

JERSEY / JUDGMENT

Bisson -v- Minister for Infrastructure

[2017] JCA 051 (29 March 2017)

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Court of Appeal 29 March 2017 Before : William J. Bailhache, Bailiff of Jersey, President; Nigel P. Pleming, Q. C., and Sir David Calvert-Smith. Between Erin Robyn Bisson Appellant And Minister for Infrastructure Respondent The Appellant appeared on her own behalf. Advocate S. A. Meiklejohn for the Respondent. judgment of the court pleming ja:

Introduction

1. The Appellant, by occupation, is a taxi driver. The Respondent is responsible for the regulation of taxis in Jersey. At the relevant time, essentially August 2016, the Appellant was licensed to drive a restricted taxi-cab. 2. This is an appeal from the decision of the Royal Court dated 6th December 2016 (Sir Michael Birt, Commissioner, and Jurats) ("the Judgment") (Bisson-v-Minister for Infrastructure
- [2016] JRC 227). The subject matter of those proceedings was the 19th August 2016 decision of the Respondent to suspend the Appellant's public service vehicle ("PSV") licence and her badge to drive public service vehicles. The suspension was originally of indefinite duration but was varied on 14th September to a period of 6 weeks from 19th August - therefore expiring on 29th September 2016. The appeal to the Royal Court, made under Article 10(3) of the Motor Traffic (Jersey) Law 1935 ("the Law"), focused on three grounds - (1) the decision to suspend was wrong because the Appellant reasonably relied on the contents of the gov.je website, (2) the decision was disproportionate, and (3) the decision was discriminatory (on the basis that the Appellant is a person undergoing gender transition).
3. In her 3-page Notice of Appeal in this Court, the Appellant's main ground of appeal appears to be that the imposition of an indefinite suspension was disproportionate and has, in effect, proved to be a far lengthier suspension, and is continuing. This was confirmed by the Appellant in her oral submissions. However, other points are raised and they are addressed below. The statutory framework 4. The statutory framework is fully set out in paragraphs 3 to 19 of the

Judgment.

It is only necessary here to refer to four provisions - Articles 10(1) and 30(1) of the Law, and Articles 3 and 11 of the Motor Traffic (Taxi-Cabs - General)(Jersey) Order 2002 ("the Order"). 5. Article 10 of the Law provides that the Minister may suspend or revoke a PSV licence either for a specified period or for an indefinite period if it appears to the Minister: "(1) (a) that its holder is no longer a fit and proper person to operate the public service provided by the vehicle having regard to the holder's conduct, whether in respect of the provision of that public service or otherwise, the manner in which the vehicle has been used or operated or the manner in which the public service has been provided (or has failed to be provided); or

- (b) that the vehicle to which the licence relates has been used or operated in contravention of a condition set out in the licence." 6. Article 30(1) of the Law provides for the suspension or revocation of the badge if the Minister is satisfied that the person is not a fit person to drive the public service vehicle (either permanently or for the time being) by reason of, inter alia, the person's conduct (see paragraph 9 of the Judgment). 7. Articles 3 and Article 11(1) of the Order address, and underline the importance attached to, restricted taxi-cabs not using taxi ranks. Article 3 provides: "(1) Except as provided by paragraph 2, a restricted taxi-cab must not - stand on a taxi rank; or pick up passengers at a taxi rank.
- (2) A restricted taxi-cab may pick up passengers at a taxi rank established at the Airport, Albert Pier or Elizabeth Harbour if no controlled taxi-cab is standing on the taxi rank." 8. Article 11 deals with enforcement and provides: "(1) If a cab is allowed to stand on a taxi rank or is used to pick up a passenger at a taxi rank ... contrary to Article 3(1) ..., that action is to be taken to be a breach of the cab's public service vehicle licence and renders the licence liable to be revoked or suspended in accordance with Article 10(1)(b) of the Law." 9. These provisions are repeated, and specifically brought to the attention of taxi-operators (whether drivers or businesses providing taxi services), in the Driver and Vehicle Standards ("DVS") Code of Conduct: "A failure to comply with any requirement of this code will be taken into account by the Minister when considering if you are a fit and proper person to continue to hold a taxi-cab licence and/or badge and whether your vehicle is fit to continue to be used as a taxicab." "18..... If your taxi-cab is a restricted taxi-cab you must not pick-up passengers from, on or near a taxi rank or stand on any taxi-rank" (With the same exceptions as in Article 3(2) of the Order.) "20. You should make yourself aware of the laws governing your profession and observe the rules of the road." The decision of the Royal Court 10. In the judgment, after describing the nature of the appeal and summarising the background facts, the Royal Court focused on the events of 16th August 2016 which led to the suspension of the Appellant's PSV licence and badge. It was on that day that the Appellant parked her cab at the taxi rank at the Weighbridge for the purpose of picking up passengers (the rank did not fall within the Article 3(2) exclusions). The Appellant accepted before the Royal Court that she had picked up a fare at the taxi rank on some six occasions that day. By that time, the Appellant had successfully completed a wheelchair training course and had purchased a Wheelchair Accessible Vehicle ("WAV"). Completion of that training and driving a WAV

