EDITORIAL NOTE: NO SUPPRESSION APPLIED.

IN THE DISTRICT COURT
AT PALMERSTON NORTH

CIV-2016-054-000179
[2016] NZDC 20036

UNDER	SECTION 106 LAND TRANSPORT ACT 1998
IN THE MATTER OF	AN APPEAL AGAINST A DECISION OF THE NEW ZEALAND TRANSPORT AGENCY
BETWEEN	WIREMU PIKITEKAHA ABRAHAM Appellant
AND	NEW ZEALAND TRANSPORT AGENCY Respondent

Hearing: 26 September 2016

Appearances: S Khan for Appellant
P Murray for Respondent

Judgment: 30 September 2016

RESERVED DECISION OF JUDGE G M ROSS

Appeal against decision

[1] The appellant appeals against a decision of a senior adjudicator of the NZ Transport Agency (NZTA) made and dated at Christchurch on 11 April 2016.
That decision, which was a final decision, arose upon the appellant's application for a renewal of a driving instructor endorsement on his driver licence. The grounds of the declinature of the application for the renewal of the driving instructor endorsement were that the senior adjudicator was not satisfied that the appellant was a fit and proper person to hold such an endorsement.

[2] The appeal is made pursuant to s 106 Land Transport Act 1998. Before a final decision as referred to in para [1] is made, submissions in respect of the proposed official action are invited, and extensive submissions were made on behalf of the appellant to NZTA by the appellant's solicitor.

[3] The original notice of proposal in this case from the NZTA to the appellant was dated 11 March 2016 and was received by the appellant on or about 14 March 2016. The notice was entitled "Notice of Proposal to Decline". This followed the appellant's application for the renewal of the instructor endorsement. In this notice, the senior adjudicator set out some 10 grounds which he referred to as facts as the basis for his not being satisfied that the appellant was a fit and proper person to be the holder of the instructor endorsement.

[4] There were 10 such grounds.

4.1 Apprehension for traffic related offences – a total of 32 of these. Fifteen infringements and convictions were detailed from 13 January 1982, until 9 August 2015.

4.2 Then there were 17 traffic related offences included in a fines summary dated 16 December 2015.

4.3 This demonstrated persistent offending over a period of 33 years and 7 months from 1982 until 9 August 2015, some three months prior to the date of the appellant's renewal application, and was for offences directly relating to safety.

4.4 The speeding range for excess speeding was from 7% in excess of the permitted limit up to 46% in excess of the permitted limit. This latter case was the last traffic offence, of 9 August 2015, alleging 73 kph in a 50 kph area.

4.5 That the appellant had incurred 160 demerit points over the course of his traffic related offending history, and was currently subject to 55 demerit

points, until 9 August 2017. That would be when the two year period from the last traffic offending elapsed.

4.6 Having regard to that record, the senior adjudicator could not be confident, he said, in appellant's ability to satisfactorily instruct driver trainees, especially when issues of safe and legal operation of a motor vehicle arose for tuition.

4.7 On a previous occasion an application to renew the instructor endorsement was granted (20 December 2010) but the senior adjudicator pointed to the appellant being issued with a letter warning him that should he incur any convictions or come to the attention of NZTA in the future, a fresh assessment of the appellant's fitness and proprietary might result, and all matters hitherto and subsequently, if any, would be considered as part of that application.

4.8 The eighth ground was the observation of the senior adjudicator that the appellant appeared to have ignored the warning given in 4.7 above because of the additional four traffic related offences since the issue of the notice including the warning on 20 December 2010. However, the appellant denied that he had ever received that warning in the first place.

4.9 Then reference is made as the ninth ground to the 22 criminal convictions of the appellant on the *police* register including convictions entered in January 2010 for evading and attempting to evade assessments and the payment of GST for a transport company.

4.10 Thus for the foregoing reasons, the senior adjudicator was of the belief that it was not in the interests of public safety to allow the appellant to hold a driving instructor endorsement.

