

**CALDERDALE MBC**

**WARDS AFFECTED : ALL**

**LICENSING AND REGULATORY COMMITTEE**

**22 JUNE 2015**

**CALDERDALE COUNCIL CONTRACTED TRANSPORTATION WORK –  
COUNSEL'S OPINION**

**REPORT OF THE HEAD OF CUSTOMER SERVICES**

**1. ISSUE**

For Members to consider the legal opinion given by Counsel in relation to the Council's transport services and agree any amendments to the process.

**2. NEED FOR A DECISION**

At their Meeting 5 January 2015, Members resolved that officers seek Counsel's opinion on, the need for, and legality of, requiring drivers fulfilling Council contracted work to be licensed in Calderdale. Minute L16/23(k) refers.

**3. RECOMMENDATIONS**

It is recommended that Members consider the opinion given by Counsel, attached at Appendix 1 and agree the process for officers to adopt with immediate effect.

**4. BACKGROUND**

4.1 Following the Licensing & Regulatory Committee on 5 January 2015, the legal officer sent a brief for Counsel's opinion on –

- The legality of requiring drivers fulfilling Council contracted work to be licensed by Calderdale Council, and

- The possibility of charging Rossendale Council for enforcement costs relating to drivers licensed by Rossendale driving in Calderdale.

The brief for Counsel is attached at Appendix 1.

4.2 In summary, Counsel's advice was, to insert a general clause requiring drivers to be licensed by Calderdale Council could be considered unreasonable and therefore open to legal challenge. There is no reason to exclude drivers licensed by other authorities who may have a long, clean driving record. Counsel feel that it is not important that drivers are licensed by this Council but that they meet the safeguarding criteria.

4.3 An option may be additional tests and checks to bring those licensed elsewhere up to Calderdale Council's standards. Such a policy would need to be justified and evidenced. This can be satisfied by putting a clause in the transportation contracts that any driver undertaking work who is not licensed by this Council has to provide an up to date enhanced DBS (disclosure and barring service) check and undertake to abide by the Council's conditions - this may also include safeguarding/professional standards training, or provide evidence that they have done so elsewhere.

4.4 Counsel was of the opinion that charging Rossendale for enforcement costs would not be successful as there was no agreement to costs when the authorisations between both Councils were signed. Counsel's opinion is attached at Appendix 2.

## **5. FINANCIAL IMPLICATIONS**

None .

## **6. CORPORATE IMPLICATIONS**

The amendment to the conditions or contracts supports the Council safeguarding priorities and responsibility to protect the travelling public.

## **7. CONSULTATION**

None

## **8. OPTIONS**

Members are requested to;

- (a) Note Counsel's opinion, and
- (b) Agree to implement changes in transportation contracts and driver conditions as described at Para 4.3, or
- (c) Retain the current system.

## **9. Appendices**

- 1. Counsels Brief from the legal officer
- 2. Counsels Opinion

Zohrah Zancudi  
Head of Customer Services

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### **FOR FURTHER INFORMATION ON THIS REPORT CONTACT:**

Andrea Breen. Acting Registration and Licensing Services Manager, telephone -  
Halifax 393001

### **DOCUMENTS USED IN PREPERATION OF THIS REPORT:**

**Counsel's Opinion – In the matter of Calderdale Council's Contracted Work  
(March 2015)**



**PROHIBITING HACKNEY CARRIAGES  
LICENSED BY OTHER LOCAL AUTHORITIES UNDERTAKING CALDERDALE  
COUNCIL CONTRACTED WORK**

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**INSTRUCTIONS TO COUNSEL  
TO ADVISE**

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Counsel has herewith copies of the following documents:-

1. Operators conditions
2. Draft contract for the carriage of special educational needs passengers by taxi
3. Information Sharing Protocol with Rossendale

Counsel is asked to advise on the legality of requiring drivers/operators fulfilling Council contracted work to be licensed by Calderdale Council, both from a licensing and contractual point of view.

Please note such a requirement will necessitate the inclusion of an additional condition in the operator's conditions. A copy of the current conditions is attached.

**Background**

In the last few years Calderdale Council has seen a number of drivers obtaining hackney carriage licences from other councils with less stringent policies, in particular Rossendale, and then returning to work within Calderdale as private hire drivers.

The drivers obtaining licences from Rossendale and coming back to work in Calderdale have in the majority been either drivers who have had their licences revoked or applicants who have been refused a licence because of previous convictions and/or concerns over the safety of passengers.

Consequently we do not wish for such drivers to be undertaking work in the Calderdale area.

There is currently a good information sharing protocol in place with Rossendale and our enforcement officers have been authorised to enforce Rossendale's conditions. This has prevented some drivers who have previously had a licence refused or revoked by Calderdale gaining a licence with Rossendale. However this does not entirely eliminate the risk.

