Case Number: 213/E/RV

GANGMASTERS APPEAL TRIBUNALS

Appellant: Angels Care Agency Ltd t/a Angels Recruitment

Respondent: The Gangmasters and Labour Abuse Authority

Heard at: Watford

On: 22 September 2023

Before appointed person: Employment Judge George

REPRESENTATION:
Written representations from both the appellant and respondent.

JUDGMENT

1. The appeal is dismissed. This decision shall take effect from the date on which the judgment and reasons are sent to the parties.

REASONS

1. On 6 April 2023 the appellant appealed against the respondent's decision of 13 March 2023 to revoke its licence. The respondent resisted the appeal and their response was sent to the appellant on 23 May 2023. In a letter from the tribunal of that date, the appellant was informed that he could choose to ask that the appeal be determined without a formal hearing and that if he did so:

> "This will be done by written determination and the appointed person will take into consideration all the information provided by the Licencing Authority, or the information you have provided, plus anymore you wish to provide, before making a decision."

2. The parties agreed that the appeal could be dealt with on the papers and I decided that it was appropriate to do so.

3. I had before me a copy of the respondent's amended reply to the appeal and supporting documents as described in that amended reply: Documents 1 to 38. Those included the appellant's appeal documentation. I made an order for the provision of any further written submissions and received and took into account a letter and attachments from the appellant dated 5 June 2023, the Licencing Authority's response to that dated 8 June 2023, the appellant's further submissions dated 14 July 2023 and the Licencing Authority's skeleton argument. I gave leave for the Licencing Authority to amend their reply by deleting a reference to paragraph 78 in the original for reasons which were provided at the time and are not now repeated.

Relevant law

4. The Gangmasters (Licencing) Act 2004 (hereafter referred to as the 2004 Act) sets out the requirements for those involved in the supply of workers to do work of a kind to which the 2004 Act applies to be licenced by the Licencing Authority. Those who do not hold such a licence are prohibited from acting as Gangmaster in agricultural work, processing and packaging any produce derived from agricultural work and certain other sectors.

5. The functions of the respondent are set out under the 2004 Act and include to make such rules as it thinks fit, subject to the approval of the Secretary of State, in connection with the licencing of person to act as Gangmasters. The respondent may modify or revoke any licence or any conditions of that licence where it appears that a condition of the licence or any requirement of the 2004 Act have not been complied with.

6. Regulation 8 of the Gangmaster's (Licensing Authority) Regulations 2015 provides that for the purposes of the exercise of the respondent's functions under sections 1, 7, 8 and 9 of the 2004 Act and rules made under section 8, in determining:

> "(1) (a) the criteria for assessing the fitness of an applicant for a licence or a specified person, and
>
> (b) the conditions of a licence and any modification of those conditions,
>
> the respondent shall have regard to the principle that a person should be authorised to act as a Gangmaster only if and in so far as his conduct, and the conduct of a specified person, comply with the requirements of paragraph (2).
>
> (2) The requirements are:
>
> (a) the avoidance of any exploitation of workers as respect their recruitment, use or supply; and
>
> (b) compliance with any obligations imposed by or under any enactment in so far as they relate to or affect the conduct of the

> licence holder or a specified person as persons authorised to undertake certain activities."

7. The Gangmasters (Licensing Conditions) Rules 2009 (hereafter referred to as The Rules) set out the procedure for licensing Gangmasters covered by the 2004 Act. Rule 4 and the Schedule to the Rules specify the licence conditions that apply to licence holders.

8. The respondent has published eight Licensing Standards and the version relevant to this appeal are those which are issued in January 2020 (Doc 1 of the Bundle). Each standard has an associated score and those which are deemed to be critical are worth 30 points. Of particular relevance to the present appeal are:

   8.1 Licensing Standard 1: Fit and proper test. In particular, I note critical standard 1.3 (bundle page 14) which provides that: "A licence holder musty correct any additional licence conditions (ALCs) within the time period prescribed by the GLAA."

