

THE GANGMASTERS (APPEALS) REGULATIONS 2006

In the matter of an appeal against a decision made by the Gangmasters
Licensing Authority (Ref 7/E/RV)

Dynamic Workforce Limited
(Appellant)

V

The Gangmasters Licensing Authority
(Respondent)

Appointed Person

Mr David Perry

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

Decision

Upon consideration of the appeal documents, the reply and the accompanying papers lodged by the Appellant and the response to the appeal and accompanying papers lodged by the Gangmasters Licensing Authority and upon consideration of the written statements of Manjinder Thandi, Zyta Kieronska, Andrzej Dowlaszewicz, Saman Ahmad, Kinga Bober, Mark Heath, Jayne Garner and Bartholomiej Pabiniak it is the decision of the Appointed Person that the Appeal of Dynamic Workforce Limited is **dismissed** and this decision shall take effect on the date of its service on the parties.

Summary Statement of Reasons

- 1 This is an appeal against the decision of the Gangmasters Licensing Authority ("GLA") on the 7 March 2007 to revoke with immediate effect the licence granted to Dynamic Workforce Limited ("Dynamic").
- 2 As a result the expedited procedure as set out in reg. 20 of the Gangmasters (Appeals) Regulations 2006 ("the Appeals Regulations") applies, directions have been given by me and the parties have agreed the appeal will be dealt with without an oral hearing pursuant to reg. 15 of the the Appeals Regulations. The parties have supplied all documents they wish to rely upon and these have been considered by me in accordance with reg. 15(3) of the Appeals Regulations.

BACKGROUND

- 3 Dynamic was incorporated in January 2000 although the business had been operated for ten years prior to that by a sole trader. Since incorporation Dynamic has provided labour for a number of business including Bomfords Limited ("Bomfords") Whilst not all of Dynamic's clients were covered by the Gangmasters

Licensing Act 2004 (the Act) they all required Dynamic to hold a Gangmasters' licence.

- 4 Prior to the Act coming into force Dynamic were audited by the Temporary Labour Working Group (TLWG) in February 2005. The GLA recognised successful audits by TLWG and so when Dynamic subsequently applied for a licence it was not inspected by the GLA.
- 5 Dynamic was granted a GLA licence on the 6 July 2006 subject to three conditions as a result of matters which had been highlighted in the TLWG audit. These related to licence standards 6.2, 7.3 and 10.1. Two conditions (6.2 & 7.3) were subsequently removed on 12 September 2006. Dynamic had until 6 October 2006 to comply with the remaining condition. The papers are silent on, if and when, this was complied with.
- 6 On the 27 February 2007 the GLA carried out a visit to Bomford's premises at Atherston, Warwickshire. At the time of the inspection Dynamic engaged 119 workers and 8 full time employees.
- 7 During that visit the GLA interviewed a number of workers. Amongst other matters the workers complained that: -
 - 7.1 they had not been paid holiday pay;
 - 7.2 they had worked for a continuous period of several weeks without a day off;
 - 7.3 whilst on the way to work in a minibus that morning a lady they knew as "Zyta" briefed them on what they were to say if questioned by the GLA's officers and threatened they would lose their jobs if they did not comply; and
 - 7.4 they were unclear on what to do in the case of fire or accident.
- 8 Transcripts and/or notes of those meetings have not been provided but I have before me an unsigned witness statement of Mark Heath, one of the GLA staff, and a witness statement of Bartholomiej Pabiniak that relates to those meetings
- 9 Also on the 27 February the GLA wrote to Dynamic ("the Notification Letter") to require Dynamic to provide certain information for inspection including its complete payroll for 2006/07 and complete personnel files for each individual worker. Dynamic assert it received that letter the following day 28 February 2007.
- 10 An inspection of the information ("the Inspection") took place on the 1 March 2007 at Bomford's premises at Salford Priors, Worcestershire. During the Inspection GLA staff interviewed Mr Avtar Singh and Mr Manjinder Thandi (also known as Mannie Singh) of Dynamic. Transcripts and/or notes of that meeting have not been provided despite a note taker having been present. I have been provided with an unsigned witness statement of Jayne Garner, one of the GLA staff, and a signed witness statement of Manjinder Thandi that relates to that interview.
- 11 During that interview, amongst other matters discussed, Dynamic accepted that sometimes loans were made to workers, these were not recorded on the payroll, and there were no formal arrangements in place to recover the loans.

