

**IN THE DISTRICT COURT
AT BLENHEIM**

**I TE KŌTI-Ā-ROHE
KI TE WAIHARAKEKE**

**CIV-2018-006-000211
[2019] NZDC 8826**

BETWEEN

PAVEL MERTA
Appellant

AND

NEW ZEALAND TRANSPORT AGENCY
Respondent

Hearing: 10 May 2019

Appearances: Appellant appears in Person
P A Norman for the Respondent

Judgment: 17 May 2019

RESERVED JUDGMENT OF JUDGE A A ZOHRAB

Introduction

[1] This is an appeal by Mr Merta against the decision of Mr Pugin of the respondent, NZTA, to decline Mr Merta's application for renewal of his passenger endorsement.

[2] Mr Merta is aged 46 and has been in New Zealand for approximately 15 years. He currently works as a truck driver for Heagney Bros Limited, general cartage contractors. He wishes to retain his passenger endorsement because that will give him further job opportunities.

[3] The issue I have to decide on this appeal is whether, as at the date of the hearing 10 May 2019, he is a fit and proper person to hold a passenger endorsement.

[4] Mr Pugin’s decision that Mr Merta was not a fit and proper person to hold a passenger endorsement, made finally on 24 October 2018, was because of his cumulative traffic history, both before grant of his endorsement, and also subsequent to his endorsement, which demonstrated a propensity to act with disregard for transport laws and, therefore, with a poor attitude towards matters of public safety as it relates to matters of transport.

Approach on appeal

[5] The approach to an appeal under s 106 Land Transport Act 1998 (“the Act”) is not in dispute. In *Brown v New Zealand Transport Agency* Judge Kellar noted at para [32]:¹

In summary:

- (a) The appeal is a re-hearing;
- (b) There is a wide discretion to accept evidence with consideration guided by relevance;
- (c) The standard of proof is the civil standard;
- (d) The statutory criteria is the essence of the appeal;
- (e) The court is necessarily constrained by the materials submitted to it;
- (f) In an unlikely situation of equipoise, the onus will be on the appellant;
- (g) The more important question, the more cogent the evidence will be expected to be;
- (h) However, in the end it is for the appellate authority to be satisfied of the applicability of the statutory criteria to the facts.

[6] It is clear from the judgment of the Supreme Court in *Kacem v Bashir* that my obligation on this appeal is to consider the merits of the case afresh, and the weight given to Mr Pugin’s reasoning is a matter for my assessment.² His decision on behalf of the respondent is not binding on the Court, but it is persuasive.³

¹ *Brown v New Zealand Transport Agency* DC Dunedin CIV-2010-012-000808, 14 April 2011.

² *Kacem v Bashir* [2011] 2 NZLR 1.

³ See *Taua v Director of Land Transport Safety* (DC North Shore CIV-2004-044-000877, 4 June 2004)

Statutory Criteria

[7] The Act, and the Land Transport (Driver Licensing Rule) 1999 (“the Rule”), provide the regulatory framework governing passenger endorsement. Both require the holder of a passenger endorsement to be a “fit and proper person”.

[8] Clause 35 of the Rule sets out the criteria and procedure in relation to the fit and proper person test, and provides that the respondent may take into account the factors recorded in ss 30C, 30D and 30E of the Act.

[9] Section 30C contains both mandatory and permissive considerations. It provides:

30C General safety criteria

- (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.

Factual background

[10] Mr Merta has held a passenger endorsement since October 2013. Prior to this time, Mr Merta had a number of traffic offences recorded in his history, and though his application for a passenger endorsement was granted by the Agency on 16 October 2013, it included a “Warning Notice” in the following terms:

As a result of the recent vetting process I have reviewed information indicating that you have recent and historic traffic offences which are of concern to me.

I am prepared to grant your application on the basis that should you incur any further convictions/infringements and/or come to the attention of the Agency in the future, this may result in a fresh fit and proper person assessment at which time the decision-maker will be entitled to take the entire history into account, to include the matters already known and considered as part of this application.

[11] Mr Merta’s passenger endorsement was granted for five years.

[12] Mr Merta has offended seven further times since the issuing of the passenger endorsement. They included the offences of:

- (a) Exceeding the 50 kilometre per hour speed limit in the vicinity of a school by 22 kilometres per hour (on 7 February 2017); and
- (b) Exceeding the 100 kilometre per hour speed limit by 43 kilometres per hour (on 14 October 2017).

[13] On 6 November 2017, Mr Merta's licence was suspended for three months due to excess demerit points.

[14] On 17 August 2018 Mr Merta, applied to renew his passenger endorsement.

[15] On 30 August 2018, Mr Pugin of the Agency received the file. He formed the view that Mr Merta was not a fit and proper person to hold a passenger endorsement, and on 31 August 2018, sent a notice of proposal to decline to Mr Merta.

[16] On 30 September 2018, Mr Merta sent an email outlining an explanation for some of his infringements and convictions.

[17] On 24 October 2018, Mr Pugin sent a notice of final decision to Mr Merta informing him that the application was declined upon the grounds that he was not satisfied the appellant was a fit and proper person. The reasons which informed his decision are outlined in his affidavit. Mr Merta then appealed.

Mr Merta's traffic history

[18] Ms Norman summarised the key aspects of Mr Merta's history in para [5] through [14] of her submissions, and a copy of his history is attached to Mr Pugin's affidavit.

[19] Ms Norman acknowledged that Mr Merta drove significant distances in his capacity as a truck driver, but emphasised that Mr Pugin considered the fit and proper person test looking at all of Mr Merta's driving, not only in his capacity as a professional driver, but also in his capacity as a private citizen.

