

The Gangmasters (Appeal) Regulations 2006

In the matter of an appeal against a decision made by the
Gangmasters Licensing Authority (GLA)

81/E/RV

OK Private Enterprises Ltd ("OK")
(Appellant)

V

The Gangmasters Licensing Authority ("GLA")
(Respondent)

Appointed Person J S Walker

Decision and Summary Statement of Reasons of the
Appointed Person, in relation to the above matter:

Decision

The appeal by OK against the revocation by the GLA on 21 August 2009 of OK's Gangmasters License dated 6 March 2008 is dismissed. The revocation of that License will take effect on 3 September 2010.

Summary Statement of Reasons

Introduction

1. OK have had a Gangmasters Licence in their present and previous legal manifestations since 13 June 2006 and prior to that operated under the Temporary Labour Workers' Group Scheme. The human person behind OK as its Principal Authority is Ms Onute Kairyte. She is also the human person behind another organisation, OK Plus, which provides support services to migrant workers and has a history of supporting them. They have a history of reporting to the GLA breaches of Licensing Standards by other Gangmasters. Accordingly, Ms Kairyte has considerable experience of the licensing regime for Gangmasters and the Licensing Standards which the GLA require to be complied with. She is extensively assisted by Mr Anthony Teague who has represented her throughout this matter and at the Appeal Hearing.

2. The GLA were represented at the Appeal Hearing by Mr Kevin J O'Donovan, Counsel.

3. Both representatives provided me with helpful skeleton arguments and submissions.

4. The grounds upon which the GLA revoked OK's licence of 6 March 2008 are set out in their letter dated 21 August 2009 and is based upon breaches of a

number of Licensing Standards found by the GLA which resulted in a score of 22 points against the fail score of 30 which is the catalyst for consideration of revocation of a Licence (although the breach of Licensing Standard 7.3 which carried 8 points was not relied upon by the GLA).

Regulatory Framework and Law

5. Mr O'Donovan helpfully provided a copy of a decision of an Appeal Without an Oral Hearing by another Appointed Person on 26 April 2009 - 59/E/RV (PTR Ltd -v- GLA) - in which my colleague set out the regulatory and legal framework which I happily adopt, except

5.1 he refers to the Appeal being a "re-hearing" when of course there has not been a previous hearing and this hearing is the first and a full hearing and not simply a review of the GLA decision, and

5.2 the burden of proof of each of the alleged Licence Standard breaches is on the GLA on the balance of probabilities as Mr O'Donovan fairly accepted.

6. It should be noted that the Licensing Standards said by the GLA to have been breached by OK are the 2006 Standards and not their subsequent 2009 Standards.

7. Mr Teague referred me to a number of other matters; the Legislative and Regulatory Reform Act 2006; the Human Rights Act 1998; the Hampton Implementation Review Report by the Better Regulation Executive and the National Audit Office; various policy documents of the GLA; complaints to the Parliamentary Ombudsman by OK and OK Plus; complaints to the police of malicious damage and perverting the course of justice by the GLA and in particular their Compliance Inspector, Mr Gerald Smith; judicial review proceedings; employment tribunal proceedings; other court proceedings. In my judgement, it is not my place to determine such matters as are within the purview of other bodies.

8. Apart from generally denying the alleged breaches of the Licensing Standards, a large part of the material in the bundles of documents and the Appeal Hearing itself was taken up with Ms Kairyte's allegation that "*This case is the most unfair treatment of me, as a person and employer and also my workers. The accusations are supported by lies, rumours and propositions without real evidence from enforcement officer, GLA Gerry Smith, interpreter GLA Kate Anderson, labour provider Adam Young and a few former employees of our agency, who have together created a Consortium and have manifested against us with false accusations. The aim of this deal was to complete Adam Young's plans to take over our employment business.*" [That is taken from Ms Kairyte's witness statement page 1]. It is that which was the basis of the allegations of criminal damage to two of OK's vehicles in which Mr Smith was said to be implicated and perversion of the course of justice by him and the GLA. The allegations of criminal conduct are a matter for investigation by the police and they have not taken any further action following those complaints. That "case" essentially derives from the belief by Ms Kairyte that a former self-employed supervisor of hers, Adam Young, had

