents would occur and would follow the advice given by TE Groom. He viewed the result of her audit as a "*pass*".

12. At the outset of the hearing, Mr May informed the DTC that he had not brought any maintenance and systems documents to the hearing as TE Groom had viewed them all. He had not been spending much time in the office as the site was "*dirty*" and as he had open pin wounds to his leg with the pins remaining in situ, he had been advised by his GP not to attend the operating centre. As a result, having initially returned to work, he then had to remain at home and left a supervisor in charge who had made a bad job of it and had to be dismissed. Brian May, then took over Mr May's responsibilities.

He had also been a victim in the attack, suffering a very significant head wound. Mr May confirmed that he had all the required documentation and asked for an adjournment for him to prepare for the hearing. He told the DTC that the past few months had been a “*terrible time*” for him and he and his brother had not been able to fully prepare because they did not know what was needed. The call up letter had been misplaced and Mr May only contacted the OTC the day before the hearing to find out what was required. Mr May candidly accepted that he did not realise how serious the hearing was. He thought that the hearing simply concerned the two PG9’s. He could not recall seeing the “*propose to revoke*” letter. He had suffered life changing injuries and it had affected his mental state. At one stage, it was thought that he might lose his leg because of infection and he had been on Ora-morph medication until very recently. Further, a contract had been terminated whilst he was convalescing and he had been forced to issue court proceedings for the recovery of a very substantial amount of outstanding monies under the contract. It had all been overwhelming. The public inquiry could not have come at a worse time. Whilst his brother had ultimately taken over, he had previously been the quality manager for the ground work undertaken by the company and was in charge of eight teams. Brian May had done his best to step into the shoes of Mr May. Whilst Mr May had not brought evidence of financial standing to the hearing, they were now working on a new contract with significant monthly payments (the figure was mentioned) and a payment was due the day following the hearing. Mr May said he also had £17,000 from his personal credit cards which could be added into the calculations.

13. The DTC then refused the application for an adjournment. She noted that Mr May had failed to provide financial evidence. She considered the Senior Traffic Commissioner’s Guidance on Case Management and noted that medical evidence was required. She did not consider that the evidence produced by Mr May was sufficient as it related to Mr May’s initial hospital admission only and there was an urgent issue in relation to compliance. Mr May had been absent from the company for a number of months and that had affected the company’s ability to be compliant with consequential road safety implications and as a result, the adjournment was refused.
14. Mr May then addressed the issues arising out of the prohibitions and repeated the contents of the letter that had been handed in to the DTC. Mr Pennington (who had been issued with the two PG9’s) was an experienced driver and in respect of the tyre damage on both occasions, the damage must have been occurred in transit. Mr Pennington would not have noticed the severely deflated tyre on 13 March 2018 because the vehicle had twelve tyres and the damaged one was the inner most of one of the two sets of rear tyres. As for the tyre damage on 2 July 2018, the tyre was “*fairly new*”. The stop lamp defect could not have been present when the vehicle left the operating centre because it would have been noticed when the vehicle was on the weighbridge and it would have been noted by Mr Pennington on his daily driver defect report. Mr May had been told that the cause was “*shorts in the wires*” which could be caused by the tipper slamming down. The vehicle was eight years old. The defect was rectified at the stop site and the PG9 lifted. He reiterated

that the company now had a policy of a second driver defect walk round check after a vehicle had travelled over rough terrain.

15. Mr May accepted that the expiry of the MOT certificate on vehicle HX10 ADZ was his responsibility. He had purchased two vehicles from SHB, an established large vehicle dealership and had been told by the sales representative (who was subsequently sacked) that both vehicles had full twelve-month MOT certificates and that was something to be expected. However, when the paperwork was sent to him, only one MOT certificate was included and whilst he had chased the sales representative for the second, it was not forthcoming. In fact, the MOT had expired two or three months before the PG9 was issued. He had learnt his lesson. All MOT tests were now booked in three months before the expiry date and included in the forward planner. As for driving licence checks, he now checked them on line every three months and each driver had a separate file. He accepted that he did not have this system in place at the time that Mr Corbett was stopped but he insisted that Mr Corbett was entitled to drive the vehicle as a result of grandfather rights but he had failed to tick the appropriate box when applying for his licence.
16. The DTC then went through the evidence of finance and noted the evidence which had been provided failed to meet the requirements for five vehicles although Mr May had offered to transfer substantial funds from his own account to that of the company.
17. Brian May concluded the evidence by stating that he was embarrassed that they had attended without the relevant documentation and that it had "*just been a horrible year ... but we are through that now*". All the relevant documentation could be provided, including finance and details of the legal proceedings referred to by Mr May.
18. After a short adjournment, the DTC then gave an oral decision:

".. I have considered very carefully everything you have said and everything I have seen. You already know the issues that you face. My decision has to be to revoke your licence and that is because I am not satisfied that the vehicles have not been kept in a fit and serviceable condition. So I am not satisfied that you have been complying with the undertakings on your licence and that is for a number of reasons. I have not seen the evidence today of the maintenance inspections or the driver defect reports. I do find it difficult to believe that the prohibitions occurred due to events that were not detectable by the driver at some point, whether it be on the initial walk round or at some point during the journey, and also I am not able to be satisfied that you have the available finances in order to maintain the vehicles simply because that evidence is not in front of me today. So those findings are under section 26(1)(c)(e)(f) and (h) of the 1995 Goods Vehicles (Licencing of Operators) Act 1995 .."

