Appeal Case No: 59/E/RV [Licence number: PRIM 0001]

THE GANGMASTERS (APPEALS) REGULATIONS 2006

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE GANGMASTERS LICENSING AUTHORITY ON 7 AUGUST 2007

BETWEEN

Prime Time Recruitment Limited

Appellant

and

The Gangmasters Licensing Authority

Respondent

DETERMINATION OF APPEAL WITHOUT AN ORAL HEARING

DATE OF DETERMINATION: 26 April 2009

BY APPOINTED PERSON: Mr D W Skinner

PAPER REPRESENTATION

For the Appellant: Ms Madeleine Abas, Solicitor, of Osborn Abas Hunt Solicitors

For the Respondent: Mr Kevin O'Donovan of Counsel, instructed by Mr Tony Russell, Solicitor, of Fraser Brown Solicitors

DECISION

1. The Appellant's appeal by notice dated 3 September 2008 against the decision of the Gangmasters' Licensing Authority given by notice dated 7 August 2008 of its intention to revoke the Appellant's licence with effect from 4 September 2008 (subject to this appeal) is allowed.

2. The Appellant's licence is reinstated.

3. This decision takes effect from the date of service hereof on the parties.

STATEMENT OF REASONS (IN SUMMARY FORM)

Introduction

1. For convenience I refer to the Appellant as "Prime Time" and the Respondent as the "GLA".

2. I decide this appeal on the basis of the papers presented to me, up to and including the GLA's written submissions received by me on 17 April 2009, comprising:

2.1. Written submissions:

23/3/09	Prime Time (34 pages)
24/3/09	GLA (22 pages)
25/3/09	GLA's supplemental submissions (6 pages)
30/3/09	Prime Time's response to GLA's (2 pages)

2.2. Bundle of documents numbered 1-61, paginated 1-426

I have received this 426 page agreed documentary bundle and a "core bundle" tabulated 1-23. The latter is necessarily selective (for example including the Notice of Appeal, but not the GLA's Response), but appears to include nothing that is not in the former, except perhaps tab 21 "Work History Schedule Summary". Unfortunately references in the submissions and witness statements are not consistently to the same bundle, which is a source of difficulty and confusion. In the event, I have endeavoured to give consideration to all of the documents in the larger bundle, focusing of course on those most relevant. Therefore, by and large, I disregard the core bundle and, unless otherwise stated or self-evident in context, all document and/or page references in these reasons are to that main bundle.

2.3. Witness statements

For completeness, however, I list the witness statements on both sides, notwithstanding that these are incorporated within the bundle:

For Prime Time:

Ms Williams (Prime Time's Finance Director & licence Principal) – document 50, from page 353, dated 11/3/09
+ supplemental at page 426, dated 23/3/09
Ms Medhurst (Projects Manager) – document 51, from page 357, dated 11/3/09
Ms Percival (CEO Recruitment Division of Prime Time's parent company, Cordant Group Plc) - document 52, from page 362, dated 11/3/09
+ supplemental, document 53, page 366, dated 16/3/09
Ms Mercer (Cordant Recruitment Division Project Director) - document 54, from page 367, dated 11/3/09
Mr Skelton (Managing Director of PMP Recruitment Ltd, part of Cordant's Recruitment Division - document 55, from page 369, dated 11/3/09

For GLA:

Mr Wilkinson (GLA's Head of Licensing) – document 56, from page 370, dated 11/3/09
Mr Yensen (GLA's Enforcement Officer / Inspector – document 57, from page 385, undated.

3. Prime Time appeals against the GLA's decision (by its Head of Licensing Mr Wilkinson), communicated by letter dated 7 August 2008 (document 33), to revoke its current gangmaster's licence. This followed a compliance inspection conducted by enforcement officer Mr Yensen on 26 and 27 June 2008. Mr Yensen's inspection confirmed that Prime Time was (or had been) in breach of licensing standard ("LS") 8.1. LS 8.1 (document 4, page 53) requires that a gangmaster may only sub-contract licensed activity to a sub-contractor who is also licensed. It is not in dispute that Prime Time had infringed this condition for a period from October or November 2007 by recruiting workers to its customer Tulip Limited via unlicensed sub-contractor Pamela Neave Employment Group. The formal notice of appeal and GLA's response are documents 1 and 2 in the bundle.

