

Mr Stuart Sugarman
Chief Executive
Rossendale Borough Council
The Business Centre (Room 118)
Futures Park
Bacup
Lancashire
OL13 0BB

Our Ref: DBW / RTA
Your Ref:
Date: 28 December 2016
Please ask for: David Wilson

**By First Class post and email to:
StuartSugarman@rossendalebc.gov.uk**

Dear Mr Sugarman,

In the matter of a proposed application for judicial review between The Crown (on the application of Rossendale Taxi Association) and Rossendale Borough Council

The proposed claimant has consulted Gerald Gouriet QC in respect of the above.

Please find enclosed the Letter Before Claim for your earliest attention.

A copy of this letter and the enclosed Letter Before Claim is also being sent to the Council's Monitoring Officer, Clare Birtwistle.

I look forward to receiving the Council's response in early course and, in any event, by no later than 4pm on Thursday, 12 January 2017.

If necessary, the proposed block colour vehicle policy will be looked at in respect of each individual application on its merits.

Yours sincerely,



David B Wilson
Licensing Consultant, Mediator and Trainer
Consulting Editor, Paterson's Licensing Acts 2015-17
Contributing Author, LexisPSL

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**IN THE MATTER OF A PROPOSED APPLICATION FOR JUDICIAL REVIEW
IN THE ADMINISTRATIVE COURT**

Between:

THE CROWN

(on the application of ROSSENDALE TAXI ASSOCIATION)

Proposed Claimant

and

ROSSENDALE BOROUGH COUNCIL

Proposed Defendant

LETTER BEFORE CLAIM

Pursuant to the Pre-Action Protocol for Judicial Review

SECTION 1: INFORMATION REQUIRED IN A LETTER BEFORE CLAIM

Proposed claim for judicial review

1) To

Rossendale Borough Council

The Business Centre, Futures Park, Bacup, Lancashire OL13 0BB

2) The Claimant

David Lawrie on behalf of Rossendale Taxi Association

286 Newchurch Road, Stacksteads, Bacup, Lancashire OL13 0UJ

3) Reference details

Our reference: Not applicable.

Your reference: Not known.

4) The details of the matters being challenged

The proposed claimant challenges the Council's resolution to incorporate into the Council's 'Policy for the Licensing of Hackney Carriage Drivers and Vehicles, Private Hire Operators, Drivers and Vehicle' the recommendations (as amended) listed at Appendix C of the 'Report of the Licensing Manager to the Licensing Committee' dated 15 November 2016.

In particular, the proposed claimant challenges the lawfulness of the following recommendations within the Appendix C:

- (1) That the entry age limit for licensed vehicles be reduced from 7 to 5 years.
- (19) The mandatory requirement for CCTV.
- (26) That existing licensed drivers be required to satisfactorily complete the basic skills assessment prior to the renewal of their hackney carriage/ private hire drivers licence.
- (31) The maintenance of the Council's current policy on tinted windows.
- (32/33) That a local geographical knowledge test be introduced in respect of new applicant drivers and at renewal for existing licence holders (requirement to pass the knowledge test at next renewal no requirement to re-sit the knowledge test at subsequent renewal).
- (35) The application process for licensed drivers who wish to apply for another type of licence.

5) The issues

Overarching issue: it is alleged that it was unlawful for the Council by resolution to adopt the recommendations listed at Appendix C of the Licensing Manager's 'Report' dated 15 November 2016.

In adopting the recommendations (as a whole and/or individually) the Council failed to have regard to the Regulators' Code (BRDO/14/705), as required by Sections 23 and 24(2) of the Legislative and Regulatory Reform Act 2006 and the Regulatory Reform (Regulatory Functions) Order 2007 (as amended).

The only mention of the Code is at paragraph 5.7 of the Report:

"5.7 It is a matter of balancing the impact on the taxi trade against the overall, overarching concept of public safety, including having regard to the Regulators [sic] Code."

It is not sufficient merely to *mention* that regard has been had to the Code, it is necessary to *have* regard to it.

The Report fails to identify the applicability of the Code, or of any provision of it, to the changes proposed to be made to the licensing policy.

The Minutes of the meeting of the licensing committee on 15 November show that no provision of the Code, nor its applicability to each or any of the Recommendations made at Appendix C of the Report, was ever discussed.

