



ROAD TRANSPORT FORUM

Upper Tribunal change approach over automatic licence termination

In two cases in which they have quashed the automatic termination of Operator's Licences as a result of non-payment of the fee for the continuation in force of the licence, the Upper Tribunal have changed the way in which such cases should be approached.

In a combined decision allowing the appeals by Patrick Ward, trading as Allshires Landscapes, and Overbrook Recovery Services Ltd, the Tribunal said they had said on many occasions that there is no statutory requirement to give notice to an operator that a continuation fee is about to become payable and that it is the primary responsibility of the operator to pay the fee. We are satisfied that the first part of this proposition remains correct because there is no provision in the 1995 Act, or in either of the 1995 Regulations, requiring that notice must be given when a continuation fee is about to become due. While we remain satisfied that the primary responsibility for payment remains with the operator, it is clear that this responsibility is neither as one-sided, nor as simple to carry out, as may have been previously thought.

This is the first occasion on which the Tribunal has had an opportunity to see the full terms of an Operator's Licence when considering an appeal against a refusal to disregard the automatic termination of a licence. We do not believe that the terms of Note 1 to an Operator's Licence have ever previously been considered. Nor do we believe that the potential for confusion between the review date and the prescribed time for payment has ever emerged as starkly as it does in one of the present appeals. In view of these new points, it seems to us that we ought to re-consider the approach to automatic termination. We say that for two reasons.

Page 1 of an Operator's Licence sets out two dates:

- (i) The date from which the licence is in force and
- (ii) The date of the next review, which will be on the same day and the same month but at five-yearly intervals after the licence came into force.



It follows that there is no direct reference to the pay-by date on page 1 of an Operator's Licence. On its own, Note 1 does not provide a precise date because it simply refers to "*the deadline stated in the associated fee request*". It would have been more helpful to have set out the definition in the 1995 Fees Regulations because this would have enabled operators to work out the correct date. However, an even clearer and fairer way to deal with the matter would have been to state on page 1 of the licence the date by which the first continuation fee must be paid, followed by a note stating that further continuation fees must be paid before each fifth anniversary of that date. Once an operator receives a fee request, it is possible to ascertain the date when the fee is next payable because of the statement at the bottom of page 1 that the fee then due covers a period until the date given. Whether it is actually realistic to expect operators to conclude that this will be the next pay-date is another matter, since it depends on inference rather than a direct statement that this will be the case.

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In the past, the Tribunal has urged operators to make diary entries to act as a reminder of the date when the continuation fee will be due. In addition, it has been suggested that this can be ascertained from the date on the disc displayed in the operator's vehicles. The Tribunal stated that in view of what it now knew, it had to question whether these suggestions are as practical or reliable as they appeared to be at the time. Once an operator has paid the continuation fee for the first time, it is reasonable to suggest carrying forward a diary entry giving the date by which the next continuation fee is payable. But, until the first continuation fee has been paid, the only ways in which an operator can ascertain the pay-by date appear to be by working it out from the definition in the 1995 Fees Regulations or by asking the OTC.

Any operator seeking assistance as to the pay-by date from the December 2011 revised edition of the VOSA Guide GV74 is liable to be misled if they attempt to calculate the pay-by date by reference to what is said. This is what it says:

“Continuation fee (for an existing licence)

The continuation fee is payable every five years, so you will have to pay the first payment five years after your licence was granted. The fee covers the costs of maintaining and monitoring the licence for another five years. It is non-refundable”.

The statement that: *“you will have to pay the first payment five years after your licence was granted”* is simply wrong because it does not accord with the definition of the prescribed time for payment in the fees regulations. This passage simply enables those who consult it to determine the review date, and it encourages them to believe that this is also the pay-by date, which it is not. It should be removed or revised as a matter of urgency. The Tribunal went on to say that until this is done it seems to them that reliance on this passage, coupled with payment before the review date would be *capable* of amounting to an exceptional circumstance. Whether, in fact, it will justify disregarding automatic termination will be a matter to be decided on the facts of each individual case.

The Tribunal stated that it was its belief that the date on the vehicle disc shows the review date and that it does so for a very good reason. If that was not the case, and the date on the vehicle disc was the pay-by date, operators would be left without valid discs until such time as the new discs were delivered.

It follows, when deciding whether or not there are exceptional circumstances which justify setting aside the automatic termination of a licence, that all concerned should take into account the following:

- (i) That the effect of Note 1 is to give rise to a reasonable expectation that a request for payment of the continuation fee will be sent to the operator's current correspondence address.
- (ii) That ascertaining the pay-by date, in the absence of a fee request, is not straightforward, especially for those paying for the first time.
- (iii) That there is scope for confusion between the pay-by date and the review date and the date on the vehicle disc is the latter not the former.

Jared Dunbar says that this case should remind operators of the need to be aware of all relevant deadlines and dates and they should not necessarily rely on others to remind them of those dates. If Operators are in any doubt over deadlines, they should proactively search out answers from the relevant people. Operators also need to keep all important dates recorded somewhere. The obvious place would be on their Forward Planner alongside other dates such as their Pre-Maintenance Inspection dates, rolling road brake test dates, MOT dates, Vehicle Excise Duty dates, tachograph calibration dates and driving licence check dates.

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