

THE GANGMANSTERS (APPEALS) REGULATIONS 2006

In the matter of an appeal against a decision made in the
Gangmasters Licensing Authority (Ref 24/E/RV)

D. J. HOUGHTON
(Appellant)

v

THE GANGMASTERS LICENSING AUTHORITY
(Respondent)

Appointed Person

Ms G S Sage

Representing the Appellant
Respondent

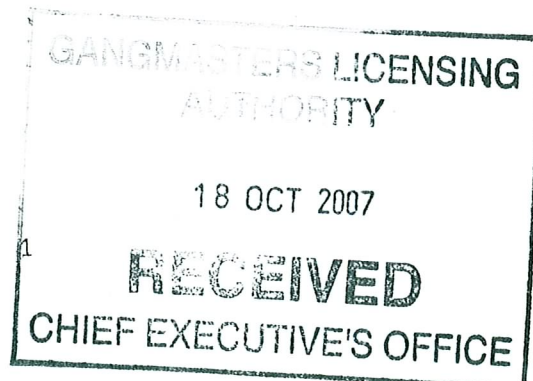
Messrs Perrys Accountants

Representing the

Mr I. Wilkinson

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

Decision



Upon consideration of the appeal documents submitted by the Appellant's representative by a letter dated the 2nd August 2007 and the Gmappeal1 presented on the 6th August with supporting documentation and upon consideration of the Respondents response dated 11th September 2007 it is the decision of the Appointed Person that the appeal of D J Houghton be **dismissed** and the decision to revoke their licence is effective from the date of the promulgation of this decision.

Statement of Reasons

Findings of Fact

1. The Appellant applied for a licence on the 27th September 2006 and an application inspection was conducted, the results of which identified three areas of non-compliance in respect of failing to meet the licensing standards 6.1, 6.7 and 6.11. The license was issued on the 5 January 2007 subject to the Appellant complying with the three conditions that was found to fail to meet the required standard, within three months. The Appellant was reminded in this letter of his right to appeal the conditions attached to the license but did not do so. The time within which the Appellant had to comply with the preconditions attached to the license was the 5th April 2007.
2. On the 14th June 2007 the Respondent sent a letter to the Appellant informing him of the intention to carry out an inspection of the business pursuant to Rule 4(9) of the Gangmasters (Licensing Conditions) Rules 2006 on the 6th July 2007. The Appellant was informed that the inspection would be carried out in accordance with the Licensing Standards. On the 18th June 2007 the Inspector due to carry out the visit took a telephone call from the labour provider and during this call the inspector explained why the original conditions had been applied to the license and he was posted a copy of the licensing standards to the Appellant. The inspection was carried out on that date but D J Houghton was not present due to the fact that "his absence was due to a bird welfare issue which required his presence at short notice and was unavoidable". The Appellant did not request that the visit be rescheduled nor did he send a person in his place to assist with the inspection.
3. The outcome of the inspection was that the Appellant scored 110 points, the fail score was 30 points. The Respondent found that the Appellant was found to be non-complaint in relation to the following licensing standards:

- a. License Standard 2.9



There was no record of any SSP payments and no record of holiday payments. Some workers had been employed for over 2 years and had not received holiday pay. There had been no attempt to pay arrears of holiday pay to workers who had left the labour provider and no system to record a workers annual leave or sickness

b. License Standard 3.3

It was found that the labour provider had advanced wages to workers but there was no written evidence of an agreement being made to cover the loan or the amount of, or recovery period of, the loan.

c. License Standard 4.3

This was found to be a critical breach in that the labour provider used two caravans to accommodate the workers and no gas certificates could be provided for these vehicles. Not all the gas certificates could be provided for the properties used. No electrical safety testing had taken place at these properties and it could not be confirmed that the electrical appliances were safe. It was also found that a property used in Penenden should be registered as a house of multiple occupancy with the local authority but it was not and it was found that the property housed eight workers and had insufficient toilet facilities for that number of occupants.

d. License Standard 5.2

Of the 25 workers employed, five had signed Working Time Regulations opt out forms in respect of the 48 hour working week but the forms had not been dated or signed by the labour provider. The fifteen who had not signed opt out forms were working over 48 hours per week. It was confirmed to the Inspector that the workers worked more than 48 hour working week.

