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## IN THE NORTH WEST OF ENGLAND TRAFFIC AREA



**CEG PACKAGING LIMITED – OC2016007**

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### **DECISION OF THE DEPUTY TRAFFIC COMMISSIONER**

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**Decision: –**

**The application for a restricted Goods Vehicle Operator's Licence is refused under section 13(B) of the Goods Vehicles (Licensing of Operators) Act 1995 ("the Act")**

#### **Background**

1. This application sought a restricted goods vehicle operator's licence to authorise the use of 2 vehicles and 0 trailers.
2. CEG Packaging Limited ("the Applicant") is a limited company, of which Mr Colin Graham is a joint director with his wife, Mrs. Lynn Graham. Mr Graham ("the Director") is Managing Director of the Applicant.
3. The application has been called into Public Inquiry ("P I") by letter dated 8 October 2018 due to concerns as to whether the Company is not unfit to hold a licence as a result of relevant activities or convictions (section 13(B) of the Act) and whether it has sufficient financial resources to ensure that its vehicles can be maintained in a fit and serviceable condition (section 13(D) of the Act).

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4. Concerns had arisen as a result of the history of compliance with licence conditions relating to a licence held by Grahams Cartons Ltd, of which the Director was the managing Director and which company was effectively taken over by this Applicant following its entering into administration. Those concerns arose from: an appearance at P.I. in 2008, a strong warning issued after an unsatisfactory VOSA inspection in 2013; correspondence regarding an undertaking to file annual audit reports including an interview at the Office of the Traffic Commissioner (“the OTC”) to discuss the implementation of recommendations from audit reports in December 2017; the failure to notify the Traffic Commissioner that Grahams Cartons Ltd had entered administration; the revocation of the licence held by Grahams Cartons Ltd and the ‘transition’ from Grahams Cartons Ltd to the Applicant during which it appeared that there had been unlicensed operation of vehicles.
5. The hearing bundle contained details of a previous PI in 2008 and correspondence between the OTC and the Applicant between 2014 and 2018. The P.I. in 2008 led to the revocation of a previous licence granted to the Director as a sole trader and the granting of a new licence to the forerunner of the Applicant, Grahams Cartons Limited (“the previous company”). It is apparent from the letter recording the outcome of the P.I. that the Director had failed to apply for a new licence when he changed the entity of his business from that of sole trader to that of limited company four years earlier. Therefore, the previous company of which the Director was the Managing Director operated vehicles without a licence for four years.
6. The correspondence arose as a result of an unsatisfactory maintenance investigation undertaken by VOSA in December 2013 which on 5 February 2014 led to the issue of a strong warning and an additional undertaking added to the previous company’s licence for a third party audit of maintenance systems on an annual basis.
7. During the course of correspondence chasing up the audit report for 2018, the auditor revealed to the OTC that the previous company had gone into administration and that its business had been “taken over” by the Applicant. The administration had not been notified to the OTC and the Applicant had continued to use the vehicles authorised to be used on the licence of the previous company after the date it entered administration. It also came to light via a reference in the report of the Administrator of the previous company that it was convicted in October 2018 of an offence under the Health and Safety at Work Act 1974 (“the HSWA”) following an incident at the premises of the previous company, now the Applicant’s premises, in which an employee suffered a serious injury after trapping his hand in machinery. The discovery of the administration of the previous company led to the revocation of its licence on 8 August 2018.

## **The Hearing**

8. The Public Inquiry took place at 10 am on 23<sup>rd</sup> November 2018 in the tribunal room of the Office of the Traffic Commissioner in Golborne. The Director appeared and was represented by Mr Paul Loughlin of Stephenson’s Solicitors LLP. The Director was accompanied by Ms. Claire Richardson, an employee of the Applicant.

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9. Further documents were handed in by the Director just prior to or at the hearing consisting of: vehicle maintenance contract dated 1 August 2018; driver defect report books for vehicle YJ16 NCW for 2018 together with MOT result for the same vehicle dated 25 June 2018 and safety inspection forms for the vehicle dated 11 June and 3 September 2018; certificates of attendance dated 20 and 21 November 2018 on a one day Transport Manager refresher course for Ms Richardson and the Director provided by Tachograph Analysis Consultants Limited ("TACL"); a contract between the Applicant and TACL for the provision of compliance services relating to "analysis of tachograph information and support services" dated 22 November 2018; letter from TACL dated 22 November 2018; photocopies of wallcharts supplied by Tachodisc which appeared to be aide memoires on drivers hours and driver defect checks.

