



TRAFFIC COMMISSIONER FOR THE NORTH EAST OF ENGLAND

**PUBLIC INQUIRY HEARINGS
BEFORE DEPUTY TRAFFIC COMMISSIONER
FIONA A HARRINGTON
LEEDS, 21 NOVEMBER 2019**

**KEITH JAMES BISHTON T/A DD VEHICLE SERVICES (“the First Operator” or “Mr
Bishton”)
OB0229171**

-and-

**GARY ALBERT HARBY T/A WIZARD TRANSPORT (“the Second Operator” or “Mr
Harby”)
OB2023329**

-and-

KEITH JAMES BISHTON (“the Transport Manager” or “Mr Bishton”)

**The Goods Vehicles (Licensing of Operators) Act 1995 (as amended) (“the Act”)
Regulation (EC) 1071/2009 (“the EU Regulation”)**

DECISIONS

In relation to the First Operator

1. Having determined from my findings on the evidence before me that (i) the following grounds entitling me to exercise my discretion to make a direction under Section 26(1) of the Act are made out, and (ii) the following grounds under section 27(1)(a) and section 27(1)(b) of the Act are made out, and (iii) on balance, it is appropriate and proportionate to so order, the First Operator's Licence is **REVOKED** with effect from 23.59 hours on 28 February 2020:

Grounds

Section 26(1)(c)(i) There has been a relevant conviction of the licence holder (on 24 July 2019 for an offence committed under the Act on 16 October 2018);

Section 26(1)(c)(iii) That during the five years ending with the date on which this direction is given there have been prohibitions under section 68 or 70 of the Road Traffic Act 1988 (power to prohibit driving of unfit or overloaded vehicles) of the driving of a vehicle of which the licence holder was the owner when the prohibition was imposed (Immediate PG9 issued on 8 April 2015);

Section 26(1)(f): That undertakings recorded in the licence have not been fulfilled to have proper arrangements in place to ensure:

- the laws concerning the driving and operation of vehicles used under this licence are observed (failing to appropriately check /use of a driver not holding a valid Drivers' Certificate of Professional Competence);

- the rules on drivers' hours and tachographs are observed, proper records are kept and that these are made available on request;

- records are kept (for 15 months) of all driver reports which record defects, all safety inspections, routine maintenance and repairs to vehicles, and that these are made available on request;

Section 26(1)(h):

That since the licence was issued there have been material changes in the circumstances of the licence holder that were relevant to the issue of the licence, namely:

- the foregoing;
- the findings under section 27(1)(a) and 27(1)(b) below;

Section 27(1) (a)

It appears to me that the licence holder no longer satisfies the requirements:

- To be of good repute (as determined in accordance with paragraphs 1 to 5 of Schedule 3);
- To be professionally competent (as determined in accordance with paragraphs 8 to 13 of Schedule 3);

Section 27(1)(b)

It appears to me that the Transport Manager of the licence holder designated in accordance with Article 4 of the EC Regulation no longer satisfies the requirements of Section 13A (3) of the Act (to be of good repute (as determined in accordance with

paragraphs 8 to 13 of Schedule 3)).

In relation to the Second Operator

2. Having determined from my findings on the evidence before me that (i) the following grounds entitling me to exercise my discretion to make a direction under Section 26(1) of the Act are made out, and (ii) the following grounds under section 27(1)(a) of the Act are made out, and (iii) that, on balance, it is appropriate and proportionate to so order, the Operator's Licence is **REVOKED** with effect from 23.59 hours on 28 February 2020:

Grounds

Section 26(1)(c)(i) There has been a relevant conviction of the licence holder (on 14 May 2019 for an offence committed under the Act on 16 October 2018);

Section 26(1)(c)(iii): That during the five years ending with the date on which this direction is given there have been prohibitions under section 68 or 70 of the Road Traffic Act 1988 (power to prohibit driving of unfit or overloaded vehicles) of the driving of a vehicle of which the licence holder was the owner when the prohibition was imposed (Delayed PG9 issued on 16 October 2018);

Section 26(1)(h): That since the licence was issued there have been material changes in the circumstances of the licence holder that were relevant to the issue of the licence, namely:

-the foregoing;

-the licence holder's failure to notify his conviction prior

to his operator's licence being granted (as undertaken on application) and thereafter as required by his licence;

-the licence holder's failure to notify a change in his financial standing and to demonstrate appropriate financial standing for a Standard National Goods Vehicle operator's licence authorising the operation of up to 1 vehicle;

-the findings under section 27(1)(a) below;

Section 27(1)(a)

It appears to me that the licence holder no longer satisfies the requirements:

- To be of good repute (as determined in accordance with paragraphs 1 to 5 of Schedule 3);
- To have appropriate financial standing (as determined in accordance with Article 7 of the EC Regulation).

In relation to the Transport Manager

3. I determine that the Transport Manager Keith James Bishton is no longer of the appropriate good repute (as determined in accordance with paragraphs 8 to 13 of Schedule 3 of the Act) and is unfit to manage the transport activities of an operator as a transport manager. The Transport Manager is disqualified from acting as a transport manager for an indefinite period pursuant to paragraph 16(2) of Schedule 3 of the Act. Whereas the disqualification of the Transport Manager from acting as a transport manager is imposed for an indefinite period, it remains open for him to apply to the Traffic Commissioner for an order to cancel or vary the order of disqualification made at any time **after** he has

completed the following measure specified under paragraph 17 (2) of Schedule 3 to the Act:

The Transport Manager shall retake and pass all heads of examination for the transport manager's Certificate of Professional Competence in goods transport.