- 12 In addition during the Inspection the GLA assert that they discovered evidence showing:-
- 12.1 that there were no records that workers were paid annual leave and statutory sick pay;
 - 12.2 there were no controls in place to monitor that workers had been allowed to take statutory breaks;
 - 12.3 that vehicles with nine or more seats used to transport the workers were not registered as Public Service Vehicles and that drivers did not have the appropriate entitlement to drive; and
 - 12.4 that workers' contracts did not contain an undertaking to pay the worker regardless of whether Dynamic were paid and the contracts incorrectly set out the entitlement to paid holiday.
- 13 I am not referred to any correspondence or discussions after the 1 March 2007 between the GLA and Dynamic until the GLA wrote to Dynamic on the 7 March.
- 14 Following the Inspection the GLA assessed Dynamic against the Licensing Standards and a licensing standard score was generated. As a result it appears the case was passed for review to a licensing team and then on to the GLA's Head of Licensing. This process lead the GLA to write to Dynamic on the 7 March revoking Dynamic's licence with immediate effect ("the Revocation Letter").
- 15 The Licensing Standards that are published by the GLA summarise how the legal requirements that relate will be applied and assessed. They derive from the Gangmasters (Licensing Conditions) (no.2) Rules 2006, are known to all concerned and are clear. They adopt a points scoring method which categorises infringements according to the seriousness of the same. The more significant the failure the higher the score. As a result where an audit has taken place and infringements identified, a licence holder will be permitted to retain their licence with up to three "major" non compliances, subject to additional licence conditions being imposed. Only if the total score exceeds 30 points, that is, for the purposes of this appeal, 4 or more major non-compliances, will the licence be revoked. Accordingly, the scoring system has provisions built in excluding isolated non compliances unless they are "critical". Dynamic scored 78, made of one critical non-compliance (score 30) in relation to standard 3.1 and several other major non-compliances (score 8).
- 16 Whilst the GLA regime is regulatory, the purpose of the GLA, is "*to protect workers from exploitation*" and, as I am reminded by Dynamic, the GLA state they "*adopt a proportionate response when applying the licensing standards*" and that "*the GLA is concerned with identifying the more persistent and systematic exploitation of workers rather than concentrating on isolated non compliances*" (paragraphs 1 and 14 of the Licensing Standards, October 2006).

FINDINGS IN RELATION TO THE ALLEGED BREACH OF LICENSING STANDARDS

- 17 In relation to the breaches of the Licensing Standards I find as follows:-

Standard 2.9

- 18 In its grounds of appeal Dynamic states the GLA did not require records of holiday

or sick pay to be provided at the Inspection and thus Dynamic did not bring those documents, but it could have done so, had it been aware of this requirement. It also states that most of the workers concerned had only been employed for a matter of weeks and thus they had not taken holiday. Dynamic also state it has now provided the information required to remedy the default.

- 19 Dynamic say that the placing of the records on files and the obligation to provide the information on the day are different requirements, and they were not told of the allegations by the workers at the Inspection.
- 20 Pursuant to standard 2.9 holiday and sick pay records amongst other matters should have been recorded within the personnel files that were requested for the Inspection in the Notification Letter. The GLA assert no records were made available. Dynamic do not dispute that the information was not available on the day.
- 21 This was a breach of Standard 2.9.