would entitle her, when the relevant changes to the law had been made, to have a purple plate as opposed to a white plate for her taxicab. The necessary amendments to the 2002 Order, which would have permitted the Appellant to pick up passengers from a taxi-rank, did not come into force until 19th September 2016 (having been enacted on the 12 September) - this was common ground before the Royal Court. The PSV licence issued to the Appellant permitted her to operate only a restricted taxi-cab, not a controlled taxi-cab. In other words, as at 16th August 2016 she had no legal right to park her cab on a taxi rank, and no legal right to pick up passengers at a taxi rank. 11. In May and June 2016 the Appellant complained about the delay in bringing in the WAV system, and, by email, on 11th July 2016 accused the Department of "deliberately putting off the issue of the purple plate". In that email, the Appellant added: "As far as I am concerned if this is to continue I will drive on the rank with or without the purple plate. As the colour makes no difference. The fact the decision has been made makes it part of the road traffic law. The Minister can do as he wishes." 12. According to her Affidavit filed with the Royal Court, the Appellant made enquiries on Sunday 16th August by checking www.gov.je, and "even telephoned Police Headquarters to check the contents and they too were confused by the entry". She continues: "It was after checking this site and showing friends that they too also thought that if it was on there then it must be correct. I could only assume that having passed the Disability Awareness course and having a Wheelchair Accessible Vehicle gave me the right to access the Rank." 13. This explanation for being on the rank, and picking up fares, was repeated in the meeting held with DVS on 17th August 2016. 14. Mr Forrest's response to this explanation is summarised in his second affidavit dated 25th October 2016, at paragraph 8: "The Appellant was clearly aware that she should not drive on the rank as the legislation had not altered. This is established in the Appellant's email of 11 July 2016 [set out above]". 15. There is no suggestion in the evidence that the advice given to the Appellant in July 2016 that she should not act as if the changes had already come into operation had been withdrawn. The grounds of appeal 16. As mentioned above the main ground of appeal in the Notice of Appeal is that the suspension was disproportionate. The Notice of Appeal is difficult to follow, but there are other complaints which can be summarised as follows: (i) The Royal Court should not have allowed the Respondent to alter "the terms of the appeal" so that the focus was on the six week suspension identified in September 2016, rather than the indefinite suspension set out in the letter dated 19th August 2016. This area of complaint includes the following: "The appellant would not have appealed the six week suspension as the suspension expired before the appeal would have been heard in the Royal Court". The reason for including this complaint, it is claimed, is that there was procedural unfairness in allowing the Respondent to alter the terms of the appeal, but the Appellant was denied the opportunity to amend her notice of appeal to include a request for a change to or deletion of condition 13. (Much of the next page of the Notice of Appeal is devoted to condition 12 on a licence issued on 9 December 2016, after the judgment of the Royal Court.) I will turn to these conditions later in this judgment. (ii) The Respondent has allowed company owners to discriminate against the Appellant, relying (in part) on a comment in a Facebook page dated 13 December 2016. (iii) The Respondent has acted "contrary to the Human Rights Jersey Law

