

The Gangmasters (Appeal) Regulations 2006

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

120/E/RV

UAB Top Job (“Top Job”)

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 the Appellant against the revocation by the GLA on 1 April 2011 of the Appellant's Gangmasters Licence in the name of UAB Aulina Consulting dated 28 August 2007 is dismissed. The revocation of that Licence will take effect on 26 August 2011.

Summary Statement of Reasons

Introduction

1. Top Job in the name of their predecessor business, Aulina Consulting, were granted a Gangmasters Licence on 28 August 2007. There were subsequent renewals. An inspection took place on 22 September 2010 which suggested that there was some non-compliance with Licensing Standards and a score of 68 may have been accrued, which could result in revocation of the Licence. That was done by letter dated 3 March 2011, with effect from 1 April 2011. On 23 March 2011, Top Job appealed which meant that their Licence remained valid pending determination of the appeal. The GLA responded to that appeal on 12 May 2011. Both parties agreed that the appeal should be determined on written representations.

2. I have had regard to all of those documents; an agreed bundle and subsequent correspondence. That bundle included a number of purported witness statements by workers which were not signed. They should have been. However, as no objection was taken to that by Top Job I have taken them at their face value.

3. Accordingly, I find the following facts on the basis of all of that material on the balance of probabilities.

Regulatory Framework and Law

4. The regulatory framework is now well established and I do not propose to rehearse it here. It was set out for example in an earlier appeal without an oral hearing by another Appointed Person on 26 April 2009 – 59/E/RV (PTR Ltd –v- GLA) – and which I happily adopt. No doubt a copy can be obtained if desired from the Secretariat.
5. The burden of proof of each alleged Licensing Standard breach is on the GLA on the balance of probabilities.
6. It should be noted that the Licensing Standards said by the GLA to have been breached by Top Job are the 2009 Licensing Standards.
7. My task is to decide whether or not on the balance of probabilities the GLA have proved that Top Job were in breach of all or any of the Licensing Standards alleged and, if so, whether or not revocation of their licence was a proportionate and appropriate decision to make. I set out each of the Standards alleged to have been breached, my findings of fact in relation to them and my conclusions.
8. I refer to documents in the bundle by reference to their respective tab numbers.

General Background

9. Top Job is a recruitment agency in Lithuania. By virtue of having applied for and obtained a Gangmasters Licence it may be inferred that they accept that their activity and business comes within the scope of the GLA Regulations.
10. Top Job supply what they call “clients” to four other Gangmasters who are labour providers in the United Kingdom against identified job vacancies in the agricultural and agricultural packaging industry.
11. Top Job have a standard form of contract (tab 29 of the bundle), the object of which is expressed to be “recruitment services in finding an employer in the United Kingdom” for the “client”.
12. Top Job’s obligations are described as being in two parts:-
 - 12.1 to provide free of charge services which includes finding the client an employer in the United Kingdom;
 - 12.2 to provide chargeable services, for example the translation of documents, preparation of paperwork, information and consultation to and with the client and others, including the organisation of transport to the United Kingdom and co-ordination of the journey.
13. Top Job have a standard form of contract, tab 30 for example, with a number of “employers” in the United Kingdom who are themselves registered or licensed Gangmasters and act as labour providers to labour users who become the end employer of the “clients”. That contract provides: “The employer shall provide with manpower resources from Lithuania in the United Kingdom according to the list of free

workplaces" (sic). I take it that that in effect means that Top Job will provide the UK labour provider with "clients" from Lithuania for identified job vacancies.

14. The transport for the clients from Lithuania to the United Kingdom is organised by Top Job through a Lithuanian transport company, Transpaule Ltd, under a standard contract (tab 21). Top Job is described as the customer and Transpaule as the carrier. The object of that agreement is for the carrier to provide the services of passenger transportation to foreign countries to the customer, to lease the vehicle; to provide driving services on the customer's transport. Their respective obligations are set out. The carrier "on the ordered date to transport passengers of the customer to foreign countries at a specified address" and the customer undertakes to organise trips to foreign countries and to pay the amount agreed for transport services according to the number of booked seats and the distance.

15. Transpaule has 8 seater minibuses for this purpose, although on some occasions when they did not have a vehicle available a vehicle registered in the name of Top Job's principal authority, Mrs Rita Biliukaite, was used driven by a Transpaule driver.

16. Those passenger clients paid Top Job for that transport, except in some cases they may have paid the driver direct.

17. It is clear to me that a number of "clients" of Top Job have paid money to them in various ways as described in their witness statements and interviews with GLA inspectors for finding them work placements in the UK and transport. Top Job has provided no documents showing any breakdown of the amounts paid by "clients" as between different chargeable services, other than in some instances for transport. They say that the reason for that is that the clients were paying for a programme, that is to say a package of services which was indivisible. However, it is clear to me that in the instances recorded in the bundle, the payments made by clients did include for Top Job finding them work placements in the United Kingdom, as well as transport. There is no evidence that I have seen that any of the other chargeable services have been provided. The kind of thing said by those witnesses is "money paid to Top Job as a guarantee of a permanent job", "a job finding fee and transport", "offered a job in Southport", although this couple arranged their own transport but nevertheless still paid a fee and "a job finding fee [and] a travel cost".

