

TRANSPORT LICENSING SEMINAR

The Transport Licensing Authority

Presented by

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District Court

1. Jurisdiction simply defined means the power of any judicial or quasi-judicial officer to embark upon an enquiry. The limits and bounds of the powers of that officer are normally defined by statute although there are cases where they are defined by custom. Over recent years there has been a growing acceptance of the power of the High Court to exercise supervision over administrative tribunals including the tribunal we are discussing today, the Transport Licensing Authority. A brief glance at the New Zealand Law Reports gives a good illustration of this. In 1960 we find that there were two reported cases on administrative law. In 1978 the number had risen to 12. The result of this continuing review in the administrative field by the High Court and the Court of Appeal is that the definition of the word Jurisdiction is becoming more refined and there are now various shades of meaning attached to the word jurisdiction in a number of decisions which are familiar to Lawyers.
2. In considering the Jurisdiction of the Transport Licensing Authority we must not only consider those sections of the Act which authorise him to embark upon an enquiry but we must also consider those sections of the Act which regulate the manner in which he conducts his enquiry and which indicate to him the matters into which he must enquire during the course of such an enquiry. He can properly embark upon a hearing within his jurisdiction but can exceed his jurisdiction during the course of the enquiry. I cannot do better than use the words of Lord Reid in Anisminic v Foreign Compensation Commission (1969) 2 A.C. 147; (1969) 1 ALL E.R. 208

"I have come to the conclusion that it is better not to use the term (Jurisdiction) except in the narrow and original sense of the Tribunal being entitled to enter on the enquiry in question. But there are many cases where, although the Tribunal had jurisdiction to enter on the enquiry,

it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account some things which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of those errors, it is as much entitled to decide that question wrongly as it is to decide it rightly."

3. In Transport Licensing Law, the Licensing Authority is called upon to enquire into applications for Transport Licences. The need for such a Licence arises from the provisions of Section 108 of the Transport Act 1962 which reads as follows:-

"(1) Except as provided in this Part of this Act, it shall not be lawful for any person to carry on any passenger service or taxi-cab service or rental service or goods service or, within a harbour-ferry service district, any harbour-ferry service, otherwise than pursuant to the authority and in conformity with the terms of a passenger-service licence or a taxi-cab service licence or a rental-service licence or a goods service licence or a harbour-ferry service licence, as the case may be, granted under this part of this Act.

(2) Every person commits an offence who does any act in any capacity as agent for any transport

service that may be lawfully carried on only pursuant to a licence under this Part of this Act, if at the time of his doing that act such a licence is not in force in respect of the service."

4. The Transport Services for which licences are required are defined in Section 2 of the Act and it is convenient to set out those definitions in this paper.

"Goods Service" means the carriage of goods for hire or reward by means of a motor vehicle; and includes the letting on hire of a motor vehicle by a person who himself drives the vehicle or provides a driver therefor if during the hiring the vehicle is used for the carriage of goods; but, subject to the provisions of Sections 109 and 114 of this Act, does not include the carriage of goods by the owner thereof (whether for hire or reward or not) by means of a motor vehicle.

The reference to Section 109 is a reference to one of the rail restriction sections of the Act. If there is an available rail route for the carriage of goods then in certain circumstances the owner of those goods must use the rail and cannot carry the goods himself.

"Harbour-ferry service" means a service for the carriage for hire or reward of passengers or of goods by means of a harbour ferry"

"passenger service" means the carriage of passengers for hire or reward by means of a motor vehicle; and includes the letting on hire of a motor vehicle by a person who himself drives the vehicle or provides a driver therefor if during the hiring the vehicle is used for the carriage of passengers, with or without goods"

"Rental car" means a motorcar used in a rental service:

"Rental Service" means a service for the letting of a motor vehicle on hire (otherwise than under a hire-purchase agreement or under a bailment that is for a period exceeding 6 months) for the carriage of passengers (including the driver) or of goods or

both to a person who himself drives the vehicle or provides a driver therefor "

"Taxicab Service" means a passenger service carried on by means of a taxicab or taxicabs used as such"

It is worth noting that a taxicab service is a particular type of passenger service and the definition of passenger service must be read in conjunction with this definition.