   8.2 Licensing Standard 2.5 requires, amongst other things, that "A licence holder must maintain records to show that a worker receives paid annual leave to which they are legally entitled" (8 points) and "A worker must be paid any holiday pay to which they are legally entitled during the course of their engagement" (30 points).

   8.3 Although not one of the Licensing Standards it is also relevant in paragraph 4.2 of the Standards document, that the GLAA notifies applicants that:

   > "Workers employed by a labour provider should expect to receive the same fair treatment irrespective of which sector they work. If a business wishes to obtain or hold a GLAA Licence the GLAA will consider its conduct beyond the licensed sectors as well as within them. This will be taken into account when making a decision as to whether the business is fit and proper and its compliance with all of the Licensing Standards."

9. The respondent conducts inspections of licenced applicants and holders intended to test against the eight relevant standards. If an inspection score results in a score of 30 or above the holder's licence will usually be revoked or refused.

10. Section 10 of the 2004 Act and the provisions of the Gangmasters (Appeal) Regulations 2006 (The Appeal Regs) govern the process by which an affected licence holder may seek to challenge the decision of the respondent to refuse to issue or to modify or revoke a licence. The Appeal Regs provide for an appointed person to be appointed to hear and determine each appeal, Regulation 15 provides for the power to decide the appeal without an oral hearing which is the procedure both parties have agreed to adopt in the present appeal. The nature of the decision is referred to in Regulation 21

which provides that the appointed person shall allow or dismiss the appeal and the decision of the appointed person should binding upon the parties.

11. In Regulation 2(1) it is stated that the overriding objective of the Appeal Regs is to enable the appointed person to deal with the appeals justly. This includes so far as particle:

> "(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. The appointed person shall give effect to the overriding objective including when interpreting any provision. It is recognised by the Licensing Authority that decisions made in previous appeals against licence decisions of the respondent do not bind the appointed person. However, they argue that I should nevertheless consider and adopt the approach taken by the appointed person in Gary Cooke t/a Gary's Labour Agency v the Respondent (198/E/R). In particular they argue that whether the appellant was compliant with the relevant Licensing Standard has to be decided at the date of the decision and evidence after that date will usually be inadmissible unless it falls within Ladd v Marshall [1954] EWCA Civ 1.

13. Mr Felix Okafor is the director of Angels, the appellant and has written on their behalf. He argues that the letter from the Secretariat of 23 May 2023 stated that, in my decision, I would take into consideration all of the information provided by both parties "plus any more you wish to provide" before making a decision (see para.1 above). In my view that does not give rise to any particular expectation that evidence will be admitted in the appeal if that is contrary to the overriding objective. Although a previous decision of a different appointed person is a decision of a tribunal with equivalent jurisdiction to my own, in my view, the overriding objective of dealing with appeals justly includes that there should be consistency of approach in one appeal when compared with another.

14. The reference to Ladd v Marshall is to a Court of Appeal authority in a different jurisdiction in which it was said that the test for whether evidence should be admissible on appeal which was not relied on at first instance, was that it could not have been obtained with reasonable diligence for use at the first instance hearing and that the evidence would probably have had an important influence on the outcome of the case and is credible. The evidence must not only be relevant but it must be probable that it would have had an important influence on the case.

15. It is not the case, therefore, that the principles which I am urged to adopt from Gary's Labour Agency provides of no circumstances in which additional evidence not before the decision maker at the date of the decision could be taken into account by the appointed person.

16. The new information that Mr Okafor wishes me to take into account is a new draft of the Agency Worker Agreement which was not before the decision maker and which, he says, confirms the removal of a reference to calculation of holiday pay by the application of a percentage from the Staff Employment Agreement used by Angels. Mr Okafor points out that the respondent did not specifically request a copy of that document. The reason I think that this does not fulfil the test in Ladd v Marshall is that in paragraph 24 of the amended reply, the respondent states:

> "The worker contract included in Mr Okafor's email was considered by the GLAA to satisfy the requirements of the ALC attached to the licence in respect of Licensing Standard 5.2 and this ALC was subsequently cleared."