[5] A comprehensive letter from the appellant's solicitors was sent to NZTA and the senior adjudicator, clearly based on the instructions of the appellant. Subsequent affidavits in support of this appeal are entirely consistent with the details which he

provided to his solicitors, who answered the senior adjudicator's grounds, on a point by point basis. Really, from an evidentiary point of view, the matter was not taken much further than that at the hearing of the appeal. There were some further refinements in respect of the appellant's recollection of individual instances of the traffic-related offending. For his part, the senior adjudicator in opposing the appeal, set out all of the factual details comprising the basis of his belief that the appellant was not a fit and proper person to hold an instructor's endorsement, in a lengthy and detailed affidavit, verifying where this was possible, all of the details to which he had adverted in the affidavit.

Applicable rules

[6] The appeal is brought under s 106 Land Transport Act 1989 ("LTA"). This section provides a general right of appeal to the District Court, and the Court may confirm, reverse, or modify the decision appealed against. The procedure is set out in s 111 LTA. The provisions of s 111(2) of the Act cover the wider admissibility of evidence tendered and representations made by or on behalf of a party, and Rule 18.19 provides that appeals are by way of rehearing. Counsel are agreed generally that the correct approach is as was set out by the Supreme Court in *Kacem v Bashir* [2011] 2 NZLR 1 at para [31]:

> [31] The Court of Appeal discussed the application of the decision of this Court in *Austin Nichols & Co Inc v Stichting Lodestar* to the present kind of appeal. The Court correctly observed that on a general appeal of the present kind the appellate court has the responsibility of considering the merits of the case afresh. The weight it gives to the reasoning of the court or courts below is a matter for the appellate court's assessment. We should add here that if the appellate court admits further evidence, that evidence will necessarily require de novo assessment and consideration of how it affects the correctness of the decision under appeal. The Court of Appeal was right to say [24] that Courtney J had rather overstated the effect of *Austin, Nichols* when she indicated she should approach the appeal to the High Court "uninfluenced" by the reasoning of the Family Court. The High Court was required to reach its own conclusion, but this did not imply that it should disregard the Family Court's decision. What, if any, influence the Family Court's reasoning should have was for the High Court's assessment.

And also, the summary of Judge Kellar in *Brown v New Zealand Transport Agency*, District Court, Dunedin, CIV-2010-012-808 14 April 2011 at para [32]:

[32] In summary:

(a) The appeal is a rehearing;

(b) There is a wide discretion to accept evidence with consideration guided by relevance;

(c) The standard of proof is the civil standard;

(d) The statutory criteria is the essence of the appeal;

(e) The Court is necessarily constrained by the material submitted to it;

(f) In an unlikely situation of equipoise, the onus will be on the appellant;

(g) The more important the question, the more cogent the evidence will be expected to be;

(h) However, in the end it is for the appellate authority to be satisfied of the applicability of the statutory criteria to the facts.

[7] If the Rules so provide, an applicant such as the appellant must satisfy NZTA that he or she is a fit and proper person to hold the endorsement as a driving instructor. The criteria are set out in clause 35(1), Land Transport (Driver Licensing) Rule 1999 where there is an express requirement in s 30C and 30D. Section 30C(1) of the Act provides that NZTA must consider any matter that should be taken into account:

(a) in the interests of public safety; or

(b) to ensure that the public is protected from serious or organised criminal activity.

These are what have been described as the "musts". Then there are other factors which are factors that NZTA may consider, having regard to the nature and degree of the appellant's involvement in any transport service. These involve consideration of:

7.1 The persons criminal history (if any);

7.2 Any offending by the person in respect of transport-related offences (including any infringement offences);

7.3 Any history of serious behavioural problems;

7.4 Any complaints made in relation to any transport service provided or operated by the person or in which the person is involved, particularly complaints made by users of the service;

7.5 Any history of persistent failure to pay fines incurred by that person in respect of transport-related offences;

7.6 Any other matter that NZTA considers it is appropriate in the public interest to take into account.

[8] However, s 30D applies to the appellant as seeking a driving instructor endorsement. NZTA, and hence the Court must also consider:

8.1 Any history of serious behavioural problems;

8.2 Any offending in respect of offences of violence, sexual offences, drugs offences, arms offences, or offences involving organised criminal activities;

8.3 Any offending in respect of major transport-related offences, particularly offences relating to safety or to road user charges;

8.4 Any persistent offending of any kind;

8.5 Any complaints in respect of the transport or any transport service operated by the person that are of a persistent or serious nature.

