

Appeal No. 136/E/RV

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

BETWEEN:

TEMPS DIRECT 24/7 LIMITED

Appellant

-and-

THE GANGMASTERS LICENSING AUTHORITY

Respondent

HELD AT

ON 15 & 19 May 2012

APPOINTED PERSON: V.C. DEAN

Representation:

For the Appellant: Mr Dalvair, Managing Director

For the Respondent: Ms L Gilligan, Solicitor

DECISION

The appeal by Temps Direct 24/7 Limited pursuant to Regulation 3 of the Gangmasters (Appeals) Regulations 2006 against the decision of the Gangmasters Licensing Authority to revoke the Gangmaster License without immediate effect is dismissed.

REASONS

1. The appellant's license was revoked (without immediate effect) on 30 August 2011. The appellant appeals to the appointed person against the revocation decision of the respondents by way of an appeal dated 26 September 2011. I am the appointed person to consider this appeal pursuant to Regulation 3 of the Gangmaster (Appeals) Regulations 2006 (s/2006 No.662) ("the Gangmaster Appeal Regulations"). This document records the summary reasons pursuant to Regulation 22 of those Regulations.

The Law

2. Section 1 of the Gangmasters (Licensing) Act 2004 ("2004 Act") establishes the Gangmasters Licensing Authority (GLA).

3. Section 4 provides that a person acts as a Gangmaster if he supplies a worker to do work to which the 2004 Act applies for another person.

4. Section 3 of the 2004 Act applies to agricultural work, gathering shell fish and processing and packaging any produce derived from agricultural work or shell fish, fish or products derived from shell fish or fish.

5. Section 6 provides:

"A person shall not act as a Gangmaster except under the authority of a license and to act as a Gangmaster without the authority of a license is an offence under Section 12."

6. Section 7 provides:

"The GLA may grant a license if it thinks fit. A license granted to a body corporate authorises activities carried on by the body through such persons representing or acting on behalf of the body as a named or otherwise specified in the license. The License Authority authorises activities by the holder of the license and by persons employed or engaged by the holder of the license from a named or otherwise specified in the license."

7. Section 9 of the Act provides:

"The GLA may revoke any license "where it appears that a condition of the license or any requirement of this Act has not been complied with".

8. Regulation 12(1) of the Gangmasters (Licensing Authority) Regulation 2005 confirms that for the purposes of exercising its functions under the 2004 Act and rules made under Section 8:

"In determining the criteria for assessing the fitness of an applicant for a license must specify the person and the conditions of the license and any modification of these conditions. The authority shall have regard to the principal that a person must comply with the requirements of paragraph (2)".

9. Regulation (2) confirms:

"The requirements" referred to in paragraph 12(1) are:-

1. For the avoidance of any exploitation of workers as in respect their recruitment, use or supply; and
2. A compliance with any obligations imposed by or under any enactment insofar as they relate to or affect the conduct of a license holder or a specified person or persons who are authorised to undertake certain activities."

10. To determine this regulatory regime whether a Gangmaster qualifies for the grant or continuous with the license, or whether a license should be issued subject to conditions, refused, modified or revoked the GLA has introduced licensing standards. These reflect industry relevant legal requirements to establish compliance conditions to obtain and retain a license. Part 1 of the Licensing Standard (April 2009) gives background and guidance and Part 2 sets out the Licensing Standards in detail (page 59).

Evidence

11. In considering the appeal raised by Temps Direct 2007 Ltd, I have considered the documents contained within the agreed bundle (pages 1-99) to those documents to which I have been referred by the parties. I have heard evidence from the appellant and read his witness statement and have heard evidence from the respondents from Angila Holden, the Enforcement Officer of the GLA; Linda Boyle, Enforcement Officer; Sarina Barton, acting Appeals Officer and I have read the witness statement of Steven Gant, an Enforcement Officer in this case. I have considered the submissions made by both parties and the evidence before me. The basis of the revocation of the appellant's license was the decision taken to revoke his license not with immediate effect communicated to the appellant in a letter dated 30 August 2011 as amended (page 288) based upon the investigation report compiled by Angila Holden submitted on 22 June 2011 referring to an inspection date 11/4/2011 and 28/4/2011 (pages 245-253). As a result of the non-compliance the appellant accrued a score of 68 points.

