IN THE MATTER OF THE GANGMASTERS (APPEALS) REGULATIONS 2006

Case number 3/E/RV

BETWEEN

BALTIC WORK TEAM LIMITED

Appellant

and

THE GANGMASTERS LICENSING AUTHORITY

Respondent

DECISION

Upon hearing Mr Pullen of counsel for the appellant and Mr Hodgson, solicitor for the respondent it is ordered that:

1. The appeal of Baltic Work Team Ltd is dismissed;

2 The decision to revoke the appellant's licence is effective from 24th August 2007.

REASONS FOR DECISION

1 This is an appeal against a decision by the respondent to revoke the appellant's licence with effect from 3 March 2007. That decision was notified by letter dated 5 February 2007.

2 The notice of appeal comprises a letter from the appellant's accountant dated 22 February. Essentially, the grounds of appeal in that notice deal with the breaches of the licence standards relied upon by the respondent. Those grounds were prepared by the appellant's accountant. At the outset of the hearing the appellant by its counsel sought to amend those grounds to advance arguments based upon

the Human Rights Act 1998. That application was not opposed by the respondent and I allowed the amendment, principally because I am in any event bound by the provisions of that Act in determining this appeal.

3 The factual background to this appeal may be shortly stated. The Appellant is owned by Mr Andris Tiltnieks who is of Latvian origin. He came to this country four years ago and worked at first as an agricultural labourer. He set up a company to supply labour, mostly of Latvian nationality, to the agricultural and fish processing industries, in which sectors the legislation with which I am concerned applies. He also supplies labour in sectors to which the legislation does not apply, such as cleaning caravans for the holiday trade. Most of the work is done in Cornwall. He applied for a licence in May 2006. He had previously undergone an audit for the Temporary Labour Working Group in preparation for the application and was successful. For that reason, no application was needed immediately prior to the grant of the licence which was issued on 1 June 2006. The revocation of the appellant's licence followed a compliance inspection by the respondent carried out on 31 January 2007.

4 In view of the breadth of the arguments advanced to me, I should set out the relevant parts of the primary and secondary legislation. Having provided, by section 6, that a person shall not act as a gangmaster except under the authority of a licence, section 7 of the Gangmasters (Licensing) Act 2004 provides that the respondent authority may grant a licence if it thinks fit. The licence shall be granted for such period and subject to such conditions as the respondent considers

appropriate. Section 8 gives the respondent power to make rules in connection with the licensing of persons to act as gangmasters. Power of revocation is contained in section 9.

5 The Gangmasters (Licensing Authority) Regulations 2005, made under the Act, provide by regulation 12 as follows:

(1) For the purposes of the exercise of its functions under sections 1, 7, 8, and 9 of the 2004 Act and rules made under section 8, in determining:

(a) the criteria for assessing the fitness of an applicant for a licence or a specified person, and

(b) the conditions of a licence and any modifications of those conditions, 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, and the conduct of a specified person, comply with the requirements of paragraph (2).

(2) The requirements referred to in paragraph (1) are:

(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 enactment 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.

6 In exercise of its rule making power, the respondent authority made the Gangmasters (Licensing Conditions) (No2) Rules 2006 which were in force at the

material time. Those rules provide, inter alia, that a licence holder must comply with the licence conditions set out in the Schedule to the Rules. These conditions are given practical application by the use of a set of Licence Standards published by the respondent. For the purposes of inspections carried out by the respondent, a scoring system is applied. Non-compliance with the Standards is classified in four categories to which points are applied. A non-compliance classified as "critical" attracts 30 points. A "major" non-compliance attracts 8 points. "Reportable" and "correctable" non-compliances attract 4 and 2 points respectively. The failure score for an inspection is 30 points. By this means, a licensee who gains 30 or more points on an inspection automatically suffers the revocation of his licence.

7 I heard evidence from Mr Tiltnicks and his accountant, Mr Coulson. I also heard from Mrs Simpson who carried out the compliance inspection on behalf of the respondent and from Mr Wilkinson, the Head of Licensing at the respondent authority.

8 At the outset of the hearing I canvassed with the parties whether I should treat this appeal as a review of the respondent's decision or as a re-hearing, leaving me free to make findings of my own as to the matters relied upon by the respondent authority. Neither party argued strenuously against the latter approach and that is the way in which I shall approach this appeal. In so deciding I have derived assistance from the decision of the Divisional Court in <u>R (on the application of London Fire and Emergency Planning Authority) -v- Secretary of State for</u>

Communities and Local Government (2007) EWHC 1176 (Admin) in which the position was broadly similar.