On application, the Transport Manager will need to satisfy the Traffic Commissioner at that time that he has regained his good repute to act as a transport manager.

Section 28 of the Act

4. No orders have been made by me against either operator under section 28 of the Act. I have allowed a short period of continued operation in relation to each licence to enable an orderly rundown or transfer of the business, presently carried on as a sole trader in each case, using the respective licences.
5. In the event that either of Mr Bishton or Mr Harby, or any entity linked to them, seeks to obtain an operator's licence then that application shall be referred to the Traffic Commissioner for consideration. The Traffic Commissioner will need to be satisfied by way of reliable and credible evidence at that time, amongst the other matters relevant on application, including available finance, that the applicant as the case may be is of good repute (standard licence) or is not unfit to hold the licence in question (restricted licence) having regard to their involvement and the matters considered in this decision.

REASONS FOR DECISIONS

BACKGROUND

6. The First Operator currently holds a Standard National Goods Vehicle operator's licence authorising the use of 7 vehicles and 4 trailers issued by the Traffic Commissioner for the North East of England with effect from 19 May 2000. Operator licensing records specified 2 vehicles to be in the possession of

this operator at the time the bundle relating to the First Operator was prepared by the Office of the Traffic Commissioner (“OTC”) for this Inquiry. (An Inquiry bundle is generally referred to in this decision as a “Brief”).

7. Licensing records show that the First Operator was issued with 2 formal warning letters by the Traffic Commissioner in 2005 (relating to issues of maintenance) and 3 further warning letters, in 2011 (1) and 2015 (2), for various vehicles specified on the licence also specified on another operator’s licence (a failure to keep licence records updated). The authorised operating centre for the purposes of this licence is The Yard, Dunkirk Road, Dunkirk, Nottingham NG7 2LD.
8. The Second Operator currently holds a Standard National Goods Vehicle operator’s licence authorising the use of 1 vehicle and 1 trailer issued by the Traffic Commissioner for the North East of England with effect from 18 June 2019, with 1 vehicle specified in operator licensing records to be in the possession of this operator. The authorised operating centre for the purposes of this licence is at Unit 6-7 Balloon Wood Industrial Estate, Coventry Lane, Bramcote, Nottingham NG9 3GJ. This site is also the address of the operator’s nominated maintenance provider, Wright Brothers Automotive Limited and of the nominated transport manager, Mr David William Wright.
9. The Second Operator was also previously a partner in a partnership holding a Standard National Goods Vehicle Operator’s Licence, Lee Quincy English and Partners, trading as Fargo Transport, Licence number OB1141773. Vehicle registration mark FJ07 VTA (‘the Vehicle’) was specified against that licence when it was subject to a Driver and Vehicle Services Agency (‘DVSA’) roadside check on 3 January 2018. The Vehicle was removed from that partnership licence on 30 April 2018 and specified against the First Operator’s licence on 4 May 2018. The partnership’s licence was surrendered in September 2018 after DVSA enquiries established that the partnership had ceased trading and operating vehicles under its licence.

10. On 16 October 2018, the Vehicle and trailer C294680 were subject to a DVSA roadside check in Suffolk. At that time, the Vehicle was specified against the licence of the First Operator and was being driven by Mr Gary Albert Harby, the Second Operator, who, at that time, did not hold an operator's licence. Following interviews and enquiries, DVSA took prosecution action against each of the First and Second Operators. The following convictions resulted:

OFFENCE DATE	CONVICTION DATE	OFFENDER	OFFENCE	FINE/COSTS
16/10/18	24/07/19	MR KEITH JAMES BISHTON	On 16 October 2019 at Rougham Hill Truck Park, Bury St Edmunds in the County of Suffolk did aid, abet, counsel or procure Mr Gary Albert Harby to use goods vehicle registration mark FJ07 VTA on a road for the carriage of goods for hire and reward when not the holder of an operator's licence which authorised the said vehicle contrary to section 2 (1) (a) and (5) of the Act	£400 FINE £700 COSTS £40 VICTIM SURCHARGE
16/10/18	14/05/19	MR GARY ALBERT HARBY	On 16 October 2019 at Rougham Hill Truck Park, Bury St Edmunds in the County of Suffolk did use goods vehicle	£333 FINE £115 COSTS

			registration mark FJ07 VTA on a road for the carriage of goods for hire and reward when not the holder of an operator's licence which authorised the said vehicle contrary to section 2 (1) (a) and (5) of the Act	
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11. The First Operator notified his conviction above to the Traffic Commissioner by letter dated 16 August 2019.

12. The Second Operator failed to notify his conviction of 14 May 2019 to the Traffic Commissioner such that his application for an operator's licence was granted to him by the Traffic Commissioner on 18 June 2019 without any knowledge of this. Question 15b) had been ticked by the Second Operator on his licence application form on 26 April 2019 to confirm '... that you are aware that you must tell the Traffic Commissioner immediately of any relevant convictions that occur between the submission of your application and a decision being made on the application.'

13. By reason of the foregoing, and the related reports received from DVSA, the Traffic Commissioner determined that each of the First Operator, the Second Operator and the Transport Manager should be called to Public Inquiry, for the reasons set out in the respective call up letters sent by the OTC to each of them, set out in the respective Briefs.

PUBLIC INQUIRY HEARINGS

14. The Public Inquiries took place, conjoined, on 21 November 2019. The hearings were listed for hearing at the same time as there were obvious issues in common and the possibility of conflicting evidence.

