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DECISION OF THE TRAFFIC COMMISSIONER FOR THE NORTH WEST OF ENGLAND

In the matter of the
Goods Vehicles (Licensing of Operators) Act 1995 (The Act)

EXECUTIVE CHAUFFEURS MANCHESTER LTD
OC1148148

Public Inquiry held at Golborne
on 31 January 2019.

Decisions:

The Operator:

On findings under Section 26 (1), (b), (c) (iii), (ca), (e), (f) and (h) of the Act.

It is directed there be curtailment of the licence from 7 vehicles to 5 vehicles. This direction will take effect on 11 February 2019 at 23:45hrs. The operator will notify vehicles to be removed by 8 February 2019 at the latest.

The curtailment will extend for a period of close to 7 weeks ending on 31 March 2019 at 23:45hrs. Vehicles removed may not be deployed on any other licence during the curtailment.

A formal warning will also be recorded.

I extend to the operator the opportunity to satisfy me that the current overdraft limit of £12500 has been in place since 31 October 2018 (as it already ought to have done). I allow until 11 February 2019 for this to be achieved.

The former Transport Manager - Karl Seaton

I record the repute of Karl Seaton as seriously tarnished but not lost.

I record a formal and final warning and require him to undertake a complete two-day Transport Manager Refresher of his CPC by 31 May 2019, and to evidence his attendance to me by certificate.

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Background

1. Despite its name, **Executive Chauffeurs Manchester Ltd** (OC1148148) trading as ECM Tippers (hereafter ECM) is the holder of a Standard National Goods Vehicle operator's licence for 7 vehicles and 2 trailers, granted on 17 November 2016. The present directors are Allan Tyson, Jasmine Yates and Christopher Goodier. The current Transport Manager (TM) is James Fitton.
2. An application to increase the licence to 10 vehicles and 2 trailers and to nominate a new operating centre is before me.

Circumstances leading to a Public Inquiry

3. A Public Inquiry before me, which was concluded on 31 January 2019 was triggered by the following events, not the subject of material dispute:-
 - (a) A roadside check by Traffic Examiner (TE) McKay, where a series of break offences by Driver Dickinson were detected;
 - (b) A roadside check by TE McCabe, where it was found Driver Turner was not using, and did not have in possession, his driver card and whereby it transpired the vehicle was in use during a 10 day period when the operator had certified that a SORN was in force;
 - (c) A roadside check by TE Finnigan, where Driver Orpin had made no entries on the analogue chart then in use and was in possession of no prior charts, which he claimed to have "thrown away";
 - (d) The resignation of Karl Seaton on 10 May 2018, (he had been appointed as TM on 11 April 2017), in circumstances where he was critical of a state of affairs where he was "not able to obtain operational control or constructive knowledge of the operation of ECM";
 - (e) A mostly satisfactory TEOR (Traffic Examiner Operator Report) by TE Groom, after her site visit on 30 June 2018;
 - (f) An unsatisfactory outcome to a maintenance investigation by Vehicle Examiner (VE) Ainscow on 18 July 2018.
4. The compliance record of ECM was significantly poor in that the prohibition rate for vehicles was 47% (over 2 years). Seven DVSA contacts with the operator out of 15 leading to at least one prohibition being issued. In fact, since the start of the licence some 29 prohibitable items had been found (17 of them immediate in nature, albeit none was "S" marked).
5. Offence prohibitions (two of them) and a fixed penalty were issued during 2018.
6. The initial and final MOT failure rates for the operator were identical, and extremely poor – 70%, when the national averages are 16% and 10% respectively. It was the case that on two occasions, 22 May 2017 and 23 July 2018, vehicles submitted for MOT had been issued with immediate prohibitions on the test lane.
7. The operator's compliance risk score (OCRS) was Red/Red.

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8. A Directions Hearing on 5 November 2018 had preceded this Public Inquiry. As a result, Karl Seaton (the former TM) and Christopher Goodier (a director) had filed written statements. In his, Karl Seaton had expanded upon his criticisms of his former employers for keeping him “out of the loop” in terms of significantly adverse matters affecting the operator’s licence – that is its prohibitions and MOT failures. Christopher Goodier had replied to those matters, countering any claim that Mr Seaton had been excluded from having full knowledge of the operations.
9. The calling-in letter for the hearing had identified breaches of the condition to notify changes, the issue of prohibitions and fixed penalties, breaches of the statements of intent made upon grant and of undertakings attached to the licence, as well as material change relevant to the continuance of the licence as factors for consideration. Such were the concerns that the operator’s good repute, financial standing and professional competence were brought into question both in relation to the current licence and to any variation to it.
10. The former TM was brought before the Public Inquiry in respect of his good repute and professional competence.