2000, article 14" by applying to the Royal Court for costs. (iv) "As confirmed by the Inspector of Motor Traffic Mr Gordon Forrest. If I do not appeal this decision the licence will be revoked as it will remain unused not for wanting to use it but by being denied to use it due to being unable to affiliate or be employed by existing companies." 17. There is nothing in points (ii) and (iii) above. A comment on a Facebook page days after the decision of the Royal Court is irrelevant to the correctness of that decision. An application for costs by a successful litigant (here the Respondent) is not (without more) arguably a contravention of Article 14 of the European Convention of Human Rights, set out in Schedule 1 to the Human Rights Law. Article 14 provides: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with the national minority, property, birth or other status." 18. The Convention right relied on by the Appellant is Article 1 of the First Protocol, protection of property. A litigant, such as the Appellant, is not immune from an application for legal costs because she is undergoing gender reassignment. In any event, there is nothing in the evidence we have seen to suggest that the application for costs was itself discriminatory, or in contravention of the ECHR or the Law. 19. Points (i) and (iv) may be linked. Whether or not this is correct, they do not assist the Appellant in this appeal. The true focus of the appeal before the Royal Court was the six week period of suspension. It would appear that the Appellant used the reduction from an unlimited suspension to a fixed period suspension, which was favourable to her, as a means of raising other complaints which had no relevance to the reasons for the August/September suspension, but were connected to her continuing inability, at the time of the hearing before the Royal Court, to operate as a licensed taxi-cab driver. This is addressed in paragraphs 56 to 61 of the Judgment. Before setting out the key paragraphs it may assist if the context is explained. 20. The Appellant's licence at the time of the August 2016 incident, and in earlier iterations, included a condition requiring the licence holder to work from a recognised taxi-cab company, co-operative or approved booking entity. As at August-September 2016, this was Condition 13: "Licence holder to work from the recognised restricted taxi-cab company or co-operative named on the application and shown overleaf and seek permission from DVS before moving to a different company or co-operative." The company/co-operative named at that time was Red Appco Cabs Limited (known as "Red Cabs"). A director of Red Cabs was included in correspondence with Mr Forrest in July 2016, and informed that their drivers (including the Appellant) could not access the taxi ranks until the legislation had been amended, and the director duly passed this on to the Appellant in an email - "I appreciate that you are feeling the pressure of being in limbo whilst waiting for the purple plate paperwork to come out of the system - but please, please do not simply drive on to the ranks". These emails are set out in the Judgment at paragraphs 29-31. 21. The history of the relationship between the Appellant and Red Cabs, is set out in *Bisson v Doré and Red Appco Cabs Limited*, Employment Tribunal Case Number: 1612 - D - 34/16, decision dated 27th March 2017. 22. Red Cabs ceased to trade, or may have ceased to trade, just before the suspension ended on 29 September 2016. The Appellant informed the Royal Court (see paragraph 58 of the Judgment) that "she had been unable to secure an affiliation with any

other taxi-cab company and was therefore unable to operate as a restricted taxi-cab driver at present." The Royal Court, correctly in our view, declined to investigate issues such as whether or not Red Cabs had in fact ceased to trade. But, as the Appellant was not affiliated to a Condition 13 entity at the time of the Royal Court hearing, she had either to wait until she moved to a "different company or co-operative" or try and challenge Condition 13 itself, as preventing her from pursuing her chosen occupation. Hence the request to the Royal Court to enlarge the appeal to include the condition. This was rejected in the Judgment (paragraph 61) in the following terms: "The second point raised by Ms Bisson [the first point was the Red Cabs point] was as to whether we would remove Condition 13 from her licence, so that she could operate without being affiliated to a restricted taxi-cab company. We informed her that this course was not open to the Court on this appeal. This was an appeal against a decision to suspend her. It was not an appeal against the imposition of Condition 13. Article 9(7) of the Law confers a right to appeal against the imposition of a condition on a PSV licence, but that must be brought within 29 days of the grant of the licence with the condition in question. It follows that, if Ms Bisson wishes to appeal against the imposition of Condition 13, she will have to mount an appeal under Article 9(7) and seek leave to appeal out of time. We are not to be taken as encouraging her to bring such an appeal as it would clearly raise an issue as to the standard conditions imposed by the Minister and whether it was now too late to appeal in any event. But, that is the course which she must follow if she wishes to question the imposition of the condition. As this Court said in *Dodds v Minister for Transport and Technical Services*

