

GANGMASTERS (APPEALS) REGULATIONS 2006

**In the matter of an appeal against a decision made by the
Gangmasters Licensing Authority (Ref 71/E/RV)**

ASAP (SW) Ltd

(Appellant)

V

THE GANGMASTERS LICENSING AUTHORITY

(Respondent)

APPOINTED PERSON

MJR GRIFFITHS

WRITTEN DETERMINATION

DECISION

That the appeal of ASAP (SW) Ltd be dismissed. The decision is to take effect from the date upon which it is signed.

Background

The appellant was granted a licence under the Gangmasters Licensing Act 2004 on 18 July 2007.

The appellant was inspected on 27 February 2008 and worker interviews were conducted.

Following that inspection the appellant scored 130 points against the licence standards which score resulted in a decision by the GLA to revoke the licence with immediate effect on 6th April 2009.

The appellant appealed that decision on 27th April 2009.

I had before me the appeal, the GLA's response and a bundle of evidence referred to by each party.

The law

1. The Gangmasters (Licensing) Act 2004 aims to curb exploitation of labour in agriculture and other particular industries. The GLA has established standards to assess compliance. The GLA assesses on inspections to consider compliance/ non-compliance.
2. For the purposes of assessing non-compliance, a scoring system is used which categorises infringements according to their level of seriousness. The "fail- score" of non-compliance is 30. Each non-compliance can be characterised as Correctable 2 ; Reportable 4; Major 8; and Critical 30.
3. Regulation 12(1) of the Gangmasters (Licensing Authority) Regulations 2005 states that, "the Authority shall have regard to the principle that a person should be authorised to act as a gangmaster only if and in so far as his conduct complies with the requirements of paragraph (2), namely "compliance with any obligations imposed by or under any enactments in so far as they relate to or affect the conduct of, the licence holder or a specified person as persons authorised to undertake certain activities."
4. Regulation 5(1)(a) of the Gangmaster (Appeals) Regulations 2006 allows a gangmaster to bring an appeal against a decision of the Authority to "refuse his application for a licence".
5. I have considered the GLA Licensing Standards and the guidance to each standard: the Gangmasters (Licensing Authority) Regulations 2005: the Gangmasters

(Licensing Conditions) (No2) Rules 2006: the Gangmasters (Appeals) Regulations 2006 and the Agricultural Wages Order 2007.

Findings

Licence standard 1.1.

6. This standard requires the gangmaster to be and remain a fit and proper person to hold a licence. I directed myself to rule 5 of the Gangmasters (Licensing Conditions) (No 2) Rules 2006 which provide that when assessing whether a licence holder is fit and proper to hold a licence, regulation 12(2) of the Gangmasters (Licensing Authority) Regulations 2005 apply. Regulation 12(2) provides that in determining the criteria for assessing the fitness of an applicant for a licence the GLA shall have regard to the principle that the licence holder's conduct should avoid exploitation of workers and ensure compliance with the relevant statutory provisions. A failure to comply with this standard falls into the critical category and scores 30 points which, in the absence of any other licensing failures, justifies revocation of the licence under the standard.

7. The appellant in her notice of appeal presents no submissions or argument as to why the GLA's determination in this respect is not correct. She simply says that it is "in dispute".

8. The GLA concludes, following its inspection, that the appellant was unaware of a number of issues to which the licensing standards applied and acknowledged that her partner, Ms Andrews, was out of her control.

9. It seems to me that a fundamental requirement of a "fit and proper person" able to discharge the obligations imposed by the licence, is that that person should be aware of and have control over the activities of the licensed business.

10. I find, therefore, that the failure of this standard is justified

Licence standard 2.2

11. This standard requires the gangmaster to have proper systems in place for the collection of tax/national insurance/VAT and that deductions from workers' pay of income tax and national insurance are accurate, appropriate and paid to HMRC.

12. A failure to comply with this standard falls into the major category and scores 8 points for failure.

13. The appellant asserts that wage slips issued to workers shows deductions of tax and national insurance. She also asserts that her own documents showed amounts paid to HMRC.

14. The GLA produced in evidence workers' pay slips and complained that they show handwritten deductions in respect of rent which is above the amount permitted under the regulations. In addition, they say, the appellant showed no evidence of workers being registered with national insurance numbers and/or tax being paid.

15. The deduction of sums other than in respect of income tax and national insurance do not fall within standard 2.2. I accept that the payslips produced do not record a national insurance number. They do, however, refer to taxable pay and deduction of national insurance and in the face of the appellant's submission that these funds have been paid, I find insufficient evidence to satisfy me that the failure under this standard is justified.

Licence standard 2.5

16. This standard requires the gangmaster, where deductions are made from wages other than those legally required, to have evidence on file of the workers' written consent to those deductions.

17. A failure to comply with this standard falls into the major category and scores 8 points for failure.

18. The appellant makes no submissions in respect of this alleged failure.

19. The GLA says that written consents were on file but they had been backdated and were retrospectively entered into. There appeared to be no argument from the workers interviewed that they did not agree the deductions or had, in any way, been coerced into signing the consents. The basis of the failure alleged by the GLA is that backdating consents was not viewed as a "legitimate method" of obtaining consent to the deductions. There is, however, nothing in standard 2.5 that specifically provides for the consent to be given prior to the deductions being made and although I accept that such a procedure would be preferable, in the absence of any allegation of coercion, I find that the standard is met.

