IN THE MATTER OF AN APPEAL
PURSUANT TO REGULATION 6
THE GANGMASTERS (APPEALS) REGULATIONS 2006

BETWEEN

Appellant		**Respondent**
Victor Foster Poultry Services Ltd (hereinafter referred to as VFPS)	**and**	Gangmasters and Labour Abuse Authority (hereinafter referred to as GLAA)

Appointed Person: Employment Judge P Britton
Location: Nottingham
Date: 8, 9 and 10 October 2018

Appearances
For the Appellant: Mr C Breen of Counsel
For the Respondent: Mr J Jupp of Counsel

JUDGMENT

1. The appeal is dismissed.

2. The coming into effect of the revocation of the licence is 28 days from today.

3. Specifically, I conclude that the Appellant fails under:
   - Standard 1.2 competency - not being fit and proper;
   - Standard 6.4 critical – transport;
   - Standard 7.3 not critical - contractual arrangements, ie the written particulars of employment, and because of those findings it thus follows, albeit it would not have affected my decision, that he is not fit and proper under Standard 1.1

REASONS

Introduction

1. On 3 November 2017, the Gangmasters Licence of VFPS was revoked by the GLAA, subject to any appeal and thus if that occurred essentially stayed until the outcome of the appeal in this case by me. On 30 November 2017, VFPS duly appealed. Essentially the ground of the appeal was that it was unfair to take away the

licence which was held in the name of Victor Foster, the majority shareholder of VFPS in that the GLAA was not justified in concluding that there had been a "wholesale disregard" of the Licensing Standards, to which of course the Appellant – VFPS - must adhere. Set out was how VFPS had on many occasions co-operated with the GLAA. In other words, it had done its best. Therefore, for reasons fully set out, it was in those circumstances disproportionate to revoke the licence.

2. The GLAA does not agree relying on the reasons for why the licence was revoked as comprehensively set out in bundle 1 of the 4 ring binder core bundles in this case and commencing at page 1[1]. These I shall refer to in due course.

3. As to my remit, with two very experienced Counsel before me, and in particular in matters of this nature, I do not see the need to recite in any detail the actual regulatory regime or the remit.[2] Suffice it to say that my jurisdiction is covered by the Gangmasters (Appeals) Regulations 2006. The appeal is by way of a rehearing as was made clear in particular by this Judge inter alia in his judgment in ***Gary Cook trading as Gary's Labour Agency -v- GLA (***as it then was). As per Regulation 21, I can allow or dismiss the appeal. For the avoidance of doubt as I made clear in that judgment reiterating a previous obiter observation (as to which see paragraph 24), I must focus my attention upon that which was the case at the time of the GLAA investigation report in this case. It followed a lengthy series of inspections by the Inspector (Mr S Gant) who provided his report to the GLAA on 19 July 2017 (Bp 1192).

4. Stopping there, I have heard from Mr Gant under oath and I have before me his statement in chief in the witness statement bundle. Much of what he had to say was not challenged as the defaults by VFPS in this case are really not the issue. The grounds of the appeal (as have been made clear by Mr Breen) are that there was compliance to the best of the ability of VFPS essentially via Mr Foster and therefore to revoke this licence was in the circumstances disproportionate; prayed in its aid in that sense is that there has been a lack of objectivity in the decision making in particular of the decision maker at the GLAA who revoked the licence, Ms Serena Barton. She also gave evidence under oath before me: her statement in chief is also in the witness statement bundle.

5. Therefore, going back to the framework in which I look at this matter, I of course therefore take into account whether there was anything additional that came before Ms Barton which she ought to have considered in reaching her decision.

6. Finally, of course this is a rehearing and in that respect, that which has become available to me and which could have been available to Ms Barton or Mr Gant but for the reasons that I shall touch upon, is not something that I consider I can ignore.

7. I also heard from Victor Foster under oath, again evidence in chief by witness statement and a supplemental in rebuttal of the GLAA statements.

Findings

[1] Any specific mention by me to pages in the bundle have the prefix Bp.
[2] In any event as to which see the written submissions of Mr Jupp.

8. Mr Foster is clearly aware of the regulatory regime. On his behalf it is accepted that there are critical standards to which a licensed gangmaster (or in this case labour user) subject to the remit of the Gangmasters Licensing Regulations must comply with. The reason for that is self-evident; it is to avoid the risk of exploitation of what can be vulnerable workers, particularly in the nature of the work they do; it is to ensure that there is compliance with such things as health and safety; and payment of the national minimum wage (NMW); and compliance with the Working Time Regulations, all of which I shall touch upon.