Under Section 114 of the Act, there is power for the Minister to declare certain services to be passenger services or good services or rental services Whether those services are carried on for hire or reward or not.

5. It will be observed that the feature which is common to all of these definitions is the concept of "hire or reward". These words are used in the alternative. The inclusion of the words "or reward" is not merely for the purpose of giving an alternative word to "hire" for the purpose of bringing in a subject matter which does not include hire but does include cases where there is no obligation to pay. In my view the term reward was intended to refer to and include any valuable consideration which embraces any payment for the service of carriage, although it also embraces payment for other services or on some other account. The word "reward" has a wider significance than the simple word "hire". It may consist of valuable consideration not only in money but in services which bring a material benefit. The words imply reciprocal relations between two persons involving the performance by one person of some useful office or work for some other person and the word "reward" means a recompense by that other person for the service rendered.
6. The Statutory Provisions relating to the constitution of districts and the appointment of Licensing Authorities are to be found in Sections 91-96 of the Transport Act 1962 and do not require any discussion here.
7. The procedure for applying for a Licence is outlined in Sections 116 and 117. Although this procedure may appear to be simple there are certain statutory requirements relating to the application including the requirement to advertise.

A failure to advertise or even the publishing of an advertisement which does not give clear and sufficient details of the application could well affect the jurisdiction of the Licensing Authority to embark on his enquiry.

8. The proceedings before an authority and generally the procedure he follows is outlined in Sections 102, 105 and 106. These sections provide for an informal procedure. This lack of formality does not mean that the licensing Authority is entitled to disregard certain fundamental requirements. These are the requirements of natural justice. He must be free from bias. The hearing must be fair. He must hear both parties and conduct his hearing in such a way that both or all parties have an equal opportunity to be heard on all matters before the authority. He may properly embark upon his enquiry but if during the course of the enquiry or hearing he departs from the rules of natural justice this departure would be a matter which affects his jurisdiction to continue the hearing with the result that his final decision would be a nullity.
9. There is also power in the Act (Sections 103 and 104) to grant temporary licences. Such a licence is a licence granted for a limited period or for a limited purpose. In the grant of such a licence the authority must continue to be concerned with his jurisdiction not only to grant the licence but to abide the rules of natural justice. Here we find a situation where the informality provided by the legislation could well lead a licensing authority or his delegate into the trap of departing from jurisdiction. For example a licence may be required to cart a particular article from point A to point B. The authority makes enquiries by telephone to ascertain if there is a licensed service available. He is told that there is. If he then, without hearing any parties, decides on the suitability of the existing service and then grants the temporary licence he has departed from the rules which he should follow and has exceeded his jurisdiction.
10. Because Mr Craddock intends to deal with the subject of goods service licensing in depths, I do not intend to deal with that matter in this paper. I therefore pass to the other types of licences which would be the subject of an application to the authority. When an application is made for a passenger service licence the matters which have

to be taken into account are set out in Section 119 of the Transport Act 1962. It is important to note that this section is in Two Parts. The Section directs the Licensing Authority to embark upon his enquiry in a particular manner. He must first resolve the question of necessity or desirability "in the public interest" . He is also called upon to consider the extent to which an improved standard of service is desirable the needs of the district and need to protect public funds. Having considered these matters he is directed by the statute to form a preliminary opinion. He must decide whether after taking account of those matters the proposed service is unnecessary or undesirable. If he makes that finding then he is not entitled to proceed further and the matter concludes. In other words the statute lays down certain criteria and says that if these are not satisfied the licence is to be refused and the authority is to go no further. If however these criteria are satisfied then the licence is not granted automatically but the authority is directed to continue his enquiry taking account of the other transport services already provided, the financial ability of the applicant, the desirability of maintaining reasonable standards of living in the industry and other matters which are set out in Sub.Section (2) of the Statutes.

