

THE GANGMASTERS (APPEALS) REGULATIONS 2006

In the matter of an appeal against a decision made by the
Gangmasters Licensing Authority (Ref 107/E/RV)

CROWTHER AND JOHNSTONE LTD
(Appellant)

V

THE GANGMASTERS LICENSING AUTHORITY
(Respondent)

APPOINTED PERSON

MISS C GRUNDY

Written Determination

WRITTEN DETERMINATION AND REASONS

DECISION

Upon consideration of the appeal documents, it is the decision of the Appointed Person that the Appeal of Crowther and Johnstone Ltd be dismissed.

REASONS

1. This is an appeal against the decision of the Gangmasters' Licensing Authority (GLA) on 16th July 2010 to revoke the Licence of Crowther and Johnstone Ltd trading as C and J Recruitment Ltd without immediate effect.
2. The parties sought directions for an oral hearing and directions were given on 4th January 2011 and further directions on 15th February 2011, however it has recently been agreed that the appeal will be dealt with without an oral hearing pursuant to regulation 15 of the Appeals Regulations. The parties have supplied all documents they wish to rely upon and these have been considered by me in accordance with regulation 15(3) of the Appeals Regulations. They have been provided in a Bundle containing some 557 pages, many of which are not relevant to my decision, but provide background to the trading position of the Appellant.

THE LAW

3. The Gangmasters (Licensing) Act 2004 aims to curb exploitation of labour in agriculture and other particular industries. The GLA has established standards to assess compliance. The GLA assesses on inspections to consider compliance/ non-compliance.

4. Regulation 12(1) of the Gangmasters (Licensing Authority) Regulations 2005 states that, "the Authority 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 complies with the requirements of paragraph (2), namely, " (a) the avoidance of any exploitation of workers as respects their recruitment, use or supply and ,(b)" compliance with any obligations imposed by or under any enactments 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."
5. Persons acting as gangmasters must be a fit person Regulation 12(4).
6. Regulation 5(1) (d) of the Gangmaster (Appeals) Regulations 2006 allows Crowther and Johnstone Ltd to bring an appeal against a decision of the Authority to "revoke his licence " .
7. Guidance as to the NMW and Accommodation Offset has been published in April 2007. It is purely Guidance.

BACKGROUND

(1) The history is as follows and I so find, on 16th May 2006, Christian Johnstone made an on- line application for a licence on behalf of Crowther and Johnstone Ltd. On 9th June 2006 the Licence was approved. There has been more than one change of Principal Authority between its original issue and the current proceedings. There are concerns regarding the interrelationship between the Appellant and an insolvent labour provider.

(2) A Compliance inspection was notified to the Appellant on 19th April 2010 and took place on 22nd April 2010. The Inspector was Graham Cross.

(3) At the inspection the Inspector found there to be concerns relating to minimum wage payments relating to the provision of accommodation and transport charges, concerns regarding holiday pay entitlement, difficulties relating to accommodation supplied by the Appellant to workers, and there were concerns regarding contractual arrangements.[469-493]

(4) A Compliance Inspection report was submitted, Crowther and Johnstone Ltd did not sufficiently conform to the Licensing Standards in particular Standards 2.2,/2.8 4.1, 6.4, 7.3, 1.4 in the view of Ian Wilkinson on the evidence available at that stage. [503-507].

(5) In the circumstances the Licence was revoked on 16th July 2010, the fail score being 98. [508-512] The fail score for an inspection is 30.

(6) Subsequently a notice of appeal was lodged on 11th August 2010, [513-525].

The Appellant indicated in respect of the minimum wage issue, "Employees who have accommodation currently were accommodated prior to engagement of employment."... Accommodation is not provided as part of the job and as such should not be interpreted as

part of the Accommodation offset.” “Transport is provided and a nominal fee of £5.50 per day is charged.” [515]

In respect of the terms of engagement the Appellant asserts that the terms were taken from a model contract taken from the REC, and a new contract has recently been devised and rolled out. [516]

(7) The GLA response to the Appeal acknowledged compliance in certain areas and revised the fail score to 38 and confirmed the revocation without immediate effect. [535- 556].

(8) In previous directions orders relating to the outstanding issues for the Appeal, it was set out that, “In the light of the amended fail score of 38 points, the original fail points score having been assessed as 98 points. It is noted that it appears to the Appointed Person that the issues at this stage appear to relate solely to alleged Violation of Licensing standard 2.2 relating to the obligation to pay National Minimum Wage and alleged Violation of Licensing standard 7.3 relating to a failure to accurately specify workers’ employment status in their terms of engagement.” There has been no clarification from the parties, however it seems Licensing Standard 2.8 regarding Minimum wage in Payment is also in consideration as well as standard 2.2.

FINDINGS IN RELATION TO BREACHES OF LICENSING STANDARDS

(9) STANDARD 2.

PAYMENT OF WAGES, TAX, NATIONAL INSURANCE, VAT, IMPROPER DEDUCTIONS AND ALLIED MATTERS

Proper systems are in place for the collection of tax/ national insurance /VAT.

