

The Gangmasters (Appeal) Regulations 2006

In the matter of an appeal against a decision made by the Gangmasters
Licensing Authority (GLA)

Todorov & Co Ltd
(Todorov)
(Appellant)
V
The Gangmasters Licensing Authority
(GLA)
(Respondent)

Appointed Person J.S. Walker

Decision and Summary Statement of Reasons of the Appointed Person, in relation to the above matter:

Decision

The Appeal is dismissed. This Decision is to take effect on 1 September 2009.

Summary Statement of Reasons

1. Upon reading the following documents in relation to the Appeal Ref No: 69/E/RV: -
 - 31 December 2008 Licence Revocation with effect from 28 January 2009 (but postponed pending the outcome of this Appeal) because of the breach of a number of Licensing Standards (LS) resulting in 124 points when the fail score is 30;
 - 26 January 2009 Appeal by Todorov setting out grounds in general and relating to particular LS breaches;
 - 25 February 2009 GLA response to the Appeal which sets out the particular scores in relation to each LS thereby filling the gap in the Licence Revocation and attaching a bundle of documents to which the document numbers below refer;
 - 20 March 2009 Additional evidence and comments from Todorov and enclosures including a certificate of Continuous Liability dated 30 October 2008 from the Consulate

of the Republic of Bulgaria, document 31, 8 signed declarations of receipt of payments due, document 33, and an email dated 12 November 2008 of 3 withdrawals of complaints against Todorov, document 34;

- 16 April 2009 GLA response to 20 March 2009 in which they no longer rely upon an exchange of emails in document 9, accept that Todorov would not be able to offer a PAYE scheme in this country and do not pursue the absence of up to date turnover figures;
- 30 April 2009 Further response and comments by Todorov to 16 April 2009 with further enclosures, making complaints against the GLA inspector Mr Japp and enclosing an unidentified extract relating to "posted workers", an extract from the Joint Council for the Welfare of Immigrants' description of posted workers, an extract from DT4163-DT relating to double taxation agreement with Bulgaria and NIM33007 relating to posted workers going to and coming from abroad;
- 22 May 2009 GLA's final Appeal submission including statements of Neil Court, Lesley Boulton Ian Japp and Aurel Voiculescu and the GLA Compliance Code of Practice of July 2006;
- 4 June 2009 Todorov's response to 22 May 2009;
- 13 July 2009 The outcome of the investigation into Todorov's complaints about Mr Japp;

and

2. Both parties having requested that this matter be dealt with without an oral hearing, I determine this Appeal without an oral hearing and have had regard to all of that material and the overriding objective.

Introduction

- 3 Todorov is Gangmaster based in Bulgaria supplying seasonal agricultural workers to the agricultural and packaging industry in the United Kingdom. Todorov does not have a base in this country. The Managing Director Mr Kostadin Todorov visits this country from time to time.

- 4 Todorov's initial licence, issued on 11 September 2007, was a "new business" licence. They confirmed on 13 May 2008 that they had begun to trade in this country.
- 5 Todorov are an employment recruitment agency in Bulgaria and I am only concerned with that part of their business (and I saw no information about any other part) relating to the recruitment and employment of Bulgarian workers and their immediate dispatch to the United Kingdom to 3 labour user sites in particular, Well Pict, Arbroath; Oakington Tomato Farm, Oakington, Cambridge; and Friday Bridge International Farm Camp, Wispy. The revocation of Todorov's licence flows from an inspection by GLA inspectors of those 3 sites on 17 December 2008. I have to decide this matter on the basis of the evidence with which I have been presented and the written representations.
- 6 Those inspections led to the GLA identifying perceived breaches of their licensing standards.