The obvious criteria for consideration stand out, against the appellant's background. Prior to the immediate application for renewal of his driving instructor endorsement, he had held a driving instructor endorsement for more than a decade. He is employed by and is a shareholder in a company known as Rangitikei Enterprises Limited, and holds a Transport Service Licence in relation to this company. NZTA confirm that he is one of two NZTA approved driving course providers in the Rangitikei area. He holds driver licence classes 1-5. As his driving experience

perhaps shows, in addition to course work as an instructor and actual vehicle driving instructing, he is also a fulltime truck driver himself.

[9] The background is against the requirement of high standards which are expected of professional drivers. As NZTA submitted, the holding of an endorsement such as an instructor endorsement is a privilege and not a right; and that there is a continuing obligation notwithstanding the holding of an endorsement to maintain the status of a fit and proper person. The status is to be measured as at the present time, that is the date of the appeal.

[10] There are a number of matters upon which I should more particularly focus in determining the appellant's fitness and propriety in this case. This would be consistent with dealing with both the mandatory and discretionary matters to be taken into account.

[11] One of these factors is the exclusion or not of aged matters. In other words, of what age, or how long ago, does an infringement or an offence, or even a notation, become irrelevant, and able to be excluded? See *Neas v Director of Land Transport*, District Court, Christchurch CIV 2008-009-2932 5 November 2008 at para [17], where Judge MacAskill put aside offences which had occurred 10, 12, and 14 years before. His Honour stated in respect of those offences:

> While not wholly irrelevant, I put them aside as now relatively stale.

The appellant argues that if this approach is applied, then the offences that occurred more than 10 years ago are stale, and should be put aside. On a view of matters most favourable to the appellant, that would leave four admitted, fine paid, points imposed, speeding charges, of 19 May 2007, 2 January 2011, 24 January 2015, and 9 August 2015. Then there would also fall into the time span, the charge of driving outside the mileage stated on the road user charges licence, of 18 September 2006. Of course, this is not to ignore altogether the previous infringements, outside that time period of which there are at least two just outside (2005) including one for exceeding the speed limit with a heavy motor vehicle.

[12] For these current or relevant speeding matters, then, the appellant gives a somewhat microscopic review of how these infringements arose (e.g. travelling downhill with a bend in the road and looking where he was going and not looking at the speedometer to measure his speed as he was going; extension of 50 km/h speed limit and movement of speed limit signs further back than they had previously been. With respect, these explanations do not stand close scrutiny in relation to what are, on the face of it, common or garden speeding offences otherwise without aggravating features. The significance lies more in the infringer. He is impliedly asking the Court to accept that, in one case, the posted speed limit signs having changed their position, that he drove at a speed according to their previous position – tantamount to an acceptance that he had not seen the newly placed sign and did not slow down. The signs are there for a reason. Ignoring them, or operating according to a belief that things are as they have always been, to explain an otherwise modest excess of speed against the posted limit, is, to echo the words of Judge Toomey in *Daniels v Director of Land Transport Safety* [2002] DCR 375: " a behavioural problem."

Such a review is supported in *Collings v Land Transport New Zealand* DC Timaru CIV 2010-076-37, 15 March 2010 by His Honour Judge Callaghan; if more is required in respect of issues as to speeding infringements and public safety, the matter is made clear by His Honour, and also the material attached to Mr Stevenson's affidavit. And in his analysis of the appellants speeding offences, Mr Stevenson has drawn the Court's attention two further allegations in the above time period, one of 12 October 2009, and one of 31 August 2011. Mr Stevenson deposes that he does not know why the police withdrew these two charges. When considering his decision, he took into account that the appellant had originally been charged, but gave them little weight. I should take into account, as did Judge MacAskill in *Neas* (supra) at para [11]:

> It is unfair that a person should be treated as if he had committed a serious traffic offence without being given the opportunity to defend himself in Court…

But I cannot ignore altogether that, whatever the outcome, and despite any opportunity to defend, the incidents have arisen at all for a person in the appellants

position. My assessment, then, is that some weight, but limited, can be attached to issues for which some propensity over the longer term is disclosed, and that it is but part of the overall context to be taken into account. The appellants own explanation for the withdrawal (para 7 of his affidavit of 19 August 2016) is that on his denial of the infringements, the police, who he claimed had their facts wrong, did not wish to take further action and thus withdrew the infringements.