11. One of the important matters which has to be considered by the Licensing Authority during the second stage of his enquiry is any evidence or representations received "at the public sitting" on behalf of the Minister of Railways, Local Authorities, or other public bodies or persons carrying on Transport Services"of any kind" likely to be affected. This gives a right of audience to all those involved in Transport Services which could be affected. For Example a goods-service operator can be heard on a passenger service application if the grant of the application is likely to affect the operation of his goods service. This could come about if the passenger service operator intends to carry parcels which were at present carried by the goods service operator. The Operators who can be heard are those who operate on land, sea or air and there is no restriction other than that they are "likely to be affected". A refusal to hear any of these would be an error going to jurisdiction which could nullify the whole proceedings. Those who have this right of objection must be heard at a public sitting. There is no provision for them to be heard in any other manner.

12. It would seem that the Licensing Authority can make proper enquiries to confirm evidence placed before him or seek by personal inspection to determine the weight properly to be attached to evidence. In other words he has the right which a trial judge or a Jury has to "view". This does not mean he is able to become a witness to the extent that he ascertains matters which were not properly placed before him. It simply means he has a right to view for the purpose of evaluating the evidence which is before him. He should not make these enquiries without advising interested parties and giving them the right to be heard on the result of his evaluation.

13. The Act (Section 120) gives a statutory preference for passenger service licences to local authorities and other public bodies in certain cases. The authority is not entitled to ignore this statutory preference. If there is an application by a local authority or other public body for a passenger service licence, in the circumstances set out in the statute, then that application is to be given preference over all other applications. This does not mean that the local authority or public body has an absolute right to the grant of the licence as all applications must be judged on the tests the statute provides and a Licensing Authority has power to refuse a licence for precisely the same reasons as would justify the refusal of a licence to any other applicant.

14. Since 1971 there have been special provisions in the Act relating to regional Authorities (120A). A Regional District is the district of a Regional Authority which is a public body constituted by any Act as a Regional Authority. The Auckland Regional Authority would be the only such authority qualifying at the present time. Applications for passenger service licences other than taxi-cabs to operate in a regional district are sent to a Regional Authority by the Secretary for Transport after the applications have been made to him in the usual way. The regional Authority is to consider the application and return it to a Regional Transport Licensing Authority with such recommendation as it desires to make. If it recommends the grant then the Regional Transport Licensing Authority advertises the application but if no objections are received, it can grant the application without a public sitting. If on the other hand the Regional

Authority says it does not consent to the grant, the application is still to be advertised but must be considered at a public sitting. For the purpose of this type of application there is a special Licensing Authority to hear the application known as a Regional Transport Licensing Authority. This authority is the Licensing Authority for the District together with two additional members appointed by the Minister, one of whom must be appointed on the recommendation of the Regional Authority for the Regional District.

15. It will be observed that the addition of the provisions relating to Regional Districts imposes jurisdictional limit which must be observed if the application when it is finally determined is to be treated as having been determined properly and within jurisdiction.

16. From the definitions set out in this Act and set out earlier in this paper, it will have been noted that a taxi-cab service licence is a type of passenger-service licence carried on with a particular type of vehicle. However the provisions relating to the hearing of an application for a Taxi-Cab Service Licence differ somewhat from those relating to a passenger-service licence. In the first place the right of objection is limited by Section 118. The Authority is prohibited from taking into account any objection which is made by any Licensee of a taxi-cab service or by a group or organisation of licencees of taxi-cab services unless the objection relates to the suitability of the applicant, to the desirability of providing and maintaining a reasonable standard of living and satisfactory working conditions in the industry or it is proved that the objector or as the case may be the Licencees who are members of a group or organisation are subject to a roster which has been approved by a Licensing Authority and is being effectively operated. This only restricts the right of objection of Licencee of taxi-cab services or groups of such Licencee. It does not restrict the right of objection of others who would normally have the right to be heard.

