



## ROAD TRANSPORT FORUM

### Single prohibition notices do not need notifying to the Traffic Commissioner

Operators are now not required as a matter of course to notify the Traffic Commissioners of the issue of an isolated prohibition notice. However, should a number of prohibitions be issued during a short period an operator must write to the local Office of the Traffic Commissioner outlining the reasons for this and what preventative measures have been put in place to prevent a recurrence. This should be sent to the relevant address dependent upon the traffic area in which the licence is held.

Jared Dunbar from Dyne Solicitors comments:

"Unfortunately, this could leave operators unsure of a number of things:

1. What is 'a number of prohibitions'?
2. What is 'a short period of time'?

Do three prohibitions in 12 months warrant a letter being sent? Do three prohibitions in 3 months warrant a letter? Presumably, the definition of 'a short period of time' will be different if the prohibitions are for the same or similar issues.

There is merit in reducing the administrative burden on operators and the traffic commissioners and their staff, especially when the prohibition data is available to the authorities online. But previously things were black and white: an Operator received a prohibition and the Operator wrote in. Unfortunately, operators now need to make a judgment call as to whether they need to notify or not.

It is recommended that operators take a caution approach on writing in as they cannot be criticised for supplying too much information.

Advice should be sought if operators are unsure whether they need to write in. Again, advice should also be sought as to what measures should be implemented to prevent a recurrence and also on the contents of the letters they send. The information Operators provide could be crucial in avoiding being called up to a Public Inquiry, where their Operator's Licence would be at risk."

### 'Intention of unfair competition' and not 'the result' that matters

The intention of an act designed to give an operator an unfair advantage over competitors was what matters whether or not it achieved its purpose.

This was emphasised by the Upper Tribunal, when they dismissed an appeal by Arnold Transport & Sons Ltd against the revocation of the company's licence and the disqualification of director and transport manager Paul Arnold after the fitting of tachograph interrupter switches in the company's vehicles. Mr Arnold was convicted of an offence of forgery for which he was sentenced to two years imprisonment suspended for two years.

The Tribunal said that "it was an offence intended to obtain an unfair advantage in relation to the company's competitors. The fact that it is now asserted that it did not achieve that purpose should carry little if any weight. One reason is that it is the underlying intention that matters. Another reason is the potential impact of unfair competition on other operators.

The impact of unfair competition is insidious in that it gradually and subtly undermines the confidence of compliant operators that their competitors will comply with the regulatory regime and thus compete fairly. What matters is the perception that other operators are competing unfairly not whether they are achieving any benefit as a result. Once rumours, of unfair competition spread, (or clear evidence of it becomes apparent), the assumption will be made that it must be advantageous because there would be no point in running the risks involved if it was not. It is also corrosive because once rumours of unfair competition, (at the very least), begin to spread the perception that some operators are competing unfairly, (whether or not they profit by doing so), has a damaging effect. It means that normally compliant operators will feel tempted to 'cut corners' in relation to the regulatory regime in order to remain in business. Some may decide to resist that temptation but others are likely to succumb. The end result, if swift and effective steps are not taken to stamp out unfair competition, is that the operators who are most determined to remain compliant will be at greatest risk of being put out of business, even though they are the very operators who most deserve to remain in the industry. Trust, (whether between operators and the Traffic Commissioner or between operators themselves), is all too easily destroyed. Rebuilding it, if that is even possible, is likely to be a long and slow process."

## Periods of grace will no longer be granted without evidence

The Upper Tribunal has made it plain that periods of grace, for example for the appointment of a qualified transport manager or the staying of a decision by a Traffic Commissioner pending an appeal, should not be granted without some tangible evidence, beyond mere hope and aspiration, that the granting a period of grace will be worthwhile, and that there are reasonable prospects for a good outcome.

In dismissing appeals by Duncan McKee against the revocation of his operator's licence and disqualification from holding such a licence, and by Mary McKee against her disqualification from acting as a transport manager, the Tribunal said that some sort of analysis along these lines will be necessary because, amongst other reasons, Traffic Commissioners have to decide how long to grant a period of grace. Moreover, as with a stay, there is no point in granting a period of grace if the likely effect is just to put off the evil day when regulatory action will have to be taken.

Jared Dunbar from Dyne Solicitors comments that "Operators must apply for periods of grace as soon as they are required. Failure to do so could get them in serious difficulties with their Traffic Commissioner. Operators should also take advice early on what evidence is likely to be required by Traffic Commissioners."

## Traffic Commissioners can consider more than five years history

In regard to what was said to be the five year rule in looking at an operator's previous history, the Upper Tribunal said it was not aware of any 'five-year rule' relating to previous public inquiries or regulatory action, and it considered that reference to the Rehabilitation of Offenders Act 1984 is misconceived. It stated that inquiries were a civil commercial jurisdiction with a strong emphasis on firm and consistent regulation, public protection, and fair competition. One key question that routinely arises is whether or not the Traffic Commissioner can trust an operator to be compliant in the future. In the Upper Tribunal's view, especially with a pattern of ongoing and apparently continuous non-compliance in the past, Traffic Commissioners are entitled to go back as far as they need to, in order to properly answer this question (subject to the permitted statutory framework which, of course, does impose some time limits in relation to some aspects).



## An oversight cannot be an exceptional circumstance

A mere oversight cannot be said to be an "exceptional circumstance" enabling the late payment of an O-licence continuation fee to be accepted. More is required before exceptional circumstances may properly be found. This conclusion was held by the Upper Tribunal, when they dismissed an appeal by Guisepppe and Giosue Bille, trading as Contrada Farms UK, against the termination of their licence.

The Goods Vehicles (Licensing of Operators) Act 1995 places responsibility for renewal 'fairly and squarely on the operator'. If the continuation fee is not paid by the prescribed time, then the licence automatically terminates. However, the Traffic Commissioner may disregard the prescribed time if he considers there are exceptional circumstances that justify him doing so.

In this case, the operator had left payment of the renewal fee to a part-time book/keeper accountant and did not check that payment was made in time.

Jared Dunbar from Dyne Solicitors comments that "this case highlights the importance of not missing deadlines and the company owners make sure correspondence from the Traffic Commissioner is dealt with in a timely manner. If tasks are delegated to junior staff, management needs to make sure those tasks are completed"

Commercial Editor: Mike Jewell, (mikejewell@dynesolicitors.co.uk)

Contributors: Mike Jewell & Jared Dunbar

Dyne Solicitors Limited • The White House • High Street • Tattenhall • Chester • Cheshire CH3 9PX

Tel: 01829 773100 • Fax: 01829 773109 • Email: info@dynesolicitors.co.uk

**www.dynesolicitors.co.uk**