



WESTERN TRAFFIC AREA

Decision of the Traffic Commissioner

Public Inquiry in Launceston, 19 November 2019

DEALTOP (PLYMOUTH) LTD t/a TARGET TRAVEL

**TRISTAN KELLY – TRANSPORT MANAGER
WILLIAM ASHLEY TAYLOR – TRANSPORT MANAGER**

DECISION

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

Pursuant to adverse findings under Section 17(1)(a), that is that the operator is no longer of good repute and no longer demonstrates financial standing, and further and separate adverse findings under Sections 17(3)(aa) and 17(3)(c), that vehicles are not kept fit and serviceable and that prohibitions have been issued, the licence is revoked with effect from 16 February 2020.

The operator is engaged in home to school transport that will need to be replaced. I would consider an application supported by the local authority to extend the revocation date at a lower level of authority until 30 March 2020. Appropriate checks on vehicle safety would be required.

I am minded to disqualify the company and the constituent directors from playing any part in the control of any entity holding an operator’s licence for a period of between 1 and 3 years and I invite submissions on that matter prior to making a decision on 17 January 2020.

The good repute of transport managers Tristan Kelly and Ashley Taylor is unblemished.

BACKGROUND

1. Dealtop (Plymouth) Ltd is the holder of a standard national public service vehicle operator's licence currently authorising the use of twenty-three vehicles. The licence was granted at a public inquiry on 11 November 2018 initially with authority for seventeen vehicles. A variation was granted on submission of further financial evidence in February 2019 bringing authority to its current level. I had previously, at a public inquiry in 2018, revoked the company's previous operator's licence on a failure to demonstrate financial standing.
2. The directors are Robert John Risk and his son Lee Robert Risk. Robert John Risk is the managing director. The transport manager from grant of the licence until the end of June 2019 was Tristan Kelly. Mr Kelly was replaced in July this year by Ashley Taylor.
3. On 5 June 2019, DVSA Vehicle Examiner Lee Balsdon made an unannounced visit to the operating centre where he met with Robert Risk and Tristan Kelly. His subsequent maintenance investigation identified a number of shortcomings:
 - i. No safety inspection records were available for AN08UHJ which was issued an 'S Mark' prohibition on 23 May 2019 for a tyre worn below the legal limit, measuring a tread depth of 0.47mm (minimum for a vehicle of that size is 1.6mm). There were also no driver defect reports;
 - ii. The inspection sheet for MX09AOE dated 19/12/2018 shows ABS light defected and no rectification work done;
 - iii. Maintenance file for MX09AOE showed driver detectable defects reported on safety inspections and no corresponding driver defect sheets;
 - iv. Some driver defect sheets inspected show repair work is not always fully evidenced.
4. On inspection of three vehicles, VE Balsdon found no defects.
5. The operator responded to the vehicle examiner's findings but did not fully address the concerns. It was argued that AN08UHJ was not taxed as a PSV and was not carrying passengers for hire or reward. That was why it was outwith the maintenance programme. That had now been rectified. Further explanations of other shortcomings and action to be taken were provided.
6. On 15 July 2019, vehicle MX09AOE was involved in a serious collision on the B3257. The operator properly informed my office. There is no suggestion that the operator or its driver was in any way culpable but an examination of the crashed vehicle identified significant defects that pre-dated the incident.

7. My office received a letter on 9 August 2019 from Devon County Council raising concern that the operator had used non-DDA compliant vehicles on public bus services on multiple occasions during June and July 2019.
8. On 3 October 2019, my office was notified by the Council that vehicle WCR819 failed to display an operator's licence disc during a school contract run.
9. These shortcomings caused me to call the company to public inquiry in the following terms:

Under Section 16(1) of the 1981 Act, that the operator was operating more vehicles than authorised,

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(1)(b) of the Act and Section 14ZA(3) of the Act, that the nominated transport manager may not be exercising continuous and effective management of the transport operations;

Under Section 17(3)(aa) 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 there would be effective driver defect reporting

Under Section 17(3)(c) of the Act, that vehicles had been issued with prohibition notices

Under Section 17(3)(e) of the Act, material change in relation to financial standing

10. Mr Tristan Kelly and Mr Ashley Thomas were each called to consider their good repute as transport managers.

THE PUBLIC INQUIRY

11. Mr Robert Risk, Mr Lee Risk and Mr Ashley Thomas attended for the company represented by Paul Atkinson, transport consultant. Mr Tristan Kelly attended unrepresented. I was provided in advance with a written statement from Robert Risk, another from Ashley Thomas and a small bundle of documents from Tristan Kelly.
12. The oral evidence is electronically recorded and a transcript is available on request; I repeat here only that which is central to my decision.
13. Financial standing was dealt with in private. See Appendix 1 [**Note: Appendix 1 has been redacted as it contains sensitive information**].

