



Tawakal Foods Limited
[2023] UKUT 230 (AAC)

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Appeal No.UA-2023-000213-T

On appeal from the Traffic Commissioner for the South Eastern and Metropolitan Traffic Area

Tawakal Foods Limited

Appellant

Before: Upper Tribunal Judge Ward, Mr G Roantree and Mr M Smith

Hearing date: 25 July 2023

Representation:

Appellant: Did not attend

DECISION

Although Form UT12 was completed in the name of Mr Mohamud Hassan, it is the appeal of the operator (of which Mr Hassan is a director) and the title of the case is as shown above.

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

REASONS FOR DECISION

1. The operator held a restricted licence under the Goods Vehicles (Licensing of Operators) Act 1995 (“the Act”). Following a Public Inquiry held on 16 January 2023, the licence was revoked from 23:45 on 3 March 2023 in consequence of adverse findings under paragraphs (a)(e)(f) and (h) of section 26(1) of the Act, set out below.

2. The appeal was listed for hearing at 1030 on 25 July 2023 at Field House, London EC4. While the operator’s solicitors had ceased trading a relatively short time beforehand, the notice of hearing had been re-served on the operator direct. As a tube strike had been announced for the hearing date (though it did not in the event proceed) the Upper Tribunal office had emailed to check that the operator would nonetheless be able to attend, receiving by email dated 14 July confirmation that it could.

3. By 1045 there was no attendance or representation on behalf of the operator. The clerk telephoned the operator and was told that Mr Hassan had gone to hospital. No further detail was forthcoming. When the clerk rang Mr Hassan’s own mobile, it went straight to voicemail. No email has been located from Mr Hassan or others on behalf of the operator

alerting the Upper Tribunal to the apparent difficulty and seeking a postponement of the hearing.

4. The panel was satisfied in view of the email of 14 July that the operator had been notified of the hearing. It considered it was in the interests of justice to proceed with the hearing as:

(a) there was sufficient written evidence to enable the panel to reach an informed view about the matters in issue; and

(b) if the operator had wished to be represented but this had been frustrated by Mr Hassan's need to go to the hospital, it would be open to the operator under rule 43 of the Upper Tribunal's Rules to apply in writing, within one month of the date of the letter issuing this decision, for it to be set aside and the application would be considered. Such an application should explain why in the operator's view it would be in the interests of justice for the present decision to be set aside and a further hearing convened.

5. So far as relevant, section 26(1) provides:

"(1) Subject to the following provisions of this section and the provisions of section 29, a traffic commissioner may direct that an operator's licence be revoked, suspended or curtailed (within the meaning given in subsection (11) on any of the following grounds—

(a) in the case of a heavy goods vehicle licence, that a place in the traffic area to which the licence relates has, at a time when it was not specified in the licence as an operating centre of the licence-holder, been used as an operating centre for heavy goods vehicles authorised to be used under the licence;

...

(e) that the licence-holder made, or procured to be made, for the purposes of—

(i) his application for the licence,

(ii) an application for the variation of the licence, or

(iii) a request for a direction under paragraph 1 or 3 of Schedule 4,

a statement of fact that, whether to his knowledge or not, was false, or a statement of expectation that has not been fulfilled;

(f) that any undertaking recorded in the licence has not been fulfilled;

(h) that since the licence was issued or varied there has been a material change in any of the circumstances of the licence-holder that were relevant to the issue or variation of the licence;

..."

6. The concerns raised by the Traffic Commissioner were centred on:

(a) operating from an unauthorised operating centre and

(b) lack of systems, record-keeping and inspection.

7. It is convenient to deal with each in turn.

Unauthorised operating centre

8. The operator had not been at the specified operating centre since May 2019. The operator submits that an attempt was made to regularise the position in August 2020. A statutory notice appeared in the *Enfield Independent* for August 12, 2020. It is submitted that a fee was paid on August 19. The documentary evidence (p63) does not show the amount of the payment, that such a payment went through or that if it did, it related to the present operator rather than another similarly named company, which is known to have made an application around the same time. At p66 there is a copy of form GV81, appropriately completed to apply for a change of operating centre, but unsigned and undated. Mr Hassan had claimed in correspondence that a covering letter was sent to a named individual in around November 2019 together with the advertisement, but as the newspaper showing the advertisement bears its date of issue, Mr Hassan must have been in error on that point. In any event, no letter of application from the operator (of any date) can be produced, it is said because of a corrupt hard drive. There is no evidence that such an application was ever received at the office of the Traffic Commissioners.

9. On 31 August 2021 the operator telephoned a Ms Shepherd, a team leader in the Licensing Team, and was told that to regularise the position, the operator needed to lodge an urgent application and request an interim licence. Although Mr Hassan obtained access to the VOL system, no application was made and no other communication took place. The 2020 “application” was only referred to again after the letter in June 2022 proposing to revoke the licence.

10. We are doubtful as to the evidence said to show that a payment was made to DVSA in respect of the licence fee. It would be at first sight surprising if there was an unallocated payment received by the Traffic Commissioner’s Office and we should have expected some follow-up by them, had that been the case. Ultimately, though, whether such a payment was made is of limited importance. The Traffic Commissioner did not conclude there was not such a payment, but it is undisputed that the operating centre in use was not in fact authorised and her conclusion in relation to the weight to be given to that fact rested on the lack of any other evidence of an application, the failure to follow up the purported application for a prolonged period, and the failure to check the licence on VOL, which would have revealed there was no application under consideration.