e. License Standard 5.3

There was no written system in place by the labour provider recording the hours worked by each worker, but it was possible to work this out "with difficulty".

f. License Standard 6.1

There had been no discussions between the labour provider and the labour user regarding health and safety before the workers arrive on site. The burden of proof was on the labour provider to show that this standard had been complied with. The labour provider is expected to

prove that the responsibility for managing health and safety has been agreed and assigned and that health and safety risks are properly controlled. The labour provider could not satisfactorily prove any of this to the inspector. This was a matter that was previously highlighted during the application inspection and compliance was required within three months of the granting of the licence.

g. Licence Standard 6.2

No proof could be provided of what general health and safety training had been given or what it covered. There was no site specific training and nothing appeared to be approved by the various labour users.

h. License Standard 6.11

There were 5 mini buses used to transport workers, none of which were registered as PSV. This was identified during the application inspection and compliance was required within three months as a pre-condition to the granting of the license.

i. License Standard 7.3

This is a requirement for all those employed for more than a month to be provided with a contract of employment or a written statement of employment particulars. These contracts must be agreed and provided to the workers before work commences. The contract in place did not comply with standard 7.3 as it did not detail SMP entitlement and did not give an undertaking to pay the worker even if the labour provider was not paid. On inspection it appeared that some workers did not have contracts but the labour provider maintained that workers had copies but they had not returned them.

j. License Standard 9.1

The labour provider did not keep recognisable files for each worker and did not record the workers address and none of the workers had national insurance numbers. The labour provider had no system in place to ensure that workers apply for national insurance numbers.

k. License Standard 10.1

Employers will be required to show that they have fully complied with Section 8 of the Asylum and Immigration Act 1996. On inspection it was found that the labour provider took copies of Eastern European passports but did not carry out a similar procedure for any other worker who claimed to be British or to have a right to work in the UK. As a

result not all workers who claimed to be British had provided passports to the labour users to ensure that they were copied. The labour provider had failed to meet the requirements of standard 10.1 as this standard applied to all workers irrespective of reported nationality.

4. The decision of the GLA revoking the Appellant's license was by a letter dated the 10 July 2007 which confirmed the reasons for the revocation as above in paragraph 3. The decision to revoke would take effect on from the date of 6th August unless the Appellant submitted an appeal.
5. An appeal was submitted by Perrys Chartered Accountants on behalf of the Appellant by a letter dated the 2nd August 2007. The letter presented the appeal on the following grounds:
 - a. That the license holder was not present at the audit visit therefore the visit should not have proceeded.
 - b. When the Appellant was granted a license no adverse comments were made other than with regard to the PSV. It was therefore unjust that the Appellant has not been given sufficient time to put things right after the audit visit found that they had "contravened so many standards", as opposed to taking away their license, which will ultimately affect their livelihood
 - c. That immediate action had been taken to update the contracts of employment to include all the items identified in the audit, a bookkeeper has been contacted to run the payroll, the caravans are no longer in use and Maidstone Borough Council were being contacted with regard to the issue of multi occupancy housing and health and safety matter are now discussed with all workers and documentation is being drawn up for the future. It was confirmed that action was being taken about the PSV situation and a letter was attached from the garage (Kings Hill Garage) but it was said that "our client was unaware that the PSV regulations already applied, believing them to come into force at the end of the year and they are now putting into place matters which your auditor brought to their attention".
6. The grounds of appeal set out in Form Gmappeal1 were as follows:
 - i. "D J Houghton was not present at the compliance visit on 6/7/07. His absence was due to a bird welfare issue which required his presence at short notice and was unavoidable. As a result of his absence the compliance visit should not have proceeded. In addition our client cannot understand the fact that his initial audit when licence was granted was a good one and

the only item which was commented upon was the fact that the vehicles were not registered as PSV, yet now so many items are not satisfactory, despite the fact that nothing has changed. It would therefore appear that there is a discrepancy in standards at audits and therefore it seems unfair not to be given time to rectify problems which initially were not brought up. If they had known they would have taken steps to rectify as their livelihood is at stake".

