**IN THE UPPER TRIBUNAL** **Appeal No. T/2019/08**
**ADMINISTRATIVE APPEALS CHAMBER** **[2019] UKUT 168 (AAC)**
**TRAFFIC COMMISSIONER APPEALS**

**IN AN APPEAL FROM THE DECISION OF**
**Sarah Bell, Traffic Commissioner for**
**London and South East of England dated 7 January 2019**

**Before:**

**Her Hon. Judge J Beech, Judge of the Upper Tribunal**
**George Inch, Specialist Member of the Upper Tribunal**
**John Robinson, Specialist Member of the Upper Tribunal**

**Appellants:**

**CGR (CG ROSULETE) LIMITED**
**COSMIN GABRIEL ROSCULETE**
**MANUELA OLDANO**

**In attendance:** Mr Nesbitt QC instructed by AMD solicitors on behalf of the Appellants with Mr Rosculete in attendance.

**Heard at**: Field House, 15-25 Bream's Buildings, London, EC4A 1DZ
**Date of hearing:** 9 April 2019
**Date of decision:** 22 May 2019

## DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that the appeals be DISMISSED and that the orders of revocation and disqualification take effect from 23.59 on 2 July 2019

**SUBJECT MATTER:-** Adequacy of reasons; proportionality of orders of revocation and disqualification.

**CASES REFERRED TO:-** 2009/225 Priority Freight & Paul Williams; 2002/217 Bryan Haulage No.2; 2014/59 Randolph Transport Ltd & Catherine Tottenham; 2011/36 LWB Ltd; 2013/07 Redsky Wholesalers Ltd; 2012/34 Martin Joseph Formby t/a G & G Transport; 2012/25 First Class Freight; 2010/29 David Finch Haulage; T/1015/63 Mr & Mrs Smith

## REASONS FOR DECISION

1. This is an appeal from the decision of the Traffic Commissioner for London and the South East of England ("the TC") made on 11 January 2019 when she revoked the restricted operator's licence of CGR (CG Rosculete) Limited ("the company") with effect from 23.45 on 21 February 2019 and disqualified the company, Mr Cosmin Gabriel Rosculete and Ms Manuela Oldano from holding or obtaining an operator's licence or from being involved in an entity that holds or obtains such a licence for a period of two years.

The Background

2. The background relevant to this appeal can be found in the appeal bundle, the transcript of the hearing, the written decision of the TC and is as follows. The company undertakes highway maintenance work and has held a restricted operator's licence since 2011, authorising 10 vehicles and 3 trailers with 5 vehicles and 3 trailers in possession. The directors of the company are Mr Rosculete and Ms Oldano.

3. In February 2015, the company was called to a public inquiry as a result of a compliance report marked "unsatisfactory", the Traffic Examiner having found that the company believed that its drivers were exempt from tachograph use and were using a mixture of domestic logs and digital tachographs to record drivers' hours. Concerns were also raised as to whether the company was using the operating centre in Twickenham. At the conclusion of the hearing, a formal warning was issued and an undertaking was given to provide evidence of the availability of the nominated operating centre. Shortly thereafter, the company made an application to remove the Twickenham operating centre from its licence, nominating an alternative in Feltham. The application was granted in August 2015.

4. In the interim, on 31 July 2015, Vehicle Examiner ("VE") Rohan undertook a fleet inspection as a result of two immediate PG9's having been issued in August 2014 and March 2015, the latter having been "S" marked. His report was marked "unsatisfactory" as a result of the following shortcomings:

    - No road wheel re-torque register/record was in place
    - Rectification work was not being recorded on PMI sheets
    - No brake tests were recorded on one in three of the PMI sheets
    - Only one PMI sheet available for vehicle YJ6LFE dated 21 May 2015
    - There were no PMI sheets available for vehicles MX57CHY and SN57DGU from 16 February 2015 onwards
    - The operating centre was not authorised, although an application had been made (see above).

    As a result of the adverse findings, the Office of the Traffic Commissioner ("OTC") issued a written warning to the company on 13 October 2015.

5. On 8 May 2018, an unannounced maintenance investigation took place as a result of an "S" marked PG9 having been issued to SN57DGU on 27 March 2018 for a tyre worn below the legal limit on axle 3. Further prohibited items were damage to the side wall of a tyre on axle 2 with the body cords exposed and a defective indicator lamp on the dashboard which was illuminated, indicating a fault. VE Rohan inspected one vehicle during his investigation. The driver confirmed that he had already performed his daily walk round check. However, a delayed PG9 was issued for a defective driver's seat belt. The driver maintained that the seat belt had been working when he had checked it earlier. VE Rohan was doubtful that the driver had undertaken his daily check or if he had, that it was undertaken competently.

6. Mr Rosculete was in attendance during the investigation. However, the full maintenance records were not all available for VE Rohan to inspect and it was agreed that Mr Rosculete would attend the DVSA office at Yeading on 19 June 2018 to produce all of the missing paperwork. On that day, neither director attended for personal reasons, although they had authorised a Transport Consultant, Chris Farrer, to attend on their behalf. The outcome of the investigation (set out in a report dated 15 August 2018) was marked as "unsatisfactory" for the following reasons:

    - The "S" marked PG9 which had been issued on 27 March 2018 (as set out above) indicated a significant failure in maintenance.
    - The delayed PG9 issued on 23 January 2018 to HX56 MYU for a non-steer tyre worn below legal limit on axle 3 nearside inner (which indicated a failure in the maintenance systems). The vehicle had a safety inspection on 7 February 2018. Recorded on the sheet in the defects section was "*various tyres U/S".* Rectification was signed off with the initials "*CGR".* On the same day, the vehicle was then presented for PG9 clearance by the same driver who had been driving the vehicle when the PG9 had been issued (Mihai). Clearance was refused because the PG9 tyre defect had not been rectified.
    - An annual test initial pass rate since last investigation of 70% against the national average of 83%.
    - The delayed PG9 issued during VE Rohan's investigation for the defective driver's seat belt.
    - Road wheel re-torque register not available for inspection.
    - No evidence of measured brake tests recorded on safety inspection sheets.
    - The PG9 issued on 27 March 2018 included three delayed items including a defective indicator lamp indicating a fault. The same vehicle was checked by another Vehicle Examiner on 25 April 2018 and was prohibited for the same defect. The vehicle had covered 1,656km between checks.
    - Mileages were not recorded on 10 of 20 PMI sheets viewed.
    - Eight out of ten PMI sheets viewed did not include a record of rectification work.
    - There was only "*some"* evidence of follow-up rectification work following defects being identified during daily walk round checks.