12. With particular regard to this appeal the details of the non-compliance with points accumulated are set out below:

1. Breach of Licensing Standard 1.2 (30 points) principal authority competency test.

The Principal Authority (PA) was determined as not fit and proper to hold a license because:

1. He was unable to evidence competency in running a compliant labour business not having records available. The appellant referring to records having been removed when a computer was stolen the day before inspection and it was not acceptable to have no record stored anyway except on a computer with no back-up facility.
2. Inappropriate enquiries under the Rehabilitation and Offenders Act 1974;
3. No records to show that workers received benefits to which they were entitled in respect of annual leave entitlement;
4. Withholding wages of a worker and not providing a reasonable explanation;
5. Failure to agree terms and conditions of employment in writing and incomplete work of files;
6. Failure to evidence pay in national minimum wage and lack of records making it impossible to cross-reference timesheets and payslips to determine whether or not workers had been paid the correct amount.

2 Licensing Standard 2.1:

The standard provides that a principal authority must:

1. Accurately calculating and deduct tax and national insurance from a worker's pay and pay the correct amount to HM Revenue and Customs in a timely manner;

The appellant was found to have failed to account to HM Revenue and Customs in respect of PAYE and VAT leading to indebtedness in respect of VAT of £98,020.00 and PAYE and NIC of £64,364.00 as at 24 August 2011, a critical standard was breached with a score of 30 points.

- 3 Non-compliance with Licensing Standard 5.2 'working hours' - due to a lack of records available at the date of inspection it appeared to the GLA that the majority of workers working in excess of 48 hours did not have 48 hour 'agreements' in place, a non-critical standard was breached, a score of 8 points.

13. The appellant exercised his right of appeal and has asserted, since the revocation that he has been able to collate through third parties copies of Opt Out Agreements, he asserts that whilst he admits an indebtedness to HM Revenue and Customs ("HMRC") to a significant degree the sums are not those asserted by the respondents.

14. Having heard oral evidence and considered the documents to which I have been referred I would observe that the appellant whilst not represented at the hearing, submitted his appeal with details of an appeal subsequently provided. In essence, the summary of the appellant's appeal would seem to be that the original version of the letter of revocation dated 30 August miscalculates the points to be 98 rather than 68 points, albeit that the arithmetical error was subsequently corrected to reflect the 68 points detailed in the substance of the letter of revocation.

Licensing Standard 2.1 - Accounting to the Revenue

15. The appellant asserts that the indebtedness to HM Revenue and Customs is not as much as HMRC claim. The appellant admitted at the hearing before me that he estimated in August 2011 the debt to be in the region of £40,000 for PAYE and national insurance and in the region of £62,000 in respect of VAT. He is clear that the appellant admits an indebtedness and at the date of the revocation following inspection he was in breach of the standard.

16. The appellant asserts that the reason why he was unable to evidence records that were required by the GLA was that all company records were retained on a computer which the appellant had had stolen the night before the inspection on 11 April, a theft during which the appellant asserted that he had received a physical assault such that due to the circumstances the appellant had been unable to collate all the records that exist.

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17. I would observe that during the course of evidence that appellant has confirmed, that in response to the enquiries of HM Revenue and Customs that the appellant had initially asserted to that authority that payments had not been made after July 2010 as the company had not traded, an assertion that was patently not true.

18. The appellant subsequently confirmed to HMRC that his assertion was incorrect. The appellant's cavalier approach to the truth damages his credibility and suitability as a PA. The appellant's assertion was that his discussions with HMRC enforcement officers had been to deal with queries on his account not to press for payment and, whilst accepting an indebtedness in not in significant sums, he acknowledged to me that payments had not been made promptly to HMRC and that significant sums were still outstanding. The appellant's own evidence, that confirms that he misled HMRC in respect of the standing of the business, causes me to have doubts in respect of his credibility.

19. The appellant asserts that the reason why he was unable to disclose at the inspection on 11 April the records that he says were held entirely on the computer, was that he had been subject to an assault the day before on 10 April when his former brother-in-law and friends and his ex-wife attended the premises where he retained records on his laptop computer, and had removed the computer and that the appellant had suffered a physical assault where his glasses were broken, his face was bruised and he lost a tooth. Whilst the inspectors confirmed that the appellant had broken glasses and had a missing tooth they saw no signs of bruising or injury to the appellant's face and, moreover, incredibly the appellant did not make a report of a physical assault to the police. The appellant explains his failure to report the matter to the police because previously, following the break-up of his marriage the police had not involved themselves in the domestic dispute that he had with his now former wife in respect of property when he asserted she and her brothers had removed from the former matrimonial home property including the computer and had disorganised his company records in May 2010. It was the view of the respondent that the appellant failed to report an alleged assault, that there were no signs of cuts or bruises as might be expected from a physical assault and, moreover, that there was a significant amount of furniture at the premises when the inspectors inspected the very next day which was felt to contradict the appellant's version of events.

