

REASONS FOR DECISION OF THE TORONTO LICENSING TRIBUNAL

Date of**Hearing:** February 23 and March 23, 2017**Panel:** Moira Calderwood, Chair; Melina Laverty and Daphne Simon, Members**Re:** Dawit Habte Fikremichael
Applicant for a Vehicle-For-Hire Licence (Application No. B654558)**Counsel for Municipal Licensing and Standards:** Ms. Brennagh Smith

INTRODUCTION

Mr. Fikremichael held a City of Toronto Taxicab Driver's Licence from 1992 to 2009. On July 25, 2016, Mr. Fikremichael submitted the current application for a Vehicle-for-Hire licence. Municipal Licensing and Standards (MLS) of the City of Toronto denied his application. Mr. Fikremichael requested a hearing before the Toronto Licensing Tribunal. That hearing proceeded on February 23 and March 23, 2017.

ISSUE

Does Mr. Fikremichael's conduct provide reasonable grounds to believe that a licence should not be granted, or should be granted with a probationary period and conditions placed upon it?

SUMMARY OF EVIDENCE

Testimony of Ms. Kuztelska

Ms. Kuztelska is the Supervisor, Municipal Licensing and Standards, with MLS. Through this witness, the City submitted into evidence Report No. 6661 (pages 1-103) which was marked as Exhibit 1, without objection by Mr. Fikremichael. Ms. Kuztelska's colleague Mr. Van Elswyk and staff prepared the report.

The report contains documentation respecting Mr. Fikremichael's criminal charges and convictions, as well as information about his charges and convictions under the Highway Traffic Act (HTA) and City of Toronto By-laws.

The Report shows that Mr. Fikremichael was convicted in 1996 of assault, in 1997 of driving with over 80 mg of alcohol in his blood, and in 2009 of impaired driving.

The Report contains a 3-year provincial Driver Record abstract for Mr. Fikremichael, dated July 25, 2016, showing no record of convictions.

The Report contains a letter dated July 22, 2016, from York Regional Police, showing that Mr. Fikremichael had no record of criminal convictions.

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In cross-examination, Mr. Fikremichael brought Ms. Kuztelska's attention to the letter at page 64 of the Report, dated July 27, 2016, setting out MLS's grounds for refusing his application. That letter stated, in part:

A review of your file indicates that on May 3, 2012, report #5779 was before the City of Toronto Licensing Tribunal due to a record of convictions under the Criminal Code of Canada. On this date your Taxicab Drivers licence application B185348 was denied. Further, on April 24, 2014 report #6006 was deemed abandoned by the Toronto Licensing Tribunal at a hearing dealing with your previous denial of a licence, which you failed to attend. This provides reasonable grounds to believe you are not entitled to the issuance of a licence in accordance with the Toronto Municipal Code, Chapter 546.

Ms. Kuztelska acknowledged that the previous deemed abandonment is not relevant to the hearing of the present application, even though it was mentioned in the July 27, 2016 letter.

Testimony of Mr. Fikremichael

During the course of his direct testimony and Ms. Smith's cross-examination, Mr. Fikremichael provided further information and documentation (duly marked as Exhibits in the hearing) with respect to his personal circumstances and his criminal, driving and By-law conviction history.

Mr. Fikremichael has six children aged 12 years to 24 years, who are all in school, and he supports them financially.

Mr. Fikremichael qualified as a Mechanical Engineering Technician in April 1997 (Exhibit 6), and worked in that capacity until a back injury made it impossible for him to continue. He began driving a taxi part time, while a student. After the back injury, he returned to taxi driving full time to make a living. Because the work was flexible, he could choose not to drive on days when he experienced severe back pain.

After his 2009 impaired driving condition, which carried a two-year driving suspension, and in the eight years since, Mr. Fikremichael was not licensed to drive a taxi in Toronto, and worked at various times as a security guard, a pizza delivery driver, and as a driver for Uber (Exhibit 10). Once his car became too old to meet Uber's vehicle requirements, he had to give up that employment. As a delivery person, his hours were not guaranteed, and depended on how many take-out orders the restaurant received. As a result, his income was unreliable.

Mr. Fikremichael provided documentation (Exhibit 13) showing that he obtained a Record Suspension (which he referred to as a "pardon") from the Parole Board of Canada on May 16, 2015.

Mr. Fikremichael provided documentation (Exhibit 9) showing that he completed an Alcohol and Drug Awareness Program with the Salvation Army in November 2013. He provided a copy of a November 14, 2016 note from a doctor (Exhibit 12), stating that Mr. Fikremichael does not have alcohol abuse problems, as far as the doctor knows.

