

The Gangmasters (Appeal) Regulations 2006

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

189/ER

Gary Cook trading as Gary's Labour Agency

(Appellant)

V

The Gangmasters Licensing Authority (GLA)

(Respondent)

Heard on: 27 and 28 March 2017

Appointed Person Peter Britton

Representation: The claimant acting in person

For the GLA: Mr J Jupp of Counsel

Decision and Reasons of the

Appointed Person, in relation to the above matter:

Decision

The appeal against the refusal to grant the Appellant a Gangmasters' Licence is dismissed.

Reasons

Introduction

1. On 15 July 2016, the decision maker at the GLA who is Ms Joanne Baggaley (JB) (from whom I heard sworn evidence) issued her decision as the decision maker for the purposes of Section 7 of the Gangmasters (Licensing) Act 2004 whereby she refused the Appellant a licence to operate as a gangmaster. Her reasons are fully set out in that detailed decision, which is in the bundle before me at pages¹ 1 - 9. She applied first of all Licensing Standard 1.1. In summary

¹ References to the bundle by me are Bp followed by the page number.

this requires the Appellant (ie the principal authority (PA) to be named on the licence) to demonstrate that he is fit and proper and inter alia candid and truthful. Of course, this goes to the modus operandi for applying for a licence, all of the requirements for so doing are fully set out in the bundle.

2. Suffice it to say that a potential PA needs to make formal application for a gangmasters licence and in so doing needs to provide all the information which is set out in the explanatory documentation. In this case the relevant application of Mr Cooke commences at Bp 145. As is to be expected, the document requires that the applicant make a declaration at the end of the document that he has been truthful and made full and proper disclosure.

3. JB failed the appellant under Licensing Standard 1.1. Her decision fundamentally focuses on the non-disclosure of the Appellant's previous involvement with an agency known as AAA Personnel Ltd (AAA) from 4 December 2006 until 25 April 2007 as to which see the documentation at Bp115-139.

4. The second ground upon which JB refused the application was pursuant to Licensing Standard 1.2, which is the principal authority competency test. The applicant as a potential PA must have demonstrated, essentially by the end of the inspection (to which I shall come), the requisite competency and capability to hold a GLA Licence. In reaching her decision JB was inter alia required to have to inter alia to, whether the Appellant had displayed a sufficient understanding of the GLA Licensing Standards and/or had sufficient management processes.

5. Before I move on apace, the final thing to say is that under Licensing Standard 1.1, Ms Baggaley determined that the Appellant should be awarded (if that is the right phrase) 30 points. The significance of that is that 30 points equals in usual circumstances a fail in itself. Under Licensing Standard 1.2, she also awarded 30 points. So a total of 60 points.

6. The Appellant has the right to appeal from a determination by a decision maker at the GLA and which was made plain to him in JB's decision to refuse him his licence. So, he appealed on 11 August 2016 via his then solicitors. The appeal document is at Bp10 - 17 and I have of course paid full regard to it.

7. Finally, as they so entitled to do, the Respondent responded to those grounds of appeal on 14 September 2016 (Bp 18 - 33).

8. In making my adjudication today, I have paid close regard to the joint bundle to which I have been taken. I have heard sworn evidence in the following order; in each case the witness giving evidence-in-chief by way of a written witness statement, which of course I have read. I have heard first from the two GLA inspectors, who were Graham Cross and Helen Miller; then from JB; finally from the Appellant.

9. Finally I am grateful for the skeleton argument of the Respondent prepared by Mr Jupp.

The law

10. I have been asked by Mr Jupp on behalf of the GLA to give guidance as to the way in which the Appointed Person (AP) approaches these matters. I covered this to some extent in the obiter observations which I gave in the judgment (NV Gangwork) which is at tab 25 in Mr Jupp's authority bundle. I adopt it for this judgment and will now expand upon it and thus it is no longer obiter

11. At paragraph 2 as I said my remit for the purpose of determining appeals is the Gangmaster (Appeals) Regulations 2006 (the Regs). There are no published rules of procedure. The Regs simply provide at Regulation 2(1):

"2. - (1) The overriding objective of these Regulations is to enable the appointed person to deal with appeals justly.

(2) Dealing with an appeal justly includes, so far as practicable -

(a) ensuring that the parties are on an equal footing;

(b) dealing with the appeal in ways which are proportionate to the complexity or importance of the issues; and

(c) ensuring it is dealt with expeditiously and fairly."

