

GANGMASTERS (LICENSING ACT) 2004

THE GANGMASTERS (APPEALS) REGULATIONS (NORTHERN IRELAND) 2006

APPEAL REF NO: 818/17 GLA

APPELLANT: A&K Hygiene Ltd

RESPONDENT: Gangmasters Licensing Authority

DECISION

The decision of the appointed person is that the appellant's appeal, pursuant to the Gangmasters (Appeals) Regulations (Northern Ireland) 2006, is dismissed.

APPOINTED PERSON: Employment Judge Murray

REPRESENTATION OF PARTIES:

APPELLANT BY: Mr C A Tabacaru, Managing Director and Principal Authority of the appellant company.

RESPONDENT BY: Ms Baggelly, Appeals Manager, of The Gangmasters Licensing Authority.

The appeal

1. This an appeal against a decision of the Gangmasters Licensing Authority ('GLA') dated 19 October 2016 whereby the GLA refused the appellant a licence to act as a licensed gangmaster.

Sources of Evidence

2. I had written statements and oral evidence from Mr Tabacaru, Principal Authority of the appellant, together with written and oral evidence from Mr Hooper and

Ms Baughan of GLA. I had regard to that evidence and to the documentation, the legislation and the legal authorities in order to reach my decision.

Case-management

3. The appellant lodged an appeal on 20 October 2016 in the Manchester Office of the GLA. The appeal was thereafter processed by that office until an Employment Judge directed that the proper forum for the appeal was the tribunal in Northern Ireland under the Northern Ireland Appeal Regulations.
4. The papers were then transferred to the Gangmasters Appeals Secretariat in Northern Ireland. As, on the face of it, the proceedings had been lodged late, I granted an extension of time to enable the appeal and the reply to be in time as the parties had by correspondence consented to this.
5. The appeal was case-managed and various directions were given at a Case Management Discussion (CMD). A copy of the relevant CMD Record of Proceedings is attached to this decision.
6. A few days before the hearing date, the GLA indicated that the correct title of the appellant should be the name of the limited company rather than the name of the principal authority ('PA'). I indicated, in advance of the hearing, that this matter would be dealt with at the outset of the hearing. At the outset of the hearing both sides agreed that A&K Hygiene Ltd should be substituted as the appellant for Catalin Andrei Tabacaru. I therefore ordered the substitution in accordance with my powers under the Rules. The appellant in these proceedings is therefore A&K Hygiene Ltd. The Principal Authority of the appellant at all relevant times has been Mr Tabacaru.
7. The parties agreed that the 45-minute recording of a telephone call between Mr Tabacaru and Ms Baughan of GLA did not need to be played in tribunal. I listened to the recording in full prior to the hearing and was satisfied that the extracts outlined in Ms Baughan's statement were accurate and were the only relevant extracts for this appeal.
8. The thrust of the appellant's dealings on the phone with the GLA were that his application was taking too long, that he was being treated differently to others who had made applications, that he was not allowed to speak to the person making the decision and was not allowed to attend in person at their office. I explained that any issues about delay in the application or complaints about the way the GLA staff dealt with the appellant on the phone were not relevant to this appeal.

The legal framework

9. The GLA has a discretion to grant a Gangmasters licence if it thinks fit. The relevant legislative framework (which covers the whole of the UK) is set out in the following:-
 - (1) Gangmasters (Licensing) Act 2004
 - (2) The Gangmasters (Licensing Conditions) Rules 2009

(3) The Gangmasters (Licensing Authority) Regulations 2015

10. There is provision for appeal against the refusal of a licence and there are separate sets of Regulations to deal with the appeal process. The relevant Regulations for the appeal in this are those covering Northern Ireland, namely The Gangmasters (Appeals) Regulations (Northern Ireland) 2006 ('the Appeal Regulations').
11. At Regulation 5 of the Appeal Regulations it is provided that an applicant may appeal against the GLA's decision to refuse the application for a licence. At Regulation 21 it is provided that the appointed person shall allow or dismiss the appeal.
12. The respondent's representative provided a skeleton argument together with copies of the following authorities:-
 - (1) Sarah Jane Hague (One of Her Majesty's Inspectors of Health and Safety) v Rotary Yorkshire Limited [2015] EWCA Civ 696;
 - (2) The Queen on the application of Hope and Glory Public House Ltd v City of Westminster Magistrates' Court [2009] EWHC 1966 (Admin);
 - (3) FS Commercial Limited v Gangmasters Licensing Authority [Appeal Numbers: 49/E/R and 60/E/R], an appeal decision issued in Great Britain in 2012;
 - (4) Regina (Hope and Glory Public House Ltd) v City of Westminster Magistrates' Court [2011] EWCA Civ 31.
13. From the authorities it is clear that there has been some debate about, firstly, the nature of this appeal hearing and, secondly, about the burden of proof in these cases.
14. The burden of proof point relates, in part, to which side gives evidence first. On this case-management issue I decided, without objection from either side, that the GLA witnesses should give evidence first.
15. The debate about the nature of the hearing relates to whether the appeal is in the nature of a re-hearing, a review or is a combination of both approaches. Given my factual findings and conclusions set out below, there is no requirement for a lengthy discussion of the legal arguments on both sides as regards the nature of the hearing nor as regards the burden of proof.
16. The closest analogous proceedings are those set out in the *Hope and Glory Public House* case which went to the High Court and Court of Appeal in 2011. That concerned an appeal in relation to restrictions placed on a liquor and entertainment licence by a Local Authority licensing committee.

