IN THE SOUTH EASTERN & METROPOLITAN TRAFFIC AREA

TRAFFIC COMMISSIONER DECISION

C G R (CG ROSCULETE) LIMITED

LICENCE NUMBER OK1106316

GOODS VEHICLES (LICENSING OF OPERATORS) ACT 1995

Decision

1. Pursuant to adverse findings under Section 26(1) (b), (c)(iii)), (ca), (f) and (h) of the Goods Vehicles (Licensing of Operators) Act 1995, CGR (CG Rosculete) Limited no longer meets the requirement of fitness as required by Section 13B of the 1995 Act. Accordingly, I revoke Licence OK1106316 with effect from 23:45hrs on 21 February 2019.

2. CGR (CG Rosculete) Limited, Mr Cosmin Gabriel Rosculete (Director) and Ms Manuela Orlando (Director) are disqualified from holding or obtaining an Operator's Licence or being involved in an entity that holds or obtains such a Licence in Great Britain for 2 years as provided for by Section 28 of the 1995. The disqualification shall take effect from 23:45hrs on 21 February 2019.

Background

3. The Case Summary sets out the history since 2014. In brief, the Operator attended at a Public Inquiry in February 2015 and received a warning. A further warning was issued in October 2015 after another DVSA investigation. In May/June 2018, DVSA conducted a follow up Maintenance Investigation, the outcome of which was marked "unsatisfactory". Accordingly, I called the Operator to a further Public Inquiry.

The Hearing

4. The Public Inquiry commenced and concluded on 5 December 2018 in the Tribunal Room, Office of the Traffic Commissioner, Ivy House, 3 Ivy Terrace, Eastbourne BN21 4QT. The Operator was represented by one of its Directors, Mr Gabriel Rosculete and Mr Philip Brown, Solicitor. I heard oral evidence from Vehicle Examiner Mr Jim Rohan and Mr Rosculete. At the conclusion of the hearing, I confirmed a written Decision would issue within 28 working days.

Issues

5. The Operator accepts the findings of the DVSA investigation. Accordingly, I have made the appropriate findings under Section 26 of the 1995 Act above. It falls for me to consider the DVSA and Operator evidence on steps taken since the investigation and what, if any, regulatory action to take.

Documents and Evidence

6. Before writing this written decision, I have considered the following.

   (i) Public Inquiry bundle papers.

   (ii) Operator's written representations and bundle of documents.

   (iii) The Compliance Audit provided by the Operator prior to the hearing.

   (iv) Documents copied during the course of the hearing.

   (v) *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.

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

   (vii) The Senior Traffic Commissioner's Statutory Guidance and Statutory Directions issued January 2016 and 2017 (2017 version as the 2018 version was issued just before this hearing).

CONSIDERATION AND FINDINGS

7. It is important to set out my approach from the start. I do not propose to set out all the evidence, as it is a matter of record from the documents and the available transcript. I do refer to material evidence below where relevant to my findings and conclusions. Each director of a company has a shared responsibility for its management. Generally, directors are joint and severally liable for a breach of this collective responsibility. There are circumstances in which the consequences for each director may not necessarily be the same. However, in this case, Mr Rosculette confirmed that his co-director is also involved in managing the transport operations, save for a recent period of ill health.

8. From the outset the evidence makes woeful reading. There have been unsatisfactory outcomes to a Traffic Examiner investigation in 2014 and Maintenance Investigations in 2015 and 2018. The issues in July 2015 remained in May/June 2018. The Vehicle Examiner summarised the situation in June 2018 as follows:

   - Delayed 'S' Marked roadworthiness prohibition issued on 27/03/2018 to vehicle SN57DGU (non steered tyre below legal limit, tyre with body cords exposed on sidewall & malfunction indicator lamp indicating a fault).
   - Delayed roadworthiness prohibition issued on 23/01/2018 to vehicle HX56MYU (non steered tyre below legal limit on axle 3 nearside inner).).
   - Annual Test Initial pass rate since the last fleet check on 31/07/2015 is 70% (3 of 10), against the national average of 83% for the same period.
   - Vehicle YJ56LFE inspected at this Fleet check and issued with Delayed roadworthiness prohibition for defect driver's seat belt.
   - Road wheel re-torque register not available for inspection.
   - Safety inspection sheets with no rectification work being recorded (8 of 10 sheets viewed). No action recorded reference defects found during inspection.
   - No evidence of measured brake test recorded on safety inspection sheets.
   - Vehicle HX56MYU had a safety inspection on 7th February 2018, this being the day the vehicle was presented for PG9 clearance, and was refused PG9 clearance for the same

tyre defect. The safety inspection sheet has recorded in defects found section "Various tyres U/S".

