General Regulatory Chamber
First-tier Tribunal for Scotland
Transport Appeals

Adjudicator's Decision

Mr Allan Hamilton - v - Glasgow City Council

Appeal Details

Case number:	LZ00036-2308	Appeal Raised:	25/08/2023
Vehicle:	[redacted]	Hearing:	There was no hearing
Representative:	N/A	Decision:	11/10/2023
Number of PCNs:	1	Adjudicator:	Alexander Green

Decision - PCN LZ1016139A

Mr Allan Hamilton, you have won this appeal.

There is nothing to pay and the authority will cancel the penalty charge
This is because the authority made a procedural error.

Issued: 11/08/2023 Entered: 07/08/2023 10:01 Broomielaw

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Adjudicator's Decision

Adjudicator's Reasons

1. The appellant, Mr Allan Hamilton , is appealing a Low Emission Zone Penalty Charge Notice ("LEZCN") issued by Glasgow City Council (the "Council").Mr Hamilton has requested a decision without a hearing.

2. The LEZCN was issued on 11 August 2023 in respect of a contravention that was alleged to have taken place on 7 August 2023 at 10:01 hours (the "detection date"). It is alleged that the vehicle (registration number[redacted]) was being driven in a Low Emissions Zone in Broomielaw, Glasgow. The Council alleges that the vehicle did not meet the specified emission standard of the low emission zone and that the vehicle was not exempt by virtue of the Transport (Scotland) Act 2019, section 17 (4) . A scheme surcharge means that the penalty charge amount will double with each subsequent contravention by the same vehicle with the 90 days of the previous contravention. This was the first contravention.

3. On 16 August 2023, Mr Hamilton submitted formal representations to the Council. He says that the contravention did occur but in the light of extenuating circumstances, it would be unreasonable to impose a penalty charge notice. In particular, he says that on the day in question he had just purchased the van from Clyde Motors and was heading back to Ayr. He missed his turn and not being from Glasgow but from Ayrshire, he was unaware that he had driven into the Low Emission Zone and he did not see any signage and was lost. He says this was an oversight and he believes it is unreasonable to impose the penalty under the circumstances.

4. The Council considered and rejected Mr Hamilton's representations setting out their reasons for doing so in a notice of rejection dated 18 August 2023. It stated, amongst other things:

> *This above vehicle does not meet the required Low Emission Zone (LEZ) standards and cannot be driven in any Low Emission Zone in Scotland if it is not in an exempted category. Only diesel vehicles registered*

from September 2015 and petrol vehicles registered from 2006 will meet the required Low Emission Zone conditions.

Whilst I note your comments, I am satisfied that prior to Low Emission Zone in question, clear advisory signage is in place. Drivers are expected to adhere to the signage in place. If they do not, then a Charge

Notice is issued. The appropriate signage is displayed in advance of entering the Low Emission Zone to offer drivers an alternative route

5. The Council must establish the contravention on a balance of probabilities.

6. On reviewing the papers, I identified a preliminary issue concerning the method that the Council used to serve LEZCN which could be determinative on whether the LEZCN was enforceable. Consequently, on 6 September 2023, I issued a case management order requiring the Council to provide further information on how the LEZCN was served. In the case management order I set out my preliminary views on the matter to the effect that I did not believe that the LEZCN was correctly served and was, therefore potentially unenforceable. I invited the Council to provide written representations to the Tribunal. I initially gave the Council seven days to do this but granted two further extensions which cumulatively extended time to 28 days. On 9 October the Council submitted written representations. Mr Hamilton has also provided written representations.

7. The Low Emission Zones (Emission Standards, Exemptions and Enforcement) (Scotland) Regulations 2021, regulation 6(1) (the "2021 Regulations") provides:

6.—(1) Where a local authority has reason to believe that a penalty charge is payable under section 6(2) of the 2019 Act, it may serve a notice ("a penalty charge notice") on—

(a)the registered keeper, or

(b)any person by whom the penalty charge is payable under regulation 5.

8. The 2021 Regulations do not provide interpretation regarding the service of a notice or other document (e.g. by first or second class post, registered post, recorded delivery etc…). Consequently, it was my preliminary view that the Tribunal would have to consider whether the Interpretation and Legislative Reform (Scotland) Act 2010 (the "2010 Act") was engaged to determine the correct mode of service of the LEZCN and whether it had been properly served on Mr Hamilton and was enforceable.