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Mr. Fikremichael described a number of points of contention he has had with MLS over the years, including:

- MLS removed his name, without cause, from the Driver's List (which, under prior legislation, registered those who wished to obtain an Ambassador taxi licence). Exhibit 11 is a 2002 letter from MLS stating that Mr. Fikremichael's name was removed from the Driver's List due to his failure to submit required documentation, along with a letter of response from Mr. Fikremichael providing his explanation and attaching the documentation.
- His prior (2014) application should not have been marked "abandoned." On some of the occasions when he attended the Tribunal with respect to that prior application, MLS encouraged him to seek an adjournment. On the day that his application was marked abandoned, he was out of the country due to the death of his father, but sent a representative to the Tribunal. (The minutes from April 2014 confirm that Mr. Fikremichael was unable to attend the Tribunal and sent a representative.)
- He sought judicial review of the Tribunal's April 24, 2014 decision to deem his application "abandoned." His testimony was that the judge and the MLS lawyer present at the Divisional Court hearing (Ms. Smith) told him that he could apply again and his licence would be granted. Exhibit 5 is a copy of the January 28, 2016 endorsement of Justice Sachs of the Divisional Court, dismissing Mr. Fikremichael's motion to extend the time to bring an application to judicially review the Tribunal's decision to deem his application abandoned. The endorsement states in part:

In my view, the moving party [i.e., Mr. Fikremichael] has not provided satisfactory explanation for his delay in pursuing this matter. Therefore, I decline to exercise my discretion to allow the moving party to issue an application for judicial review...I note that under this decision, the moving party is not precluded from bringing a new application for his licence.

- When he made the present application for a licence, he met all the requirements (listed in Exhibit 4), filed the appropriate documents, took a course, paid the fees, etc. (as shown in Exhibit 8), but, in his view, MLS refused his application in retaliation for his exercising his right to go to Divisional Court to challenge the "abandonment" decision.

SUBMISSIONS

Ms. Smith for the City

Ms. Smith stated that the Tribunal should issue Mr. Fikremichael a Vehicle-for-Hire licence, on probation, with conditions.

She noted the passage of time since Mr. Fikremichael's last criminal conviction. She pointed out, however, that approximately 11 years elapsed between Mr. Fikremichael's first alcohol-related driving conviction and his second, and that 11 years have not yet

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elapsed since the second (2009) conviction, so we cannot be sure that such alcohol-related behaviour will not recur.

Ms. Smith stated that Mr. Fikremichael gave a very similar account of the circumstances which led to each of those convictions, adding that Mr. Fikremichael's accounts minimized his responsibility and that he did not appear to accept full responsibility for the conduct leading to either conviction. Ms. Smith pointed out that in June 2012, when the Tribunal denied Mr. Fikremichael's application for a taxi driver's licence, it noted:

This panel is very concerned about public safety for passengers and the driving public where a taxicab driver might drive impaired. Mr. Fikremichael has had two convictions for impaired driving, at least 1 in a cab. The sentences for both convictions were severe. While Mr. Fikremichael maintains that he was not driving at the time, the severity of the penalties imposed suggests that the situations were considered to be serious at the time of conviction. He has not accepted responsibility for his actions.

Although a long period of time has now passed since the last conviction, Ms. Smith submitted, there is still sufficient concern about the safety of the public to impose a period of probation and conditions on Mr. Fikremichael's licence rather than grant it unconditionally.

With respect to Mr. Fikremichael's Record Suspension, Ms. Smith referred to a previous decision of the Tribunal (*Re Anwar*, February 14, 2013) in which former Chair Miskin wrote, regarding what was then called a pardon:

... the Tribunal concluded that it should not treat the conviction as having been erased by the pardon. Indeed the statute has since been amended, and the term "pardon" has been removed. The Tribunal interpreted the statute to mean that the record of conviction was not deleted by the Pardon, but rather the Pardon merely effected a separation of the record of the pardoned offence from any other criminal record which might pertain to the Applicant. In any event the Tribunal addresses the conduct of an applicant, of which the conviction is merely some indication.

Ms. Smith submitted that a Record Suspension does not equate to total absolution and that the Tribunal may still consider the previous conduct.

Ms. Smith stated that some of Mr. Fikremichael's statements at the hearing regarding the progress of his three applications for a taxi/vehicle-for-hire licence brought his honesty and integrity into question. For example, she noted that Mr. Fikremichael stated that the Divisional Court justice said that if he reapplied, he would be granted a licence, whereas Justice Sachs' endorsement shows that she actually said that in spite of the dismissal of Mr. Fikremichael's application to extend the time to apply for judicial review, he was "not precluded from bringing a new application for his licence."

Ms. Smith maintained that due to ongoing concerns about possible criminal behaviour, and about honesty and integrity, the licence should be placed on probation for a period of four years. She added that there was no need to impose a requirement respecting an alcohol awareness course, as Mr. Fikremichael has already completed one.

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Mr. Fikremichael for himself

Mr. Fikremichael submitted that his license should be issued without probation. He noted that his criminal probation was only three years and he has completed it. He felt that this was sufficient punishment. He also waited additional years to seek a pardon, and another eight months since applying for this hearing.

Since obtaining the pardon, he has no criminal record and when the Parole Board reviewed his case they accepted he has been of good conduct. He fulfilled all the requirements to obtain a licence by applying, taking a course, paying a fee, etc. He completed the Alcohol and Drug Awareness program, and his driving record is clean. There is nothing now to stop him from working, and the Tribunal should grant his licence without conditions. He does not want probation hanging over him while he is driving a taxi. Other people who have a past criminal record and received a pardon apply and get their vehicle-for-hire licence without probation. It was not this easy for him. The City was motivated to retaliate against him.