12. And at Regulation 21:

"(1) The appointed person shall allow or dismiss the Appeal.

(2) The decision of the appointed person shall be binding on the parties"

13. Save for judicial review, which of course would be exceptional; there is otherwise no mechanism for appeal from the decision of an AP. Thus there is no jurisprudence at a higher court level relating to GLA appeals. However there has built up a library of decisions by APs, which Mr Jupp has put before me. But of course they are illustrative, rely very much on their own facts, and do not bind me.

14. However, there is jurisprudence relating to other licensing regimes and which is in Mr Jupp's authorities bundle and which in terms of assistance that can be derived there from was in part rehearsed by me in the NV case and particularly commencing at paragraph 49.

15. Additionally to assist the GLA (and indeed future Appellants) the approach to hearing the appeal is first as per *Hope & Glory Public House Ltd v City of Westminster Magistrates' Court* [2009] EWHC 1996 (Admin) (at 31). Thus, in relation to an appeal from a decision of the GLA, it is a) a rehearing and at which b) the AP should have regard to the intentions underpinning the GLA regulatory regime. Stopping there, and it is enshrined in the enabling statute and indeed the subsequent Regulations and guidance thereto, the *raison d'être* for the gangmasters' licensing regime is to ensure that there are safeguards to the

deployment (whether they be employees, workers or agency workers) of gang workers inter alia in the agricultural and associated industries. By their very nature, the utilisation of labour in those spheres can be haphazard and those who are employed may be vulnerable. Therefore the regime is in place to ensure that those who apply for and are granted a GLA licence are fit and proper persons of probity who have demonstrated at the inspection that they are competent to undertake what is a responsible role as a gangmaster.

16. To turn it around another way, gone are the days when a modus operandi of persons deploying labour for end users (ie farmers or packing businesses) without any real regard for such as the health, safety, or payment of such as the minimum wage or compliance with at least statutory working conditions for those deployed can be tolerated: hence the regulatory regime

17. The third and obvious point is that the AP must of course pay careful attention to the reasons given as in this case by the GLA decision maker for refusing the application. What one is essentially doing is to look at all the evidence that the decision maker had at the time of her decision, starting from the premise that the first fundamental is the crucial importance of the inspection report. What happens following an application, and thus happened in this case, is that once the application has been submitted electronically and then vetted, it is then sent back with a covering letter to the applicant making clear that he must again read it carefully, amend it if appropriate to ensure accuracy, sign it and return it.

18. Subsequently notice is given (as in this case) that:

- there will be an interview/inspection of the appellant for the licence, obviously first to view where that person might be working from; the office facilities and matters of that nature;
- to examine that individual by way of questioning as to whether he meets the criteria which I have now touched upon for the purposes of getting a licence;
- to explore such things as the preparation of that individual in anticipation of getting a Licence; is there a business plan; is there sufficient working capital to cover such as delays in payment by the end user of the workers as it is fundamental to the licensing regime that the workers deployed must be paid at then end of the working week even if the end user has not paid.

19. For reasons I have now outlined the inspectors will want to be sure that the applicant is well aware of and conversant with such things as the Working Time Regulations and thus rest breaks, statutory annual leave, the prevailing minimum wage and matters of that nature. Also that there are proper contractual documents in place for both the engagement of the workers and also the deployment of the same to the end user; PPE policies and contractual provisions which make plain that in the case of employees or workers, that personal protective equipment is going to be supplied by the gangmaster. That of course is a fundamental. The agricultural world can be hazardous.

20. An applicant has plenty of opportunity to get his house in order so to speak ~~before the inspection takes place. He is informed as in this case well in advance.~~ Furthermore a bit of a reprieve in terms of a shortcoming may be given by the inspector if he thinks there are documents that could be provided but that the applicant needs a few days grace to sort it out. In this case, that happened.

21. Reverting to *Hope & Glory*, this leads to the fourth and obvious point that I must apply the regulatory regime as if I was standing in the shoes of JB.

22. Next at what date is it that compliance needs to be shown. Is it by the conclusion of the inspection process? Or is immediately prior to the determination by the decision maker: in this case JB? Mr Jupp has referred me to the judgment of one of my colleagues (Mr Ashton) in the appeal of *Solid Gold Services Ltd*, as to which see Bp99 and which as to the approach he reiterated in *All Staff Solutions UK Ltd 34/E/R* which was before me in the authorities bundle when I did the NV case. What he says is:

"In the absence of any authority, I accept the question of whether the Appellant was compliant with the Licensing Standard has to be determined as at the date of inspection, not some later date."