11. We can see no error in her approach or conclusion on this point and she was justified in the finding she made for the purposes of paragraph (a) of s.26(1) and the weight she gave to it.

Record-keeping and inspection

12. A desk-based assessment had been carried out in September 2022. Of the 17 areas examined, 12 were considered “Unsatisfactory”: the operating centre, inspection/maintenance records, driver defect reporting, inspection facilities and maintenance arrangements, vehicle emissions, load security, wheel and tyre management, driver documents, driver training records, driver hours/record keeping, compliance with the Working Time Directive and Transport manager/responsible person assessment. To summarise, there was a lack of systems and records and of evidence more generally.

13. The operator did engage a consultant and a number of documents were submitted in evidence to the Public Inquiry, but the Traffic Commissioner considered that the material submitted did not fully meet the requirements of the call-in letter and was of limited help to the operator. No useful purpose would be served by reiterating all the points I -X in paragraph 6 of the Decision where the Traffic Commissioner specified her concerns; we see no reason to disagree with her assessment.

14. Based on the transcript of the Public Inquiry, it would be fair to say that the Traffic Commissioner was evidently not impressed by Mr Hassan's evidence. In her written decision, she was particularly critical of Mr Hassan's failure to respond to the Desk Based Assessment, when a response was due within 7 days, and that he had incorrectly and misleadingly indicated in the Desk Based Assessment that the operator had at that point only just started operating HGVs when in fact it had been doing so since August 2021.

Grounds of appeal

15. These were as follows:

- (a) despite the evidential problems, the operator had submitted an application to change their operating centre and, as the fee had been collected, the operator assumed that the application had been accepted;
- (b) they have taken steps to introduce compliant checks, as a result of the desk-based assessment;
- (c) the revocation of the licence will result in redundancies and loss of trade.

Ground (a) – change of operating centre

16. As noted above, it is undisputed that the change of operating centre had not, in fact, been authorised and the question is about the weight given by the Traffic Commissioner to the issue. She took the view (possibly generous to the operator) that a fee may have been paid, but gave weight to the prolonged failure by Mr Hassan to check if there was an extant application. Mr Hassan's case on this issue was doubtless not helped by the Traffic Commissioner's conclusions on his approach to compliance generally. She also drew attention to the significance of unauthorised use of an operating centre, reflected in it being a criminal offence under section 7 of the Act. Even if the operator did make the assumption referred to in the grounds of appeal, that does not excuse the failure to check, or to follow-up, for such a prolonged period about such an important matter.

Ground (b) – steps taken to improve

17. Clearly by the time of the Traffic Commissioner's decision, the operator had not taken adequate steps to ensure compliance, for the reasons the Traffic Commissioner gave. If it has done so subsequently (and there is no evidence of that before us), such improvements are not circumstances existing at the time of the Traffic Commissioner's decision and the Upper Tribunal is precluded by Transport Act 1985, sch.4, para 17 (3) from taking them into account.

Ground (c) – redundancies and loss of trade

18. The Traffic Commissioner tackled this head-on in her decision, saying:

“Whilst this is the operator’s first public inquiry, that is not a barrier to revocation in serious cases. This is such a case. Mr Hassan has failed over a sustained period of time, up to and including the public inquiry to properly engage in quality monitoring and control of the transport operations. He did not find the time, knowledge or inclination to focus on road safety. Mr Hassan’s attention has been on commercial need. When the public inquiry call-in letter should have focused his attention, he has abdicated responsibility to a consultant. What Mr Hassan has done since 18 October 2022 is too little too late. When I pose the question, can I trust that Hassan moving forward (*sic*), then the answer must be “no”. This decision may or may not put the operator out of business, but if that happens, it does not go against my intention in revoking this licence. Revocation is appropriate and proportionate where there is a long-standing disregard for the underpinning principles of the operator licensing regime, namely road safety and fair competition.”

19. Although there may be something of a glitch in what she wrote, it is clear that in that passage, the Traffic Commissioner was in substance asking the question mandated by 2009/225 *Priority Freight*:

“In our view before answering the ‘Bryan Haulage question’ it will often be helpful to pose a preliminary question, namely: how likely is it that this operator will, in future, operate in compliance with the operator’s licensing regime? If the evidence demonstrates that it is unlikely then that will, of course, tend to support a conclusion that the operator ought to be put out of business. If the evidence demonstrates that the operator is very likely to be compliant in the future then that conclusion may indicate that it is not a case where the operator ought to be put out of business. We recognise, of course, that promises are easily made, perhaps all the more so in response to the pressures of a Public Inquiry. What matters is whether those promises will be kept.”

That was the correct question to ask and we consider that the Traffic Commissioner was entitled to answer it as she did and we agree with her.

Conclusion

20. In consequence, the appeal is dismissed.

C.G.Ward
Judge of the Upper Tribunal

Mr G Roantree
Member of the Upper Tribunal

Mr M Smith
Member of the Upper Tribunal

Authorised for issue on 2 August 2023