Law & regulatory framework

4. The parties will be familiar with the statutory and regulatory framework, which is summarised in the GLA's main submissions paragraph 2, but I summarise further, starting again with the Gangmasters (Licensing) Act 2004 ("the Act"), and confined firstly to generalities.

5. The purpose of the Act is to protect potentially vulnerable workers from exploitation in concerned sectors of industry. It established the GLA to operate a licensing system for direct and sub-contract UK and non-UK based labour providers (gangmasters) in specified areas of work in the United Kingdom, notably agriculture, horticulture and shellfish-gathering and associated food processing and packaging. Since October 2006 it has been an offence to operate as a gangmaster in those areas without a licence or in breach of licence conditions.

6. Secondly, and more specifically, authority for the action of the GLA which is challenged in this appeal derives from sections 7 and 9 of the Act, empowering the GLA to grant a licence *"if it thinks fit"* and to revoke any licence *"where it appears... that a condition of the licence or any requirement of this Act has not been complied with."*

7. To determine under this regulatory regime whether a gangmaster qualifies for the grant, continuance or transfer of a licence, or whether a licence should be issued subject to conditions, or refused, modified or revoked, the GLA has introduced Licensing Standards. These reflect industry relevant legal requirements and establish compliance conditions to obtain and retain a licence. Part 1 of the licensing standards (October 2006) issued by the GLA gives background and guidance (document 4 in the bundle). Part 2 sets out the licensing standards in detail.

8. Paragraph 14 in Part 1 (page 38), under the heading "Assessing compliance with the licensing standards", states:

> *"The GLA adopts a proportionate approach when applying the licensing standards. The GLA is concerned with identifying the more persistent and systematic exploitation of workers rather than concentrating on isolated non-*

compliances".

9. It goes on to explain a method of assessing compliance with licensing standards through inspections, applying a measure of non-compliance based on a points system under 4 categories of infringement in descending order of seriousness: critical = 30 points, major = 8 points, reportable = 4 points and correctable = 2 points. Paragraph 26 (page 40), dealing with inspections of existing licence holders, includes this sentence:

> *"For a licence holder whose non-compliances are found to be critical, or which in total exceed the permitted score, the licence will be revoked immediately or from a given date."*

10. Licensing standard 8.1 is in the "critical" category, non-compliance score 30. It reads (page 53):

> *"Any subcontractors used must be properly and currently licensed by the GLA."*

11. In the discharge of its statutory duties, the GLA has set practice criteria for the exercise of its powers and responsibilities, by reference to the above licensing standards marking system. As the name suggests, 30 points is regarded as a "critical" benchmark, or "fail score". This schematic approach is addressed in section A of the GLA's response to the appeal (document 2). After describing the inspection process (pages 15-16), which results in an inspector's standard report going to the licensing team for final decision, paragraph 18, under the heading "Discretion", explains that the licensing team must be satisfied of evidence of non-compliance, adding:

> *"The evidence gathered is to demonstrate the systematic failure to comply with the [licensing] standard"*

12. Later, in paragraph 21 (page 17), the Head of Licensing's options, depending on the licensing standard score ("LSS"), are summarised under bullet points. These do not appear exhaustive, but the stated options include:

- *"issue a licence with additional... conditions. This is where... one or more "Major" non-compliances [have been identified]... but where the LSS does not exceed 30...*

- *revoke the licence without immediate effect if the LSS is more than 30 but no immediate threat to the safety of workers has been detected."*

- *Revoke the licence with immediate effect and not allow the labour provider to trade until an appeal is heard*

13. Apropos inspections as a method for checking compliance, the GLA's Compliance Code of Practice (July 2006) observes in its opening paragraph (document 3, page 28):

> *"However, inspection will be used proportionately, as the GLA will only target those areas of greatest risk of non-compliance..."*

In similar vein, the Enforcement Policy Statement (February 2008) develops the common thread of proportionality, at paragraph 6 (document 7, page 89):

> *"Proportionality in securing compliance will generally involve taking account of the degree of harm caused by non-compliance. Sometimes, however, the precautionary principle will require enforcement action to be taken even though the risks may be uncertain."*

And under the heading "Enforcement Options" at paragraph 12 (page 90), regarding existing licensees:

> *"... For more extreme non-compliance licence revocation may be appropriate."*

14. Pursuant to section 10 of the Act, the Gangmasters (Appeals) Regulations 2006 ("the Regulations") provide for appeals against the decisions of the GLA. By Regulation 3, employment tribunal judges are appointed to hear and determine such appeals. Under Regulation 4, a Secretariat is provided by the Department of State for Environment, Food and Rural Affairs ("Defra") to administer the appeals process. Relevant extracts (or summaries) of the Regulations include:

<u>Regulation 2</u>

2(1) The overriding objective of these Regulations is to enable the appointed person to deal with appeals justly.

