

Appcal Case No: 84/E/RV

THE GANGMASTERS (APPEALS) REGULATIONS 2006

**In The Matter Of An Appeal Against A Decision Of The
Gangmasters Licensing Authority made on 8 October
2009**

BETWEEN

Polana Sp. Zo.o.

Appellant

and

The Gangmasters Licensing Authority

Respondent

**DETERMINATION OF APPEAL WITHOUT AN ORAL
HEARING**

DATE OF DETERMINATION: 22 March 2010

BY APPOINTED PERSON: Mr D.K. Battisby

PAPER REPRESENTATION

For the Appellant: Mr S. Taylor, Director

For the Respondent: Ms C. Wilson, Appeals Co-ordinator

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DECISION

The Appellant's appeal by a notice dated 29 October 2009 against the decision of the Gangmasters Licensing Authority given by notice dated 8 October 2009 of its intention to revoke the Appellant's licence with effect from 4 November 2009 (subject to this appeal) is allowed.

STATEMENT OF REASONS

Introduction

1. In this decision I refer to the Appellant as "Polana" and the Respondent as the "GLA".
2. I decide this appeal on the basis of the papers presented to me consisting of:-
 - a) Notice of Appeal dated 29/10/09.
 - b) GLA response to appeal in a ring folder file consisting of the response (11 pages) and 11 annexed and separately tabbed documents (hereinafter references to numbered documents refer to the tab number of this response).
 - c) Email from Mr M. Baker of the Gangmasters Licensing Appeals Secretariat to Mr I. Wilkinson and Ms C. Wilson of the GLA dated 19 February 2010 raising some enquiries on my behalf about the GLA's response to appeal.
 - d) Email from Ms Wilson of the GLA to Mr M. Baker dated 26 February 2010 with attached copies of a letter from the GLA to Polana dated 16 September 2009 and a copy of the email sending that letter dated 18 September 2009.
3. The parties consented to the appeal being dealt with without an oral hearing pursuant to regulation 15 of the Gangmasters (Appeals) Regulations 2006.
4. Polana appeals against the GLA's decision communicated by a letter dated 8 October 2009 (document 2) to revoke Polana's Gangmasters licence. This followed the failure of Polana to respond to letters from the GLA requesting information sent between 31 July 2009 and 18 September 2009 and the GLA forming the view that, as a result of these failures, the licence holder, Polana, and the Principal Authority, Mr P. Wisniewski, had failed to act in a fit and proper manner contrary to Licensing Standard of the Licensing Standards (April 2009). The notice of appeal annexed copies of two separate letters sent to the GLA from Polana dated 30

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October 2009 and 28 October 2009. Delay in responding to the request for information was acknowledged and mitigation put forward. In the light of the notice of appeal and annexed correspondence the GLA reviewed its decision, but nevertheless upheld it subject to this appeal.

The Facts

5. There appears to be no real dispute about the facts. It is simply a case of interpreting whether the facts amount to there having been a breach of Licensing Standard 1.1. Accordingly the facts I find are as follows.
6. The Gangmasters licence in this case was issued on 18 December 2007 and sent with a letter from the GLA of the same date to Mr Wisniewski of Polana dated 18 December 2007 (document 4).
7. Polana was classified as a new business. The letter included confirmation that it was "...a requirement of the licence that you and your organisation continue to comply with the GLA's licensing conditions, the applicable licensing standards and continue to be classed as "fit and proper" to hold a licence".
8. The licence was renewed in December 2008.
9. On 31 July 2009 Mr D. Dixon, the GLA's Director of Strategy, drafted a letter (document 6) which was sent out by the GLA's Licensing Team to Polana at its address in Poland. The letter sought confirmation that Polana had complied with the requirements of the Bulgarian Labour Inspectorate and set out 12 questions/requests for information. The letter commenced by explaining that the GLA was seeking documentary evidence that the operations of Polana were compliant with the Licensing Standards. There was a reference to where a copy of the current licensing standards could be found online and made the point that it was important that a licence holder should be "fit and proper" to hold a licence demonstrating compliance with the requirements and standards of other regulatory bodies. That included compliance with the standards of overseas authorities and EU law. The letter explained that enquiries had revealed that Polana was providing workers to a farm who were Bulgarian nationals, as well as some Romanian workers. The letter was seeking to get to the bottom of whether such Romanian or Bulgarian workers were being supplied to the UK and the request for information was quite extensive as set out in the letter. The letter concluded in its penultimate paragraph asking for a response to all matters with supporting documentation by 14 August 2009. It said that failure to comply with the request "may affect the status of the licence".