17. Although there are subsequent criticisms of that amended contract (Doc 15) it does nor appear to have been material to the decision. It would not be likely, therefore, to have an important influence on the outcome of the case.

18. Although the respondent accepts that other documentation supplied by the appellant in support of its grounds of appeal had previously been supplied, it points out that the explanation provided at points a. to c. in the letter of 5 June 2023 (see the 1st page of that letter), had not been provided prior to 5 June 2023. To the extent that the respondent suggests that I disregard this, I reject that argument. Those points seem to me to be in the nature of written submissions about evidence already provided which was before the decision maker at the time the decision to revoke was taken. I take those points into account.

19. In taking the approach set out above and making those preliminary decisions, I do not dissent from, and in fact agree with an adopt, the approach taken by the appointed person in Gary Cook t/a Gary's Labour Agency v the Respondent (198/E/R) which is that:

    (a) An appeal under the Appeal Regs is a rehearing;

    (b) I should have regard to the intentions underpinning the regulatory regime under the Act;

    (c) I should pay careful attention to the reasons given in this case by the respondent's decision maker for refusing the application for the licence;

    (d) I should apply the regulatory regime as if I was standing in the shoes of the respondent's decision maker;

    (e) Whether the appellant was compliant with the relevant Licensing Standards has to be determined at the date of the decision (in this case to revoke the licence); and

    (f) Evidence after that decision date will usually be inadmissible (unless it falls within Ladd v Marshall.

20. It is clear that the purpose of the 2004 Act and the role of the respondent is to protect workers in agriculture, shellfish gathering and associated processing and packaging sectors from potential exploitation; to ensure that they are able to work within a safe environment and that they are appropriately remunerated and engaged under fair terms and conditions. The licensing conditions applied and enforced by the respondent are designed to achieve that end and to protect against exploitation or the potential for exploitation within the aforementioned sectors.

Calculating holiday pay and leave entitlement for part year workers.

21. Regulations 13 and 13A of the Working Time Regulations 1998 (hereafter the WTR) confer on qualifying workers the right to take annual leave. Regulation 16 confers on workers the right to be paid for that leave. It sometimes helps to note that these are two different rights; the right to take leave and the right to be paid for it. On 5 August 2019 the Court of Appeal handed down a decision in the Harpur Trust v Brazel [2019] EWCA Civ 1402 which was about the correct calculation of the amount of annual leave to which a visiting music teacher was entitled. She worked at a school but did not have a set number of working hours and only worked during school terms. Her employer argued that for an employee who worked for part of the year it was easiest to satisfy her holiday entitlement by calculating the hours she worked at the end of the term, multiplying that by 12.07% and paying her her hourly rate for that number of hours thus buying out her entitlement to paid holiday. As a teacher in a school she was expected to take holiday during holidays from the term time and the school argued that this would give her payment to which she was entitled for part of those holidays. 12.07% is the proportion that 5.6 weeks of annual leave bears to the total working year. The rationale was that Mrs Brazel had earned holiday pay in the same proportion of her total pay for the term and so this was an appropriate way to compensate her as a party year worker.

22. Part of the reason why this did not comply with the provisions of the WTR is that it elides the entitlement to leave with the entitlement to be paid for that leave.

23. Ultimately, the case went to the Supreme Court and document 4 in the bundle is the judgment given on 20 July 2022 by Lady Rose and Lady Arden. They considered the alternative methods of calculation put forward by the school in paragraph 53 of their judgment with which the other Supreme Justices agreed. The first method the school suggested was described as the "percentage method" (para 55) where the worker is entitled to paid leave for 12.07% of the working hours that they have actually performed. The calculation is done by adding up all of the hours or days worked, multiplying that by 12.07% and multiplying that figure by the hourly or daily rate of pay.