9. Section 1 (1) of the 2010 Act states:

This Part applies to—

(a) Acts of the Scottish Parliament the Bills for which receive Royal Assent on or after the day on which this Part comes into force,

(b) Scottish instruments made on or after that day, in the case of Scottish instruments made as mentioned in paragraph (a) or (b) of the definition of "Scottish instrument" in subsection (4),

10. Section 1 of the 2010 Act also sets out the provisions relating to its application. In particular, it provides:

(2) This Part does not apply insofar as –

(a) The Act or instrument provides otherwise, or

(b) the context of the Act or instrument otherwise requires.

11. Section 26 (which is in Part 1) of the 2010 Act states:

Service of documents

(1)This section applies where an Act of the Scottish Parliament or a Scottish instrument authorises or requires a document to be served on a person (whether the expression "serve", "give", "send" or any other expression is used).

(2) The document may be served on the person—

(a)by being delivered personally to the person,

(b)by being sent to the proper address of the person—

(i)by a registered post service (as defined in section 125(1) of the Postal Services Act 2000 (c. 26)), or

(ii)by a postal service which provides for the delivery of the document to be recorded…

12. Schedule 1 of the 2010 Act defines words and expressions. A "document" is defined as:

anything in which information is recorded in any form (and any references to producing a document are to be read accordingly).

13. The LEZCN is a "document" for the purposes of the 2010 Act.

14. Section 1(4) of the 2010 Act defines a "Scottish instrument" as follows:

… An instrument of the type mentioned in subsection (5) made under-

(a) an Act of the Scottish Parliament (whenever passed)

15. Section 1(5) of the 2010 Act lists the types of Instrument including:

(c) regulations

16. The 2021 Regulations are an "instrument" for the purposes of the 2010 Act.

17. In its written representations, the Council submits that the LEZCN was validly served. Furthermore, it submits that the 2010 Act is not applicable and that it can rely upon the relevant provisions set out in the Local Government Scotland Act 1973, section 192 (the "1973 Act"). It states:

Glasgow City Council's legal team has provided the following response to the question on how documents are served:

The Penalty Charge Notice was served on the Appellant using second class post.

The Council notes that the Low Emission Zones (Emission Standards, Exemptions and Enforcement) (Scotland) Regulations 2021 do not contain an explicit definition of the word "serve". However, the Council does not consider that Section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010 applies to the service of LEZ Penalty Charge Notices and the Notice of Rejection.

The Council, as a local authority, considers that it is entitled to rely on Section 192 of the Local Government Scotland Act 1973. [excerpt copied below for ease of reference, in particular Sections 192(1) and (6)] to effect service of the Penalty Charge Notice and the Notice to Owner.

192.— Service of notices, etc., by local authority.

(1) Any documents to which this section applies may be served—

(a) by being sent by post in a prepaid letter or delivered to or at the residence or place of business of the person to whom it is addressed……

(6) This section applies to any notice, order or other document which is required or authorised by an enactment (including any enactment in this Act) or any instrument made under an enactment to be served by or on behalf of a local authority, or by an officer of a local authority, not being a document to the service of which the provisions of some enactment other than this section or some instrument made under an enactment are applicable.

18. Mr Hamilton submits the following:

I do not believe the the that the proper legal protocol according to current legislation has been followed in the serving of notice as was just posted through letterbox not recorded or signed for.

Also believe blue badge holders are exempt proof provided.

And:

The legal definition of serve is to know that the document has been properly presented to the proper person ie registered delivery signature by appellant I believe Glasgow council is in breach of the legislation there are two Allan Hamiltons at this address myself and my son I will be challenging the council as believe this is there interpretation of the legislation

19. In contrast to the provisions of section 26 of the 2010 Act, I am reminded that the Interpretation Act 1978, section 7 (the "1978 Act") provides in relation to postal service:

Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

20. I note the Council's concurrence that the 2021 Regulations do not contain an explicit definition of "serve". Consequently, I find that the 2021 Regulations do not supplant the 2010 Act regarding service of documents. I do not accept the Council's submission that it can rely upon the provisions of section 192 of the 1973 Act in preference or instead of the provisions of the 2010 Act. This is because the 1973 Act predates the 2010 Act. Furthermore, the 2010 Act expressly applies to Scottish Instruments implemented after that legislation came into force which includes the 2021 Regulations. It is to 2010 Act rather than the 1973 Act that recourse must be made to determine the modes of service of the LEZCN that are permitted and whether, once chosen, it is mandatory to effect service in the manner prescribed.

