

JERSEY / JUDGMENT

Bisson v Minister for Infrastructure

[2019] JRC 037 (07 March 2019)

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judgment

the commissioner: 1. This is an appeal by the Appellant against a decision of the Minister dated 5th September, 2018, to suspend her public service vehicle licence ("PSV licence") and public service vehicle badge ("badge") for four weeks. The Appellant has in fact served the period of suspension but brings this appeal on the basis that it should not have been imposed. The law 2. Pursuant to Article 6 of the Motor Traffic (Jersey) Law 1935 ("the Law"), a person may not cause or permit a motor vehicle to be used on a road as a cab unless the person is the holder of a PSV licence for the vehicle that authorises the vehicle to be used as a cab. Furthermore, pursuant to Article 28 of the Law, a person must not drive a public service vehicle on a road unless the person is the holder of a badge that authorises the person to drive public service vehicles of the type being driven. 3. Article 10(1) of the Law provides that the Minister may revoke or suspend a PSV licence in the following terms: "10(1) The Minister may revoke a public service vehicle licence or suspend its validity, either for a specified period or for an indefinite period, if it appears to the Minister - (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)..." 4. Article 30 contains a similar provision in respect of revocation or suspension of a badge and provides as follows: "30(1) The Minister may, by written notice served on the holder of a badge, revoke or suspend, either for a specified period or for an indefinite period, the authority the badge gives the person to drive a public service vehicle if the Minister is satisfied that, by reason of the person's conduct, or a physical or mental disability, the person is, either permanently or for the time being, not a fit person to drive a public service vehicle of the type specified on the badge." 5. Each of Article 10 and Article 30 provides for a right of appeal to the Royal Court against a decision by the Minister to revoke or suspend a PSV licence or a badge (as the case may be). 6. In *Bisson -v- Minister for Infrastructure*

[2016] JRC 227, this Court described the test on the hearing of such an appeal in the following terms at paras 20

- 22:- "20. On behalf of the Minister, Advocate Meiklejohn accepts that the approach of the Court should be that described in *JT (Jersey) Limited v Jersey Competition Regulatory Authority*

[2013] JRC 238 where, at paragraph 71, the Court summarised the position where the right of appeal was unqualified - i.e. not subject to a qualification such as the appeal only being allowed if the original decision was 'unreasonable' - as follows:- "71. We have carefully considered the correct approach to be adopted in appeals under the [Telecommunications (Jersey) Law 2002] and have concluded that the Court should allow an appeal if it is satisfied that the decision of the JCRA was wrong; it does not have to go further and conclude that the decision was plainly wrong or so wrong as to be unreasonable, let alone attaining the higher threshold of being *Wednesbury* unreasonable. ..." 21. The Court further summarised the position at paragraph 74 as follows:- "74. In summary, adapting what was said in *Interface* to reflect our decision in this case, the Court will look at three aspects on an appeal: (i) It will consider whether the decision was one which the JCRA was empowered to make, i.e. was the decision *ultra vires*? (ii) It will look at the correctness and fairness of the procedure in order to decide whether the proceedings of the JCRA were in general sufficient and satisfactory. (iii) It will look at the merits of the decision (as well of course as considering matters such as whether the JCRA took into account any irrelevant factors or failed to have regard to relevant factors) and decide whether the appellant has satisfied it that the decision was wrong. In reaching its conclusion, it will give due weight to the decision of the JCRA bearing in mind its expertise and experience." 22. We agree with the Minister that those passages are equally applicable to appeals under Article 10(3) and 30(4) of the Law, substituting references to the JCRA by references to the Minister." 7. We would also refer to the passage in *JT (Jersey) Limited v Jersey Competition Regulatory Authority*

[2013] JRC 238 which immediately follows the extract from paragraph 74 quoted above, where the Court said:- "Where an appeal is allowed because of procedural errors or unfairness of sufficient gravity, the likely remedy will be that the decision is quashed and the matter remitted to the JCRA for reconsideration." The same applies in relation to appeals against decisions of the Minister pursuant to the Law. Factual background 8. The Appellant is the holder of a PSV licence (and badge) authorising her to drive a private hire cab. Historically private hire cabs were not normally entitled to stand on or pick up passengers at a taxi rank, but gradual changes in the industry mean that a private hire cab may now do so if the cab meets the 'accessible standard' for passengers with disabilities and is issued with a purple licence plate, which is displayed on the vehicle. The Appellant is the holder of a purple plate in respect of her vehicle and is therefore entitled to stand on and pick up passengers at a taxi rank. 9. The Appellant has a previous history of difficulty with the Driver and Vehicle Standards Department ("DVS") which administers matters relating to PSV licences and badges on behalf of the Minister. In August 2016 she was suspended for a period (following variation) of six weeks for accessing the public rank at the Weighbridge prior to the introduction of her purple plate and therefore at a time when she was not

entitled to do so. Her appeal to this Court was dismissed, *Bisson v Minister for Infrastructure*

