

SHERIFFDOM OF LoTHIAN AND BORDERS AT LIVINGSTON

[2020] LIV 41

LIV-B106-20

JUDGMENT OF SHERIFF DOUGLAS A KINLOCH, ADVOCATE

in the cause

SCOTT McMILLAN

Appellant

against

WEST LoTHIAN COUNCIL

Livingston, 25 August 2020

The sheriff, having resumed consideration of the cause, SUSTAINS pleas in law 2, 3, 4 and 5 for the Respondents; Repels pleas in law 1, 2, 3, 4 and 5 for the pursuer, and DISMISSES the appeal; continues consideration of all questions of expenses arising from the appeal.

NOTE:

[1] This is an appeal by Scott McMillan ("the Appellant") against a decision of the Licensing Committee of West Lothian Council ("the Committee") to suspend his taxi driver's licence, number 081D, with immediate effect from the date of the Committee's meeting on 18 March 2020. The suspension is to have effect until 11 August 2022, a period of nearly two and a half years.

[2] The reason for the Committee suspending his licence was a determination by them that, in terms of the Civic Government (Scotland) Act 1982, schedule 1, para 11(2)(a), he was

no longer a fit and proper person to hold that licence, in that he had been convicted of a number of offences, mainly road traffic in nature, during the period 2016- 2019.

[3] After sundry procedure, the appeal called before me for a hearing on 10 August 2020 at Livingston Sheriff Court. The appeal hearing took the form of a telephone conference as the emergency provisions caused by the Coronavirus pandemic prevented the parties from attending court. The Appellant represented himself, and the Council was represented by Ms Hogg, Solicitor, West Lothian Council. No evidence was led at the hearing, the parties having agreed that this was not necessary, and that the appeal could be determined solely on submissions. The parties were further agreed that their submissions would be presented in writing, and these were duly lodged in advance of the hearing. At the telephone hearing before me both parties confirmed that they did not have anything significant to add to their full written submissions. At the end of the hearing I took the case to avizandum.

Background

[4] The background to this appeal is that the Appellant is a taxi driver who has had a taxi driver's licence for about 20 years. It was renewed most recently on 11 August 2019 for a period of three years. However, he also has another 16 or so taxi licences or "private hire plates" (as I understand they are sometimes colloquially referred to) in his name, which allow him to operate private hire cars which are driven by other private hire taxi drivers on the basis of their own taxi driver's licences. The Appellant, through a limited company which he operates, also has a substantial contract with West Lothian Council to take school children to school. It is said that this contract is worth over £1M per year.

[5] On 6 December 2019 the legal department of West Lothian Council received a request from Police Scotland for the Council to consider the suspension or revocation of the

Appellant's taxi driver's licence. The Council's Licensing Committee was due to meet on 12 February 2020, and the Chief Solicitor of West Lothian Council submitted a report to the Licensing Committee, regarding the Police Scotland request. The Appellant did not attend this meeting, but as the Committee could not be sure that he had been notified of the meeting, they adjourned the meeting until 18 March 2020 to allow the Appellant to attend. The hearing took place on 18 March when the Appellant was present.

[6] The report prepared by the Chief Solicitor explained to the Committee that Police Scotland sought suspension or revocation of the Appellant's taxi driver's licence on the ground that a number of "convictions" demonstrated that the Appellant was "likely to cause a threat to public safety". Details of the convictions were included in 3 Appendices to the report, namely Appendices A, B and D. The report explained to the Committee that the convictions as set out in Appendices B and D were considered to be protected in terms of the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013, and could only be seen and taken into account by the Committee if the Committee was satisfied that justice could not be achieved without the Committee being able to consider the convictions. The question of whether the convictions in Appendices B and D should be seen by the Committee was considered as a preliminary issue at the hearing on 18 March 2020, and the Committee heard submissions on this point from Police Scotland and from the Appellant. Having considered the submissions the Committee decided that it was necessary for them to look at the convictions in order that justice could be done. No challenge is taken to that decision, and in any event it seems to me that there can be no real criticism of the way in which the Committee dealt with the point, or the conclusion to which they came. It was necessary for them to have all relevant information.