15. The First Operator/Transport Manager attended and gave evidence, represented by Mr Noel Philo, Counsel of KCH Garden Square Barristers, instructed by Mr Christopher Powell of Rothera Sharp, Solicitors. Ms Shellie Marie Bishton, the daughter of the First Operator, was also in attendance and gave evidence.
16. The Second Operator attended and gave evidence, accompanied by Mr David William Wright his nominated transport manager, who also gave evidence on his behalf. The Second Operator was unrepresented.
17. Each party provided me with evidence of available financial resources prior to the hearing for my consideration as well as access at Inquiry to some of the maintenance records and tachograph information requested.
18. I heard from all parties (with evidence relative to financial standing for the Second Operator heard *in camera*) and, at the conclusion of the conjoined hearings on 21 November 2019, I reserved my decisions.

CONSIDERATIONS AND FINDINGS

19. I do not repeat all the evidence given and considered by me in these decisions; the evidence given and produced at the hearings on 21 November 2019 is a matter of record. The hearings were recorded.
20. In making my decisions, I have considered the law, guidance and directions set out in the relevant Senior Traffic Commissioner's Statutory Documents, including, in particular, Statutory Document no. 1 on Good Repute, Statutory Document no. 2 on Finance, Statutory Document no. 3 on Transport Managers and Statutory Document no. 10 on the Principles of Decision Making and the Concept of Proportionality.
21. The parties had not required DVSA Traffic Examiner (TE) Richard Mutimer or DVSA TE Ricky Cyril Youd to attend the Inquiry. I accept and adopt, as if set out

in full in this decision, the Background above and their respective evidence as follows:

First Operator and the Transport Manager

- TE Richard Mutimer, Public Inquiry Statement and Appendices A to E, concerning the First Operator dated 14 October 2019:
- Statement, including interview by TE Mutimer of the Second Operator on 16 October 2018 and statement of TE Ricky Youd regarding the interview of the First Operator on 2 November 2018
- Appendix A Photographic Evidence of the Vehicle and trailer with load on 16 October 2018
- Appendix B Statement of Victoria Wooldridge, OTC Leeds
- Appendix C Statement and exhibits from Martin Hazlewood, LPS Transport Manager
- TE Youd, Traffic Examiner Operator Report ('TEOR')
- First Operator's reply to TE Youd regarding the TEOR findings

(found at pages 64 to 106 of the First Operator's/Transport Manager's Brief)

Second Operator

- TE Mutimer Section 9 Statement dated 5 December 2018 concerning roadside stop and interview of Second Operator on 16 October 2018
- Photographic evidence of the Vehicle and trailer with load on 16 October 2018
- PG9 roadworthiness prohibition notice issued to the Vehicle on 16 October 2018

- Statement of Victoria Wooldridge, OTC Leeds

- Statement and exhibits from Martin Hazlewood, LPS Transport Manager

(found at pages 36 to 64 of the Second Operator's Brief)

22. Having also heard from each of the parties concerning the foregoing evidence, I find as follows.

The offences committed by the First Operator and the Second Operator on 16 October 2018, leading to conviction

23. On 16 October 2018, DVSA carried out a check of the Vehicle and semi-trailer C294680 at Rougham Hill Lorry Park, Bury St Edmunds, Suffolk. The Vehicle and trailer combination had been escorted to the check site by the Police as part of a Police organised goods vehicle check with DVSA. The trailer was carrying a container loaded with toys.

24. The operator's licence displayed in the window of the Vehicle was in the name of the First Operator and checks of licence records showed that the vehicle was specified on the licence of the First Operator.

25. The driver of the Vehicle was Mr Gary Albert Harby- the Second Operator. A check of operator licensing records confirmed that there was no trace of an operator's licence issued to Mr Gary Albert Harby in any traffic area which would have been effective on 16 October 2018 and the Vehicle was specified on the First Operator's licence on that date. Licensing records show that the Vehicle was specified against the First Operator's Licence on 4 May 2018 and removed as of 2 July 2019.

26. Mr Harby explained to DVSA that the container had been loaded at Felixstowe Port and that he was en route to deliver the container to East Harling on behalf of LPS Container Services at Felixstowe. He stated that he had taken his

- instructions directly from LPS. LPS paid him directly for the work completed less an amount for the fuel used in completing the work (which was paid by LPS).
27. Records obtained by DVSA from LPS for the work undertaken on 16 October 2018 were produced and are consistent with the arrangement described by Mr Harby. The address on the invoices provided by LPS is Mr Harby's home address. The net payments made by LPS (for the amounts payable after the fuel costs are deducted) are paid directly into a bank account held by Mr Harby.
28. Mr Harby described himself to DVSA on 16 October 2018 as an 'owner-driver' and on interview on 16 October 2018 and at Inquiry clearly stated that the Vehicle had remained in his ownership. He explained that the First Operator had become the registered keeper of the Vehicle as this was, he understood, needed for the insurance arrangements, whereby the First Operator added the Vehicle to his goods in transit and motor vehicle policies. Mr Bishton also carried out tachograph analysis on his behalf. The maintenance of the vehicle was arranged and paid for by Mr Harby with Wright Brothers, Unit 6 Balloon Wood Industrial Estate, Nottingham which was also where the Vehicle was parked by him when not in use. On interview, when asked why he did not have an operator's licence in his own name he responded that he did not know that he needed one. At Inquiry he explained that this is because he relied on Mr Bishton that the arrangements made with him covered his use of the vehicle – he thought it was 'okay' to use the First Operator's licence to run his truck under the arrangements made with the First Operator.
29. The Second Operator further described to me that prior to the stop on 16 October 2018 he had paid the First Operator some £930 per month for the rent / hire of his operator's licence, for the Second Operator's services as transport manager and for the excess on the First Operator's insurances for his vehicle.
30. When interviewed by DVSA on 2 November 2018, the First Operator stated that he had owned the Vehicle since April/May 2018 and that he had bought the vehicle off Mr Harby. Consistent with this, in a letter to LPS Container Services dated 21 May 2018 (at page 100 of the First Operator's Brief) on *DD Haulage*

