

CO/2242/2014

Neutral Citation Number: [2015] EWHC 1972 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT IN BIRMINGHAM

Birmingham Civil Justice Centre
Priory Courts
33 Bull Street
Birmingham
B4 6DS

Tuesday, 17 March 2015

B e f o r e:

MR JUSTICE HICKINBOTTOM

Between:

THE QUEEN on the application of

(1) QASIM ARYUBI
(2) SABER NAZARY

Claimants

v

BIRMINGHAM CITY COUNCIL

Defendant

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(Official Shorthand Writers to the Court)

Mr R De Mello and Mr T Muman (instructed by Carltons Solicitors) appeared on behalf of
the **Claimants**

Mr A Verduyn (instructed by Birmingham City Council) appeared on behalf of the
Defendant

J U D G M E N T
(As approved by the Court)

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1. MR JUSTICE HICKINBOTTOM: The Claimants, who are of Afghan origin, are market traders whose business is to sell fruit and vegetables from stalls in the Birmingham open market known as the Bull Ring Market ("the Market"). The Market is owned by the Defendant Council ("the Council"), who issue licences to trade there. The licences are governed by the Council's Rules and Regulations for the Operation of Retail Markets 2006 ("the 2006 Regulations"). The 2006 Regulations allow the assignment of licences, and the profitability of stalls is such that, dependent upon location, they are often assigned for a premium. The Claimants say that they each paid £35,000 for the goodwill of the stalls from which they trade, namely stalls 9 to 11 (the First Claimant) and stall B22 (the Second Claimant).
2. The 2006 Regulations have a section headed "Disciplinary Procedure". Regulation 5 provides for the issue of Offence Tickets for breaches of the Regulations; and regulation 6 provides for periods of suspension and even termination of licence for stallholders who receive multiple Offence Tickets. One of the offences for which a ticket may be issued is the employment of unregistered staff, contrary to the requirement to register staff under regulation 1.1 and 1.3 (regulation 5.3.11). By regulations 7 and 8, a Senior Officer may issue a Notice of Suspension or Termination Notice; and those paragraphs provide for the contents of such notices including, for the latter, the reason for its issue.
3. Regulation 9 gives a stallholder a right of appeal from such notices to the Head of Operations (Markets) ("the Head of Operations") who is required to give a decision in writing, which may allow the appeal or suspend the stallholder or terminate the stallholder's licence. A further appeal from the Head of Operations is only allowed where the sanction involved is a suspension of more than four weeks or termination of licence. Any further appeal is to the Council Business Management Sub-Committee, under regulation 11.
4. However, that is not the only disciplinary route. Under regulation 10, where this has been "an incident of serious misconduct", a Senior Officer may suspend a stallholder pending a disciplinary hearing before the Head of Operations (regulation 10.1). The Head of Operations is then bound to convene a disciplinary hearing at the earliest opportunity (regulation 10.2). Following that hearing, again, the Head of Operations is required to give a decision in writing in one of the same three forms as under regulation 9 (Regulation 10.3). Again, a stallholder has the same right of appeal to the Business Management Sub-Committee under regulation 11 (regulation 10.4).
5. Under regulation 11, the Business Management Sub-Committee is entitled to regulate its own procedure, but it is again required to allow the appeal or suspend the stallholder or terminate his licence.
6. At the relevant time, the Head of Operations was Mark Croxford. The Business Management Sub-Committee was in abeyance; but Mr Croxford's line manager, the Director of Regulation and Enforcement, Jacqui Kennedy, was performing its relevant functions. There is no issue in this claim as to her authority to do that.