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10. In the absence of a reply to the letter of 31 July 2009 the GLA sent a further letter to Polana at its Polish address dated 7 September 2009 (document 7). This letter referred to the previous letter and repeated the same 12 questions/requests for information. The second paragraph of the letter stated: "We will require a written response to these questions as soon as possible. Failure to reply in a timely manner could affect the status of your licence".
11. On 11 September 2009 Mr Taylor, who has completed the notice of appeal on behalf of Polana, telephoned the GLA in response to the GLA's letter of 7 September 2009. He was told that they could not deal with him as there was no record of the Principal Authority, Mr Wisniewski, having authorised Mr Taylor to speak to the GLA regarding the matter. Mr Taylor was advised that the GLA would need to contact Mr Wisniewski before they could discuss the matter with him. On 14 September 2009 a Polish speaking member of the GLA Licensing Team called Mr Wisniewski's mobile telephone number. He stated that he was in hospital and that Mr Taylor would be responding to the correspondence on his behalf and that Mr Taylor was a Director of Polana. Mr Wisniewski also took the opportunity to authorise Mr Taylor to act on his behalf and confirm that Mr Taylor would be running the business in his absence.
12. On 16 September 2009 the GLA wrote to Mr Taylor regarding the requests for information contained in the letters dated 31 July 2009 and 7 September 2009. The letter set out again the 12 questions/requests for information and called for a reply by 1 October 2009. The letter contained a warning that failure to reply "may affect the status of the licence". For some reason, which I cannot ascertain from the papers, this letter was addressed to Mr Taylor of Polana at Pitt Road, East Sutton, Maidstone. It would appear to be the only letter of relevance both prior to and after this date that was sent to that address. When Mr Taylor did write to the GLA on 16 October 2009 he commenced by apologising for "not answering sooner your letter of 7 September referring to correspondence on 31 July". His letter comes from Polana at its Polish address. At the end of the letter he indicates that he has received the GLA's letter of 8 October 2009 (document 2) containing the decision to revoke the licence. That letter was sent to Polana's Polish address. It is odd that just the one letter out of a whole series of correspondence to Polana was sent to the English address as opposed to the Polish address.
13. Further, the email from Ms Wilson to Mr Baker dated 26 February 2010 suggests that the letter of 16 September may not even have been posted since it refers to the "email sending this letter dated 18 September". The email of 18 September 2009 was addressed to info@winterwood.co.uk. Therefore, if this was the only means by which the letter was sent, it would appear to have been sent to an email address that was not necessarily a

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personal email address of Mr Taylor and was sent to an organisation called Winterwood. There is reference to Winterwoods Farm in the twelfth request for information contained in the GLA's correspondence and a suggestion that Polana was a subsidiary of Winterwoods Farm, with which Mr Taylor was connected. The GLA has submitted nothing to prove or disprove this. In his response to this question at numbered paragraph 12 of his letter dated 16 September 2009 to the GLA, Mr Taylor stated there was no legal relationship between the two companies. However, he did accept that he personally was a shareholder and director of both companies, so there was a connection with him.

14. Notwithstanding that the letter was sent to an address in England and/or emailed to a non-personal email address at a different company, it is more likely than not that Mr Taylor did eventually receive it because he refers to the GLA's deadline of 1 October in his letter of 28 October 2009 (document 11). The letter of 16 September 2009 is the only communication in the papers before me that referred to a deadline for response of 1 October 2009. Therefore, the letter probably came to Mr Taylor's attention sometime after writing his letter of 16 October 2009 and before completing the letter of appeal of 28 October 2009.
15. Having failed to hear from Mr Taylor by 1 October 2009, the GLA issued the licence revocation in its letter of 8 October 2009 (document 2) sent to Polana at its Polish address. The letter confirmed that the decision would take effect from 4 November 2009 unless an appeal was submitted against the decision within 20 working days.
16. Mr Taylor responded on behalf of Polana with a letter dated 16 October 2009 (document 10) sent to the GLA. I have already mentioned this letter above. Mr Taylor responded to all 12 questions/requests for information. The letter indicated that the delay in responding was due to Mr Taylor's unsuccessful attempts to find a resolution to what he described as their "tax/Ni dilemma". He said it was still unresolved, but was responding to update the GLA of the situation. The letter concluded with a statement that, as Polana currently had no workers and did not plan to have any until the question of the tax and Ni had been sorted out between the respective authorities, he wondered whether the GLA would put the revocation issue "on hold".
17. I have not seen and do not know how the GLA responded to Mr Taylor's letter of 16 October 2009. However he wrote again on behalf of Polana to the GLA in a letter dated 28 October 2009 (document 11). This letter commences with a statement that he had seen that his request to suspend the revocation on the grounds that they were not currently trading was not allowed as it should have been directed to the Appeals section and not the General section. As far as I can see all correspondence to and from the

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GLA has the same address and there is no distinction between different sections. Nevertheless his letter went on to say that he was sending the letter as an appeal against the decision to revoke the licence. The appeal in the usual form was completed and dated 29 October 2009 and attached copies of the two letters from Mr Taylor dated 16 October 2009 and 28 October 2009. The grounds for appeal were stated to be set out in those two letters. The appeal form is date stamped has having been received by the GLA on 9 November 2009.

