



WESTERN TRAFFIC AREA

Decision of the Traffic Commissioner

Public Inquiry in Bristol, 20 August 2018

ABUS LTD: PH1094121

ALAN JAMES PETERS – TRANSPORT MANAGER

DECISION

**PUBLIC PASSENGER VEHICLES ACT 1981
(the “1981 Act”)**

Pursuant to findings under Section 17(3)(aa) of the 1981 Act (condition of vehicles), the operator is issued a formal warning in relation to the maintenance shortcomings identified by DVSA.

Pursuant to a finding under Section 17(1)(e), a material change between the circumstances of the operator between those apparent now and those thought to be in place at time of licence

APPENDIX 1 – FINANCES – NOT TO BE RELEASED OTHER THAN TO THE OPERATOR WITH PERMISSION OF A TRAFFIC COMMISSIONER

BACKGROUND

1. Abus Ltd (“Abus”) is the holder of a standard international PSV operator’s licence authorising the use of twenty-five vehicles. The licence was granted in March 2010. It is a bus operation operating registered services and local authority contracts. Alan Peters is the sole director.
2. The company was the subject of a maintenance investigation conducted in March 2014 which was marked as unsatisfactory. This led to educational and appraisal undertakings being attached to the licence which were satisfied and removed from the licence in June 2015. Undertakings were also given in relation to proper separation between the operations conducted under this licence and those under licence PH0005662 held by Alan Peters as a sole trader.
3. A further maintenance investigation was carried out in May 2018. It identified similar deficiencies with maintenance and driver safety inspections as had been in place in 2014. The Vehicle Examiner was also concerned at the relationship between Abus Ltd and L C Munden & Sons Ltd (“Mundens”). He reported that the two businesses were co-located. The vehicles were owned and maintained by Mundens. The drivers were employed by Mundens. The Vehicle Examiner had been assisted during his visit by Simon Munden, director of Mundens, and Tim Loughlin, Mundens’ general manager (Alan Peters was also in attendance).
4. For all these reasons, I decided to call the operator to public inquiry in the following terms:

under Section 17(1)(a) that the holder of the licence may no longer satisfy the requirements of Section 14ZA(2), namely that the licence holder no longer meets the requirement of:

- Section 14ZA(2)(a) to have an effective and stable establishment in Great Britain (as determined in accordance with Article 5 of the 2009 Regulation),
- Section 14ZA(2)(b) to be of good repute (as determined in accordance with paragraphs 1 to 5 of Schedule 3 of the Act),
- Section 14ZA(2)(c) to be of the appropriate financial standing (as determined in accordance with Article 7 of the 2009 Regulation),
- Section 14ZA(2)(d) to be professionally competent (as determined in accordance with paragraphs 3 to 7 of Schedule 3 of the Act).

under Section 17(3)(aa) of the 1981 Act, of the 1981 Act, that any undertaking recorded in the licence has not been fulfilled, specifically:

- that vehicles would be kept fit and serviceable
- that drivers would report promptly any defects or symptoms of defects that could prevent the safe operation of vehicles and/or trailers, and that any defects would be promptly recorded in writing
- that maintenance records, including driver defect reports, would be kept for fifteen months

under Section 17(3)(c) of the 1981 Act that a prohibition notice under Section 69 of the Road Traffic Act 1988 (power to prohibit driving of unfit or overloaded vehicles) has been imposed on a vehicle owned or operated by the licence holder.

under Section 17(3)(e) of the Act, that there had been a material change in the circumstances of the licence holder

5. Mr Alan Peters was called in his own right to consider his good reputation as transport manager. Due to the concerns over the operating entity, I invited Mundens to attend.

THE PUBLIC INQUIRY

6. Alan Peters attended for the operator represented by Peter Woodhouse, solicitor. Simon Munden and Tim Loughlin attended for Mundens. I was provided with a witness statement and a bundle of documents in advance for which I was grateful.
7. The full evidence is available in the form of the detailed statements provided by the DVSA examiner and the operator's comprehensive submission bundle. Oral evidence is adequately recorded. I record here only that which is directly relevant to my decision. In particular, given the significant and ongoing reduction in fleet size and the evidence and submissions I heard, I found it unnecessary to take any action in relation to maintenance other than issue a formal warning for a lack of attention to detail and incomplete management oversight. I do not repeat or summarise any of the maintenance evidence here other than where it relates to the relationship between Abus and Mundens.
8. Financial standing was considered in private – see Appendix 1.
9. There were a number of people in the public gallery. For their benefit, Mr Woodhouse helpfully summarised the main points of Mr Peters' statement.
10. From this point forward, this decision considers only the issue of the operating entity.