and Machine Movers letter head, it is stated that the vehicle is 'owned and operated' by Mr Bishton and is covered by his goods in transit insurance. The letter also refers to a copy of his motor vehicles' insurance. This letter also states that 'The vehicle is lease hired to Gary Harby t/a GH Transport' and that 'Payment relating to work/or services undertaken will be invoiced by Gary Harby/GH Transport with all monies due payable directly to Gary Harby/GH Transport.'

31. At Inquiry, the First Operator stated to me that he had bought the Vehicle at nil cost – no money had changed hands. No documentation had been completed for the purchase or for the lease/hire of the Vehicle back to the Second Operator that he referred to in his evidence. The arrangements had, he said, been done on 'a handshake'.
32. In interview with DVSA on 2 November 2018 when asked if he had a receipt or invoice for the purchase of the Vehicle Mr Bishton had responded, 'We will have one somewhere.' and that he could produce that, if required.
33. On questioning by DVSA on 2 November 2018 Mr Bishton maintained that he was the user of the vehicle and that Mr Harby was acting as his agent. He stated that he instructed Mr Harby on 16 October 2018 to collect the container from Felixstowe Port and deliver it to East Harling and that this was done by telephone – '...he just gets told to go to the port and they give him his work'. He also stated, concerning the arrangements on 16 October 2018 that 'He works for us, but he gets his daily work from LPS.'
34. Mr Bishton confirmed to DVSA in his evidence that he had been the operator of the Vehicle on 16 October 2018, Mr Harby was a friend, that he did acquire the lorry from him and that from then he had taken over the running of the lorry. He explained that he had carried on using Wright Brothers to do the maintenance as Mr Harby had used them. The Vehicle had been parked up at the maintainer's yard when not in use.

35. On 2 November 2018 Mr Bishton told DVSA that he had employed Mr Harby as a self-employed driver, paying him £100 per day against invoice and that this arrangement had been in place approximately 2 months. (The stop on 16 October 2018 was 2 ½ weeks before.) He concluded the interview on 2 November 2018 by stating: 'As Gary has worked for me for the last few months as a self-employed driver, I have come to trust him to go to LPS on a Monday and work as required for the week. Other than any major incidents we have no communication apart from the odd phone call to see how things are.'
36. Mr Bishton accepted on questioning on 2 November 2018 that he had not notified the Traffic Commissioner prior to the stop of the maintenance and operating centre arrangements for the Vehicle once it was specified against his licence.
37. In his letter to the Traffic Commissioner dated 16 August 2019 notifying his conviction Mr Bishton explained:

'At the time of the incident my principle (*sic*) business was in the transportation of industrial machinery. At the start of 2018 I had been approached by Mr Gary Harby who proposed that I expand my business to include container transportation. Mr Harby had prior experience in this area, and I agreed on the understanding that he would take principle (*sic*) responsibility for this new side of the business. Accordingly, at the time Mr Harby was taking his day to day work instructions from Logistics Planning Services in Felixstowe and was being paid directly by them. The vehicle drove was owned and insured by me and was specified on my operator's licence. I would also download his tachograph data. Mr Harby would intermittently invoice me for work done.

As a result of this incident I have taken legal advice and I recognise now that this arrangement was too 'hands off' and at the time of the incident I was not exercising the necessary control over vehicle FJ07 VTA to be deemed the 'user' of the vehicle. This was the basis on which I pleaded guilty and this basis was accepted by the prosecution and the court.

Following this unfortunate incident, I ended the container transport side of the business and no longer have any ongoing business relationship with Mr Harby. In addition, I shall shortly be attending a transport manager refresher course to ensure that my knowledge is up to date.

I wish to apologise for this incident. It was never my intention to circumvent or undermine the operator licensing regime.’ (Page 34 of the First Operator’s Brief)

38. The First Operator was required by the letter calling him to Inquiry dated 16 October 2019 to bring various evidence to the Inquiry including:

-Copy of lease/hire agreement for vehicle FJ07 VTA and invoices between Keith James Bishton t/a DD Vehicle Services-OB0229171 and Mr Gary Albert Harby;

-Receipt/sales invoice of purchased vehicle FJ07 VTA as stated in interview on 2 November 2018;

(see page 12 of First Operator’s Brief).

The First Operator failed to produce any of these required documents.

39. Mr Bishton stated to me that after the stop on 16 October 2018 the arrangement with Mr Harby was changed so that LPS Container Services invoiced and paid the First Operator directly and the First Operator paid the Second Operator £100 per day for his services as a self-employed driver driving the Vehicle which remained specified on the First Operator’s Licence. Mr Bishton states that he continued to own the vehicle and thereon paid for its maintenance.