The revocation was to take place with effect from 11 January 2019 to allow Mr May to consider whether to reapply for a licence.

The Appeal

19. At the hearing of the appeal, Mr May attended with his brother, Brian. At the outset of the hearing, Mr May offered a file of documents relating to maintenance to the Tribunal for our consideration. As these were the documents that Mr May should have produced at the public inquiry, the Tribunal refused to consider the file being mindful of the prohibition contained in paragraph 17(3) of Schedule 4 of the Transport Act 1985. The file was returned to Mr May.
20. Mr May's ground of appeal was simply that the DTC should have granted his application for a short adjournment. Whilst he appreciated that he had not produced up to date evidence of continuing medical treatment, the hospital summary clearly confirmed that he had suffered significant injuries in April 2018 and further, when he attended the public inquiry, he was still wearing an external fixation halo to his leg which could not have escaped the attention of the DTC. It was plain and obvious that he had ongoing physical injuries. Whilst he further appreciated that he should have attended with all of the relevant documentation, he had not appreciated the seriousness of the issues to be considered. The report of TE Groom was marked "*mostly satisfactory*", neither PG9 was "S" marked indicating a significant failure of the company's maintenance systems and were for defects which commonly arose in vehicles which were required to traverse rough terrain. Further, the Traffic Commissioner had previously indicated that a public inquiry would not be required if Mr May agreed to a reduction of his vehicle authorisation from five to three until he could evidence sufficient finances for five vehicles.
21. We agree with Mr May's points. On the face of the evidence that was before the DTC, this was not a seriously bad case of non-compliance over a prolonged period of time leading to significant road safety issues. It is not clear from the DTC's oral decision as to why she did not accept Mr May's explanation for the tyre damage when such damage is well known within the ground works industry. She did not refer to the oral evidence that she heard about the systems that Mr May had purportedly put in place to address the issues raised by the PG9's and those raised in TE Groom's report. Further, Mr May had already demonstrated financial standing for three vehicles and the reason why the public inquiry was called was because he did not accept a voluntary reduction of vehicle authorisation to three. We agree that the letter of 16 August 2018, offering Mr May the opportunity of avoiding a public inquiry if he were to agree to a reduction in vehicle authorisation, was capable of lulling Mr May into a false sense of security. The DTC did not make any findings as to whether she accepted his account that he had not seen the detail of the call up letter because it had been misplaced and that he did not appreciate the issues to be raised at the hearing until he called the OTC the day before the hearing. Again, the report of TE Groom would have added to Mr May's false sense of security.
22. The Senior Traffic Commissioner's Guidance No.9 (paragraphs 24 to 26) makes clear that when considering an application for an adjournment, a

balancing exercise has to be undertaken, with issues of road safety and delay (amongst others) being put into the balance. We are not satisfied that road safety militated against an adjournment in this case and if that had been at the forefront of the DTC's mind, she would not then have delayed revocation for a period of six weeks. The same applies to the issue of delay. Further, there was no suggestion in the DTC's decision that the application was simply a ruse to delay the inevitable or an attempt to circumvent the public inquiry process. Whilst Mr May should have produced up to date medical evidence to support his application, we are nevertheless satisfied that in the interests of justice and fairness, Mr May should have been granted a short adjournment with a reduction of vehicle authorisation from five to three pending the adjourned hearing with an undertaking to provide up to date evidence of financial standing in the interim.

23. It follows that this appeal is allowed being satisfied that this is a case where the facts impel us to interfere with the DTC's decision as per the Court of Appeal decision in *Bradley Fold Travel Ltd & Peter Wright v Secretary of State for Transport (2010) EWCA Civ. 695*. The appeal is allowed and the matter is remitted for rehearing. The company's vehicle authorisation is reduced from five to three vehicles. Evidence of financial standing (in the name of the company rather than that of Mr May) must be submitted to the Office of the Traffic Commissioner within two weeks of this decision covering the period 1 February to 30 April 2019.
24. It may be advantageous to the Appellant company to seek assistance from a specialist in road transport regulation to ensure that all of the required documents are collated and in good order for the adjourned hearing. Mr May should also provide medical evidence as to the course of his recovery since his discharge from hospital.



**Her Honour Judge Beech
29 April 2019**