20. During the course of the hearing the appellant has provided via his solicitors additional documents that were not previously disclosed to the respondent, a number of signed and undated Opt Out Agreements and Contracts. However, the appellant has been unable to provide a full set of records in respect of his workers at the time of the inspection nor at this hearing. The appellant has provided statements from a number of workers who have asserted that deductions were made from their pay with their agreement and their agreement for late payment of their wages direct to bank accounts.

21. The appellant disclosed to the respondents a number of standard blank workers contracts, redacted worker payslips, pay calculations and timesheets and redacted worker Working Time Regulations (page 8).

22. Whilst the appellant has provided me with an account of his sorry personal circumstances it remains the case that the appellant accepts his significant

indebtedness to HMRC. In light of the provisions of Licensing Standard 2.1 the appellant's debt to HMRC would appear to be a longstanding issue and failure to make payments amounts to a clear and blatant breach of Licensing Standard 2.1. If the appellant was unable to provide to the respondent either at the inspection or thereafter, detailed accounts of the deductions of tax and national insurance for any workers or copies of actual payslips, it is apparent that the appellant has not been candid or truthful in his dealings with either the GLA or HMRC. Whilst the appellant in the Notice of Appeal suggests that a tax debt is not an appropriate matter for the GLA it is clearly and unequivocally detailed in Licensing Standard 2.1 that the PA is required to accurately calculate and deduct tax and national insurance from all workers and pay the correct amount to HM Revenue and Customs in a timely manner and in respect of VAT, a license holder is required to be registered and to charge and pay the correct amount of VAT in a timely manner. The appellant has done neither of these. I therefore conclude that the GLA were entitled to reach that conclusion that they did regarding breach of this standard.

Licensing Standard 1.2 "fit and proper"

23. The appellant's abject failure to provide any backup to his worker's records and his reliance allegedly on the sole source of record keeping, namely a computer and the appellant's failure to provide payroll records, timesheets and payslips to enable the respondent to assess compliance with the Licensing Standards. 2.2, 2.3 and 2.4 illustrates the appellant's failure to comply with the competency and capability requirement that he should be as principal authority a 'fit and proper' person.

24. I am particularly concerned that, were I to accept the appellant's evidence, he removed from the then business premises which were run by his ex-wife in January 2010 his records in relation to workers and secured them at his home which became the registered place of business. In May 2010 the appellant asserts that his laptop computer was removed from the former matrimonial home by his then wife and his brother-in-law and that thereafter he had to make further efforts to secure the personal records of his workers. Notwithstanding that experience the appellant asserts that when the second computer was so unfortunately removed from his home and place of business on 10 April, the day before the inspection, that he had not exercised the prudence of retaining any back-up records or methodical paper copy records in respect of his workers. The appellant's account was not credible to me and even if it was a reflection of the truth, the appellant's competence and capability to hold a GLA license was lacking.

Licensing Standard 5.2 - Opt Out Arrangements

25. The appellant at the hearing before me sought to provide evidence obtained from his contractor, copies of 48 hour Opt Out Agreements signed by some but not all of his workers. I remind myself however that in considering the decision taken by the GLA, I am to consider whether or not the decision taken by the GLA was a reasonable decision when the revocation decision was taken.

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26. Having considered all of the evidence and the submissions made by the parties to me, I do not consider that the appellant's argument has sufficient merit to persuade me that the revocation notice issue by the GLA was not correct.

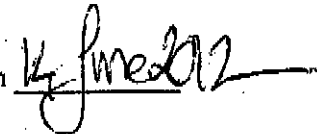
27. From the evidence before me I find that two critical standards have not been complied with and these each attract 30 points in addition to the 8 points attracted in respect of the failure to provide records signed by each relevant employee of opt out arrangements.

28. Whilst the appellant has sought to assert that he has taken steps to rectify those aspects of the Licensing Standards with which he was not compliant at the time of inspection on 11 April 2011, I do not accept that it is a sustainable argument. A Gangmaster must remain compliant with the Licensing Standards at all times and is required and should be prepared to face the consequences if he is not compliant on the date of inspection to allow a failure to comply with a Licensing Standard to be remedied sometime later by an expedient of putting in place remedial action which would not in effect at the time of the compliance inspection makes a mockery of the licensing regime. The appellant's failures particularly in relation to the critical standards are a serious dereliction of duty by the appellant and to allow him simply to rectify those matters would undermine entirely the ethos of the legislation and the Licensing Standards. Moreover, even before me the appellant has accepted his significant indebtedness to HM Revenue and Customs and in respect of breach of that critical standard low. The decision of the GLA shall stand.

Signed by


Appointed Person

on



Judgment sent to Parties on