[7] Appendices A, B and D are reproduced in the defenders' first Inventory of Productions. The convictions are as follows, in chronological order: –

1. 13.5.16 – Edinburgh JP court – a conviction for driving without insurance
2. 15.7.16 – Livingston JP court - using a mobile phone – Fined £250
3. 12.8.16 – Livingston JP court – failing to attend at court – Fined £100
4. 1.1.18 – speeding - fined
5. 5.11.18 – PF fine – no tax disc
6. 12.4.19 – PF fine – keeping vehicle which does not meet insurance requirements
7. 12.11.19 – Ayr JP court – speeding – Fined £350

Although I have referred to the appendices as containing convictions, it can be seen that two of the convictions are in fact “Procurator Fiscal fines” imposed under the alternative to prosecution scheme. The Appellant had 7 live penalty points on his driving licence at the date of the hearing.

Procedure at hearing

[8] The procedure at the Committee hearing is set out in the “Statement of Reasons”. No challenge is made as to the accuracy of the contents of the Statement. In summary, at the committee meeting on 18 March 2020 the representative for Police Scotland submitted that the Appellant’s convictions demonstrated a pattern of offending by the Appellant which showed that he either chose to ignore road traffic legislation, or was careless about the consequences of repeatedly breaching the legislation, and the effect of this on his taxi driver’s licence. The Appellant confirmed to the Committee that he was content to represent himself. He did not address the committee at length, but argued that the fact that he was in

charge of a company which transported 600 children per day to and from schools demonstrated that he had to be seen as a fit and proper person to have a taxi driver's licence notwithstanding the various convictions which he accepted he had acquired. Members of the committee asked the Appellant various questions regarding some of his convictions, all as narrated more fully in the Statement of Reasons. They asked him what the consequences to him of his licence being suspended would be, and the Appellant stated that the company which he has which employs a number of taxi drivers would fold, and the staff would lose their jobs. Members of the committee questioned the Appellant about this assertion.

[9] The Statement of Reasons shows that after hearing from all parties the Committee decided that the Appellant was no longer a fit and proper person to hold a taxi driver's licence because the number and nature of the convictions demonstrated a pattern of offending which "impacted on his role as a licensed taxi driver", and also demonstrated "a propensity to ignore road traffic law". They took the view that the fact that his company had a contract with West Lothian Council to provide taxis to take children to school was a separate consideration which was irrelevant to their decision as to the effect of the criminal convictions. The committee also took the view that the Appellant had not been frank regarding his explanation to the Committee as to the circumstances in which some of the offences had been committed, and as to the possible effect on his company if his personal taxi driver's licence was suspended. The committee concluded that the convictions amounted to an unacceptable pattern of offending which was compounded by his lack of frankness before the committee in the way in which he answered questions. They took the view that they "could not trust him to abide by road traffic law or the conditions of his licence", and that he therefore had to be seen as not being a fit and proper person to hold a taxi driver's licence.

The law

[10] The statutory provisions which govern this appeal are to be found in paragraph 18 of schedule 1 of the 1982 Act. Paragraph 18(7) provides that an appeal can only be upheld if the Sheriff considers that the licensing authority, in arriving at their decision:

- (a) erred in law;
- (b) based their decision on any incorrect material fact;
- (c) acted contrary to natural justice; or
- (d) exercised their discretion in an unreasonable manner.

Putting the matter very informally, this appeal can only succeed if the Committee completely misunderstood the law or the facts, acted in a way which resulted in an unfair hearing, or imposed a sanction which was so far “over the top” that it cannot be supported as being reasonable.