"clandestinely" obtained a Gangmasters Licence for himself and recruited some of her workers and set up in competition with OK. "Kate" (sic) Anderson is a support worker with the West Cornwall Migrant Support Services providing free of charge support to migrant workers of a similar nature it seems to that provided at a charge by OK Plus and may therefore be thought to be in competition with them. I deal with this matter because if there were any truth in it, it would go to the credibility of the GLA and its witnesses. I have seen no cogent evidence of such a "Consortium", in effect, a conspiracy. All I have seen is in one of the supplementary the bundles at page 24, which is a copy of an unproved email from someone not known to Ms Kairyte, a Mr Blewett, dated 10 November 2008 who retells something he says he heard Adam Young say in a public house. In my view, that has no probative value. The rest in my view is simply fanciful speculation. I therefore reject that "case" by Ms Kairyte.

9. My task is to decide whether or not on the balance of probabilities the GLA have proved that OK were in breach of all or any of the Licensing Standards alleged and, if so, whether or not revocation of OK's licence was a proportionate and appropriate decision to make. It is to that task that I turn below. I will set out each of the Standards alleged to have been breached, my findings of fact in relation to it and my conclusion.

10. In doing so, I have carefully considered the evidence of the witnesses called by the GLA and by OK. I found the witnesses for the GLA to be straightforward and credible. On the other hand, I found that Ms Kairyte's evidence was evasive and not straightforward. Mr Teague's evidence did not help me as being mainly a narrative of his interpretation of his understanding of the position. So far as the Polish witnesses called by OK are concerned, there was some evidence that some content of their witness statements had been suggested to them by Ms Kairyte. Some were word for word the same as others. Some appear to have been translated before they were written. For those reasons, I prefer the evidence of the GLA witnesses.

11. In addition, I had numerous documents in the main bundles of 1100 paginated pages and two further smaller un-paginated bundles. A good deal of that documentation related to the matters to which I have referred in paragraphs 7 & 8 above and which are outside the scope of this Appeal. There was a great deal of duplication of documents. All of that has greatly extended the length of this Appeal. Moreover, a lot of the documentation produced by Ms Kairyte, and I suspect more so Mr Teague, is extremely repetitive and difficult to understand. I have therefore concentrated upon the evidence which I heard in the Appeal Hearing and the documents to which I was referred rather than that extraneous material, although I have been through it. I also had a number of questionnaires purported to have been completed by other Polish workers. They are primarily self-serving documents in support of OK as a good Gangmaster. I had no basis for judging their independence or veracity.

12. In setting out below the Licensing Standards which are alleged to have been breached, it should be noted that a number of other matters were the subject of report by the Compliance Inspector, Gerry Smith, which were not taken forward as

alleged breaches and grounds for revocation of OK's licence I have therefore disregarded them.

Licensing Standard 2.5

This reads: *"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"*

13. Ms Kairyte had a practice, which she describes as philanthropic, of making loans through OK to Polish workers, for example to purchase air tickets to and from Poland, to enable them to meet financial commitments there, to pay the rent of accommodation here. She had a form of loan agreement which, during a previous compliance inspection by GLA Inspector Neil Court on 26 February 2008 prior to the grant of the licence on 6 March 2008, he found to be defective and gave her advice about the changes to be made and required a new form of loan agreement to be provided within 48 hours. She did that and Mr Court approved the new form. Prior to that, Ms Kairyte admitted that she did not have written consent to the deductions made from workers' wages towards repayment of those loans, but says that that omission ceased in December 2008.

14. Part of the problem was that Ms Kairyte did not use the new form of loan agreement correctly. It provided for the weekly repayment rate and the commencing date to be specified. Neither was done because deductions were made at varying rates purportedly agreed verbally between Ms Kairyte and the worker designed to leave enough in the pay packet for that week's living expenses because their pay varied according to the demands of their work. Nevertheless, it is a requirement of the Standard, as well as Section 13 of the Employment Rights Act 1996, that there should be written consent to those deductions. In my judgement, it is not enough for a loan agreement to be signed by the worker with those two details left blank or even, as we shall see later, for copies of signed loan agreements which have the amounts of deductions shown on them after the event to be given to the worker