40. I do not have sufficient evidence to determine the legality or otherwise of the continued use of the Vehicle whilst specified against the First Operator’s licence following the stop on 16 October 2018 until its removal on 2 July 2019 and note this was not a matter raised in the call up letters to the parties. I have made no findings on this, save that I am told that the arrangements were changed from the time of stop with a stated intent to legitimise the arrangements previously in place. The First Operator advised me that no legal advice was taken at that time to ensure this.

41. Of the 2 accounts of the arrangements in place between the First Operator and the Second Operator on 16 October 2018, where conflicts in the evidence given clearly arise, I am drawn to prefer the evidence of Mr Harby. His evidence has been consistent throughout and from the outset when encountered by DVSA on 16 October 2018, he has openly and freely given evidence which is adverse to his interests as to the arrangements in place.

42. In contrast, the evidence of the First Operator/Transport Manager has not been credible in key respects as to the arrangements that were made with the First Operator including the following statements variously made to DVSA when interviewed under caution, which have not been corroborated by written agreements, invoices or receipts, that:

- he was the owner of the vehicle having bought it off the Second Operator;
- an invoice for the purchase was available and could be provided on request;
- on 16 October 2018 the Second Operator was working for him as a self-employed driver and paid £100 per day for his services using the Vehicle (as he stated on 2 November 2018 that this arrangement had been in place some 2 months/the last few months);
- he was the user of the Vehicle on 16 October 2018 and the Second Operator was acting as his agent;
- the vehicle was owned and operated by him.

43. The Second Operator subsequently applied for his own operator's licence. He openly admitted to me that he had not applied previously as he did not have the necessary funds to satisfy financial standing on application.

44. I conclude that the practice of 'fronting' applied in relation to the use of the Vehicle by the Second Operator on 16 October 2018, facilitated by the First Operator. I find that 'fronting' involves conduct, which can seriously undermine the effectiveness of the regulatory regime.

45. In this context, I adopt for these purposes the definition of 'fronting' given by the Upper Tribunal in determining the appeal by Utopia Traction Ltd Appeal No. T/2011/34:

"In the context of vehicle operator's licensing 'fronting' means that a person, partnership or company, which does not have an operator's licence, uses the operator's licence held by another entity to conceal the fact that they are behaving in a way which requires them to have an operator's licence of their own. In other words, it deprives the Traffic Commissioner of the right to control an 'operator', when Parliament has said that such an entity should be within his or her jurisdiction".

46. I also accept and adopt the definition of 'fronting' considered further by the Upper Tribunal in determining the appeal by SilverTreeTransport Limited Appeal No. T/2012/71:

"Another way in which to describe the same situation would be to say that: 'fronting' occurs when appearances suggest that a vehicle, (or fleet), is being operated by the holder of an operator's licence when the reality is that it is being operated by an entity, (i.e. an individual, partnership or company), which does not hold an operator's licence and the manner in which the vehicle is being operated requires, if the operation is to be lawful, that the real operator holds an operator's licence."

Other matters relevant to the First Operator

Compliance with undertakings

47. When asked to explain the different business names used, Mr Bishton stated at Inquiry that he trades as a sole trader as *DD Vehicle Services* and that business trades as *DD Haulage and Machine Movers*. At the foot of the *DD Haulage and Machine Movers* letterhead referenced above it states: 'Cheques made payable to *DD Vehicle Services*', which is consistent with the use of both trading names in the one sole trader business. I have accepted his evidence that there has not been a change in the entity operating vehicles under the licence from a sole trader to a partnership, company or otherwise. I also formally note that financial

standing was demonstrated to my satisfaction for the licence held by him as a sole trader.

48. I note that the TEOR completed by TE Youd dated 9 November 2018 was marked by him, in his opinion, as 'unsatisfactory' with his adverse findings summarised as follows:

- Ensure have tacho analysis system that is able to analyse data;
- Ensure tacho analysis system is able to produce infringement reports and ensure appropriate disciplinary action taken;
- Ensure tacho analysis system has working time directive analysis features;
- Ensure CPC records are kept for all drivers;
- Ensure all MOT's are kept on file;
- Ensure all vehicles are correctly specified, all vehicles are parked at operating centre and all vehicles are maintained by notified contractor.

49. In his response to the TEOR shortcomings dated 16 November 2018 (at page 105 of the First Operator's Brief) the First Operator states that 'I have no excuse for not having correct procedures in place' and sets out the steps taken to address this. Reference is made to new software purchased for analysis of working time and drivers' hours and he states that he had removed the driver who had no valid Drivers' CPC qualification from all driving duties until he had completed the 5-day training course now booked for him to complete.

50. The First Operator's licensing records show an unsatisfactory maintenance investigation in 2005 and the warning letters referred to in the Background above. There is only one roadside encounter recorded for this operator, but this resulted in the issue of an Immediate roadworthiness PG9 prohibition notice on 8 April 2015 for a snapped brake operating system cable. The notice was not 'S' marked by the issuing officer to indicate a significant failing in maintenance systems at that time, although obviously the defects found were serious as the DVSA officer noted that no brakes were available as a result of the fault.

51. My review of records produced at Inquiry raised questions which the Operator was unable to address to my satisfaction. I was provided with a printout of driver infringements from the analysis of tachograph data for Mr Bishton as a driver listed for the period 23/10/19 to 20/11/19, with 48 infringements shown. Only 1 infringement was explained on the statement signed by the driver – no. 20, concerning an accident on the A453. An entry queried by me from 31 October 2019 – of ‘unknown time of 107 minutes’ with ‘card insertion whilst driving’ was unable to be explained by Mr Bishton.