[2016] JRC 227 as was a further appeal to the Court of Appeal, *Bisson v Minister for Infrastructure*

[2017] JCA 051 . 10. The Appellant has been undergoing gender transition. On 12 th January, 2018, she was issued with a certificate under the Gender Recognition (Jersey) Law 2010 which confirms that she is for all purposes a female. It is clear from the evidence and from what she said during the appeal that she is sensitive if persons misgender her. 11. On 4 th December, 2017, the Minister (acting through the DVS) suspended her PSV licence and badge for a period of two weeks due to three incidents when she had abused passengers who had misgendered her. That led to complaints about her behaviour to the DVS. The suspension would normally have taken effect immediately, but in order to reduce the financial effect of the suspension on the Appellant, the DVS deferred the beginning of the suspension until 2 nd January, 2018, so that it would not take effect during the busy Christmas and New Year period. The current suspension 12. As already stated, the Minister (acting through Mr Forrest as head of DVS) suspended the Appellant's PSV licence and badge on 5 th September, 2018, for a period of four weeks. The letter of 5 th September (the "Decision Letter") gave three grounds for the decision. 13. The first was her conduct in ordering passengers out of her cab for innocently misgendering her. This was summarised in two paragraphs of the Decision Letter in the following terms:- "Firstly, your conduct relating to the ordering of well-meaning passengers out of your taxi-cab for innocently misgendering you, the seriousness of which was pointed out to you at the meeting held between the Department and yourself at DVS on 25th July 2018. I have now had the opportunity to further consider your comments at the meeting of the above date. Disappointingly, when repeatedly questioned by me as to how you intend to deal with similar situations should they occur in the future, you gave me no assurances that you were prepared to take a different approach and indeed showed no remorse or indication that you felt you had done anything wrong. To be clear, ordering well-meaning passengers out of your taxi-cab constitutes unacceptable behaviour from a PSV badge and licence holder, is a breach of clauses 11 and 19 of the code of conduct which form part of your licence conditions, and not for the first time brings your 'fit and proper' status as a PSV badge and licence holder into question." 14. In his affidavit sworn for this appeal, Mr Forrest relied on two matters in support of this first ground of complaint. The first was a written complaint dated 25 th July, 2018, from a member of the public (to whom we shall refer as "Mr M") in relation to an incident which occurred on 20 th July, 2018. From the complaint (which was annexed to Mr Forrest's affidavit) it appears that a marshal at the taxi-rank had referred to the Appellant as 'he'. After driving some 30 yards, the Appellant told Mr M and his wife to get out and may have said something relating to the passengers being 'stupid'. This occurred at 11pm on a Friday night. 15. The second item relied upon by Mr Forrest under the first ground of complaint was video footage voluntarily supplied by the Appellant apparently showing her ejecting an unnamed member of the public from her taxi for calling her 'sir' when getting into the vehicle. 16. The second ground relied