17. Similarly the matters to be taken into account before the Licensing Authority reaches the stage of deciding whether it will give further consideration to the application are different to those where the application is for a passenger-service

licence. In the case of a passenger-service licence the Licensing Authority is directed to what we could call necessity or desirability in the public interest. If the authority believes that the service is unnecessary or undesirable it is directed by statute to refuse the grant. It can only go further if it has not reached the stage of saying the service is unnecessary or undesirable. In the case of a tax-cab service licence application the authority is directed to consider a number of matters, some of which it would not have considered in relation to a passenger service until it had got over the "necessity or desirability in the public interest hurdle". There is no statutory provision which directs the authority, after covering the preliminary matters to refuse the Licence if it has not reached the state where it is satisfied that the service is unnecessary or undesirable. In relation to Tax-cabs the authority is directed to consider certain matters and then told that if after considering those matters it proposes to give further consideration to the application it would consider other matters namely the personal character of the applicant and his past performance in the industry together with his financial ability. It would seem that the scheme of the Act in relation to taxicabs is such that the Licensing Authority is enabled to get a clearer picture of the real "public interest" in relation to the area where a service is proposed before it grants or refuses a Licence.

3. The other type of application which a Licensing Authority considers is an application for a Rental Service. Here again the statutory criteria differ. The authority is directed generally to have regard to the fitness of the applicant and his financial ability; the suitability of his premises and vehicles; facilities for maintenance of the vehicles. When the Authority has considered these matters then the statute directs that if it is satisfied on these matters it shall grant the application unless it is satisfied that existing services are adequate and that the grant of the application would injure materially the economic stability of an existing rental service licensee operating efficiently. It is worth noting that the conjunction is "and" not "or". The Authority has to be satisfied both that existing services are adequate and the grant would injure materially the economic stability of an existing operator. This does not mean an immediate effect on economic stability. The Licensing Authority

is entitled to take into account not only the extent of loss of revenue to an objector and the length of time that would elapse before the loss was replaced by a normal growth, but also the resources^{of} which the objector has to enable^{him} to tide over the loss/revenue during that time. In New Zealand Rental Vehicle Proprietors Association v Luxford (1967) N.Z.L.R. 453 Tompkins J. said "I think the words "economical stability as used in the subsection refer to the financial state of the Objectors business, its profit earning capacity, its resources in cash or other assets , its ability to meet contingencies and to weather adverse conditions. I think it means its general financial soundness. "

19. The differing criteria between the various types of passenger- and rental applications are important. A departure from these criteria or a preliminary determination on a wrong matter could go to jurisdiction and affect the final result.
20. I do not intend to deal in depth with Harbour-Ferry Service Licensing. This applies only on specified Harbours and as the Auckland Harbour is the only specified Harbour it is not something of general application or importance at the present time. Suffice to say that the statutory provisions are to be found in Sections 96 and 97 of the Transport Act 1962.
21. I come now to deal with the question of conditions which may be imposed on a licence and here it is important to distinguish between those conditions which are imposed by a licensing authority and those conditions which are implied by Law. It is also important to distinguish between those conditions from which exemption can be granted by a Licensing Authority and those conditions which are part and parcel of a licence by statute or regulation and over which a Licensing Authority has no control. Perhaps the best illustration of these is the rail restriction. This rail restriction is imposed as a condition of every goods service licence whether the condition is inserted in the licence or not but the regulation has provision for the licence to expressly state that the restriction or condition is not to apply. Thus a Licensing Authority can grant exemption from this particular condition. On the other hand the condition as to suitability and maintenance of vehicles used in transport services, which is imposed by Section 133 has no provision for the Licensing Authority to

grant exemption. This is of importance because a Licensing Authority has no jurisdiction to exempt Licencees from certain conditions but has jurisdiction to exempt them from other conditions. Those involved in Transport Law should be aware of the conditions which are implied in Licences by the operation of statute or regulation and should also be aware about the possibility of exemption from those conditions.