The Main Issue

- 7 The nub of this matter, from which much else flows, is whether or not the Bulgarian workers at those 3 sites recruited by Todorov in Bulgaria as their own employees solely for the purpose of being seasonal agricultural workers in the United Kingdom were "posted workers" under European legislation or not. If the former they would have been subject to Bulgarian law in relation to that employment including contracts of employment, tax and national insurance. If the latter they would have been subject to United Kingdom law.
- 8 That is an interesting and complex issue. I have not been presented with the text of the relevant European legislation. I can therefore only decide the matter on the material before me.
- 9 It is apparent that there are conditions which have to be satisfied for "posted worker" status to apply. In particular, Todorov have to apply for a certificate (form E101) from the Bulgarian National Revenue Agency. Document 7, a letter from the Bulgarian General Labour Inspectorate responding to an enquiry of 10 September 2008 from the Second Secretary (Political Affairs) of the British Embassy in Sophia about Todorov says;
 - 9.1. In response to the question "*Were the workers specifically sent to Great Britain, was that done in compliance with Bulgarian legislation and are there supporting documents available in Bulgaria to prove that?*" the answer was "*Todorov and Co EOOD has applied for certificates concerning the applicable legislation (Form E101) for*

the agricultural workers. The National Revenue Agency (NRA) has issued decisions rejecting the issuance of certificates concerning the applicable legislation, because of the company's failure to meet the conditions laid down in Regulation (ECC) No. 1408/71 of the Council of June 14 1971, under which the agricultural workers of Todorov and Co Eood may remain subject to Bulgarian Social Security legislation. Therefore the Bulgarian agricultural workers hired by Todorov and Co Eood are subject to the labour legislation of Great Britain."

- 9.2 In answer to whether or not Todorov or Mr Todorov were under investigation for violation of Bulgarian legislation, the reply confirmed that there were no violations of Bulgarian employment legislation.
- 10 Todorov say that Bulgarian authorities have not "rejected" the issuing of those certificates. However, I find that that letter is good evidence that they have.
- 11 Document 8 is a copy of a notification from the Bulgarian National Revenue Agency dated 18 July 2008 to Todorov which refers to various pieces of European legislation apparently relating to this matter. It quotes Article 14(1)(a) of Council Regulation (EEC) 1408/71 to which I have already referred *"that a person employed in the territory of a Member State by an undertaking to which he is normally attached who is posted by that undertaking to the territory of another Member State to perform work there for that undertaking shall continue to be subject to the legislation of the first Member State provided that the anticipated duration of that work does not exceed 12 months and that he is not sent to replace another person who has completed his term of posting."* (My emphases.) That appears to be the most authoritative definition of "posted worker" that I have in front of me. I note the use of the words "normally" and "continue" in that quotation. In my view, they imply that the posted worker will already be an established employee of the employer in the sending state who is posted on a tour of duty in the receiving state. This document apparently relates to 250 persons employed by Todorov in a specified activity, "crop growing", all of whom were posted to Great Britain. It goes on *"The person who is referred to in the request was hired by the sending undertaking [Todorov] as a "farm-hand" in the Agricultural Section [of the National Classifier of Economic Activities]. The job that the person would have in Great Britain is unrelated to the line of business of Todorov and Co EOOD in the territory of the Republic of Bulgaria as farming is totally incompatible with the recruitment, relocation and representation of manpower. Therefore, the employee posted cannot be seen as working for Todorov and Co EOOD. The first requirement needed to assume that the employee works for the undertaking that posts him in the territory of the other*

member state is not met. It must be remembered that the Regulation provisions of posting are inapplicable to an undertaking that has administrative staff alone in the territory of the sending member state. Therefore, the conditions under which the person can remain subject to the Bulgarian social security and health insurance legislation are not met. For that reason I do not see any justification for issuing a certificate of legislation applicable, hence my refusal..."

- 12 Todorov set against that the Certificate of Continuous Liability dated 30 October 2008, document 31. That confirms that all workers named on it (and none are on the copy supplied to me) are legally employed by Todorov and Co in Bulgaria. That seems to reflect what I understand the position to be, namely that in Bulgaria, Todorov as an employment agency recruit Bulgarian workers and enter into contracts of employment with them but not to work in Bulgaria but only to work in Great Britain. They are not established Todorov employees working in Bulgaria who are "posted" to do a tour of duty in Great Britain.
- 13 Accordingly, I find that the workers supplied by Todorov to the 3 sites I have mentioned were not "posted workers" in accordance with the European legislation to which I have referred and were not subject to the Bulgarian social security and health insurance legislation but were subject to the labour legalisation of Great Britain.