- The prohibition rate for the operator since the last public inquiry was 83% against a national average of 27% and 100% over the previous two years compared to the national average of 25%. Between August 2014 and July 2018, ten PG9's had been issued to the company's vehicles. Five were immediate and two had been "S" marked.
- OCRS score for the operator was Amber 5 Roadworthiness and Amber 5 Traffic.
- On 4 July 2018 (after VE Rohan's investigation), vehicle HX56MYU was subject of a roadside check and an immediate PG9 was issued for a defective repeater light, along with three other defective lights. The driver showed VE Rohan his electronic record of his daily walk round check. The vehicle had only covered 21kms since that check. VE Rohan concluded that it was highly unlikely that four bulbs on separate systems had stopped working in such a short distance. It followed that the driver had failed to conduct his walk round check properly.

As a result of the many tyre defects noted on prohibitions, VE Rohan further suspected that not all the drivers were carrying out their daily walk round checks. He concluded that there appeared to be little ownership or control with regards to the maintenance of the vehicles operated by the company. VE Rohan noted that in respect of the PMI sheet dated 7 February 2018 and endorsed "*various tyres U/S"*, the PMI sheet was endorsed "*rectified by CGR"* (Mr Rosculete). It appeared to VE Rohan that defects were being reported by the maintenance contractor for repair/rectification by the company. He concluded that it was the company that had presented the vehicle for clearance with the same defect. He was further concerned that in respect of the shortcomings identified in relation to the lack of a wheel re-torque register/record, the failure to record rectification work on PMI sheets and the absence of any brake test records, these were shortcomings found during his previous investigation in July 2015. VE Rohan's overall conclusion was that the company was not maintaining its vehicles in a fit and roadworthy condition.

7. VE Rohan issued the company with a PG13F&G to which Mr Rosculete responded in an undated letter. He asserted that the company had been "*let down"* by its maintenance contractor and this had not come to light until VE Rohan's investigation. Mr Farrer and Mr G Singh, a newly appointed transport specialist, had agreed that the standard of the contractor's safety inspections were "*below the expected standard".* He accepted that the ultimate responsibility lay with the company directors. He was "*extremely disappointed"* to discover that on at least one occasion, the maintenance contractor had presented a vehicle for the removal of a PG9 and clearance had been refused (H56 MYUon 7 February 2018). Mr Rosculete found this "*inexcusable".* As a result, he had devised a new maintenance system. He had employed a full-time mechanic who would be responsible for the maintenance of all equipment and vehicles. The company had a facility away from the operating centre where safety inspections would take place. The same mechanic would also oversee the drivers daily walk round checks and he would carry out and record any defect rectifications which would be signed off. Mr Rosculete had contracted with the local DAF main dealer to carry out

brake performance checks on all of the company's large vehicles on a twelve-weekly basis and on those dates, the DAF dealer would also carry out the preventative maintenance inspection which would, in effect, check the standards of the in-house mechanics. In addition:

- The company would be using the latest inspection documents, including DAF's electronic system. All records were to be checked by either Mr Rosculete or Mr Singh as an outside auditor.
- Mr Rosculete would be personally monitoring any roadside encounters and in the unlikely event of further prohibitions, he would carry out an immediate investigation.
- He had printed off the 2018 Guide to Maintaining Roadworthiness and had read it and given a copy to his mechanic who understood its content.
- He had printed off and read the FTA wheel torque guidance and he had adopted the recommendations as company policy. The company owned a torque wrench and it would continue to be used.
- Ms Oldano normally had direct access to the company's compliance risk score and MOT history and the directors would continue to monitor the company's performance and Mr Singh had been asked to make regular visits to provide assurance that the company was meeting all of the requirements of the operator's licence.

8. By a letter dated 31 October 2018, the company was called to a public inquiry scheduled for 5 December 2018. Prior to that date, Mr Brown submitted written representations to the TC. It contained a schedule of Mr Rosculete's comments upon the PG9's issued to the company's vehicles (it is of note that none of the PG9's had been the subject of appeal by the company at the time). He was critical of the police and the DVSA officers who had issued a number of PG9's, including VE Rohan. By way of example, it was asserted that the PG9 issued on 4 July 2018 should not have been issued because "*the light bulb"* was working and VE Rohan could not see it properly because of bright sunlight (there were in fact four defective bulbs). It was emphasised that maintenance inspections had been moved "*in-house*", the MOT initial pass rate represented an improving picture, the wheel torque policy was in place and an independent compliance audit had been commissioned. All recommendations would be implemented and the operator hoped to gain FORS accreditation. Revocation of the operator's licence would lead to the termination of the business with a loss of 58 jobs. A suspension of the licence would lead to termination of contracts and the continuing existence of the company would be in issue. The company could sustain a time limited curtailment of up to four vehicles.

9. An independent audit mentioned in the written representations was carried out by Kevin Antonia of Ridgeway Training on 19 November 2018. The report was signed off by Mr Antonia on 28 November 2018. The TC was only provided with a copy of it twenty minutes before the start time of the public inquiry. The following adverse findings were recorded by Mr Antonia:

- There was no evidence of refresher training or other means by which the licence holder was keeping up to date with operator licence issues.
- The operator did not know the most recent OCRS score as it did not have access to the OCRS reports system. The only record of the OCRS vehicle test history report was provided in the Public Inquiry brief. Mr Antonia registered Mr Rosculete on the OCRS on the date of the audit.
- There were no written instructions available in relation to loading procedures and there was no written evidence of any practical instructions given.
- The operator had brought maintenance in-house six months before the audit (i.e. May 2018) because the operator was not happy with the quality of the checks due to the high number of MOT failures and PG9s issued. Two people had been employed to undertake the maintenance. This change in maintenance had not been notified to the TC. The operator said that the TC would be informed of the change at the public inquiry.
- Maintenance was taking place on land owned by the Mr Rosculete. A tour of the facilities revealed the presence of a torqued pneumatic air gun; manual jacking equipment; oil, ad-blue and diesel fuelling facilities. Mr Antonia was advised that all necessary tools were stored in a van which was also used for mobile repairs. Neither the van nor the road maintenance compressors required to use the air gun were available for Mr Antonia to inspect. As for undercover facilities, these did not have sufficient headroom to allow for the larger vehicles to be inspected or repaired. Mr Antonia was assured that the height of the roof supports would be increased. Mr Antonia concluded that it was not possible to confirm whether the vehicle maintenance arrangements were satisfactory.
- Roller brake testing ("RBT") had not been undertaken at the required intervals. The operator was advised that RBT should take place a minimum of four times a year with the vehicle fully loaded i.e. every other maintenance inspection as well as at MOT renewals. Brakes should be tested by some other means at all other PMIs. Results were to be recorded on the PMI sheets. The operator booked a brake test for HX56MYU immediately and assured Mr Antonia that all other vehicles would have a roller brake test within one week of the audit and then at maximum intervals of twelve weeks.
- There was no evidence of any kind of quality checks on the workmanship or maintenance of the vehicle checks.
- The driver defect reporting system was via a free app with reports being filed electronically to the company and to Mr Rosculete's mobile phone. Rectification work could be added to the report when done. There was no evidence of drivers receiving written instructions as to the use of the system.
- There was very limited evidence of faults being found on the daily walk round checks by the drivers. This contrasted with the high number of faults found at PMIs and the high number of PG9s being issued. Whilst the defect reporting system was satisfactory, it needed to be used properly by the drivers and the reports needed to be checked by the

operator and the drivers challenged if they were not completing the reports properly.

- There was evidence that defects were not being recorded correctly. Several reports had defects recorded but they were ambiguous, for example, "*mirror/s or "light/s"* with no reference as to which ones. There was no space on the defect report for this to be noted. For one vehicle, the same defect was noted on three consecutive reports. There was a facility for drivers to take photographs and attach them to the reports, but this was only used occasionally.
- There was limited evidence of rectification work shown against the defects reported.
- Minimal checks were in place to ensure that the driver defect system was being used correctly and that the defects were being rectified and signed off. This was necessary to ensure that re-education could take place of the driver and the person repairing a defect if not recorded correctly. Mr Rosculete assured Mr Antonia that the reports would be scrutinised and that drivers would receive training and records made of rectification of defects. A toolbox talk on defect reporting was attended by the drivers on 21 November 2018 and attendance recorded. The drivers did not sign to confirm that they understood the training.
- One vehicle was missing an MOT certificate although it was not due for expiry until 30 June 2019.
- All drivers were Romanian nationals. The DVLA had not been notified of any medical conditions and there was no evidence of the drivers having been reminded to do this.
- There was no evidence of driving licence renewal dates being checked.
- There was no system for logging penalty points between updates. Even though the drivers were Romanian nationals, the DVLA kept details of any points accrued. Mr Antonia devised a form to record licence checks and provided the operator with the relevant telephone number to obtain the information.
- The company did not possess a company card for downloading the digital tachograph information from the vehicle units as required every ninety days. A card was ordered.
- The company did not have a detailed mobile phone policy, drug and alcohol policy and there was no driver's handbook. This was essential. Mr Antonia provided an editable compliant version for the company to edit and he was assured that such a handbook would be supplied as evidence at the public inquiry.

10. Mr Antonia concluded:

> "*Both Mr Rosculete and Mrs* (sic) *Oldano realise and accept that the current level on compliance with road worthiness is unacceptable and they must improve their procedures to ensure that no further penalty notices are issued and that no vehicles fail future MOTs. The auditor enhanced their planning document and gave them several other documents to help them improve in this respect".*

The Public Inquiry

11. Mr Rosculete attended on behalf of the company which was represented by Mr Brown. Mr Farrer was also in attendance but did not take part in the proceedings. The audit report and the documents required for production were handed to the inquiry clerk only twenty minutes before the commencement of the hearing (the call up letter made it clear that such information was to be available for at least an hour before the hearing commenced). In the limited time available, VE Rohan considered the records and in answer to questions asked by the TC, confirmed that no further PG9's had been issued since 4 July 2018 and two vehicles had passed their MOTs. He described the company's previous maintenance record keeping as "*quite good"* but he was concerned that it was Mr Rosculete who was endorsing the rectification work on the PMI sheets. However, the records produced were a "*huge improvement"* as he had seen some measured brake tests and one laden brake test and endorsements were being endorsed "*presumably by the maintenance provider".* When the dates of RBTs were looked at in detail, VE Rohan concluded that those which had taken place were separate to the PMIs and not even in the same week and were not planned on the forward planner. Further the first evidence of an RBT was in September 2018 (one test), four months after VE Rohan's visit; otherwise RBT appeared to commence in October 2018 but not even in the same week as the PMI. As for the driver defect reports, some of them recorded defect rectification and were signed off whilst others did not. Some defect sheets recorded the repair but not the defect. A wheel torque register had been produced at the hearing but the first entry was September 2018, three months after his investigation and his repeated recommendation to use one (the first recommendation was in 2015). There was still room for improvement.

12. As for Mr Rosculete's criticism of VE Rohan's conduct in issuing the PG9 on 4 July 2018, he flatly rejected that the PG9 should not have been issued. He could not have missed all four bulbs as a result of sunlight. He was not colour blind. VE Rohan confirmed that contrary to Mr Rosculete's assurance to him in his response to the PG13F&G, there was no evidence that Mr Rosculete had undertaken an investigation into the circumstances of that PG9 being issued. Having considered Mr Rosculete's comments about the PG9's contained in the written representations, VE Rohan confirmed his view that there did not appear to be ownership of the vehicle maintenance problems by the company. He described the presentation of HX56 MYU for clearance of the PG9 with the same defect as a "*big issue".* He noted that the PMI had been signed off by Mr Rosculete, not the maintenance provider and the same driver who had been driving the vehicle when the PG9 had been issued, presented the vehicle for clearance. Further, the vehicle had been used with unrectified defects which had been reported on 29 October 2018, there being a mileage difference between that report and the PMI sheet on 30 October 2018. As for driver defect reports for vehicle SM57 DGU, defects were marked on 11 October 2018 and not rectified; different defects were recorded on 12 October and not rectified with all defects being rectified at the PMI on 13 October 2018. Turning to the driver training provided by the operator, VE Rohan had been led to believe in June 2018 that this this was to be undertaken by Mr Farrer (VE Rohan had been told that Mr Farrer had been