## Evidence

10. I was in possession of a bundle which contained the outcome of the P.I. in 2008, the correspondence between the OTC and the previous company between 2014 and 2018 and the correspondence relating to the current application. I also had the documents listed at paragraph 9 above, written submissions with appendices from Mr Loughlin sent in by e mail during the day before the hearing, and two audit reports, one produced by Mr Loughlin during the hearing dated May 2017 and one produced by the OTC clerk to the hearing dated 11 June 2015, both audit reports produced following my enquiry during the hearing.
11. In response to questions from his solicitor and from me, the Director gave evidence that covered the following areas: his history in the transport industry; his regulatory history; the difficulties leading to the administration of the previous company; the incident leading to the prosecution by the Health and Safety Executive ("HSE"); changes implemented as a result of HSE involvement; the history of correspondence regarding audit reports; changes made as a result of audit reports; the period of transition between the previous company and the Applicant; structure of the Applicant and likely future licence compliance. The Director attributed the administration of the previous company partly to tough trading conditions, but mainly to a computer "glitch" that had led to the {REDACTED}. When asked if the previous company would have been financially viable without the debt accrued to HMRC, he said it would have "but very little". The Director conceded that there had been a history of failure to correspond with the OTC because he was "not good at administration" and attributed the regulatory history to this. With regard to the incident involving HSE, the Director called this a "freak accident" caused by an employee inexplicably climbing onto machinery. He accepted that the previous company had pleaded guilty to an offence under the HSWA which amounted to accepting that there were insufficient safety measures in place as far as equipment in the Applicant's premises was concerned, though he suggested that the guilty plea was on legal advice, and that safety was adequate. With regard to the audit reports, the Director displayed minimal knowledge of their contents, stating that he had instructed TACL to prepare and submit them. There was a dispute over the payment of the bill to TACL for the cost of the audit done in May 2018, but that dispute had since been resolved and a contract had been agreed with TACL to provide ongoing audits. The Director was unaware that the 2018 audit had not been submitted to the OTC.

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12. The Director said that the Applicant was in a good position financially, though currently incurring additional costs due to having to sub-contact the transport work. I questioned him regarding the mileage shown on the inspection reports suggesting that the main vehicle, registration no. YJ16 NCW, had been used well beyond the date of the administration of the company. He said that the Applicant stopped using the vehicle as soon as he became aware of the revocation of the licence on 7 August 2018. When I challenged this on the basis of the large amount of kilometres accrued between the date of the last Driver defect report which records the odometer reading as 91161 on 20 July 2018 and the odometer reading recorded on the inspection report on 3 September 2018 for the vehicle recorded as arriving on 31 August 2018 as 97761, the Director was adamant that usage of the vehicle stopped as soon as he became aware of the revocation of the licence, despite having said that the vehicle was used only for short distance local deliveries. OTC records show a telephone conversation on 19 July 2018 between an OTC caseworker and Mr Kirkwood from TACL acting on behalf of the Applicant in which Mr Kirkwood advised of the liquidation of the previous company and the caseworker told Mr Kirkwood of the need to notify the Applicant that the licence granted to the previous company was no longer valid.
13. The Director spoke of “vast improvements” made recently. When asked for an example, he described the implementation of HSE recommendations regarding separation of staff private car parking from commercial vehicles. When questioned about improvements made as a result of audit reports, he referred to a decision to have roller brake testing at each inspection and the improved use of driver defect report books.
14. Ms Claire Richardson gave evidence. She said she had recently joined the Applicant and her role includes coordinating health and safety measures and operator licence compliance. She said that she could see why systems had become “lax” but was confident that she could put in place systems to improve compliance. She said that she had learnt a lot from the course attended this week, and listed as part of her role carrying out checks on drivers’ hours, vehicle defect rectifications, 10 weekly inspections and driver licence details.
15. The Director spoke of an improved position for future compliance: instead of one person being responsible, in future there would be a number, principally himself and Ms Richardson, whereas Mr Jones, who had been responsible in the past, was “stretched”. The Director spoke of improvements in a number of aspects of operation: with regard to drivers’ hours, there was now an agreement to download tachographs weekly for analysis by TACL; previous failings with regard to brake testing and driver defect reports had been rectified; a revision to the SAGE computer programme would prevent reoccurrence of VAT underpayment; HSE recommendations on safety had been followed at considerable cost.

## Submissions

16. On behalf of the Applicant, Mr Loughlin made the following submissions:
  - Although two issues relevant to fitness had arisen close together and the “headlines” of the case suggested that the Applicant is not fit to hold a licence, the Director has done all he can to demonstrate likely future compliance.

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- No competitive advantage has been gained by underpayment of VAT in view of the period of five years over which the underpayments had accumulated.
- Compliance with undertakings regarding vehicle maintenance could be reinforced by additional undertakings for annual audits and a random audit of one driver per month.
- There is now a clear structure within the Applicant to ensure that undertakings are complied with, particularly with the addition of Ms Richardson and her designation as compliance coordinator.
- Failings, though accepted, are historical.
- The HSE prosecution arose from a “freak issue” but time spent and investment made would prevent reoccurrence.
- Overall, a reduction in concerns demonstrates fitness to hold a licence going forward.