The Public Inquiry

11. So it was that each of the directors (as set out above) and the current TM appeared before me at the Public Inquiry represented by Scott Bell, solicitor. Karl Seaton was also present separately represented by Huw Edwards of counsel. I heard evidence from these persons, except Ms Yates.
12. In a preliminary discussion with the advocates, concessions were made by them for their clients, in an effort to narrow the issues were in dispute. During the course of evidence, however, it became clear that a material dispute did continue to exist.
13. Karl Seaton maintained that until very close to the date of his resignation that he was never told of the prohibitions issued during his period of office, nor the extent or nature of any MOT failures. Both Allan Tyson and Christopher Goodier, to a greater or lesser extent, expressed the opposite view. Mr Tyson said prohibitions were discussed with Mr Seaton, he was supplied with copies and that Mr Seaton had expressed disappointment and concern at their issue. Mr Tyson was however unable to describe to me the nature of the conversation he said he had had with Mr Seaton. The tenor of his evidence was of him “assuming” or “being pretty sure” Mr Seaton would have found out, although this could have been through the maintenance contractor, Lee Whittaker, who was in contact with both of them. Mr Goodier’s evidence was in a similar vein: he did not *know* if Mr Seaton was aware, but he did not believe that in their shared office environment and through contact with the maintenance contractor, that Mr Seaton could have failed to find out. Mr Tyson accepted that he could not produce e.g a corroborative email or note to Mr Seaton and did acknowledge that any prohibition notice issued would have been handed to Lee Whittaker, so that necessary repairs could be effected by him.

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14. I do not set out in narrative form the other evidence, not the subject of material dispute that I heard but instead reflect on it below as part of my findings.

Findings

15. On the balance of probabilities, I find on the disputed matter about the TM's knowledge that it is more likely than not that Mr Seaton was *assumed to know* of the MOT failures and issue of prohibitions, and not that he was *told* of them. Such a finding is consistent with the evidence before me, and my being satisfied that Karl Seaton's role was accepted as being part-time in nature (so far as ECM was concerned) and that Allan Tyson said he had the most direct contact with the drivers, who would have had first knowledge of prohibitions issued. This finding however, whilst it provides an explanation consistent with Mr Seaton's evidence, does not exonerate him as a TM. Whilst he can hardly pursue enquiries about matters he is unaware of, on the same account, I find he has been guilty of a sorry lack of proactivity. Such a skill being integral to the role of TM. In short, he has during a period over 12 months failed to fully address himself to the basic responsibilities of his task to manage effectively and continuously transport operations by questioning, by checking and re-checking and using what sources of information including using IT, that are available to him.
16. This operator through its directors, and I include in that definition Christopher Goodier – albeit as a shadow director (since he did not have the role formally in the period from March 2017 to October 2018, the most relevant period covered by the circumstances at issue). [A shadow director being defined for these purposes as “a person whose directions/instructions the directors are accustomed to act on, even though not formally acting as such”]. The company's directors has failed to scale up internal compliance arrangements adequately upon the change of ECM from being a Restricted Goods Vehicle operator's licence holder to a Standard National Goods Vehicle operator's licence holder in April 2017. As is admitted by it now, a part-time TM 5 hours' per week was inadequate, and following my finding, the failure to engage fully and appropriately with Mr Seaton beyond the narrow responsibilities given for drivers' hours management and booking in vehicles for MOT and PMI, is a culpable failure.
17. The absence of any proper sit-down meeting to take account of his extended responsibilities was naïve in the context of Mr Seaton's increased role.
18. There is also acceptance by the operator that the trust, which continued to be placed in Lee Whittaker, lasted far beyond the point when such trust and confidence in him ought to have been found to be exhausted. In evidence, Allan Tyson told me it was 3 months after Mr Seaton left that a new contractor was engaged.
19. Overall, I find there has been a lethargy about the readiness to bring about change or to react to matters, which ought to have been obvious.

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20. No evidence, which might persuade me that any proper investigation was undertaken into the circumstances of any individual MOT failure or any prohibition, took place.
21. Mr Tyson accepted that he knew what he was doing when, in the absence of its log book (and therefore the capability of renewing the vehicle excise duty) that he let a vehicle that was untaxed go out on the road.
22. Mr Goodier admitted to signing the TM1 for Karl Seaton without reading its contents or taking proper account of the assurance he was giving that the contents was true, to the best of his knowledge and belief
23. Mr Goodier rightly accepted that he had treated the nature of the businesses of Bettamix Concrete Limited and ECM, as if they were the same, with the same risks to compliance, when, even if it had not already been clear at the outset of the licence, it had soon become clear, this was not the case.
24. Where the TM Karl Seaton is concerned, I reiterate the concerns expressed in my finding about the disputed matter. His largely supine acceptance of his new role begs the question whether he can be trusted to act as a TM should. The evidence he offers of his exclusion from a full understanding of what was happening on the licence was of a relatively, long standing nature. I conclude that his description of having “no control whatsoever” is significantly exaggerated, if matters were as described, the position ought to have triggered his resignation. He failed to ask the questions that a proactive TM would have done. These failures go directly to his repute.
25. His wholly naïve denial at the outset of questioning that he had no need of refreshment of his skills as a TM was concerning. His later acknowledgement of being insufficiently questioning or proactive was a positive, as was his belated realisation that there were things to learn from what had happened.