Submissions

18. The letter from Polana dated 28 October 2009 sets out Polana's submissions in relation to the appeal. Delay in responding to the GLA's correspondence was acknowledged. This was put down to the problems in trying to find a resolution to their tax/NI dilemma which was still then unclear. They had ceased trading while the position was being resolved. Mr Taylor said that they had been receiving conflicting advice on the subject.
19. By way of further mitigation for the delay, the Principal Authority, Mr Wisniewski, had been taken into hospital in September and had not been in a position to respond as quickly as he would have liked to have done. Once he had been telephoned by the GLA in hospital, he gave Mr Taylor the authority to deal with matters. Mr Taylor refers to his response given on 16 October 2009. He accepted that this was 15 days later than requested, but refers to his attempt to contact the GLA on 11 September 2009 which was rebutted because he did not have the necessary authority.
20. It is submitted that the only corrective action required was to respond to the letter and provide the information. That has now been done and no other regulations have allegedly been contravened. For those reasons it is submitted that the appeal should be allowed.
21. The respondent submits that Polana was sent an important letter requesting information on 31 July 2009 and, despite receiving reminder letters dated 7 September 2009 and 16 September 2009, Polana failed to respond by the deadline given of 1 October 2009. Because of this the GLA submits that Polana has failed to meet the "fit and proper" test.
22. The GLA further submits that consideration was given to Mr Wisniewski's hospitalisation and leeway was granted to enable there to be consultation with Mr Taylor so that he could respond on Polana's behalf. It is said that the situation could not have been permitted to continue indefinitely so that by 8 October 2009, a decision had to be taken.

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23. Finally it is submitted that, the fact that Polana is no longer supplying labour, should not influence the position regarding the revocation.
24. In summary, the GLA submits that Polana's failure to act in a fit and proper manner was a critical failure under the Licensing Standards and that failure of a critical standard should result in revocation of the licence.

The Law & Regulatory Framework

25. The Gangmasters (Licensing) Act 2004 ("the Act") aims to curb the exploitation of labour within agriculture and other concerned sectors of industry. The Act led to the formation of the Gangmasters Licensing Authority in April 2005. The GLA exists to ensure the Act is followed and that conditions are fair for legitimate businesses and workers across the relevant sectors.
26. Sections 7 & 9 of the Act allow 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"*.
27. 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. The latest Licensing Standards were issued in April 2009.
28. Paragraph 4.1 of the Licensing Standards deals with how the GLA is to approach the question of compliance and paragraph 4.1 states as follows:-

"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, unless such a non-compliance is "critical" in its own right."
29. The Licensing Standards go on to explain the method of assessing compliance with licensing standards through inspections, applying a measure of non-compliance based on a points system. The fail score for inspection is 30 points. Standards designated as "critical" are worth 30 points. All other Standards are worth 8 points, except Licensing Standard 1.4 which is worth 16 points.

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30. Licensing Standard 1.1 is the "critical" category relied upon by the GI A for its decision to revoke Polana's licence. This states that:

"The licence holder, Principal Authority, and any other person named or otherwise specified in the licence must at all times act in a fit and proper manner".

The Standard then notes that the GLA will assess all relevant factors in considering whether a licence holder acts in a fit and proper manner and then gives a long list of factors by way of non-limiting examples. Generally these cover very serious issues such as intentional obstruction of the GLA, certain criminal convictions, insolvency and the like.

31. The letter of 8 October 2009 from the GLA (document 2), relies upon an example given in the notes to Licensing Standard 1.1, namely as follows:

[whether the licence holder] has...."not been candid and truthful in all their dealings with any regulatory body and they demonstrate a readiness and willingness to comply with the requirements and standards of the regulatory system and with other legal, regulatory and professional requirements and standards..."

32. I would add in passing that this example in the notes to Licensing Standard 1.1 could be much better phrased without mixing negative and positive statements, as well as using the third person singular and plural in the same sentence.