ANALYSIS AND CONCLUSIONS

The Tribunal decided to grant the application to issue Mr. Fikremichael a Vehicle-for-Hire license, and to impose a two-year probationary period and conditions.

In reaching our decision, we applied the Tribunal's mandate, set out in part in the Toronto Municipal Code, § 546-8.A(3)(c):

Have regard for the need to balance the protection of the public interest with the need for licensees to make a livelihood.

The basic facts did not appear to be in dispute in this case. Rather, the parties disagree with respect to the interpretation or significance of certain facts.

Mr. Fikremichael took the position that the Record Suspension (formerly called "pardon") which he has obtained means that his criminal record is completely clear and his past convictions should no longer be considered. The Tribunal agrees with Chair Miskin who said that the record regarding the offences in question is separated from any other criminal record which might pertain to the applicant (which in this case is none) but that the Tribunal is entitled to consider the underlying conduct of an applicant that led to the charges and/or convictions, whether or not the convictions are still registered on an applicant's record. Mr. Fikremichael did not leave the Tribunal with the impression that he was forthright in acknowledging past driving lapses. We note that the Tribunal may, in exercising its mandate to protect the public, consider conduct leading to a charge whether or not there is a conviction; for example, we occasionally consider the underlying conduct that led to a charge, even where the charge was withdrawn.

In considering the protection of public safety in this case, the Tribunal had minimal concerns about the 1996 assault conviction. This appears to have been a single incident and is now more than 20 years in the past. We were more concerned about the two alcohol-related driving offences. These too are now long in the past, as the most recent offence took place in 2008 (almost 10 years ago). The Tribunal is aware, however, that substance misuse is a condition which notoriously recurs, as it seems to

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have done in Mr. Fikremichael's case, when he was convicted for a second time after 11 years had elapsed. Under the circumstances, we concluded that a period of probation with monitoring via periodic criminal record checks would adequately protect the public. Ms. Smith sought a 4-year period, but given the length of time that has elapsed since Mr. Fikremichael's last conviction, coupled with the information that he has completed alcohol abuse counselling in the interim, we were satisfied that a two-year period would suffice.

Mr. Fikremichael appeared very firmly convinced that once he had submitted the required documentation and fees, and further had completed a taxi driving and an alcohol awareness course, he had a right to be issued a licence, and that MLS had wronged him in not issuing one. This interpretation is not supported on a reading of the By-law, which clearly provides (§§ 546-3 and 546-4) that MLS may (and in some cases, must) administratively deny a licence application where the applicant has certain criminal charges, and that the applicant then has a right to apply for a hearing before the Tribunal. This is exactly what happened in this case.

Mr. Fikremichael also appeared to be convinced that the motive for MLS's refusal of his current application was retaliation against him for applying for a judicial review of the Tribunal's decision to deem his previous application abandoned. On this point, the Tribunal found the wording of MLS's application denial letter dated July 27, 2016 to be truly unfortunate, as it certainly could be interpreted as including the previous abandonment as a ground for refusal.

The letter did, however, also advert to Mr. Fikremichael's prior criminal record and set out public safety concerns as a ground for refusal.

Further, it was the Tribunal, not MLS, which marked Mr. Fikremichael's previous application "abandoned." The Tribunal is a quasi-judicial body which is separate from MLS. It was not entirely clear to us why MLS might be motivated to retaliate against someone who challenged a decision of the Tribunal (which is not a decision of MLS).

In the end, Mr. Fikremichael's view of MLS's treatment of him and his belief that MLS has been improperly motivated in its dealings with him left the Tribunal somewhat concerned as to whether Mr. Fikremichael would be governable by MLS, which is the regulator of the vehicle-for-hire industry in Toronto. We concluded that imposing a probationary period with conditions would provide Mr. Fikremichael with an opportunity to show that he respects MLS's authority over him as a licensee, and would provide MLS with an opportunity to monitor Mr. Fikremichael for the first two years after his reinstatement as a licence holder.

With respect to the other aspect of the test set out in the Tribunal's mandate, the need for licensees to make a living, there was no information before the Tribunal to the contrary of Mr. Fikremichael's statement that he provides financial support for his family which includes six children; Ms. Smith fairly acknowledged Mr. Fikremichael's financial situation, in her submissions.

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DECISION

The Tribunal ordered that Mr. Fikremichael's application be granted and he shall be issued a Vehicle-for-Hire licence, effective immediately, subject to the following conditions:

- (1) Mr. Fikremichael's licence shall be placed on probation for a period of two (2) years.
- (2) Prior to each of the next two (2) renewals of the licence, Mr. Fikremichael must provide to MLS, at his own expense, an original updated abstract of his criminal record.
- (3) During the probationary period, if Municipal Licensing and Standards has concerns with any new charges or convictions, those matters and report No. 6661, and any updating material, shall be brought back before the Tribunal for a full hearing.

Originally Signed

Moira Calderwood, Chair
Panel Members, Melina Lavery and Daphne Simon concurring

[Reference: Minute No. 98/17]

Date Signed: May 25, 2017