

THE GANGMASTERS (APPEALS) REGULATIONS 2006

In the matter of an appeal against a decision made by the Gangmasters Licensing Authority (Ref: 35/E/RV)

EMP SOLUTIONS LIMITED

Appellant

v

THE GANGMASTERS LICENSING AUTHORITY

Respondent

Appointed Person

Mr P Gilroy QC

Decision and Summary Statement of Reasons of the Appointed Person

Decision

The decision of the Appointed Person is as follows:

- (1) This appeal shall be dealt with by way of written determination.
- (2) The appeal of EMP Solutions Limited is dismissed.
- (3) The decision to revoke the licence of EMP Solutions Limited is effective from 3 July 2008.

Summary Statement of Reasons

1. By letter dated 20 December 2007 the Respondent notified the Appellant that it intended to revoke its licence under the Gangmasters (Licensing) Act 2004, (“the 2004 Act”), stating that the intended revocation would take effect on 21 January 2008¹ unless an appeal was submitted against that decision within the next 20 working days. By letter dated 9 January 2008, Messrs Rana, a firm of Chartered Accountants acting on behalf of the Appellant, notified the Respondent that the Appellant intended to appeal against the proposed revocation of its licence and setting out four grounds of appeal.
2. It was originally anticipated that the appeal would be conducted by way of an oral hearing and a request to that effect was made by the Appellant in an undated document received by the Gangmasters Licensing Appeals Secretariat (“GLAS”) on 6 March 2008. I gave directions for the further conduct of this appeal on 26 March 2008, directing that the Appellant file and serve any necessary additional material occasioned by the Respondent’s reply to the Appellant’s grounds of appeal, that the parties should provide an agreed time estimate, that they should endeavour to agree a list of issues which needed to be determined for the purposes of the appeal, to agree an indexed and paginated bundle of documents, to serve witness statements and provide the GLAS with copies of all primary and secondary legislation and all case reports relied upon together with concise skeleton arguments summarising their respective cases. By letter dated 15 April 2008, Messrs Rana provided the GLAS with a substantial amount of wage records in respect of the Appellant, all dated 30 March 2008. Beyond that, the GLAS had no further

¹ The letter stated 2007 in error.

communication from the Appellant or its representatives as to the balance of the directions given on 26 March 2008. The GLAS wrote to the Appellant's representatives on 28 March 2008 enclosing a copy of the directions of 26 March, and again on 15 April 2008 reminding them of the need to comply with the directions. The Respondent provided a draft list of issues. There was no similar document provided by or on behalf of the Appellant. The Directions order of 26 March 2008 placed the onus on the Appellant to lodge an agreed bundle of documents with the GLAS. Neither the Appellant nor its representatives did so.

3. On 14 May 2008 the Respondent applied under Regulation 15 of the Gangmasters (Appeals) Regulations 2006, ("the 2006 Regulations"), to have the appeal decided by way of written determination. The grounds of the application were essentially the failure of the Appellant and/or its representatives to comply with the directions issued on 26 March 2008. On 15 May 2008 I directed that the Respondent issue its application for permission for the appeal to be determined in writing upon the Appellant by no later than 4.00 pm on 20 May 2008 and that the Appellant should lodge its response to that application and serve a copy of the same upon the Respondent by no later than 4.00 pm on 27 May 2008. The Respondent's application was duly served upon the Appellant from whom no response was received. The Appellant's representatives were informed by the GLAS that in the circumstances the appeal would now be dealt with by way of a written decision. In so far as it was necessary for me to do so I decided that it was appropriate for there to be a written determination on the basis of my powers under Regulation 15(1)(a) (deemed agreement by or on behalf of the Appellant) and/or Regulation 24(2) of the 2006 Regulations.
4. In the light of the Appellant's failure to agree a list of issues for me to determine, I have decided this matter on the basis of the contents of the Respondent's revocation letter of 20 December 2007, Messrs Rana's letter of 9 January 2008, the Respondent's Appeal Response dated 6 February 2008, and all documents in support of those items of documentation.
5. I therefore now turn to each of the grounds of appeal.

Licensing Standard 2.8

Ground of Appeal

"The letter refers to the Company not in compliance (sic) with Minimum Wage Regulation (sic) and Agricultural Wages Order (AWO). The company wage records clearly demonstrate that the company does comply with the national minimum wages (sic). The issue was regarding the compliance of AWO. It was made clear to the Inspectorate that the neither the Labour user (sic) nor Defra notifies the Labour suppliers of the AWO and that this was the first the company was aware of the AWO even though the AWO has been in force for some time.

In the meeting with the compliance team it was agreed that the breach was not intentional by the company and an action plan was agreed with immediate effect. The following steps have been implemented:

1. *A meeting was agreed with the labour users and issues regarding AWO implemented (sic).*
2. *AWO has been implemented within the wages records.*

3. *Wage records now clearly identify workers by departments who work in AWO sector.*
4. *AWO outstanding to employees for the period April to October 2007 are being calculated and will be awarded to each employee”.*
6. The Respondent maintains that at the time of the inspection copies of pay slips were obtained to show that the workers were not being paid the correct minimum wage, that the workers received £5.52 per hour regardless of the amount of hours worked, that the principal authority and his accountant had no knowledge of the Agricultural Wages Order and that the Appellant failed the Licensing Standard as a result of this.
7. I am satisfied that the pay slips submitted by the Appellant were issued after the inspection had taken place. As stated at paragraph 2 above, Messrs Rana provided the GLAS with a substantial amount of wage records in respect of the Appellant, all dated 30 March 2008, which post-dates the Respondent’s statement of intent to revoke the Appellant’s licence. In the event that the relevant workers were reimbursed in respect of the period during which they were being paid incorrectly, such corrective action took place after the compliance inspection and subsequent licence revocation decision and therefore this evidence can have no bearing on the appropriateness or otherwise of the original decision to revoke the Appellant’s licence.
8. Ignorance of the law is no excuse. In any event, the Appellant first applied for a licence in April 2006 and underwent an audit with the Temporary Labour Working Group (“TLWG”) on 30 November 2005 in preparation for its licence application. Having undergone such an audit prior to applying to the Respondent for a licence, and having held such a licence, the Appellant should have been fully aware of its obligations under UK legislation.
9. There is no merit in this ground of appeal.