The appellant’s pleadings

[11] The Appellant appealed the Committee’s decision by way of a Summary Application lodged with Livingston Sheriff Court on 14 April 2020. Answers were lodged by West Lothian Council to the Summary Application, and after a period of adjustment a Closed Record was prepared. The Appellant’s case as set out in his pleadings is to the effect that the Committee exercised their discretion unreasonably by failing to give proper weight to “significant matters of fact”, such as: (i) the effect of the Coronavirus emergency situation on his taxi business; (ii) the fact that this taxi business which he operates provides important taxi services to West Lothian Council; (iii) the fact that he is regularly assessed by the Police and the Council in relation to his taxi business; (iv) the fact that he requires a taxi driver’s licence to cover absences by taxi drivers employed by him, in order to fulfil his obligations

to the Council under his contract with them. Two other matters raised by the Appellant in his Summary Application are no longer relevant. The first is a suggestion by the Council in their pleadings that he had failed to disclose convictions to them as required by the terms of his licences. It was agreed before me that this allegation did not form any part of the Committee's deliberations. The second is that the Committee were wrongly advised by the Clerk as to the effect of revocation of his licence, but as the more serious step of revocation was not taken it was agreed that I need not consider that point.

Submissions

[12] In support of his case as set out in his pleadings, the Appellant puts forward a number of arguments in his written submissions as to why he maintains that the Committee exercised their discretion in an unreasonable manner in deciding to suspend his taxi driver's licence.

[13] He argues that his convictions were not as serious as the Committee thought, in that they did not attach sufficient weight to the fact that in respect of his conviction for driving without insurance he had been admonished, and that two of his "convictions" were dealt with by means of Procurator Fiscal fines, and were not therefore to be treated as if they were convictions in a court of law. These PF fines were, in any event, for minor matters which could be described as administrative in nature, for example failing to have a "tax disc" for a vehicle. The PF fines did not therefore suggest that he was a risk to the public as maintained by the police. He argued also that the Committee had been wrong in concluding that he was being evasive with them, the impression which they had gained having been an inaccurate one which had resulted from the fact that he was nervous and unfamiliar with the procedures at the hearing. The Committee were also wrong in concluding without any

proper evidence that he must have been driving his taxi on a commercial basis when he was stopped for not having insurance. He argued that the fact that West Lothian Council trust him to be in charge of such an important contract must mean that he has to be seen as a fit and proper person to hold a licence, and the Committee were wrong to take the view that the commercial contract which he had with West Lothian Council to transport children was of no relevance. The fallacy in the Committee's reasoning, he argued, was demonstrated by the fact that on the one hand they referred to the contract as being irrelevant, but on the other hand said that his convictions would set a bad example to the staff working for him. The committee's reasoning had been contradictory and flawed. He argues that his taxi business had already been affected by the "lockdown" imposed during the Coronavirus emergency measures, and he says that if he is also prohibited from driving a taxi on top of that then his business could fold. He argues that the length of the suspension of his licence imposed by the Committee was excessive, and therefore an unreasonable exercise of their discretion.

[14] Ms Hogg, on behalf of the Council, submitted, in summary, that the weight to be attached to the Appellant's convictions, and the inferences to be drawn from the convictions was a matter for the Committee as a local licensing Committee familiar with local conditions. They were entitled to take into account matters which did not result in a criminal conviction, such as the Procurator Fiscal fines. They were entitled to form their own views as to the explanations offered by the Appellant regarding his convictions. There was nothing to suggest that they had misunderstood the Appellant's position, or that the procedure adopted by the Committee was in any way unfair. The Committee did not fall into error in regarding the separate contract to provide taxi services to the Council as being irrelevant to their decision as to whether he was a fit and proper person to hold a taxi

driver's licence. The appellant knew that he could be legally represented, and had had every opportunity to be represented if he had wished. There was nothing to suggest that they had failed to take into account the pandemic, in so far as the effects of it could be known at the time of the hearing. There was no error in law in the decision of the Committee, and the appeal ought to be refused.