assisting the operator for a number of years) although the records produced at the hearing showed that it had been Mr Rosculete who had provided the training. VE Rohan concluded that upon the documents produced, his suspicions that not all of the drivers were checking their vehicles were well founded and he repeated his concern about a lack of ownership of the maintenance issues on the part of Mr Rosculete. He was "*not sure what is happening"* with the preventative maintenance checks and the lack of alignment between those checks and the roller brake testing. He had been told in June 2018, that the maintenance was provided by an external maintenance contractor and he was unaware until the hearing that the position had changed in May 2018. He had therefore not had an opportunity to view the facilities now being used by the company which would need hardstanding, a weather-proof building, "*possible headlight/roller brake tests/torque wrenches … not jacks .. preferably lifts and a pit"*.

13. Mr Rosculete then gave evidence which can be summarised as follows:

- The decision was made to dispense with the services of the external maintenance contractor (Steve Redfern of Thames Valley) in June 2018 upon the advice of Mr Farrer following VE Rohan's investigation, as Mr Farrer was very concerned by the standard of the company's maintenance.
- The decision was then made to bring the maintenance "*in house*" as two of the drivers had the appropriate qualifications as part of their driving qualifications obtained in Romania. They were put in charge of the PMIs and the rectification of the defects reported by the drivers. Mr Redfern was retained during the "*changeover"* period to oversee the PMIs and the rectification work and he signed off all of the PMI records. There was a delay in the handover of the work as the company had to arrange for the PMI sheets to be translated into Romanian. Mr Redfern continued overseeing the drivers' work until October 2018.
- Mr Rosculete denied that it was he who had been signing off the rectification work on the driver reports and the PMIs with the initials "*CGR"* prior to October 2018. Mr Redfern must have been doing this without Mr Rosculete's knowledge and he should not have been doing so.
- The latest PMI sheet available to the TC was 30 October 2018 and that was signed by Mihai and signed off by Mr Rosculete who was signing to record that he had checked that the repair had been done. He accepted that he was not qualified to do so. The PMI sheets were now being properly completed and signed off by a qualified person (he did not say who).
- A new system of roller brake testing had been introduced in late November as a consequence of the conclusions in the audit report. The forward planner was marked "*RBT booked in"* every other PMI and the DAF dealer had agreed to undertake the PMI and the RBT as a priority that week. The company did not have a contract with the DAF dealership. Four of the five vehicles had RBT tests in November, the fifth vehicle being SORN, although it remained specified on the

licence as Mr Rosculete did not appreciate that on-line changes to specifications could be undertaken easily and quickly.

- DAF also did the pre-MOT PMI whilst the company did the pre-MOT preparation.
- As for the maintenance facilities, Mr Rosculete confirmed the facilities as described in the audit. VE Rohan had not been told about the new system because it was not in force when he visited. The vehicles were now taken by the company for MOT testing and roller brake testing. The records for MX57 were looked at. The date recorded for the MOT test was incorrect and there was no record of a pre-MOT inspection. Mr Rosculete assured the TC that the work was done by the company.
- The company had been receiving OCRS reports since 19 November 2018.
- He explained that the maintenance records had not been available for Mr Antonia to inspect during the audit because it took place at the home of Ms Oldano who was working from home. Mr Rosculete assured the TC that he did appreciate the importance of producing properly completed paperwork.
- He had undertaken tool box talks having been taught how to use the driver defect app by Mr Farrer. He had also shown Mr Rosculete how to use the torque register. Mr Rosculete had then explained these to the drivers. He had not received any operator refresher training for three or four years. This was despite VE Rohan having been informed on 31 July 2015 that Mr Rosculete would be attending a two-day operator seminar in September 2015. Mr Rosculete accepted that he had been concentrating on the operational side of the business rather than vehicle maintenance.
- He was normally at the operating centre going through the walk round checks with the drivers. The TC asked about defects that had been reported by a driver one day but not the next and then reported on the third day. Mr Rosculete informed the TC that the faults would have been eventually rectified at the PMI. Parts were ordered and then they would be fitted. Defects which were repeatedly noted were minor ones. Mr Rosculete accepted that there was no record of assessments made on the driver's defect reports to that effect and the findings at PMI contradicted the driver's defect reports.
- Mr Rosculete appreciated the TC's concerns about the issues with the driver defect reports and the rectification work or absence of it until a PMI and that the maintenance was being undertaken by two of the drivers. He considered that "*an assessment*" was required. VE Rohan interjected at this stage pointing out that the problem was Mr Rosculete's judgement as to what was appropriate. One of the two drivers now responsible for maintenance had been issued with three PG9's and the other with one and yet Mr Rosculete considered that it was appropriate for them to be in charge of maintenance. Mr Rosculete's assessment was "*wrong"*. Mr Rosculete disagreed: he and Mr Farrer (neither being qualified fitters) had trained the two drivers to understand the format of the PMI record sheets and Mr Redfern had told them how to undertake a PMI. The TC then queried

why it was, in those circumstances, that they were unable to correctly undertake daily walk round checks as drivers. Mr Rosculete explained that they did not understand the app that was being used because of the language barrier although this had been overcome. As for Mihai taking vehicle HX56 MYU for prohibition clearance with the same defect, he must have failed to spot the defective tyre during his walk round check. Mr Rosculete would have to "*look into"* that. The PMI on 7th February 2018 had been conducted by Mr Redfern along with the rectification work. Mihai, the driver, must have travelled to the maintenance contractor to collect the vehicle and then accompanied Mr Redfern to the testing station. He would not have entered the building. He did not go onto to explain how it was in those circumstances, that Mihai was recorded as presenting the vehicle for PG9 clearance rather than Mr Redfern. Mr Rosculete denied knowing that the PG9 clearance had been refused.