24. As the Supreme Court explained in para 67, this method is contrary to the statutory scheme set out in reg.16 WTR which states that holiday pay should be calculated in accordance with the definitions of a week's pay in sections 221 to 224 of the Employment Rights Act 1996 (hereafter referred to as the ERA). By those sections, broadly speaking, a 12-week reference period was

taken and the total the pay over 12 weeks was divided by 12 to arrive at the week's pay. Any week in which the contract of employment continued but the employee received no pay should be ignored: for example if over a 16 week period, the employee worked during the first 4 weeks, then did not work for 4 weeks and then worked for 8 weeks, the total wages in the first 4 weeks would be added to the total wages in the last 8 weeks and that sum divided by 12 – ignoring the 4 weeks in which no work was done.

25. An alternative method suggested by the school was the "worked year" method (para 56) by which the weeks in which the worker actually worked should be calculated as a proportion of the total working year of 46.4 weeks. That percentage would then be applied to the 4.6 weeks annual leave entitlement under regs.13 and 13A WTR. The problem with this method, which amounts to the right to leave accruing over the year as and when hours are worked, was that it was inconsistent with the terms of reg.15A WTR. That regulation limits the amount of leave to which a worker who has started in a new job is entitled to the amount deemed to have accrued and provides that accrual occurs at a rate of one twelfth of the 5.6 week entitlement for each month that they work.

26. The Supreme Court then held that the decision to incorporate into the WTR the means of calculating the average week's pay set out in s.224 ERA which meant taking an average of a 12 week pay reference period (excluding any weeks in which no pay was received) was a policy choice by parliament. The Supreme Court also decided that there was nothing in the WTR which indicated that alternative methods of calculating pay such as pro rating were permitted and those argued for by the school were directly contrary to what was required by statutory wording.

27. The reference period for determining an average weeks earnings in the ERA was lengthened from 12 weeks to 52 weeks under the Employment Rights (Employment Particulars and Paid Annual Leave) (Amendment) Regulations 2018.

28. To illustrate the effect of the decision, I set out a hypothetical example. Person A works 2 two days a week at a rate of £100 per day for the first 13 weeks of their employment. Since they work the same number of days a week their average weekly pay is £200. They have worked for three calendar months and have accrued 3/12 of 5.6 weeks annual leave. This is 1.4 weeks which has a value, for example should they leave employment without taking that leave, of £280.

29. Person B works 4 days a week for the first 4 weeks of their employment at £100 per day and then takes no work for 4 weeks during which time their relationship is still governed by a contract of employment. They then work 5 weeks at 4 days a week. Like person A, since the contract has covered a period of 13 weeks, they have now accrued 3/12 of their annual holiday entitlement of 5.6 weeks. The correct application of s.224 ERA, assuming a worker on a zero hour contract or a temporary worker, means that a week's pay is calculated as an average of the 9 weeks during which person B worked. A week's pay in their case is £400, because no account is taken of weeks in

which no pay is received, and the holiday they have accrued has a value of £560.

30. Person A has worked for 26 days in the 13 weeks. Person B has worked for 36 days in the 13 weeks but Person B's holiday will be paid at double the amount of person A's.

31. If one used the percentage method to calculate Person B's holiday pay by multiplying the 9 weeks they have actually worked by 0.1207, that leads to a multiplier of 1.0863. When multiplied by the average weeks wage of £400 the total is £434.52. This demonstrates how the percentage method potentially undervalues the holiday pay entitlement compared with the statutory regime.

Findings of fact

32. The appellant made an online licence application 8 February 2022 and the respondent carried out an inspection by telephone on 9 June 2022. A report was prepared on 21 June 2022 which is at document 8. In that the investigation officer explains that Angels supplied workers in the healthcare sector and wants to expand the business into commercial, warehouse, construction, sales and factories. Angels were not at that time supplying workers into the GLAA sector. The findings of the investigating officer about the holiday pay scheme operated by Angels are at section 2.5 of the inspection report. At that time the worker contract provided an express term in respect of annual leave that stated:

> "You are entitled to payment in lieu of annual leave. Your overall hourly pay consists of an additional 12.07% payment in lieu of annual leave."

The contract then provided means by which the worker could indicate whether they wished to be paid holiday pay fortnightly with their pay or for Angels to keep the money and pay them later.