Decision

Error in law or material fact

[15] The power to suspend a licence is given to a licensing authority by the Civic Government (Scotland) Act 1982. Schedule 1 of the Act, paragraph 11(2)(a), provides that a licensing authority can suspend or revoke a licence if in their opinion the holder of the licence is *inter alia* "no longer a fit and proper person to hold the licence", and paragraph 11(2)(c) provides that it can be suspended if "the carrying on of the activity to which the licence relates has caused, or is likely to cause ... a threat to ... public safety". It can be seen from Appendix A that the initial letter from Police Scotland suggested revocation of the licence on the ground that the Appellant was likely to cause a threat to public safety, and that in his summing up before the Committee the representative of Police Scotland founded on this ground, although he also suggested in his summing up that the Appellant was not a fit and proper person to hold a taxi driver's licence. The statement of reasons shows that the ground of suspension actually considered by the Committee was that the Appellant was not a fit and proper person to hold a taxi driver's licence, and I consider that this ground of suspension was a ground that was properly before the Committee and that they were entitled to consider it. The statutory grounds of suspension are closely linked, and despite the reference to public safety issues in the letter from Police Scotland it

would have been clear from all that was said at the Committee hearing that the real issue which the Licensing Committee were considering was whether the Appellant was to be seen as a fit and proper person to hold a taxi drivers' licence. I do not consider that the Appellant could have been in any doubt that it was the effect of his convictions on his fitness to hold a taxi driver's licence which was the crucial issue with which the Committee was concerned. The Police Scotland representative referred to the question of whether the Appellant was a fit and proper person to hold a licence when he answered questions from the Appellant. I do not see that the reference in the letter from Police Scotland to public safety would have led the Appellant to make different submissions to the Committee. The Appellant specifically referred to the question of being fit and proper in his submissions to the Committee. It is not suggested by the Appellant in his pleadings (or in his written submissions) that the Committee misunderstood the law regarding suspension or revocation of a licence which they had to apply in coming to their decision, and I do not see that this could be suggested. I do not see therefore that there is any basis for me taking the view that the Committee misunderstood the law, and therefore erred in law in coming to their decision. They applied the correct test. The Appellant does not suggest either that the Committee based their decision on any incorrect material fact, and so this ground of appeal does not arise.

[16] I accordingly find that the appeal cannot succeed on the ground that the Committee either erred in law or based their decision on an incorrect material fact.

Natural justice

[17] In relation to the next potential ground of appeal, that is the question of natural justice, the Appellant did not argue that the Committee's procedures were flawed, and

therefore unfair. In any event, there is nothing whatsoever in the information given to me to suggest that the Committee acted in a way which was contrary to natural justice. The Appellant, for instance, was given full opportunity to argue his case, and did so. Although he did not speak at length, he was given the opportunity to say all that he wished, and while he might, even as an experienced businessman, have found the whole procedure slightly daunting, he had the opportunity to try and obtain legal representation. I accordingly find that there is no ground for overturning their decision on the basis that the Committee acted contrary to natural justice.

Was discretion exercised unreasonably

[18] In relation to the crucial question of whether the Committee exercised their discretion unreasonably, it is very important to note that my function is not to decide the appeal on the basis of whether I personally would have suspended the Appellant's licence: see eg *Merjury v Renfrewshire Council*, 2001 SC 426, Inner House, at para 5. The decision to suspend the Appellant's licence was one that was solely for the Committee, provided they exercised their discretion in a manner which was reasonable.

[19] One of the Appellant's main arguments (which he put forward at the Committee hearing, in the Initial Writ and in his submissions) was that the fact that he has been awarded a large contract by the Council means that he must be seen to be a fit and proper person to hold a licence. In relation to this argument, the Committee, in my view, gave perfectly rational reasons for rejecting it. The question before the Committee was the effect of his convictions, and whether they meant that he was not to be seen as a fit and proper person to drive a taxi. Consideration of the wider business relationship which he has with the Council, and whether he conducts that business responsibly, was largely irrelevant in

my view to the question of whether he should be allowed to drive a taxi. Whether the Appellant could drive a taxi safely, and within the law, is a separate matter from the question of whether he should be awarded a contract to provide taxi services. Having said that, no doubt West Lothian Council might decide at some point to look separately at the question of whether he was someone who should be in charge of such a large contract, but that is a separate question. I do not consider that the fact that the Committee regarded the contract as a separate issue, but then referred to it in their decision, indicates a serious failure of reasoning on their part. At worst, there is a slight lack of consistency there, but the point is not a significant one. The Appellant's argument on this point, which seemed perhaps to be his main argument, therefore fails.