- Mr Rosculete offered to give an undertaking that all maintenance would be provided by a DAF contractor in the future.
- The effect of regulatory action was that the company needed a minimum of four vehicles for call outs as part of their reactive maintenance contracts with local authorities. After 4 April 2019, the company would need seven vehicles as local authorities entered a new financial year. He had a substantial contract with Hounslow which contained penalty clauses. He had not produced any evidence of the effect of regulatory action upon the company because he was unaware of the need to do so (although Mr Brown then informed the TC that he had told Mr Rosculete to produce evidence of contracts and the effect of revocation for the TC to consider). If the licence was reduced to two vehicles, the company would need to use smaller vehicles with a risk of overloading and the company could not manage for more than a limited period. He referred to other contracts and the risk of being penalised if work could not start. He had not made any contingency plans and had missed the advice about that in the call up letter. He had not thought that the licence might be revoked.
- He had learnt a lesson at the hearing and had taken everything on board. The company employed 76 people (58 people in Mr Brown's representations) and he was definitely going to enter into a maintenance contract with a DAF dealership.

The Traffic Commissioner's decision

14. The TC's decision does not include a summary of the evidence that she had heard, merely referring to the fact that it was set out in the transcript. She reminded herself that directors are jointly and severally responsible for the management of the company and that this case was no exception as Ms Oldano had taken an active role in the management of the transport operations. The evidence made "*woeful reading".* The TC referred to the compliance history of the company and VE Rohan's findings in June 2018 and the written assurances given by Mr Rosculete in response to VE Rohan's findings in the PG13F&G. A number of the issues identified by VE Rohan remained. The TC noted:

- The company had not mentioned that it had or intended to move its maintenance "in house" in May/June 2018, Mr Antonia's audit confirming that the change had taken place in May 2018.
- The company did not notify the Office of the Traffic Commissioner ("OTC") of the change in maintenance arrangements when they did take place and did not notify the OTC upon receipt of the calling up letter, a decision having been made to notify the material change at the public inquiry hearing, despite the advice of Mr Antonia.
- The assurance that a DAF main dealer would undertake full PMIs with roller brake tests every twelve weeks as a standard check on the in-house fitters did not materialise.
- Roller brake testing started in around November 2018 but was random and not linked to the PMIs.
- Mr Rosculete gave an assurance that the *"in house"* mechanic would supervise the driver's daily walk round checks to ensure that defects were properly recorded and rectified. However, the system remained deficient with drivers failing to record some reportable items or if they were recorded, the vehicles were put into service with no record of rectification. This was evidenced by the defects noted on PMI records and by the prohibition issued on 4 July 2018.
- No one in the business was accepting responsibility for the prohibitions. Mr Rosculete's response to the investigation included "*I will personally be monitoring any roadside encounters and in the unlikely event of further prohibitions will carry out an immediate investigation".* He did not investigate the PG9 issued by VE Rohan on 4 July 2018 to HX56 MYU.
- Mr Singh had been engaged as an external consultant to assist. This arrangement did not continue but no alternative arrangement had been put in place.

The TC concluded that previous assurances had not been followed through even after the events of 2015. There was limited or no discernible improvement in the driver defect reporting or PMIs.

15. The TC then considered the Guide to Maintaining Roadworthiness 2018 and the statement of expectation on maintenance facilities. VE Rohan had not been told about the facilities now used by the company and Mr Antonia was unable to inspect the equipment used. However, the undercover facilities were inadequate. In light of the TC's findings re past assurances, Mr Rosculete's assurance that suitable tools were available to the fitters did not assist her.

16. The TC's biggest concern was the company's failure to properly monitor and control its systems. Instead of heeding previous warnings, the company had demonstrated an ".. extraordinary lack of judgment. It seems incapable of objective assessment when it comes to road safety and fair competition". The TC set out the following examples:

- Mr Rosculete blames the external contractor for the issues on 7 February 2018 but all the paperwork pointed to the company's own staff as being culpable. The operator's driver took the vehicle to MOT when it failed and the PMI sheet records that it was for the company to undertake the repair.
- Prohibitions had been issued after the maintenance system had been brought "in-house".
- The company held drivers responsible for the most recent prohibitions although there was no evidence to support this.
- The company arranged for an external audit but did not make the PMI documentation available to Mr Antonia.

17. The TC agreed with VE Rohan's assessment that underlying problems remained and that there was no one exercising quality monitoring and control of the transport operations. It followed that the few positives had limited weight. The company operated a successful business in monetary terms but that was at the cost of safety. The TC was satisfied that the company was undertaking its own repairs even before the services of the external maintenance contractor had been dispensed with. Toolbox talks were undertaken by Mr Rosculete rather than an external trainer. He also had signed off the most recent PMIs even though he lacked expertise.

18. The TC considered *2015/59 Randolph Ltd & Catherine Tottenham* and *2011/036 LWB Ltd* and *2013/007 Redsky Wholesalers Ltd* and noted that the question of fitness to hold a restricted licence was not a significantly lower hurdle than the requirement of being of good repute for standard licences. She concluded that it would be helpful in this case to pose the *Priority Freight* question (*2009/225 Priority Freight Ltd)* namely, "can I trust this operator moving forward" and her answer was in the negative. She referred to *2012/34 Martin Joseph Formby t/a G & G Transport* (paragraph 17) and concluded that the company in this case had failed to heed the warnings from TCs and the DVSA. The proposals made at the hearing were ones which should have already have been implemented after July 2015 and June 2018. Previous assurances had proved unreliable and the TC was drawn to the conclusion that Mr Rosculete had a *"pedestrian and closed mind approach to compliance, a dangerous mix".* The company was not fit to hold a licence.

19. The TC then went on to consider whether it was disproportionate to revoke the company's licence. Her answer was "*no"* as it was essential to protect road safety and the company's more safety conscious competitors. She referred to *2012/025 First Class Freight* and concluded that the case required a robust approach to such a blatant disregard to the licensing regime and to maintain confidence in it.

20. As for disqualification of the company and its directors, the TC had regard to paragraph 54 of the Statutory Guidance, the Statutory Direction Document No.10 on the Principles of Decision Making and *2010/29 David Finch Haulage* and determined that the case warranted an imposed exclusion from the benefits of commercial vehicle transport for a period. The company had posed a significant risk to road safety and gained an unfair competitive

advantage for a long period and this disqualification would go some way to redress the balance for its competitors. It would also send a message to the industry that there was no advantage in disregarding the regime. Accordingly, she made the orders set out in paragraph 1 above under section 26(1)(b), (c)(iii), (ca), (f) and (h), section 13(b) and section 28 of the Goods Vehicles (Licensing of Operators) Act 1995.