Other Preliminary Matters

- 14 Todorov's grounds of Appeal challenge the GLA decision on the basis that no compliance inspection ever took place or at any rate took place without the knowledge of Todorov. However, I accept the GLA response to that on 25 February 2009, paragraph 63, that the Guidance in their publication "How to keep your licence" does include that "Occasionally we may make an unannounced visit."
- 15 That challenge is expanded to contend that the principles of natural justice were breached. I reject that assertion. There are only 3 basic requirements of natural justice which in my judgment are relevant in this case: -
 - 15.1 Firstly, that the person should know the nature of the accusation against him;
 - 15.2 Secondly, that he should be given an opportunity to state his case;
 - 15.3 Thirdly, the Tribunal, or in this case the Regulatory Authority, should act in good faith. See for example **Khanum – v – Glamorgan Health Authority** [1978] IRLR 238 in the parallel employment field.

It is clear from the copious material which has been provided not only by the GLA but by Todorov that they have had full knowledge of the matters alleged and opportunities to respond to them. Accordingly, I reject the suggestion that the decision of the GLA to revoke Todorov's license was ultra vires.

- 16 There is also a general criticism by Todorov that the GLA have used in their investigation witness statements which have been disclosed in redacted form deleting the details of the maker in order to protect their identity. I accept that it is desirable where possible for those details to be made available to any person who is being investigated in relation to matters to which those statements are relevant. However, in the circumstances of this particularly regulatory regime which is directed towards dealing with potential abuse of vulnerable workers that there is a balance to be maintained between the desirability to protecting workers who may generally be in fear and providing fairness to the employers being investigated. Accordingly, I reject Todorov's criticism of this practice in this case.

Breaches Of Licensing Standards

LS1.1

- 17 The GLA do not consider that Mr Todorov is a fit and culpable person to hold a Gangmasters licence. They rely upon his "illegally" supplying workers as posted workers despite having his application rejected by the Bulgarian authorities; his failure to respond to Mr Japp's request for an explanation regarding deductions made from workers at Well Pict; deducting 16% from the workers wages without authorisation and attempting to mislead the GLA with regard to his turnover.
- 18 The turnover point is not being pursued by the GLA. The deduction from wages and the absence of an explanation is a substantial breach of a later licensing standard.
- 19 In my view, the substantive breach of this LS to be considered is whether or not Mr Todorov or Todorov itself should be considered not to be a fit person by virtue of the supply of posted workers without the relevant authorisation by the Bulgarian authorities with which I have dealt above.
- 20 I bear in mind that that is a complex matter of European legislation; that on the face of it Todorov have made enquires and purported (albeit unsuccessfully) to comply; that in relation to other Bulgarian employment law relating to their substantive business no violations are recorded against them; and that this appears to be the first alleged failure to comply

with licensing standards. I also bear in mind the policy background to the Gangmasters legislation set out in the Explanatory Memorandum to the Gangmasters Appeal Regulations paragraph 7.2 which provides "*The Authority's licence standards will require licence holders to act in a "fit and proper" manner. To meet this test the licence holder must have no relevant previous convictions or outstanding charges against them. They will also be expected to operate their business legally and to ensure the people they employ or supply are treated fairly.*" Compliance with the licence standards is of course required. However, I am also aware of the GLA practice of working with the Gangmasters to assist them in bringing their standards up to that of compliance so that in cases where a licence is refused or revoked, they may be given the opportunity of making fresh applications without presumably thereby being regarded as not fit and proper persons. No doubt a Gangmaster who repeatedly fails to comply or treat its employees fairly will come into this category of not being fit and proper persons but not in my judgment on the first failure of individual standards.