7. The appeal does not seek to deny that the Appellant is in breach of the matters listed in the letter of the 10 July 2007.
8. The Respondent's response was as follows:
 - a. The appeal was based on the premise that there had only been one problem highlighted and that was the issue of the PSV license, in fact there were three non-compliances with 6.1, 6.7 and 6.11. The license was issued on the condition that these matters should have been corrected by the 5th April 2007. The fact that nothing has been done by the inspection date is a problem for the appellant. The licence letter clearly requested changes to be made by a certain date. The Appellant was informed of the date for the visit and there was a telephone call between the Inspector and the Appellant a few days before during which the changes required were discussed. Mr Houghton never mentioned that he would not be available for the visit
 - b. The Respondent denied that the regime was inconsistent. An inspector can only report their findings and will not omit a non-compliance simply because a previous audit did not come across the information they uncovered at the time of their inspection. The responsibility of compliance falls to the labour provider. All the information a labour provider would need to achieve compliance and remain compliant is publicly available. The labour provider in this case has failed to achieve compliance despite a written request on the 5th July 2007.
 - c. With regard to the issue of the labour provider not being present, this was unfortunate however this did not explain the non-compliances at the inspection. The point was also made that the GLA inspector can inspect a labour provider at their discretion and can undertake "un-notified" inspections if they see fit to do so. The GLA have made it clear that inspections are carried out, what will be inspected and what the consequences of non-compliance will be.
 - d. The appeal submitted does not deny the non-compliances and the labour provider has indicated that immediate action has been taken to

correct all non-compliances highlighted. The labour provider was correctly found to be non-compliant with standards previously highlighted and standards discovered at the compliance inspection. The labour provider does not submit in the appeal that his presence would have changed the fact that non-compliances were discovered. The GLA submits that their findings were entirely correct and the correct action was taken as a result.

- e. Without specific reasons supported with evidence by way of witness statement or documentary evidence the appeal would appear to be more of a complaint against the process used.
 - f. With regard to the Community Impact Assessment, the GLA took the decision to revoke without immediate effect so as not to impact the community. Liaison will be maintained with the relevant local groups to prevent a major impact. Therefore, there should be no reason to delay in the implementation of the decision in this case. The GLA took the decision to revoke without immediate effect as worker health and wellbeing was not in immediate danger. This should not be interpreted as the non-compliances are not serious. The intention of revoking without immediate effect is to ensure justice can take its course and if the decision falls in the labour providers favour no business detriment has been caused. However, if the result is not in the Labour providers favour the GLA would expect the decision to be implemented without delay.
 - g. In conclusion the Respondent called for the licence to be revoked with immediate effect as the labour provider has failed to comply with the standards directed by the GLA and as a result the license must be revoked. If the GLA's position is upheld any delay in the implementation of the decision will undermine the reason why the GLA was created – to bring to end worker exploitation. Therefore, delayed implementation only serves to extend the period within which further exploitation may occur
 - h. The GLA relied on the precedents of 2/E/R and 4/E/R and 3/E/C
9. It was agreed by the parties that this matter could be determined without the need for a formal hearing.

The Decision

1. It was noted that the Appellant, through his representative, did not deny that there was a breach of all of the above provisions at the time of the inspection on the 6th July 2007. It was argued that the visit should not have proceeded without the license holder being present. Having looked at the Gangmasters (Licensing Conditions) Rules 2006 and the Licensing Standards, it is not a pre-condition that the license holder be present at the inspection, it was not therefore capable of invalidating the findings of the Respondent contained in their letter dated 10 July 2007. Were this to be a pre-condition it would considerably fetter the GLA in the execution of their statutory duties. The Appellant does not attempt to say that the findings of the inspection were reached in contravention of the aforementioned Rules, just that the visit "should not have proceeded", in that case therefore the visit was in accordance with the Licensing Rules and the findings were therefore valid and an accurate reflection of the state of affairs discovered on the day of the inspection.
2. It was also noted that the Appellant wrongly submitted that there was only one breach at the time the license was granted, there were three breaches that were subject to the requirement that they be rectified by the 5th April. The Appellant was found to be in breach of two of these requirements at the date of the inspection and no reason was given as to why the two breaches had not been remedied. The appeal stated that the Appellant was not aware that the PSV regulation already applied but the license made specific reference for the need to comply with standard 6.11 which had to be remedied by the 5th April, the Appellant was clearly aware and was in breach of this provision. The Appellant had sufficient time to remedy the three breaches identified at the initial inspection but failed to do so.
3. It was recognised by the Appellant that it was found at the date of the inspection that there was contravention of "so many standards". The standards required of a license holder were provided to the Appellant as part of the process. The requirements are no more than to comply with existing legal requirements such as Health and Safety legislation, Working Time Regulations rights relating to paid annual leave, working time and rest breaks and rights under the Employment Rights Act 1996 relating to the right to have written statement of terms and conditions and not to suffer unlawful deduction of wages. It was said by the appellant that it would be unjust to fail to give the Appellant sufficient time to remedy the breaches. The Appellant would have been aware from the documentation provided to him by the Respondent at the time of applying for the license of the requirements necessary to be granted a

