



EMPLOYMENT TRIBUNALS

Appellant: P & M Groundworks Limited

Respondent: Gangmasters Licensing Authority

HELD AT: Sheffield **ON:** 2 and 3 February 2015

BEFORE: Employment Judge Little
(Appointed Person)

REPRESENTATION:

Appellant: In person

Respondent: Mrs L Gilligan, Solicitor (Freeths LLP)

DECISION

The appeal is dismissed and the appellant's licence number PMGR0002 is revoked with effect from midnight on Tuesday 17 February 2015.

STATEMENT OF REASONS FOR THE DECISION

Background

1. The appellant is a Limited Company and Mr Peter Milewski is its owner and director.
2. In the language of the Gangmasters (Licensing Conditions) Rules 2009 Mr Milewski is the appellant's "principal authority" because he is the individual responsible for the day-to-day management of the business.
3. The appellant is a Gangmaster. That term is defined in the Gangmasters (Licensing) Act 2004 ("the Act") as a person who supplies a worker to do work of a type to which the Act applies. Such work includes agricultural work. (See sections 3 and 4 of the Act). A person shall not act as a Gangmaster except under the authority of a licence granted by the Gangmasters Licensing Authority (section 6).

4. The appellant had been granted such a licence, its first, on 23 June 2006. However, that license had been revoked on 15 June 2007.
5. A new licence was granted to the appellant on 11 September 2007. That was licence number PMGR0002 and it is the revocation of that licence with which I am concerned in this appeal.
6. In April and in May 2008 the respondent carried out compliance inspections of the appellant's business. Section 16 of the Act gives powers to the respondent's enforcement officers and compliance officers to conduct such investigations.
7. As a result of those compliance investigations the respondent attached an Additional Licensing Condition (ALC) to the licence. That was in respect of health and safety matters. However, quite soon afterwards the respondent sanctioned the removal of that additional condition.
8. The events with which I am particularly concerned began when there was a further compliance inspection in June 2013.
9. Mr Graham Cross, one of the respondent's Compliance Officers, had been asked to undertake this inspection. Mr Cross has given evidence at this appeal.
10. On 19 June 2013 Mr Cross wrote to Mr Milewski to inform him that there would be a compliance inspection on 27 June 2013 (see the email at page 308 in the bundle).
11. On the date of the inspection Mr Cross was accompanied by Mr Ian Japp, Senior Investigating Officer. I have also heard evidence from Mr Japp.
12. As was his practice, Mr Cross took notes of the inspection and a copy of his notebook which deals with the 27 June inspection is at pages 319-334 in the bundle.
13. Progress on this occasion was hampered because much of the paperwork which the officers needed to inspect was not at the appellant's business premises. It was said to be with the appellant's accountants, a firm called Hey & Co. in Huddersfield. The appellant also used the services of a book-keeper, a Ms Dawn Catling. However, Ms Catling was not present on this occasion.
14. Among the matters investigated during the course of the 27 June meeting were the following:
 - The licensing arrangements for a 16 seater LDV minibus used by Mr Milewski to transport the workers.
 - The arrangements for payment for the fuel for that vehicle which was paid by the workers.
 - The accommodation used by the workers and whether that was accommodation provided by the appellant and how it was paid for.
15. On 4 July 2013 Mr Cross sent an email to Mr Milewski (347A-B) reminding him of the outstanding documentation that was required.