[20] Her submission was that since Mr Merta was granted a passenger endorsement on a “without prejudice basis”, that there has been a clear pattern of offending.

[21] Since being granted the passenger endorsement on 16 October 2013, his traffic offence history discloses:

- (a) 23 March 2014, exceeding the 50 kilometre per hour speed limit.
- (b) 7 January 2016, no inspection of vehicle.
- (c) 7 January 2016, no warrant of fitness vehicle.
- (d) 7 January 2016, operating an unlicensed motor vehicle.
- (e) 17 November 2016, operating an unlicensed motor vehicle.
- (f) 17 November 2016, driver not wearing a seat belt.
- (g) 7 February 2017, exceeding 50 kilometres per hour in vicinity of a school (plus 22 kilometres per hour).
- (h) 14 October 2017, exceeding the 100 kilometre per hour speed limited (travelling at 143 kilometres per hour).
- (i) 12 June 2018, not wearing a seat belt.
- (j) 12 June 2018, producing a log book with omissions.

[22] Ms Norman submitted that the key offences which informed Mr Pugin’s decision to decline continuation of the endorsement were the two most recent speeding offences. She noted the gross nature of the breaches, and the earlier prior history of exceeding the speed limit.

[23] Ms Norman highlighted the contents of Mr Pugin’s affidavit and in particular paras [4.4] through to [4.6], and the fact that reports and investigations undertaken by

the Agency, and other Government entities, have consistently shown that excess and inappropriate speed is amongst the single biggest safety issue facing road users.

[24] Ms Norman submitted that the conclusions drawn by Mr Pugin were reasonably open to him, given Mr Merta's proven history, and given his excuses for the speeding offences. In essence, she submitted that Mr Merta did not appear to be contrite or chastened as a consequence of the traffic infringement process, and had excuses for both speeding offences, neither of which mitigated the offending.

[25] Mr Merta emphasised in his submissions that the speeding offences were "human error" on his part, and he did not commit them deliberately.

[26] In discussion, it appears that he still has some concerns about the wisdom of truck drivers being required to wear seat belts on a compulsory basis, albeit he said he accepted that was the law.

[27] He also still maintained that he really "had no choice" as far as the speed that was used for the overtaking of three vehicles because they were travelling closely together. He also said he was unaware of the proximity of the school because the signage was obscured, albeit that he was taking a shortcut down that road.

[28] Ms Norman submitted that the Agency normally requires a two-year gap in offending before a willingness to reconsider their position. I pointed out to Ms Norman that Mr Merta's last speeding offence was 14 October 2017, and enquired whether or not they would look afresh at it on 14 October 2019, but her submission was that they would look at the position again two years from the last offence, when he committed the offences of not wearing a seatbelt and producing a logbook with omissions.

[29] Ms Norman also identified that Mr Merta had not undertaken any training or courses to address the issues identified by Mr Pugin such as, for example, undertaking a defensive driving course, or a driver improvement course.

[30] In summary, Ms Norman submitted that Mr Merta's traffic history showed traffic offending occurring persistently over the 14 months prior to Mr Pugin's decision not to renew Mr Merta's passenger endorsement.

Discussion and decision

[31] I accept that there are troubling aspects to Mr Merta's traffic infringement history. One would have thought, given he was granted the passenger endorsement subject to a clear "Warning Notice" that it would be reviewed if there was further offending, that Mr Merta would have been more careful when driving so as to ensure compliance with the law.

[32] Mr Merta drives a large truck for the purposes of his day-to-day employment, yet in his personal capacity he has exceeded the speed limit quite significantly on two separate occasions. The first was in the vicinity of a school and then, secondly, the excessive speed when on his motorbike. One would have thought that given the clear warning on his passenger endorsement, and after committing the speeding offence close to a school, that he would have moderated his speed subsequently. However, that clearly was not the case, given the excessive speed on his motorbike when overtaking three cars.

[33] Speed has been proven to be a major contributing factor in accidents in New Zealand, and notwithstanding his earlier speeding offences prior to receiving his passenger endorsement, the defendant does not appear to be contrite or chastened by his experience, and has excuses for both the speeding offences which led to the suspension of his licence. Put another way, one of the matters that concerns me is Mr Merta's continued justification of his persistent breaches of the law, both as to speed and the need to wear a seatbelt.

[34] Furthermore, notwithstanding suspension of his licence, shortly after receiving his licence back, he is again driving without a seat belt, and has omissions in his logbook.

[35] The significance of a passenger endorsement is that he is granted permission to drive passengers, and so public safety is paramount when considering whether a driver should retain the privilege of a passenger endorsement.

[36] I accept Mr Merta's submission that he is not a "bad person", and that he drives considerable distances for the purposes of his employment. However, having a passenger endorsement is a privilege and is not a right. I have concerns about the gross speed that he has been travelling at on two occasions in 2017, notwithstanding the clear warning that he was given by the Agency when he was issued his passenger endorsement, and notwithstanding his traffic infringement history prior to the grant of his passenger endorsement.

[37] In my view, as at the date of hearing, looking at Mr Merta's traffic infringement history in its entirety, and considering his explanations, Mr Merta is not a fit and proper person to hold a passenger endorsement. I decline to allow his appeal against the decision to refuse his application for renewal.

[38] If Mr Merta wishes to seek a passenger endorsement in the future, I encourage not only compliance with the law, but I also suggest that he undertake some form of approved driver improvement course so that he can at that time demonstrate not only compliance with the law, but also an understanding as to the importance of complying with the speed limit, and the need to wear a seatbelt.

A A Zohrab
District Court Judge