The Gangmasters (Appeals) Regulations 2006

Between

Appellant Cornish Enterprises

and

Respondent The Gangmasters Licensing Authority

Before Appointed person Mr MJR Griffiths

Heard on 11th November 2009 and 23rd March 2010 at Truro

Representation

Appellant Mr James Boyd, of counsel
Respondent Mr Tony Russell, solicitor, Messrs Fraser Brown

DECISION

The appeal is allowed.

REASONS

Definitions

"GLA" means the Gangmasters Licensing Authority.
"2006 standards" means the Licensing Standards imposed under the Gangmasters (Licensing Conditions) Rules (No 2) 2006.
"2009 standards" means the Licensing Standards imposed under the Gangmasters (Licensing Conditions) Rules 2009.
"Licence" means a licence issued under the Gangmasters (Licensing) Act 2004
"Regulations" means the Gangmasters (Appeals) Regulations 2006

The Appeal

This is an appeal against the revocation by the GLA of a licence issued on 1st July 2008 (number COR0002) to the appellant trading as Cornish Enterprises.

Introduction

1. The appellant previously traded as Celtic 2000. Trading in that name he had a licence. That business was a partnership with another. The partnership came to an end in circumstances in which he was left with a very

substantial liability to HMRC. He also had some compliance issues with the GLA. The GLA revoked the Celtic 2000 licence: there was no failure under 2006 standard 2.2: the appellant appealed: following negotiation, the appeal was withdrawn and a fresh licence was granted to the appellant trading as Cornish Enterprises.

2. Compliance enquiries made by the GLA prior to the grant of the licence to Cornish Enterprises revealed the fact of the debt to HMRC. There were also concerns about outstanding holiday pay to workers.

3. Consequently, a further condition was imposed upon the licence in addition to the standard conditions. The additional condition imposed under the 2006 standards was:-

"Licensing standard 2.2. Deductions from workers pay of income tax and national insurance are accurate, appropriate and paid to HMRC."

This standard had to be complied with within three months. The reason given was that details of non-compliance were specified as being that

"The appellant was unable to furnish up-to-date payment information and HMRC who are reporting that the labour provider's debts with them are increasing". "Failure to meet the deadline may result in revocation of the licence".

This is not easy to construe in the context of a pre-existing debt; but makes sense in the context of ongoing failures such as holiday pay and the details referred to claims being made by workers for unpaid holiday pay.

4. In an internal report, the GLA considered it

"inappropriate to prejudge the HMRC issue and therefore, the debt with them has not influenced the decision in terms of fit and proper".

In the context of what transpired, I find that report to be of significant importance.

5. The three months deadline in the licence expired on 1 October 2008.

6. On 2 October, the appellant was sent a reminder requesting documentary evidence to show that licence standard 2.2 has been complied with. The letter was not entirely clear because, arguably it referred exclusively to the holiday pay issue, and not to the pre-existing HMRC debt issue. The details of non-compliance alleged referred to "debts". In any event, that is how the appellant construed it.

7. By this time, the holiday pay claims of the workers were being considered by the County Court and by February 2009, following an appeal, those claims were resolved.

8. Notwithstanding the lack of the documentary evidence required, no further steps were taken by the GLA in face of what appeared to them to be a breach of the condition; they took the view that a revocation of the licence would jeopardise the rights of the workers and it was better, therefore, to leave the licence in place and the appellant trading.

9. In April 2009, new licensing standards were issued and thereupon applied.

10. In May 2009, a GLA compliance officer visited the appellant. He had a brief discussion with the appellant and his accountant. He, apparently, made a note of the meeting. That note has not appeared in evidence. He reported by email to the GLA that the appellant had confirmed that he was up-to-date with his tax, without giving any particulars.

11. The appellant absolutely denies any such discussion took place with this compliance officer. While he acknowledges that a discussion did take place, he says that he was exclusively in respect of the holiday pay issue.

12. At the same time, the GLA had obtained a report from HMRC confirming that the appellant continued to be non-compliant and the debt was steadily increasing and that action was being considered on a substantial outstanding amount.

13. Faced with the apparent contradiction, an internal licence decision report concluded that the appellant had *"attempted to mislead the GLA"* and that the *"dishonesty had resulted in the conclusion that he was not a fit and proper person to hold a GLA licence".* The report was no more than the deciding officers internal memo; it was not a report as one might construe the word as meaning the result of an investigation and consideration of evidence. No such steps had been undertaken.

14. The GLA thereupon invoked the new 2009 standards 1.1 and 1.3 on the basis that the appellant had failed to comply with the payment of liabilities within the three months deadline imposed in the licence conditions. The attendant narrative to this internal report concluded that the appellant had

> *"chosen to mislead the GLA inspector and has proved that he cannot be trusted, hence the decision to revoke the licence".*

15. The license was revoked by letter dated 24 June 2009 and the appeal was lodged on 21 July 2009.

16. One potentially significant event occurred in March 2009, which the appellant did not tell the GLA about; namely that HMRC petitioned for his bankruptcy. An order was made in February 2010 and he is now anticipating a creditors meeting to approve an Individual Voluntary Arrangement under the Insolvency Act.

The law and discussion

17. Appeals are to be considered in accordance with the following principles.

18. The overriding objective under the Regulations is for me to deal with appeals justly which includes not only the management of the appeal itself but also in the way in which the statutory provisions are interpreted.

19. The licensing standards themselves require the GLA to adopt a proportionate approach. The 2006 standards also provide that the GLA is concerned with *"identifying the more persistent and systematic exploitation of workers rather than concentrating on isolated non-compliance".* The words *"unless such non-compliance is "critical" in its own right"* are added in the 2009 standards.