33. On 30 August 2022 the investigating officer contacted Mr Okafor by email to ask for clarification including of the method of calculation of holiday pay (document 11). His response (document 12) makes it clear that Angels were applying the percentage method.

34. On 9 September 2022 the respondent took the step of granting a licence with Additional Licence Conditions and directing the appellant to comply with the ALCs by 7 October 2022. The decision is at document 13 and in it the respondent explains that Licensing Standard 2.5 requires workers to be paid any holiday pay to which they are legally entitled. They inform the appellant that calculating holiday pay at 12.07% has not been a valid method of calculating holiday pay for workers without fixed hours of work since 6 April 2020 (para.10) and that calculations of an average week's pay for the purpose of calculating holiday pay needed to use a reference period of 52 weeks (paras.11 and 12). They also point out that the Licensing Standards expect workers employed by the labour provider (the appellant in this case) to receive the same fair treatment which it is required should be given to workers

in the GLAA sector irrespective of which sector they work in. Then the respondent explained in para.14 that, although the apparent failure by Angels to pay holiday pay calculated in accordance with the statutory regime would be sufficient grounds to refuse to grant a licence, they have instead decided to give them an opportunity to rectify those issues.

35. By para.15, the respondent required Angels to provide the following information by 7 October 2022:

    - "written confirmation that any reference to a holiday pay calculation of 12.07% has been removed from worker documentation and replaced with reference to the correct pay reference period

    - written confirmation that Angels' processes for calculating holiday pay for workers have been corrected to fall in line with the requirements of the ERR 2018

    - confirmation that you have started to conduct a review into the payments which have been made to workers in respect of holiday pay dating back to 6 April 2020, and

    - a date estimate as to when you anticipate that both the review and back payments to any adversely affected workers will be completed."

36. They also provide a link to government guidance on the relevant changes to calculation of holiday pay.

37. As I have said, an amended contract was provided on 5 October 2022 although the respondent has subsequently noted that it did not include an additional reference to the correct pay reference period. Since Mr Okafor had enquired about the correct calculation of holiday entitlement the respondent provided him with links to sources of information. Mr Okafor apparently asked for further clarification in particular about the document 17 briefing by the respondent which he read as referring to holiday pay being calculated to using the percentage method. I can see the scope for confusion in the document but the investigating officer responded (document 20) to say that was a calculation to show the "holiday pay charge rate element". That seems to me to satisfactorily explain that it was not a reference to how to calculate a worker's entitlement to receive paid holiday but to how to estimate the cost of a worker when deciding what to charge for their time.

38. In the light of the forgoing correspondence, the respondent extended the deadline for compliance until 11 November (document 21). On 7 November 2022 Mr Okafor wrote on behalf of Angels setting out the steps taken by the appellant to ensure that they comply with their responsibilities to employees including subscribing to an HMRC approved payroll software and engaging a local HR company. While generally reassuring, those do not specifically address the ALCs specified.

39. A final reminder was sent on 22 November 2022 further extending the deadline to 7 December 2022 (document 23).

40. On 28 November 2022 Angels emailed two spreadsheets (document 24 and 25) to the respondent along with a document entitled "calculating holiday pay for agency workers on irregular or varied work patters" (document 6). I shall analyse those spreadsheets in more detail below. However, I note that as well as one sheet of the spreadsheet appearing in the bundle of documents I have had forwarded to me the MS Excel spreadsheets themselves which each contain two active sheets. Sheet 1 of each of the two files is not replicated in the bundle.

41. Mr Okafor wrote on 3 January 2023 and provided them again because they appear to have gone astray. Since a further extension was granted until 22 February 2023 any confusion about whether the original email of 28 November was received or not did not disadvantage the appellant. In that email letter of 24 January 2023 (document 26) the Licensing Authority explained why the information that has been provided was insufficient. They state in paragraph 2 that the explanation on how Mr Okafor calculated holiday pay in the spreadsheet file entitled "Calculating holiday pay on irregular or varied work pattern" continued to calculate the holiday week entitlement of a worker by using a formula of 5.6 weeks ÷ 46.4 weeks which arrived at a ratio of 0.1207. That was then taken forward in the calculation of the number of holiday weeks a worker is entitled to in the calculations in the spreadsheets. It was repeated (para 4) that that method of calculation was not valid because, in substance, it is the percentage method.