The Appeal

21. At the hearing of the appeal, Mr Nesbitt QC appeared on behalf of the Appellants and submitted a detailed skeleton argument for which we were grateful.

22. There were six grounds of appeal contained in the Appeal Notice with a seventh added at the hearing. They can be summarised as follows:

1) The TC failed to address the question set out in *2002/217 Bryan Haulage Limited No 2* namely, "is the conduct such that the operator ought to be put out of business".
2) She failed to consider the impact of revoking the licence before doing so.
3) She made findings of fact which were not justified or were unsupported by any or sufficient reasoning.
4) She failed to undertake a sufficient balancing exercise.
5) She failed to give consideration to whether a less onerous sanction might achieve the regulatory objective.
6) Revocation of the licence was disproportionate.
7) Disqualification was not warranted in this case.

23. Mr Nesbitt conceded from the outset that the evidence demonstrated persistent weaknesses in the company's compliance systems and that the TC was entitled to view the position as at the date of the public inquiry seriously; he further conceded that the company's failings warranted regulatory action. Mr Nesbitt accepted that as the evidence unfolded at the hearing, it became apparent that the recent efforts made by the company were still "*significantly deficient"*. The company had misjudged what was required to put things right and "*exasperation"* on the part of the TC was warranted. The move to in-house maintenance with drivers as mechanics was not well thought through. However, VE Rohan's assessment of the systems was that there had been an improvement although Mr Nesbitt accepted that as the evidence unfolded during the hearing, VE Rohan's position changed as a result of further consideration of the documentation produced along with Mr Rosculete's response to the PG13F&G, the written representations which had been submitted by Mr Brown prior to the hearing and Mr Rosculete's comments about the PG9's issued to the company's vehicles. Mr Nesbitt submitted that Mr Rosculete had however given an undertaking to contract with a reputable DAF dealer to undertake all of the company's vehicle maintenance. That undertaking demonstrated that Mr Rosculete had recognised that the decision to transfer maintenance in-house had been misjudged.

24. The principle criticism of the TC's decision was that it did not include an adequate evaluation of the evidence that she had before her and she failed to ask herself the question "*is the conduct such that the operator ought to be put out of business?"* During the course of Mr Nesbitt's submissions, the Tribunal indicated that we agreed with his analysis, the TC's decision being rather "*short hand*" in its approach to the evidence and the questions that ought to have been asked. Whilst the TC may have had the *Bryan Haulage* question in mind when asking herself whether revocation was a proportionate response, she failed to set that out in terms. We further note that she failed to set out any positive features of the case (however few) when undertaking her balancing exercise. In the circumstances, Mr Nesbitt was invited by the Tribunal to indicate the positive features which it was contended, the TC had failed to take into account in undertaking her balancing exercise and which should be given weight when determining the severity of regulatory action. He listed the following:

- The company had held a restricted operator's licence since 2011.
- There were no concerns in maintenance terms arising out of the Traffic Examiner's investigation on 29 August 2014, the concerns being that the company was not using the nominated operating centre and were not complying with the rules on drivers' hours record keeping.
- During the maintenance investigation in July 2015, the driver defect reporting was assessed as satisfactory and PMIs were being undertaken at the agreed intervals. Mr Nesbitt accepted that at the stage, the company's maintenance failings warranted a second written warning.
- In May/June 2018, whilst weaknesses continued in the company's maintenance systems, the picture was not one which pointed inevitably to revocation of the operator's licence. The company had a compliance history which could be described as "mixed" but it was not one of the worst. The PMIs were taking place although the records were flawed and the driver defect reporting system was assessed as either "satisfactory" or "mostly satisfactory".
- The driver defect reporting system as at the date of the hearing was sophisticated although mistakes were being made and it did need considerable tightening of the system. The failure of a driver to notice four light bulbs having failed in July 2018 was an example of the system failing. Mr Nesbitt acknowledged that there were many imperfect features of the systems.

25. When asked for submissions as to the nature of the regulatory action that was warranted in this case, Mr Nesbitt submitted that an appropriately structured, reasoned determination was required to ensure that the regulatory action was appropriate and proportionate. He referred the Tribunal to paragraph 9 of *2009/225 Priority Freight & Paul Williams* in which the Tribunal determined that "*There will be cases where it is only necessary to set out the conduct in question to make it apparent that the operator ought to be put out of business"*. Mr Nesbitt submitted that this case did not fall into that category. A careful assessment was required, taking account of all relevant matters. He

submitted that once an appropriate balancing exercise had been undertaken, taking account of Mr Rosculete's acceptance of the maintenance deficiencies as at the date of the hearing and the grave consequences to the company and its employees of severe regulatory action, a dramatic curtailment with a suspension would be appropriate along with undertakings and a further audit.

26. In the event that his submissions did not succeed, Mr Nesbitt further submitted that the orders of disqualification were unnecessary and disproportionate. This was not a case where there had been dishonesty or lack of integrity but rather failures in judgement. The company and the directors should be left with an opportunity to apply for a new licence and demonstrate that they could implement and maintain compliant systems in the future. He referred to paragraphs 47 and 48 of *T/2015/63 Mr and Mrs Smith* and reminded the Tribunal that all regulatory action which, in practice, closes down a business must be a proportionate, regulatory response.

Discussion

27. We have already indicated in paragraph 24 of this decision that we are satisfied that the TC's decision was inadequate, not least because she appeared to fail to address the *Bryan Haulage* question in terms. In our view, a reference to proportionality is insufficient to demonstrate that the correct legal test has been considered and applied.