- 21 Accordingly, in the circumstances of this case as it has emerged, I find that to regard Mr Todorov or Todorov itself as not a fit and proper person to be a Gangmaster because of this failure to comply with the individual licensing standards is a disproportionate response when sanctions are available in relation to the individual breaches which follow.

LS 2.1

- 22 Todorov failed this standard as there was no evidence that they were registered as an employer with HM Revenue and Customs and had a PAYE number. Todorov responded to that in paragraph 28 of the Grounds of Appeal that it would be impossible to register with HM Revenue and Customs given that they have no offices or presence in the United Kingdom. In their response on 16 April 2009, paragraph 16, the GLA accept that that quotation was accurate and that Todorov would not be able to operate a PAYE scheme in this country and the GLA would no longer pursue this point.
- 23 Accordingly, I find that Todorov did not breached this licence standard. (However, in passing, it seems to me to be implicit in this standard that Gangmasters located outside the UK should have an office in the UK for this purpose. That would also make it easier for the GLA to ensure compliance with other standards which are premises based, such as the production and inspection of documents. Perhaps consideration should be given to making that an explicit requirement provided that European and UK law would permit that.)

- 24 One consequence, as the GLA say in paragraph 16 of their Response on 16 April 2009, is that HMRC is now pursuing for example Mr Voiculescu for £44,800 unpaid tax and national insurance in relation to those workers supplied to him by Todorov.

LS 2.5

- 25 This is a requirement for there to be evidence of workers' written consent to deductions from wages other than those legally required.
- 26 There is no dispute that 16% was deducted from wages of Todorov workers by them. That was not in respect of any legal requirement in relation to United Kingdom tax and national insurance which was liable to be paid by virtue of those workers being subject to United Kingdom law and not Bulgarian. There was no evidence of their written consent beforehand to those deductions being made. It is not enough for Todorov to say in their Grounds of Appeal, paragraph 26, that they had supplied a spreadsheet for the Well Pict workers to Mr Japp which set out the deductions made. This is one of those matters which derives from their incorrect understanding of the status of the Bulgarian workers.
- 27 Accordingly, I find that Todorov did fail to meet this licensing standard.

LS 2.7

- 28 This requires evidence that the Gangmaster has not wilfully held or threatened to withhold payment to any worker on any of the specified grounds.
- 29 There was evidence to the GLA from witness statements that payments were delayed. In my judgment, delay amounts to withholding albeit for a time and not necessarily permanently.
- 30 The GLA had evidence that Todorov had threatened to not release monies for workers salaries [due from Todorov to these workers who were their employees] unless Oakington Tomato Farm paid Todorov for outstanding invoices. The email for that is at document 20 dated 12 September 2008. GLA also had evidence in document 30 and witness information that workers who had transferred from Oakington to Friday Bridge Farm Camp had not been paid their holiday pay.
- 31 In Todorov's additional evidence and comments on 20 March 2009 at paragraph 35 they deal with this matter. There was apparently a dispute about the payment due from Oakington Tomato Farm to Todorov and they were trying to make him pay. They go on "it does not prove that we have not paid our people. And it was sent out to him, not the workers so we

were not threatening the workers to withhold wages.” This offends the licensing standard in that it is a threat to withhold payment to the workers by not releasing the salaries. It does not require a threat to be made to the individual worker. The licensing standard in my judgment encompasses the threat to the labour user which has the effect of withholding payment to the worker.

32 Accordingly, I find that this standard was breached.

LS 2.10

33 This requires evidence that workers have been provided with itemised pay slips. There was evidence that some had not been. On 24 September 2008, Mr Japp requested copies which were not produced by Mr Todorov saying that “*employers do not produce pay slips in Bulgaria.*” Although he submitted a summary of the wages and deductions for 1 week the standard is directed towards the information being provided to each worker.

34 This again follows from the incorrect belief that Bulgarian law which does not require these being applicable rather than as is the case in the case of United Kingdom law which does require this.