7. What happened on 24 January 2014 and subsequently is, to a very considerable extent, controversial. However, the Claimants say that, generally at that time, three men were working on stalls 9 to 11, namely the First Claimant, Mohammed Ejaz Khan and Mohammed Shafiq Khan; and three men were working on stall B22, namely the Second Claimant, Iqbal Khan and Ibrahim Bakerkhalil Khan. None of the four employees to whom I have referred was registered under the provisions of the 2006 Regulations.
8. That morning, the West Midlands Police carried out a raid at the Market, suspecting people of working there illegally. The Claimants themselves were not there, although the Second Claimant seems to have arrived as the operation was ending. In addition to the four employees to whom I have referred, two further men were at the market: Sabir Khan and Zaqil Dill, who at the time were apparently living with Iqbal Khan. During the operation, seven men were arrested, including all four employees, Sabir Khan and Zaqil Dill. I will return to those six arrested men shortly.
9. On 5 February 2014, Mr Croxford wrote to the Claimants inviting them to a meeting on 14 February, because (he said) it had come to his attention as a result of the raid that they had been employing persons ineligible to work. Mr Croxford appears to have considered this meeting a disciplinary hearing under regulation 10.2, although the Claimants were not suspended and Mr Croxford does not appear to have referred to it as such. He explained at the eventual appeal that, after the raid, he had been informed by the West Midlands Police and the UK Border Agency that the six arrested men "had been detained for working illegally and were... residing at a detention centre... awaiting deportation"; and it was that information which prompted him to write to the Claimants to discuss the matter. At the meeting, he said the Claimants were evasive and ill-informed about the men they employed, giving accounts that were to an extent contradictory. He said that a Market Police Officer had been there that day, and had seen all six men working on the stalls. He expressed the view at the appeal that he considered it unlikely to be happenstance that these men had been arrested and detained for working illegally; and the Claimants had shown him no evidence that they had carried out appropriate checks upon them.
10. In the event, Mr Croxford found that the Claimants did not know the names of the men who were working on the stalls, of whom at least two did not have the right to work. He concluded that the Claimants had not met the terms of their respective licences, in particular failing to comply with UK legislation (contrary to regulation 2(k)) or with the 2006 Regulations (regulation 2(l)). He therefore decided to terminate their licences forthwith. Again, it is not entirely clear under what provision of the 2006 Regulations Mr Croxford thought he was acting; but presumably it was regulation 10.3. Mr Verduyn, for the Council today, confirms that that was the case.
11. The Claimants did not accept any of the factual basis upon which Mr Croxford acted. Their four employees had the right to work, which they could prove, and the other two men who did not have such a right simply (they said) did not work on their stalls. They considered that Mr Croxford had arrived at the findings and conclusions he did because of a number of procedural errors on his part, which meant that the Claimants did not have a fair hearing. Had they had an appropriate opportunity, they considered they

could easily have shown that the factual basis upon which Mr Croxford worked was wrong.

12. As I have indicated, the Claimants had a right of appeal to Ms Kennedy, which they exercised. She held a hearing and produced a written decision dated 4 April 2014 in respect of each Claimant, but in essentially the same terms. Each decision letter is lengthy, and sets out the background to the appeal and the evidence from the witnesses that she heard, who included Iqbal Khan and Sabir Khan for the Claimants and an Andy Miller, a Market Police Officer. In addition to questions posed to those witnesses by the parties before her, she took the opportunity to ask the Claimants and Mr Croxford questions, the responses to which are set out over two pages in her decision letter. The questions and the responses were clearly focused upon the issue of whether the Claimants were employing illegal workers at the market.
13. In the decision letter, Ms Kennedy made it clear that she had disregarded letters from other market traders complaining that the Claimants had undercut the price of their products. It is common ground that she was right to do so. She said that Mr Croxford had acted on hearsay evidence, and it may have been that further investigations should have been carried out. She accepted that "the Council did not have sufficient evidence to be certain about the conclusions of Mr Croxford." As a result, she accepted that the decision of Mr Croxford was "wrongly made for the reasons which he stated". By that, she clearly meant that the reasons relied upon by Mr Croxford did not support the sanction of termination which he imposed. However, she went on to say that she was in the position to determine the appeal as the whole, with documents and oral representations of which Mr Croxford did not have the benefit. In legal terms, what she meant by that was that she had heard the disciplinary hearing de novo on the basis of the evidence that had been presented to her.
14. She said that the Claimants were right to say that they had not been arrested, charged or convicted of any offence. That, she noted, was not in dispute. But, she said, she was concerned by some of what she had heard and read during the appeal. She set out over a page what she described as a non-exhaustive list of her concerns. She said she was "sufficiently doubted by the ... matters". The seven bullet points to which she referred set out matters which she considered were "unusual". She then continued as follows:

"None of these matters are proved and I make no accusation. Nor am I able to draw any conclusion beyond inference. It would not be appropriate for me to entertain supposition and so I find that I am only able to say I believe the truth of this matter is not known to me.

Whilst I can uphold the reasons given by Mr Croxford, I am concerned by the information I have read and heard and so I am not satisfied that the appeal should be granted.

The note that the licences could have been terminated on 28 days' notice in any event and also that the [2006 Regulations] appear not to have been followed for reasons other than those given by Mr Croxford. Namely that the [Claimants] have failed to register the names and current addresses for

all employees with the Council and to notify the Council immediately of any changes in such details...