16. The respondent made further enquiries about the provision of accommodation. In relation to accommodation in Scotland, Mr T McCrosson, Enforcement Officer (who has given evidence at this hearing) interviewed the proprietor of the Kingsley Guest House in Arbroath. The proprietor was a Mr Mahmood. Two other Enforcement Officers, Mr S A Tidy and Mr P Yensen, made enquiries about accommodation in Cornwall. I have not heard evidence from Mr Yensen and Mr Tidy was not able to attend this hearing because he was giving evidence in a criminal trial in Liverpool. However, I have had before me a signed witness statement by Mr Tidy and having discussed the matter with Mr Milewski he had no objection to me reading that statement and then giving it such weight as I felt appropriate.
17. On 5 August 2013 the appellant sent some further documentation to the respondent. However, it would transpire that this was not all the information or documentation which Mr Cross had requested.
18. On 10 October 2013 Mr Cross undertook a further compliance inspection at the appellant's premises. On this occasion he was accompanied by Mr Tidy. Ms Catling, the book-keeper, was also present when this inspection took place. As before Mr Cross took notes and those are in the part of his notebook which appears in the bundle at pages 335-344. Mr Cross observed that there were still missing timesheets and payslips. In respect of the timesheets that had been produced, Ms Catling said that she had not seen those documents before and that when preparing the payroll she would just pay what Mr Milewski told her to pay.
19. During the course of this investigation it was put to Mr Milewski that he was reclaiming VAT in respect of the purchase of fuel for the minibus when in fact that was not an expense incurred by the appellant because payment was made by the workers themselves. Mr Milewski described this as "a white lie" and confirmed that he knew that it was wrong (see page 336). Mr Milewski also accepted that the account that he had given at the June inspection about the arrangements at the Kingsley Guest House in Arbroath – which differed from the account now given by the proprietor of that establishment – had not been correct. Mr Milewski also agreed that he had failed to declare the provision of accommodation to workers at the time when the appellant made its application for a GLA licence (the relevant part of the application form is at page 371). Further, Mr Milewski was unaware of the "accommodation offset" rules applicable when determining whether the Agricultural Minimum Wage had been paid. There was also further discussion as to the licensing of the minibus. Finally, Mr Cross also had to point out that he had still not received copies of the appellant's written terms of business for four of the eight labour users which it supplied.
20. On 18 October 2013 Mr Cross made a final request for the documents which were still outstanding. A copy of that communication is at page 402.
21. Although a response was received from Ms Catling, there were still outstanding items which, it was said, were still with the appellant's accountants.
22. Mr Cross then proceeded to prepare his inspection report. A copy of that report which was submitted on 11 November 2013 is at pages 406-437.

23. The respondent issues Licensing Standards and the relevant edition appears in the bundle at pages 132-163. The introduction to the standards document provides that the standards are the conditions of a GLA licence. The standards document explains that the GLA adopts a proportionate approach when applying the licensing standards and that it is concerned with identifying the more persistent and systematic exploitation of workers rather than concentrating on isolated non compliances, unless such a non compliance is critical in its own right. Compliance with the standards is to be assessed, where necessary, through inspections of licence holders. Paragraph 4.8 of the standards document (page 136) provides that the inspection will test the relevant licensing standards which will result in an overall score. Each standard has an associated score with standards designated as critical being worth 30 points and all other standards being worth eight points (with one exception that does not apply in this case). Paragraph 4.11 provides that a licence will usually be revoked if the inspection score is 30 points or more, although the GLA may consider attaching additional licensing conditions where it is proportionate to do so after considering the extent and nature of the non compliance.

24. Mr Cross' inspection report was therefore structured around an analysis of the perceived compliance or non compliance with the various standards.

25. The inspection report was then put before Mr Ryan Hooper, one of the respondent's Licensing Officers. I have heard evidence from Mr Hooper. It was his task to determine whether any steps needed to be taken as a result of Mr Cross' findings. Mr Hooper's decision report is at pages 446-478. He concluded that the appellant had breached two critical licensing standards and one non critical licensing standard.

26. Those standards were Licensing Standard 1.1 – critical: fit and proper test; Licensing Standard 6.4 – critical: transport; and Licensing Standard 7.4: agreeing terms with labour users.

27. Licensing Standard 1.1 (page 142) provides:

“The licence holder, Principal Authority and any person named or specified in the licence, must at all times act in a fit and proper manner.”

28. The standard goes on to note that the GLA will take into account various factors, including whether the Principal Authority has contravened any of the requirements and standards of other Regulatory Authorities including HM Revenue & Customs. Another factor will be whether the Principal Authority has not been candid and truthful in all their dealings with any Regulatory Body (page 143).

29. Licensing Standard 6.4 dealing with transport includes the following:

“A licence holder who operates vehicles with nine or more passenger seats used for hire or reward must:

- Have a Public Service Vehicles (PSV) Operators Licence, and
- Have documentary evidence that the vehicles are registered and maintained as PSVs and have a certificate of initial fitness.

A driver used by the licence holder to transport workers must:

- Hold a valid driving licence
- Have Passenger Carrier Vehicle (PCV) entitlement and Driver Certificate of Professional Competence if driving a vehicle with nine or more passenger seats used for hire or reward."

30. Licensing Standard 7.4 is concerned with agreements and records with labour users and includes the following:

"Before first providing services, other than providing information, to a labour user, a licence holder must agree in writing the terms which will apply between the licence holder and the labour user."