35 Accordingly, I find that Todorov failed this standard.

LS 6.1

36 This requires responsibility for managing health and safety of workers to be agreed and assigned.

37 Todorov in their grounds of Appeal paragraph 36 concede this “technical breach”.

38 Accordingly, I find Todorov had failed this standard.

LS 7.3

39 This requires employees employed continuously for 1 month or more under a contract of employment to have a written statement of employment of particulars.

40 There is evidence that some of them did not.

41 Accordingly, I find Todorov had failed this standard.

LS 8.1

- 42 This requires that any sub-contractors used must be properly and currently licensed by the GLA.
- 43 The GLA consider that Todorov failed this standard because there was evidence not disputed by Todorov that they had asked the 3 labour users to remit a large proportion of the sums due from them to Todorov to the bank account of a company called Newbridge Establishment Limited in Guilford (query erroneously said to be Gibraltar in paragraph 53 of the GLA representation of 25 February 2009?). The other sums were remitted to Todorov's bank account in Bulgaria. From that information the GLA have drawn the conclusion that Newbridge Establishment Limited were a sub-contractor of Todorov. If so, they were have required to have been licensed as well. Todorov say that Newbridge were not a sub-contractor but merely provided payroll/ accountancy services to them.
- 44 In my judgment, the word "sub-contractor" in this context must refer to a sub-contractor for the provision of labour. That is to say, the labour provider enters into a contract with the labour user to provide labour but does not have enough available and so sub-contracts all or part of that contractual requirement to another Gangmaster who thereby becomes a labour provider as well and needs to be registered.
- 45 I do not regard the evidence of the payment arrangements which I have described as amounting to evidence that Newbridge Establishment Limited were a sub-contractor of Todorov in the provision of labour. Accordingly, they have not failed this standard.

LS 10.1

- 46 This requires that all workers are legally entitled to work in the UK and employers will be required to show that they complied fully with Section 8 of the Asylum and Immigration Act 1996 in relation to workers employed.
- 47 It follows from my finding above in relation to the nub of this matter that the workers supplied by Todorov to these 3 sites with which we are concerned have not been shown by Todorov to be legally entitled to work in the United Kingdom. Whilst I have found in the circumstances that I have described that this does not render Todorov not a fit and proper person to have a licence, nevertheless it is a clear breach of this licence standard. This again follows from the incorrect understanding of the workers' status by Todorov.
- 48 Accordingly, I find that they have failed this standard.

LS 2.2

- 49 This requires that deductions from workers pay of income tax and national insurance are accurate, appropriate and paid to HMRC. This appears in the revocation letter but does not appear in the written submission of the GLA dated 25 February 2009 presumably because it is met by the withdrawal in effect of the breach of license standard 2.1 requiring registration with HMRC and a PAYE number which they cannot comply with because they do not have premises in this country. There is therefore no breach of this standard.

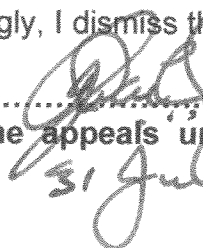
Generally

- 50 Todorov make the point that in relation to a number of alleged breaches, for example LSs 1.1, 2.2, 2.10 and 10.1 that they amount to a multiple penalty. In my judgment, particularly given that I have rejected the breach of LS 1.1, that is not the case. These are breaches in their own right properly recorded and points awarded.
- 51 Finally, I should deal with the complaints against Mr Japp in relation to his conduct of the matter my Mr Todorov. The GLA requested a delay in the consideration of this Appeal to allow Mr Japp to respond to those complaints. I have seen his witness statement above. I further delayed the matter as I became aware that an internal investigation was being conducted into them. As I have indicated in relation to the letter dated 13 July 2009, those complaints have not been upheld. It is not for me to go behind that outcome and I accept it. In my judgment, none of those matters complained about have affected the decision of the GLA.

Conclusion

- 52 Each of the licence standards which I find had been breached by Todorov attract 8 points. I have found breaches of 6 licence standards resulting in a score of 48. That exceeds the fail score of 30.
- 53 Accordingly, I dismiss the appeal.

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


31 July 2009,