15. I find that after the date of the licence granted on 6 March 2008 (which in effect drew a line under past failures) deductions from workers' wages towards repayment of loans continued without prior written consent to the deductions made. I accept the evidence to that effect of T Danowski and T Gabrus and loan agreements with them on pages 645, 646, 648 and 649 of the bundle. In my judgement, oral consent which OK say they obtained is not sufficient either to comply with the Standard or Section 13. On the contrary, Mr Danowski's evidence was that the amounts of the deductions were fixed by Ms Kairyte on her own without even their oral agreement. That assertion of oral consent was made for the first time at the Appeal Hearing and nowhere earlier. Accordingly, Ms Kairyte was not accurate in the information she gave to GLA about that.

16. Accordingly, I find that this Standard was breached which carries 8 points

Licensing Standard 2.10

17. This reads: "*There is evidence that workers have been provided with itemised accurate payslips for each pay period showing at least their income tax, national insurance payments and other authorised deductions*".

18. I find that OK had a practice of showing on payslips only deductions for income tax, national insurance and transport. They did not show other deductions. The deductions for repayment of loans in particular were not shown on payslips. OK purported to give information about deductions by a posit note inserted inside the sealed payslips, or a note on the outside of the tear off seal of the sealed payslip. Ms Kairyte also said that a yellow copy of the loan agreement showing the latest deducted repayment would be inserted inside the worker's sealed payslip. She says that she was advised by Mr Court in his inspection that that was an unsatisfactory practice and should end. He has no recollection, nor is there any note in the documentation, that he did so. Ms Kairyte says, however, that that practice ceased after Mr Court's inspection.

19. I accept Mr Smith's evidence that a number of workers told him and demonstrated to him that that practice had continued up to his investigation of that point on 25 February 2009. I also find and accept the documentary evidence in relation to the loan agreements and deductions in the cases of T Danowski and T Gabrus that that practice continued after Mr Court's inspection.

20. Accordingly, I find that OK did breach this Standard which carries 8 points.

Licensing Standard 3.1

21. This reads: "*Workers are not subjected to physical or mental mistreatment*".

22. GLA did not assert that workers were subjected to physical mistreatment but relied upon there having been mental mistreatment.

23. I find that OK did perpetrate the following (non-physical) mistreatment;

23.1 Before T Danowski and T Gabrus began to involve Kat Anderson in their problems with OK they had a satisfactory relationship. However, when T Gabrus began to question Ms Kairyte about how much she and T Danowski owed and about their accommodation, Ms Kairyte began to send threatening text messages to T Gabrus and other workers in the house. The text messages to T Gabrus were seen by Kat Anderson. I accept T Gabrus' evidence describing that threatening treatment in her witness statement.

23.2 I also find that as a consequence of those complaints and involvement of Kat Anderson, the amount of work allocated to T Danowski and T Gabrus diminished. They were told by OK that as they had turned to Kat Anderson for support, *she* could find them work and accommodation.

23.3 I find that as their financial difficulties increased, T Gabrus was pressured to sign a loan agreement for a loan to enable them to pay the rent

by OK's supervisor, Piotr Sobezak, and she was told that if she did not do so Ms Kairyte would make them leave their accommodation.

23.4 This culminated in the dismissal of T Danowski and T Gabrus, allegedly for unauthorised absence from work. It was only when Kat Anderson contacted Ms Kairyte about their position that the purported warning and dismissal letters appeared. I find that those were more likely to be fabricated because there was no prior implementation of the contractual disciplinary and dismissal procedure.

23.5 I find that OK were proposing to evict T Danowski and T Gabrus from their accommodation and that was threatened in a text message to T Gabrus telling her that Ms Kairyte had new tenants for their room who would be moving in next Sunday.

23.6 There is some less probative corroboration of threatening conduct at page 364, an undated letter from another worker at the Migrant Support Service to Ms Kairyte in relation to another worker, Paulius Riepsa's wages. He thought he had been under paid and was sent threatening and unprofessional letters by Ms Kairyte.

24. Whilst I have found that those actions constituted mistreatment of OK's workers, I find that the GLA have not proved that they constituted "mental" mistreatment. That connotes at least some kind or degree of adverse *mental* effect similar to the adverse *physical* effect which would be demonstrated in relation to physical mistreatment. I had no evidence of such mental effect of the mistreatment I have described, although I have no doubt that it would have been distressing and even frightening. That, in my judgement, is not enough to draw an inference of mental mistreatment in the absence of some medical evidence.