The evidence of Mr Tristan Kelly

14. Mr Kelly referred me to the bundle he had provided and adopted it as his evidence. He had started as a bus driver and became transport manager when the new licence was granted in November 2018. Following grant of the variation in June 2019, he felt that he did not have proper control. Ashley Taylor had referred him to the Senior Traffic Commissioner's Statutory Guidance and he resigned with effect from 1 July 2019.
15. Vehicle AN08UHJ is a silver Ford Transit 13-seat minibus. It was being driven by a manager when it was encountered and inspected by DVSA at Agaton Fort, Plymouth. It was taxed PLG and tested as a Class 5 (that is, private PSV). All company vehicles were now within the fleet maintenance programme.
16. In relation to the ABS light identified at the preventative maintenance inspection, Mr Kelly had not been in the habit of cross-checking the inspection reports with the relevant driver defect report. That was now done. The driver had left the company. The tyre policy was to change them by the legal limit. It was accepted that tread depths were sometimes not entered. Inspection reports were left on the engineer's desk for him to review. In response to a question from Mr Atkinson, Mr Kelly confirmed that the toolbox talks promised in the response to DVSA had been undertaken by Mr Baser, fleet engineer. Having completed his evidence, Mr Kelly left the inquiry at this point.

The evidence of Robert Risk, Managing Director

17. Mr Robert Risk adopted his statement as his evidence. He confirmed that the company needed nineteen vehicles to satisfy its contracts.

18. The new operating centre was a significant improvement. The workshop had three entrance doors instead of one. There were five inspection bays and sufficient clearance for the biggest vehicle. The roller brake tester had been removed from the old site in September and was awaiting reinstallation. He bought it new from Tecalemit two years ago. Roller brake testing was currently outsourced. The brake tester would be reinstalled within six months.
19. The fleet is owned outright except for the vehicles bought this year. It had been necessary to upgrade the Plymouth Argyle team coach. Some older double decker buses had been replaced with ones with seat belts to provide greater flexibility. A new supporters' coach had also been needed.
20. Tristan Kelly had wanted to take the transport manager CPC. He had been good on IT. Mr Risk got on fine with Mr Kelly personally. He was dedicated and loyal. He hadn't known that he was going to resign. Mr Risk initially suggested that Mr Kelly had told VE Balsdon that he was going to resign but then withdrew that comment. Mr Kelly had stopped using the Coachman system.
21. Ashley Taylor had been in the business previously. He had a great deal of experience. He didn't want to take on the transport manager role until the school holidays. Mr Kelly was management and should have given a month's notice. He had given no indication that he had an issue. Mr Taylor was now having to recheck that systems are in place and operating. Mr Wiseman, a former transport manager, was now in a position where he could come back. The company would then have two older, established, transport managers. In addition, Jamie Lynn was sitting the second part of his transport manager's CPC in December.
22. The prohibition for HXZ9740 was for a bit of exhaust roar. It was a rear-engined Volvo B10M. When Mr Baser (fleet engineer) had signed off the PMI for MX09AOE, he may have assumed that the auto-electrician had repaired the ABS fault.
23. Mr Risk had been unaware until receiving the public inquiry bundle that MX09AOE had received a prohibition notice following the crash. He had no knowledge of why the vehicle was in service with two defective tyres. Spares were kept so there was no reason for it.
24. The vehicle operated without an MOT at a school bus check had been an administrative error on the part of a member of staff. George Nesbitt had typed on the planner 31.06.2019. It should have read 31.05.2019. It was clearly an error as there is no 31.06.2019. The use of WCR819 without a disc was an error on the part of the driver. They had never used more vehicles than authorised.
25. I asked Mr Risk about the measurement of tyre tread at PMI and was told that a digital tyre tread depth gauge was in use. I noted from my own examination of the records provided at the inquiry that FN03DYA was inspected on 22 October 2019 and the tread depth was recorded as 1mm.

No defect was noted and there was no evidence of any action. Mr Risk did not comment.

26. Mr Atkinson asked Mr Risk about the impact of regulatory action. Nineteen vehicles were needed for the contracts that were in place. His business had been providing the services for 40 years. He did not treat the contracts with contempt. He had a new, seven-year lease on the premises taken out in October. Revocation would be the end of the business. It was not viable with the four vehicles for which financial standing could be shown. Fifteen was the lowest viable number.