9 I make the following findings of fact.

Licence standard 2.5

This provides that an inspection will seek assurance that:

> "Where deductions from wages, other than those legally required, are made (e.g. for transport), there is evidence on file of workers' written consent to those deductions."

This is a reflection of the provisions of Part II of the Employment Rights Act 1996. Mrs Simpson's evidence was that her inspection showed that quite large advances of wages were made to workers engaged by the appellant but that the appellant was unable to produce any documents signed by the workers and signifying their consent to having those advances recouped through their wages. This was not challenged by the appellant who said, however, that all advances of wages were recouped in the same month as they were granted. That does not afford a defence to the legal requirement that an employee should have signified his consent in writing. I was told that a proper arrangement has since been put in place. I find that there was a breach of this standard. The respondent classifies this breach as "major" and a score of 8 points was applied.

10 Licence standard 2.8

This reads as follows:

> "The worker is paid at least the national or agricultural minimum wage,

taking into account the rules on accommodation charges."

The evidence of Mrs Simpson, which I accept, was that some of the appellant's workers were doing work to which the Agricultural Minimum Wages Order 2006 (the AWO) as distinct from the National Minimum Wage (NMW) Regulations applied. Under the AWO, the basic wage paid to workers is the same as the NMW but, certain workers who do supervisory or more technical work, such as tractor driving are entitled to higher rates of pay. The AWO also provides for overtime payments, which the NMW does not. Mrs Simpson's inspection revealed that, on the day of the inspection, one worker working in agriculture was classified as a supervisor but was not being paid the higher rate provided for in the AWO. Mr Tiltnieks said, when asked by Mrs Simpson, that he had no knowledge of the AWO. The inspection does not appear to have looked beyond the particular day of Mrs Simpson's visit and so there was no evidence to show that this was other than an isolated incident involving only one worker amongst the 53 employed by the appellant. Mr Tiltnieks's evidence was that he entrusted the management of his payroll to his accountant. He said that this was the first occasion upon which he had employed a supervisor and it is accepted on his behalf that he made a mistake. The accountant was aware of the provisions of the AWO but had not realised that it was relevant and did not regard himself as employed to advise the appellant on this issue.

11 I find that there was a breach of this licence standard by virtue of the appellant's failure to pay one employee the rate prescribed by the AWO on the day of the

inspection. This is classified by the respondent as a critical breach and attracted a score of 30 points.

12 Licence standard 2.9

This requires that:

> "There is evidence that that all workers receive paid leave entitlement........."

This initially attracted a "major" score of 8 points upon the basis that it appeared to Mrs Simpson that the appellant was paying "rolled up" holiday pay in breach of guidance issued following a ruling of the European Court. In its response to the grounds of appeal the respondent concedes that this standard had been applied incorrectly and the respondent no longer relies upon this alleged breach of the licensing conditions.

Licensing standard 3.3

This requires that:

> "Any debts properly entered into, or agreed recoveries from wages, are in writing and do not seek to cover more than the amount agreed or the recoveries allowed."

This relates to the same factual matter as standard 2.5, i.e. the making of advances of wages. Mrs Simpson identified that no written agreements were in place. The point is made on the respondent's behalf that what is here required to be in writing is not the workers consent to recoupment through his wages but the loan agreement between employer and employee and that I accept. I shall consider in

a subsequent paragraph whether there is an element of duplication with standard 2.5.

Licensing standard 7.3

This requires that evidence should be available to show that all workers who have been employed continuously for one month or more under a contract of employment should have a written statement of employment particulars. This reflects Part I of the Employment Rights Act 1996. The standard goes on to provide that certain specified terms must be included in the statement of particulars. Of these, two were not included, namely:

(a) an undertaking to pay the worker for any work carried out regardless of whether the Labour Provider has been paid by the Labour User; and

(b) whether the worker is supplied under a Contract of Employment or a Contract for Services.

It was also suggested by Mrs Simpson that the fact that some of the statements of terms and conditions were unsigned meant that there was no legal agreement between the appellant and the workers concerned. That I find to be incorrect. A contract of employment may be made orally. What the law requires is a statement of the relevant terms and conditions to be supplied by the employer.