31. The reasons for Mr Hooper finding Licensing Standard 1.1 to be breached were as follows:

- The VAT irregularities.
- The failure to declare when applying for the licence the provision of accommodation.
- Insufficient record keeping so as to prove that the National Minimum Wage or Agricultural Minimum Wage had been paid.
- The lack of candour and truthfulness in various accounts that Mr Milewski had given to Mr Cross.
- The ongoing uncertainty about the appellant's dealings with a company called Nebula Labour Limited and the apparent provision of payslips in the name of that company by the appellant.
- The accommodation issues.

32. Mr Hooper also found a breach of Licensing Standard 6.4 (transport). He concluded that the evidence "shows that P & M have clearly been operating a vehicle with nine or more passenger seats for hire and reward without holding a PSV licence. P A Milewski has additionally failed to demonstrate that he has a PCV entitlement and a Driver Certificate of Professional Competence". (See page 472).

33. Mr Hooper also found a breach of Licensing Standard 7.4 (written terms of agreement). He concluded that P & M had only been able to produce half the number of agreements that should have been in existence.

34. A summary of Mr Hooper's decision overall is recorded at the end of his decision report (page 477) in these terms:

"Following a review of all the evidence provided by the inspector it is clear that P & M have failed two critical licensing standards and one non critical licensing standard. Licence holders must score less than 30 points during an inspection in order to retain a licence. P & M has scored 76 points. Due to the seriousness of

the non compliances against two critical standards, I believe that it is a proportionate action to revoke P & M's licence."

35. I should add that Mr Hooper's reference to 76 points appears to be erroneous. In fact it was 68 points (30+30+8). However this error was corrected when the decision notice was issued and in any event the appellant had accrued a score considerably in excess of the 30 points which would usually lead to revocation.

36. Mr Hooper than wrote to Mr Milewski on 13 March 2014 giving him notice of licence revocation. That letter is at pages 1-5 and it gives a detailed explanation for the scores and the decision which followed from those scores.

37. On 30 March 2014 the appellant presented its Application Notice of an Appeal – which is the appeal now before me. The Notice of Appeal itself it at pages 7-10 in the bundle. However, annexed to that notice were a substantial number of documents which in the bundle run from page 11 to page 101.

38. At this stage the appellant had not, it seems, sought legal advice. The appeal grounds were wide-ranging. In summary:-

- The appellant denied that it had paid for workers' accommodation.
- If VAT had been incorrectly reclaimed that was on the advice of the bookkeeper.
- Mr Milewski referred to information which he had provided to the respondent about other Gangmasters alleged failings.
- The workers' accommodation at the Kingsley Guest House had been paid for by the workers themselves.
- Mr Milewski pleaded ignorance of the law in relation to the necessary licensing of the minibus.
- He maintained that he had written contracts with all those to whom he provided labour services albeit that one, Dunbar Farmers, had refused to sign the contract.
- There was criticism of the respondent for what Mr Milewski described as unfair and heavy-handed treatment and defamation of his good character.

39. Among the numerous documents attached to the notice were references or testimonials from some of the appellant's workers and labour users.

40. The respondent made its formal reply to the appeal on 3 June 2014. A copy of that document is in the bundle at pages 102-116.

41. Subsequently the appellant was able to obtain legal advice when they instructed Brabners LLP. It appears that those solicitors assisted Mr Milewski in the preparation of his witness statement for this Hearing. It sets out a somewhat more concise basis for the appeal. The main thrust of the appeal, as articulated in the

witness statement, was that the revocation of the licence had been wrong and disproportionate.

42. In summary the points raised in Mr Milewski's witness statement are as follows:

- That he had been frank and honest with the GLA at all times.
- VAT was only reclaimed on the fuel because bookkeeper advised this.
- Mr Milewski was unaware that VAT was also being reclaimed in respect of any accommodation charges.
- That he would repay any VAT wrongly reclaimed.
- That he did not accept the account given by the proprietor of the Kingsley Guest House.
- That he had not seen the Nebula payslip until it was shown to him by Mr Tidy on 10 October 2013.
- He had helped the GLA by passing them information about other individuals he believed were not complying with GLA licensing standards.
- He made reference to the testimonials.
- He continued to maintain that P & M had not provided accommodation to its workers and so was not obliged to keep records of any accommodation charges.
- That all was in order with the transport and its licensing on the basis of what he said he had been told by a VOSA representative at a GLA seminar. Moreover his insurers were satisfied with the arrangements.
- No-one had told him he needed a Certificate of Professional Competence.
- He had now removed seats from the minibus and so that was an historical issue.
- He had written terms with his clients and had asked for further time to produce all that documentation to Mr Cross.
- He suggested that the only document he could not supply was that for Dunbar Farmers.
- He was unaware that the last correspondence from his bookkeeper to Mr Cross was to the effect that he, Mr Milewski, would provide further missing terms of business documents. (I might add that that is rather odd in circumstances where clearly Ms Catling copied her email to Mr Milewski).