(2) Dealing with an appeal justly includes, so far as practicable

(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.

(3) The appointed person shall seek to give effect to the overriding objective when he

(a) exercises powers given to him by these Regulations; and

(b) interprets any provision.

(4) The parties shall assist the appointed person to further the overriding objective.

<u>Regulation 5</u>

5(1) An appeal may be brought by a person against a decision of the [GLA] -
(d) to modify or revoke a licence

5(3) A licence which is the subject of an appeal against modification or revocation shall continue to have effect according to its original terms and

conditions until such date as determined by the appointed person

Regulations 6-14 make provision for pursuing and processing an appeal, including notice of appeal by the appellant (regulation 6) and reply by the GLA (regulations 9 and 10)

Regulation 15 gives power to decide an appeal without an oral hearing where both parties agree and the appointed person considers it appropriate, and the appointed person in that event shall consider any written representations from the parties.

Regulation 21 empowers and requires the appointed person either to allow or dismiss the appeal.

15. Remarkably, it appears nowhere established whether an appeal is by way of re-hearing ("de novo") or review. It has been stated that the appointed person acts as an adjudicator, which evidently leans towards the former. In my view, the appellate function necessarily connotes consideration of the decision at first instance. At the same time, I take the overriding objective and regulation 21 to confirm what might be thought the legislative intent, requiring me to decide whether, on a balance of probabilities, justice and fairness favour overturning the GLA's decision by allowing the appeal, or upholding it by dismissing the appeal.

16. That said, since the matter is to be determined without an oral hearing (regulation 15 having been invoked by Prime Time, the GLA consenting and myself considering it appropriate), I do not have the benefit of observing witnesses in person or hearing and seeing their evidence tested under cross examination. Hence I have examined quite exhaustively all the submissions, cross referencing the documentary and witness evidence in the written statements. Inevitably I rely on the submissions so far as any contentious facts appear corroborated in the evidence presented, resolving where necessary the few material conflicts of evidence which arise on a balance of probabilities upon evaluation of such evidence.

Facts

17. Accordingly, I am grateful to the representatives for their very thorough summarising of the facts which each asserts and indeed which they both submit to detailed analysis. Where the facts are agreed, or the differences are of no consequence to my decision, I need do no more than refer to the submissions, and thereby the large canvas of evidence and other supporting documentation to which they make reference. As a useful starting point, Mr O'Donovan includes a chronology and list of "dramatis personae" (his paragraphs 3 and 5).

Conclusions

18. Prime Time make much of the alleged erroneous findings of fact upon which the GLA based its decision to revoke the licence. Further, it is said that the investigation was inadequate and conclusions drawn prematurely which closer attention (as the severity of the penalty required) would have shown to be misplaced or at least misjudged.

19. I have given close scrutiny to the evidence relating to these factual contentions which in principle are capable of objective resolution. In practice, as already adverted to, I am unable to probe the evidence beyond what appears at face value from the documentation and witness statements. On this basis, I am not persuaded that Prime Time has demonstrated the substance of these points, notably (1) that it had alerted itself to the admitted non-compliance and corrected the offence at its own initiative prior to any warning bells being sounded by the GLA, and (2) the related issue of the duration of the breach and its end date.