52. My random examination of the safety inspection records produced led me to consider the report completed by the nominated maintainer Keltruck on 27 September 2019 for one of the First Operator’s specified vehicles. I noted with concern that the certificate of roadworthiness completed by the maintainer was qualified. 18 defects were reported on the record as requiring attention. Only 1 of these was marked as rectified - a non-safety related defect - low engine oil level, corrected by topping up to the correct level. All of the remaining 17 matters were marked as ‘reported’, 2 of these were categorised by the maintainer as safety related defects. Consequently, the roadworthiness certificate was qualified:

All safety defects listed above have not been rectified as detailed above and the customer or his representative has been notified accordingly.

53. The First Operator and Ms Bishton sought to assure me that the defects were rectified before this vehicle was returned to use but, in the absence of any records to show this and with no driver defect reports produced at Inquiry, despite request, I was unable to verify this or the efficacy of the driver reporting system further in any meaningful way. It appears that the First Operator was undertaking his own repairs and rectification work, not the nominated maintainer. The First Operator had not notified the Traffic Commissioner of in-house or other additional maintenance arrangements.

54. [REDACTED]
[REDACTED]

[REDACTED]

Other matters relevant to the Second Operator

Failure to notify Conviction

55. Section 8(4) of the Act requires an applicant to provide any further information which a Traffic Commissioner may reasonably require in relation to the application and in particular any information specified in paragraph 1 of Schedule 2. This includes particulars of notifiable convictions which have occurred during the preceding five years and relevant activities carried out at any time before the application by the applicant, any company of which the applicant is or has been a director, where the applicant is a company any person who is its director or any other company linked with that director, any member of a partnership and any parent company.

56. Section 9(1) of the Act requires an applicant to inform a Traffic Commissioner of a notifiable conviction within the meaning of paragraph 4 of Schedule 2, and/or the issue of a notifiable Fixed Penalty, which occurs between the date of making the application and its disposal.

57. A licence is issued to an operator on trust that the operator will comply with the requirements and that the application form has been fully, honestly and accurately completed (Upper Tribunal decision in the appeal 2016/074 Christchurch Coaches Ltd).

58. In this case, the Second Operator failed to disclose a previous licence application and the partnership licence referred to in the Background above on application. This was raised with him by the Central Licensing Unit ('CLU') processing the application for this licence and he responded to CLU by a letter dated 20 May 2019 apologising for his 'oversight' to mention the previous

application and licence. The conviction was on 14 May 2019, only 6 days previous to this letter. Notwithstanding this, he failed to mention the conviction in this letter or otherwise and offers no explanation for this other than, again, oversight.

59. I have also reminded myself of the Tribunal’s observation in determining the appeal 1992/ D8 Bradford Cargo Terminal Ltd:

“The completion of an application form for a goods vehicle operator licence is a serious and significant matter from the point of view of the public, quite apart from the interests of the applicant company itself. Any licensing authority is entitled to assume that the appropriate degree of care and accuracy has been employed by the person who completes an application form for a licence.”

60. I find it incredible that the Second Defendant, with his previous history of involvement in operator licensing, knowing that he was unable to meet the requirements to apply for a licence in his own name, considered the arrangements in place on 16 October 2018 to be lawful such that he did not need an operator’s licence in his own name and, further, that he simply overlooked the notification of the conviction to the Traffic Commissioner before the licence was granted.

Financial standing

61. The Second Operator was required to demonstrate financial standing in an amount of not less than £8000 for his Standard National Goods Vehicle operator’s licence authorisation of 1 vehicle.

62. [REDACTED]



63. The Second Operator has accordingly failed to demonstrate the appropriate financial standing through available funds and facilities in his name assessed in accordance with Senior Traffic Commissioner Statutory Document no. 2 on finance. He had failed to notify the Traffic Commissioner of the financial difficulties experienced by him.
64. I formally find that it appears to me that he does not meet the requirements of financial standing for the current authorisation under this licence.
65. The Second Operator's transport manager Mr Wright is also his nominated maintainer. At Inquiry, he offered to support the Second Operator in the matter of his financial standing by provision of a statutory declaration. Mr Wright explained that the Second Operator had paid several maintenance bills for the vehicle during the period and had suffered a loss of earnings whilst the vehicle had been off road for repair. Mr Wright assured me that the Second Operator did not 'cut corners' on maintenance of the vehicle, its reliability was essential to him, and that he paid Mr Wright fully and promptly for all repairs as required.
66. I have considered if a 'period of grace' to the Second Operator from the requirements of financial standing is appropriate, given the prospect of financial standing being met by the end of the period by way of the statutory declaration. I do not consider a period of grace to be appropriate in the particular circumstances of this case. The licence has only been in place since 18 June this year, it was obtained without disclosure of the conviction, and the Operator has then failed to notify the changes in his financial standing, or to put alternative funding arrangements in place, which has enabled him to continue operating without oversight by the Traffic Commissioner in circumstances where a mandatory requirement of the licence, namely financial standing has not been met.

Conclusions - First Operator

67. The First Operator has held this licence since 2000, nearly 20 years, and this is the First Operator's first Public Inquiry. He has provided some positive evidence that systems are in place to comply with undertakings under this licence, albeit incomplete as found above. Further on the positive side, the First Operator's 5-year test summary is unremarkable with results close to national averages – with, I note, a good 2-year test summary with all 3 vehicles presented passing on first presentation at test. The First Operator attended the arranged interview with DVSA in November 2018 and responded to the TEOR promptly in writing, with new tachograph analysis software subsequently obtained and put into use. He notified the Traffic Commissioner of his conviction promptly. He has plans to address the issue of professional competence for this licence through the training and intended qualification of his daughter to act as a transport manager in goods transport. Mr Bishton has also completed some transport manager refresher training in October 2019.