25. Accordingly, I find that this Standard was not breached by OK. However, I will return to this matter when I consider Licensing Standard 1.1 below.

Licensing Standard 3.3

26. This reads: "*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*".

27. I find that despite the advice about the proper form of loan agreement given by Mr Court and the adoption of a form approved by him, it was not used in a compliant way, in particular the amount of the loan was not always specified, the amount of the weekly deductions or repayments was not specified, and the commencing date of deductions was not specified. Even if the deductions at a variable rate were "agreed" between Ms Kairyte and the borrower as she says, but they dispute, even those "agreed" recoveries were not in writing. That requirement in my view is not met by any such subsequent noting in the way she suggests on copies of the loan agreements afterwards.

28. Accordingly, I find that this Standard was breached by OK and carries 8 points.

Licensing Standard 6.1

29. This reads: *"The Gangmaster has co-operated with the labour user to ensure that; responsibility for managing the health and safety of workers has been agreed and assigned and that the health and safety risks to which they may be exposed at work are properly controlled"*.

30. OK at the time employed two profoundly deaf Polish workers. Ms Kairyte admitted that OK did not have in place risk assessments specifically in relation to deaf employees. It is incontrovertible that these workers worked in dangerous environments with dangerous machinery in either the fields or pack houses. The general risk assessment for workers dated 1 June 2009 at page 56 onwards does not amount to a suitable and sufficient assessment of risk to deaf workers in that environment. (I will return to that document under Licensing Standard 1.1).

31. Licensing Standard 6.1 does not specifically refer to risk assessments. Mr O'Donovan drew my attention to the requirements for these under the Management of Health and Safety at Work Regulations 1999, Regulation 3 and the commentary in the textbook Munkman, paragraphs 10.20 and 10.22 and the case referred to there of *Alison -v- Underground [2008] ITR 719* which, to summarise, *Risk assessments are meant to be an exercise by which the employer examines and evaluates all the risks entailed in his operations and takes steps to remove or minimise those risks.* In my judgement, OK's purported reliance upon the knowledge of the deafness of these two workers or others in their gang and to, as it were look out for them, is not sufficient compliance with this requirement.

32. Moreover, there was no evidence of any discussion or agreement between OK and the labour user about where responsibility for managing their health and safety would lie and be assigned. This agreement allocating responsibility between the labour provider and the labour user is particularly important in circumstances such as this case where the labour provider is based in Boston and the workers working for the labour user are on the other side of the country in West Cornwall.

33. In my judgement, *"the health and safety risks to which they may be exposed at work"* cannot be *"properly controlled"* unless there has been an examination and evaluation of all the risks and steps taken to remove or minimise those risks by a risk assessment under the Regulations.

34. Ms Kairyte relies in her defence on this matter on having followed the "don'ts" in the Guidance for People doing Risk Assessments, page 793, of the Health and Safety Executive's leaflet *"Health and Safety for Disabled People and their Employees"*. However, she makes no reference to, nor do I have any evidence of compliance with, the Guidance to *"do"* in doing risk assessments on pages 791 and 792,

35. Accordingly, I conclude that OK breached this Standard carrying 8 points.

Licensing Standard 6.8

36. This reads: *"The Gangmaster's vehicles are being maintained and that there are no obvious/identifiable serious safety defects."*

3. OK had a fleet of some 29 passenger vehicles for the transport of workers. Whilst interviewing workers in Cornwall, Mr Smith was told by them of 3 vehicles operated by OK that were in a dangerous condition *"unlike the remainder of the fleet"*. Those 3 were Ford Transit buses.

