

Date: 19 November 2012

GLA success in challenge over “pay day by pay day” schemes

On 15 November 2012 the judge appointed to decide this appeal, Judge Porter, handed down her decision in the appeals by FS Commercial Ltd (“FSC”) against the GLA’s decision to refusal to grant FSC a licence. The Judge accepted the GLA’s decision as correct, and dismissed FSC’s appeals.

FSC applied for a licence on 1 September 2010. It was refused on 14 January 2011, following which an appeal against the GLA’s decision was made. During the appeal a further application was made on 12 June 2012 which was refused on the same day.

Background

FSC was proposing to operate a “pay day by pay day” tax relief model which the GLA considered breached two Critical licensing standards. The proposed model was contrary to PAYE and national insurance legislation, and meant that FSC would be unlawfully failing to declare significant amounts of Employers’ national insurance contributions each year. The fee that would be charged to workers as part of this scheme, which would be deducted from their take home pay, also meant that they would be paid less than the national minimum wage.

Harry Grierson, Business Development Director for FSC, who gave evidence at the hearing, was previously an employee of Pavillion Management Services Limited. That company lost its licence in 2009 for being in breach of the GLA’s licensing standards in relation to tax matters. Pavillion was acquired by FS Commercial Ltd in June 2011.

The appeal

Harry Grierson explained that FSC were assisted in the appeal by the Cordant Group. They were also supported by evidence from Alan Nolan, Senior Partner of the Aspire Business Partnership. Mr Nolan is an advocate of “pay day by pay day relief” tax relief models. Under cross-examination at the appeal, the Judge found that Mr Nolan’s evidence was “evasive”, that he had “clearly sought to avoid telling the truth”, and that his evidence, based on his “many years experience in this field”, was “wholly unsatisfactory” and contradictory. Mr Grierson, in his evidence, admitted that the model FSC operated was in breach of the dispensation issued to them by HMRC, that this was on the advice of Mr Nolan of the Aspire Business Partnership, and that he knew the actions taken were in breach of that dispensation.

Details of how the FSC model operated, and why it was considered to be in breach of the GLA's licensing standards can be found in the full judgement [here](#).

Appeal result

In her decision, Judge Porter concluded:

"... It was reasonable and appropriate for GLA to refuse the licence on the grounds that standard 2.1 [concerning tax and national insurance contributions] had not been met. GLA would be in breach of its own duty to grant a licence to a company which chooses to flout the law, to disregard the HMRC guidance. The suggestion that GLA must grant the licence, let FSC operate in the GLA industry, while HMRC challenges FSC's interpretation of the law in a different arena is wholly without merit. GLA's duty is to refuse a licence to a company who does not comply with the current tax legislation. It would be in breach of its duty to grant a licence to such a company.....", (paragraph 129.12 of the judgement)

Judge Porter did not accept that either HMRC or the GLA's interpretations were wrong, as asserted by FSC's lawyers, and found that FSC had in fact "failed to identify a single statutory provision" that supported the model it operated.

Judge Porter held that the scheme devised by FSC and FESV clearly went against the purpose of the NMW Regulations and therefore breached standard 2.2. She described the fee to be deducted as "merely another way of making the low paid workers pay for [FSC's] payroll function".

The Judge upheld the GLA's decision on all grounds and found that "on the evidence before [her] it is clear that if FSC were granted a licence it would be in breach both of the Critical Conditions Standard 2.1 and 2.2. It is not appropriate to grant FSC a licence".

A spokesperson for HMRC said:

"We welcome the outcome in this case. Statements published by HMRC in July 2011 and August 2012 set out its position with respect to Pay Day by Pay Day Tax relief models and the outcome in this case is consistent with that position. The GLA's perseverance in this appeal sends a clear message to those who use these schemes, or advocate them, that tax avoidance and breaches of the national minimum wage regulations will not be tolerated"

Margaret McKinlay, GLA Chair said:

"The GLA has made a commitment to Ministers and Government's Red Tape Challenge to work more closely with specialist law enforcement agencies. This includes HMRC. This case shows how effective the GLA can be on what are resource intensive and complex financial investigations. It demonstrates the GLA's commitment to seeing investigations through for the benefit of the workers, UK Plc, and compliance with the law. The GLA will continue to investigate such cases and defend its decisions robustly."

Notes to editors

1. The Gangmasters Licensing Authority (GLA) was set up to curb the exploitation of workers in the agricultural, horticultural, shellfish gathering and associated processing and packing industries. The [Act](#) establishing it was passed in 2004.
2. Protecting workers is the key aim alongside protecting legitimate labour providers and protecting the tax payer by uncovering unpaid taxes.
3. The GLA regulate the supply of workers and labour services to any of the regulated sectors in the UK.
4. The GLA assess compliance against its [Licensing Standards](#) which reflects UK legislation, including Forced Labour Offence. Licensing Standard 1.1 covers whether a person is "Fit & Proper" to hold a licence.
5. The GLA's most recent guidance was issued in [GLA Brief 12](#)
6. HMRC have provided guidance on their position on [11 July 2011](#) and [30 August 2012](#)
7. The results for all GLA appeals can be found [here](#). The references for the FS Commercial Ltd appeals are: 49/E/R and 60/E/R, and the decision can be found in the 2012 results [page](#) (No. 98).
8. The GLA is committed to the Governments regulatory principles, and does not conduct inspections without reason where potential risks may be identified.

End

Public enquiries: 0845 602 5020

Media enquiries: 0845 602 5020

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