- Mileages not recorded on some PMI sheets (10 of 20 sheets viewed).

9. The Operator sent DVSA a number of assurances (page 36-37 of the PI bundle) in reply to the PG13F. Regrettably, a number of the above issues remained a feature at the hearing on 5 December 2018. On that date, I noted:-

    - The Operator did not mention actual or potential 'in-house' maintenance to the Vehicle Examiner via Mr Farrar in May/June 2018. The reply states that the change only happened after the DVSA investigation. Paragraph 5.7 of the external audit confirms the change happened in May 2018.

    - The Operator says that a DAF main dealer will do full PMIs with roller brake tests every 12 weeks as a standards check on the in-house fitters. This did not happen.

    - The roller brake testing started circa November 2018 but is random and not linked at all to Preventative Maintenance Inspections ("PMI's").

    - The Operator did not notify the change in maintenance arrangements even after the Call-In Letter dated 31 October 2018. It decided to leave notification of that material change until 5 December 2018, despite the Auditor's advice.

    - The Operator stated the 'in house' mechanic would supervise daily walk round checks, ensure defects were properly recorded and rectified. The driver defect reporting system remains deficient – the drivers do not pick up some reportable items or if they are picked up, the vehicles are put into service anyway with no record of rectification. This is also evidenced by the PMIs and Prohibition on 4 July 2018.

    - No-one in the business is accepting responsibility for prohibitions. The PG13 response includes: '*I will personally be monitoring any roadside encounters and in the unlikely event of further prohibitions will carry out an immediate investigation'.* Mr Rosculete did not investigate the PG9I and PG9D issued by this Vehicle Examiner to HX56MYU on 4 July 2018 (page 47 – 50 of the PI bundle).

    - A Mr Singh had been engaged as an external consultant to assist. This arrangement did not continue but no alternative was put in place.

    It follows previous assurances have not followed through even after the events in 2015. There is limited or no discernible improvement in driver defect reporting or PMIs.

10. The Guide to Maintaining Roadworthiness 2018 gives a clear statement of expectation on maintenance facilities:

    Facilities should include:

    • undercover accommodation for the largest vehicle in the fleet. This is required to ensure that safety checks can be conducted satisfactorily in all weathers (depending on fleet size the building may need room for more than one vehicle at a time)
    • tools and equipment appropriate to the size and nature of the fleet
    • an adequate under-vehicle inspection facility
    • adequate lighting
    • access to brake test equipment (eg a roller brake tester, decelerometer)
    • access to headlamp test equipment
    • access to emissions testing equipment
    • access to steam or pressure under-vehicle washing facilities
    • a safe working environment.

11. The Vehicle Examiner was not told about the facilities. At paragraph 5.9 of the audit, the auditor confirms that he was unable to inspect the van and tools but the undercover facilities are inadequate. In light of my factual findings in paragraph 9 above, the Operator's assurances on the tools suitability and availability do not assist me.

12. The biggest concern for me is the Operator's complete failure to properly monitor and control its systems. It was at a Public Inquiry in 2015 for an adverse Traffic Examiner report. Later the same year, it received a warning on maintenance matters, which included the paragraph (page 70 of the PI bundle): '*…should further reports of an adverse nature be received this matter will be taken into account when considering whether action should be taken against your operator's Licence.'* Instead of heeding that warning, the Operator has demonstrated an extraordinary lack of judgement. It seems incapable of objective assessment when it comes to road safety and fair competition. By way of example:-

    a. Mr Rosculete blames the contractor for the issues on 7 February 2018 but all the paperwork points to own staff as being culpable. The Operator's driver took the vehicle to MOT when it failed. The PMI sheet shows that the Operator was to do the repair.

    b. Now the PMIs are in-house, Prohibitions are issued.

    c. The Operator held drivers responsible for the most recent Prohibitions but there is no evidence of this.

    d. The Operator arranged for an audit, but then did not make the PMI documentation available.