20. For example, the last sentence of paragraph 18 of Prime Time's main submissions states that the minutes at pages 115c-115f confirm the instruction, at the meeting(s) on 19 March 2008, not to use secondary suppliers. Amongst much else, I have scrutinised that and the referenced documents and witness statements, also paragraphs 7-33 as a whole, and paragraph 6(5)(c)-(f) and 7(3)(d) of the GLA's main submissions. I appreciate the probative content of documents 16–16c, particularly pages 115, 115a and, assisted by Mr O'Donovan's chronology, the relevant line on my otherwise illegible copy of the handwritten note at page 115c (echoing similar on page 115a), together with Prime Time's 4 witness statements covering this episode. The minutes themselves (document 16c, pages 115d-f) do not in fact confirm the instruction to stop using secondary suppliers. Be that as it may, it is a fair point within Mr O'Donovan's paragraph 7(3)(e), that undeniably Prime Time did not have in place a procedure that operated *effectively* to prevent the breach which happened.

21. The evidence is also inconclusive as to when, as well as why, the unlicensed supply of sub-contract labour terminated, whether due to Prime Time's own action or prompted by the GLA's investigation, or a combination of both. Upon examination, the evidence on this whole topic, which somewhat occupies both sides, is less compelling than Prime Time submits and I agree with Mr O'Donovan to the extent that there may be an element of hindsight if not wishful thinking in the contention that the GLA mistook the essential facts on which its decision to revoke was based.

22. However, the significance of this may be over-stated. What the evidence confirms is what all appear agreed upon - that Prime Time took it's gangmaster's responsibilities seriously as a matter of principle and was pro-active in prioritising them in terms of policy and procedure, even if on occasion its practice fell short. This brings me to the main point in my decision, which depends not so much on any critical error of fact by the GLA, but on the more subjective issue of discretion.

23. On this aspect I have considered very carefully the witness statements of Mr Yensen and most especially (as Mr O'Donovan urges) Mr Wilkinson. I do not seek to undermine the authority of the latter or to embarrass the former. Mr Wilkinson shoulders the decision-making responsibility, which includes balancing the "carrot and stick" approach of the licensing and enforcement regime. The facts of this case self-evidently allow for a range of responses. Mr Yensen acknowledges the predominantly positive features, favourable to Prime Time, which therefore inform his report (for example document 29, pages 242-243 – and see generally documents 24, 25, 28, 29 and 31-34) and are openly conceded in his witness statement (document 57). I do not rely on his conclusions as to the appropriate sanction, strictly outside his remit, but Mr Yensen's evidence is corroborative of some of the factors which seem to me to carry more weight than allowed by Mr Wilkinson. He – Mr Wilkinson - found no mitigating factors "capable of persuading me to exercise my discretion not to revoke". I respect

that judgment, but from my review of all the papers, I am persuaded otherwise. On largely common grounds of fact, I find a preponderance of mitigating circumstances that strongly support a less draconian sanction.

24. I develop these:

24.1. Prime Time's record of regulatory compliance was heretofore substantially unblemished. The GLA avowedly does not presume that labour providers are predisposed against the regulations and it could only have reason in this instance to regard Prime Time as committed to them. It recognises the need to encourage good contractors where that can properly be done, as much as penalise bad ones. Specifically, the sub-contract workers assigned here in breach of LS 8.1 were treated no differently to those supplied directly and the risk of actual exploitation was negligible. Although unlicensed, Pamela Neave Employment Group Ltd was considered reputable in its field, as is Tulip Meats. All were taken unawares and whilst the breach exposed a weak link in the implementation of Prime Time's policy of no outsourcing without director approval, it demonstrated the merit of its strategic ideal to exclude "second-tiering" altogether.

24.2. The evidence presented from the inspection (i.e. reported by Mr Yensen) was confident in asserting that the workers concerned suffered no actual or prospective detriment, and that Prime Time had put its house in order practically, founded in an already positive ethos of compliance, with little risk of repetition. After his review, Mr Wilkinson is a little hasty in discounting the evidence of a systems check having been applied throughout its 150 or so branches (his paragraph 8.5, page 376), for want of evidence disclosed by Prime Time before or during the appeal, when the comment to that effect is made as an apparently unqualified statement of fact by his own inspector (document 25, page 226).

24.3. Was this a "systematic" failure" rather than an "isolated incident"? The distinction was important to the decision-making – see paragraph 4 of Mr Wilkinson's witness statement (document 56, page 371). It seems to me that there is a borderline area where the expressions overlap. Any failure in an organisation may be described as a system failure, because a perfect system would never fail. That does not to my mind make such a failure necessarily systematic. On the facts of this case, there is room to describe the single, inadvertent oversight as an isolated incident (after all, the inspector himself did not believe it to be a "systematic failure" – see for example page 251 in document 34,), notwithstanding that it was an action or omission which continued over a period of time.