14 It follows that the breaches of the licensing standards alleged by the respondent are substantially proved. I further find that the respondent exercised no discretion in its application of the scoring system applied to the licensing standards. Mr Wilkinson told me that he had no discretion to amend the score if there had been

a breach of a standard. He felt that any mitigation that might be advanced had to be considered on appeal.

15 Mr Pullen for the appellant submitted as follows:

(a) Article 1 of the First Protocol to the European Convention on Human Rights applies:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any was impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure payment of taxes or other contributions or penalties."

He submits that the licence granted to the appellant is a possession within the meaning of Article 1. There must be a reasonable relationship of proportionality between the means employed to achieve the objective of the legislation and the aim sought to be achieved. I am therefore invited to apply those principles of proportionality in deciding whether to uphold the revocation of the licence.

(b) The points scheme adopted by the respondent is unfair because it fails to allow consideration of any mitigating factors.

(c) The points scheme is a wrongful fetter upon the exercise of a statutory discretion. Reliance is placed upon dicta of Lord Reid in British Oxygen Co Ltd

-v- Minister of Technology [1971] AC 610 at 625.

(d) Mr Pullen asks me to consider the three stage test postulated by Lord Clyde in De Freitas -v- Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69 PC, restated by Lord Steyn in R (Daly) -v- Secretary of State for the Home Department [2001] 2 WLR 1622 and followed by Simon Brown LJ in International Transport Roth GmbH & Ors -v- Secretary of State for the Home Department [2002] 3 WLR 344. The court or tribunal should ask itself: whether (i)the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective. Mr Pullen submits that the objective of the legislation in this case could be achieved by less drastic means than the points scheme adopted by the respondent.

(d) I am asked to consider and to give due weight to the impact of revocation upon the appellant's business and upon those he employs.

(e) As to the particular breaches it is submitted that:

(i) 2.5 - this was simply a mistake - the appellant failed to regard the recoupment of advances as deductions from wages;

(ii) 2.6 - this too was a mistake. The appellant and his accountant between them failed to appreciate the application of the AWO;

(iii) 3.3 - this is a duplication of 2.5;

(iv) 7.3 - again, the appellant made an honest mistake as to the terms that

should be included.

16 Mr Hodgson for the respondent accepts that Article 1 applies but, understandably, he relies upon the proviso to the Article. Whilst not conceding that the licence is a possession within the meaning of Article 1, he accepts that revocation has such an effect upon the appellant's business as to amount to an interference with the enjoyment of a possession. The state, he argues, enjoys a wide margin of appreciation in relation to the proviso to Article 1 (Tre Traktörer Aktiebolaget -v- Sweden [1989] 13 EHRR 309.)

17 The respondent also relies upon the decision of Mr Kenneth Parker QC sitting as a deputy judge of the High Court in Nicholds & ors -v- Security Industry Authority [2006] EWHC 1792 (Admin). That case involved a scheme for the licensing of persons employed as door supervisors at nightclubs and the like. The learned deputy judge said this (at para. 87):

> "........Parliament has by section 7 of the (Private Security Industry) Act (2001) imposed upon the specialist regulator, the Authority, the duty of drawing up the criteria for recognising persons as fit and proper to be door supervisors. In my view, it would, therefore, be right to accord the specialist regulator, to whom Parliament has entrusted the task, a discretionary area of judgment, and to confine the court's role to more of review as explained by Lord Nicholls in (Wilson -v- Secretary of State for Trade and Industry [2003] UKHL 40). It is indeed common ground that that is the correct approach in this case. Furthermore, the drawing up of

criteria by the Authority concerns a matter of social policy. From time to time cases involving door supervisors may come before the courts........but the court cannot have the same panoramic view of the industry, or the same experience and understanding of the industry which day-to-day exposure gives to the Authority."