22. In addition to the conditions which are implied by operation of Law the Licensing Authority has power by Section 127 of the Transport Act 1962 to prescribe terms and conditions. The Act sets out some of the matters which may be prescribed but of course has the coverall clause which enables him to prescribe any other matters and conditions that the Licensing Authority thinks proper. Here we would find that jurisdictional questions can arise. It is my view that the only conditions which can be prescribed are those which relate to the efficient and effective operation of the Licence. To take an extreme example a Licensing Authority could not prescribe a condition that a driver of a vehicle should wear a top hat to church on Sunday. Could he prescribe a condition that the driver of a passenger-service vehicle shall wear a peaked hat while driving the vehicle. ? I do not think he can although others may well believe that an authority could prescribe such a condition. I believe he can prescribe conditions requiring drivers to be neat and tidy in their appearance but he cannot go further and prescribe the manner in which they are to be neat and tidy. There is a fine line to be drawn between jurisdiction to prescribe conditions which relate to the efficiency of the service and jurisdiction to prescribe conditions which have the effect of interfering with the freedom of operation of a person in ^{business on his} own account. He could not prescribe conditions/contrary to law. He could not e.g. prescribe a condition that all drivers must be members of a Union if there is provision in industrial law for certain drivers to be exempt from belonging to a union. In other words he must not invade the territory of other judicial authorities. I could give numerous examples but the point I am making is that the authority to prescribe terms and conditions is an authority which must be exercised in the spirit of the legislation which is being administered and although there may be fine line to be drawn between these and other conditions if the line is crossed then in my view the authority has exceeded his jurisdiction.

23. I do not intend to deal in depth with questions of transfer and amendment of licences. It is sufficient to say that the Authority can amend and he has power to transfer. However this is not a rubber stamp operation. There are requirements as to advertisement and hearing which must be complied with. The restrictions imposed on the jurisdiction of a licensing authority in this area the grant of a new licence. He must act fairly. He must observe the rules of natural justice. He must act in accordance with his statutory authority,
24. By Sections 141 and 142 a Transport Licensing Authority is given power to hold a public enquiry into the conduct of a service or to review a licence. It is important to note that the jurisdiction to hold an enquiry and the jurisdiction to review arise in different sets of circumstances. A public enquiry is held to determine whether or not a transport service authorised by a licence is being carried on in conformity with the terms and conditions of the Licence. A review is held if the Licensing Authority is of the opinion that the circumstances under which the licence was granted has materially changed. The distinction is important . If a review is held to ascertain whether a service is being carried on in conformity with the terms and conditions of the Licence the Authority will be acting without jurisdiction. If on the other hand the real concern is that the circumstances under which the licence was granted has changed and the Authority decides to hold a public enquiry then any decision he makes would be a nullity as he had no jurisdiction to hold the public enquiry.
25. In both cases, namely a public enquiry and a review, the authority must be careful to ensure that he does not exceed his jurisdiction in any way. It is in this area that the statement by Lord Reid which I quoted earlier in this paper becomes of real importance. The authority must confine himself to enquiring into the matter in hand. He must ensure that all those entitled to be heard are heard. He must give each and every party an opportunity to present their evidence and argument. He cannot be affected by bias. As the Sections enable the Licensing Authority to impose penalties namely the suspension or revocation of the

licence it is my view that these sections are in the nature of penal sections and must be strictly construed. Any failure to advertise in accordance with the sections, to notify those who are entitled to notification and to give a full and fair opportunity for all to be heard would nullify the proceedings.

26. It may be thought from the general tenor of this paper that I have outlined a number of matters which impose such severe restrictions on a Licensing Authority that he walks a very narrow line in the exercise of his jurisdiction. That is not to be thought of. When questions of jurisdiction are to be determined they are normally determined in the High Court and a reading of all the Judgments of that Court seem to indicate that the essential test applied is one of fairness. Is it fair that a decision should be allowed to stand in certain circumstances? Did the Licensing Authority act fairly in coming to his decision. Fairness and common sense are almost synonymous. The law does not set out to make things difficult for parties to hearings before an administrative Tribunal. It simply imposes a requirement of fairness. Possibly we could compare a hearing on an administrative review in relation to an administrative Tribunal to the actions of a referee in a game of football. He has rules which he has to observe and enforce, but like the referee the High Court Judge is always entitled in the interest of fairness to play the advantage.