28. The next issue is one of disposal of the appeal. Adequacy of reasons, should not, in the normal course of events, lead to an appeal being remitted for a further hearing if the Tribunal is able to undertake its own evaluation of the evidence and make appropriate findings and this we now do:

a) The company held a restricted licence from 2011 to 2014 without any compliance issues and that is a positive feature;
b) In 2014, the company was called to a public inquiry held in 2015 because its directors had fundamentally misunderstood the rules on drivers' hours records and tachographs and were operating the company from an unauthorised operating centre. Apart from a PG9 issued in 2014, which was considered during the public inquiry, maintenance did not otherwise feature in the evidence. That is of limited positive weight bearing in mind the company's failure to comply with the relevant law on drivers' hours and records and its failure to use its authorised operating centre. Those failings indicate a disregard for the need to operate a compliant transport operation;
c) In March 2015, an "S" marked PG9, denoting a significant failure of maintenance was issued to HX56 MYU. That demonstrated that the driver defect system was not being implemented as it should have been. That is a negative feature;
d) In July 2015, prompted by the "S" marked PG9 above, a maintenance investigation was marked as unsatisfactory and the company was issued with a warning letter by the OTC. The full list of shortcomings is set out in paragraph 4 above. That is a negative feature. What is striking about the shortcomings found by VE Rohan in May 2018 was that the lack of a

wheel re-torque register/record, the failure to record rectification work on PMI sheets and no brake test records on the PMI sheets were three of the shortcomings found in May 2015. It follows that the company had failed to address those shortcomings at all in the intervening three years despite assurances to the contrary which again indicates a disregard for the need to operate a compliant transport operation;

e) In April 2017, HX56 MYU failed an MOT test which indicates that the vehicle had had not been the subject of any or any adequate pre-MOT preparation. That is a negative feature as it again indicates a disregard for the need to prepare vehicles for testing;

f) There followed five PG9's all issued in 2018 prior to VE Rohan's next maintenance investigation. One, issued on 27 March 2018 to SN57 DGU was "S" marked, which was again for tyre damage on two different axles and for an emissions malfunction indicator lamp which was permanently illuminated. Both defects were an indication that there was a failure in the driver defect reporting system. Those PG9's demonstrate a disregard on the part of the company to implement and enforce a compliant maintenance system;

g) The only PMI sheet that is included in the appeal bundle relates to HX56 MYU dated 7 February 2018 and which notes in relation to tyres "*various tyres u/s".* That PMI sheet was completed by Mr Redfern. He has recorded in respect of all twelve items which required rectification that it was for the company to undertake that work, having initialled the rectification section of the PMI sheet with "*CGR".* It is therefore clear that since at least February 2018, the company was undertaking its own repairs and rectification work, not Mr Redfern. It follows that any failings in maintenance are wholly attributable to the company. That is a negative feature;

h) When VE Rohan attended the operating centre on 27 March 2018, he was led to believe that there was a maintenance contract in place which inferred that it was the contractor undertaking the vehicle maintenance. VE Rohan was not informed by Mr Rosculete that repairs were in fact being undertaken by the company. If he had been told, then VE Rohan would have required access to the maintenance facilities being used by the company. It would then have been apparent that they were unsatisfactory not least because the larger vehicles could not be accommodated in the undercover area. When Mr Farrer attended upon VE Rohan on 19 June 2018, he did not tell VE Rohan about the detail of the maintenance arrangements. This is a negative feature;

i) As for the driver defect system whilst there was evidence that a satisfactory system was in place and that there was evidence that walk round checks were being undertaken and that some rectification work was recorded, VE Rohan's suspicions that the system was not being used properly by the drivers and the company were well founded. That is a negative feature;

j) The overall findings of VE Rohan as set out in the PG13F&G are set out in paragraph 6 above. We find that against the background of one public inquiry and two warning letters, that VE Rohan's conclusions demonstrated again, a disregard of the need to comply with regulatory requirements for operating large vehicles. Mr Rosculete's concession that

he had been concentrating on the business rather than the maintenance of the vehicles operated by the company was justified and unavoidable in the circumstances. His concession is a limited positive feature bearing in mind that the situation was obvious. The investigation outcome was a significantly negative feature;

k) We find Mr Rosculete's response to the PG13F&G to be revealing and of considerable concern:
   - He blamed Mr Redfern for the failings in maintenance when Mr Rosculete had to later concede in evidence that it was his drivers who responsible for maintenance and not Mr Redfern, who in the first instance simply undertook the PMIs leaving the rectification work for the company and subsequently simply oversaw the drivers, Maihai and Innuet as they undertook the PMIs. His comments in relation to Mr Redfern were a misrepresentation at best and untruthful at worst;
   - He referred to a newly appointed transport specialist, Mr Singh and assured VE Rohan that Mr Singh would regularly visit the operating centre to provide assurance that the company was continuing to comply with all regulatory requirements and that he and Mr Rosculete would be checking and auditing the latest PMI documents. However, there was no reference to Mr Singh in the written representations submitted by Mr Brown, Mr Antonia did not refer to the input of Mr Singh in his audit and Mr Rosculete did not mention Mr Singh at all during the course of his evidence. Further, Mr Singh did not provide a witness statement or attend the hearing. There was therefore no evidence before the TC that Mr Singh has had any input into this company other than assisting in the collation of documents to be provided to VE Rohan. It would therefore appear that Mr Singh's input did not materialise for some reason not explained or the assertion was untrue;
   - Mr Rosculete asserted (and repeated in evidence) that it was Mr Redfern who presented HX56 MYU for removal of the prohibition when it is clear from the evidence that it was the company which was responsible for rectifying all faults on the vehicle and then presenting it for PG9 clearance. It is a nonsense to suggest that the reason why Mihai's name was recorded as the person presenting the vehicle for clearance was because he went with Mr Redfern but did not enter the building. We conclude that this assertion was untruthful;
   - Mr Rosculete described a new system of maintenance involving the employment of a full-time mechanic using facilities with an undercover area for PMIs. The same mechanic would be overseeing the driver defect reporting and he would be responsible for ensuring that all defects were correctly recorded as being rectified. This of course, was not the true position. Two drivers were undertaking the PMIs being overseen by the very person that Mr Rosculete blamed for the inadequacies in his maintenance systems. There was no evidence of any monitoring of the driver defect reporting system whether by a mechanic or otherwise and the TC highlighted on-going deficiencies in it during the course of

the hearing. The evidence before the TC was that the deficiencies in the system flowed from the drivers being unable to understand the app and use it correctly. Further, it was simply untrue to state that there an undercover facility suitable for PMIs as the larger vehicles could not fit into it.