43. Further, Mr Milewski contended that revocation was disproportionate because the respondent could instead have added conditions to the licence. He concluded his

witness statement by expressing his concern at the prospect of the loss of livelihood for his workers and for himself if the licence revocation were to be put into effect.

44. Unfortunately, Brabners ceased to represent the appellant in the week prior to this Hearing. The appellant's evidence was given by Mr Milewski by reference to the witness statement I have mentioned. However, the appellant called no other witnesses. It had been envisaged at the time that this appeal was listed for a five day Hearing that the appellant would be calling between three and four witnesses. I should also add that Mr Milewski's heart does not seem to have been in this appeal – certainly at the Hearing stage. He brought no papers with him. Fortunately the respondent had a spare copy of the two volume bundle and witness statements. At the beginning of the Hearing he expressed the view that revocation of the licence was a foregone conclusion, although I assured him that this was not the case, and the outcome would only be determined by me once I had heard the evidence and the parties' arguments. In the event Mr Milewski asked very few questions in cross examination of the respondent's witnesses. In particular he had very few questions for Mr Hooper who obviously was one of the respondent's key witnesses. In those circumstances I put questions to Mr Hooper based upon the appellant's case as disclosed in Mr Milewski's witness statement. At the conclusion of the Hearing both sides were given the opportunity to sum up their respective cases. All that Mr Milewski said at this point was: "What's the point? I've done my best".

The Relevant Law

45. In the main I have sought to record this in the most relevant place when setting out the background. The only other significant provision I need to refer to is that contained in Regulation 12 of the Gangmasters (Licensing Authority) Regulations 2005 which provides as follows:

"Licensing Functions and the Register of Licences

- (1) For the purposes of exercising its functions under sections 1, 7, 8 and 9 (revocation) of the 2004 Act and rules made under section 8, in determining –
 - (a) the criteria for assessing the fitness of an applicant for a licence or a specified person, and
 - (b) the conditions of a licence and any modifications of those conditions,the Authority shall have regard to the principle that a person should be authorised to act as a gangmaster only if and insofar as his conduct, and the conduct of a specified person, comply with the requirements of paragraph (2).
- (2) The requirements referred to in paragraph (1) are –
 - (a) the avoidance of any exploitation of workers as respects their recruitment, use or supply; and
 - (b) compliance with any obligations imposed by or under any enactment insofar as they relate to, or affect the conduct of, the licence holder of a specified person as persons authorised to undertake certain activities."

My Conclusions

Licensing Standard 1.1 – the Fit and Proper Test

46. I note that Mr Milewski accepts that the appellant wrongly reclaimed VAT on the fuel costs paid by its workers. In my judgment that was more than a “white lie” as Mr Milewski described it at the time of the investigation. Nor is it an excuse to say that it was done on the advice of the bookkeeper. In fact Mr Milewski was not offering that explanation at the time of the investigation. That has only been put forward in the appeal grounds. In any event I have not heard from Ms Catling. The thrust of what she told the respondent at the time was that rather than advising Mr Milewski she did as she was told. Mr Milewski’s indication that he would make repayment to HMRC does not undo the breach.

47. As I have noted, one of the factors to be considered by the Authority is whether the requirements of other regulatory authorities, including HMRC, have been contravened. Clearly there was contravention in relation to the fuel VAT. The same considerations apply to the reclaiming of VAT for the Sun Valley accommodation in Cornwall. Moreover, in this regard the truthfulness of Mr Milewski as principal authority is called into account. That is because of the prevarication at the time of the investigation as to whether VAT had in fact been reclaimed. Any doubt about that was clearly removed on inspection of the appellant’s VAT 100 return at page 251 in the bundle. It follows that the VAT infringement was, for these reasons, aggravated when considering the truth and candour of the principal authority.

