

**IN THE DISTRICT COURT  
AT TAUPO**

**I TE KŌTI-Ā-ROHE  
KI TAUPŌ-NUI-A-TIA**

**CIV-2018-069-000009  
[2018] NZDC 18013**

BETWEEN

HAMISH GORDON PHIMISTER  
Appellant

AND

NEW ZEALAND TRANSPORT AGENCY  
Respondent

Hearing: 30 August 2018

Appearances: P Clarke for the Appellant  
M Zintl for the Respondent

Judgment: 4 September 2018

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**JUDGMENT JUDGE P W COOPER  
[On appeal]**

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**The appeal**

[1] This is an appeal against a decision of the Land Transport Agency dated 19 December 2017:

- (a) Disqualify and prohibit the appellant from driving any vehicle being used in a transport service (other than a rental service) for a period of one year and one day;
- (b) Revoke the appellant's driver licence in respect of Classes 2, 3, 4 and 5; and

- (c) Disqualify the appellant from holding or obtaining those classes of driver licence for period of one year and one day to take effect from midnight on 26 December 2017.

[2] This decision was made on the grounds that the appellant was not a fit and proper person to be a transport service driver.

[3] Initially the New Zealand Transport Agency (“NZTA”) on 15 November 2017 notified the appellant of its intention to impose a revocation and disqualification for a period of three years. After considering submissions on behalf of the appellant, this was reduced to the period of one year and one day referred to above.

### **Background**

[4] The appellant has an extensive record of traffic offending beginning in 1997.

[5] Between 1997 and 2008, the appellant had accumulated a total of 17 offences. These included driving with excess breath alcohol (2003); producing a logbook with omissions (2005); and 13 speeding infringements (12 involving heavy motor vehicles). On top of this, on 30 September 2008 while driving a truck and trailer unit, the appellant crashed. As a result, he was convicted of careless driving. The accident was apparently due to inattention and excessive speed. This incident occurred while the appellant was subject to a three month suspension for demerit points and driving under the authority of a limited driver’s licence.

[6] All of this led the NZTA to give formal notice to the appellant proposing to revoke his Class 2, 3, 4 and 5 driver licences and disqualify him in respect of holding or obtaining those driver licences for a period of 18 months. The appellant made submissions in response to that proposal to the effect that he had learnt from his mistakes. He had a supportive employer who spoke highly of his abilities and said that the appellant had shown genuine remorse and learnt from his experiences. As a result of those submissions, the Land Transport Agency reconsidered the matter and was persuaded against the proposed revocation and disqualification. The appellant was advised of this by a letter dated 23 December 2008.

[7] However, the appellant's offending continued. Between 26 February 2009 and 12 May 2009, the appellant accumulated another 19 offences (11 logbook false particulars); six driver hours offences; and two speeding infringements (heavy motor vehicles).

[8] This continued offending led the NZTA to revoke the appellant's Class 2, 3, 4 and 5 driver licences and disqualify and prohibit him from driving in respect of those driver licences for a period of two years from 30 November 2009.

[9] When that period of disqualification ended, the appellant resat his Class 2, 3, 4 and 5 driver licences.

[10] The appellant's offending continued. He accumulated the following further offences:

3 June 2011	Exceeding 80 kilometres per hour
23 August 2012	Exceeding 90 kilometres per hour with heavy motor vehicle
29 July 2013	Producing a logbook with omissions
22 August 2013	Exceeding maximum gross mass limit
6 June 2016	Not wearing a seatbelt
6 October 2016	False statement in logbook
6 October 2016	Breach of driver hours requirements
6 October 2016	Exceeding 90 kilometres per hour with heavy motor vehicle
19 December 2016	Exceeding 90 kilometres per hour with heavy motor vehicle
5 June 2017	Exceeding 100 kilometres per hour (speed camera)

[11] This continued offending against a background of earlier offending and disqualification led the NZTA to again take action to prohibit and disqualify the appellant, which is now the subject of the present appeal.

## **The law**

[12] Section 87A Land Transport Act 1998 provides:

“If the [[Agency]] is satisfied that a transport service driver is not a fit and proper person within the meaning of [the Act], the [[Agency]] may disqualify that person, for a period not exceeding 10 years, from driving any vehicle being used in a transport service ....”

[13] Section 30C Land Transport Act sets out the general safety criteria as to whether or not a person is a “fit and proper person in relation to any transport service”.

This section provides as follows:

- “(1) When assessing whether or not a person is a fit and proper person in relation to any transport service, the [[Agency]] must consider, in particular, any matter that the [[Agency]] considers 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.
- (2) For the purpose of determining whether or not a person is a fit and proper person for any of the purposes of this Part, the [[Agency]] may consider, and may give any relative weight that the [[Agency]] thinks fit having regard to the degree and nature of the person's involvement in any transport service, to the following matters:
  - (a) the person's criminal history (if any):
  - (b) any offending by the person in respect of transport-related offences (including any infringement offences):
  - (c) any history of serious behavioural problems:
  - (d) 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:
  - (e) any history of persistent failure to pay fines incurred by the person in respect of transport-related offences:

- (f) any other matter that the [[Agency]] considers it is appropriate in the public interest to take into account.
- (3) In determining whether or not a person is a fit and proper person for any of the purposes of this Part, the [[Agency]] may consider—
  - (a) any conviction for an offence, whether or not—
    - (i) the conviction was in a New Zealand court; or
    - (ii) the offence was committed before the commencement of this Part or corresponding former enactment; or
    - (iii) the person incurred demerit points under this Act or a corresponding former enactment in respect of the conviction; and
  - (b) the fact that the person has been charged with any offence that is of such a nature that the public interest would seem to require that a person convicted of committing such an offence not be considered to be fit and proper for the purposes of this section.
- (4) Despite subsection (3), the [[Agency]] may take into account any other matters and evidence as the [[Agency]] considers relevant.”