I am therefore asked to determine this matter by asking whether the respondent, in devising and implementing the licensing standards and the points scheme, has approached its task in a manner which was open to it. In Nicholds the court rejected a submission that a scheme which automatically debarred from employment as doormen persons who had been convicted of certain offences was outwith the scope of the relevant legislation. However, I am assisted by a passage in the judgment at para. 49. Counsel had attacked the licensing scheme upon the basis that no criminal offence could be so serious that the Authority could treat it as an absolute bar to obtaining a licence. The learned deputy judge questioned whether "a more nuanced and less extreme attack" upon the criteria might not appear more credible. One offence which would serve to debar an applicant for a licence was the possession of a shotgun without a certificate. It was possible to conceive of a situation in which a person of good character, perhaps distracted by a bereavement or the like, failed to renew his licence. Under the scheme, he would be automatically debarred from obtaining a doorman's licence, notwithstanding the mitigation available to him. The learned deputy judge expressed no concluded view as to whether an attack upon the criteria based upon such an example might

succeed, but seemed to imply that such an argument had some merit. Mr Hodgson relies upon this decision to support the proposition that there is nothing inherently improper in using a points scheme for licensing purposes such as these.

18 Mr Hodgson also drew my attention to the documents which seemed to show that a number of the appellant's employees were working overtime. If the AWO applied to them, then there was a widespread failure to pay them the rates to which they were actually entitled. This aspect of the case was not investigated by the respondent's inspectors and did not form part of the case that the appellant had to meet. I disregard this for present purposes.

19 I do not accept that the licensing standards and the points scheme per se are a contravention of Article 1. On the other hand, there seems to me to be considerable force in the argument that, if it (the points scheme) is rigidly applied, it can lead to injustice. The measures employed to enforce the objective of the legislation (I have in mind regulation 12 of the 2005 Regulations), if rigidly applied, arguably go further than is necessary to accomplish the objective (Daly). I am attracted by the views, albeit obiter, expressed by the learned deputy judge in Nicholds in the passage to which I have referred.

20 In the course of argument I put to the advocates the following hypothetical example of a breach standard 2.8. Suppose that the pay of a worker employed by a licensee is governed by the NMW. Suppose that, in one week only, and due to a clerical error that worker is underpaid by 50 pence. There is a breach of the NMW and of standard 2.8 which attracts a score of 30 points. The result is that the

respondent must revoke the licensee's licence. It says that it has no discretion in the matter. In the absence of some aggravating factor, it seems to me that the result in such a case is not proportionate to the objective sought to be achieved by the legislation.

21 I have cited the above example not because I suggest that there are parallels to be drawn with the present case but to show that, at least in some circumstances, the scheme adopted by the respondent is arguably too rigid to satisfy the requirement of proportionality. I refer in particular to the fact that one critical breach, without more, attracts the number of points leading to automatic revocation and to the fact that there seems to be a large and unexplained difference between the number of points attracted by a major breach and a critical breach.

22 However, I think it unfair to condemn the scheme without reference to the appeals mechanism. I regard this as being an inherent part of the overall system for the application of the legislation. Rule 21 of The Gangmasters (Appeals) Regulations 2006 gives the Appointed Person an entirely unfettered discretion to allow or dismiss an appeal. I approaching my decision, I must have regard to the objectives of the legislation (I again remind myself of rule 12 of the 2005 Regulations) and Article 1.

23 I reject any suggestion that, in a case such as this, I should consider whether proven breaches of the licensing standards might be the "tip of the iceberg". The respondent has powers of investigation sufficient to bring to light the true extent of any breaches in a case where it suspects that there is more to be revealed.

24 I am persuaded, on the evidence, that each of the breaches is properly to be categorised as a mistake rather than a deliberate flouting of the requirements. Nevertheless, they were each clear failings to comply with the law's requirements, albeit that they are quite stringently drawn. I reject the submission that there is an overlap between the need to record a loan agreement in writing and the need to ensure that the worker gives his written consent to the loan's repayment through his wages. There are sound reasons for requiring that each of these matters is properly recorded. Mr Hodgson fairly points out that, if the breach of standard 2.8 was to be classed as major rather than critical, there would still be four breaches giving a total of 32 points. On the other hand, if the breaches of the standards other than 2.8 were absent, the true seriousness of the particular breach of that standard in this case, taken alone, would not appear to me to justify the draconian measure of revocation of the licence.

25 In the result I have decided that I should dismiss this appeal, but that I should make the decision to revoke the licence effective from a date sufficiently far ahead to allow time for the appellant to make a fresh licence application and for the respondent to process that application. I am told by counsel for the applicant that his client would require 2 to 3 weeks to make an application and by Mr Hodgson that it would take the respondent 30 days to deal with it. I allow a little time for slippage and shall revoke the licence with effect from 24th August 2007.

....

Hugh Parker - Appointed Person