

ADVICE FOLLOWING THE CASE OF:

(1) ALMA LUNT

(2) ALLIED VEHICLES LTD -v- LIVERPOOL CITY COUNCIL

Brief background to the case

Mrs Lunt had a back injury necessitating her distributing her weight by reclining the back of her wheelchair and using footrests. This resulted in her wheelchair being longer than say the standard length and it measured some 1200mm. There was a survey done by the Department of Transport Mobility Inclusion Unit which states that she is not alone in having a wheelchair of a variant length and shares this characteristic which several hundred wheelchair users in the UK.

Mrs Lunt was the voluntary Chair of the Merseyside Coalition of Inclusive Living and also treasurer of the Liverpool Wheelchair Users Group. She also participated in the policy forum of the Liverpool City Council concerned with wheelchair access issues. In 2007 she became aware of an application by Allied Vehicles to licence the Peugeot E7 for use as a hackney carriage. She tried the E7 herself and she was impressed with it.

Mr Edwards was Liverpool city's principal licensing officer and he produced a report on 31 October 2007 and repeated in a second report in 2008 the following: "Before a type of vehicle may be licensed as a hackney carriage it needs to be approved by the Liverpool City Council as a suitable vehicle for use as a taxi cab in Liverpool. The council has accepted that purpose built taxis which comply the conditions of fitness of the London carriage office are suitable for such use. Other vehicles are considered on the merits but to date no vehicle which is unable to meet the conditions of fitness have been approved by the council."

He then made reference to an equality impact assessment document in which he noted that the standard of the London conditions of fitness laid down critical standards which vehicles must attain before being licensed as a hackney carriage. The licensing committee makes reference to those standards "If a vehicle falls short of those standards it will generally not be approved for use as a hackney carriage".

On 31 October 2007 the licensing committee first considered the matter. It heard from Mr Fry who was an employee of Allied Vehicles, Mrs Lunt and Mr Bruce, Chairman of Liverpool Wheelchair Users Group. The minutes summarised "They are in favour of the E7, not all TX vehicles are wheelchair accessible".

Others opposed the application including the manager of the TX range. The hearing was adjourned for further information to be obtained and consultation with others including other local authorities on the types of vehicles they authorised for use as hackney carriages.

On 4 March 2008 there was a meeting lasting some hours between

Mr Edwards, Mr Bruce, Mrs Price and Mrs Lunt. The last three disagree with Mr Edwards recollection of what was said at that meeting in particular with the safe securing of wheelchairs in taxis. After that meeting Mr Edwards completed the disability impact assessment. This said, amongst other things, that the application could present the potential for a dis-benefit to wheelchair users if the E7 were not approved. It went on to say "However due to the vehicles size and engineering considerations associated with the design, it cannot conform to the minimum turning circle requirements associated with hackney carriages and is higher off the ground creating increased wheelchair ramp angles. He further wrote "The licensing committee will consider any application on its merits submitted by any vehicle manufacturer who designs and builds a vehicle which is constructed for public hire activity."

The report contained comments made by a Mr Gore who was the Merseyside police force vehicle examiner. However it is fair to say that the E7 was modified in the period between the first and second reports and concerns relating to the steep ramp and sliding doors had been addressed by the applicant.

Allied Vehicles prepared a report setting out accurately Mr Bruce's and other wheelchair users concerns including the knowledge that some wheelchair users were excluded from use of the present licensed taxis. Wheelchair users were often left unsecured and in a dangerous situation when travelling and that the reason for this situation was the limited turning area available in the rear of London style taxis. This report also contained reference to the Lowland report which was a report commissioned by Lowland Market Research to investigate wheelchair user's taxi journey experiences.

During the hearing Mrs Price also addressed the committee but despite this material the chairman felt that these matters were all down to driver error which could be addressed by training.

Allied Vehicles submitted information relating to other local authorities which did licence the E7 including those surrounding Liverpool city so that people could begin their journeys outside of Liverpool but end them in the city but could not hail or begin their journey there in an E7.

