

MINUTES OF THE EIGHTH GLA LABOUR PROVIDER GROUP MEETING – 3 OCTOBER 2008 HELD AT THE GANGMASTERS LICENSING AUTHORITY, NOTTINGHAM

Present:

Mark Boleat	Association of Labour Providers
David Camp	Association of Labour Providers
Jerry Camp	Association of Labour Providers
Mark Rye	DKM Labour
Julia Brereton	Sastak
Nick Graff	Smart Group
Marshall Evans	Recruitment & Employment Confederation
Joanne Young	Right4Staff
Michael Bayne	Scottish Machinery Ring Association
Terry Godfrey	
Darryl Dixon	Gangmasters Licensing Authority
Neil Court	Gangmasters Licensing Authority
Almut Gadow	Gangmasters Licensing Authority

Apologies

Anne Fairweather	Recruitment & Employment Confederation
Gus Ferenczy	Recruitment & Employment Confederation

1. Review of previous actions

AWO issues: It was agreed in telephone conversations between DC and DN/AG to put on hold the single issue Licensing News on AWO awaiting the outcome of two ongoing appeals cases which may inform the GLA's future position on AWO.

Single issue Licensing News to be published after appeals concluded.

DN

Application of LS 9.1 where not all workers have NI numbers: DWP advice handed out, which confirms that there is no obligation for LPs to request or keep on file evidence that workers have applied for NI numbers.

DD explained that NI numbers are jointly owned by the DWP and HMRC. HMRC is likely to share DWP position as above, but GLA has not received confirmation from HMRC.

NC: advice nevertheless highlights that workers should be encouraged to apply for NI numbers. It is good practice for employers to do so. DD: a worker's reluctance to apply for a NI number might be an indication that the worker does not have the right to work in the UK.

GLA confirmed that lack of evidence of workers' applications for NI numbers were no grounds to fail LS 9.1.

NMW and deductions for transport: DC confirmed that DN had already forwarded relevant HMRC advice.

GLA position on when to revoke with immediate effect: DD to formulate policy after responses to Licensing Standards consultation have been reviewed, and make available to the group. DD

Publication of ALC's on the GLA website: DD explained that GLA's Head of IT liaising with IBM to assess possible options.

In order to publish ALCs on the Public Register, IBM will need to enhance the licensing system functionality so that records with ALCs either showed a tick box on the register, or could identify the precise ALCs requiring improvement. The business rules proposed will enable either solution to be implemented avoiding the need for further enhancements in the future. GLA still discussing with IBM how to build both options into one functionality.

GLA to inform group of details of proposed process once these are known. DD

Information sheet: A draft of the information sheet has been circulated to the group. AG to email a copy to the group by end of 3 October. All to send comments to AG by 10 October. AG/
All

JC/ MB requested that the information sheet be made available to LPs at the time when planned inspections are scheduled, or at the beginning of an unannounced inspection. DD had no objections to doing so in principle but would discuss the procedure internally.

"Minimum charge rates": Action completed. All GLA communication is clear that rates are a minimum, not recommended rates.

Use of Licensing News: Action completed. The text of future Licensing News articles will make clear which articles contain guidance.

Testing written contracts at inspections: GLA solicitors will run a session on testing written contracts during October staff training.

WRS: AG confirmed that no LP had ever lost or been refused a licence because of WRS issues. Out of all refusals and revocations, 26 related to LPs who had at some point failed LS 10.1. In 20 of these cases, the failure under 10.1 was one factor in the refusal or revocation decision, rather than relating to a separate, earlier or later inspection.

In one of these cases reference was made to WRS. However, that labour provider would have failed under 10.1 even without reference to WRS as he had not checked ID for any UK and some foreign nationals, and with 78 points his licence would have been revoked even if 10.1 had not been failed.

Prioritising actions: priorities have been assigned to all actions in the updated action log after last meeting. GLA to continue in future minutes.

Update on supermarket protocol: DD confirmed that the protocol between GLA and

supermarkets is near completion. Supermarkets intend to informally consult their supply chains on draft protocol and are happy for GLA to consult labour providers. No drafts were available for stakeholders yet as all details had not yet been agreed, and consulting on drafts before both parties were happy was pointless.

MR asked how the GLA would proceed if no agreement could be reached. DD: GLA would consider agreements with individual retailers in that unlikely event.