The evidence of Ashley Taylor, Transport Manager

27. Mr Taylor had taken on the transport manager role with effect from 15 July. He currently drove two hours in the morning and two hours in the afternoon. He had five hours in between for his transport manager duties. He had taken an overview of the business. Compliance with the PMI schedules was, in his opinion, a disaster. There was a big backlog. The maintenance diary was very different to the actual PMIs. He had found that the Coachman system had not been used since January 2019. The PMIs didn't correspond with the wall-planner. He directed me to the relevant images in the evidence bundle (pages 35 showed Coachman not updated, page 39 showed the backlog of PMIs). They had not yet caught up with inspections but were working towards it. He reminded me that it was a 37-vehicle fleet.
28. The issue had been exacerbated by having to move premises. That had impacted from July onwards. They had the new workshop up and running from 6 October. He had lots of questions about tyres and had investigated to see what had happened. He had reintroduced the tyre policy which was that they should be changed at 3mm. It had been in place previously but lapsed. He could not do what was necessary as transport manager whilst still driving morning and afternoon. The arrangement with Simon, the auto-electrician was too relaxed. That was why the PMI was signed-off without confirmation that the ABS had been rectified.
29. Mr Taylor had agreed to step in to the breach when Mr Kelly left. He would not take the post until the summer holidays as it was just too busy. He confirmed that the vehicle being used without a disc was being driven by a fitter standing in at short notice. Mr Taylor had been out driving at the time. I was referred to the daily detail for that day which I accepted. He had initiated a new (old) approach to ensuring vehicles were taxed by producing old-style discs for each.
30. I asked why PMIs had not been outsourced to deal with the backlog. I was told that was a matter for Mr Risk. I asked why he was still driving and was told that was a practice from when he was the second transport manager. Mr Risk then told me that they had only been without a workshop for a week and he had spoken to an alternative provider but felt there was, in the end, no need to outsource inspections. Driving four hours a day was not unreasonable for a transport manager in what was now a much smaller

business. However, if it was necessary, Mr Taylor could come off the morning school run.

Closing submissions

31. I could be offered an undertaking that the transport manager would not drive. The company would reinstate the FTA audits previously undertaken. A period of grace for finance was requested and further evidence would be provided within seven days.
32. The previous revocation had been because of financial standing. At the last public inquiry, the licence was granted and it had been increased thereafter. Traffic Commissioner Sarah Bell had curtailed the previous licence from forty to thirty-seven in 2016. The company had never been called on maintenance previously.

CONSIDERATION AND FINDINGS OF FACTS

33. Mr Taylor provided evidence of vehicles in use on 3 October 2019 and an explanation that the vehicle without a disc was being driven by a fitter at short notice to cover an absent driver. I am content that there is no evidence to suggest that the operator has operated more vehicles than authorised. There is no evidence of any breach of Section 16(1) of the 1981 Act.
34. Vehicle AN08UJH was encountered at the DVSA site in Plymouth on 23 May 2019. It was being driven by a manager and the vehicle is used for moving staff and positioning drivers. It was not specified on the operator's licence and was not, at that time, included in the operator's maintenance programme. The use of the vehicle outside authority of the licence appears to have been accepted by DVSA so I do not make criticism of the operator for that now. However, Section 1(1) of the 1981 Act defines for the current circumstances, a public service vehicle as "*being a vehicle adapted to carry more than eight passengers, used for carrying passengers for hire or reward*".
35. There is established helpful case law on the definition of "*hire or reward*". These are referenced in the UT decision *T/76/2017 Andrew Steven Gingell*:

27. ...Mr Nesbitt QC referred us to DPP v Sikonder (supra) and the reference to Albert v Motor Insurers' Bureau (supra) and the finding that the carriage of passengers for "hire or reward" meant a vehicle used for the systemic carriage of passengers for reward not necessarily on a contractual basis, going beyond the bounds of mere social kindness and amounting to a business activity did amount to carriage for hire or reward. He also pointed to the reference to Motor Insurers' Bureau v Meanen (1971) 2 All ER 1372 in which the features in that case were highlighted by Lord Donovan: "The long standing and regular arrangement for the carriage of passengers; "the use of a minibus fitted with seats for

11 passengers; the arrangement (albeit informal) among the regular passengers to pay for the cost of the petrol; these features add up to and justify the conclusion that McKale was engaged part-time in carrying passengers under an arrangement which went beyond mere social kindness. It had the flavour of business about it". This was the test applied in Sikonder.

and commented upon by the Upper Tribunal:

31. We are satisfied that the TC's determination is beyond challenge or as Mr Nesbitt QC put it, it is "unassailable". The TC was entitled to be sceptical about Mr Gingell's account that on 18 July 2017, he had not, or was not going to receive payment for the service on that day but in view of the other evidence, it was not necessary for him to make any findings about it. It is clear that the TC rejected the evidence that Mr Gingell gave at the hearing having considered the answers that Mr Gingell gave in his interview under caution and he was entitled to do so. Upon that evidence alone and when applying the principles set out in Sikonder, the TC was plainly right in concluding that RX57 had been operated for hire or reward. Further, upon the basis of Mr Gingell's evidence about the journeys being a "trial run" in order to win a contract with the parents, including the journey of 18 July 2017, the TC was plainly right in concluding that RX57 was being or had been used for reward and in particular, the school contract commencing in September 2017 which he estimated was worth "thousands".

36. Clearly the movement of staff to enable them to carry out their work in a 12-seat vehicle goes beyond mere social kindness. It is a business activity and so is an act carried out for hire or reward. It has a very strong flavour of business about it. The vehicle should have been operated under the operator's licence and should have a proper Class 6 PSV MOT. Noting that these matters were not in the call-up and that DVSA appears not to have taken issue with them, I make the finding but attach no weight in terms of my decision.
37. I take a different view of the fact that the vehicle was encountered with a nearside rear tyre that had tread measured at 0.47mm, over a millimetre less than the legal limit for a vehicle of that size. The driver was issued with an endorsable fixed penalty notice. Section 17(3)(c) of the Act makes clear reference to prohibitions that are issued to vehicles "owned or operated" by the operator. There is no doubt that the vehicle was owned by the operator. Its condition is directly relevant to the operator's licence. To allow a tyre in that condition to be used on a vehicle is unforgiveable for anyone let alone a licensed operator.
38. DVSA Vehicle Examiner William Honey examined vehicle MX09AOE following the collision on 15 July 2019. Unsurprisingly, VE Honey identified a number of defects caused by the impact. He also identified the following which he did not find to have been caused by the impact:

- i. Power steering oil leak and powers steering oil reservoir level below minimum,
 - ii. nearside axle 2 shock absorber body heavily corroded,
 - iii. brake air reservoirs had moderate surface corrosion and there was excessive oil discharge from the air drier,
 - iv. nearside axle 1 tyre worn to close to legal limit, offside axle 2 outer tyre had damage to the tread area exposing the cords, nearside axle 2 inner and outer tyres worn beyond the legal limit,
 - v. exhaust tailpipe heavily contaminated by grease/oil constituting a fire risk.
39. Vehicle Examiner Honey was particularly concerned at the condition of the tyres and the contaminated exhaust and issued an immediate prohibition.
40. In the positive, three vehicles inspected by VE Balsdon at the maintenance investigation were found to be clear of defects but the condition of AN08UHJ and MX09AOE was entirely unacceptable. Both vehicles had prohibition notices issued for defects that were readily apparent to any driver conducting anything approaching a worthwhile walk-round check. Three further prohibitions have been issued, all in the last 6-7 months. I therefore find that Section 17(3)(aa) is well made out as is Section 17(3)(c). Given the tyre defects in particular, I attach significant weight to this finding.
41. Mr Risk accepts in his written statement that non-DDA compliant vehicles were used on registered bus services on 21 June 2019, 11 July, 18 July, 22 July and 23 July. He explains that the scheduled vehicle had broken down. This is further evidence that vehicles are not being kept fit and serviceable.
42. DDA stands for the Disability Discrimination Act 1995. Under that Act, The Public Service Vehicles Accessibility Regulations 2000 were made which required, in simple terms, all single deck vehicles on regular services to be accessible from 1 January 2016 and double-deck vehicles by 1 January 2017. Mr Risk states that he preferred to operate the route with a non-compliant vehicle rather than fail to operate entirely. He seems to miss the point that he is required to operate the route with a compliant vehicle and he should ensure that he has contingency in place. Being compliant with accessibility regulations is all part of keeping vehicles fit and serviceable and this admission on the operator's part is a serious one. Not only do I find that Section 17(3)(a) is made out in that the operator has failed to abide by his undertaking to ensure vehicles are fit and serviceable, the inherent discrimination against those with mobility impairments goes to Mr Risk's good repute. The lack of contingency also calls in to question the financial standing of the operator.

Transport Manager Tristan Kelly

43. Tristan Kelly provided written submissions. Some of those submissions include allegations against the company. Those allegations are unsubstantiated and I take no account of them. I accept that Mr Kelly did

what he felt he had to do and resigned. His account of his resignation was not challenged by the operator or his representative.