[13] The other infringement offence was driving outside the mileage stated on the road user charges licence. Though the vehicle was apparently owned by his wife, the significance of this operator offence is less the immediate purchase of road use charges to defeat the overrun, and more the failure of a man steeped in driver knowledge and licensing requirements for vehicles of all kinds to be used on New Zealand roads in failing to have checked this aspect of the "useability" of the vehicle before he drove it. The same observation could also be made in respect of his long years as a heavy motor vehicle operator and holder of a transport service licence where distance licence requirements and currency are very much the norm. He appears on this occasion to have merely assumed road user charges were paid up to cover that driving.

Further offences

[14] These arise from a series of stoppages at the CVIU truck-stop at Ohakea which took place on 28 April 2011, 26 July 2012, 12 September 2012, 15 April 2013, 1 May 2013, 7 May 2014, and 18 May 2014. At this time, the appellant deposes that he was driving a route which went through Ohakea some three times per day approximately. Four of the above dates occurred at Ohakea; and another one certainly at Putaruru. A close scrutiny was conducted by Mr Stevenson of the records which were kept in relation to the stops, for which any subsequent regulatory misdemeanour was not sanctioned. There were two issues with the truck and the heavy semi-trailer. On the truck, a mud-flap assembly was detaching and was a safety risk, but that could be fixed at the roadside. The second issue, with the trailer, was that some of its brakes were out of adjustment. Mr Stevenson's affidavit deposes that the trailer was issued with an order prohibiting its further operation until all brakes were brought back into balance. The action taken for vehicle two on the

exhibit attached to Mr Stevenson's affidavit was "green sticker". This identifies a defective vehicle. (All faults must be repaired, the vehicle must comply with all requirements. Vehicle may only be driven only as directed, in writing by the enforcement officer for repair. Vehicle must not be returned to service until a new CoF has been issued) Mr Stevenson's point here is that the appellant was operating two heavy motor vehicles (truck and semi-trailer) on a road when they were not up to certificate of fitness standard. He accepts that the police did not prosecute on this occasion. The appellant claims not to have been able to see the mud flap become partially detached from the driver's seat; and as to the brake issue, this was remedied by TR Group under the rental agreement. The appellant deposes that he was not aware of the issue until he was stopped.

[15] As to the second occasion, on 26 July, the truck he was driving was found to have non-operational brake and tail lights and a missing rear reflector. Neither did the heavy semi-trailer have an operational brake light. The point the respondent makes here is that again, the appellant was operating two heavy motor vehicles not up to CoF standard. Again, no prosecution followed by the police for the two allegations.

[16] And so it goes on during the subsequent dates, allegation, confirmation of details and record on a contemporaneous basis; and explanation from the appellant. But the significance of these matters to me is this. That for the most part the defects in the regulatory requirements (tyre or tyres with insufficient tread, incorrect transport service label, expired licensing of a trailer, out of adjustment brakes, electronic braking system operating improperly) – none of these matters appear to have been consequenced or sanctioned by the police. However, the specific allegations in each case are scarcely denied by the appellant, which in some respects is to his credit, but he seeks to mitigate the conclusions from the inspections of the vehicles he was driving in each case. However, in his particular circumstances, and with the particular emphasis on public safety and the public interest, the question has to be asked why it is left to the enforcement agencies to ascertain the defects and defaults. On a properly preventative basis, and keeping the public interest and public safety on the roads uppermost in mind, the appropriate checks should have been carried out before the vehicle or vehicles are used on a particular date, so that there

might not be any question of operating a vehicle on a road below a Certificate of Fitness standard. There is again an assumption that all is well, that the vehicle or vehicles are up to Certificate of Fitness standards…….a continuing responsibility. There was nothing before me to suggest that less than adequate facilities or resources were available to the appellant, or that there was any other explanation except impliedly for an occurrence during the usage of the vehicle that day and unknown to the driver (the detached mud-flap situation, perhaps.) However, being stopped so frequently, and with so many seemingly minor but potentially risky defects being found on inspection checks, an experienced driver who would seek to impart his knowledge and skills as an instructor to others far more ignorant in the ways of heavy trucking than himself, might have altered course to avoid the repetition of accumulating defects. The absence of sanctioning, and the explanations made by the appellant, are of less significance to me than it kept recurring.

