



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

**Appeal No. UA/2022/000581/T
NCN: [2022] UKUT 00235 (AAC)**

ON APPEAL from a DECISION of the TRAFFIC COMMISSIONER for SCOTLAND

Before: M Hemingway: Judge of the Upper Tribunal
S Booth : Member of the Upper Tribunal
Dr P Mann : Member of the Upper Tribunal

Appellant: Mika Logistics Limited

Reference No: OM2002122

Representation:

For the appellant: Mrs S Anderson in person

Heard at: Remote hearing administered from the Rolls Building in London

Date of Hearing: 16 August 2022

Date of Decision: 30 August 2022

DECISION OF THE UPPER TRIBUNAL

This appeal is dismissed.

Subject matter: Financial Standing

Cases referred to:

Bradley Fold Travel Ltd & Anor v Secretary of State for Transport [2010] EWCA Civ 695.

T/2012/17 NCF (Leicester) Limited

T/2017/7 Michael Hazell (No2)

T/2013/77 Hughes Bros Construction Limited



REASONS FOR DECISION

1. This appeal to the Upper Tribunal has been brought by Mika Logistics Limited (“the appellant”) in the person of Mrs Mairi Anderson, who is one of its directors. The appeal is directed towards a decision of the Traffic Commissioner (“the TC”) embodied in a letter of 13 April 2022, to refuse its application for a variation of the terms of its Standard National Goods Vehicle Operators Licence.

2. The appellant was granted its licence on 20 October 2017. Prior to the making of the variation application it was authorised, under the terms of its licence, to utilise 6 vehicles and six trailers. On 3 February 2022 the appellant sought variation to secure authorisation for the use of 10 vehicles and 11 trailers.

3. The application raised issues concerning the financial standing of the appellant. As to that, Section 13A(2)(c) of the Goods Vehicles (Licencing of Operators) Act 1995 (“the Act”) provides that an operator seeking or holding a licence must have appropriate financial standing as determined in accordance with paragraph 6A of Schedule 3 to the Act. There is a formula set out in the legislation under which the necessary amount of available finance links directly to the number of vehicles provided for under the terms of the licence. The Office of the Traffic Commissioner (“OTC”) informed the appellant that, based upon that formula, it would be necessary to demonstrate available finance at the level of £48,500. The correctness of that calculation has not placed in issue in this appeal, and, in any event, we detect no basis to doubt its accuracy.

4. The appellant submitted various items of evidence concerning its financial position in response to letters sent to it, by the OTC, inviting it to do so. Immediately prior to the TC’s decision on the variation application, the appellant had submitted in totality, Bank of Scotland business account statements in the name of the appellant spanning the period from 24 December 2021 to 2 February 2022; a bank statement relating to a different bank account which Mrs Anderson was able to clarify to us was her own personal account, and which covered the period from 29 December 2021 to 31 January 2022; a letter of 15 February 2022 from the Bank of Scotland confirming that the appellant had an overdraft facility of £15,000 with respect to its business account held with that bank; and evidence of a credit facility with available credit of £3,000 with the Bank of Scotland. That evidence had been supplied in response to the OTC’s request for evidence of sufficient financial standing for a 28-day period the last date of which was not to be more than two months from the date of receipt of the application.

5. The OTC undertook a number of calculations as different items of financial evidence were submitted to it. Its final calculation, the one which underpinned the TC’s decision on the variation application, indicated that the average available funds for the 28-day period assessed amounted to £34,432. That fell significantly short of what was required. That calculation has not been the subject of any challenge in this appeal. It is right to say that the personal bank account referred to above was not included in the calculation (see below) but even if it had, that would not have led to the appellant being able to show the availability of £48,500, on average over the assessment period, as required. That is because that bank statement

evidenced funds of £2,999 as of 29 December 2021 and £10,631 (the highest amount showing in the bank statement) as at 31 January 2022 with, for the most part, a credit balance of varying amounts between the two. Thus, even if it could have been taken into account (and we shall say more about that below) it would not have assisted in reaching the level required.

6. On 13 April 2022 the OTC wrote to the appellant to inform it that the variation application had been refused on the grounds of inadequate financial standing. It is right to point out, though, that the letter did acknowledge that the appellant had sufficient financial standing for the 6 vehicles and 6 trailers which it had been operating. The letter informed the appellant of the right of appeal to the Upper Tribunal.

7. The appellant availed itself of that right of appeal. The grounds of appeal were prepared by Mrs Anderson who also supplied a letter of 20 April 2022 in support. In essence, she contended that the available funding was sufficient (though she did not dispute any of the calculations as already noted); she explained that the appellant had purchased a number of vehicles recently and that such had had an adverse impact upon the credit balance showing in the bank statements; she asserted that the appellant's customers pay their bills regularly; she explained that she owns two other companies and that funds emanating from those companies could be made available to the appellant company; and she suggested that, if it were to be thought insufficient funding was available for all of the vehicles being sought under the terms of the variation, authority for a greater number of vehicles than 6 could nevertheless still be given.