38. On 1 April 2009 at one of OK worker's locations, Little Antron, Mr Smith saw with PC Higgs one of those 3 vehicles. This was recorded throughout as being Y241 UPM when it is apparent that it was Y241 JPM as confirmed after the hearing by PC Higgs. This vehicle was used to transport OK's workers. They found the overall condition of the vehicle poor; the rear nearside tyre outer wall was perished, the outer 1.5 inches around the complete circumference was bald and the remainder were down to the tread wear indicators; one rear seat did not have a securing clasp for a seatbelt and another seatbelt was torn and ineffective and missing the securing buckle; the spare tyre was in poor condition and down to the tread wear indicators; the rear offside brake light was not operating; and the front of side indicator lens was cracked and not working. Mr Smith pointed out all of those defects to the driver and recommended that they be rectified before the vehicle was taken back onto the public highway. Mr Smith saw that vehicle the following day. The bald tyre had been replaced but not the spare tyre and one of the seatbelts had not been attended to. He impressed on the person with the vehicle the need to rectify those defects. He says nothing about the brake and indicator lights on that day. Clearly, some defects had been remedied.

39. Mr Smith also checked another Transit on 1 April 2009, P484 GCH, which was in poor condition and not in current use and due to be scrapped. Nothing further turns on that vehicle.

40. On 2 April, he found and checked the third Transit bus, S181 UAO (again incorrectly and confusingly recorded throughout as S181 VAO). That was parked and unattended at another OK workers' location. There was a MOT certificate issued in relation to that vehicle, page 582, on 13 February 2010 which is relied upon by OK as showing it being in satisfactory condition. However, it must be said that an MOT certificate is only evidence of condition of the vehicle at the time of the inspection and not later. Mr Smith ascertained from the labour user at that site that this vehicle was routinely used to transport OK workers. He looked through the window and saw that there were 3 seats in front of a bulkhead and could see no sign of seatbelts fitted to them. However, he fairly says that he could not get into the vehicle and the windows had dew on them and were dirty. He rang the OK office and spoke to a member of staff there and told him about this. He later received a telephone call from Mr Teague and told him of the outstanding defects and learned it was being alleged that these vehicles had been sabotaged and that the seatbelts had been cut. He fairly adds *"I cannot categorically say (i.e. with 100% certainty) that seatbelts have not been cut"*. I heard from the driver of that vehicle who told me that he regularly checked it but on 1 April realised that 3 of the safety seatbelts had been damaged by being cut. He brought to show me what he

said were the 3 cut seatbelts and he says he reported that to Ms Kairyte who told him to park up the vehicle and lock it and use another van, a backup vehicle, to transport workers. That allegation of malicious damage was part of the foundation of OK's allegation that there was a "Consortium" or conspiracy to destroy her business and this had been deliberately done just prior to and with knowledge of Mr Smith's inspection in order to cause an inspection failure. This criminal damage was reported to the police, along with an allegation of perverting the course of justice in which it was suggested that Mr Smith was implicated. The police did not consider that there had been an offence of perverting the course of justice and recorded the malicious damage as an undetected crime, not knowing who had been responsible for it.

41. We are therefore left with two vehicles out of 29 which I find did have obvious/identifiable safety defects. However, I bear in mind that a vehicle owner, such as in this case OK who owned these vehicles, cannot always prevent defects arising or malicious damage, if such it was, being caused. The important thing is for them to be put right quickly. That was done in relation to some defects. This is a matter on which I accept Mr Teague's point that the GLA enforcement regime is particularly directed towards systematic breaches. I also bear in mind that defects of individual vehicles of a serious/identifiable nature can be dealt with peremptorily by the police under e.g. the Construction and Use Regulations. I was not told whether the remaining 26 or so vehicles were inspected. I was not told whether or not the police issued vehicle rectification tickets under the VDRS Scheme and, if not, why not or why the vehicles were not taken off the road. I have also borne in mind Mr Teague's point about proportionality in the application of the policy of the GLA to breaches of the Licensing Standards.

42. Accordingly, I have come to the conclusion that it is disproportionate to regard the failure in relation to these 2 vehicles as being a critical failure carrying 30 points and on their own therefore justifying revocation of the licence. Therefore, I find that OK should not be regarded as having breached this Standard.

Licensing Standard 1.1

43. This reads: "*A current GLA licence to act as a Gangmaster under the 2004 Act is in issue and the licence holder is or remains fit and proper to hold it*".

44. OK failed this standard because OK were not honest with the GLA about their role in the provision of accommodation for their workers. I find, so far as is necessary to do so, that OK did effectively provide accommodation at Cam Dell and in the caravans at Riviera Produce, paying rent for the former and collecting rent in relation to both through one of their workers; making loans to enable workers to pay their rent; directing them to that accommodation on arrival in the United Kingdom; and purporting to have the power to evict T Danowski and T Gabrus from their accommodation at Cam Dell.