Licence standard 2.8

20. This standard requires the gangmaster to pay to the worker at least the national or agricultural minimum wage taking into account the rules on accommodation charges.

21. A failure to comply with this standard falls into the critical category and scores 30 points.

22. The Agricultural Wages Order 2007 which came into force on 1 October 2007 and which, accordingly, applies to this case, provides that overtime rates be paid when a worker works for more than 8 hours a day. I do not know what grade of worker the appellant's workers were for the purposes of the Order; I assume, however, that they were more than Grade 1 and over school leaving age in which event the minimum overtime rate was £8.28p per hour.

23. It appears from the face of the documents that there has been a breach of this standard although the appellant says that it was corrected as soon as it was drawn to her attention, I find that the failure of this standard is justified

Licence standard 2.9

24. This standard requires the gangmaster to produce evidence that all workers receive paid annual leave entitlement and any other benefits to which they are entitled. Records of any paid annual leave entitlement, statutory sick pay, statutory paternity pay, statutory maternity pay and the statutory adoption pay must be kept on workers' files.

25. A failure to comply with this standard falls into the major category and scores 8 points for failure.

26. The appellant asserts that there are holiday records and wage slips showing holidays paid. The terms and conditions of employment provided by the appellant provide for holiday entitlement. The report of the GLA confirmed that there is evidence that holiday pay was being paid and conclude, from the fact that worker interviews indicated that no holidays were taken, that this was an example of illegal rolled up holiday pay. I am unsure as to how the GLA come to that conclusion.

27. On the evidence, I am not satisfied that there has been a breach of this standard.

Licence standard 4.2

28. This standard provides that where workers live in accommodation provided by the gangmaster they are allowed to find suitable alternative accommodation after giving an agreed notice period.

29. A failure to comply with this standard falls into the major category and scores 8 points for failure.

30. The GLA's inspection produced evidence that workers had been threatened if they chose alternative accommodation. The appellant raises no issue in this regard and I find, accordingly, that there has been a breach of this standard

Licence standard 4.3

31. This standard provides that where workers live in accommodation provided by the gangmaster, it contains appropriate facilities and the equipment meets relevant safety regulations.

32. A failure to comply with this standard falls into the critical category and scores 30 points.

33. The GLA's inspection concluded that the gas appliances were not covered by relevant safety certificates but in other respects the accommodation provided was in good condition and not overcrowded. I have considered the guidance to this licensing standard in the light of the Regulations and conclude that the priority target for the standard is to ensure that the accommodation provided is in good condition, not overcrowded, and safe. The licensing standard requires the gangmaster to be able to produce evidence that electrical equipment is being properly maintained and that the tenants have been supplied with copies of the most recent gas safety certificate as required by the regulations.

34. The Gas Safety (Installation and Use) Regulations 1998 provide an obligation upon landlords to check relevant appliances at 12 month intervals and retain evidence thereof.

35. While gas safety certificates had been previously received they had expired and fresh certificates were readily obtained. At the date of inspection, however, the appellant had not complied with this important standard and the failure is justified.

Licence standard 7.3

36. This standard requires the gangmaster to provide to all workers after one month's employment a written statement of employment particulars or, if they are not employees, evidence of the terms upon which they work which are agreed before the work commences. The written statement must include

- whether the worker is an employee;
- an undertaking to pay the worker irrespective of whether or not the gangmaster is paid by the labour user;
- relevant notice periods;

- the rate of pay; and
- when the worker will be paid and his entitlement to paid holiday, SSP and other benefits.

37. A failure to comply with this standard falls into the major category and scores 8 points for failure.

38. The appellant asserts that she has written terms and conditions of employment, disciplinary procedures and a health and safety policy.

39. The GLA's inspection revealed that those documents did not meet the required standard. The GLA do not specify in what respects they are deficient although it asserts that the provision of a handbook does not cover the standards expected. There is no reference in licence standard 7.3 to provision of a handbook or otherwise.

40. In a consideration of this issue, I considered paragraph 9 of the Schedule to the Gangmasters (Licensing Conditions) (No2) Rules 2006 which provides that a licence holder must record all terms in writing where possible in one document and give the worker written terms before he commences work unless the worker has been given a written statement of particulars in accordance with the Employment Rights Act 1996.

41. I considered the documents to which the appellant referred in her appeal and which appeared in the bundle of evidence.

42. The terms and conditions refer to employment, continuity of employment, and place of employment. I think it not unreasonable to assume, therefore, that it was clear to the worker that he or she was an employee.

43. Because there is no reference to a "labour user" or any indication on the face of the statements that the gangmaster might be dependent on payment from a third party to pay the workers' wages, there seems no purpose in having such an undertaking, in employment terms, were it not for the particular provisions of this licence standard.

44. It contains notice periods. It specifies the rate of pay. It provides details of when the worker will be paid, details of entitlement to paid holiday, SSP and other benefits.

45. I am satisfied that there is no breach of this licence standard.

Disposal

46. I uphold the decision of the GLA regarding the appellant's breach of licensing standard 1.1, 2.2, 2.8, 4.2 and 4.3. The total score for these failures is a 106 and the decision of the GLA, therefore, to revoke the licence with immediate effect is upheld.

Signed..........

Person appointed by the Secretary of State to determine appeals under the Gangmasters (Appeals) Regulations 2006.

Dated.....*6th July 2009*.....