

Camberley House 1 Portesbery Road Camberley, Surrey GU15 3SZ Tel: 01276 509306 Fax: 01276 761076

Email: info@labourproviders.org.uk Website: www.labourproviders.org.uk

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# GOVERNMENT REVIEW OF REGULATORY APPEALS MECHANISMS SUBMISSION BY THE ASSOCIATION OF LABOUR PROVIDERS

### **Contacts**

David Camp, Director, Tel: 07855 570007, E-mail: David@alliancehr.co.uk

#### Introduction

The Government, as part of its agenda to tackle red tape is reviewing regulatory appeals mechanisms to identify the potential to improve existing mechanisms and has asked for submissions to be sent by 31<sup>st</sup> January.

An appeals mechanism in the context of this review includes routes by which a business can:

- challenge a decision made by a regulator and/or
- seek to understand better the reasoning behind a decision and/or
- seek reassurance that the decision a regulator has made is consistent with other judgments being made in similar circumstances.

Such routes can be formal processes up to and including a legal route or a more informal process, such as a way to seek a second opinion on a decision from within a regulator or from an independent third party.

The Association of Labour Providers (ALP) represents over 270 labour providers, all of which are subject to the statutory licensing of the Gangmasters Licensing Authority (GLA). The following submission relates to the GLA appeals mechanism.

## Proposals to improve the GLA Regulatory Appeals Mechanism

The GLA is a regulator with significant powers that can seriously impact the trading situation of a labour provider, including a bar on supplying to the regulated sector.

It is in the interest of labour providers, the GLA, the Government and the taxpayer to reduce the high number of appeals submitted through the Tribunals and to seek alternative, less expensive and time consuming routes that offer means of informal, internal dispute resolution, particularly in less serious cases.

Below follows a number of recommendations as to how this could be achieved.

The current GLA process may be summarised as:

- 1. Compliance / Application Inspection by Inspector against the GLA Licensing Standards
- 2. Inspection Report submitted by Inspector to GLA Licensing team
- 3. Licensing team decision
- 4. Right of appeal through the Courts

The GLA appeals process for England, Scotland and Wales is run by Her Majesty's Courts and Tribunal Service (HMCTS) and in Northern Ireland the appeals process is run by the Office of the Industrial Tribunals and the Fair Employment Tribunal (OITFET). There is no fee to lodge an appeal against a decision of the GLA, but each party is responsible for their own costs in preparing for and pursuing and responding to the appeal. There is no provision for costs to be awarded under The (Gangmasters Appeals) Regulations 2006.

Until May 2012 the inspected labour provider was not informed of the allegations against him and had no opportunity to respond to the GLA evidence prior to a decision being made by the GLA Licensing team. This was contrary to the principle of natural justice of "Audi alteram partem" in that no person should be judged without a fair hearing in which each party is given the opportunity to respond to the evidence against them. This process was also contrary to the <a href="Regulators">Regulators</a>'
<a href="Compliance Code">Compliance Code</a> at 8.2 which states that: "When considering formal enforcement action, regulators should, where appropriate, discuss the circumstances with those suspected of a breach and take these into account when deciding on the best approach."

The GLA has since modified its position stating that:

"The intent of the GLA at inspections is that there should be "no surprises for the inspected labour provider when the Licensing Decision letter is issued. Therefore, GLA Inspectors will ensure that the Principal Authority is aware of issues that may indicate that the requirements of the standards are not being met.

During the inspection the Inspectors will identify the issues that they have found and may invite the licence holder to comment and present any evidence. In practice this will normally be done as each particular area of the standards is reviewed as would be expected as good practice.

However, GLA Inspectors may also decide that it is appropriate to put a summary of allegations to the Principal Authority or seek comments on matters uncovered during the inspection, at the end of the inspection."

This is an improvement on the former situation but does not go far enough.

Recommendation 1 - GLA Inspectors should always hold a "summary of allegations" wrap up at the end of an inspection at which they highlight issues uncovered which may be potential breaches of the licensing standards. This allows the labour provider to offer a full response on these issues and present all relevant evidence prior to a decision being taken. This reduces the scope for error and misunderstanding and reduces the number of cases that will go to appeal.

Having concluded the inspection on a labour provider, the GLA Inspector currently compiles an Inspection Report which is submitted to the GLA Licensing Team for a decision. This Inspection Report is regarded by the GLA as a confidential document and is not provided to the labour provider. Requests to view the Inspection Report are refused.