Accommodation

48. I am satisfied that the appellant was effectively providing accommodation to its workers. That is because of the wide definition of that concept as contained in Licensing Standard 4.1 (page 148 in the bundle). It is of concern that Mr Milewski was apparently not aware of the scope of that definition, particular bearing in mind the need for record keeping if accommodation was being provided and the effect that the provision of accommodation would have on the calculation of whether or not the Agricultural Minimum Wage was being paid. It is clear that the respondent whilst not invoking Licensing Standard 2.2 (paying wages), nevertheless had concerns that the accommodation offset was being exceeded. It is also of concern that Mr Milewski, as the principal authority, professed ignorance of the concept of the accommodation offset. If the appellant is in the alternative assumed to have known that it was effectively providing accommodation then completing the application form for the licence to the effect that it was not is a further matter of concern. That is especially so in circumstances where the declaration at the conclusion of that application form records that all information given is correct to the best of the signatory’s knowledge and belief and that there were no deliberate omissions or incorrect statements (see page 373).

49. A further matter which damages the fit and proper assessment is Mr Malewski’s ultimate acceptance that the account he had initially given about payments to the Kingsley Guest House was incorrect. He did so when confronted with the statement taken from Mr Mahmood senior. Mr Milewski’s somewhat lax approach to information given during the inspection process is underlined by his comment yesterday that:

"You sign the statement then you think you should not have done so."

50. The Nebula payslips issue remains something of a mystery. Whilst Mr Milewski denies having seen any Nebula payslips until shown them by Mr Tidy, there is further damage to the candour and truth factor when it is noted (as Mr Hooper did) that the appellant's bookkeeper had submitted to the appellant an invoice for a payroll set up and a payroll run for Nebula (page 261).

51. Accordingly I consider that Mr Hooper was correct in scoring the appellant 30 with regard to the failure of critical License Standard 1.1.

Transport

52. I accept the respondent's conclusion that the circumstances of the workers' use and payment for transport had the effect that, for licensing purposes, the LDV minibus registered number YJ54 WMD was being used for "hire or reward". Because at the material time (the inspection date) that vehicle was used in a 16 seat configuration, there was in law the requirement for a Public Services Vehicles Operator's Licence and for the driver – Mr Milewski – to have a Passenger Carrying Vehicle Entitlement and a Driver Certificate of Professional Competence. Whilst Mr Milewski may have been unaware of the wide definition of hire and reward, that is not the point. The fact that his insurers – it seems after the event – have taken a different view – not categorising what was happening as hire and reward – is something of a red herring. The definitive opinion and the one which was binding on the appellant was that of the Vehicle Operator Standards Agency (VOSA). It seems improbable that Mr Milewski would have been advised that he did not require those additional vehicle licences when he had what seems to have been an informal chat with a VOSA representative at a GLA seminar. Mr Milewski was in possession of the definitive statement contained in the GLA's Licensing News issue for spring 2008 (page 123). Mr Milewski's comment in cross examination that he had that document but, in his words "couldn't be arsed to look at it" is unfortunately typical of his approach to the requirements of the heavily regulated sector in which he operated. Again the retrospective action of removing seats from the vehicle to bring it out of the licence requirement does not alter the fact that the appellant was in breach at the time of the inspection.

53. I therefore conclude that Mr Hooper was correct in his determination that Standard 6.4 had also been failed, thereby adding a further 30 points to the appellant's score.

Written Terms with Labour Users

54. Licensing Standard 7.4 is not a critical standard. However, in circumstances where the appellant had only been able to provide 50% of the documentation I take the view that Mr Hooper was entitled to infer that non production was equivalent to non existence, and so apply a further eight points.

55. It follows that as the appellant had correctly been given a score of 68 points the inevitable result, which was neither wrong nor disproportionate, was that the licence had to be revoked.

56. Having regard to the endemic nature of the breaches – particularly in relation to the fit and proper consideration – I consider that adding licensing conditions would have been insufficient.


57. The revocation as decided by Mr Hooper has been in suspense because of the appeal process. Now that the process has concluded my decision is that the licence number PMGR0002 is to be revoked with effect from midnight on Tuesday 17 February 2015. I should add that initially as announced my decision was that the revocation would take effect on 10 February. However, Mr Milewski asked for further time in order that he could put his affairs in order. In fact there had been an indication on the first day of the Hearing that, in line with his somewhat pessimistic approach to this appeal, he had already put measures in place. In any event, having taken Mrs Gilligan's view on behalf of the respondent, there was no objection to me allowing a 14 day period of grace rather than the seven I originally indicated.



Employment Judge Little
Appointed Person
4th February 2015

DECISION AND REASONS SENT TO THE PARTIES ON

..... 06/02/2015

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FOR THE TRIBUNAL OFFICE

[AF]