MR expressed his concerns at the amount of influence the protocol might give supermarkets. Given the power supermarkets already hold in sector, relationship between retailers and GLA of paramount importance to labour providers. Other government departments had not handled cooperation with supermarkets well in the past. GLA had a unique role and should use its position wisely.

DD/ NC confirmed that supermarkets would not be given regulatory control, nor would they be able to direct the way in which the GLA uses its regulatory powers in any way. GLA would work with supermarkets where this helped to improve conditions for workers, but would be highlighting problems in supply chains, not be dictated to by retailers.

DC/ JC observed that no labour user or retailer had been named in GLA press releases recently, asked whether the GLA's policy of naming and shaming businesses had changed with supermarket protocol. DD/ AG confirmed it remains GLA policy to name and shame any retailer or labour provider found to have been complicit in, or turned a blind eye to, worker exploitation or abuse.

Unlicensed labour provider: At June meeting, in response to questions about the GLA's approach to unlicensed labour providers, GLA had offered to provide figures on the number of businesses who had applied for a licence after enforcement notice served. GLA is hoping to set up a mechanism to monitor as an indicator to measure outcomes. However, currently collating these figures would currently require a manual trawl through records. Agreed that GLA would not present those figures to group for now.

Retrospective charges: At June meeting, GLA had agreed to forward DEFRA legal advice for MB and GF. AG explained that this had not been possible as the GLA had never received a detailed, written legal opinion. At the time when the issue was first discussed, DN had requested legal advice from DEFRA, and received a single sentence response merely stating that retrospective charging was not an option. DN had then contacted DEFRA lawyers by telephone on several further occasions, and verbally obtained the advice set out in the board paper, circulated again to the group for reference. Hence GLA had no document summarising DEFRA's legal reasoning which could be made available. The board paper was the best summary available.

GLA to confirm to MB within one week whether it is possible to obtain a more detailed written legal opinion from DEFRA, in order that MB can write to secretary of state.

AG

DD suggested that the same end might be achieved by a different means. Once the GLA

receives further enforcement powers under Regulatory Enforcement and Sanctions Act, the GLA would effectively be able to levy an additional charge or fine in the form of a Macrory penalty.

MB reiterated that he had proposed an additional fee rather than a penalty. DD: result would be the same, LPs found to have acted without licence would have to pay an additional amount of money when applying, be that a fee, fine or penalty.

GLA Labour User Group

MB stated that the minutes from the labour user group had not been forwarded to the labour provider group. DC confirmed that AG had in fact forwarded the labour user group's action log to the group. Labour User Group meetings are not minuted in full.

GLA guidance consolidation

GLA still reviewing guidance and options for presenting consolidated guidance online and/or in a hard copy document.

Dual licence holding

DD confirmed that the GLA's approach was clear: where a connection between two licences or two licence holders could be identified, both would be reviewed if non-compliances found under one. Key criterion whether both businesses were managed in the same way (by same individuals, subject to same procedures, etc.)

Examples of cases in which licences have been revoked or refused on that basis include 'lifeboat licences', i.e. companies holding a licence under which they did not trade until a related company lost its licence, and new business applications in which the named Principal Authority did not understand how to run the business while an employee had previously lost his licence.

Connections between businesses have to be assessed case by case. It would be difficult to cover all conceivable scenarios in a policy.

MB felt this was a matter of asking the right questions of applicants to cover the business as well as the individual. DD confirmed that GLA in the process of reviewing the application form and intended to include further questions in this regard in the application form.

MB asked to see the form ASAP. DD agreed to make early draft without associated guidance available the group shortly.

AG

Low Pay Commission

Letter from Paul Whitehouse made available to group. AG reported that the DN, IL and PW had had a constructive meeting with Low Pay Commission. GLA shared the group's concerns re effects of accommodation offset and had presented these to Low Pay Commission. Asked to propose a workable alternative, GLA had suggested capping rent levels in line with fair rents.

MB pointed out that the Low Pay Commission had not created the accommodation offset rule. GLA noted the correction but felt it did not alter the message communicated in the letter.

AWO

DEFRA's Judith Marsden is producing updated guidance on the applicability of AWO, which DEFRA will make available once a first draft has been completed. AG to check timescale with Judith Marsden.

AG

2. Minuting meetings

In response to a request by the ALP, meetings will now be minuted in full. Actions arising from the meeting to be summarised, and priorities assigned as requested by MR on 27 June.