9. VFPS is a substantial enterprise – its turnover was at the time of material events at least £2.5m. It then employed about 80 workers on the mainland, it seems operating out of 3 centres, namely Bristol, Preston and Nottingham. There was also an operation in Northern Ireland. Mr Foster was based in Portadown in that province, there situate he had a small administrative team (all part-time) which has changed over the years from time to time. As at the material time there was a payroll person, a finance person, and an HR person. Also, from time to time he would obtain legal advice; primarily from MCL Employment Law and in particular Patrick Moore and his assistant.

10. As to the modus operandi of the business, Mr Foster had over the years gained contracts with poultry farmers across the country and also substantial chicken producers in the food industry such as Moy Park and Noble Foods. He basically employs workers to catch chickens on behalf of the end users. Having been caught the chickens are then loaded into crates and transported, by I gather another contractor, to such as a Moy Park processing factory for slaughter, processing, and onward sale.

11. The workers used by VFPS, mainly Eastern European, were provided with accommodation centred upon the operational bases to which I have already referred. The enterprise was run for him on a day to day basis in the United Kingdom by Romans Nosals. In terms of how things were operating at the time I am dealing with (although I shall come back to the history prior thereto) and taking the period post the start of Mr Gant's investigations and his visits to various farms starting with Sunny Farm in Bedfordshire on 6 May 2016, the documentation that was obtained (as to which see the analysis commencing at Bp 1525 and cross-referenced to the business schedules that Mr Foster provided during the course of the investigation) show that by and large the modus operandii was as follows.

12. Mr Foster, would from time to time undertake an itinerary of visits to existing and new clients on the mainland. Through the services of Romans, there would be then be worked out schedules for the work including as to which team would go to which chicken farm and as to how may such farms could be visited and at which chickens would of course be caught and crated over a working day which was most often at night. The planning would include the transportation of the relevant team in one of fleet of minibuses owned by VFPS. In each team it can be assumed there would be 7 workers as the minibus seats 6 and the driver would of course have a separate seat. The driver would also take part in the chicken catching.

13. Stopping there, what I can safely conclude, as to which see the Gant analysis and thence that undertaken by the GLAA's Solicitor commencing at Bp 1536, is that there are numerous examples of the period of work from the travelling out from say

Bristol to the return, which were very long indeed. A good example (and it is one of many) is the analysis of the work by Uldis Kemers who was a driver worker. Thus, on 17 January 2016 the departure was at 17:00 and the working day did not finish in the sense that the workers did not arrive back at Bristol until 11:10 the following day. That self-same day, he started, in the sense of transporting out from Bristol a team and of course working with it, at 17:00 with a return the following day at 12:05. In other words, it is not difficult to work out that as the driver of that particular minibus he only got 5 hours and 50 minutes of rest in between these assignments. Suffice it to say that I am satisfied going all the way through those schedules taking me up to July 2017, that this pattern continued. I will give one more example. Thus, Aleksander Archipenko (who was the driver for the team in relation to the particular vehicle and I assume was working out of Bristol where I have said workers were accommodated) on 18 June[3] started at 20.30 and finished at 15.00 on the 19th. That same day he again started out 16.00 and finished at 6.30 on the 20th. So, a total of hours working from leaving Bristol until return of 18.5 hours for the first shift, so to speak; and 14.5 hours for the second; and with only one hour break following the first shift before embarking as the driver on the second. I repeat this is part of a pattern.

14. Going back to the Critical Standards to which I referred and focussing on health and safety and its interface to being fit and proper to hold a licence, this is clear cut evidence of the safety of the teams when being transported being at serious potential risk. Without a proper break as per the WTR[4], there is every risk that a driver can fall asleep. It may well be that Mr Foster has now ensured he has two drivers per minibus, but I am dealing with material events at the time of Mr Gant's series of inspections.

15. Again, what is fundamental therefore within the Licensing Standards as to competency, let alone fit and proper, is to keep proper records, which of course is also a requirement of the NMW[5] and WTR Regulations, and so that it can be seen that all hours of work are being recorded so that (a) calculation can be made as to whether the national minimum wage is being paid and (b) to ensure that 11 consecutive hours of rest are taken in each 24 hour period worked.