upon in the Decision Letter was the Appellant's abusive attitude to the DVS. Although the letter mentioned other instances of abuse, the specific matter evidenced in Mr Forrest's affidavit was, as he put it, an 'uncontrolled rant' by the Appellant which had been recorded on the Department's voicemail on 29 th August, 2018. The transcript of that voicemail message is as follows:- "Hello Richard, it's Erin Bisson. Just to let you know that the tribunal has rejected both claims against (corrected herself) Nigel Le Maistre and Paul Bannier and I don't want to deal with your department ever, ever again because your department disgusts me in every kind of possible way. You are a filthy, disgusting, terrible department, allowing taxi drivers to go round donning wigs and parading themselves in front of my car. You've done absolutely nothing. I'm outraged by you I told the department, tribunal service the absolute works." The caller then hung up. 17. The Decision Letter went on to inform the Appellant that the DVS would no longer accept telephone calls from her and would only respond to normal, acceptable emails. In line with the States of Jersey Police Department, any other correspondence would be treated as trivial and not responded to. 18. The third ground relied upon in the Decision Letter was a complaint that the Appellant had jumped the queue of taxi drivers waiting to pick up passengers at the Weighbridge taxi rank on 1 st September, 2018. In his affidavit, Mr Forrest exhibited complaints from two taxi drivers about this incident. It is of note that one of the emails of complaint referred to the Appellant throughout in the male gender. This appeal 19. The Appellant has been acting in person throughout this appeal. Her notice of appeal contains some 24 paragraphs setting out the grounds of appeal. It has to be said that many of them are not relevant. We agree with Advocate Meiklejohn who, in his written submissions, summarised the relevant paragraphs under three headings as follows:- (i) The decision was discriminatory. (ii) The decision was Wednesbury unreasonable. (iii) The decision was prejudicial and unfair in that it did not inform the Appellant of the time limit for appealing to this Court. 20. The matter initially came before the Court for hearing on 10 th January, 2019. Having read the papers and noting that the Appellant was acting in person, the Court was concerned that she might well have an arguable case that the procedure followed by DVS leading up to her suspension was unfair. Accordingly it adjourned the hearing and gave her leave to amend her notice of appeal to include such a ground. This she has duly done. 21. On the same occasion, the Court rejected an application that the appeal should be heard in private. It held that there was no valid ground for departure from the principle of open justice. Furthermore, at that hearing and the resumed hearing, the Court also refused various applications by the Appellant for, inter alia , reporting restrictions to apply to any judgment, for further disclosure from the Minister, for an outside police force to be appointed to investigate her complaints, for the Court to permit her to amend her administrative appeal to an Order of Justice and for the matter to be adjourned pending her criminal complaint against a member of the public and/or because she said she was medically not fit to take part in the proceedings. 22. At the resumed hearing, the Court had the benefit of a supplementary affidavit from Mr Forrest dealing with the procedural aspects and further written submissions from Advocate Meiklejohn on behalf of the Minister. Alleged procedural unfairness 23. We propose to deal with this aspect of the

appeal first. 24. As can be seen from paras 13 - 18 above, the Minister relies upon four individual matters as supporting the three grounds of complaint. The only possible opportunity given to the Appellant to explain her side of these matters was at a meeting held with Mr Forrest and a colleague from the DVS (together with a note taker) on 25 th July, 2018, at midday. 25. Notes of the meeting were exhibited to the affidavit of Mr Forrest. It is clear that there was a somewhat discursive conversation and we can well understand the difficulty which the DVS representatives may have had in seeking to keep the discussion to the subjects at hand. But the fact is that none of the four matters specifically relied upon by the Minister in the affidavit of Mr Forrest as justifying the decision to suspend were ever put to the Appellant at the meeting or at any time thereafter prior to the Decision Letter. 26. Thus:- (i) There is no reference during the meeting to the complaint by Mr M. That may well be because it had not been received at that point. We note that the complaint is dated 25 th July and the meeting between the Appellant and Mr Forrest was held at midday the same day. Be that as it may, at no time prior to the Decision Letter was the Appellant informed of the complaint by Mr M or given an opportunity to give her version of events in relation to the facts of that complaint. She only saw the written complaint when Mr Forrest's affidavit for this appeal was filed. (ii) The second matter relied upon by the Minister in connection with the first ground of complaint is the video footage supplied by the Appellant herself. We accept that, as she supplied the footage herself, the Appellant may be taken to be familiar with its content. Nevertheless, she was at no stage during the interview asked about what was on the footage and whether she had any explanation for the way she had behaved. Indeed the Decision Letter suggests that the officers of DVS viewed this video evidence after the interview on 25 th July. The officers clearly formed an adverse view of her conduct from the footage but at no stage prior to the Decision Letter was she given an opportunity of giving any explanation of or comment about her behaviour as disclosed in the footage. (iii) She was not asked at the interview if she had any explanation of the 'rant' as it post-dated the interview. Nevertheless she has at no stage prior to the Decision Letter been given an opportunity of offering any explanation or mitigation that she might wish to put forward in relation to the voicemail message. (iv) Nor was she asked about the queue jumping incident because that took place on 1 st September. However, again she was never asked before the Decision Letter whether she had any explanation for her behaviour. 27. It follows that she has not been asked to give her side of things in relation to any of the four matters upon which, according to the affidavit of Mr Forrest, the DVS relied for its decision to suspend her. 28. During the course of the hearing, the Appellant said that she regretted what she had said in the voicemail of 29 th August and explained that she had that very morning been informed she had lost three discrimination claims before the Employment and Discrimination Tribunal (of which two were against the DVS) and she had also been told of an unfortunate medical matter which had upset her. She was therefore in a distressed state when she had left the voicemail message. As to the queue jumping on 1 st September, she explained to us that there was a gap at the rear of the queue at the Weighbridge and there was also a gap at the front of the extension of the queue at the bottom of Mulcaster Street, with those taxi