3. Lack of progress on previous agenda items

Agenda item withdrawn by the ALP

4. Supermarket protocol

See 1)

5. Overseas Labour Providers and SAWS agents

November 2006 Licensing News circulated for reminder. Position remains unchanged.

DC concerned that many overseas agents charge workers, and sought clarification how GLA inspects overseas agents.

DD confirmed that no licensed labour provider may charge workers. Where legislation in exporting countries permitted charging workers GLA can tackle this at the point where workers supplied into UK businesses. In addition, GLA was establishing links with Embassies/Authorities in exporting countries.

GLA now required all overseas labour providers to attend face-to-face interview in UK as part of application process. GLA recently refused an application from a Bulgarian labour provider, at the same time as issuing an enforcement notice against Bulgarian sister company, on the basis of information obtained in the UK. That company is now being investigated by Bulgarian labour inspectorate with whom the GLA has established closer cooperation.

JC suggested worker interviews should be an important part of monitoring overseas labour providers.

In TG's experience, esp. Polish and Lithuanian workers often expect to pay a fee before being given a job or accommodation, and would not even report that to GLA. To address these problems, GLA is working through embassies to disseminate its own information and information from BERR's 'Know before you go' campaign to potential recruits in exporting countries.

TG concerned about labour users who avoid GLA regulation by recruiting directly in exporting countries. DD aware of such cases but GLA often found that the labour users ultimately did not source and interview workers personally but relied on agents to facilitate recruitment. These agents were then supplying workers and licensable.

MB pointed out that Bulgarian workers were open to exploitation because of the legal status the Home Office had created for them: The fact that Bulgarians were entitled to reside and pay taxes but could not be lawfully employed in the UK created opportunity for their exploitation.

6. Posted workers

DD explained that, under European law, a company posting worker is required to have “significant activities” in home country. BERR does not police whether workers are genuinely posted or merely employed by Romanian or Bulgarian ‘post box companies’, as BERR feels doing so would be taking a narrow interpretation of the posted workers Directive. However, GLA was working with authorities in exporting countries, e.g. Bulgarian Labour Inspectorate who use a set of criteria to check if workers were genuinely posted.

HMRC regards the labour user as “end user”, responsible for tax purposes.

DC asked whether the GLA required employers to produce E101 certificates in relation to all posted workers, and whether reference numbers were acceptable. DD/NC would normally expect to see E101 certificates. While a certificate reference might be acceptable (if verifiable) a reference which related to an application for a certificate was not.

DC stated that he HMRC had advised differently. DC to forward advice to GLA.

DC

7. Explanation of GLA regional restructure

Map and organisational chart circulated from group members’ reference.

8. GLA media strategy

See 1)

9. Regulators’ Compliance Code

Board Paper on Hampton Implementation Review circulated for information.

DC highlighted that the Regulators’ Compliance Code would become statutory law and could be relied upon in appeals against the GLA. JC asked if appointed persons would be trained in the application of the Code. DD has raised the need to do so with Defra. As Defra run the secretariat, this would be for Defra to arrange. (After note – it is not clear that the code could be used against the GLA in relation to individual cases in appeals. This would need to be tested)

10. Natural Justice in Compliance Inspection process

DC feels GLA should give licence holders notice of inspection findings and opportunity to respond before revoking a licence without immediate effect. DC: revocation decisions can be disproportionate, based on incorrect or insufficient evidence, misfounded or otherwise incorrect without such a right to respond. Letting labour providers make representations before a final decision is made was a matter of natural justice, and would reduce the number of appeals and associated costs.

DD disagreed: DC's argument is not supported by appeal results. Revocation without immediate effect already allowed labour providers the opportunity to reply before any decision took effect. A pre-appeal would merely create an additional stage in the process. It would create additional work, effectively duplicating in pre-appeal the arguments both sides would present at appeal, and would lengthen the process unnecessarily. A pre-appeal stage would take up additional resource without noticeably changing outcomes.

DC stated that he was aware of a number of cases in which unfair decisions had been made, which could have been identified at a pre-appeal stage. DD had previously offered to review any cases in which DC felt this was the case; DC was not willing to identify any such cases.

DD: the history of appeals shows that there is no need to introduce additional stages into the process. Out of all 62 concluded appeals against GLA decisions, the GLA won 31 and lost 2. 26 appeals were withdrawn by labour provider, while GLA overturned its own decision before the appeal hearing on 3 occasions.

