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ROAD TRANSPORT FORUM

TCS entitled to suspend licences even if leads to potential business failure

The Upper Tribunal have made it clear that the possible failure of a business because its O-licence has been suspended does not prevent Traffic Commissioners imposing such a penalty if the circumstances warrant it.

Their comments came when they dismissed an appeal by Dundee Plant Co Ltd against the 12 week suspension of its licence because the fact that it had been operating without a Transport Manager for 16 years had been concealed from Traffic Area staff. It had been argued that a 12-week suspension was equivalent to a revocation and yet the Traffic Commissioner had decided that a revocation was not necessary.

The Tribunal said that they had no doubt whatsoever that revocation would have been justified and unimpeachable on appeal. The illegality lasted for 16 years, and was covered up by repeated dishonest and fraudulent concealment. If ever there was conduct that appeared to drive a coach and horses through the operator licensing system, this was it. The extent and duration of the unlawful conduct, coupled with blatant lies told to the Traffic Commissioner's staff, strikes at the very heart of the regime. This, therefore, is the starting point. Conduct such as this cannot be tolerated and the purposes and objectives of the licensing system would generally require revocation and disqualification. Yet, there were factors - clearly identified in the Commissioner's decision - that caused her to hold back

It must have been perfectly plain from the outset that this operator was staring revocation in the face. Consequently, if it was proposed to try and persuade the Commissioner not only to draw back from revocation, but to limit the length of any suspension, then it was surely apparent that the most compelling financial evidence would be needed to permit any 'tantamount to revocation' argument to have even the remotest chance of success. On the financial evidence presented to the Commissioner it was far from established that the costs of hiring in a small fleet for 12 weeks would, in fact, be ruinous. Words of doom and gloom are easy to utter, and Commissioners hear them all the time.

It follows that, in a case like this, assuming that the Commissioner might have been encouraged to impose a shorter suspension had she been determined to provide a lifeline, the actuarial evidence needed to be far more specific, comprehensive and compelling that it was.

Whilst recognising that the longer the period of suspension, the harder it will be for many companies to continue in business, there is no statutory limit on the period of suspension that a Commissioner can impose. Moreover, as a matter of law, a suspension is very different from a revocation. It provides a glimmer of hope, and a means to return to operation with a known and established authorisation and operating centre - without the need to make a fresh application. It provides a chance for a new leaf to be turned over if the suspension can be survived. It is not possible to disqualify an operator or a director if a licence is merely suspended.

It would be a very retrograde step to discourage Commissioners from taking tough regulatory action (but falling short of revocation) if it appears right to do so where a very clear marker is needed even if there is a possibility that the consequence will be to put the business in peril. In an appropriate case (which this is) a Commissioner is entitled to say: "I hope you survive but if not – so be it. On these particular facts, the public interest in maintaining the integrity of the system demands nothing less than a lengthy suspension".

Jared Dunbar of Dyne Solicitors says the Senior Traffic Commissioner's Statutory Guidance makes it quite clear that the starting point for consideration of regulatory action for 'serious' or 'severe' cases is action that 'may materially affect the transport operation. For serious cases this is limited to a 'time limited curtailment' but for severe cases this can be either a 'suspension' or an 'indefinite curtailment'. Had the correct financial evidence been put before the Traffic Commissioner at the original hearing, then the operator could arguably have proved the 'tantamount to revocation' argument. However, the inability to introduce new evidence at an appeal hearing (unless under exceptional circumstances) confirms the importance of preparing properly for your Public Inquiry and not leaving anything to chance.

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The increasing importance of load security

Some years ago it was a common practice for Police officers to stop commercial vehicles when they were concerned about the security of a load. In many cases the officer did not have the training to understand what he was looking at. An example would be the haulier's use of split film polyurethane rope which caused constant problems because, after some use, this rope can look as if it would hold nothing even though in practice it is often as good as new.

Recently, however, the issue of 'load security' has become a matter of general concern not only here in the UK, but also in the EC: a concern that reflects the growing recognition of the real dangers that can result from the loss of a load or part of as load.

In the UK Section 40a of the Road Traffic Act 1988 creates the offence of using a motor vehicle or trailer when there is a danger of injury to any person where a vehicle is being used for an unsuitable purpose or is carrying too many passengers, and when the weight, distribution of the load or the manner in which it is secured involves a danger of injury to any person.

Prosecutions may be brought by the police, the Health and Safety Executive and VOSA, and, no less importantly, any conviction must be reported to the Traffic Commissioner. In general terms the operator is in the hands of either those who load the vehicle or, of course, the driver and yet a conviction is a very serious matter. Not only can the fine be substantial but the Traffic Commissioner may well call a 'Public Inquiry', particularly if the report from VOSA suggests that the operator's operational systems are inadequate.

As with so much of Health and Safety the secret of a successful regime lies in the operator's attitude to training.

All safety equipment such as ropes, straps, chains, tensioners, Stilsons, and wood used for packing should be routinely checked for wear by employees who have been trained to recognise what is unacceptable condition. There should be written record of checks on equipment in daily use such as straps and tensioners which should be checked at appropriate intervals. Drivers must be directed to reject equipment that does not appear to be in a suitable condition.

On a day to day basis it must be clear that the main responsibility for load security lies with the driver. It is, therefore, imperative that drivers are trained:

- To understand the dangers that can result from an insecure load.
- To use load security equipment safely.
- To recognise equipment that is unsuitable perhaps, by reason of wear or, in the case of straps, perhaps by reason of a cut in the fabric.
- To know which method should be used to secure a particular load. For instance chains can damage certain loads.
- To refuse a load which appears to be insecure.

Driver training should always be formal, and there should be a record of the date of the training session with the name of the trainer and the names of those who attended.

This may all seem to be yet another administrative burden but, in reality, the time involved is not great particularly when it is compared with the protection afforded to the operator in the event of a prosecution.

Jonathan Lawton

Jared Dunbar of Dyne Solicitors says operators should read the DfT's Code of Practice on the Safety of Loads on Vehicles to ensure they follow best practice for load security. As stated, training should be undertaken and the details recorded but also refresher training on a regular basis should be considered. To paraphrase a famous quote: the costs of compliance may seem large but the costs of non-compliance are massive.

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