24.4. In any event, is this semantics? The labels do not matter, but their use suggests a restricted view by the GLA of its discretion, which goes beyond what the legal and regulatory framework requires so far as I can see, and in the particular case in my judgment is not justified by the facts. I illustrate this by reference to the response (document 2), which fairly reflects the thrust of the GLA's approach, as exemplified mainly in Mr Wilkinson's evidence and the focus of Mr O'Donovan's submissions.

24.4.1. Paragraphs 12, 33 and 37 of section B of the response (pages 19 and 23) indicate that GLA felt Prime Time's non-compliance score of 30 effectively bound it to revoke the licence in order to comply with the licensing

standards and scoring scheme and its own policy. It relies on the compliance process set out in section A of the response, together with the licensing standards themselves and the Compliance Code of Practice, to which I have referred above.

24.4.2. At the least, this position is confused. Firstly, there is no explicit reliance on any mandatory requirement to revoke at 30 points. The options quoted (paragraphs 21 in section A, 7 in section B, pages 17 and 19) appear to link revocation to a score of *more* than 30, described in paragraph 7 as the "*pass* score" (my emphasis). Paragraph 26 in the licensing standards' part one "useful background and guidance" (page 40), which I have noted, is not quoted directly, but may underpin the GLA's response statement at paragraph 9 (page 19), which, in relation to critical standard 8.1, reverts to the description of 30 points as a "*fail* score" (my emphasis again).

24.4.3. Secondly, regardless, the GLA plainly does have discretion and approached its decision making in this instance – as in the past - on that basis. The bulk of its case goes to demonstrating that it was a proper and proportionate but not inevitable exercise of its discretion to revoke this licence in these circumstances.

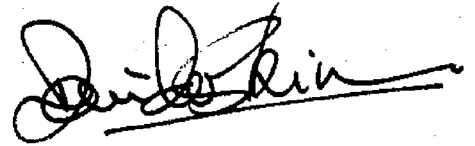
24.5. Finally, I should dispose of the delicate issue of the false hopes raised by Mr Yensen, only to be dashed by Mr Wilkinson. Firstly, I repeat that the inspector's views do not carry weight with me as such, but are corroborative of facts established independently. Secondly, GLA failed in its own procedures. Its compliance code of practice (document 3) includes a section under the title "Inspection Results" (at page 31) which advises:

"Compliance officers will not normally give, either verbally or in writing, any indication as to the result of the inspection at the time it is conducted."

The officer in this case of course did give Prime Time a thoroughly positive indication that the licence would not be revoked. Unquestionably Mr Yensen had the best of intentions - so no doubt did Mr Nash. However, although Prime Time is entitled to feel aggrieved at the manner in which the decision was delivered, I cannot accept that this colours the fairness of the decision itself, the subject of this appeal, which I must judge on its own merits.

25. As to that, to conclude, I am satisfied that this was an inadvertent, "one-off" infringement of LS 8.1 by an otherwise well-regarded and well-regulated labour-provider. The oversight which caused the failure was in breach of Prime Time's own procedures and put right as soon as brought to its attention by the GLA, even if (as to which the evidence is ambivalent) not already "self-corrected". No harm was done, no measurable exposure to risk of abuse resulted, and little prospect of this salutary breakdown being repeated. On the contrary, Prime Time has voluntarily strengthened internal arrangements in pursuing a strategy of keeping all labour supply under its own roof. The offence was far from "extreme" and the GLA appears to me to have taken an unnecessarily prescriptive view of the licensing standards scoring scheme, given the broader aims and objectives it is designed to serve. I allow substantial leeway to the GLA's discretion, in which clearly different considerations compete. However, taking account of the legal and regulatory framework, including guidance and codes of

practice, I find its decision on the facts of this case excessively harsh and disproportionate. I overturn it and uphold the appeal. In consequence, Prime Time's licence is re-instated.



(Mr D W Skinner)

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

Dated: 26 April 2009

DECISION SENT TO THE PARTIES ON

....

AND ENTERED IN THE REGISTER

....

FOR SECRETARIAT