23. I expressed a caveat to that in my paragraph 54 in NV:

"I would add to that, or rather I would amend it to read, "has to be determined at the date of the decision to revoke²."

24. By way of clarification I am entirely with my colleague Mr Ashton for reasons which I have now given that the question of whether the Appellant was compliant with the Licensing Standards is assessed on the basis of the inspection. Otherwise, how would the GLA be able to meaningfully assess competency? There has to be date, rather like an examination which is what in effect this is, by which to show the required integrity and competency. The caveat, albeit my judgment was obiter, is simply this that of course however it is not the inspector who makes the decision to refuse the licence. As in this case, a report is sent in and then it is for the decision maker, on the basis of that report, to make a decision. The appeal is from the decision of the decision maker; not the inspector. Of course, in those circumstances there has to be the additional caveat that there may be exceptional circumstances where prior to the adjudication of the decision maker, there may be a need to further investigate or correct something, ie a mistake that has been made, albeit that does not apply in this case. By mistake, I mean by the inspector. Secondly, it may be that there was some impediment operating on the mind of the appellant at the interview such as ill health which got in the way of that person being able to fairly explain themselves. It might be that in such circumstances that the applicant thereafter wrote in to the GLA explaining that he had not been well; perhaps providing a medical certificate and explaining why he had not done himself justice. That might be something that the decision maker would need to give consideration to. In other words the role of the decision maker is not to just simply rubber stamp the inspectors findings. If that were the case, there would be no need.

² Or as in this case to refuse the application.

for the decision maker. As it is none of those eventualities applies in the case before me.

25. Having providing that explanation for the approach to be taken as an AP, I now come to my findings of fact in this case.

Findings of fact

26. I want to make it plain that I am not damning the Appellant for his past. That he has previous convictions is obvious, but they are spent. In that sense Mr Cross in his investigation report (Bp325-345) make reference to them and other matters such as that " Mr Cook has been linked to a suspected VAT scam" that concerned him. But he had used the word "SENSITIVE". What should therefore have happened is that before the report was submitted to JB those references should have been redacted. Unfortunately that did not happen.

27. I can understand the concerns that the Appellant therefore has. But I am entirely satisfied from the evidence of JB, who I found to be a particularly impressive witness, that she deliberately excluded from her mind any consideration of that information.

28. However what was relevant and admissible for JB to consider, was that in his application for a licence the Appellant was obliged to set out as to whether he had been in the past a licensed gangmaster or associated with a business which had been so licensed. He said he had not. By the time the inspection took place, Mr Cross knew that this was not true because the GLA does not destroy its records. The Appellant was given an opportunity to deal with the point but when asked about the relevant gangmaster operation known as AAA Personnel Ltd (AA), he said he had no knowledge of it. He was also asked if he had ever been a director of that business and he said no. He was asked if he knew Wayne Phoenix. He said yes up to about 10 years previously. He did not say that he and Wayne had been in business together as AAA.

29. Mr Cross left it at that. He was entitled to. He had given the Appellant an opportunity to explain himself and the Appellant had decided to say that he had no knowledge about these issues at all.

30. In due course JB, in terms of the document trail that was put before her, came to the conclusion that the Appellant had been deliberately untruthful as she found it inconceivable that he could have forgotten about the AAA scenario.

31. It is critical because applying Licensing Standard 1.1 being truthful and candid in terms of the application and obviously in the interview, is so fundamental because obviously if it can be reasonably concluded on a balance of probabilities by the decision maker that the person had not been candid, then how can they be fit and proper? I wish to make it clear that there is a side issue concerning Max Labour Agency, which I will come to. But JB has made plain to me that irrespective of the Max issue, such was the seriousness of the shortcoming over AAA, she was justified in imposing 30 points and thus just on standard 1.1, let alone failings as to standard 1.2, refuse the license.