Criminal offences

[17] I have taken into account, but treated only neutrally, the convictions under the tax legislation. Its significance is that it has arisen out of the operation of a trucking company by the appellant, over a significant period of time, again, this industry being one in which the appellant has long years of service and is the very industry in which he seeks to impart his knowledge and skills to others as a continuing instructor. How much more necessary, then, for him to pay attention to the necessary details of all legislation affecting a business of this kind, in particular a highly regulated industry, involving a consistent level of "bookkeeping" in all its aspects. As against that, the convictions have been entered, the penalty served, and the reparation (a substantial sum) paid back over a period of time. I mentioned this to show that it is not excluded from my consideration, but is not taken into account otherwise in my fit and proper assessment. It might in ordinary circumstances colour or flavour the character references which accompany the appeal. However, despite the location of the appellant's business, and the public good factor which is seen by a number of supporting training and industry players, these factors are only peripheral to the discretionary factors, let alone being a mandatory concern. The prosecutions appear to have arisen out of financial considerations, which are

expressly not covered by the statute, unless of course there are safety or public interest issues which flow. Such is not pointed to here.

Demerit Points

[18] Again, I do not count that from time to time the appellant has accumulated demerit points, but never to the stage of a driver licence suspension, either one way or the other. It may be, as the appellant argues, that there would be an element of double counting if it was to be regarded as a factor to count against him when the infringement itself counts against him being a fit and proper person to hold an instructor's endorsement on his driver's licence.

Distance travelled – occupational hazard?

[19] As counsel have submitted, there is a variation in judicial views at the District Court level as to the higher risks for some drivers – e.g. in Prasad's case speeding for a taxi driver, and in cases such as the present, huge mileage is in heavy motor vehicles, often with a trailer or semi-trailer. Greater exposure to time on the road and distance travelled, and sometimes the purpose of such travel, leads to the argument that less weight might be placed on infringements. However, Judge Harrop in *Kini v NZ Transport Agency* DC Lower Hutt CIV-2011-032-000401, 18 November 2011, points out the obvious converse position – such drivers will provide a risk to public safety more often than a driver who drives less.

The 2010 warning

[20] As pointed out above, the appellant denied receipt of the warning. In any event, had he received it, it might have appeared equivocal to him or of no or less relevance to his particular circumstances. It is accepted that there was an error in the heading and body of the warning notice in that it referred to a passenger endorsement, and not a driver instructor endorsement. In any event, whether it was received or not, in light of the view which I have reached in this case, it does not amount to a tipping point at all. Sufficient is the open publicity given to speeding and its consequences, together with the safe operation of vehicles of all kinds on New Zealand roads, that it is scarcely essential for a warning to have to be given to a

person who would seek to continue to be engaged in the significantly responsible task of driver instructor.

Conclusion

[21] In this role, either at the wheel or in a classroom or teaching scenario, where there is an example to set, a person such as the appellant with an instructors endorsement should be a standard setter, and not a creator of a double standard. There can be no room for a "do as I say, not as I do" mentality. In each of his private driving, heavy truck driving, and instructing, to be a fit and proper person to hold the instructor endorsement, he has to practice what he preaches. And, as the record shows, over his motoring career and lifetime, with a history which has involved offending and stoppages which actually or potentially compromises the safety of other road users, I do not assess him as a fit and proper person on account of the factors which I have outlined above. Allowing him to hold a driver instructor endorsement would not be in the interests of public safety. NZTA's decision to decline the application for the instructor's endorsement was correct. The Senior Adjudicators decision is upheld.

[22] It will follow the outcome of this appeal that there will be an order that the appellant will pay the respondents cost on a 2B basis.

G M Ross
District Court Judge