drivers at the back of the queue in Mulcaster Street not moving forward to take their place either at the rear of the Weighbridge queue or at the front of the Mulcaster Street queue. She told us that they may have been taking a break and she thought that they did not therefore want to move up the queue. As to the complaint by Mr M, she said in response to the draft of this judgment, which was circulated in the usual way, that Mrs M had made a derogatory remark in the cab. 29. We are not saying that her explanations would necessarily have made any difference to the decision to suspend her. That would be a matter for assessment by the Minister. However, the fact is that she was never given an opportunity to put forward these explanations (or any others which she might have) and accordingly the Minister was never in a position to consider them. We remind ourselves of what the Court of Appeal said in *Re X Children*

[2009] JLR 143 at para 36:- "In our view, Mr Pollard's candid testimony constituted (unusually) an admission of a breach of the primary rule of natural justice, namely that a person potentially affected in his rights or interests by a decision should have a reasonable opportunity to see and comment on matters which might be deployed to his disadvantage. Save in exceptional circumstances, such a breach inevitably flaws the decision. The court should not, other than in such circumstances, assume that the disadvantaged person would have been unable to influence the decision if he had enjoyed the opportunity denied to him. ..." 30. The suspension of a PSV licence and/or badge has a serious effect on the driver in that the driver cannot earn a living during the period of suspension. The decision to suspend may only be taken lawfully if a fair procedure is followed and the fair procedure must, as the Court of Appeal said, give the driver a reasonable opportunity to see and comment on matters which might be deployed to the driver's disadvantage. 31. In our judgment, the procedure followed by the DVS on behalf of the Minister wholly failed to comply with the requirements of a fair procedure in the present case. Simply put, none of the four specific matters relied upon in Mr Forrest's affidavit as justifying the decision to suspend were ever put to the Appellant. That has meant that the DVS never heard any explanation which the Appellant might have had to offer prior to reaching its decision and took its decision in the absence of the knowledge of any extenuating or mitigating circumstances which she might have put forward. 32. In the circumstances, we see no alternative but to quash the Minister's decision to suspend the Appellant because of the unfair procedure which was followed. In normal circumstances, we would remit the matter for the Minister to reconsider. However, in this case the period of suspension has already been served and therefore any decision to re-impose the period of suspension following a proper procedure would be academic in that sense. Nevertheless, it is up to the Minister whether, for the sake of accurately reflecting the Appellant's previous history, he wishes to undertake a fair procedure and, if satisfied, consider whether to confirm the imposition of the suspension. Other grounds of appeal 33. In the light of our decision on procedural unfairness, the other grounds of appeal no longer strictly arise. Nevertheless we think it would be helpful briefly to express our view on them. 34. The Appellant states at ground M of the notice of appeal:- "The decision is discriminatory and based on people