[20] Allied to this is the Appellant's further argument that the Committee did not attach sufficient weight to the effect of the Coronavirus pandemic. As I understand his argument, he contends that as at the date of the hearing before the Committee his taxi business had already been affected by a downturn in business caused by the restrictions put in place to deal with the pandemic. He argues that if, on top of this, he is unable to drive a taxi himself when necessary, then his business could be seriously affected, to the detriment of himself and other taxi drivers who work for him. In relation to this argument, it is clear from the Statement of Reasons that the Committee took his argument into account, and there is nothing before me which causes me to think that the Committee did not understand the point which the Appellant was making. The possible effect of the coronavirus on his business does not persuade me that the Committee exercised their discretion unreasonably.

[21] Another of the Appellant's main arguments is that the Committee were jumping to conclusions in taking the view that he had not been entirely frank with them in relation to the circumstances which gave rise to his convictions. In terms of the Inner House decision in

the case of *Glasgow City Council v Bimendi* 2016 SLT 1063, the Committee was entitled to take into account all information available to it in deciding whether the Appellant was a fit and proper person to hold a licence. The Committee were entitled, in my view, to draw reasonable inferences from the facts of the convictions as known to them, and to consider whether the explanations given to them by the Appellant were full and frank. I consider that they were entitled to take into account the answers which the Appellant gave to questions asked at the hearing by Committee members, provided that the conclusions which they drew were not completely misconceived. They had the opportunity to see and hear from the Appellant, and having done so, and having listened to his explanations, in my view they were entitled to draw the conclusion that he was not being entirely frank, and to count that against him in deciding whether he was a fit and proper person to hold a taxi driver's licence. I do not think that it could ever be said that their conclusions were completely misplaced.

[22] In relation to the Appellant's argument that the Committee did not properly assess the seriousness of his convictions, I note that a number of cases which were decided in the Court of Session have concerned consideration by the local authority of previous convictions and whether they meant that the person concerned was not a fit and proper person to hold a licence. It is clearly settled that it is for the Committee to determine whether the previous convictions are sufficiently serious for them to hold that the applicant is not a fit and proper person. As I have said a number of times, it is not for me to substitute my view, even if different, from that of the Committee. The weight to be attached to the convictions is a matter for the local authority, having regard to what it considers to be the interests of the public as a whole (see eg *Ranachan v Renfrew District Council* 1991 SLT 625).

[23] It is worth mentioning that in the case of *Middleton v Dundee City Council* 2001 SLT 287 it was held that the authority was entitled to conclude that an applicant was not a fit and proper person to be the holder of a taxi operator's licence on the basis of a number of convictions for driving offences. The circumstances in *Middleton* were quite similar to the present case. The Appellant had acquired seven convictions over an 11 year period. They were for speeding, careless driving, failing to stop after an accident, another for speeding, failing to comply with a red traffic light, defective lamps, failing to produce his driving licence for examination by the police, another speeding conviction, and a fixed penalty for failing to comply with a stop sign. The Committee suspended his taxi licence for the remainder of its unexpired period and said that he had an "an appalling record of offences over a lengthy period" and that he could not be trusted to act responsibly. He appealed his suspension to the Sheriff who upheld his appeal on the basis that the Committee should not have had any regard to his speeding convictions, or to the careless driving conviction, or to the red light conviction as although these might be relevant to the question of whether he should hold a taxi driver's licence they were irrelevant to the question of whether he should hold a taxi operator's licence. The remaining convictions were not enough to show that he was not a fit and proper person to hold a taxi operator's licence. The local authority appealed the Committee's decision to the Inner House of the Court of Session which overturned the Sheriff's decision and confirmed the suspension. The Inner House held that a consideration of driving convictions might be an indicator of someone's fitness and propriety to be the holder of an operator's licence. The Committee were entitled to conclude that he was not a fit and proper person to hold a licence.