The evidence of Mr Alan Peters

11. Mr Peters told me that he started in 1991 as a sole trader, owner-driver with one vehicle. Safety inspections were conducted at another PSV operator's site, Buglers. The vehicle was parked at Mundens. He had initially hired one driver from Mundens to cover a period of leave. That had grown to the current position.
12. He and Simon Munden had gone to school together and worked closely all their lives. Prior to the grant of this licence, all Mundens' [aka Crown Coaches] vehicles had been on hire to his former sole trader licence. It was easier for him to show financial standing, so the Mundens licence was surrendered and all work contracted through Abus. Mundens had PAYE payroll systems in place and it was easy simply to employ drivers through Mundens and then hire to Abus. Simon is now engineering manager for Abus as part of the wider maintenance and driver contract. Abus paid for driver CPC training.
13. Mr Peters described the arrangement as akin to using Mundens as a driver employment agency. I put it to him that was not the case. With a true agency driver, the operator can terminate an individual's employment at any time. That was not the case here. His action could be frustrated by the need for Mundens to follow a proper disciplinary process. As Abus was Mundens' only customer, Abus refusing the services of a driver would place Mundens in an impossible position. Mr Peters told me that had never arisen.

The evidence of Simon Munden

14. Mr Simon Munden confirmed Mr Peters' evidence. He described a commercial arrangement where Abus paid Mundens a set amount each month. There was then an annual reconciliation based on actual hours worked and maintenance conducted. He added a management fee to the drivers' hourly rate. Abus Ltd owns the vehicles.

Closing submissions

15. Mr Woodhouse summarised the relationship as had been set out by Mr Peters and Mr Munden. He submitted that Section 81(1)(b)(ii) was widely drawn, defining the operator of the vehicle as "*the person for whom the driver works (whether under a contract of employment or any other description of contract personally to do work)*". He referred me to the sample contract in the operator's bundle. There was no requirement in the Act for the driver's contract to be with the operator. It was not specified that the contract should be written. The drivers personally had a contract with Mundens which included doing work for Abus. A traffic commissioner had previously been satisfied. The legislation was not as straightforward as saying the driver had to be employed by the operator. It was Abus who had the benefit of the drivers' labour.

16. The money trail was clear. Abus took the operating profit. Mundens charged Abus a management fee. It was a proper arms-length commercial contract. Abus paid for CPC training. It was accepted that the disciplinary process was not the same as that of an agency.

CONSIDERATION AND FINDINGS OF FACTS

17. The facts do not appear to be contested and I summarise them here:
 1. An arrangement was made at some time around 2009 or 2010 for all the work undertaken by Mundens' vehicles to be transferred to Abus Ltd because it was easier for financial standing to be shown by that entity
 2. This licence was granted in 2010.
 3. Abus owns the vehicles.
 4. Mundens employs all the drivers.
 5. The drivers are full-time employees, on a normal employment contract with Mundens deducting tax and national insurance payments.
 6. Mundens does not supply drivers to any other operator.
 7. Vehicles are maintained by Mundens under a maintenance contract.
 8. The businesses are co-located.
 9. Simon Munden takes a personal responsibility in the maintenance of the fleet, referred to by Mr Peters as his "engineering manager".
18. So who is the operator of the vehicles? Operator is defined at Section 81 of the Public Passenger Vehicles Act 1981. It is useful to consider that Section in full:

81.— Interpretation of references to the operator of a vehicle or service.

(1) For the purposes of this Act—

(a) regulations may make provision as to the person who is to be regarded as the operator of a vehicle which is made available by one holder of a PSV operator's licence to another under a hiring arrangement; and

(b) where regulations under paragraph (a) above do not apply, the operator of a vehicle is—

(i) the driver, if he owns the vehicle; and

(ii) in any other case, the person for whom the driver works (whether under a contract of employment or any other description of contract personally to do work).