32. Why do I conclude that she acted reasonably? I obviously heard the Appellant under cross-examination and his explanation as to why he forgot about AAA. But I conclude as follows. This brings me back first to the documentation concerning AAA commencing at Bp115. As at 4 December 2006 AAA had a gangmasters' licence. AAA was a limited company. The only Director, and indeed the Company Secretary, was the Appellant. The PA, for the purposes of that licence, was Mr Phoenix. I can only observe that it seems to me that Mr Phoenix was not actually the guiding light of that business; it has to have been the Appellant as he was the only Director. It came to light, in terms of the GLA, that Mr Phoenix had not been truthful when obtaining the licence. He had failed to disclose that he had criminal convictions that were not spent. The upshot was that the GLA notified him that it proposed to revoke his licence. So the Appellant e-mailed the GLA asking to substitute himself on the licence as the PA. On 12 February 2007 he submitted an application, (it seems twice (see first Bp124 and then Bp134)), just as he was to do in terms of the appeal before me in 2016. He made one extremely serious non-disclosure. That is that at the time he made that application, the Appellant had been very recently convicted of a serious offence and sent to prison for 6 months, although it may be that he only served a short period of time and was then released on a tag.

33. The email trail that I have seen in relation to that matter leads me to suspect, and here I am with Mr Jupp, that the Appellant was also at that stage fishing to see if the GLA knew anything about that last conviction, which was circa 12 November 2006. To compound matters, in the first application he had failed to complete the section as to whether he had any unspent convictions.

34. In the second one, because it was obviously rejected because it was not fully completed, he went the whole way, of course having now had the telephone conversation and realising that they did not know about the last conviction. Thus on the last page he put something bland about he was under suspicion of a possible motoring offence. As it is the GLA had by 27 February 2007 found that he had two other unspent convictions for common assault and VAT evasion. Thus material non disclosure.

35. As it is, he then never pursued his application, which had been overtaken so to speak by events because due to Mr Phoenix's lack of co-operation with the GLA, it had by now revoked the licence. But the Appellant made an angry telephone call, as is obvious from the record (Bp131) on 27 February 2007, to the GLA inter alia complaining that this was racist treatment of him. The Appellant is white and what he is talking about there is the fact that he was saying that Eastern European gangmasters are not under the same degree of scrutiny as their English counterparts.

36. Coming back therefore to the interview with Mr Cross and his colleague Helen Miller on 3 June last year and the Appellant saying he did not know anything about AAA or Mr Phoenix, other than they had lived together at some stage about 10 years ago, the explanation of the Claimant is that he genuinely forgot. It was a long time ago.

37. At one stage, he seemed to be suggesting that he was also praying in his aid the trauma of witnessing killings in the Ukraine where he has been staying on a regular basis over the last few years with his Ukrainian wife and 8 year old daughter. But he rowed back on that under cross-examination and said that he was not relying on trauma.

38. JB found it inconceivable that the Appellant would so forget AAA given the circumstances which I have now rehearsed.

39. I conclude as follows. JB did not act unreasonably in reaching her conclusion. I have observed the Appellant. My own view is that he wants to escape his past; that is fair enough. But I surmise that when he put in the application on 21 April 2016 (Bp145) and stated that he had never inter alia been associated with a licence holder business, that he worked on the premise that the GLA would no longer have any records for AAA. To turn it around another way, I do not believe him when he says he had forgotten. It is such a major thing to forget about; his own company; needing to apply to have the licence put in his own name as opposed to the unfortunate Mr Phoenix and in a context where he has just been convicted of a serious offence and which he fails to disclose doubtless hoping that it will not come to light or indeed his other unspent convictions.

40. It follows that I conclude that this non disclosure is so serious that Ms Baggaley was entitled to reasonably conclude that it demonstrated a lack of truthfulness and candour. In itself, it is enough for me to uphold the decision to refuse a licence.

Max labour agency

41 Put at its simplest, under the regulatory regime, there is a requirement as part of the conditions to disclose any working for a gangmaster. I did quiz this, making the analogy with for instance a 17 year old student carrot picking for the summer and then going off to university and then deciding to apply some years later to be a gangmaster. Would he really be supposed to remember and disclose? Mr Jupp makes the point that there is a valid reason for this which is that in the gangmaster world there is unfortunately, as is known to the GLA, the using as a front a person put forward as a PA but who is really under the control of unscrupulous others who may for example have been refused or had revoked a licence: hence the need for disclosure. On reflection I therefore find the requirement to be reasonable.