68. On the other hand, the First Operator's encounter history over the last 5 years outside of annual test is limited to a single DVSA stop and that resulted in the issue of an Immediate roadworthiness prohibition notice for the trailer inspected for serious road safety defects. The compliance history includes warning letters issued to the Operator which appear to relate principally to shortcomings in the administration of licence records concerning vehicles specified against the licence. It is essential that material changes such as the number of vehicles being operated and the identity of such vehicles is notified appropriately and the history concerning the Vehicle also raises apparent failings in his administration to notify the Traffic Commissioner of material changes in operating centre and maintainer, which should have been notified if the vehicle had been truly in the lawful possession of the First Operator and used by him under his operator's licence. He failed to check properly that his drivers each held the legally required Drivers' Certificate of Professional Competence before driving a specified vehicle - and DVSA determined on investigation that one of his drivers did not do so.

69. As found above, I do not consider the First Operator to have been fully and completely open and honest with DVSA, in his letter to the Traffic Commissioner on 16 August 2019, or to me at Inquiry, concerning the actual arrangements in place between Mr Harby and him on 16 October 2018. The evidence preferred by me is that Mr Harby remained the owner of the vehicle and that it remained in his lawful possession. As ownership was not transferred there was no lease or hire back arrangement. Mr Bishton had limited contact with Mr Harby and the Vehicle and did not control Mr Harby's transport activities, he failed to manage and monitor Mr Harby's compliance with the rules on drivers' hours and tachograph records in any meaningful way, he failed to ensure that the Vehicle and trailers hauled by it were kept fit and serviceable and the payment arrangements in place at 16 October 2018 were not as described by him to DVSA on 2 November 2018. Mr Harby's evidence, accepted by me, is that Mr Bishton received payment from him for the use of his operator's licence. Questions also arise as to whether the insurances for the vehicle covered the use on 16 October 2018 given the offending circumstances on that date, namely that on 16 October 2018 the Vehicle was being used for hire and reward, that the Vehicle was not being used by the First Operator at the time it was stopped and that (i) the user of the vehicle did not hold an 'operator's licence' in Great Britain, in other words a goods vehicle operator's licence, issued by a Traffic Commissioner, under the provisions of the Act, and (ii) the vehicle was not being operated within any exemptions to the general requirement to hold an operator's licence whilst operating in Great Britain. Further the number and nature of the First Operator's various failings to notify material changes to the Traffic Commissioner show a disregard for the Traffic Commissioner's requirements of transparency.

70. As a consequence, I find that the First Operator has severely damaged the trust placed in him by the Traffic Commissioner in granting this licence. The complete honesty and transparency of an operator are essential features to gain and retain the trust of the Traffic Commissioner. Traffic Commissioners must be able to trust those to whom they grant operator's licences to operate in compliance with the regulatory regime and to keep the Traffic Commissioner informed of all material changes. The public and other operators must also be able to trust

operators to comply with the regulatory regime. A lack of the required honesty, integrity and transparency strikes the very heart of the regulatory system of operator licensing.

71. In balancing the 'positives' with the 'negatives', I am assisted by the helpful questions posed by the Upper Tribunal to assist Traffic Commissioners in determining whether a licence should continue or whether some other, non-terminal, intervention is appropriate. The offending conduct leading to the conviction as well as the lack of openness and honesty I have referred to in paragraphs 68 and 69 weigh particularly heavily in the balance and, overall, I am drawn to conclude on balance that the answer at this time to the question, suggested by the Upper Tribunal in their decision 2009/225 Priority Freight & Paul Williams, of how likely is it that this operator will, in future, operate in compliance with the operator's licensing regime, is "unlikely".

72. If the evidence demonstrates that future compliance is unlikely then that will, of course, tend to support an affirmative answer to my next question, raised in the decision in the appeal 2002/217 Bryan Haulage (no.2), namely, is the conduct such that the operator ought to be put out of business?

73. I understand from the evidence given by him at Inquiry that the revocation of the licence will end the business currently carried on by the First Operator as a sole trader. The two vehicles in his possession are specialist vehicles and the haulage carried out by them is often combined with the removal and installation by the business of the items transported. This creates a practical difficulty in subcontracting the transport and, further, the transport requires the use of specialist vehicles which cannot, I am advised, be sourced easily, if at all, elsewhere. Even if subcontracting were feasible, I am advised (albeit without any actuarial costings to support this) that it would not be financially viable, and it would also create a risk of loss of customers to the new transport provider.

74. I find that the answer, at this time, to the Bryan Haulage question is 'yes'. My assessment of the level of severity of the combined shortcomings found for the purposes of the guidance in Statutory Document no.10 as 'SERIOUS to SEVERE'. I consider a less onerous sanction than revocation is not appropriate

given the seriousness of the shortcomings found and the need for a robust approach in these circumstances to uphold the integrity and efficacy of the regulatory regime.

75. Having found as above, I have proceeded to find and order as set out in paragraph 1 above.

Conclusions -The Transport Manager

76. The Transport Manager obtained his Certificate of Professional Competence in goods transport to act as a transport manager in March 1996. In his letter dated 16 August 2019, to the Traffic Commissioner (at page 34 of the First Operator's Brief) he stated that: 'In addition, I shall shortly be attending a transport manager refresher course to ensure my knowledge is up to date.' At Inquiry, I was provided with a certificate of completion by him of a Transport Manager Refresher Course on 11 October 2019. This appears to be a one-day course.