42. The appellant replied on 16 February 2023 (document 27) alleging that the respondent's approach had been disproportionate and arguing that he had gone to great lengths to try to provide satisfactory evidence. He argues that modern payroll software have not in many cases been able to incorporate this calculation into their software and he had managed to devise a formula himself using an Excel spreadsheet. The respondent's reply (para 36) explains that this letter and the spreadsheets were reviewed by a licensing officer who considered that they clearly demonstrated the continued usage of the 12.7% calculation method. In the light of the three extensions to the deadline which had been given, it was decided that the appellant continued in its failure to provide evidence of compliance. Given the continued non-compliance with Licensing Standard 1.3 in that Additional Licence Conditions had not been corrected and the appellant's continued failure to provide evidence of compliance, the appellant had accrued a licencing score of 30 points because of the failure to comply with Licensing Standard 2.5. A decision revoking the licence was sent on 13 March 2023.

Discussion and conclusions

43. In their appeal Angels referred to miscommunication or misunderstanding of the original request. In document 31 Mr Okafor states that he has revisited the original letter and set out in his own covering letter of 6 April 2023 (misdated 6 March 2023) the four matters which the respondent had specified should be answered. In the second page he states the following:

> "In respect to the above points from your letter of 14 October I hereby give the requested written confirmation.

- I can confirm that reference to holiday pay calculation using 12.07% has been removed from worker document replaced with current relevant information (52 weeks average).

- I can confirm that our holiday calculation is now in line with the requirements of the ERR 2018 using 52 weeks average instead of 12.07%.

- I can confirm that I have undertaken the review contained in the spreadsheets attached.

- I can confirm that following the review no staff as adversely affected. I appeared that both methods of calculation arrived at the same conclusion, therefore no one is being owed."

44. The substantive Licensing Standard that the appellant has not cleared is that of correcting ALCs against Standard Licensing 2.5. Although on the face of it the answers provided within the appeal letter address the questions asked, in the first place those came after the decision and in the second place, the information does not address the substance which is the question of whether the appellant does now comply with the applicable statutory regime when calculating holiday pay for their existing workers and therefore give confidence that they would make sure that any GLAA workers would be paid holiday pay to which they were legally entitled. The appellant also alleges that he had provide the answers substantively.

45. I accept the respondent's arguments that the evidence submitted by the appellant still clearly reveals its continued use of a non-compliant method of calculating the holiday pay of its workers.

46. In the appellant's submissions of 5 June 2023, he states in Mr Okafor's explanation at a. to c. on the first page, that the two spreadsheets contain two live sheets the first of which shows the details of the casual agency workers. The second sheet:

> "pulls relevant figures from tab one to populate and calculate the required figures under each relevant heading including the number of weeks worked in the year, the holiday accruement in weeks and holiday payment entitlement."

47. He argues that a comparison is shown of the holiday calculation using the 52 weeks average and using the 12.07% which is the review he has done apparently to satisfy himself that there has been no disparity between holiday pay paid to his workers and the holiday pay that would have been paid had they been calculated on the correct basis.

48. In the calculation on the right hand side of the second sheet of each of the two spreadsheets is set out a series of calculations headed "Post-April 2020-Holiday Calculation in weeks". The workers are paid fortnightly and it can be seen from sheet 1 that the first period used on the sheet for April 2020 to March 2021 is the fortnight ending 5 April 2022.

49. In sheet 2, Mr Okafor has set out for each worker the number of weeks worked in the 12-month period under the column "Weeks Worked". Under the column "Average weekly pay" he has divided the figure in column D "Gross without holiday pay" by the column H figure for the number of weeks worked to get the average weekly pay.