33. Where on inspection a score of 30 points or above has been marked, any application for a licence will be refused or the existing licence will be revoked. This is set out at paragraph 6 of Part 1 of the Licensing Standards. The GI A is then given the option to revoke the licence with or without immediate effect.

34. 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. Relevant extracts (or summaries) of the Regulations include:

Regulation 2

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

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

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- 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;*
- 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;*
- b) *Interprets any provision.*

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

Regulation 5

5(1) *An appeal may be brought by a person against a decision of the [GLA] –*

- c) *To modify or revoke a licence.*

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 & 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.

35. I hereby note that both parties have agreed to the oral hearing procedure and I consider it to be appropriate.

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Conclusions

36. In summary, this case concerns whether the failure by Polana to respond to correspondence from the GLA by 1 October 2009 makes them not fit and proper to hold a licence. This turns on whether or not I consider Polana demonstrated a readiness and willingness to comply with the requirements and standards of the regulatory system and with other legal regulatory and professional requirements and standards as under Licensing Standard 1.1.
37. Clearly the GLA was entitled to write to Polana in the terms that it did in the letter dated 31 July 2009. That letter called for a response by 14 August 2009 and indicated that a failure to comply with the request might affect the status of the licence. In my judgment it would have been clearer if the possibility of the licence being revoked had been expressly stated.
38. When no response was made to the letter of 31 July by 14 August another letter was sent by the GLA to Polana dated 7 September 2009. Again it has been written in fairly gentle terms, simply noting that no response had been received and repeating the request. On this occasion it is stated that a failure to reply "in a timely manner could affect the status of your licence".
39. After that Mr Taylor did get in touch, but the GLA could not deal with him about the matter until the necessary authority had been given by Mr Wisniewski. However, at that point, the GLA was obviously aware that Mr Taylor was attempting to deal with matters and that there were difficulties as a result of Mr Wisniewski having been hospitalised. I do not know the date when he became hospitalised, but he was in hospital when the Polish speaking representative of the GLA contacted him on 11 September 2009.
40. Once the necessary authority to act had been obtained, the GLA wrote to Mr Taylor on 16 September 2009, again requesting the same information. He was asked to respond within the next 10 working days, which expired on 1 October 2009. Again the letter used the same terminology as the previous two letters that a "failure to reply to this letter may affect the status of the licence".
41. No reply was made by 1 October 2009. The letter revoking the licence was sent out on 8 October 2009. As soon as this was received Mr Taylor wrote to the GLA on 16 October 2009. Clearly, on this occasion, he was concerned about the threat to terminate the licence and expressly referred to this in his concluding emboldened paragraph. This leads me to conclude that, if the letter of 16 September 2009 had been expressed in terms that it was the last opportunity being given to respond and that a failure to respond could result in action being taken to revoke the licence,

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Mr Taylor would indeed have responded by the deadline. As it was, he would have been aware of the lax attitude shown previously by the GLA about Polana's failures to respond within given timeframes or by deadlines. None had previously resulted in anything other than another reminder letter in exactly the same terms.

42. I believe the same would have applied to Mr Wisniewski and that, whilst he can be criticised for not having acknowledged or replied to the letters of 31 July 2009 and 7 September 2009, the failure to have done so does not lead to him being neither fit nor proper to hold a licence. Again there was no sense of urgency or threat in those communications and, at some point, Mr Wisniewski became ill and was hospitalised. Clearly he asked Mr Taylor to deal with the letter of 7 September 2009, since Mr Taylor telephoned the GLA on 11 September 2009.
43. Neither the acts nor omissions of Mr Wisniewski or Mr Taylor lead me to conclude that they were being deliberately obstructive, nor were they acting in such blatant disregard of the licensing regime as to render them not fit and proper persons under the Licensing Standard test.
44. No worker was under threat as a result of the failure to deal with the correspondence, particularly as it appears that Polana had ceased supplying workers until the problems had been resolved. This much must have been recognised by the GLA in that the licence was not revoked with immediate effect.
45. Finally, there was a duty on the part of the GLA to adopt a proportionate approach when applying the Licensing Standards. When one observes the examples given under Licensing Standard 1.1 as to what could amount to a failure to act in a fit and proper manner, what Polana has done bears no comparison. Whilst it must have been frustrating for the GLA not to have its correspondence answered, revoking the licence was not a proportionate response and was excessively harsh. At least one final warning should have been given that a failure to respond could lead to the licence being revoked.

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46. I conclude that it is in the interests of justice to allow the appeal and I do so.



.....
(Mr D K Battisby)

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

Dated 24 March 2010

DECISION SENT TO THE PARTIES On:

..... 25/3/10

AND ENTERED IN THE REGISTER

..... 

FOR SECRETARIAT