Standard 3.1

- 22 The GLA treated this failure as "critical" and cited this as the sole criterion for revoking the licence with immediate effect.
- 23 Dynamic whilst it accepted it knew of "Zyta" asserts it did not know her personally and stated that she was not employed by it nor did she have any control over its workers. It is accepted by Dynamic that she refers workers to it. She has provided a witness statement and confirmed the above. It appears she also accepts she has relationships with a number of work providers in the locality.
- 24 Since the revocation of its licence Dynamic has provided clocking in records to show that Zyta could not have been where the witnesses say she was when the threats were allegedly made. Dynamic also raises allegations as to credibility as to one of the witnesses concerned in relation to other claims he made that Dynamic say are in conflict with the documentary evidence provided. Dynamic also provides witness statements showing some of the claims made by the witnesses interviewed by the GLA were not representative and it was a good gangmaster.
- 25 There is an admitted connection between "Zyta" and Dynamic in relation to referring workers and she also appears on Dynamic's vehicle insurance documents as being a driver although Dynamic say they allow a number of local groups to use their vehicles and that is the reason for this. The circumstances were such that the GLA should have been suspicious.
- 26 During the Inspection Dynamic was asked if anyone had warned the staff about the visit and it denied this. Dynamic says the GLA did not however provide the information I have now before me. Quite rightly, the GLA took these allegations extremely seriously and had to safeguard and protect the workers concerned, but the GLA failed to detail the substance of these allegations to Dynamic and to allow them an opportunity to comment.
- 27 From the documents I have seen there is nothing to suggest Dynamic was aware prior to the visit by the GLA to Bomfords on the 27 February that there was to be a

visit. The Inspection Notification was dated the 27 February and Dynamic state they did not receive it until the 28 February. I accept that as such. This in my view is inconsistent with Dynamic being aware of the impending visit. It therefore appears improbable from the information I have seen that Zyta would have known there was a need to brief the workers on the morning of the 27 February.

- 28 The evidence subsequently provided by Dynamic suggests Zyta was in Rugby from around 7.35 a.m. on the 27 February and not where the witnesses said she was. It is suggested Dynamic did not have an opportunity to provide this information at the time as a result of the failure of the GLA to raise the substance of this issue with Dynamic.
- 29 I form the view there is doubt over the evidence relating to these threats and am not satisfied based on the evidence before me the GLA should have acted in the way it did. Further given this issue was so fundamental, this non-compliance being categorised as "critical" and this was also used as the basis for revocation with immediate effect, the GLA should have put the substance of the allegations in detail to Dynamic, taking steps to properly protect the workers concerned, and have allowed Dynamic an opportunity to comment on these before acting as it did. I find they did not do so and that as at the 7 March 2007 the GLA should not have treated this as a critical failure and used it as the basis for revocation with immediate effect .

Standard 3.3

- 30 At the Inspection Dynamic admitted this standard had been breached by the making of loans without formal arrangements in place. In its appeal it stated that it had adopted measures and taken advice to deal with the matters raised.
- 31 Dynamic was in breach of this standard.

Standard 5.1

- 32 In the Revocation Letter the GLA assert that there were no controls in place to ensure workers had taken statutory breaks, they refer to workers at interview stating no days off had been taken over a 3 to 4 week period and this was a breach. Dynamic points out that the requirement is that workers be **allowed** to take statutory breaks and that in the absence of evidence to show that the workers were not **permitted** to do so there is no evidence of breach. Dynamic suggest that adopting a 14-day period for the purposes of reg.11 Working Time Regulations 1998 that the work sheets provided by it show that breaks were taken [pages 62-68 and 74-76 of exhibit MT1].
- 33 I find there is no evidence to suggest that workers were **not allowed** to take breaks and there was no breach of this standard.