Recommendation 2 – Prior to submitting the Inspection Report to the GLA Licensing Team, the GLA Inspector should provide a copy of the written report to the labour provider and allow a period of two weeks for the labour provider to respond in writing. This again reduces the scope for error and misunderstanding and reduces the number of cases that will go to formal appeal. At this stage the ALP could support its members on a without prejudice basis in resolving any points of difference between the GLA and the labour provider.

A similar process already exists where a new licence application is refused. This is called a 'pre appeal' and the labour provider can provide further information to correct any factual errors within 10 days. It is proposed that this approach is extended to compliance inspections on existing licence holders.

N.B. In accordance with the Regulators' Compliance Code 8.2 recommendations 1 and 2 above would not apply where immediate action is required to prevent or respond to a serious breach or where to do so is likely to defeat the purpose of the proposed enforcement action.

On receipt of the Inspection Report the GLA Licensing team make a decision on the labour provider's compliance or otherwise with the GLA Licensing Standards with the outcome being one of the following:

- Full compliance with Licensing Standards
- Additional Licence Conditions imposed
- Revocation without immediate effect
- Revocation with immediate effect

Recommendation 3 – The decision should be issued within four weeks of an inspection visit (or end of response period if Recommendation 2 is adopted) or an interim notification provided. It is not acceptable for the GLA to have provided no response to a labour provider, as regularly happens, for many months after an inspection visit.

Following the issue of the Licensing Team decision there is no formalised process to question/challenge or otherwise respond on the decision other than to appeal the finding through the Tribunal Service where cases are heard by an Appointed Person in a format that resembles an Employment Tribunal. This is costly and time consuming for both the GLA and the labour provider.

Recommendation 4 – There should be a period of four weeks whereby the labour provider can submit evidence and enter into discussions with the GLA regarding the findings of the case. This again reduces the scope for error and misunderstanding and reduces the number of cases that will go to formal appeal. Again the ALP could support its members on a without prejudice basis in resolving any points of difference between the GLA and the labour provider.

The first key principle of natural justice is "Nemo iudex in causa sua", meaning that no person can judge a case in which they have an interest. The GLA should therefore consider whether this internal process above should be heard by a separate function to the Licensing Team.

Following the above alternative internal dispute resolution mechanisms, the formal appeal channels as currently exist would then be available.

As part of a current consultation, the GLA is to consider a number of changes to increase transparency regarding the status of a GLA licence holder. Specifically:

- Enhancing the public register to detail any additional licence conditions (ALCs) on a licence
- Identifying whether a particular licence is subject to appeal
- Identifying on the public register the outcome of an appeal, for a limited time period
- Amending the active check process to notify when there are changes to a licence status as detailed above

This information would be publicly available to competitors and clients. The GLA believe that to publish such information would create a pressure to raise the level of compliance within the industry with the labour provider more likely proactively to resolve, and correct, the identified areas of non-compliance. The GLA also considers that such a change would provide greater openness and information for labour users and that they will want to contract with fully compliant labour providers, and those that are non-compliant will therefore work towards compliance and the removal of the additional licence conditions in order to be able to compete on a level playing field. Where a licence was subject to revocation proceedings labour users would be able to make contractual decisions with the full knowledge of the potential impacts and risks to their business and make contingency plans to avoid disruption.

This proposal presents risks to both the GLA and labour providers. Where such information is displayed on the GLA Public Register it is to be expected that in a significant number of cases, as the GLA recognises in its consultation, that the labour provider will withdraw their business from the labour provider. To display such information on the GLA public register before any form of appeal at all has been heard creates a perception of guilty until proven innocent. Evidence demonstrates that the GLA loses or withdraws from one in eight cases that are appealed to Tribunal. Without implementing an internal checking and review process as contained in the recommendations above, to adopt these new proposals put forward by the GLA runs the risk of:

- Unfairly tarnishing the reputation of a significant proportion of labour providers
- Such organisations litigating against the GLA (as has happened previously) for loss of business, goodwill and reputation damage.

The reasons why the GLA should amend its licensing decision process and adopt the recommendations outlined above are:

- It would be in accord with the Regulators' Compliance Code.
- It would demonstrate an evolution towards lighter touch regulation without limiting the powers that the GLA has at its disposal.
- It adheres to the principles of natural justice in providing a fair opportunity for a labour provider to challenge the evidence presented by the GLA, to summon witnesses and to present evidence, and to have counsel, if necessary, in order to make its case properly prior to a decision being made.
- It would reduce the GLA's and labour provider's legal fees as more issues would be resolved at a pre-legal stage.
- It reduces risk of legal action against the GLA