17. In summary, I agree with the respondent's representative's submission in this appeal that the import of the *Hope and Glory* decision and its effect in these proceedings is that:-
- (1) An appeal of this nature is in the nature of a re-hearing.
 - (2) That the tribunal must have regard to the policy of the GLA.
 - (3) That the tribunal must pay careful attention to the reasons given by the GLA.
 - (4) That the tribunal must apply the relevant policy as if they were 'standing in the shoes' of the GLA.
 - (5) That the nature of the appeal is a combination of a review and re-hearing in that evidence can be heard which goes beyond the evidence that was before the decision-maker.
 - (6) The test in this appeal is whether the GLA's decision was plainly a wrongful exercise of its discretion.
18. In the *Hope and Glory* case the principle outlined is that the burden is on the appellant to persuade the Court that it should reverse the Order under appeal. To be clear, I make no final decision on that in the current appeal, given that, whichever party bears the burden, in the circumstances of this case, the result would have been the same, given the clear findings in this case.
19. The standard of proof is the civil standard, that is the balance of probabilities.

Findings of fact and conclusions

GLA documents

20. There are three documents which set out the GLA licensing procedure and policy as follows:-
- (1) Licensing standards
 - (2) Application form guidance
 - (3) Licensing decision policy
21. In summary, these documents outline the considerations which the GLA will take into account in deciding whether or not to exercise its discretion to grant a licence. A points system is set out whereby the eight 'Licensing Standards' are assigned a specific number of points and are each designated as 'critical' or otherwise.
22. The licensing standard in issue in this case is Licensing Standard 1 which is designated as critical and is entitled 'Fit and Proper Test'. The relevant parts of that standard (which runs to two and a half pages) are as follows:-

"The factors the GLA will consider include, but are not limited to, whether the Principal Authority, directors or company officers (where the licence holder is a company), partners (where the licence holder is an unincorporated association) and any person named or otherwise specified in the licence has:

- been convicted of any criminal convictions unspent under the Rehabilitation of Offenders Act 1974. Particular consideration will be given to offences of dishonesty, fraud, violence, forced labour, human trafficking, carrying offensive weapons, firearms offences, intimidation, blackmail or harassment.*
- not been candid and truthful in all their dealings with any regulatory body and they have not 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. This includes deliberately under-declaring turnover, or ...*

The GLA treats each case individual, taking account of the seriousness of, and circumstances surrounding the matter in question. The GLA will consider the explanation offered by the person to whom it relates, the relevance of any conviction, rehabilitation and evidence that the matter will not reoccur."

23. Relevant parts of the application form states as follows:-

- "(1) This form must be signed by the Principal Authority to confirm the accuracy of the information provided.*
- (2) Please read the GLA Licence Application Form Guidance before completing this form.*
- (3) If you need any help completing this form, please contact us on 0345 602 5020, or look at our website : www.gla.gov.uk*
- (4) Have you any unspent criminal convictions, or alternative sanctions or penalties for proven offences? If yes, please state details below."*

24. The Licensing Policy document makes it clear that the GLA will make enquiries, including enquiries from the police and enforcement authorities in the United Kingdom and other countries.

25. In the Application Form Guidance the extent of enquiries to be undertaken by the GLA is set out as follows:-

"Section H : declaration and consent

The information you provide will be used to assess your application. It may be checked with other Government Departments and authorities (such as Local Authorities) with the legal right to access information held by the GLA. It may also be checked with financial and other organisations involved in crime prevention for the purpose of preventing and detecting crime (including

the police, the Audit Commission and any other body with relevant audit powers). This includes overseas equivalents of UK government departments and enforcement bodies.