Committee met on 28 March 2008 and decided to refuse by a vote of four to two the application. They said they were conscious of the need to give due regard to the Disability Discrimination Act 1995 as amended, but three features caused them concern in relation to the E7. Firstly, sliding doors and safety issues arising from that, second the size of the intermediate step and thirdly the size of the turning circle.

The challenge

The challenge by Mrs Lunt and Allied Vehicles being claimants (1) and (2) respectively was as follows:

- (1) Unjustified discrimination contrary to Section 21D and E of the Disability Discrimination Act as amended with effect from 4 December 2006.

21D discusses the meaning of discrimination contained with 21B of the Disability Discrimination Act 2005. Briefly this means that a public authority discriminates against a disabled person if:

- (a) for reasons which relate to the disabled persons disability it treats him/her less favourably than it treats or would treat others to whom that reason does not apply; and
- (b) it cannot show that the treatment in question is justified under Sub Sections 3, 5 or 7C, which relate to employment discrimination.

21E concerns a public authority's duty to make adjustments where a policy or procedure makes it impossible or unreasonably difficult for disabled persons to receive any benefit that is or may be conferred.

- (2) The second challenge related to the council's failure to have due regard to its duty under Section 49A(1) of the Disability Discrimination Act which outlines public authorities general duty to have the need to:

- (a) eliminate discrimination which is unlawful under the Act;
- (b) eliminate harassment of disabled persons which is related to their disabilities;
- (c) promote equality of opportunity between disabled and other persons;
- (d) take steps to take account of disabled persons' disabilities, even Where that involves treating disabled persons more favourably than other persons;
- (e) promote positive attitudes towards disabled persons; and
- (f) to encourage participation by disabled persons in public life.

- (3) The third challenge was that the committee exercised its public law discretion in regard to licensing the E7 on the basis of material and undisputed errors of fact and that their judgement was based on a decisive error and there were grounds of unfairness in that; they failed to understand that all its licensed hackney carriage fleet was accessible to all wheelchair users and misunderstood and mis-stated the impact that the maintenance of the present practice was having. They understood that this was merely restricting the choice and convenience of wheelchair users as opposed to the ability of some users to use the present licensed taxis in Liverpool at all in a safe position. Therefore it was said, they could not have reached a lawful conclusion on the merits of the application or the extent to which it constituted discrimination. The committee decision to base its consideration of the Disability Discrimination Act community law claim points on safety considerations was flawed because the material upon which it relied was inadequate as

the committee had failed to obtain relevant evidence from a competent source to advise on the question.

One of the grounds of the defence was that judicial review was not the way to proceed since Mrs Lunt had recourse to the civil courts by way of a damages claim. This was refused by Justice Blake who said that judicial review was an appropriate way to proceed.

Justice Blake in the Lunt case accepted the claimants, that is Mrs Lunt and Allied Vehicles, primary submission that the decision was liable to be quashed because the judgement of the committee was based upon the fundamental mis-stating of the factual position. The true factual position being a mandatory relevant consideration (that is something which has to be taken into consideration) both under Section 49A of the Disability Discrimination Act and at common law.

In relation to common law discretion a lawful exercise of discretion could not have been performed unless the committee properly understood the problem, its degree and extent. The amount of discretion as to fact and policy allowed to decision makers under the common law only applies to decision makers who have acted fairly and directed themselves accurately on the relevant considerations to be weighed, in the making of a judgement on the exercise of the discretion.

The committee clearly based their decision on the erroneous belief that all its existing fleet of 1400 London style taxis were accessible to wheelchair users generally and that that must mean to all wheelchair users. The problems of safe position and strapping of wheelchairs was put down to driver error rather than the constrictions of space. Therefore it felt that it was dealing with a wish by wheelchair users for a greater degree of choice rather than something which restricted their ability to access the taxi (benefit) at all. This error was critical to its decision in respect of its Disability Discrimination Act duties.

Referred to in the Lunt case is the Edinburgh study which was put before Edinburgh City Council on 20 June 2006. This concluded that there was no overriding evidence either way regarding the safety risks of u turns against 3 point turns. Unlike the PCO (Public Carriage Office) Edinburgh did not consider this a reason to retain the turning circle.