- [2012] JRC 158 at para 35, unless and until there is a successful appeal against the imposition of a condition on a PSV licence, the condition is valid and must be complied with." 23. Complaints in relation to Condition 13 feature heavily in the Appellant's Appeal Contentions and her Appeal Affidavit dated 17 February 2017. The restrictive effect of Condition 13 is said to be the cause of, or linked to, complaints that there are breaches of competition, employment and money laundering law, and the abuse of a dominant position. 24. In our opinion, the Royal Court's decision not to allow the Appellant to expand her appeal to challenge the conditions imposed on her licence was correct. But this does not mean that the Appellant is unable to bring a challenge to the condition, and she is now doing so. On 9th December 2016, the Appellant was issued with another licence this time with permission to use a specified motor vehicle as a "purple plate taxi-cab", as a private hire/restricted taxi-cab driver who may use the rank. This licence includes Condition 12, in very similar terms to Condition 13 of the previous licence (but with the omission of the word "restricted" and the inclusion of the words "or approved booking entity"): "Licence holder to work from recognised taxi-cab company, co-operative or approved booking entity named on the application and shown overleaf and seek permission from DVS before moving to a different company, co-operative or booking entity." 25. On 3rd February 2017, in *Bisson v Minister for Infrastructure*

[2017] JRC 023, the Royal Court (T. J. Le Cocq, Deputy Bailiff, sitting alone) allowed the Appellant to continue her appeal against Condition 12 under Article 9(7)(b) of the Law. That appeal has not yet been heard on the merits. (We are informed that the date of the hearing is 10th April 2017). The Deputy Bailiff declined to make any observations on the merits of that appeal, and we take the same approach. 26. When the challenge to Condition 13, or Condition 12, is taken away, and any reference to or reliance on events after the date of the Judgment stripped out, it is possible to focus on the substance of the appeal before the Royal Court, and the proportionality complaint raised before this court. 27. In paragraphs 39 to 45 of the Judgment the Royal Court addresses and considers the argument advanced by the Appellant that the events of 16th August were some kind of honest and reasonable mistake, the Appellant being misled by the entry on the gov.je website into believing that she had every right to use the taxi-rank as from March 2016 (or at least by 16th August 2016) because her vehicle was a WAV. We see no reason to reject the Royal Court's conclusion, at paragraphs 43 and 44 that the Appellant cannot genuinely have believed that the WAV, purple plate system, was already in force. Paragraph 44 ends: "In our judgment, the DVS was perfectly entitled to conclude that the action of Ms Bisson in simply going ahead to use the ranks despite her various exchanges with Mr Forrest and Mr Doré between May and July were quite inconsistent with a PSV licence holder's duty to familiarise herself with the applicable rules." 28. We do not see any error of law in the conclusion at paragraph 45 that the Royal Court did not "regard the website as providing any excuse for what she did". 29. That finding forms the basis for the consideration of the proportionality argument, and in our opinion there is no error of law, or approach, in paragraphs 50 and 51 of the Judgment: "Accordingly, given the clear warning in the Order that, if the driver of a restricted taxi-cab picks up passengers from a taxi rank, that will be treated as a breach of the conditions of his or her PSV licence rendering it liable to revocation or suspension and given the need for discipline in the regulation of cabs generally, we see nothing disproportionate in suspension being imposed on a driver of a restricted taxi-cab who on at least six occasions in one day breached the prohibition against picking up from a taxi rank. We readily accept that it is the threat of suspension or revocation which ensures compliance with the distinction between restricted taxi-cabs and controlled taxi-cabs. The decision which was ultimately taken was suspension for six weeks and it is that decision which we consider to be proportionate in all the circumstances. Had the indefinite suspension been maintained, Ms Bisson's arguments would have had much greater force and would indeed have raised an issue as to proportionality, at any rate in the case of a first offender. However, that is not the position." 30. The Royal Court here addresses the distinction between the indefinite suspension initially imposed and the six week suspension finally imposed to end on 29th September 2016. The Appellant referred in oral submissions to shorter periods of suspension imposed in some cases, and no suspension at all in others. She also drew attention to the chronology. The original, indefinite, suspension was imposed from 19th August. (The Appellant had already been suspended, on 17th August, from working for Red Cabs - for "breaking the White Plate Licence Holder Regulations by picking up customers multiple

times from the Weighbridge Taxi Rank during the evening of Tuesday 16 August 2016".)