Section H requires the Principal Authority to sign and date the form to confirm that they:

- Understand and accept that the information contained in the application form may also be shared and checked with other Government Departments and their agencies.*
- Declare that the information given in the application form and any supporting material is correct to the best of your knowledge and belief and that you have not deliberately omitted any necessary material or made an incorrect statement. You understand that if deliberate omissions or incorrect statements have been made your application may be refused without further consideration. You further understand that deliberate omissions or incorrect statements may be liable to prosecution and/or sanction."*

26. Mr Tabacaru completed the form and at question E10 ticked the box stating that he had no unspent convictions. He did this in the online form and, later, in the hard copy form which was sent to him for signature, he did not change that answer.
27. It came to the GLA's attention that the appellant had a criminal record in his country of origin, namely Romania. There then ensued correspondence whereby the GLA asked Mr Tabacaru if his answers to questions were correct and this culminated with a specific request in the letter dated 4 October 2016 as to whether his answer to question E10 was accurate.
28. In that letter Mr Tabacaru was also given details of the criminal record which had been communicated to the GLA from the UK Central Authority for the exchange of criminal records.
29. Mr Tabacaru's criminal record was that he had been convicted of theft on 25 April 2005 and the sanction was imprisonment for four years. Further, the record showed that Mr Tabacaru was convicted of two further offences in 2006, namely falsification of documents and fraud, including swindling, and he was ultimately sentenced on appeal to five years' imprisonment.
30. In the letter dated 4 October 2016 the GLA asked Mr Tabacaru if the criminal record revealed by the Romanian Authorities was correct and asked for an explanation as to why there was a previous failure to declare this information to the GLA. It was also made clear in that letter that the information might affect the status of the application.
31. I find that Mr Tabacaru was, at all relevant times, under no illusions as to the importance of this information.
32. Mr Tabacaru's explanation to me for not revealing it before was that he believed that his criminal record in Romania had been 'wiped clean' because of the lapse of time. He also however made the point that he should have been given a chance by

the GLA to apply to Romania for his record to be wiped clean. This was a contradictory position for the appellant to adopt and it tainted his evidence for me.

33. I find it inexplicable as to why Mr Tabacaru did not say during his many contacts with the GLA that he had convictions in Romania but that he did not feel they were relevant. I also find it inexplicable that he did not refer at any point to the fact (alleged by him) that he could apply for them to be cleared from his record.
34. Mr Tabacaru made the point that at the relevant period when he was filling in forms and dealing with correspondence, his infant son was very ill in hospital. Mr Tabacaru was, however, during this period, able to deal with correspondence from the GLA and to telephone the GLA on a number of occasions to discuss several matters at length and in robust terms. At no point in those communications did Mr Tabacaru ever reveal his convictions before the point when he was confronted in the letter of 4 October 2016 with the detailed list of his convictions that had been obtained by GLA from the relevant authorities.
35. At one point Mr Tabacaru himself sought a copy of his criminal record from the Romanian Consulate in Edinburgh. Mr Tabacaru provided the Consulate's response to the GLA by translating it from the Romanian into English. What he did not provide at that point was a translation of his e-mail requesting the information. This was translated on the GLA's behalf and shows that Mr Tabacaru only asked for his criminal record from the Romanian Authorities for the previous five years. As these were the years that he lived in Northern Ireland, the response from the Romanian authorities would have shown that he had no record in that period.
36. Mr Tabacaru gave no good reason for his insistence that the only period in issue was the five years before his application. In evidence to me he stated that the five years was mentioned on the online 'gateway' process before he registered with the GLA. The first time he raised this was in the appeal hearing and it was never raised at any point before in either his dealings with GLA, in the grounds of appeal nor in his statement for the appeal. For this reason, I reject that account and find that Mr Tabacaru had no grounds for believing that his criminal record for the five years before his application was the only period in issue. Indeed his insistence on this point, with no supporting evidence, tainted his evidence generally for me. I also accept Mr Hooper's evidence that the gateway process does not stipulate a five year period.
37. Mr Tabacaru alleged that at no point was he sent nor did he see the GLA Licensing Guidelines for the application form nor their Licensing Policy document.
38. Mr Tabacaru chose not to look at the guidance documents and stated that he did not receive them despite reference to them in the GLA letter. I find that Mr Tabacaru was not candid in his evidence on this point. On Mr Tabacaru's own account he did not seek out the guidance. This is another reason for finding that the appellant did not act in a fit and proper manner as the GLA needs to be confident that a gangmaster holding a licence will ensure that he or she is conversant with any relevant legislation or guidelines by taking the trouble to seek them out.