Justice Blake also outlines in the Lunt case a six step approach to deal with Section 21 of the Disability Discrimination Act and the procedure to be considered is outlined below in relation to Norwich City Council's Regulatory committee.

1. *Does the council have a policy or procedure in relation to the licensing of hackney carriages?*

Answer: Yes. We have vehicle specifications which applicants' vehicles must conform to before being licensed as a hackney carriage.

2. *Does this practice or policy make it impossible or unreasonably difficult for disabled persons to receive any benefit that is, or may be conferred by the council?*

Answer: Yes. The benefit is the ability to access taxis. We are now aware of groups of disabled persons who cannot use the London style of taxi safely and with dignity and in some cases not at all. Whilst we have not been approached by a person in Mrs Lunt's position, this potential to deny a benefit to the disabled is clearly contrary to the intention and spirit of the Disability Discrimination legislation.

3. *Is the council under a duty to take such steps as are reasonably practicable in all the circumstances of the case for it to change that practice/policy and proceed/procedure so that it no longer has that effect?*

Answer: Yes.

4. *Has the council failed to comply with its duty to take such steps?*

Answer: No. The committee is considering that as one of the relevant considerations at this hearing.

5. *Not applicable as there is no failure.*

6. *Can the council show that any failure to comply with a change in policy/procedure/practice is justified on the grounds that it reasonably holds an opinion that non-compliance is necessary in order not to endanger the health and safety of any other person; or its failure is justified as a proportionate means of achieving another legitimate aim.*

Answer: The Council have the ability through the committee to allow the E7 to be licensed by relaxing the vehicle specifications. Whilst it is a matter for members' views it is the opinion of your officers that no compelling reason under health and safety issues has been shown under this application nor is there another legitimate aim which retention of the current vehicle specification can be said to meet.

Committee members should note that it is not necessary for the feature in question to cause unreasonable difficulties for all disabled persons or even most disabled persons, any significant impact on wheelchair users as a class will suffice and act as a trigger for the disability discrimination duties.

It may be helpful for the committee to consider the Disability Rights Commissions comments in the Lunt case;

"The policy of the Act is not a minimalist policy of simply ensuring that some accesses are available to disabled persons; it is so far as is reasonably practicable to approximate the access enjoyed by disabled persons to that enjoyed by the rest of the public.

They go on to describe due regard and say that public authorities must have due regard to their duties and that due regard should be fulfilled before and at the time that a particular policy/procedure that will or might affect disabled people is being considered by the public authority in question. That due regard must be exercised with substance and rigour and an open mind. Not just ticking boxes but integrated with the discharge of public functions of that authority. It is a non-delegable duty. Although another body may be authorised to carry it out on behalf of the authority they must retain in overall control of it. It is clearly a continuing duty and it is good practice for those exercising public functions in public authorities to keep an adequate record showing that they have considered disability equality duties and all the relevant questions.

Article 28

European Court of Justice (ECJ) has in many cases developed and explained the difference between general non-discriminatory conditions attached to the selling of goods in a member state and conditions attached as to product requirements and restricting the use of imported goods on the other hand.

The committee must consider therefore in respect of community law whether the maintenance of the licensing policy as is, requiring the turning circle, prevents or greatly restricts the use of the product, namely the Tepee Expert Chassis base.

It has been decided in the Lunt case that requiring the turning circle does prevent or greatly restrict the use of that product, therefore is in contravention of Article 28 of the EC Treaty, but that it does not act as a product prohibition because the chassis can be used in an ordinary people carrier vehicle or private hire vehicle. In other words the product was not completely prohibited for vehicle use, but for use as a hackney carriage.

If the turning circle is to be retained the committee would have to justify this requirement and a justification would have to be on the basis that it is for an achievement of a legitimate aim as per step 6 of the six step approach in relation to Section 21 of the Disability Discrimination Act. It is considered that any justification if it exists could only be that of the safety of the public.

Committee should also note that restrictions have to be proportionate and no more intrusive than required to give effect to a legitimate aim.