19. I agree with Mr Woodhouse that the drafting of s.81(1)(b)(ii) does not require a written contract of employment between the driver and the operator. But what does it require? In answering that, it is necessary to understand the purpose of the Section. First, in defining the operator in circumstances where the driver does not own the vehicle, the draftsman makes no further reference to vehicles, or vehicle maintenance, or any other ownership or compliance characteristic. The focus is purely on the driver. In the case where the driver owns the vehicle and **is** the operator, it is clear that the operator has full control of the driver; they are one and the same. It follows that the purpose of sub-paragraph (ii) is to establish **control** of the driver **by the operator**.
20. Having established that the purpose of the clause is control, I move on to look at the arrangements in place between the three parties, being Abus, Mundens and a driver. The operator bundle is very helpful in this regard and I refer to it now. Page numbers are those in that paginated bundle.
21. At pages 19, 20 and 21 are a number of “All Drivers” notices. They are all issued by Tim Loughlin, General Manager of Mundens. The notice at page 21 refers to the “DVSA Examiner, who visited 3rd May 2018”. The notice is clearly written by someone who is in control of the drivers and who appears to refer to the vehicles as his own (excepting the reference to Abus on page 20).
22. The driver contract is at page 39. It is with Mundens. The sample is dated March 2013. At 2, it identifies the principal duty as *“to drive our buses and those of associated companies & any other vehicle”*. Mundens surrendered its licence in June 2012 so should not have been operating vehicles in March 2013. Drivers are *“responsible for maintaining the cleanliness of company vehicles”*, which appears to refer to Munden vehicles. It goes on “You must also comply with the obligations placed on you as part of the conditions of the company holding an Operators Licence”.
23. Paragraph 5 of the contract deals with hours of work. It states *“You will normally work a minimum of 40 hours per week. You will be required to work at any time, for any duty or service **we operate** or casual work that comes in”* (emphasis added). There is no specific reference to Abus at any point of the contract. There is no suggestion that drivers will be controlled by anyone other than Mundens.
24. Pages 46 to 56 are sample disciplinary letters. A number of points arise:

- The right of appeal is to Alan Peters. It is not clear in what capacity.
 - The example at page 50 deals with a driver who appears to be contracted to Abus and sub-contracted to First West of England Ltd. It appears from this example that Abus want to dispense with the driver altogether but are persuaded by Mundens not to do so. This is a clear example of Abus not having the necessary control as a direct result of the method of employment.
 - The example at page 56 requires the driver “to operate all **our** routes from start to finish as per the registered timetable” (emphasis added). Again, there is reference to the routes being operated by Mundens, not Abus.
 - A number of letters carry a signature block “L C Munden & Sons t/a Crown Coaches, working in partnership with Abus Ltd”.
25. I return to the purpose of s.81 of the 1981 Act. It is to establish control between the operator and the driver. In doing so, it defines the operator as the person who has control over the driver. I find that, whilst Abus has *influence* over the drivers, it is Mundens who have *control*. It follows that the vehicles are operated by Mundens, not Abus. That is a material change from the terms on which the licence was granted, albeit, in practice, I accept that nothing has changed. Section 17(3)(e) is made out.
26. Having found that Mundens is the operator, a finding that Abus has lent licence authority to an illegal operator is a natural outcome and that would normally have serious ramifications for the good repute of the operator and transport manager. Such a mechanistic approach is inappropriate here. I can find nothing to suggest that the current position was arrived at with any ill intent. It simply evolved over time. Both parties were fully open and frank with me. Whilst the full position was not apparent at time of application and has not previously been fully explored at public inquiry or otherwise, there has never been any attempt to hide it. Aside from the maintenance issues which the operator is well on the way to correcting, this is generally a compliant and well-run operation.
27. This is the first time I have come across such a relationship in a PSV operation. It is clear from the operator’s own evidence that the lines at times become blurred between the two businesses. In reality, it runs as a single entity with all parties working together to deliver the service, glued together by the strong personal relationship between Mr Peters and Mr Munden.
28. The disciplinary letters show a business (or businesses) which has a real respect for what it means to operate public services. I make no adverse findings in relation to the good repute of any party.
29. It is necessary to take action to regularise the operation.

DECISIONS

30. Pursuant to findings under Section 17(3)(aa) of the 1981 Act (condition of vehicles), the operator is issued a formal warning in relation to the shortcomings identified by DVSA.
31. Pursuant to a finding under Section 17(1)(e), a material change between the circumstances of the operator between those apparent now and those thought to be in place at time of licence grant, that is, that the applicant would be the vehicle operator, the licence is suspended with effect from 23:59 hrs, 31 January 2019 until such time as the operation is regularised, one way or another.
32. Provided the operator is working positively towards restructuring operations to be fully compliant with the law, the suspension date can be varied or the order set aside if restructuring is completed before that date. Alternatively, should the operator wish to appeal this decision, given the generally compliant operation and the unique circumstances, a stay will be granted.
33. This decision should have no adverse impact on the operator's ability to bid for or continue to carry out any contracts.
34. No adverse finding is made in relation to Alan Peters as transport manager.
35. My decision on financial standing is adjourned until 31 March 2019.



Kevin Rooney
Traffic Commissioner for the West of England
7 September 2018

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REDACTED

KR
TC
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