supposedly misgendering me innocently according to the Inspector of Motor Traffic, his officers have done it and equally during a meeting on 25th July 2018 which was minuted, he mentioned this and advised me that being my wife misgendered me during a mediation meeting on 11th November 2016 accompanied by Mrs Tara McNair (née Family)." 35. Ground X goes on to say:- "On 17th September 2018 an email was sent to the Deputy Bailiff with a link of a short video of LGBT History regarding how Transgender Women have been and continued to be treated by Governments by institutionalised bullying." 36. We have carefully read all the material which has been placed before us but we are unable to find any evidence that the decision to suspend the PSV licence and badge of the Appellant were discriminatory on the basis of her gender and/or the fact that she had been in gender transition. We are satisfied that, if any other driver with a similar history of previous misconduct had behaved in the way the DVS found the Appellant to have behaved, that driver would also have been suspended for a similar period. 37. The Appellant also contends that the decision was 'Wednesbury unreasonable' and says that it was disproportionate because it resulted in her losing her livelihood for the period of suspension. It is of course not necessary for the Appellant to prove that the decision was Wednesbury unreasonable in order to succeed on appeal. As outlined earlier, it is simply sufficient for her to show that the decision was wrong. However, if the Minister had followed a fair procedure in connection with the specified grounds and had found the relevant conduct proved, there would have been nothing remotely disproportionate about the penalty which he imposed. The Minister is entitled to expect reasonable standards of behaviour and courtesy from cab drivers even where there may be some provocation and is entitled to seek to uphold the provision of a proper public service by disciplining those who do not live up to the required standards. 38. The Appellant also appealed on the ground that the Decision Letter failed to notify the Appellant of the number of days in which she could file an appeal against her suspension. The Minister accepts that the letter failed to do this and that this was contrary to what the Court said in Bisson at para 5:- "Cab drivers cannot be expected to be familiar with the intricacies of the various appeal procedures under the Law. Given the serious consequences for a driver of a suspension or revocation of a licence or a badge, we consider that fairness dictates that any letter from DVS suspending or revoking a licence or badge should point out to the recipient that there is a right of appeal to the Royal Court and should refer the recipient to the relevant article of the Law and the time limit for appealing." 39. The Decision Letter pointed out the rights of appeal under Article 10(3) and Article 30(4) of the Law but omitted to include reference to the time limit for appealing. The Minister accepted that this information had been omitted and regretted the omission. However, the Appellant suffered no prejudice because she did in fact lodge her appeal well within the stipulated time limit.

Conclusion

40. We would not wish the Appellant to misunderstand her success in this case. She has succeeded purely on procedural grounds. Had these not occurred and had we been satisfied that the factual bases for the Minister's decision were made out, we would have upheld the Minister's decision to suspend her PSV licence and badge. We endorse the Minister's view that it is not acceptable for a cab driver to demand that a passenger leaves a cab mid-journey simply because the passenger has innocently misgendered the Appellant. The provision of a satisfactory cab service in the Island is an important public service and the Minister is entitled to expect those who are licensed to act as cab drivers to act in a proper manner. The appropriate response for the Appellant in the event of a passenger innocently misgendering her is to politely point out that she is a woman and to politely ask the passenger to address her as such thereafter. Nothing further is required. Nor is it acceptable for a cab driver to write abusive and insulting emails to the DVS as regulator of the industry or make phone calls or make voicemails of a similar nature. Finally, the Minister is entitled to expect drivers to behave reasonably and join the queue in their turn so as to avoid a free for all. Again the Court would repeat what it said at para 49 in its earlier judgment in *Bisson* :- "... Those who join the cab profession know that it is a regulated occupation and that disciplinary steps can be taken to enforce the regulatory rules. If it were to become known that the Minister would not strictly enforce the rules, we can readily understand that a free-for-all would result." 41. We wish to emphasise to the Appellant that, should she in future abuse passengers and/or order them out of her taxi for innocently misgendering her, the Minister may well consider he has no alternative but to suspend her for longer periods or even revoke her PSV licence and badge. 42. Finally, we would add this. It is clear that the Appellant feels aggrieved that she has lodged a number of complaints to DVS about what she sees as discriminatory behaviour by other drivers including deliberate misgendering. Support for the fact that this may have occurred can be found in the complaint referred to at para 18 above. The Appellant asserts that DVS has done nothing to assist her in this regard. 43. We fully understand that the Appellant may not always be easy to deal with. However she is in law a female and we invite DVS to consider whether or not it would be appropriate for it to circulate all cab drivers to point this out and to indicate that it is not acceptable for them to deliberately misgender her. According to the Appellant, one or more marshals have also deliberately misgendered her. We appreciate that marshals are not under the auspices of the DVS but nevertheless we would invite DVS to see whether appropriate representations seeking to prevent this could be made to those with responsibility for marshals. 44. In conclusion, however, for the reasons mentioned, the appeal is allowed and the decision to suspend the Appellant contained in the Decision Letter is quashed. *Authorities Motor Traffic (Jersey) Law 1935 Bisson -v- Minister for Infrastructure*

[2016] JRC 227 . *JT (Jersey) Limited v Jersey Competition Regulatory Authority*

[2013] JRC 238 *Bisson v Minister for Infrastructure*

[2017] JCA 051 Gender Recognition (Jersey) Law 2010 Re X Children

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Prepared on 28 October 2026 · Esheria