[14] Section 30F provides for additional criteria to be taken into account in relation to any goods service:

“Without in any way limiting the matters that the [[Agency]] may have regard to under section 30C(2), when the [[Agency]] is assessing whether or not a person is a fit and proper person in relation to any goods service, the [[Agency]] must consider, in particular,—

- (a) any criminal activity conducted in the course of any transport service or transport-related business or employment;
- (b) any offending in respect of major transport-related offences, particularly offences relating to safety or to road user charges.”

[15] Section 106 provides that in dealing with an appeal of this sort, the District Court may confirm, reverse or modify the decision appealed against.

### **Appellant’s position**

[16] The appellant deposes that he has been a heavy traffic truck driver for in excess of 22 years and that for at least 18 years of that period, he has been employed driving interisland line haul freight delivery work. He says that in late 2016, he was concerned as to the requirements and expectations of his employer, resulting in work pressure

and a risk of in effect having to break the law to meet those expectations. He said that in early 2017, he resigned from his role as a line haul driver and in March 2017, started work as a driver/crane operator for [the new company] in Taupo. He says that this has resulted in a major change in his working hours and job requirements. For the most part, he works locally with none of the pressure previously associated with his line haul freight work around delivery deadlines and driver hours. He deposes that since his new employment, he has received no traffic infringements in heavy vehicles. His only traffic infringement was a speed camera fine in his personal vehicle (\$30). Therefore, there had been a period of approximately 12 months between his last heavy motor vehicle infringement in December 2016 and his disqualification in December 2017. A further eight months has passed since that disqualification was imposed.

### **The respondent's position**

[17] Stated briefly, the respondent's position is that the appellant has been the subject of numerous formal warnings and a previous disqualification and revocation in respect of his transport service driver licences, but has nevertheless continued to offend. The respondent submits that this persistent offending against that background raises real road safety concerns, such that the appellant is not a fit and proper person to be a transport service driver. The respondent accepts that the appellant's employment with [the new company] has lessened his risk of reoffending, but submits that the period of disqualification and revocation of 12 months and one day is appropriate to meet the risks posed by the appellant, and it has the added protective factor that at the end of that period, the appellant will have to re-sit his driver licences. This will afford him the benefit of a refresher as to his responsibilities.

### **Analysis and discussion**

[18] The appeal is by way of rehearing and is a hearing de novo.<sup>1</sup> The Court has to assess the position as it is at the date of hearing.

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<sup>1</sup> *Munday v Director of Land Transport Safety* DC Auckland NP5748/97, 9 June 1998, Judge Joyce QC.

[19] The primary consideration in respect of s 30C and s 30D Land Transport Act is the interests of public safety.<sup>2</sup>

[20] The primary focus in this case has been on the appellant's history of offending in respect of transport related offences, including infringement offences and demerit points history. The NZTA was right to be concerned about what appeared to be the appellant reverting to his previous pattern of offending after he had regained his transport services driver licences following a period of two years prohibition and disqualification imposed in 2009.

[21] However, on 19 December 2017 when the NZTA made the decision to revoke the appellant's transport service driver licence and disqualify him for a period of one year and one day, the appellant had already been offence-free for a period of one year insofar as his transport service driver licence offending was concerned. The speed camera infringement on 5 July 2017 was in respect of the appellant's private motor vehicle and relates to him travelling at 110 per kilometres per hour in a 100 kilometres per hour area.

[22] It appears that a significant factor in that reduction of offending was the lifestyle and work changes the appellant made in early 2017. [The new employer] of [the new company], the appellant's employer, impressed me as a responsible and a very supportive employer. The appellant has, in a practical way, demonstrated a commitment and motivation to try and stay within the law. His record since those changes were made tends to demonstrate the effectiveness of those changes in reducing the appellant's risk of reoffending.

[23] In any case such as this, the personal circumstances of an appellant must take second place to the wider issue of the interests of public safety. In this case, the relevance of the appellant's personal circumstances relates not to any hardship caused by the prohibition and disqualification, but rather the changes he has made which have a protective effect in relation to risk of reoffending.

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<sup>2</sup> *Daniels v Director of Land Transport Safety* [2002] DCR 375.

[24] Having considered all of the evidence and looking at the position as it is today, I am satisfied that the NZTA was correct in its finding that the appellant was not a fit and proper person to be a transport service driver. However, the appellant has demonstrated a positive and successful effort to reduce risk of reoffending and pursuant to s 106 Land Transport Act, I modify the period of disqualification and prohibition from holding or obtaining his Class 2, 3, 4 and 5 driver licences from a period of one year and one day to a period of eight months from 26 December 2017.

P W Cooper  
District Court Judge