16. This therefore brings me on to the GLA, as it then was, investigation that was undertaken in 2012, which I shall call the Stockdale investigation. Suffice it to say that running through that (as to which see the inspection reports commencing at Bp159 and thence 30 January 2013 at Bp 178) can be encompassed for my purposes thus.

17. The inspectors made plain that inadequate records were being kept. VFPS was relying of what are called catching dockets; these in effect record time spent particularly at the various farms; amount of birds caught, remunerations and matters of that nature. What they did not show was inter alia travelling time and calculation in relation thereto. I am focusing on this particular point. It is encompassed particularly at Bp 165 onwards. There was already an issue which was flagging up. Mr Foster as the managing director and principal shareholder of VFPS was saying that his workers

[3] In my extempore judgement and reason I made an error in relying on 25 July 2017.The correct example is that now given and which was highlighted before me during the hearing.
[4] Working Time Regulations 1998.
[5] National Minimum Wage regulations 2015.

were “piece workers” and therefore they would not be inter alia entitled to the breaks to which I have referred.

18. Secondly, there was the issue of the drivers – how could they be piece workers when they are driving the vehicles? Mr Foster accepted he needed to record more information. At that stage he seems to have satisfied the GLA inspector that the new system in place would be adequate. He said (Bp166) that VFPS was now going to create a daily timesheet which would be filled in by the supervisor and faxed weekly to HQ in NI. This timesheet would cover workers’ details, actual hours worked and travelling time if required to be paid. This would be compared with payments made to workers under piece rates and any shortfalls made up.

19. Moving to the second investigation report, the issue of travelling time and the drivers came up again. The inspector was making clear that he believed that they should be paid an hourly rate for that work driving. Also of course he was making plain that he considered that the requirement to rest breaks as per the WTR did apply and he set out the relevant Regulations at Bp 180. But he qualified it as being that his interpretation was that it would only apply between the travelling time following arrival at the first assignment from “home” until the end of the last assignment. This would be, in my judicial opinion, taking a liberal view of the purport of the WTR to the advantage of VFPS.[6]

20. So, coming out of that Mr Foster could not have been but 100% clear that first of all he now needed to complete, and going forward make sure that he kept, these new promised records. Second, having said he agreed that he would have to accept that the drivers were in any event not piece workers, that of course means they would get the 11 hours break.

21. However, the only Additional Licence Conditions (ALC) placed on the licence at that stage (27 March 2013) related to two things. First there had been an employment tribunal case against VFPS. I will accept that virtually all the claims were dismissed or withdrawn, but what the tribunal did find was that there was a failure in terms of section 1 of the Employment Rights Act 1996 in relation to the provision of workers’ written particulars of employment. I deduce that the employment tribunal invoked section 38 of the Employment Act of 2002 and imposed a sanction of 4 weeks’ pay as a sanction for non-compliance with the provision.

22. Thus, moving forward, Mr Foster could have been under no illusions that he had a requirement under section 1 of the Employment Rights Act 1996 to not just produce contracts of employment for each of his workers but to give the individual worker a copy which is the wording of the section[7].

23. Second, and fundamental as to the issues before me, is that the GLA imposed a second ALC that Roman as the driver should be paid the hours he had driven.

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[6] My opinion is based on the frequently lengthy distances travelled to the first assignment and thus the interface to current ECJ jurisprudence in particular.

[7] And I deduce from the tribunal outcome this was the actual shortcoming in that there was evidence that the particulars may have been signed by the relevant employee but had been retained by VFPS and a copy not given to the worker. This of course will frequently mean that the employee will not remember such as his holiday entitlement: hence the requirement of the section that the employee be provided with a copy

24. Stopping there, I cannot see how mowing forward Mr Foster and thus VFPS could have been under any illusion other than his drivers were covered, even if the other workers were not[8], by the relevant provisions of the WTR as to 11 hour rest breaks.

25. Also, I have no evidence before me that the promised revised documentation for the purposes of record keeping to ensure compliance with NMW and WTR regs was ever used. It is conspicuously absent from the bundles that I have until we move forward to what I shall call the final stages of the Wright investigation.