21. Section 26(2) of the 2010 Act provides a document (i.e. the LEZCN) **may be served** (my emphasis) by registered post or by recorded delivery. As a matter of fact the LEZCN was not served using any of these modes of postal service.

22. I note that neither the 2010 Act nor the 2021 Regulations stipulate the consequences of the serving the LEZCN in the ordinary post (i.e. not by registered or recorded delivery) (e.g. that it is rendered unenforceable). In those circumstances I must determine the nature of applicable statutory provisions. In other words, what is the correct construction of the words "may be served"? Are they mandatory, directory or permissive?

23. When a statute requires that something must be done, or done in a particular form or manner without expressly declaring what is to be the consequence of non-compliance, is the requirement to be regarded as mandatory or merely directory or permissive?

24. Another allied question is whether an enactment which is permissive in form may be mandatory in effect. Where the statute is held to be mandatory, failure to comply with it will invalidate the thing done under it, but where the enactment is regarded as merely directory or permissive the thing done will be unaffected, subject to any penalty that may be provided by the statute for breach of it.

25. In **Woodward v Sarsons (1875) LR 10 CP at 746** per Coleridge CJ it was stated:

> *An absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment is obeyed or fulfilled substantially*

26. As to whether an enactment which is mandatory in form is in effect mandatory or merely directory, I am reminded that:

> *no universal rule can be laid down ... It is the duty of courts of justice to try to get at the real intention of the legislature by attending to the whole scope of the statute to be construed* (**Liverpool Borough Bank v Turner (1860) 30 LJ Ch 379 at 380** per Campbell CJ).

27. In **Howard v Boddington (1877) 2 PD 203 at 211** , Lord Penzance held:

> *You cannot safely go further than that in each case you must look to the subject-matter, consider the importance of the provision that has been disregarded and the relation of that provision to the general object intended to be secured by the Act, and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory.*

28. In **London and Clydesdale Estates v Aberdeen District Council 1980 SC (HL) 1** the owners of ground which the council proposed to acquire for educational purposes submitted that an appropriate class of development would be residential with associated commercial purposes. In rejecting the owners' proposal the council omitted to inform the owners in writing, as they were required to do by the now revoked article 3(3) of the Town and Country Planning (General Development) (Scotland) Order 1959, SI 1959/1361, that they had a statutory right of appeal. The House of Lords held that the requirements of article 3(3) were mandatory, Lord Hailsham saying that:

> *where Parliament prescribes that an authority with compulsory powers should inform the subject of his right to question those powers, prima facie the requirement must be treated as mandatory.*

29. **Robertson v Adamson (1876) 3 R 978** was concerned with the interpretation of the now repealed Ballot Act 1872 (c 33), of which section 2 laid down the method of taking votes at elections. Section 28 provided that 'The schedules to this Act, and the notes thereto, and directions therein, shall be construed and have effect as part of this Act', and Schedule 1 contained rules for the guidance of those taking part in elections. Lord Justice-Clerk Moncrieff observed that, in so far as the rules were mere matters of form such as for example the form of the writs to be used, their words were directory and would be complied with by as exact an adherence as circumstances would permit, but that directions given to the elector or the returning officer were a different class, and were of the nature of injunctions or prohibitions which must be as specifically complied with as if they had been specially provided in the body of the statute.

30. In **Cowper v Callender (1872) 10 M 353** it was held that negative and prohibitory words are also mandatory.

31. In **Degan v Dundee Corpn 1940 SC 457** it was held that a statute which provided that 'the corporation may provide and maintain ... and may run omnibuses within the city' was merely permissive and did not impose any obligation to provide immediate accommodation for every intending traveller.

32. In two cases under the betting and gaming legislation the court rejected the argument that if the grounds on which a licensing authority 'may refuse' to grant a licence were met, 'may' was imperative (**Mecca Bookmakers (Scotland) Ltd v East Lothian District Licensing Board 1988 SLT 520, OH**; **Patmor Ltd v City of Edinburgh District Licensing Board 1988 SLT 850)**.