44. This is Mr Kelly's first transport manager role. Insofar as there have been issues, for example, with ceasing to use the Coachman system, this is something that the operator also should have identified. Whilst transport managers must exert continuous and effective control over the transport operation, they are also entitled to be managed and supported by their employer. He has previously demonstrated a thoroughness to his work which is unusual. I refer in particular to the investigation of a failed road wheel in 2018. I am left with no concerns in relation to his good repute and I make no adverse findings.

Transport Manager Ashley Taylor

45. Mr Taylor became transport manager on 15 July 2019. He clearly demonstrated to me at the public inquiry that he has already made significant improvements despite a heavy driving workload. I have no reason to question his good repute and I make no adverse findings.

Financial Standing

46. See Appendix 1 [**Note: Appendix 1 has been redacted as it contains sensitive information**]. Financial standing is not met and this is exacerbated by the impact that appears to have on the DDA compliance of the service provided and on the safety of the vehicles operated. Section 17(1)(a) is made out. Revocation is mandatory.

Good repute

47. There are two statutory directors but, in reality, the business is run by Robert Risk. There are positives. Mr Risk has always cooperated with DVSA. He tells me that he does not treat his contracts with contempt and I believe him. The new premises appear to be a significant improvement. Three vehicles inspected by VE Balsdon were found clear of defects. There has been investment in brake testing. This is the first maintenance public inquiry, the 2015/16 inquiry having focussed on drivers hours and tachographs and that in 2018 on finance.
48. The company showed financial standing in February this year and on the basis that the amount would be available, as an average, on a continuing basis, the variation was granted. Robert Risk thereafter chose to use the money identified as financial standing to buy no fewer than eight vehicles including putting a large deposit on an expensive football team coach. That shows a recklessness which appears to have contributed to inaccessible vehicles being used on registered bus services and to vehicles being operated with bald tyres. With full knowledge of the financial standing

requirement, Mr Risk chose to be non-compliant almost immediately the variation was granted and has been non-compliant ever since.

49. The Upper Tribunal, in T/2012/017 NCF (Leicester) Ltd also commented on the impact to fair competition that arises from operators choosing not to comply with the financial standing requirements. It is simply not fair that one operator uses the money required to be available as financial standing to renew his fleet whilst all those who are compliant are unable to do so without paying for finance.
50. The use of an inaccessible bus on a registered service shows a clear contempt for those passengers who have mobility issues. I suspect Mr Risk would deny that he discriminates against those who need accessible buses. The Disability Discrimination Act was designed to end such discrimination and in breaking the PSV Accessibility Regulations, Mr Risk has clearly discriminated between those who can climb steps on to a bus, and those who cannot¹.
51. I ask myself whether or not this is an operator I can trust to be compliant in the future. The behaviour in relation to financial standing is enough on its own to answer that in the negative and such a conclusion is supported by the attitude to DDA compliance. In considering whether it is so bad that it ought to be put out of business, I cannot ignore the condition of the bus in service, MX09AOE. Whilst the defects did not contribute to the crash, they were dangerous and could well have done so in different circumstances. The operator and both its constituent directors have forfeit their good repute.
52. I did not hear from Lee Risk and he did not provide a statement. He appears to play little to no part in controlling the business.
53. This is a case where it appears to me that the company and its constituent directors require a period of reflection away from the industry. I say that because of the matters I have identified at paragraphs 48 – 51 above. The Senior Traffic Commissioners Statutory Document would suggest that a period of 1 – 3 years is appropriate. I did not hear submissions on the effect of disqualification on the operator and I invite them now. I will defer my decision on disqualification until 17 January 2020 to allow submissions to be made.

¹ Note that I do not know whether the vehicle was otherwise DDA compliant or not, for example in the display of service number and destination. I proceed on the assumption that it did comply with the non-structural elements.

DECISIONS

54. Pursuant to adverse findings under Section 17(1)(a), that is that the operator is no longer of good repute and no longer demonstrates financial standing, and further and separate adverse findings under Sections 17(3)(aa) and 17(3)(c), that vehicles are not kept fit and serviceable and that prohibitions have been issued, the licence is revoked with effect from 16 February 2020.
55. The operator is engaged in home to school transport that will need to be replaced. I would consider an application supported by the local authority to extend the revocation date at a lower level of authority until 30 March 2020. Appropriate checks on vehicle safety would be required.
56. I am minded to disqualify the company and the constituent directors from playing any part in the control of any entity holding an operator's licence for a period of between 1 and 3 years and I invite submissions on that matter prior to making a decision on 17 January 2020.
57. The good repute of transport managers Tristan Kelly and Ashley Taylor is unblemished.



Kevin Rooney
Traffic Commissioner for the West of England
20 December 2019