45. It is important to note that the failure was not because OK did or did not provide accommodation for their workers but that they were not honest about it and that went to the issue of whether or not OK are a fit and proper person to hold a

licence. Originally, Ms Kairyte told Mr Smith a number of times that OK did not provide accommodation for their workers but later told him that they did. This lack of truthfulness breaches this Standard.

46. The general risk assessment for workers of OK dated 1 June 2009 to which I have referred in paragraph 30 above tells their workers that they are at risk by virtue of being workers of OK because of the activities and powers of the GLA and its Inspectors. Effectively, it tells them not to co-operate with the GLA and its Inspectors as they may let others (the Consortium) know about imminent inspections so those others may attack OK. This is a disgraceful and irresponsible document which undermines the role of the GLA, which is primarily to protect gangmasters' workers from exploitation. This breaches this Standard.

47. I have described in paragraph 23 above the mistreatment of OK's workers which I have found occurred. Whilst for the reasons I have given there that Licensing Standard 3.1 was not breached, in my judgement that conduct does breach this Licensing Standard 1.1.

48. I have dealt in paragraph 23 above with the purported disciplinary action and ultimate dismissal of T Danowski and T Gabrus and the purported written warnings and dismissal letters issued in the absence of any disciplinary or dismissal procedure. In my judgement, to discipline and dismiss workers in that way is unacceptable and is particularly so in the case of workers where the language of the letters is English and they are not English speakers and require a Polish interpreter. This breaches this Standard.

49. I referred in paragraph 23 above to the threatening texts sent to and T Gabrus by Ms Kairyte on behalf of OK; the reduction in the work allocated to T Danowski and T Gabrus in consequence of their seeking help from Kat Anderson; and the threat to evict them from their accommodation. This breaches this Standard.

50. All of these matters pre-dated the revocation of the Licence and in my judgment may properly be taken into account in reaching my decision on this Standard. Accordingly, for each of these reasons, as well as collectively, I find that OK did breach this Standard which carries with it 30 points and the risk of revocation of their Licence on that ground alone.

Overall Conclusions

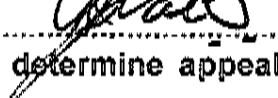
51. In considering whether or not the GLA have proved on the balance of probabilities that OK breached the Licensing Standards alleged, I have borne in mind that this Appeal is akin to "disciplinary proceedings with serious consequences", i.e. the loss of OK's business as a Gangmaster and of the employment by them of their workers. "This does not mean that the standard of proof is higher. It means only that the inherent probability or improbability of an event" i.e. breaches of the Standards in this case, "is itself a matter to be taken into account when weighing the probability and deciding whether on balance the event occurred." (*The Queen on the Application of the IPCC v AC Hayman* [2008] EWHC 2191 (Admin) para 15 quoting the House of Lords in *re H* [1998] AC 583)

I have taken those consequences into account and find that this is a case of systematic breaches of the Standards and that the GLA have proved those breaches which I have found on the balance of probabilities.

52 It will be seen that I have found there have been four breaches of Licensing Standards which carry 8 points each, a total 32, which in itself exceeds the threshold of 30 which may lead to a revocation of the Licence and also a critical breach of 30 points in relation to Licensing Standard 1.1, making a total of 62 points.

53. I have carefully considered whether or not revocation of OK's Licence is a proportionate response to those breaches, bearing in mind the seriousness of that and its effect upon OK's business and its workers. I have borne in mind the other work which Ms Kairyte does through OK Plus described in paragraph 1 above. On the other hand I bear in mind that the purpose of the licensing regime is to prevent the exploitation of workers and improve standards in the industry, and the nature and seriousness of the breaches, I have come to the conclusion that revocation is a proportionate and appropriate response to them. Accordingly, I dismiss the appeal and the revocation of the Licence will stand.

54. Having heard from Ms Kairyte and the GLA about what the practical effect would be of such a decision, if made, in the interests of OK's business and its workers and the time needed to implement it, the revocation will take effect on 3 September 2010.

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

Dated: 9 August 2010