There is recent guidance which Justice Blake used in the Lunt case given by the European Commission summarising the case law of the European Court of Justice in a document entitled "Free Movement of Goods" prepared in May 2009. Section 6.1.2 Protection of Health and Life of Humans, Animals and Plants is the most popular justification under which member states usually try

to justify obstacles for the free movement of goods. Whilst the court's case law is very extensive in this area there are some principle rules that have to be observed.

The protection of health cannot be invoked if the real purpose of the measure is to protect the domestic market, even though in the absence of harmonisation it is for a member state to decide on the level of protection; the measures adopted have to be proportionate, ie restricted to what is necessary to obtain the legitimate aim of protecting public health. Furthermore measures at issue have to be well founded – providing relevant evidence, data (technical, scientific, statistical, and nutritional) and all other relevant information.

Justice Blake did not consider that the material put forward by counsel for Liverpool City Council as that relied on by the committee was sufficient for it to discharge its duty of justification.

- 1) In particular it was very unclear what expertise Mr Gore, the police force vehicle examiner, had to speak of the safety implications of turning circles and sliding doors. Examining a vehicle for roadworthiness or compliance with the regulations is not the same as comprehensive consideration of the merits or demerits or a particular design on safety grounds.
- (2) There is a distinction between confidence and lack of familiarity with the sliding door and real concerns for safety.
- (3) The fact that the E7 was used as a public hire taxi extensively in the UK without reported incident was a compelling source of relevant evidence that would have to be addressed. It was particularly notable to Justice Blake that no concerns have been reported in Liverpool itself resulting from the dropping off of passengers by E7 vehicles licensed in neighbouring authorities.

He agreed that the turning circle was useful for the avoidance of 3 point turns in narrow streets where someone seeks to specifically hail a passing taxi however where a particular assessment has been made as to the safety consideration of the issue, as it had been in the Edinburgh study Liverpool City Council would have had to consider whether it had a cogent basis for disagreeing with such evidence and why. If the issue was safety then the practice and experience of other authorities over a reasonable period of time cannot be ignored.

Lastly he said what should weigh in the balance of any discussion of justification on safety grounds were the clear safety benefits for the secure travel for all wheelchair users, irrespective of the dimensions of their chairs that could be apparently accommodated in the E7. It was common ground that travelling unsecured sideways in a cab is unacceptable. The introduction of the E7 alongside but not in

replacement of the TX was likely to make a substantial contribution to eliminating such practices.

Justice Blake quashed the original decision and ordered Liverpool City Council to reconsider the matter.

APPENDIX

Press release

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Transport for London

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15 December 2005

London Taxis – Conditions of Fitness

Transport for London's Public Carriage Office today issued the results of the Conditions of Fitness review for London's taxi industry.

The Conditions of Fitness are intended to ensure that all taxis operating in London are safe and fit for purpose.

In 2002, the Public Carriage Office undertook a full review of the Conditions of Fitness which was completed in June 2003. Some changes were made while other conditions remained the same. However three aspects were challenged by Allied Vehicles Limited and they are as follows:

- the turning circle requirement;
- the requirement that sliding doors are power assisted; and,
- the requirement for a one-piece rear window.

Following extensive research it has been decided to:

- retain the turning circle requirement;
- not require sliding doors, if fitted, to be power assisted;
- introduce a new Condition to address the issue of visibility into and out of taxis for the benefit of passengers and drivers.

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Roy Ellis, Head of the Public Carriage Office, said: "After a comprehensive review, it was found that the tight turning circle produced tangible significant benefits to the travelling public, and that these outweighed the advantages of removing it.

"Allied Vehicles alleged that the retention of the turning circle requirement led to fewer taxis, higher fares, less suitable taxis for the needs of the disabled and the unavailability of safer and more comfortable taxis to the disadvantage in general of passengers and drivers alike. The facts of these alleged disbenefits were not borne out by the research undertaken.

"Approximately 50 million U-turns and over 90 million other tight turns are performed by London taxis each year. If these U-turns were replaced by multi-point turns and other alternative complex manoeuvres, this could cause delay and impede other road users.

"Overall during this review, both passengers and drivers preferred the existing London Taxi."

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