## Findings

17. All findings are on the balance of probabilities:
18. Sufficient availability of finances has been demonstrated. There is no evidence of personal wrongdoing or a deliberate attempt to gain a commercial advantage by knowingly underpaying VAT on the part of the Director in the circumstances leading to the administration of the previous company.
19. The failures of the Applicant and the previous company to comply with undertakings (namely twice operating without a licence, firstly between 2004-2008 following a change of entity, and secondly, following the administration of the previous company in June 2018; failing to file audits on time, and in the case of the 2018 audit, at all; failing to notify changes, namely change of entity in 2004 and the appointment of an administrator for the previous company) are relevant to likelihood of future compliance, as are steps taken to guard against reoccurrence.
20. In addition to operating without a licence following the previous company entering administration on 28 June and in the period up to the revocation of the previous company’s licence on 8 August, 2018, there must have been a further period following specific advice from the OTC on 19 July 2018 that a new licence would be required during which at least one vehicle was driven without a licence due to the driving distances recorded. This is also relevant to the likelihood of future compliance.
21. The conviction of the previous company under HSWA in October 2018 is relevant to fitness of the Applicant to hold a licence in so far as it demonstrates the approach of the Director to regulatory compliance in general and to safety issues in particular.

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## Decision

### *Legal framework*

22. The burden is on the Applicant to satisfy me that the statutory requirements under section 13 of the Act are met.
23. The Upper Tribunal has highlighted the difference in the legal framework applicable between consideration of an application to grant a licence and regulatory action against an existing licence. It has stated: "At the application stage, the "gatekeeper function" is of importance." (Shearer Transport Ltd & James Shearer 2013/046)
24. My decision is to refuse the application for a restricted licence under section 13 (B) of the Act because I am not satisfied that the Applicant is not unfit to hold a licence.

## Reasons

25. The Director of the Applicant has a history of failing to comply with undertakings as set out above and, although I recognise the steps taken to improve the likelihood of future compliance, I am not confident that the Applicant can be trusted to act compliantly in future because the Director has shown insufficient understanding of the need to take personal responsibility for compliance.
26. This lack of understanding is demonstrated by the following:
  - Despite a strong warning that led to the additional undertaking for annual audits, the Director could not remember what had led to this.
  - There were subsequent delays in filing audits in 2015 and in filing proposals to address recommendations in 2016 and the audit for 2018 was not filed at all.
  - Despite attending a meeting with the Senior Team Leader at the OTC in December 2017 to discuss shortcomings revealed by the audits of 2016 and 2017, the Director was unable to recall what had been discussed.
  - The Director was unaware that the audit of 2018 had not been filed. He appeared to minimise his responsibility for this by saying that he employed TACL to carry out and file the audits and that perhaps Mr Kirkwood of TACL was "not as good as he thought he was".
  - Despite saying that the findings of each audit were discussed with him by means of a visit to him by Mr Kirkwood, and despite the audits being in place for the last five years, the Director displayed limited knowledge of the history of the audits' findings and actions taken, apart from recent decisions to improve brake testing and driver defect reports.
  - When I asked the Director if he had responded to the main recommendation of the 2016 audit, (which was that Mr Jones, who was described as "the Transport Manager (whilst acknowledging that no formal Transport Manager was required for a

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restricted licence) “ requires support in the area of transport. If this is not forthcoming, the focus on transport will be diluted.”), his reply was “no, is the answer, I think”, though he explained that Mr Jones had said he did not need help, acknowledging that, with hindsight, he should have pursued this further.

- The findings of the 2017 audit demonstrate a lack of proactivity around addressing audit recommendations by its conclusion “ This audit has, at best, only maintained the compliance level of May 2016. In some areas compliance levels are without improvement, despite the provision of suggestions/recommendations for improvement in the May 2016 audit.” This, together with the failure to notify the OTC of the administration of the previous company, or of the conviction recorded against it, demonstrates that the Director’s attitude towards compliance has changed little since the Public Inquiry of 2008 when the decision letter records: “The operator appeared to have only the vaguest of acquaintance with the undertakings given when he applied for the licence and took no steps to inform the Traffic Area Office of the situation”.

27. I have taken account of the submission on the Applicant’s behalf that there is evidence of improved commitment to compliance going forward. I acknowledge the steps taken in the appointment of Ms Richardson, the addressing of HSE recommendations, the engagement of the services of TACL and the training courses attended by the Director and Ms Richardson. However, I also note the reactive, rather than proactive nature of the Director’s responses to safety concerns, both in transport and equipment. Though there has been a number of actions, they illustrate a reactive approach – the installation of additional safety equipment as a result of the prosecution by HSE, measures taken as a result of the calling in to P.I.: the signing of a contract with TACL the day before the PI, the attendance on training courses by the Director and Ms Richardson in the two days leading up to the P.I (despite the apparent attendance in a similar course by eh Director in 2017).

28. Overall, the Director has still not taken on board that as managing director, he must take responsibility for compliance with undertakings on a licence and this responsibility cannot be delegated. That means that, as well as engaging the services of others, he needs to understand the measures employed by the Applicant for ensuring licence compliance and for taking actions to address any shortcomings on a continuing basis and to take a proactive approach to licence compliance.

29. Since I am not satisfied that the Director has yet fully accepted this responsibility, I am not satisfied that the Applicant is not unfit to hold a licence and therefore the application is refused under section 13(B) of the Act.



**Jayne Salt**  
*Deputy Traffic Commissioner  
For the North West of England  
7 December 2018*