33. Having considered the representations and the applicable law, I find as follows:

a. In understanding the significance of this matter, it is important not to lose sight of the nature and operation of a Low Emission Zone ("LEZ"). The Transport (Scotland) Act 2019 ("TSA") imposes restrictions against driving a vehicle into an LEZ. If a vehicle does not meet the specified emission standard or is not exempt, and a person drives a vehicle within an LEZ then they must pay a penalty charge. Service of a penalty charge notice **is fundamental** to the operation of the LEZ enforcement regime in several ways:

i. It notifies the recipient of an alleged contravention and penalty charge payable.

ii. It provides the recipient with the option of paying a 50% reduced penalty if it is paid withing 14 days beginning with the date of service of the penalty charge notice.

iii. It notifies the recipient of their right to contest the penalty charge and the time limits that apply for doing so by reference to the date of the service of the penalty charge notice.

iv. If a charge certificate is served on the recipient of the penalty charge notice, the penalty charge is increased by 50%.

v. The enforcement process operates on the basis of escalating penalty charges with surcharges for multiple contraventions.

It follows that a secure and verifiable method of postal service is crucial for the effective and fair operation of the LEZ enforcement regime so that the recipient can take advantage of paying a reduced penalty charge or submitting formal representations or avoiding a charge certificate.

b. The 1973 Act does not govern the mode of service of the LEZCN. Service of the LEZCN is governed by the 2010 Act.

c. The 2010 Act permits different modes of service of a document which includes postal service. This element of the legislation **is permissive**; it provides service options for the Council.

d. The Council opted to serve the LEZCN by ordinary post. The 2010 Act specifically provides that postal service may either be by registered or recorded delivery. If ordinary prepaid postage was permissible, then the 2010 Act would have stipulated that method (as with section 7 of the 1978 Act). It does not do so. It follows that there is no option for that mode of postal service. If the option of postal service is used, then it is a **mandatory requirement** under the 2010 Act for the LEZCN either to be sent by recorded delivery or by registered delivery as these are the only types of postal service referred to in the legislation. The wording is clear and unambiguous. As the Council elected to post the LEZCN it had to use one of postal methods stipulated. It follows that the words "may be served" are, in the context of this provision, to be construed **as mandatory** and not as permissive or directory.

e. Where the statute is held to be mandatory, failure to comply with it will invalidate the thing done under it. In this case, this is service of the LEZCN. For the LEZCN to be enforceable it must have been served correctly. In this case, service was defective and the LEZCN cannot be enforced.

34. The appeal is allowed.

A M S Green, Chamber President

11 October 2023

Appeals

If you are aggrieved by the decision of the First-tier Tribunal you may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, you must first seek permission to appeal from the First-tier Tribunal. You must seek permission to appeal within 30 days of the date the decision was sent to you.

The Upper Tribunal may uphold or quash the decision on a point of law in question. If the Upper Tribunal quashes the decision, it may:

- **re-make the decision;**

- **remit the case to the First-tier Tribunal;**

- **make such other order as the Upper Tribunal considers appropriate.**

The application must:

- **identify the decision of the First-Tier Tribunal to which it relates;**

- **identify the alleged point or points of law on which the party making the application wishes to appeal; and**

- **state the result the party making the application is seeking (e.g. quash and re-make the decision).**

Reviews

You may ask the First-tier Tribunal to, or the First-tier Tribunal may on its own initiative, review the decision.

If you want the First-tier Tribunal to review the decision you must apply in writing and send a copy of your application to the other party/parties. You must make your application within 14 days of the date on which the decision was made or within 14 days of the date

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that the written reasons were sent to you. You must also explain why a review of the decision is necessary. The grounds on which a decision may be reviewed are that:

- **the decision was wrongly made because of an error on the part of its administrative staff**
- **the Appellant who had failed to appear or be represented at a hearing had good and sufficient reason for their failure to appear**
- **where the decision was made after a hearing, new evidence has become available since the conclusion of the hearing, the existence of which could not have been reasonably known about or foreseen by the parties**
- **where the decision was made without a hearing, new evidence has become available since the decision was made, the existence of which could not have been reasonably known about or foreseen; or**
- **the interests of justice require such a review**

Alexander Green
Chief Adjudicator
11/10/2023