50. This may or may not be the right figure for a week's pay calculated in accordance with s.224 ERA. The reason I say that is that it appears to calculate the total gross pay paid to a particular worker excluding holiday pay in a 12-month period. To take an example, the worker in line 11 on sheet 1 for April 2020 to March 2021 first appears on the sheet in the fortnight ending 5 April 2020 and last appears in fortnight 17 ending 15 November 2020. If that worker in line 11 did no work for which he was paid at any time prior to fortnight 1 (that ending 5 April 2020) then the total gross figure in column D is the correct starting point to calculate an average weeks pay. If he was working under contract with the appellant before the fortnight ending 5 April 2020, then his 12-month reference period extends further back and column D is not the correct figure for total wages. With workers with such different patterns of work it is unlikely that the same time period would need to be looked at for each worker but the spreadsheet appears to consider the weeks that each have worked in April 2020 to March 2021.

51. That is one limitation on the spreadsheet which means that it is not self-evident that it enables the appellant to calculate holiday pay for its workers correctly. Additionally, I accept that it is the calculation in column I which makes plain that the appellant continues to rely on a method of calculating how much annual leave has accrued using the multiplier 12.07%.. The instruction in all of the cells in column I from row 9 to 58 makes plain that the arithmetic done in order to calculate "Holiday accrued in weeks", the number of weeks worked in the 12 month period April 2020 to March 2021 (which may not be the correct figure – see para.50 above) has been multiplied by the figure in cell I7, which is 0.1207. This is indistinguishable from the calculation that the Supreme Court said was the incorrect method as set out in para 23 & 24 above. As already explained, the entitlement to leave accrues at the rate of one twelfth of 5.6 weeks for every month in employment. The data on these spreadsheets gives no indication that the appellant is using the length of continuous employment rather than the number of weeks in which the worker has done paid work, as the basis of calculating how much of the annual entitlement to leave has accrued.

52. The spreadsheets relied on by the appellant quite clearly show that they continue to use the percentage method suggested by the employer and described in paragraph 55 of the judgment of the Supreme Court in Harpur Trust which was rejected by the Justices as contrary to the WTR. Exactly this point is made by the respondent in para 67 of the amended reply. In effect, the appellant has carried out exactly the same calculation in a slightly different way so it is not at all surprising that Mr Okafor has come up with the same figure.

53. I do accept that Mr Okafor, on behalf of the appellant, has put in some effort into attempting to recalculate the holiday pay entitlement of existing workers

who presumably do not work in GLAA sectors. This shows a willingness to cooperate. However, most of his criticism of the respondent is misplaced and on the key element of whether the appellant is now correctly calculating holiday pay, I accept the respondent's argument that they appear not to be.

54. Given that this was the information that was before the decision maker when she decided to revoke the licence, I find that that was a decision that was open to her. The chronology of correspondence between the respondent and the appellant in this case shows that after the initial licence was granted with two ALCs on 9 September 2022 extensions of time for compliance were granted on 14 October, 22 November and 24 January 2023. On a number of occasions the appellant was signposted to sources of suitable advice and, in particular, the investigating officer correctly explained in their communication of 24 January 2023 (document 26) that the appellant has continued to use the percentage method which can lead to workers without fixed hours being underpaid compared with their entitlements under the statutory regime. In the light of these numerous opportunities and sources of advice, it is a matter of concern that the appellant has so far continued to use a method of calculating holiday pay which is no longer in accordance with the law. The guidance on calculating holiday pay from the Department of Business, Energy and Industrial Strategy first published March 2020 and revised July 2020 (document 3) contains some useful worked examples.

55. I find that the respondent was entitled to conclude that the appellant had not complied with Licensing Standard 1.3 because they had failed to correct Additional Licence Conditions imposed because of a concern that they were not meeting Licensing Standards 2.5 in respect of payment of holiday pay. In those circumstances the appeal against the revocation of the licence fails.

J Sarah George

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Employment Judge George

Date: …5 October 2023 ……..

Sent to the parties on: 10th October 2023

Lisa Ashworth

Lisa Ashworth
For the Tribunal Office