2.2 Deductions from workers’ pay of income tax and national insurance are accurate and appropriate and paid to HMRC (major)

MINIMUM WAGE IN PAYMENT

2.8 The worker is paid at least the national or agricultural minimum wage, taking into account the rules on accommodation charges (critical)

The Principal Authority has admitted he is the co –owner of three properties being let to some regulated workers. Inspectors spoke to six workers living at three addresses. The Appellant was aware of Accommodation offset but argued that it did not apply. The applicable offset at the time of the inspection was £4.51 for each day, midnight to midnight up to a maximum amount of £31.57 a week. There is a tenancy agreement at [279]. The rents for workers in GLA regulated occupations range from £45-65 per week depending on the room.[304-322] These figures are plainly in excess of the Accommodation offset. The hourly wages paid to workers are a maximum of £5.80 for normal NMW hours and £5.81 for normal AMW hours. It is clear therefore that even the lowest weekly

rent of £45 reduces the worker- tenants- wages below the amount permitted under NMW offset. At 18 Bank Square in Southport the Appellant levies further utility charges further lowering the pay differential.

The deduction for transport which was £5.00 [388] and has risen from £5.00 to £5.50 “subs” [272],[342] is achieved by the workers taking a laminated £5.00 note from the driver and returning it with a signature to say it can be deducted from their pay at the end of the week. This process does not operate as a genuine loan but does operate as a further deduction to pay reducing workers pay below NMW. The Appellants were in breach of Standard 2.2 and more pertinently 2.8 and have not demonstrated full compliance to date. This conduct was a critical non-compliance correctly scored as 30.

(10) STANDARD 7

RECRUITMENT AND CONTRACTUAL ARRANGEMENTS TERMS AND CONDITIONS

7.3 There is evidence that all workers who have been employed continuously for one month or more under a contract of employment have a written statement of employment particulars. Or if workers are engaged under contracts for services, there is evidence that these are agreed and provided to the workers before work commences.

The terms that must be agreed include

- Whether the worker is or will be supplied by the licence holder under a contract of employment, or for services, and the terms and conditions that will apply
- An undertaking to pay the worker for any work carried out regardless of whether the gangmaster has been paid by the labour user
- The length of termination the worker is required to give and entitled to receive, if any
- Either the worker’s pay rate, or the minimum rate to be expected
- The intervals at which the earnings will be paid; and details of any entitlement to paid holidays, SSP and other benefits

The Principal Authority confirmed that the workers are not self- employed. They do not provide their own tools and provide no invoices to the Appellant. The Appellant pays their tax and NI contributions. The contract at [302-303] is confusing. At paragraph 2 it reads, “The temporary worker is engaged as a self- employed worker although C and J Recruitment are required to make all statutory deductions from the remuneration.” The Contract at [517] which is that which the Appellant seeks to rely on going forward is also contradictory it identifies the contract as a “Contract for Services” in its title, repeats this in clause 2.1 and at 2.2 repeats the assertion as paragraph 2 above re self- employment, at 5.9 indicates, “no provision regarding annual leave shall affect the Temporary Workers status as a self- employed worker.”

The contract would appear to be one of service rather than for services- given the direction by the Appellant, the level of control, payment by PAYE, annual leave after due request and permission, statutory sick pay. The requirement for personal service, completion of a timesheet not invoicing, requirements relating to non – attendance, compliance with normal hours of work and rules and regulations and termination clauses.

The Principal Authority and the workers have indicated they do not view the position to be that they are self employed.

The Appellant relies on the fact that the latter contract has been recommended by the REC, I have considered this but it does not avail the Appellant of a defence, it is the case that the contracts identified above are both confusing and contradictory and therefore breach the Licensing standard 7.3.

The fail score being 8.

Conclusions

(11) The Appellants were at the time of the compliance inspection visit failing to show compliance with the particular Licensing standards identified above.

(12) The GLA have adopted a proportionate stance in that the original fail score has been revised downwards on presentation of evidence to address concerns. Significantly from 98 to 38. Unfortunately the non- compliance regarding the Minimum wage and the Accommodation offset is viewed quite rightly as a Critical non compliance and there is substantial Guidance available, [92-123] and the Appellant was aware of the operation of the offset but has sought to argue it does not apply. That contention is rejected. It is not possible to circumvent the offset by claiming the worker was a previous tenant before they came to work in the regulated sector. Therefore the fail score of 30 in this regard is upheld.

(13) In relation to the contract I also uphold the fail score of 8, I have considered the Appellant's submission but the Contract is ambiguous and confusing. The Appellant remains in breach despite I accept trying to address this concern.

(14) I have considered that overall as the fail score has fallen significantly this may be judged to be a finely balanced appeal on the remaining issues, however those issues are significant the Accommodation offset was introduced to protect workers from exploitation and it has been abused here. Also as the contracts remain unclear I have decided to uphold the GLA decision as to revocation.

(15) I conclude that the GLA acted proportionately in all the circumstances in line with GLA policy, standards and procedure. The appeal against the revocation of the Licence is therefore dismissed.

(16) The revocation will take effect on service of this decision on the Appellant.

Signed *C. Grundy*.....(Miss C Grundy).....

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

Dated: 4th May 2011 *4.5.11*