- It follows from the point above, that the assurance given to VE Rohan that all driver walk round checks would be overseen by a mechanic and all reported defect and their rectifications properly reported and signed off was inaccurate;
- Mr Rosculete assured VE Rohan that he would personally monitor any roadside encounters and in the unlikely event of further PG9's, he would carry out an immediate investigation. He did not undertake any investigation of the PG9 issued on 4 July 2018 and therefore his assurance was empty;
- Whilst he also assured VE Rohan that a re-torque procedure had been implemented that did not in fact take place until after Mr Antonia's visit in November 2018. The statement was untruthful;
- He assured VE Rohan that roller brake testing would take place at the same time as every other PMI with both being undertaken by DAF. The first roller brake test took place in September 2018 and the remainder only took place after Mr Antonia's audit in November 2018;
- Mr Rosculete asserted that the company had access to the OCRS and would continue to monitor its risk score and MOT pass rate history. That was untrue. Mr Antonia set up access to the OCRS for the company during his visit 19 November 2018;

Whilst Mr Rosculete had hoped that his response would assure VE Rohan and the TC of his personal commitment to be a compliant operator, it could not do so in the circumstances. Rather, it demonstrated that Mr Rosculete was prepared to make cavalier, reckless and untruthful statements in order to persuade the DVSA and the TC that his company should be allowed to continue operating large vehicles. Not only is this a devastatingly adverse feature in the case but it demonstrates that Mr Rosculete's word is not to be trusted;

l) It is unclear what role Mr Farrer has been fulfilling with the company and for how long. He did represent the directors on 19 June 2018 at the meeting with VE Rohan (which was required because Mr Rosculete was unable to produce any maintenance records when VE Rohan visited the operating centre). He also, along with Mr Singh, collated the documents that were provided to VE Rohan. If he had any material input into the company, then he had overseen an inadequate maintenance system, the use of inadequate maintenance facilities and a failing driver defect reporting system as a result of a language barrier. Neither had the drivers been trained in its use. Mr Farrer attended the public inquiry but did not provide a witness statement nor did he give evidence. In the circumstances, no comfort can be drawn from his involvement with this company going forward. It follows that his involvement cannot be considered a positive feature;

m) Mr Antonia's audit report findings are set out in paragraphs 8 and 9 above. Bearing in mind that VE Rohan commenced his investigation in March

2018 and that Mr Rosculete would have been well aware that the company had failed to rectify three of the shortcomings identified by VE Rohan in 2015, it is extraordinary that the same three issues remained in November 2018. The catalogue of inadequacies recorded by Mr Antonia is woeful and is again, a significant adverse feature;

n) Mr Rosculete's evidence at the public inquiry was far from reassuring. VE Rohan had been led to believe that the drivers were to be given training upon the driver defect reporting system by Mr Farrer. In fact, Mr Rosculete delivered the training when he lacks any qualification to do so. He was monitoring the driver defect reporting system when he had no qualification to do so and was signing off the PMI sheets when he had no qualification to do so. He dismissed concerns that drivers' defects were not being rectified immediately upon the basis that parts had been ordered and the defects were minor. He had no qualifications to make those assessments, there was no record of such an assessment being made and he could not adequately explain why on one day a defect would be reported and not on the following day but would then be reported on the third day. His approach to maintenance was casual to say the least. We find that he had no or no sufficient regard to the road safety implications of operating the company's vehicles and was far more concerned with the financial success of the company, a finding supported by the high financial standing of the company;

o) The fact that two vehicles had passed their MOTs between VE Rohan's investigation and the date of the hearing and that no further PG9's had been issued since July 2018 were positive features.

29. As the TC observed, there was little by way of positive features to be put into the balance against the significant negative features, which go to the heart of the regulatory system and road safety. In order to consider whether any regulatory action short of revocation would be appropriate in this case, the *Priority Freight* question has to be answered in the affirmative i.e. that the operator can be trusted to operate compliantly in the future with whatever undertakings and restrictions imposed upon the licence, including curtailment and/or suspension. In this company's case, the word of Mr Rosculete cannot be trusted for the reasons set out above and so the *Priority Freight* question must be answered in the negative. He is, essentially, the driving force behind the company, the TC having heard nothing from Ms Oldano whether by way of a way of a witness statement or otherwise. He has a disregard for maintenance and road safety and he cannot be trusted to operate a compliant transport operation going forwards whatever assurances he is able to give and despite the positive feature in paragraph 28. o) above.

30. We have set out the evidence in great detail so that those reading this decision can appreciate the full background to this appeal. We have no doubt, when asking the *Bryan Haulage* question, that this is an operation which should be put out of business. The company and its directors are not fit to hold an operator's licence. There is no room within the world of restricted licences held by companies who undertake highway maintenance and civil ground work for an operation such as this to operate, whilst undercutting

competitors by failing to have in place fully compliant maintenance systems which result in vehicles which are roadworthy and safe.

31. Mr Rosculete's letter of response to the PG13G&F, makes it abundantly clear how unreliable his word is and that he is not to be trusted to operate compliant vehicles. Of course, the effect of revocation may or may not result in the closure of the business. Mr Rosculete failed to provide any evidence of the effect of regulatory action upon the company and its employees. The company has considerable financial resources and there was no explanation as to why those resources could not be used to hire in large vehicles as and when required or why smaller vehicles could not be used, save that Mr Rosculete contended that a risk of overloading might result. If it is the case that the company will fail as a result of the revocation of its licence and that its employees will lose employment, the persons responsible for that is Mr Rosculete and Ms Oldano for failing to take maintenance and road safety seriously and making it their priority. We are in no doubt that revocation is not only proportionate but necessary in the interests of road safety.

32. Turning to the orders of disqualification, we are not satisfied that this is a case where the company and its directors should be allowed the opportunity to apply for a new licence without a significant period of exclusion from road transport in order for them to reflect and take stock as to the minimum standards that they must observe when operating large vehicles as part of their business. Further, orders of disqualification are proportionate in cases where the operator's dealings with the DVSA and the TC have lacked honesty and transparency as in this case. The company and its directors need time to reflect on these basic requirements when operating within a regulatory regime. In the circumstances, we endorse the TC's view that disqualification periods of two years were proportionate and necessary and we endorse all of the comments made by the TC summarised in paragraph 20 above.

33. The appeals are dismissed and the orders made by the TC set out in paragraph 20 above are endorsed and will come into effect from 23.59 on 2 July 2019.

**Her Honour Judge Beech**
**22 May 2019**