8. We held an oral hearing of the appeal which was conducted by way of video link. There were some initial technical difficulties which delayed the start of the hearing but once the hearing had commenced, some 15 minutes after it was scheduled to do so, there were no further difficulties. We are satisfied that Mrs Anderson, who participated in the hearing and represented the appellant company, was able to make all the points she wished to with the same clarity as would have been the case had there been a more traditional face to face hearing. We should add that we are grateful to her for her participation and for the points which she made to us. Mrs Anderson explained that the appellant's customers want it to use more vehicles and that, if it is not able to, it might lose business or turn away otherwise additional business. There had been no maintenance issues with respect to the appellant's vehicles. It was difficult to keep the level of funding required by the OTC and TC available for a full monthly period. That is because the credit balance in the business bank account will necessarily fluctuate due to requirements to pay wages and meet other business expenses. It would be detrimental to the business if more vehicles could not be utilised. Mrs Anderson had not invited the TC to authorise fewer vehicles than had been sought. She had not told the TC that funding would be available from her other two companies. Those were distinct individual companies owned by her and not part of a group of companies. The personal bank statement was her own.

9. As to the approach we must take with respect to an appeal such as this, paragraph 17 of Schedule 4 to the Transport Act 1985 (as amended) provides that the Upper Tribunal "*are to have full jurisdiction to hear and determine all matters whether of law or of fact for the purpose of the exercise of their functions under an enactment relating to transport*". However, it was explained by the Court of Appeal in *Bradley Fold Travel Ltd & Anor v Secretary of State for Transport* [2010] EWCA Civ 695 that the Transport Tribunal (now the Upper Tribunal) will not be required to rehear all the evidence by conducting what would, in effect, be a new first instance hearing. Rather, it has the duty to hear and determine matters of

fact and law on the basis of the material before the TC but without having the benefit of seeing and hearing from witnesses. The appellant assumes the burden of showing that the decision appealed against was wrong. In order to succeed an appellant must show that the process of reasoning and the application of the relevant law requires the adopting of a different view.

10. The Upper Tribunal has the power, on an appeal to it from a decision of the TC, to make such order as it thinks fit or to remit the matter to the TC for rehearing. It may also, of course, simply dismiss the appeal. It may not take into consideration any circumstances which did not exist at the time of the determination which is the subject of the appeal.

11. The financial standing requirement is, unquestionably, an important one. Being of appropriate financial standing consists of having available sufficient financial resources to ensure the establishment and proper administration of the business carried on, or proposed to be carried on, under the relevant licence. The requirement is an ongoing one. As explained in *T/2012/17 NCF (Leicester) Limited*, the requirement is, in particular, intended to ensure that vehicles can be operated safely because the operator can afford to maintain them promptly and properly.

12. As to sources of financial evidence it was explained by the Upper Tribunal in *T/2017/7 Michael Hazell (No2)* that financial standing may be demonstrated in a variety of ways and that the total figure in any given case may be made up from a portfolio of different sources. But in the case of a limited company (the appellant in this case is of course a limited company) available funds in a bank account must be held in the name of the company (see *T/2013/77 Hughes Bros Construction Limited*).

13. Turning then to the specific points made in the grounds of appeal, Mrs Anderson asserts, in general terms, that the appellant has sufficient finance available to meet its requirements including the requirement to maintain its vehicles. We have no reason, on the material before us, to doubt her assertion that there have been no maintenance issues with respect to the appellant's vehicles. But financial standing is a specific statutory requirement. At the risk of repetition, Mrs Anderson does not quibble with the calculation regarding the amount required for the number of vehicles sought under the terms of variation nor with the calculation conducted by the OTC and which has underpinned the TC's decision to refuse the variation application. Quite simply, the legislation requires an operator to demonstrate available financial standing of the level required. Evidence was sought to show compliance, on an average basis, for a period of 28 days. That is not an unreasonable request and avoids a potential misleading "snapshot" approach (see *T/2012/17 NCF (Leicester) Limited* once again). All of that being so Mrs Anderson's explanations as to why the business was not able to maintain the required level of finance as stipulated by the legislation in relation to the period sought by the TC (that is to say the regularity and sometimes unpredictability of business expenses) does not assist. Nor, for the same reasons, does the explanation offered regarding the need to pay deposits on recently purchased vehicles.

14. We note Mrs Anderson's assertion that her customers pay regularly. Again, we have no reason to doubt that. But our focus is upon compliance with the legislation in relation to the level of available funds which must be evidenced. That being so, that particular point does not assist.

15. We note the contention which was made for the first time when it was decided to pursue an appeal to the Upper Tribunal, that funding could be made available from other companies. We cannot criticise the OTC or the TC for failing to consider that possibility without its being expressly invited to and without evidence of any such available funds being produced. And anyway, absent something pointing to the contrary (and there is nothing like that here) it might reasonably be assumed that a company will, itself, need the money available to it in bank accounts and elsewhere for its own business needs. As to the suggestion that consideration might be given to the authorisation of more vehicles than currently permitted but less than that sought by way of variation, that was not put to the TC. In our view the TC cannot, therefore, be faulted for failing to consider that possibility for himself/herself. If authorisation for a smaller number of vehicles was to be pursued as an option, that had, as a minimum, to be put before the TC and explicitly stated.

16. In the circumstances we have concluded that the grounds of appeal are unpersuasive.

17. Having said all of the above, we can understand why Mrs Anderson makes the points she does. But it does have to be understood that the requirements of financial standing must be shown to be met. Whilst it is not a matter for us, Mrs Anderson might wish to give consideration to the making of a fresh and more fully evidenced application, perhaps, for a smaller number of vehicles than she has sought from the TC. It might be something she would care to consider taking professional advice about.

18. This appeal to the Upper Tribunal is dismissed.

M R Hemingway

Judge of the Upper Tribunal

Dated: 30 August 2022