IN THE SOUTH EASTERN & METROPOLITAN TRAFFIC AREA

TRAFFIC COMMISSIONER'S DECISION

PCS RECYCLING LIMITED

LICENCE NUMBER OK1124863

GOODS VEHICLES (LICENSING OF OPERATORS) ACT 1995

Decision

1. Pursuant to adverse findings under Section 26(1)(c)(iii), (e), (f) and (h) of the Goods Vehicles (Licensing of Operators) Act 1995, PCS Recycling Limited no longer satisfies the requirement of Section 13B of the said Act, namely not unfit to hold a Licence. Accordingly, I revoke Licence OK1124863 with effect from 23:45hrs on Thursday 29 November 2018.

2. I disqualify PCS Recycling Limited, Patrick James Corbally and Patrick Lee Corbally for a period of 4 years from that date and time from holding or obtaining an Operator's Licence or being involved in any entity that holds or obtains such a Licence in Great Britain, pursuant to Section 28 of the Goods Vehicles (Licensing of Operators) Act 1995.

Background

3. The previous history is set out in the Public Inquiry Case Summary. This Licence was granted at a Public Inquiry in March 2014, called due to adverse history on a previous Licence. In 2015, there was a Driver & Vehicle Standards Agency ("DVSA") inspection which was marked as "unsatisfactory". After receiving assurances and offers of relevant training, the Traffic Commissioner issued a formal warning and granted the Operator's application to increase the authorisation to 10 vehicles. A further increase to 17 vehicles was granted in May 2017.

4. In October 2017, the Operator attended a further Public Inquiry after Patrick James Corbally and Patrick Lee Corbally were convicted of serious offences, which included suspended prison sentences. The Office of the Traffic Commissioners did not know of the conduct, which was the subject of the criminal proceedings, at the time of the decision in May 2017. Further, there was adverse compliance history arising from roadside encounters since May 2017, in terms of a significant number of drivers hours' infringements and safety inspection sheets that were not recording tyre tread depth or brake test results. The then Traffic Commissioner's written decision is a matter of record but includes a suspension of the Licence.

5. On 21 November 2017, the Operator was issued with a "S" marked Prohibition for loose wheel nuts and an emissions cheat device on vehicle PO62BZL . A follow-up investigation took place in January 2018. The outcome of that investigation was that the Operator's systems remained unsatisfactory. In particular:-

- Preventative Maintenance Inspection Reports ('PMIs) do not record any metered brake performance checks or road tests. Assurances were given to TC Denton on 16 October 2017 that authorised vehicles were now being given a roller brake tests at every other PMI (page 96 of the PI bundle).

- Driver daily defect reports show mainly nil defects. Where defects have been recorded, there is no action/rectification work shown. The Operator admitted that some defects are repaired without being recorded.

- The 'in-house' driver defect sheet has no provision to show defects are reported to a responsible person.

- The maintenance contract was not available at the time of visit.

- Prohibitions, including an "S" mark, indicating a significant failure in the maintenance system. The Operator did not contest or appeal the prohibition.

6. As a result, of the history and on-going shortcomings, I called the Operator to a further Public Inquiry.

The Hearing

7. The Public Inquiry commenced and concluded on 25 September 2018. I heard oral evidence from Director Patrick Lee Corbally and Transport Supervisor Danielle Corbally. The other Director, Patrick James Corbally was not present. The Operator was unrepresented but also had in attendance a Transport Consultant, engaged after receipt of the Call-In Letter and who had prepared a recent audit. DVSA Vehicle Examiner Mr Daniel Simpson attended on behalf of DVSA.

8. During the Public Inquiry, the Vehicle Examiner and Operator endeavoured to obtain some additional documentation around the fitment of the cheat device and the Prohibition removal. At the conclusion, I determined that a written decision was necessary because additional evidence was required from the Operator to assist my deliberations. I confirmed that the written decision would issue within 28 days after the receipt of all additional documentation.

Documents and Evidence

9. Before concluding this written decision, I have considered the following:-

   (i) Public Inquiry Brief for the hearing on 25 September 2018.

   (ii) Vehicle Examiner Supplemental Statement to assist the Inquiry dated 25 September 2018.

   (iii) Audit by Xray Transport Management Limited.

   (iv) DVSA example of a Renault truck's emissions compliance certificate handed in during the Inquiry.

   (v) Documentation received from the Operator since the conclusion of the evidence on 25 September 2018.

   (vi) *South Bucks District Council and another V Porter(FC) (2004) UKHL33, English v Emery Reimbold & Strick Ltd [2002 EWCA Civ 605* and *Bradley Fold Travel Limited & Peter Wright v Secretary of State for Transport [2010] EWCA Civ 695* in relation to written decisions generally.

(vii) Upper Tribunal Decisions and other guidance I consider relevant to this determination as listed elsewhere in this Decision.

(viii) The current version of the Senior Traffic Commissioner Statutory Guidance and Statutory Directions.