The indefinite period was not altered until the letter of 14th September 2016, but by that time not only had her appeal been lodged, but, as noted above, the 2002 Order had been amended by the Motor Traffic (Taxi-cabs - General) (Amendment)(Jersey) (Order) 2016

- made on 12th September, coming into force 19th September - to allow WAV private-hire cabs (formerly restricted cabs) to access a taxi rank and pick up passengers from the rank. This meant that the Appellant was prevented from lawfully using the taxi-rank permission introduced by the amended law for 10 or 11 days, and this was unfair and disproportionate. And, to complete the picture, the Appellant had only been suspended from Red Cabs because the original DVS suspension was indefinite and this, somehow, is the cause of her continuing inability to resume her chosen occupation of taxi-driver - on the basis that "the Department allowed Red Cabs to close". 31. When analysed, this is also not a complaint about the six week suspension, but the impact of Condition 13, as the Appellant has been unable to find employment or affiliation with a replacement company or co-operative. 32. We have considered the Respondent's contentions, and we are grateful to Advocate Meiklejohn for his assistance in writing and in oral submissions. We do not consider that the Royal Court was wrong, such that this Court can interfere, in concluding that the six week suspension was anything other than proportionate. There was a proper basis for the Royal Court to conclude that the Appellant had deliberately flouted the rules in relation to access to and use of taxi ranks, rather than wait until the imminent change in the law. 33. The Appellant also complains that the decision of the Respondent, made by Mr Forrest, was discriminatory. The suspension decision had a legitimate basis, and there is no evidence to show that the suspension was imposed on the Appellant because she is in gender transition. We are prepared to accept that the Appellant honestly believes that she has been, and continues to be, the subject of discrimination on the basis of a protected characteristic under the Discrimination (Jersey) Law 2013, but we do not see any basis for overturning the conclusion of the Royal Court that "DVS (and therefore the Minister) would have reacted in a similar fashion to any other driver who acted as Ms Bisson did in deliberately breaching the Order by picking up passengers on the taxi rank when her vehicle was a restricted taxi-cab" - paragraph 54 of the Judgment. New material 34. The Appellant has produced a mass of new (post Judgment) material in support of her appeal. Reliance on the affidavits and submissions of her brother, Richard Bisson, has already been addressed in the decision dated 15 March 2017 (Bisson-v-Minister for Infrastructure

[2017] JCA 041). The Respondent has invited this Court to disregard the contentions, and the numerous supporting documents, which stray outside the strict bounds of the appeal. Because the Appellant is representing herself, we have looked at and considered this material but, for the reasons set out above, it is irrelevant to any issue in this appeal, and we do not see any basis for the allegation made in the Notice of Appeal that "the department clearly has a hate campaign against me". 35. As noted above the Appellant is also engaged in proceedings to challenge the continuing imposition of either Condition 12 or Condition 13. Some of the new, post-Judgment, material may be relevant to support the

Appellant's contentions in those proceedings to show the impact of the conditions on taxi-drivers. This will be a matter for the Royal Court to decide.

Conclusion

36. The burden of proof lies on the Appellant to satisfy the Court that the 6 week suspension decision was wrong - JT (Jersey) Limited v JCRA

[2013] JRC 238 , at paragraph 72. 37. There is no dispute of any substance as to the essential facts before the decision-maker, and before the Royal Court. It is common ground that the Appellant used the taxi-rank, and picked up passengers, and that this was in clear breach of the terms of her licence. The main area of contention was whether the Appellant did in fact believe that the existence of the web-site entry excused her otherwise unlawful conduct. There was material before the decision-maker, essentially the May to July 2016 correspondence, to support a reasonable and rational conclusion that the purported reliance was not to be accepted. In the course of her submissions to this Court, the Appellant revealed what may have been the real motive for her breach of the rules, and Code of Conduct: "I'll be truthful. I went on the rank because they were doing what they wanted and ignoring me". 38. We are satisfied that the Appellant has failed to make good her allegations that the contents of the website entry justified or excused her actions such that it was wrong for the DVS/Respondent to impose a period of suspension. The Appellant has also failed to satisfy the Royal Court, or this Court, that the six week suspension was disproportionate or discriminatory, or wrong in any other way. 39. For all these reasons, the appeal against the decision of the Royal Court is dismissed. Authorities Bisson-v-Minister for Infrastructure

[2016] JRC 227 . Motor Traffic (Jersey) Law 1935. Motor Traffic (Taxi-Cabs - General)(Jersey) Order 2002. Bisson v Doré and Red Appco Cabs Limited , Employment Tribunal Case Number: 1612 - D - 34/16. Bisson v Minister for Infrastructure

[2017] JRC 023 . Motor Traffic (Taxi-cabs - General) (Amendment)(Jersey) (Order) 2016. Discrimination (Jersey) Law 2013. Bisson-v-Minister for Infrastructure

[2017] JCA 041 . JT (Jersey) Limited v JCRA

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