There were therefore very few cases, 5 in total, in which the GLA's decision had been unfounded. The majority of these, 3, had been identified and reversed before reaching the appeal hearing. There was no evidence to suggest that too many cases went to appeal unnecessarily because of GLA mistakes, or that labour providers were adversely affected by the absence of a pre-appeal right to reply.

MB considered operating a 'minded to revoke' stage at the very least good practice. DD: GLA decided that such a stage would serve a purpose in the context of application inspections, but would create unnecessary work and expense after compliance inspections. DD: The track record of GLA decision making has proven this approach right.

DD reiterated his offer to reconsider GLA position in light of any examples of unfair outcomes members of the group could provide. Without such evidence, he could only conclude that the current process was fair and efficient. JC was confident examples of such decisions would be found in upcoming appeals. MB will review the appropriateness of the GLA's approach in light of Regulators' Code of Conduct.

JC found detail of explanations provided in revocation letters still insufficient. NC/DD agreed that this was sometimes the case, but that licence holders could always contact the GLA for more information. GLA currently considering possible ways of providing more detailed feedback to labour providers. Aware of ALP's request that all inspection reports

should be made available to labour providers as a matter of course. DD/NC had some concerns about doing this in so far as inspectors will sometimes note concerns which the Licensing Team does not eventually treat as a non-compliance. GLA feels feedback to LPs should only cover non-compliances.

11 Feedback on GLA meeting with Low Pay Commission

See 1.

12. GLA position on AMW

GLA has written to all licence holders to highlight the fact that AMW is now 1p / hour higher than NMW. Letter circulated to group.

Initially, GLA inspectors will ask any labour providers found to have paid workers £5.73 / hour to pay workers the difference. In the longer term, this underpayment may come to be regarded as systematic and therefore a 2.8 failure.

13. ALP GLA Inspection Survey

DC intends to survey all labour providers after inspection. Currently reviewing draft questionnaire in light of comments received.

14. Payroll Companies supplying workers

Payroll companies that supply and/or directly employ workers are required to hold a gangmasters licence. Those merely providing payroll and accountancy services to a labour provider do not need to be licensed.

15. BERR Agency Standards Inspectorate's role where workers are supplied to the GLA regulated sector

Under carve-out in the Act, GLA has sole responsibility for inspecting labour providers who supply exclusively to the regulated sector.

There will sometimes be overlap where labour providers supply into regulated and other sectors. If BERR received a complaint which expressly related only to the regulated sector, BERR would be expected to refer the case to the GLA. Both BERR and GLA sometimes receive intelligence provided by sources who cannot or do not specify whether the LP supplies only into regulated sector. Where overlap is clear, BERR and GLA would normally consult beforehand, or inspect jointly.

16. Non-compliance with licensing standards remedied prior to inspections

GLA generally assesses compliance on the basis of a snapshot taken at the time of the compliance visit. E.g. if a labour provider had in the past failed to pay holiday pay but was now doing so and had paid all outstanding holiday pay by the time of the inspection this would not be a failure.

Only where past conduct was an indication of likely future conduct would this be treated as a failure, particularly re fit and proper (e.g. past assaults on workers would be grounds to revoke a licence even if no worker was assaulted on the date of the inspection).

- 17. GLA's information sharing with other government departments**
GLA has memoranda of understanding with various other government departments. GLA will share with these departments information which is relevant to them (e.g. tax with HMRC, AMW with Defra), at agreed intervals. Inspectors are expected to highlight all reported incidents, which are passed on to a single point of contact in the relevant department.
- 18. GLA's information sharing with Defra/ HMRC re: arrears**
See 17
- 19. Deductions / withholding of wages**
DC to circulate note.
- 20. AOB**
None

Actions arising

Action	Owner	Due date	Priority
Confirm whether GLA can obtain more detailed written legal advice on retrospective charging.	AG	10/10/08	High
Forward new draft application form to group	AG	3/11/08	High
Confirm timescale for Defra guidance on AWO	AG	9/01/09	Low
DC to forward HMRC advice on E101s to GLA	DC	9/01/09	Low
AG to forward draft information sheet to group 3/10/08, receive feedback by 10/10/08, finalise information sheet.	AG	9/01/09	High