18. The journey is described as taking 1½ days or 36 hours during which the single driver only stopped twice to rest for 1½ hours on each occasion. That description of the journey is accepted by Top Job.

Licensing Standard 6.4

19. The relevant part of this Licensing Standard stipulates:
A vehicle used by the Licence Holder to transport workers must:

...

...

carry workers in a safe manner.

[The next part relates to vehicles with 9 or more passengers and is not relevant to this case.

A driver used to transport workers must:

...

...

comply with rules covering driver's hours and tachographs.

20. During the compliance inspection, Top Job sought to hide behind a separation of its role and that of Transpaule to say that this Standard did not apply to them as they did not provide transport, but Transpaule did. They also say that there is no requirement in Lithuanian law concerning driver rest times. They also say that their "clients" were not employees and therefore outside the jurisdiction of the GLA and the regulated sectors. Indeed, it is clear that the clients were not employees of Top Job, nor indeed were they workers as defined in both instances in the Employment Rights Act 1996.

21. However, in my view the relevant definition of worker for this purpose is that contained in the Gangmasters (Licensing) Act 2004. Sections 26, 3 and 4 and 5(3) which I summarise:

"Worker" means an individual who does work to which this Act applies.

The work to which this Act applies is agricultural work and processing or packaging any produce derived from agricultural work.

A person acts as a Gangmaster if he supplies a worker to do work to which this Act applies for another person,

The provisions of this Act apply where a person acts as a Gangmaster whether in the United Kingdom or elsewhere in relation to work to which this Act applies.

22. Accordingly, I find that Top Job's "clients" are workers as so defined supplied by them and that they used vehicles, albeit acquired under contract, to transport them.

23. Under this Licensing Standard, I find that those vehicles and drivers must comply with it.

24. The Public Passenger Vehicles Act 1981 defines a public service vehicle for these purposes as

[a vehicle not adapted to carry more than 8 passengers] used for carrying passengers for hire or reward at separate fares in the course of a business of carrying passengers.

25. "Separate fares" is when passengers pay individually rather than collectively. That may be direct or indirect and it makes no difference if the payment is made to a driver or in advance, for example via an agent. It is clear from what I have found above that these "clients" did pay separate fares thereby rendering even the 8 seater minibuses in which they travelled to be public service vehicles to which the driver's hours applied. Those are that, taken from the time of commencement of the journey, even if outside the United Kingdom, a driver must not drive for more than 10 hours per every 24 hours and must have a minimum break of 8.5 hours between each period of 10 hours driving.

Conclusions

26. I infer as a matter of general knowledge that driving for 36 hours with only two 90 minute breaks is not driving in a safe manner. Moreover, that breaches the driver's hours rules which, in themselves, are a standard against which safety may be judged.

27. Accordingly I find that Top Job did breach Licensing Standard 6.4. Under the scheme of Licensing Standards that carries 30 points from which revocation of the License may follow.

Licensing Standard 7.1

28. The relevant part of this Standard states:
A Licence holder must not charge a fee to a worker for any working finding services.

*"Work finding services" means services (whether by providing information or otherwise) provided by a licence holder:
to a person for the purpose of finding that person employment or seeking to find that person employment ...*

As I have indicated in my findings of fact above, "clients" of Top Job did pay fees for them to find them jobs in the United Kingdom.

Conclusion

29. Accordingly I find that Top Job did breach this Licensing Standard. According to the scheme of Licensing Standard, that too carries 30 points and may result in revocation of the licence.

Licensing Standard 7.4

30. This states:
Before first providing services, other than providing information, to a labour user, a licence holder must agree in writing the terms which will apply between the licence holder and labour user:

A number of details are then set out. A standard form of contract with employers to whom Top Job supplied workers omits some of that information. There was no ground of appeal put forward in relation to the GLA finding that Top Job had breached this Standard.

Conclusion

31. I find this Standard too was breached. However, a breach of this Standard only carries 8 points and would not on its own result in revocation of the licence.

Overall Conclusion

32. Top Job have breached two Licensing Standards both of which carry 30 points, making a total of 60 points, plus the further 8 for the final breach. Given the purpose of the regulation of Gangmasters is to protect workers from exploitation and harm, I find that revocation of the licence of Top Job in the circumstances I have described is a proportionate response to those breaches.

33. Accordingly their appeal against revocation of the licence is dismissed and the revocation will take effect on 26 August 2011.

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

Dated: 28 July 2011