39. The GLA used the definitions in the Rehabilitation of Offenders Act 1974 ('ROA') to determine whether or not convictions were spent for their purposes. The GLA recognised that the ROA applied only in England and Wales.
40. Mr Hooper was clear in his evidence, which I accept, that the England and Wales standard and legislation was used in decision-making for the following principal reasons:-
- (1) To ensure consistency across all three jurisdictions in the UK given that the differing jurisdictions had slightly different rehabilitation periods.
 - (2) That the rehabilitation periods in the ROA in England and Wales were the most generous of the periods, in that there was a shorter period for rehabilitation than that set out in the Northern Ireland legislation, for example.
 - (3) Mr Hooper also made reference to guidance by NIACRO in Northern Ireland which states that recruiters can use the guidelines in the ROA.
41. The definition of 'spent conviction' used by the GLA was that set out in the ROA. This is something they are entitled to do. It is clear that the convictions on Mr Tabacaru's record were not spent in accordance with that definition. Mr Tabacaru's point about applying to Romania to have his record wiped clean is therefore not relevant to this appeal, even aside from the fact that it was never raised at any point prior to the appeal hearing.
42. I am satisfied that Mr Hooper, the decision-maker, was not wrong to find that Mr Tabacaru had not been candid and truthful in his dealing with the GLA. I am further persuaded that Mr Hooper was not wrong in his assessment that the nature of the convictions on Mr Tabacaru's record was such that the fit and proper test was not satisfied. My reasons for so finding are principally as follows:-
- (1) The appellant persisted for a lengthy period in non-disclosure of convictions and I do not accept his explanation for failure to disclose the convictions earlier.
 - (2) At all points it should have been clear to Mr Tabacaru that it was very important to be accurate in his information. He was either deliberately providing inaccurate information or he was unreasonably lax about ensuring that he gave full and candid responses to the repeated enquiries of the GLA. On either view he was not a fit and proper person to hold a licence.
 - (3) I concur with the conclusion of Mr Hooper that Mr Tabacaru's actions at various points (particularly his insistence on the five-year period) indicated that he was trying to cover up the fact that he had a criminal record in Romania.
 - (4) The recording of a 45-minute telephone conversation with Ms Baughan on 3 October 2016 is very telling in that Mr Tabacaru

was insistent that he has no criminal convictions '*in his life*' at all. That statement was patently untrue. Mr Hooper was therefore entitled to conclude that Mr Tabacaru was not being candid and truthful in his dealings with the GLA.

43. The appellant failed on Licensing Standard 1. The decision-maker was Mr Hooper and he concluded that the appellant had not acted in a fit and proper manner, in that Mr Tabacaru, as PA, had, firstly, made false statements in the application form and subsequent process; and, secondly, he failed to be candid and truthful in all his dealings with the GLA, both in relation to the application form and in his subsequent dealings.
44. The appellant therefore failed on two points under Licensing Standard 1. Failure on either one of those points would have been enough to deny the appellant a licence, given the critical nature of that standard. In essence, it is of fundamental importance that the Licensing Authority is confident that it can rely on the transparency and diligence of the PA of a licence-holder both at the time of application for the licence and going forward if a licence is granted.
45. In assessing this appeal I bear in the mind the rationale for the licensing regime which is to reduce the risk of exploitation of vulnerable workers and to ensure that licence-holders are conversant with, and comply with, their legal obligations to their workers and to the authorities.
46. The Licensing Standards make clear that criminal convictions in relation to the honesty of the PA are of particular concern and, in this case, Mr Tabacaru's behaviour and reluctance to provide the information justifiably had a direct bearing on the assessment of his honesty and candour at the time of application for the licence.
47. I find that Mr Hooper acted proportionately in assessing whether the PA met the licensing standard and further that he acted reasonably and proportionately in the exercise of his discretion.

Summary

48. The decision to refuse a licence was a reasonable exercise of the GLA discretion as Mr Tabacaru had unspent convictions for dishonesty and his honesty and candour were in issue. In addition, the diligence of Mr Tabacaru as principal authority was clearly in issue.
49. Even taking Mr Tabacaru's case at its height and accepting his account, he made an application for a licence without looking any guidance or knowing what the standards were and without seeking advice on what an unspent conviction meant. He decided, without any basis, that convictions in the five years before the application were the only ones that were relevant and then set about trying to obtain that from the Romanian Consulate. To be clear I do not accept Mr Tabacaru's account and I find he did this in an effort to show he had a clean record.
50. If the burden of proof is on the appellant, I find that the appellant has not discharged that burden as I find, on a balance of probabilities, that the decision reached by Mr Hooper was not wrong. Standing in the shoes of the decision-maker I also

confirm that that decision was a reasonable exercise of discretion based on the information received, the assessment of the information provided, and the assessment of Mr Tabacaru's dealings with the GLA.

51. If the burden of proof was on the GLA to justify its decision, I find that they have discharged that burden by showing that they reasonably and proportionately assessed the information gathered and the explanations given by Mr Tabacaru as Principal Authority for his failure to provide the details of his criminal record earlier. The decision reached was a reasonable exercise of the GLA discretion, particularly given the rationale for the licensing regime. The decision-maker fairly and proportionately applied the licensing standards and the relevant guidelines.
52. The appellant's appeal is therefore dismissed.

Appointed person  _____
(Employment Judge of the Industrial Tribunals)

Date and place of hearing: 2 August 2017, Belfast

Date decision recorded in register and issued to parties: 11 SEP 2017



for the Secretariat