Standard 6.2

- 34 A condition had previously been imposed on Dynamic in relation to this standard which at the time of the matters concerning me had been removed.
- 35 On the visit on the 27 February the GLA found that workers were unaware of what to do in the event of accident or fire. Dynamic say that responsibility for health and

safety training was the responsibility of Bomfords. However Dynamic under the licensing standard had a duty to cooperate with them to ensure this was done.

- 36 Co-operation implies at least a duty on Dynamic to check these requirements had been fulfilled by Bomfords. Whilst Dynamic has provided evidence that manual lifting and induction training manuals were provided to one worker, it appears it believed this to be the extent of its liability. As that worker's grasp of English was such that Dynamic asked if he had been interviewed through an interpreter I am not satisfied that Dynamic complied with this obligation and thus conclude there was a breach of this standard.

Standard 6.11

- 37 This standard requires that vehicles with nine or more seats are registered as Public Service Vehicles and that drivers should have the appropriate entitlement to drive. Dynamic accepts these vehicles should have been registered and they were not. It does state that alternative arrangements have now been put in place.
- 38 There was a failure to comply with this standard.

Standard 7.3

- 39 It is tacitly accepted by the Appellant that this was not complied with but that it had instructed external solicitors in June 2005 to review the terms of employment and this has also now been remedied.
- 40 There was a breach of this standard.

CONCLUSIONS

- 41 Notwithstanding my findings above, Dynamic exceeds the score permitted to allow the licence to continue even with conditions.
- 42 Many of these standards require nothing more than compliance with current legal requirements and thus they are basic. In this case I have found the GLA were right to hold there were 5 major breaches at the date the licence was revoked. In my view these are not isolated occurrences indeed one relates to a breach of a condition imposed when the licence was first granted and which was subsequently removed.
- 43 Whilst Dynamic has admitted many of the breaches and endeavoured to put in place means of remedying the problems, states that revocation is not a proportionate response and points out the effects revocation has had, the GLA does not consider Dynamic's retrospective action relevant. The proper method for dealing with this they imply is for Dynamic to reapply for a licence. This would then allow the GLA to assess if Dynamic now meets the Licensing Standards, something I cannot do.
- 44 On the issue of a proportionate response I find the scoring system for the reasons set out in paragraph 15 above meets the objectives of paragraph 14 of the Licensing Standards.
- 45 Revocation is a draconian sanction and thus should only be used after careful

consideration, particularly where a licence is revoked with immediate effect.

- ~~46~~ Notwithstanding this and taking into account the published points scoring criteria adopted by the GLA, its review of the scores, and the nature and extent of the breaches as set out in my findings above, I am satisfied that the scores were applied in accordance with the published criteria and the Licensing Standards. I therefore conclude that the GLA were correct to revoke Dynamic's licence as at the 7 March 2007.
- 47 The GLA in their response to the appeal set out the criteria they adopt for a licence to be revoked with immediate effect. These refer to where "*there is an immediate threat to the safety of workers*". Given my finding in relation to standard 3.1 the question arises if this should have been done with immediate effect. Whilst there are safety issues relating to the breach of standards 6.2 and 6.11 these are not raised in support of the immediate revocation. The only reason given is the breach of standard 3.1.
- 48 I have the power to either allow or dismiss this appeal by virtue of reg.21(1) of the Appeals Regulations. Notwithstanding my comments in the preceding paragraph, given my limited powers and for the reasons I set out above I find that the GLA were entitled to revoke Dynamic's licence on the 7 March.
- 49 The result of Dynamic's licence being revoked with immediate effect was that Dynamic could not continue to trade until this appeal was dealt with. As I have dismissed the appeal and as I have no power to reinstate Dynamic's licence, even if I wished to do so, the position remains that Dynamic are not entitled to trade.
- 50 There is thus no merit in ordering that this decision do take effect at a date sometime in the future for instance to allow time for a new application to be made by Dynamic. Accordingly this decision shall take effect on the date of service of it on the parties.

Signed: 

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

Dated : 14 May 2007