10. I have not set out all the evidence as it is a matter of record but I have referred to the material evidence, which has informed my findings.

Issues

11. The Operator does not challenge the DVSA oral and written evidence. The Operator repeats the statement to DVSA at the time of the "S" marked Prohibition, namely it was unaware of the emissions cheat device and that it must have been on the vehicle prior to purchase. It is for me to make a finding on that point and in the circumstances of the case, determine what regulatory action, if any, is appropriate. In light of the admissions I make formal findings under Section 26(1) (c)(iii), (e), (f) and (h) of the Goods Vehicles (Licensing of Operators) Act 1995.

Consideration and Findings

12. This is a bad case. Deficiencies in the brake testing system were a feature of the Public Inquiry in October 2017. The Operator told TC Denton all authorised vehicles were the subject of roller brake tests at every other PMI. This was not happening as at the DVSA investigation in January 2018. I am entitled to expect that by 25 September 2018 those deficiencies to have been remedied, together with the other deficiencies found by the Vehicle Examiner. Instead, there is no system of brake testing. Apart from MOT, whether the vehicle gets a brake test and if so what type, is entirely random. It follows that we have some PMIs with the brake test blank. Some PMIs say it is a road test but fail to include other relevant information, such as road and weather conditions. On other occasions, there is a decelerometer test but not necessarily the same day or week as the PMI. On one occasion, there is a roller brake test but it has no correlation to any event with the relevant vehicle. The Vehicle Examiner also noted that even where work was undertaken on the brakes, there was no subsequent brake performance test.

13. I am reminded of the assessment of Judge Carlisle QC in the Upper Tribunal Decision *2009/507 William King trading as B King Scaffolding* wherein he stated "*This was one of those cases where the more that we heard, the worse it got*". Instead of taking a robust and risk-based approach to brake testing after January 2018, Mr Corbally started his evidence by telling me that roller brake testing is not compulsory. By the end of my questioning, he admitted that there was no system at all. Even after a short adjournment to consider representations on trust moving forward, I was 'offered' roller brake tests 4 times a year and decelerometer in between - but only commencing when the vehicles were next due a PMI. Whether any of those vehicles presented a risk until the next PMI is a matter of chance on such an approach. This shows me that even at that point, after all the evidence and the potential dangers exposed, tMr Corbally did not "get it", that this is not paperwork but peoples' lives.

14. Mr Corbally had no explanation as to why some of the PMIs presented at the hearing did not have the Certificate of Roadworthiness signed off. He also viewed this as an administrative oversight rather than a flag that the vehicles should not have been put on the road until resolved.

15. In terms of the driver defect reporting system, the sheets themselves appear improved but there are still driver reportable items appearing on PMIs. In evidence I was told that the drivers had received a 'tool box' talk on walk round checks. This talk was delivered by Patrick Lee Corbally and Danielle Corbally. Danielle Corbally at that time had undertaken a one-day Operator Licensing Management Course and Mr Corbally relied on his 25-years' experience in the industry. I pointed out that Mr Corbally may well just be handing on the bad practice that had led to the deficiencies in the first place and Ms Corbally had no 'qualification' whatsoever.

It follows, that the gate checks introduced also had limited benefit, as demonstrated by the PMI sheets.

16. The emissions cheat device was found on vehicle PO62BZL. The initial indicator of something amiss at the roadside was a missing fuse. The said fuse links directly to the emissions system. Mr Corbally is adamant that the device must have been fitted prior to purchase in 2015. Mr Corbally told me there was nothing in the vehicle history, which would have put him on notice of a problem. There are two pieces of documentary evidence, which undermine this assertion. The Vehicle Examiner pointed out that the relevant vehicle file includes repairs to wiring in July 2017 and before any such repair is undertaken the fuse board would be checked. At this point, either the fuse was present or the fuse was missing and should have been noticed. I also noted that on 20 November 2018 (the day before the road side encounter) that there is a handwritten note in the file which states 'filters changed, vehicle running normally again'. Ms Corbally told me Partick Corbally Senior had informed her that he did the work but she was unable to assist with any background to the suggested problem. There is nothing in the vehicle file e.g a driver daily defect sheet, to suggest the vehicle was not running 'normally' in the first place. On balance, I find that the cheat device was fitting by the operator during its ownership of the vehicle.

17. There are some positives in this case. The Operator engaged a transport consultant who prepared a pre PI audit. The weight I give this is to be balanced with the fact that the step was taken days before the PI, as opposed to shortly after the VE investigation. I have taken into account there has been very recent training, including Ms Corbally undertaking the full Transport Manager qualification with some of the results awaited. I have offers of external training for Patrick Lee Corbally and the drivers. I have promises of a roller brake test at every PMI after my disquiet at the original 'offer'. In fact, there are promises of anything I want if the Licence is allowed to continue.