Licensing Standard 2.9

Ground of Appeal

“The point raised by the compliance team is incorrect. All employees are paid annual leave in accordance with current legislation. Each employee’s wage slips clearly identifies that employees are paid holiday pay and two employees are entitled to maternity pay are paid this in accordance with current legislation. The current legislation and implementation of payroll is carried out by the payroll manager who is fully aware of the current legislation of the annual entitlement of employees and is not the responsibility of the accountant who was present at the compliance meeting. The fact that the new legislation only came into effect on 1 October 2007 and the compliance team found no breach of holiday pay (sic) or other statutory entitlement, this breach should not have been raised.”

10. I am satisfied that on the basis that the principal authority and the accountant confirmed to the Inspector that they had not increased the amount of holidays given to workers in line with the legislative changes, and on the basis of the pay slips submitted for the appeal, any changes that the Appellant has implemented only took effect after the compliance inspection took place. This can have no bearing on the correctness of the original decision to revoke the Appellant’s licence.
11. There is no merit in this ground of appeal.

Licensing Standard 5.3

Ground of Appeal

“Accurate records of days and hours are maintained by the Company from which payrolls are performed each week”.

12. It is a requirement of the Licensing Standards that accurate records are maintained by the licence holder. I am satisfied that during the inspection, the Inspector found that the Appellant was not keeping all the relevant timesheets for such periods. In accordance with National Minimum Wage legislation employees are required to retain records relating to days and hours worked for a minimum of three years. I am satisfied that the Inspector could only find time sheets dating back to 24 November 2007 for Simms and Wood and 10 November 2007 in respect of Walsh Mushrooms. Timesheets were submitted with the appeal dating from 12 December 2007. I am satisfied that the Appellant was not in a position to produce accurate records for inspection and that this resulted in a failure in respect of the relevant Licensing Standard. The timesheets submitted related to 22 December 2007 and did not demonstrate that accurate records were maintained by the Appellant. Once again the Appellant relies on evidence which post-dates the Respondent’s decision to revoke its licence by way of a purported ground of appeal against that decision.

13. There is no merit in this ground of appeal.

Licensing Standard 7.3

Ground of Appeal

“All employees are closely vetted and the necessary checks are made before an employee is offered a contract of employment. Each employee before they commence work has a signed contract. The contract which the company uses has been closely checked in two previous GLA inspections and found to be fully compliant. The compliance found certain wordings missing in the contract (sic), but the GLA visits found no breaches of the points raised due to the omissions in the contract.”

14. I am satisfied that during the inspection the Inspector found that the contract issued to the workers omitted to contain the clauses outlined by the Licensing Standards and that the principal authority submitted an amended contract but there was no evidence to demonstrate that the contract had been issued to any workers, and further that the contract contained a number of errors, namely there was no information regarding the specific hourly rate a worker would be paid and there was no mention of any other statutory benefit a worker may be entitled to.

15. There is no merit in this ground of appeal.

General

16. The Appellant’s representatives’ letter of 9 January 2008 concludes as follows:

“We would like to point out that we work very closely with the GLA and strive to meet all the requirements, however the unannounced compliance reviews as that on 12 December 2007 placed additional burden on EMP (sic) and their advisors in that if the records were not produced to the compliance team at the time of the visit for whatever reason,

automatically results in breach of the standard (sic). This should not be the case as a general policy and that reasonable time should be allowed to provide evidence requested (sic). We feel that the breaches of standard (sic) 2.9, 5.3 and 7.3 are clearly not warranted for this reason”.

17. Unannounced visits are an essential tool in the policing of compliance with Licensing Standards in relation to the holding of licences under the 2004 Act. The Respondent issues a publication entitled “*How to keep your GLA Licence*”, which states at page 4: “*Those businesses with the highest risk rating will be inspected. However, to ensure that we adopt a fair approach to inspection we will also carry out a number of random compliance inspections*”.
18. As the Respondent has pointed out in relation to this appeal, ignorance is not an acceptable reason for overturning a decision to revoke a licence. The Appellant was fully aware that it was a requirement of retaining its licence that it continued to comply with the Respondent’s Licensing Conditions, the applicable Licensing Standards and that it continued to be classed as “fit and proper” to hold a licence.

Conclusion

19. In reality, although the Appellant, through its representatives, purported to set out grounds of appeal against the original decision of the Respondent to revoke the Appellant’s licence, in reality the case advanced by the Appellant was in large part that it has implemented a number of corrective steps after the relevant inspection. Steps taken after the original decision to revoke the Appellant’s licence can have no bearing on any decision as to the appropriateness of that decision, taken on its merits on the evidence and circumstances which prevailed at the material time.
20. In all the circumstances, I uphold the Respondent’s decision and the decision to revoke the Appellant’s licence is implemented with immediate effect.

Signed

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

Dated 3 July 2008