20. By way of a persuasive assistance I was referred to the Determination on 26 April 2009 of the Appointed Person in the matter of Prime Time Recruitment Ltd. (59/E/RV). Mr Russell, for the GLA, submitted that I should consider the revocation in this case "de novo" which he interpreted as requiring me to reconsider not only all the evidence available to the GLA when the licence was revoked, but to consider, in addition, further evidence now available to me, particularly in respect of the appellant's subsequent bankruptcy.

21. It seems to me that the right approach is for me to reconsider all the evidence available to the GLA when it revoked the licence. I do not believe that justice would be served by bringing into consideration the subsequent bankruptcy not known, for whatever reason, to the GLA at the time of the revocation and not therefore a factor in its consideration of that revocation. I am aware, of course, that the bankruptcy petition was presented prior to the revocation and I will deal with issues arising from the appellant's failure to disclose that fact in this determination.

22. On granting the licence on 2 July 2008, an additional condition was attached. Licensing standard 2.2 requires the labour provider to ensure that *"deductions from workers pay of income tax and national insurance are accurate, appropriate and paid to HMRC".* The additional condition was that the appellant was to provide information, within three months, to confirm that this standard had been complied with.

23. The letter granting the licence does not identify both the pre-existing tax debt and the holiday pay issues. Having considered the internal licence decision report, which addressed and specifically disregarded the tax debt from the decision to grant the licence, it seems to me more probable than not that the condition imposed on the licence was directed at and restricted to the holiday pay element: indeed, 2006 standard 2.2 is difficult to construe in the context of the pre-existing tax debt.

24. Immediately after expiry of the three-month time limit, the GLA wrote a letter to the appellant on 2 October 2008 reminding him of the condition imposed relative to licensing standard 2.2. The letter makes no reference to the pre-existing tax debt; but does list the outstanding holiday pay issues.

25. Notwithstanding the warning letter of 2 October, the GLA, for perfectly sensible reasons, took no further steps against the appellant because they were aware that the holiday pay issue was subject to county court proceedings and it would, obviously, have been premature to have revoked the licence on this ground before a determination of those proceedings.

26. As regards the pre-existing tax debt, the GLA argue that had they revoked on that ground, it also would have prejudiced the prospect of the workers recovering any sums found due following the county court proceedings. Following an appeal, the county court proceedings were concluded and, as I understand it, it was found that the county court had no jurisdiction to hear the claims and they thereupon all failed.

27. It was not for a further three months that a compliance officer visited the appellant and it was on the basis of his disputed report that, without further enquiry or discussion with the appellant, the GLA invoked new 2009 standard 1.1. This standard provides that

> *"the licence holder, principal authority and any person named or otherwise specified in the licence must at all times act in a fit and proper manner".*

28. The standard sets out factors that the GLA will consider in assessing what is "fit and proper". Those factors include (inter-alia) the licence holder

> *"not being candid and truthful in all their dealings with any regulatory body* (which the GLA rightly consider includes the GLA) and *"being involved in "the ownership or management of a business that has gone into insolvency".*

The requirement to be candid and truthful is one of the indicators under this standard of a "fit and proper" person. I remind myself that the pre-existing debt was specifically discounted by the GLA for "fit and proper" purposes when considering the grant of this licence.

29. In invoking this 2009 standard, the GLA argue that the appellant's representation to them that the pre-existing tax debt had been resolved fell foul of the requirement to be candid and truthful with the GLA. In the light of the content of the compliance report, the licence decision report before grant of the licence, the terms of the licence condition and the warning letter of 2 October 2008, I find that it was unreasonable of the GLA to have believed that the licence condition applied to the pre-existing tax debt rather than just the holiday pay issue. In the circumstances it was unreasonable of the GLA to have relied upon the compliance officer's report without further enquiry of the appellant.

30. In making this finding, I remind myself of the requirement that the GLA's approach must be proportionate and must be aimed primarily at persistent and systematic exploitation of workers rather than isolated non-compliance. The holiday pay issue might easily have been persistent and the systematic non-compliance: it is clear from the GLA's own view of the matter, set out in the licence decision report prepared before the grant of the licence, that the pre-existing debt was an isolated incident. It is worth noting that the revocation of the Celtic 2000 licence was not for such non-compliance but for other issues.

31. The GLA cannot rely on the subsequent insolvency as a ground to invoke this licensing standard. Had it wished to do so, a proportionate approach and the interests of justice would have required the GLA to have warned the appellant, and made proper enquiries as to the reason for and nature of the petition and what its prospects where and its effect on the business of the appellant as regards licensing matters.

32. Although the petition was presented prior to the revocation decision, the order was not made until many months after it. While it would, undoubtedly, have been desirable for the appellant to have informed the GLA when the petition was presented, I do not find the failure to do so amounted, in the circumstances, to a failure to be candid and truthful under 2009 standard 1.1. The petition was materially based upon a pre-existing tax debt for which, so far as the GLA were aware, the appellant had no personal liability in terms that it had arisen because of any failure by him to make proper deductions from workers pay and account to HMRC accordingly.

33. Further, as I find in paragraph 28 above, this pre-existing debt was disregarded by the GLA when granting the licence and imposing the condition: now to use it, as a ground to revoke is, in my view, unreasonable.

Person appointed by the Secretary of State
to determine appeals under the Regulations

Dated 25/3/2010

DECSION SENT TO THE PARTIES

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