Reference is made to provisions 1, 2 & 3 of the Regulators' Code, to which, it is alleged, regard was not had, sufficiently or at all. Without prejudice to the relevance of each of those provisions, the following citations are particularly material -

Introductory paragraph:

Regulators... **must** have regard to the Code when developing policies and operational procedures that guide their regulatory activities.

Regulators must equally have regard to the Code when setting standards or giving guidance which will guide the regulatory activities of other regulators.

If a regulator concludes, on the basis of material evidence, that a specific provision of the Code is either not applicable or outweighed by another relevant consideration, the Regulator is not bound to follow that provision, but should record that decision and the reasons for it.

Provision 1

1.1 Regulators should avoid imposing unnecessary regulatory burdens through their regulatory activities and should assess whether similar social, environmental and economic outcomes could be achieved by less burdensome means. Regulators should choose proportionate approaches to those they regulate, based on relevant factors, including, for example, business size and capacity.

Provision 2

2.1 Regulators should have mechanisms in place to engage those they regulate, citizens and others to offer their views and contribute to the development of their policies and service standards. Before changing policies, practices or service standards, regulators should consider the impact on business and engage with business representatives.

Provision 3

3.1 Regulators should take an evidence based approach to determining the priority risks in their area of responsibility [here, hackney carriage and private hire licensing]...

3.2 Regulators should consider risk at every stage of their decision-making processes, including choosing the most appropriate type of intervention or way of working with those regulated...

It is alleged that the Council failed to consider what (if any) evidence there was to support the Recommendations in Appendix C of the Report. Specific recommendations, in support of which no evidence was before the Council, were:

No 1: Reduction in the maximum age for vehicles on licensing

No evidence was produced to establish that reducing the maximum age of licensed vehicles from 7 years to 5 years would improve the fitness, suitability or (otherwise) quality of the vehicles - whether because of reduced wear and tear brought about by age or any for other reason.

If the adopted policy were allowed to stand, it would have a significant financial impact upon the trade. The extra costs that would be incurred by the licensed taxi trade, however, were never assessed or quantified. Furthermore, the need for such a policy change was not established.

Whilst it was suggested that the negative impact on the trade *might* be reduced by conducting a review of hackney carriage fares, no information was before the Council as to by how much fares would need to be increased to compensate the additional financial burden to the trade. Accordingly, not only was the proportionality of the new policy not considered by the Council, it was not possible (on the information before the Council) to consider it.

The adoption of this recommendation was “a shot in the dark”, not evidence-based, and was unlawful.

No 19: Mandatory CCTV

The requirement for CCTV imposes an additional burden on the trade without any reason for the policy being established through evidence.

No 31: Vehicle tinted windows

This policy was introduced by a decision of the Licensing Committee on 25 January 2016, without any evidential basis to justify it. That decision was itself subject to a Pre Action Protocol letter dated the 23 March 2016.

The implementation of that policy was therefore postponed as the matter was to be considered again in this current review of policy.

No evidence was produced to establish why the prohibition against tinted windows is either necessary or proportionate. The text of the previous Pre Action Protocol letter is repeated immediately below.

In determining that tinted vehicle windows should be prohibited the committee has failed to have regard to the Regulators Code (BRDO/14/705) as is required pursuant to Sections 23 and 24(2) of the Legislative and Regulatory Reform Act 2006 and the Regulatory Reform (Regulatory Functions) Order 2007 (as amended).

Any reference to the above was omitted entirely from the officer's report to the Licensing Committee and was not addressed, even after Mr. Wilson highlighted it in his submissions to the Committee.

As a result the Licensing Committee failed to have regard to the cost implications of prohibiting tinted glass and in particular the heightened cost that results from the Council's historic practice of licensing vehicles with tinted glass. Members appear not to have appreciated that their decision would adversely impact vehicles already licensed. As a consequence the Committee breached its duties under sections 1.1, 1.2, 2.1, 3.1 and 3.2 of the Code and thereby its duty under the 2006 Act.

Despite the large number of vehicles with tinted glass historically in operation, there is no evidence whatsoever that tinted glass has ever contributed to the commission of an offence or wrongdoing of any kind in a licensed vehicle.