18. The time for all this was January 2018 and not after receipt of the Call-In Letter. Even after receipt of the Public Inquiry bundle and the full Vehicle Examiner Public Inquiry Statement, there has been limited attempts by the Director and he seems to have placed all his faith in Dannielle Corbally. At first blush, that may not be surprising in light of Mr Denton's findings last year. However, that decision also make it clear Mr Corbally needed to up his game and he has failed to do so.

19. The Upper Tribunal helpfully set out the marker in *2009/225 Priority Freight Limited & Paul Williams* that '*Promises are easily made, what matters is whether these promises will be kept: actions speak louder than words*'. I remind myself of the clear guidance set out by His Hon. Michael Broderick, Principal Judge for Traffic Commissioner Appeals in *NT/2013/82 Arnold Transport & Sons Limited* '*It is important that operators understand that if their actions cast doubt on whether they can be trusted to comply with the regulatory regime they are likely to be called to a Public Inquiry at which their fitness to hold an operator's licence will be called into question. It will become clear, in due course, that fitness to hold an operator's licence is an essential element of good repute. It is also important for operators to understand that the Head of the TRU is clearly alive to the old saying that: "actions speak louder than words", (see paragraph 2(xxix) above). We agree that this is a helpful and appropriate approach. The attitude of an operator when something goes wrong can be very instructive. Some recognise the problem at once and take immediate and effective steps to put matters right. Others only recognise the problem when it is set out in a call-up letter and begin to put matters right in the period before the Public Inquiry takes place. A third group leave it even later and come to the Public Inquiry with promises of action in the future. A fourth group bury their heads in the sand and wait to be told what to do during the Public Inquiry. It will be for the Head of the TRU to assess the position on the facts of each individual case. However it seems clear that prompt and effective action is likely to be given greater weight than untested promises to put matters right in the future.'* Bearing in mind the operator's history, it should have been firmly in group one. Instead, it is a mix of groups two, three and four.

20. When I pose the question, helpfully suggested in *Priority Freight:* how likely is it that those before me will, in future, operate in compliance with the operator-licensing regime, the answer must be that I cannot satisfy myself on balance that it will be. There have been numerous previous chances, including after the directors conviction for serious offences. The then *Transport Tribunal said in 2011/31 Barry Flowerdew trading as Auto Village Limited* said that a line needs to be drawn at some point. I therefore turn to the question *'is the conduct of the operator such that the operator ought to be put out of business'* as per *2002/217 Bryan Haulage No.2* in my judgement the answer is 'yes'. By reference to Annex 3 of the Statutory Guidance and Statutory Direction Document no. 10 on the Principles of Decision Making, the starting point must be SERIOUS to SEVERE. When I pose the question whether other operators expect me to remove the Operator from the system, I am satisfied on balance they would say "yes". Whilst the proportionality principle requires Traffic Commissioners to make decisions, which are commensurate with the merits of the case the decision must focus on the impact to road safety and fair competition that flow from the factual findings, regardless in which order I pose the questions above.

21. When I consider the question is revocation disproportionate in the circumstances of this case the answer is 'no'. Revocation is not disproportionate where, in the absence of any objective justification and excuse, there have been long term, sustained, repetitive deficiencies: *2009/410 Warnerstone Motors t/a The Green Bus Service.* Accordingly, I have reached the decisions set out in paragraph 1 above.

22. I have reminded myself of the helpful guidance on disqualification from the Upper Tribunal set out, starting at paragraph 54 of Statutory Guidance (No.10) on the Principles of Decision Making:
Disqualification is a potentially significant infringement of rights and the Upper Tribunal has indicated that whilst there is no 'additional feature' required to order disqualification it is not a direction which should be routinely ordered.70 There may be cases in which the seriousness of the operator's conduct is such that a traffic commissioner may properly consider that both revocation and disqualification are necessary for the purposes of enforcing the legislation. The provisions are in general terms, consistent with the concept of deterrence, but assessment of culpability and use of words such as penalty should be avoided. The case law indicates a general principle that at the time the disqualification order is made that the operator cannot be trusted to comply with the regulatory regime and that the objectives of the system, the protection of the public and fairness to other operators, requires that the operator be disqualified.

23. In T/2010/29 David Finch Haulage the then Transport Tribunal said: "*The principles that derive from these and other cases on the point can be simply stated. The imposition of a period of disqualification following revocation is not a step to be taken routinely, but nor is it a step to be shirked if the circumstances render disqualification necessary in pursuit of the objectives of the operator licensing system.* The Operator and both directors have proven themselves as unwilling to put compliance before commercial concerns. Despite copious advice and opportunities to prove themselves, they have instead chosen to be disingenuous, with a reckless approach to risk. This is a lethal combination. It is only right and just that I now remove all concerned from the industry for a substantial period, to protect the hard working legitimate industry and for public protection. Accordingly, I have reached the decision set out in paragraph 2 above.

Miss Sarah Bell
Traffic Commissioner
London & South East England
29 October 2018