26. The final point, which was only a flag up at this inspection, related to PPE. Workers were seen to be not wearing their PPE. Some had socks around their lower arms presumably to protect from claws and beaks. Otherwise they were not wearing the PPE. Suffice it to say that what I would call words of caution were issued to Mr Foster to the effect that he must ensure that they wear their PPE. That is an end of that chapter.

27. Moving forward, in 2015 we get the Wright investigation starting with a first inspection on 30 July 2015. In summary why that occurred was principally because issues had come to light relating to the accommodation provided for the workers and in particular whether one or other residency had been registered as a house of multiple occupation. Coming out of all of that, Mr Wright was concerned that the records that he was being shown (and these were the self-same catching dockets as I see it that had been deployed by Mr Foster back in 2012/13) did not show any input as to whether or not the correct limited allowance for the rented accommodation was being deducted from the workers' pay as per the NMW regs so as to mean that the workers rate of pay did not fall below the national minimum wage. So, what the Wright investigation particularly focused on running all the way through to 11 October 2016, was to ensure that Mr Foster complied by producing a record keeping system that passed muster. I will accept that he had done that by the date I have just given.

28.The Wright inspection report was submitted on 17 September. During the course of the preceding inspections noted was a lack of appropriate PPE on site on at least one inspection. This is where I am referring to the words of caution. There was an issue of some ignorance by the workers as to the contents of their contracts of employment and an issue with regard to the provision of them to the workers in their native language. I cannot see that being raised was "you are not giving each of them a contract to keep". The paying wages issue came up again. Some concern was raised with regard to accurate calculation of the NMW in relation to working hours and the recording thereof. Indeed, raised again was that there was the issue of the drivers. But I will accept that by and large, Mr Wright was satisfied that Mr Foster was complying, other than on the issue of the NMW and rent for accommodation. Raised again was the issue of the workers being paid for travel before the first place of work. Suffice it to say (and over what is said by Mr Foster's side to be a grey area) the inspector made plain that records must be kept and to which I have referred, but he does not seem to have reached a firm conclusion as to whether or not the workers should be paid the travelling from their home bases. As I have said, that is not an

[8] This issued was left at that time.

issue for me today. I am not dealing with the interpretation of the NMW in that respect and as to whether there was a breach or not.

29. What Mr Breem says is this. What Mr Foster did in relation to the Wright investigation shows a willingness to co-operate and do his best to comply. That therefore, Serena Barton failed unfairly to consider the Wright investigation and that it was in fact overlapping the Gant investigation.

30. Thus, in relation to the shortfalls that Mr Gant found on the contractual front, allowance should have been made for the fact that these (other than the issue of accommodation which was resolved) had not been flagged up on the Wright front. Therefore, it is not fair to say that Mr Foster shows as per the Serena Barton findings "wholesale disregard for the Licensing Standards". That comes under category 1 of her conclusions and her inter alia concluding that VFPS and of course Mr Foster had failed the fit and proper test, which is critical, and thus means 30 points imposed which would in any event mean loss of the licence as this is the critical threshold and because: " The GLAA considers it to be your modus operandii to operate your business in a non-compliant manner with a wholesale disregard for your legal obligations until an inspection has been undertaken and only then taken corrective action." (Bp 2)

31. At first blush Mr Breen's argument has attractions to it. However, let me make the following clear at this stage; in many ways I will not need to go any further. It brings me really to focusing this issue on the next failure as "a Critical" which is Standard 1.2 – competency. I repeat, that VFPS and thus Mr Foster from 2013 onwards cannot have been under any doubt that the drivers were not piece workers and thus were entitled to have an uninterrupted 11 hour break. From the evidence before me, despite the promises back in 2013 that this would be complied with and that there would be the new timekeeping sheets and the rest of it, by and large it did not happen. It might have done for a short while as per Mr Foster's evidence but I have no documentary evidence to that effect. Whatever way I look at it, by 2016 in terms of the data that Mr Gant was able to collect, there was a wholesale systematic failure to ensure that compliance. It cannot be stressed how serious a breach that is. I have already made the point; I do not need to labour it. The safety of his workers and the public at large was put at risk. Now, Mr Foster says that there never was an accident, I would simply observe there but for the Grace of God. The fact that he may now put two drivers on each minibus is not the point. It is an extremely serious breach which shows at best that he lacks the necessary competency to be considered fit and proper.