The decision was Wednesbury unreasonable and unlawful.

No 26: Basic skills assessment

& Nos 32, 33: Geographical knowledge test

Existing licence holders have been deemed by the Council to be 'fit and proper' to hold a licence. The new requirements will mean that they will have to pass two separate tests to re-establish that fact in the future. The

new policies will apply, arbitrarily, to all drivers notwithstanding the fact that they may have been licensed for many years.

There was no evidential basis for establishing that the tests would of themselves improve standards of service provided by the trade to the public in Rossendale. At the committee hearing on 15 November 2015, both the Licensing Manager and the chair of the Committee accepted that the test under consideration was not fit for the purpose for which it would be applied. The terms of the geographical knowledge test have not been formulated at all.

It is submitted that these policies are therefore disproportionate, arbitrary and unreasonable, and are therefore unlawful: see *Kaivanpor v DPP (DC)* 28/10/15, applying *Muck It Ltd v Sec of State for Transport (2005)* EWCA Civ 1124).

No 35: Process to be adopted for dealing with new applications from existing licensed drivers who wish to apply for another type of licence.

The Association is not aware of any proposals or discussion in relation to policies or procedures to be adopted by Rossendale Council for those hackney carriage drivers who wish to simply obtain the additional private hire driver's licence. There has been no engagement with the licensed taxi trade as to any change in the current arrangements: (contrary to Regulators' Code, 2.1).

General

The unlawfulness of adopting the above numbered recommendations was identified by the proposed claimant in its response to the Council's consultation:

- (i) by letter dated the 16th of September 2016;
- (ii) at the council-organised workshop on the 20th; and

(iii) at the Licensing Committee meeting of the 15th of November 2016.

6) The details of the action that the Defendant is expected to take

The Claimant invites the Council forthwith to rescind its decisions of the 15 November 2016 and require that they be reconsidered by its Licensing Committee.

The Council is expected only to consider the adoption of changes to the basic skills test and the introduction of a geographical knowledge test when it has the details/format of those suggested changes fully drafted.

The revised decision, when it is taken, should state how the Regulator's Code has been considered in relation to each individual policy change; and it should expressly state, if it be the case, such reasons as there are why the Council is departing from the provisions of the Code.

7) The details of the legal advisers, if any, dealing with this claim

The Claimant is assisted by David Wilson (licensing consultant) of a2z Licensing, 3 Biddick Hall Cottages, Lambton Park, Chester-le-Street DH3 4PH, telephone 0191 3857313, email david.wilson@a2zlicensing.co.uk.

The Claimant is advised by Gerald Gouriet QC of Francis Taylor Building, Inner Temple, London EC4Y 7BY, telephone 0207 3538415, email gerald.gouriet@fbchambers.co.uk under the Direct Access provisions.

8) The details of any interested parties

None.

9) The details of any information sought

None.

10) The details of any documents that are considered relevant and necessary

Notes taken by the committee officer at the Licensing Committee meeting on the 15 November 2016.

11) The address for reply and service of court documents

A reply to this Letter Before Claim and any other correspondence should be sent to:

a2z Licensing
3 Biddick Hall Cottages, Lambton Park, Chester-le-Street DH3 4PH.

Service of court documents should be sent to:

David Lawrie on behalf of Rossendale Taxi Association
286 Newchurch Road, Stacksteads, Bacup, Lancashire OL13 0UJ

12) Proposed reply date

The Claimant expects the Council to provide a substantive reply no later than 4pm on Thursday, 12 January 2017.

The Claimant considers that the statutory time limit within which they must bring a claim expires at 4pm on 15 February 2016.

13) Further matters

Not applicable

SECTION 2: ADDRESSES FOR SENDING THE LETTER BEFORE CLAIM

- (i) Stuart Sugarman, Chief Executive
Rossendale Borough Council
The Business Centre, Futures Park, Bacup, Lancashire OL13 0BB
- (ii) Clare Birtwistle, Monitoring Officer and Head of Legal Services
Rossendale Borough Council
The Business Centre, Futures Park, Bacup, Lancashire OL13 0BB

SECTION 3: SPECIFIC REFERENCE DETAILS REQUIRED

Not applicable