Conclusions

The Operator:

26. As far as ECM is concerned, I take into account of the representations of Mr Bell. There is a basic acceptance of fault in terms of miscommunication with, and the directors' involvement of, Mr Seaton in its operations, albeit not in relation to the critical issues around poor performance reflected in MOT rates and the accumulation of prohibitions. The operator does not shy away from the existence of issues, some of which continue into the new regime involving the new TM, James Fitton. The wheel-nut prohibition in October 2018 appears to point once again to the inadequacy of driver checks and/or to maintenance arrangements. My sampling of inspection records produced disclosed the deployment of KX63 NBL, during a period when, it purported to either be VOR, or when it had been brought back in to service and used for 3 days, even though a fresh preventive maintenance inspection had not been completed.

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27. The positives to be placed into the balance include the appointment of a maintenance contractor with a more professional approach, the positive audit report in November 2018 from DOCS Ltd, the updating of the fleet, the hand held IT based driver defecting system instituted, and the re-briefing of drivers.
28. I take in to account that James Fitton took on the role of TM with full knowledge of what had gone before. He provides confirmation that he is being listened to and his approach to the role largely impressed me. He is appropriately dedicated full time to the position. There has been no previous regulatory action against this operator.
29. Weighing the matters together, including the desperately poor prohibition and MOT history, I have concluded on balance, and by margins that are necessarily narrow, that the operator's repute remains intact. I find compliance is possible, albeit these are early days in the tenure of Mr Fitton.
30. I find that the failures to keep vehicles fit and serviceable over the life of the licence have placed others at an unacceptable road safety risk and that unfair commercial advantage has been achieved by the previous appointment of a TM with part-time responsibility, who was not even paid through the operator company. Prohibitions are much too numerous. MOT failures far too common and change has been much too slow, so far. Whilst there are positives, and traffic systems and procedures are deemed satisfactory, effective management of drivers continues to require close attention.
31. I conclude that "Severe to Serious" regulatory action is justified by "persistent operator licence failures, with inadequate responses....", as set out in Senior Traffic Commissioner Guidance Doc No.10: "Principles of Decision Making and the Concept of Proportionality". This is where this case fits.
32. I am aware that according to the operator, it currently deploys 5 or 6 vehicles, although 7 vehicles are in possession. The business is engaged in movement of aggregates in tipper vehicles. There are 3 vehicles engaged in this work, which is specifically contracted for.
33. I consider that the scale of default here is such that a direction, which will for a period impact upon the business in a material sense, would be both appropriate and proportionate. This might well be a business where expansion has been too quick, as Mr Bell suggests, and therefore one where the operator should be required to retrench, consolidate upon its new systems, before moving forward might again be appropriate.
34. I am therefore directing curtailment of the licence to 5 vehicles. This direction will take effect on 11 February 2019 at 23:45hrs. The operator will notify vehicles to be removed by 8 February 2019 at the latest. Vehicles removed may not be deployed on any other licence during the curtailment. The curtailment will extend for a period of close to 7 weeks ending on 31 March 2019 at 23:45hrs.
35. A formal warning will also be recorded.

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36. I exercise these powers on findings under Section 26 (1), (b), (c) (iii), (ca), (e), (f) and (h) of the Act.
37. I have not reached any conclusion on the question of financial standing but extend to the operator the opportunity to satisfy me that the current overdraft limit of £{REDACTED} has been in place since 31 October 2018 (as it already ought to have done). I allow until 11 February 2019 for this to be achieved.
38. In the light of my findings and directions, I conclude that the variation application to increase the fleet ought to be refused. I make that decision under Section 13C (4) of the Act.

The former TM Karl Seaton:

39. In reaching conclusions about the repute of Karl Seaton as a TM, I have sought to weigh the positives and negatives.
40. The negatives are contained in my findings above and I do not repeat them here. So far as the positives are concerned, not already raised, I take in to account his regulatory history, such as it is, since this is a first Public Inquiry.
41. Currently the nominated TM for EL Parker (OC1138970), albeit alongside another TM, Graham Paul Fox, that Standard National Goods Vehicle operator's licence has a positive record since he took the role in April 2016. A licence for 3 vehicles, the MOT failure rate is however a concern.
42. The record for Bettamix Concrete Ltd (OC1103088), where he was TM from early 2016 until 2018, again alongside another TM, was a positive one although, again, the MOT failure rate exceeds the national average.
43. On balance, despite the failures here, I judge that his repute is not lost but is recorded as seriously tarnished. I record a formal and final warning and require him to undertake a two-day TM Refresher of his CPC by 31 May 2019, and to evidence his attendance to me by certificate.



Simon Evans
Traffic Commissioner
For the North West of England
4 February 2019