42 As it is, the Appellant did not disclose to start with that he had spend a few days working as a field manager for Max about 6 months before his application because he had considered it was not relevant. I can understand that he might think that, but on the other hand he has many years of working in the agricultural industry and particularly engaged in the supply of or the working of gang workers. I would therefore expect him to appreciate the strictness of the regulatory regime and that it is not for him to make decisions about what is or is not relevant; that is for the GLA. As it is, I do not see it as the most serious of failings in this case. For

the reasons I have now given it does not undermine JB's awarding of 30 points under fit and proper.

Licensing standard 1.2

43. The Appellant's approach to his application was shambolic. It shows at best a lack of diligence and a cavalier approach. An example is three sets of contracts of employment/handbooks produced over the period up to before the decision made by JB and on none of those occasions, despite some assistance from Mr Cross, could he get his house in order. An example is that in every one of them, although there might be a reference in the employment contract to him supplying the PPE, when it came to the handbook extracts, or vice versa, the contrary was said and that it was the custom and practice that the worker would so provide and which flies in the face of the GLA requirements because of the critical importance of PPE and health and safety. This is just one example.

44. It is again fundamental that there should be shown that the individual applying is not a man of straw. I have already explained why. As to sufficient capital he tells me that he was not ever expecting to work for anybody other than those who will pay on the nail at the end of any given week. But he never produced any documents to support that at all to the GLA. In my experience, as an AP it is not unusual to see applicants having obtained advice as to the application and there are now professional ports of call in East Anglia. This will therefore enable an applicant to be able to produce such as a short portfolio in which would be set out the business plan; details of payroll and intended PAYE accounting as per such as SAGE; proof of a line of sufficient credit etc. In this case all that the GLA, via Mr Cross and his colleague, got from the Appellant was that he had £45 in a newly opened bank account at Lloyds. He was asked about otherwise where was his financial wherewithal, in other words to sustain a shortfall in income when needing to pay workers and he did not give a clear reply, simply referring to the fact that he had funds (unquantified and unspecified) in the Ukraine. He has told Mr Jupp today, although I am only concerned with matters as they were at the time of the inspection, subject to the exceptional and in any event otherwise by the time of Ms Baggaley's adjudication, that there is a bank account in the Ukraine in his wife's name; he cannot have one himself because of the legal regime; and that he would have been able to get his hands on substantial sums, at least circa £20,000.

45. Why did he not tell Mr Cross and his colleague that? He says because he was not asked. I have read the notes of the interview commencing at Bp190 and I accordingly find that he was given every opportunity to deal with that matter and decided not to do so. Also, it is not outside my experience as an AP that frequently applicants will provide letters from end users confirming that should they get a licence, they will be provided with a contract to supply labour and the terms. No such evidence was supplied to show that he would only be working for end users who paid on the nail. In my experience it is an optimist par excellence who believes that they will always be paid on the nail by the end user at the end of any given week.

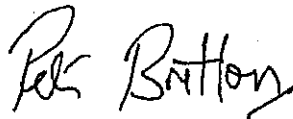
46. I have dealt so far with contractual confusion, PPE, cash flow; and I will finally add into that equation that the only business plan he proffered was one that was "in his head". I would expect somebody such as the Appellant after the experience of 2006 and knowing as he ought to have thus known what is needed by the GLA, to have been prepared and thus able to provide all that was required to show that he was competent.

47. It gets worse. The Appellant was asked about his knowledge of worker leave entitlement. He told Mr Cross four weeks. When Mr Cross corrected him that it was in fact 5.6 weeks because of bank holidays and I bear in mind that many gang workers work bank holidays and so have an accrued carry forward leave entitlement, having answered "Oh really", the Appellant at that stage said that this meant that he would have to revise his margins as the operating costs would rise from circa 14 to 20%. Why would he need to say that if as he tells me he had made plain to the Inspectors that he knew what the entitlement was and by 4 weeks meant 28 days? It does not fit.

48. There are other shortcomings but suffice it to say that I already have explored the scenario sufficiently to conclude that I have no hesitation in concluding that JB was entitled to find on the basis of the inspection report and with nothing further coming forward from the Appellant before her decision, that he also lacked the necessary competence for the purposes of Licensing Standard 1.2 Therefore she was justified in awarding 30 points.

Conclusion

49. It follows that uphold the decision to refuse this licence and thus I dismiss the appeal.



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

Dated: 12 April 2017