13. The Vehicle Examiner suggests that the underlying problem remains that there is no responsible person exercising quality monitoring and control of the transport operations. I agree and there is no good reason for this. It follows that the few positives are given limited weight. I note there is now a re-torque policy as 2 MOT passes since the investigation. This is a very successful business in monetary terms but this success is at a cost to safety. The reality is, the Operator did look at changing the maintenance arrangements, but changes must be the subject of quality monitoring and control. Change for change sake is dangerous otherwise. I am on notice that the Operator was doing some of the repairs even with the previous contractor, questioning the benefit of a change to 'in house' at all. Toolbox talks were given regarding the walk round checks. Mr Rosculete says training was provided by an external trainer but there was no evidence at the hearing. The training documents in the Operator's PI bundle show Mr Rosculete as the trainer. Mr Rosculete has signed off the most recent PMIs even though he has no expertise.

14. In *2014/59 Randolph Transport Ltd & Catherine Tottenham* at paragraph 12 the Upper Tribunal said: "*Although repute must be considered as at the date of the decision, that does not mean that the past becomes irrelevant. In many cases, the present is simply the culmination of past events".* As at the date of this Decision, the evidence clearly demonstrates dysfunctional and systems which are not working. A system that does not work is no system at all. This is unconscionable for an Operator the subject of previous warnings. I remind myself that a persistent failure to comply with undertakings, especially following a warning, may provide *compelling* reasons to conclude that there has been a loss of repute/fitness, as per *2011/036 LWB Limited.*

15. The Operator holds a restricted licence. In 2013/007 Redsky Wholesalers Ltd the Upper Tribunal stated that '*In the absence of argument…we draw back from holding that the "Priority Freight" approach is a requirement when considering the question of fitness…*BUT *is very likely to be relevant to fitness in most cases. We do not think that fitness is a significantly lower hurdle than the requirement to be of good repute'.* In light of the Operator's evidence of the importance of transport to its business, I do pose the question helpfully suggested by the then Transport Tribunal in *2009 Priority Freight*, 'can I trust this Operator moving forward?'.

16. On the evidence before me that question is answered in the negative. The Upper Tribunal stated in *2012/34 Martin Joseph Formby t/a G & G Transport* (at paragraph 17) "*Traffic Commissioners must be able to trust those to whom they grant operator's licences to operate in compliance with the regulatory regime. The public and other operators must also be able to trust operators to comply with the regulatory regime*". This Operator has failed to heed warnings from Traffic Commissioners and DVSA. The proposed steps to ensure compliance moving forward given on 5 December 2018, should already have been put in place after July 2015 and certainly after 19 June 2018. Previous assurances have proven unreliable. Mr Rosculete admitted that he had focused too much on his operational role, even during his co-director's ill health. Taking the evidence as whole, I am drawn to the conclusion that Mr Rosculete has a pedestrian and closed mind approach to compliance, a dangerous mix. In my judgement, the Operator is not fit to hold a Licence in its most common sense meaning.

17. I am required to consider the question of whether revocation is disproportionate in the circumstances of this case. In my judgement the answer is 'no'. Revocation of this Licence is essential to protect road safety and its more safety conscious competitors. In 2012/025 First Class Freight the Upper Tribunal stated that *"Traffic Commissioner's play a central role in the enforcement of the regulatory regime for both types of vehicle. That regime is intended to ensure, amongst other things, that heavy goods and public service vehicles are properly maintained and safely operated by operators who comply with the operator's licensing system and compete fairly with other hauliers (*my emphasis). The circumstances of this case require a robust response to such a blatant disregard for the operator licensing regime and to maintain confidence in it.

18. Accordingly, I have reached the decision set out in paragraph 1 above.

Disqualification

19. I have reminded myself of the helpful guidance on disqualification from the Upper Tribunal set out starting at paragraph 54 of the Statutory Guidance and Statutory Direction Document no. 10 on the Principles of Decision Making (2017 version as 2018 was only issued the same week as the hearing):

> *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. 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.*

20. In *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. Although no additional feature is required over and above the grounds leading up to revocation, an operator is entitled to know why the circumstances of the case are such as to make a period of disqualification necessary*".

21. In my judgement, the circumstances of this case warrant an imposed exclusion from the benefits of commercial vehicle transport for a period. This Operator has posed a significant risk to road safety and gained an unfair competitive advantage for a long period and this disqualification will go some way to redress the balance for its competitors. Further, it is a message to the industry as a whole that there will be no advantage in the end to disregarding the regime. The message is that only lawful operation pays dividends.

22. Accordingly, I have reached the decision set out in paragraph 2 above.

Miss Sarah Bell
Traffic Commissioner
London & South East England
7 January 2019