32. That leads me on to the next point that I make. When the workers were interviewed in terms of the Gant investigation, which was very through and comprehensive, a second point emerged. Those workers were not getting their written particulars of employment. Mr Foster accepts that due to the pressures of business that may be true. In other words, he does not challenge this. But he is required to have systems in place as per the Licensing Standards to ensure it does happen. It is a fundamental of the licensing regime. A high standard is imposed upon those who hold these licences for the reasons I have already gone to. Therefore, this point having already been picked up by an employment tribunal in one respect or another

for reasons I have gone to, to not ensure that it was complied with is again a serious breach.

33. The third breach that worries me profoundly is PPE. Of course, I have already referred to the fact that Mr Gant, and he has a photograph to prove it (Bp1087), on at least one of his inspections, found that the assembled workers were not wearing any PPE at all. When he asked them, it was to the effect that they did not like wearing the toe tec boots they were supplied with because they were too heavy. They did not think much of the overalls they were given because they tore or were otherwise uncomfortable, and they did not like wearing the masks that they had been supplied with. These were required because of course they were working in very dusty conditions in large chicken barns. Mr Foster was at a loss to answer that one; essentially, he did not realise this was happening. That is the job of his supervisors. But it has been time and time again pointed out in employment and health and safety at work cases the crucial importance of employees wearing their PPE. They must be made to comply. If they do not, then the sanction is ultimately dismissal. An employer cannot obligate his responsibilities by simply saying oh well they do not like it. I find, given there had been the previous discovery of workers not wearing their PPE, that this is a serious failing.

34. As to other aspects of the various inspections, two minibuses were found wanting. One had a spare wheel loose in the back rather than presumably attached underneath. Another one had a crack on the nearside of the windscreen. But, neither Mr Gant or Ms Barton made the obvious enquiries of what were the circumstances as to why this had occurred. There is a world of difference between the spare wheel being on the lap of a worker as opposed to being tucked away in the narrow space behind the rear seats and the back doors. Was it because there had been a need to change a wheel in the dead of night? How long had it been there? As to the crack in the windscreen, I have no photographs and neither of them knows how big a crack it was. How long had it been there? In this respect, I take note of the fact that Mr Foster had and continues to have proper arrangements in place for the provision of new tyres; the callout of the AA and windscreen insurance. On the other hand, I do note that he had been keeping proper records for all these vehicles up to about July 2015. Those records to me are absolutely first rate. It is a tick the box exercise and it includes incidentally windscreens. He stopped doing it because it seemed that the drivers found it too onerous. I do not take it as a strict requirement of the relevant Licensing Standard. Having said that, he is a hostage to fortune when he stops keeping those kinds of records because if he had not done so, then he could so easily then have produced the same to show Mr Gant that in fact the problem had only just happened (ie the windscreen) and it was already in hand to have it replaced. As it is, and Mr Jupp does not push the point with me, I am finding that Ms Barton should not have (this being a rehearing) imposed 30 points on that particular issue Bp5). The same goes for the issue, which I shall call Noble Foods, relating to what I will call end user agreements. I note that requirement has now been scrapped anyway. Given the modus operandi of the VFPS operation, I am not at all convinced that this requirement was necessary in any event. Therefore 8 points should not haven document for this purported failure (Bp7).

35. Finally, although I do consider there were failures of liaison within the GLAA, ie Mr Gant was not aware of the Wright investigation; that was not his fault; he was given

the job by a manager who should have so briefed him but obviously failed to do so. I find it very concerning that there was no link up. If there had been, then the Wright investigation could have been used to expand out and thus deal with the ongoing issues uncovered by Mr Gant. I have already now referred to the limited shortcomings of Ms Barton. But none of these observations assist the Appellant one jot given my overall findings.

Conclusions

36. So, what does it boil down to? Even allowing for the 38 points which I find should not have been imposed: that still leaves a balance from the original total imposed of 106 of a remaining 68 points which is well above the 30 point threshold. These were justifiably imposed given the serious breaches I have now rehearsed and which show consistent failure on serious fronts, ie drivers hours, proper records of working hours; written particulars of employment and PPE. Those are enough. I understand the predicament for Mr Foster. I appreciate in terms of the submissions of Mr Breen the impact my decision will have upon his business. But that is not the point. The GLAA was justified in finding serious breaches of the Licensing Standards warranting the revocation of the licence.

37. Therefore, the appeal must fail.

Appointed Person: _____

Date: 6 December 2018