77. I have asked myself if I can, at this time, trust Mr Bishton to act as a transport manager and to exercise (per section 58(1) of the Act): "...continuous and effective responsibility for the transport operations of the business insofar as they relate to the carriage of goods".

78. Based on my findings above, I find that the answer is 'no' at this time. The offending conduct leading to the conviction and his responses under caution to DVSA officers as well as to the Traffic Commissioner were not, I find wholly open and honest. Further to this, the preponderance of evidence demonstrates that the Transport Manager has failed to effectively and continuously manage the transport activities undertaken under the authorisation and purported authorisation of his licence. He has failed to do the job properly. He has failed to keep appropriately up to date and to have proper systems in place required to comply with undertakings given on application and re-iterated on renewal of the licence in 2015. By way of example, he states that he did not know that the parking arrangements at

Wright Brothers needed to be notified as a new operating centre (submitting that the rules had obviously changed since 1996) or that Wright Brothers should have been added as an additional maintainer or that the arrangements in place to manage and monitor drivers' hours and tachograph records required more than just his downloading the digital data. He never downloaded the tachograph vehicle unit for the Vehicle, only driver card data, and then failed to do any more. He failed to hold a copy of the annual test certificate for the Vehicle to ensure it was within test, he did not monitor the maintenance of the Vehicle or the working time of Mr Harby. He had failed to properly check the CPC qualification of another driver used to drive his specified vehicles and to monitor this to ensure specified vehicles operated in his business were only driven in accordance with legal requirements, that is by persons holding the correct driving entitlement including a current drivers' CPC. He failed to notify material changes to the Traffic Commissioner.

79. I have found above that it appears to me that Mr Bishton is no longer, at this time, of the appropriate good repute as an operator to hold this licence. Where an individual is both the operator and transport manager, it is questionable whether it is feasible or appropriate to compartmentalise the issue of good repute as an operator and issue of good repute as a transport manager without detailed reasons for doing so (2017/55 Alistair Walter (paras.23-24)). I see no reason to do so in this case and I find that Mr Bishton has also lost his good repute to act as a transport manager and have ordered as in paragraph 3 above.
80. I have provided in my decision for re-training as a rehabilitative measure for the Transport Manager as he has not apparently updated his knowledge in any meaningful way since 1996. A short refresher course would not, in my opinion address this lack of current knowledge sufficiently to enable him to perform the duties of a transport manager to the standards required in the modern haulage industry. I have therefore provided that he should re-take and pass the examination to gain the transport manager's Certificate of Professional Competence in goods transport. This will additionally give the Transport

Manager some time to reflect on my order and reasons for it and, hopefully, also learn from this.

Conclusions - Second Operator

81. This is the Second Operator's first Public Inquiry and he has provided some positive evidence that systems are in place to comply with undertakings under this licence, assisted by his transport manager Mr Wright. The Licence has only been in force since 18 June 2019 so there is very little other compliance history to consider since the licence was issued, although the previous compliance history of the partnership licence linked to Mr Harby appears to have been unremarkable in relation to his involvement, save for an apparent failing to notify the material change in the trading status of the partnership in a timely manner. I note positively that on encounter on 16 October 2018 Mr Harby was open and cooperative with the DVSA officers, and also at Inquiry, concerning the details of the arrangements in place with the First Operator.
82. On the other hand, I find from the combination of the offending conduct leading to his conviction, his failure to disclose the conviction (noting my findings at paragraph 60 above) and his failure to notify changes in his financial standing, that he has severely damaged the trust recently placed in him in granting this licence. These matters weigh heavily in the balance.
83. In balancing the 'positives' with the 'negatives', I am, again, assisted by the helpful questions posed by the Upper Tribunal to assist Traffic Commissioners in determining whether a licence should continue or whether some other, non-terminal, intervention is appropriate. The conduct referred to in paragraph 82 draws to conclude on balance that, at this time, the answer to the Priority Freight question of how likely is it that this operator will, in future, operate in compliance with the operator's licensing regime, is "unlikely".
84. If the evidence demonstrates that future compliance is unlikely then that will, of course, tend to support an affirmative answer to the Bryan Haulage question: is the conduct such that the operator ought to be put out of business? My

assessment of the level of severity of the combined shortcomings found for the purposes of the guidance in Statutory Document no. 10 as 'SERIOUS to SEVERE'. I consider a less onerous sanction than revocation is not appropriate given the seriousness of the shortcomings found and the need for a robust approach in these circumstances to uphold the integrity and efficacy of the regulatory regime.

85. I understand that Mr Harby is an owner driver who currently relies on the use of his vehicle to generate his income. He may obtain other work as a driver using his vocational driving entitlements, but I recognise that a revocation of his operator's licence may reduce the extent of his earning abilities. I find that the answer, at this time, to the 'Bryan Haulage' question is 'yes'.

86. Having found as above, I have proceeded to find and order as set out in paragraph 2 above.

87. I would note that Mr Harby appeared contrite at Inquiry and this does provide some hope that he will learn from the outcomes of his failings, including this order, and may in the future be trusted by the Traffic Commissioner again.

**Fiona A Harrington, LL. B (Hons), Solicitor,
Deputy Traffic Commissioner for the North East of England
7 December 2019**