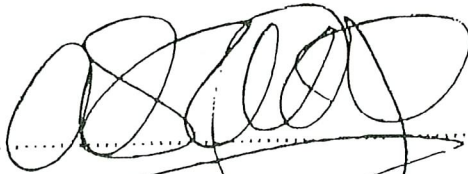
license and to retain a license. One has to note the primary objective behind the introduction of the Gangmasters (Licensing) Act 2004 which was to "curb the exploitative activities of some Gangmasters..." and this requirement calls for all labour providers to comply with general employment law provisions and to provide a high degree of protection for workers and to protect the interests of law abiding labour providers. The provision must be interpreted in the light of this primary objective. There is undisputed evidence that the Appellant has failed to comply with basic requirements set down in the Gangmasters (Licensing Conditions) Rules 2006

4. The appeal refers to "immediate action being taken" to put in place contracts of employment and payroll but no documentary or witness statement evidence has been produced to corroborate that this has been done and there was no evidence that this was in place at the date of inspection. The most serious breach was that relating to 4.3 due to the failure to have gas inspection certificates and electrical safety testing for all appliances and for the premises used to accommodate workers to be registered as multi occupancy housing, although the appeal referred to the matter of multi occupancy being discussed with Maidstone Borough Council and the caravans no longer being used, no dates were given for this decision and again it is not suggested that this was in place at the date of the inspection. There was no mention of what action had been taken to acquire all the necessary gas and electricity inspection documents. The Respondents were entitled to conclude at the date of inspection that the Appellants were in breach of this provision and the breach was critical and that it posed a real danger to the health, welfare and safety of workers.
5. It was put forward by the appellant that to take away their license would affect their livelihood however on the Compliance visit the Appellant was found to have achieved a fail score of 110, a licence can be revoke if a score of more than 30 is achieved. It was not submitted that the Respondent was incorrect in its findings nor that the breaches were not based on fact. There was no denial of the accuracy of the report. The Respondent was therefore entitled to conclude after the visit that the appellant had failed the inspection and therefore the license should be revoked This approach was proportionate to the findings of fact and the intention of the legislation brought in which was to protect workers from exploitation. There is no evidence that the Appellant's livelihood would be affected as it was noted that they have applied for a new license and the inspection is due to take place on the 16th October, if the breaches identified have been rectified the Respondent have confirmed that "If the business were to reapply during the appeal process and prove the business practices have been improved the GLA would be more sympathetic to a time extension". The matter is very much in the hands of the Appellant.

they can protect their livelihood by complying with their legal requirements. They are now aware of the extent and the manner of the breaches and what needs to be done. It has also been submitted by the Appellant that work is underway to correct all the breaches, that being the case no injustice will be caused to them by upholding the Respondents decision to revoke the license as at the 16th October they have the opportunity to be granted a new license if they can show that they are fully compliant.

6. In conclusion therefore the Respondent was correct in their decision to revoke the Appellant's license based on the evidence before them at the time. The inspection took place in compliance with the Gangmasters (Licensing Conditions) Rules 2006 and the substantive findings of the manner and extent of the breaches were not challenged on appeal. The appeal of the Appellant is therefore dismissed and the license is revoked from the date of the promulgation of this decision.

Signed.....



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

Dated:

15th

October 2007