Whilst it is realised that we cannot legally prevent drivers licensed by other Council's working in the area, the Council would like to prevent drivers who have not been licensed by Calderdale, and therefore not subject to our rigorous checks, from undertaking Council transport contract work. One example of this is the contract of special educational needs passengers by taxi. A draft contract is enclosed.

In light of criticism faced by a number of authorities in the last few years in relation to a failure to tackle child sexual exploitation, the Council is currently in the process of developing a mandatory vulnerability, safeguarding and accessibility training sessions for new and existing drivers. It is hoped that the training will be rolled out within the next few months.

It is therefore more important than ever that the Council is able to ensure as far as possible that the drivers undertaking Council contract work have been subject to the Council's checks, tests and training.

Counsel is instructed to advise on legality of requiring drivers fulfilling Council contracted work to be licensed in Calderdale.

If Counsel has any queries then please feel free to contact Claire Farrimond on 01422 393121

Claire Farrimond  
27<sup>th</sup> February 2015

**IN THE MATTER OF:****CALDERDALE COUNCIL'S CONTRACTED TAXI WORK**

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**OPINION**

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**Instructions**

1. I am instructed in this matter by Calderdale Council ('the Council'). I am asked to advise whether they can require future contract taxi work to be subject to certain conditions, which in broad terms require that the drivers who undertake the work are up to Calderdale's standards.
2. I am asked to advise on two points:
  - a. The legality of requiring drivers/operators fulfilling Council contracted work to be licenced by Calderdale Council both from a licencing and contractual point of view; and
  - b. The possibility of charging Rossendale Council for enforcement costs relating to drivers licenced by Rossendale driving in Calderdale
3. As regards point 2(a), I am informed that this would necessitate the inclusion of an additional condition in the operator's conditions, and I have been provided with a copy of the same.
4. My instructions in this matter are dated 2<sup>nd</sup> March 2015 and were received on 5<sup>th</sup> March 2015.

**Facts**



5. The Council has encountered a problem common to many councils in the UK: namely drivers obtaining hackney licences from neighbours, in this case Rossendale, and working on a private hire basis in Calderdale. The Council's concern is in relation to the suitability of these drivers.
6. I understand that the Council's enforcement officers have been authorised to enforce Rossendale's conditions. However, this is not seen as a complete solution.
7. The Council does not want drivers who it has not licenced from undertaking Council transport contract work. My understanding is that this is primarily on the basis that the Council has more stringent requirements of its drivers- including checks, tests and training.

#### Law

Purpose of the Local Government (Miscellaneous Provisions) Act 1976 ('LGA 1976')

8. In the case of R (App Newcastle City Council) v Berwick Upon Tweed [2008] EWHC 2369, the court held that the purpose of the 1976 Act was, as at paragraph 22:

*"In my judgment the major purpose behind the 1847 Act, and indeed the 1976 Act, is the safety of the public by which I include both the travelling public as passengers and other road users. Thus the scheme of the legislation is directed towards having safe vehicles, fit and proper drivers and appropriate conditions of hire. To ensure this safety a form of enforcement is provided for with a system of penalties for non-compliance. Registers of proprietors and drivers are kept together with offences committed which are available for public inspection."*

9. The case of Blue Line Taxis (Newcastle) Limited v Council of the City of Newcastle upon Tyne [2012] EWHC 2599, also records, by reference to the law commission's consultation paper, the purpose of the Act:

*"The Act promotes various public objectives (including public safety and welfare, intelligence gathering and the combating of crime, and ensuring there is a regulatory scheme that is effective and effectively enforceable (see Law Commission Consultation Paper, para 4.68 and following), through a local authority licensing*



*regulatory scheme. The hallmark of that scheme is localism: as well as the local licensing of every operation, vehicle and driver, the public vehicle hiring operation must be in fact be locally based, and the obligations imposed on operators must be capable of enforcement locally by the relevant local licensing authority."*

#### *Hire*

10. Sections 55 & 37 of the LG Act 1976 provide for the grant of licences for private hire and hackney carriages respectively.

11. The case of Berwick is relevant. The facts are well known and therefore are not set out here, save as relevant. The ratio in the Berwick case was based on the decision in Brentwood Borough Council v Gladen [2004] EWHC 2500, where it was held that a person who accepted advanced order pre-bookings for a hackney carriage did not require a private hire operator's licence, and that a person is not limited to utilising hackney carriages licenced in the district of the booking agent. However, it was said that Berwick should have regard to where its hackney licenced taxis were operating and could require such information to be provided, at paragraphs 30 and 31 it was stated:

*"Having regard to the policy and objects of the Act in my judgment Berwick in exercising its discretion under s 37 of the 1847 Act should take into account where the hackney carriage will be used. The byelaws and conditions which apply to Berwick's licensed hackney carriages are largely there to promote safety and to ensure that the vehicles are easily identifiable. They are made and imposed to protect the public and in particular the public in the Berwick-upon-Tweed area. If the hackney carriages are used in areas remote from Berwick-upon-Tweed enforcement will be very difficult and impracticable. On one view what happens to hackney carriages owned, kept and used outside the Borough are really not Berwick's concern but the concern of the area where they are operating.*

*It seems to me that the question to be asked is not whether a hackney carriage proprietor once a licence is granted would be acting lawfully but rather whether in exercising their discretion a licensing authority can use its discretion to ensure that it maintains control over those vehicles it has licensed. In my judgment a local authority, properly directing itself, is entitled, and indeed obliged, to have regard to whether the Applicant intends to use the licence to operate a hackney carriage in that authority's area and also to have regard to whether in fact the Applicant intends to use that hackney carriage predominantly, or entirely, remotely from the authority's area. This should result in each local authority licensing those hackney carriages that*



*will be operating in their own area and should reduce the number of hackney carriages which operate remotely from the area where they are licensed."*

12. In its conclusions, the Court stated:

*"(i) In the proper exercise of its statutory discretion under s 37 of the Town Police Clauses Act 1847 a licensing authority is obliged to have regard (a) to whether the Applicant intends that the hackney carriage if licensed will be used to ply for hire within the area of that authority, and (b) whether the Applicant intends that the hackney carriage will be used (either entirely or predominantly) for private hire remotely from the area of that authority.*

*(ii) A licensing authority may in the proper exercise of its discretion under the said s 37 refuse to grant a licence in respect of a hackney carriage that is not intended to be used to ply for hire within its area and/or is intended to be used (either entirely or predominantly) for private hire remotely from the area of that authority.*

*(iii) In determining whether to grant a licence under the said s 37 a licensing authority may require an Applicant to submit information pursuant to [s 57](#) Local Government (Miscellaneous Provisions) Act 1976 in order to ascertain the intended usage of the vehicle."*

#### Conditions

13. In relation to the addition of conditions to a licence for a hackney cab, [Section 47 LG Act 1976](#) provides in relation to proprietors:

*"(1) A district council may attach to the grant of a licence of a hackney carriage under the Act of 1847 such conditions as the district council may consider reasonably necessary."*

14. It should be noted that the terms which may be attached are those which are "...reasonably necessary" as per the final words in [Section 47 LG Act 1976](#).

15. [Section 46](#) permits a local authority to grant a person a licence to drive a hackney carriage, but it appears that there is no power to attach conditions to the same, as per the case of [Wathan v Neath Port Talbot Borough Council \[2002\] EWHC 1634](#).

16. [Section 48](#) provides the power to grant licences in respect of private hire taxis, [Section 51](#) for drivers and [Section 55](#) for persons to operate. It is established that all

three must be issued by the same authority (Shanks v North Tyneside Borough Council [2001] EWHC 533).

17. In relation to the imposition of conditions for private hire vehicles, in the case of Shanks it was stated at paragraph 36:

*"Section 48 enables a local authority to grant to the proprietor of a vehicle a licence to use the vehicle as a private hire vehicle, s 51 enables the grant to a person a licence to drive a private hire vehicle and s 55 enables the grant to a person a licence to operate private hire vehicles and in each case may attach such conditions to the relevant licence "as it considers reasonably necessary".*

18. The facts in Shanks are relevant to this opinion since they could be considered to impose a significant burden on the Private Hire Operator who applied for a Proprietor's licence as regards the recording of the journeys undertaken. The *ratio* in Shanks [2012] was, as per paragraph 36:

*"In my judgment, therefore, to the extent that the very wide words of s 47 have to be construed to meet modern day conditions, then they should be so construed. However, I am not at all convinced that it involves that kind of approach: the words of the statute are wide and emphatically so. That being so, that is the end of the matter subject, of course, to any condition imposed being "reasonably necessary". At all events, I do not, for my part, see any basis upon which it could properly be argued that the proposed arrangements for self-monitoring are unlawful. In those circumstances, I do not consider that the proposed arrangement is ultra vires the statutory powers."*

19. In the case of Blueline there is an examination of the legality of the terms and conditions in relation to requiring the appellant taxi firm to have a local number for the branch it opened within the borders of Newcastle upon Tyne. It was noted at paragraph 9:

*"...although the operator must be based and "operate" exclusively in the relevant licensing authority's area, that does not prevent a pre-booked journey, in whole or part, being made outside that authority's area. So long as the relevant operator's licence, vehicle licence and driver's licence are all issued by the same local authority, then it is irrelevant that any particular journey undertaken by a private hire vehicle neither begins, nor ends, nor passes through the area for which that authority is responsible"*



20. The judge in that case that there was no a material restraint of trade and in any event any such restriction was for a legitimate purpose and was proportionate to that aim, in paragraph 68 it was said:

*"In my judgment, the telephone conditions pursue the aim of better control over Blue Line Newcastle's operation, as a local operation..."*

21. In paragraph 73 it was said:

*"The facts here are very different. In the light of the local nature of the licensing system for private hire operations, the judge's finding that it was in line with the statutory purpose for an authority to require an Applicant for a new licence to establish a separate operation from an operation licensed by another authority was, in my judgment, a perfectly proper one. The imposition of the telephone conditions was to that end. That was a legitimate purpose. The imposition of those conditions did not materially interfere with the Appellant's trade – they were still able to operate in both North Tyneside and Newcastle, where they could use their trade name and indeed the 6666 number in the Newcastle operation so long as they did not use that same number in North Tyneside (or vice versa) – and, in any event, any restriction on their trade was for a legitimate purpose and was justified as being proportionate to that aim."*

## **Opinion**

22. As set out above, I am asked to advise on the legality of the imposition of a requirement that drivers and operators fulfilling contracted work for the Council must be licenced by the Council.

23. I have been provided with a draft contract for the carriage of special educational needs passengers. I will advise with this contract in mind since it seems to me that the reasonableness of any requirement is likely to differ depending on the group of passengers being considered- if there are any other relevant and specific groups of passengers please provide further instructions. In this regard it is not difficult to foresee that it is likely to be easier to justify greater safeguards when transporting vulnerable passengers than otherwise. I would be interested to know the specific

statutory requirements upon the Council as regards the passengers mentioned or other groups, whether the National Assistance Act 1948 or otherwise.

24. It does seem to me that there are a number of routes open to the council to meet its objective of safeguarding of vulnerable passengers when undertaking taxi journeys under a contract, and which are likely to differ as regards reasonableness in the eyes of the Court.
25. It could be that there is a requirement that drivers undertaking such work confirm that they meet the necessary safeguards (provide evidence of the same or a requirement for them to undertake checks by the Council), it may be that it is possible to build into a driver's licencing process the additional checks, and possibly charge them for the same, or it may be possible to insert such a term into an operator's licence, as mentioned in my instructions. I am able to discuss these options with those who instruct in conference if required.
26. In my opinion the starting position is that as a matter of contract it is likely to be perfectly possible to insert a clause requiring a driver/operator undertaking the work to be licenced by the Council. However, this is likely to be subject to a requirement of reasonableness upon the Council as a public body, and subject to scrutiny by the Court. It is at this stage that matters become more complex.
27. It may be that there is some organisational reason for the suggestion in my instructions that it would be necessary to insert an additional term into the operator's conditions and I would be interested to discuss this with those who instruct in conference. This point is likely to be important since it seems to me that it could be argued that the imposition of a term in the licence of the proprietor is unreasonable if un-necessary. It seems to me that it could be considered to be unnecessary, absent any further instructions, since such a requirement could simply be inserted into the



contract for the taxi service, rather than the licence- indeed upon consideration it seems to me that my instructions are more about procurement, rather than a licencing matter- though it seems to me that the licencing principals are relevant background. I now turn to the suggested clause to be inserted.

28. As regards the insertion of a term within an operator's licence that its drivers are licenced by the Council for the carriage of special needs passengers, it is my opinion that there is a real risk that this could be considered to be unreasonable. This is my opinion because it seems to me that it may be considered that it is not important that relevant drivers are licenced by the Council, but rather that they should meet the safeguarding criteria as regards the vulnerable passengers. I can advise/discuss the implementation of such a policy if required within the authorities if required but it occurs to me that one option may be additional tests/checks to bring those licenced elsewhere up to scratch if they so choose. Again the imposition of such a policy would need to be justified and evidenced.
29. In the event that the Council do seek to insert such a clause, it seems to me that given the likelihood of challenge the Council should ensure that a decision to impose such a condition is well evidenced. It is not difficult to foresee that someone licenced by Rossendale for many years without incident would feel aggrieved at being excluded from this work.
30. It should be noted that I have not seen a copy of Rossendale's licencing term but, as per my instructions, I have advised on the basis that they are less stringent.
31. Turning to Rossendale, in relation to enforcement costs, as a starting point I would be interested to know what was discussed as regards enforcement costs since having considered the certificate from Rossendale it does not appear to record anything in this regard.

## **Conclusion**

32. It seems to me that it is likely to be considered to be unreasonable to insert a clause in an operator's licence as regards the necessity of the Council licencing the drivers/operators for the relevant contract.
33. In relation to the recovery of the cost from Rossendale. It does not appear to me that this is likely to be successful from the current information before me, though I would be happy to discuss this matter with those who instruct.
34. Do not hesitate to contact me in Chambers if I can be of further assistance in this matter.

**JAMIE MORGAN**

**Trinity Chambers**

**5<sup>th</sup> March 2015**