[24] I would also mention that in the *Middleton* case the Inner House made it clear that speeding convictions can be relevant to the question of whether someone is fit to hold a taxi driver's licence. The court said that:

“To disregard the law relating to speed limits on three occasions within six months could reasonably be regarded as a reason for not renewing an application for a taxi driver's licence.”

[25] While in the present case the Appellant's speeding convictions were nearly two years apart, and other “convictions” were not actually convictions, it was a matter for the Committee in the present case to consider the convictions and Procurator Fiscal fines which the Appellant had acquired, and to decide whether they give any indication of his character and whether he is to be seen as a fit and proper person to hold a licence. In considering the committee's decision here, the Appellant is, of course, a taxi driver who is entrusted with the safety of his passengers, and the Council was rightly concerned as to the attitude towards the law which the Appellant has demonstrated on a number of occasions. The Statement of Reasons sets out at some length the reasons for the Committee coming to the conclusion that the convictions indicated that the Appellant was not a fit and proper person to hold a taxi driver's licence. On that basis I find that there is no basis for thinking that the Committee fell into error in the weight which they attached to the various convictions, or in the conclusion to which they came.

Length of suspension

[26] A stronger argument which is available to the Appellant, although not one which is particularly emphasised in his submissions, is that the suspension was so severe as to be Draconian, and was therefore an unreasonable exercise of the Committee's discretion. While it might indeed be thought that the suspension was quite severe, as I have said my task is

not to decide whether I personally would have imposed the same “sentence”. It is to decide whether the decision to suspend the licence was one which no reasonable committee could have arrived at taking into account all the relevant circumstances.

[27] Suspending his licence with immediate effect for a period of nearly two and a half years, was a decision which was within the Committee’s power under the 1982 Act. The Committee were correctly advised by the Clerk that suspension was a less serious penalty than complete revocation of his licence. The suspension will not, in reality, prevent the Appellant from earning a living as he does not normally drive his taxi for a living. His job is mainly a managerial one, managing the fleet of taxis which he owns, and it is clear from the Statement of Reasons that the Committee had regard to this fact. It seems to me that in determining the length of the suspension the Committee have had proper regard to all relevant factors.

[28] For all of those reasons I cannot say that the decision by the Committee to suspend the Appellant’s licence was so severe as to be outwith their discretion. I cannot say that the decision to suspend the Appellant's licence, or the length of the suspension, was so unreasonable as to be flawed and open to challenge, or indeed that it was unreasonable at all: see *Wordie v Secretary of State for Scotland* 1984 SLT 345. In my view it was within the committee’s discretion.

Summary

[29] This is a case where the Appellant has amassed seven convictions in a short space of time. A conviction for driving without insurance is generally regarded by the courts as a relatively serious offence. It carries a high number of penalty points, so the Committee were right to be concerned about it, even though the Appellant was admonished on the charge.

He has two speeding convictions, and it appears that he may have gone to trial on one of them and may not have been believed in relation to his defence. The fact that he was prosecuted, as opposed to being issued with fixed penalties, suggests that the speeds involved may have been quite high. The other convictions which he has were all relevant convictions to be considered by the Committee. As confirmed by the Court of Session in the case of *Middleton* it was open to the Committee to conclude that he was not to be seen as a fit and proper person to be a taxi driver. If taxi drivers ignore road traffic laws and regulations then it can affect the safety of their passengers.

[30] The only point which has given me a little hesitation is the severity of the sanction which the Committee imposed. But these matters are all concerned with the safety of the public. I cannot say that the suspension was such a severe sanction that the Committee were just not entitled to impose it, especially as his taxi business will be largely unaffected by his suspension. The decision, in my view, was within their discretion.

[31] Having considered the case as carefully as I can, it is my view that the Appellant has failed to make out that the Committee erred in law, or erred in any of the other ways set out in paragraph 18(7). The appeal must therefore fail.

Expenses

[32] With regard to the question of expenses, the submissions did not really deal at length with this matter, and if the parties are unable to agree the question of expenses, then the case will have to be put out to call before me for a short hearing so that expenses can be dealt with.