It is my decision then to terminate both the first licence and the second licence under part 11.3.3 of the [2006 Regulations]."

15. This claim was issued on 15 May 2014. It sought to challenge the decision of Mr Croxford on 14 February 2014 to terminate the Claimants' licences, and the decision of Ms Kennedy on 4 April 2014 also to terminate the licences albeit on the basis of different reasons. On 15 May 2014, His Honour Judge McKenna ordered the Council not to transfer the stall licences, and to allow the Claimants to continue to trade from their stalls pending the determination of this claim. On 30 June 2014, on the papers, His Honour Judge David Cooke granted permission to proceed, but limited to a challenge to one against the 4 April 2014 decision, on the ground that it was not open to Ms Kennedy to impose a sanction of termination (a) having regard to the terms of the 2006 Regulations providing for sanction by way of offence notices and (b) having declined to make findings on the factual allegations against the Claimants. The Claimants did not renew their application in respect of the other grounds. Consequently, the focus of the claim before me has been and is on the decision of Ms Kennedy of 4 April 2014 to terminate the licences.
16. However, on 24 July 2014, the Council wrote a letter to the Claimant's solicitor offering to settle the whole of the claim. The letter made clear that it was open, and it was intended that the offer to settle would be made known to the court, which it has. The letter continued:

"Our client hereby offers to settle the whole of the claim referred to above on the following terms:

- 1) The Council offers a complete rehearing of [the Claimants'] internal appeal under [the 2006 Regulations] against its final decision to terminate [the Claimants'] licences for [the Market] stalls B9 and B11 and B22 respectively before a convened panel of Council members. For the avoidance of doubt, the Council's first instance decision (often referred to by yourselves as 'the Croxford decision') which was set aside under previous internal appeal remains wholly set aside as confirmed by His Honour Judge Cooke, and the Council now offers a complete rehearing at appeal level before a panel of Council members.

- 2) It follows that the Council accepts that in this process there are no sustainable findings against your clients from the Croxford decision at the opening of the rehearing at appeal level. That much and that there is to be a rehearing at appeal level can be a matter made public. Furthermore, if your clients are successful in the appeal then of course the Council accepts that their names remain clear. If there is an apology required at that stage then it is expected that the panel would make some suitable statement or require one of the Council [to do so]. Whilst such would certainly be considered at that point, it would be inappropriate to deal

with this in advance of the rehearing.

3) Your clients will be permitted to trade on their usual days under the terms of their respective licences at [the Market] stalls B9 and 11 and B22 respectively, pending the outcome of the rehearing. Accepting of course that your clients must abide by the terms of their licences and the [2006 Regulations] throughout.

4) This offer includes costs and, as mentioned above, the Council is willing to pay your clients' reasonably incurred costs on the standard basis to be assessed if not agreed up to the date of acceptance in writing of this offer."

17. There then followed considerable lengthy correspondence concerning this offer. However, none of that correspondence compromised the claim which has come before me this morning for substantive hearing.
18. In respect of the claim, it is important to mark the nature of an appeal under regulation 11 of the 2006 Regulations. Under that regulation, the appeal body is entitled to regulate its own procedure, but the result of the appeal can only be one of three, namely (i) to allow the appeal, (ii) to suspend the stallholder, or (iii) to terminate the stallholder's licence.
19. It is clear, looking at that particular regulation, and looking at the 2006 Regulations as a whole, that the appeal is essentially against the sanction imposed under regulation 9 or regulation 10 respectively. The appeal body may regulate its own procedure, and clearly it can entertain what at law is a full rehearing of any disciplinary matter. That is what Ms Kennedy did. She heard evidence and did not restrict herself simply to reviewing Mr Croxford's decision. Having reviewed the evidence, it was for her to make factual findings; and, on the basis of those factual findings, to determine whether to allow the appeal (and consequently allow the Claimants to continue trading), or to suspend or terminate their licence.
20. Mr De Mello for the Claimants today submitted that, on its true construction, Ms Kennedy's decision letter made factual findings in favour of the Claimants. When she said that "none of these matters are proved", she intended to mean and meant that it had not been proved that they had engaged illegal workers. She went on, however, to terminate the licence on the basis of a finding that the Claimants had failed to register the four employees contrary to regulations 1.1 and 1.3. That, Mr De Mello submitted, was unlawful; because the failure to register had not been a complaint which had been considered at the hearing and not put to the Claimants for response as it ought to have been.
21. In any event, if that had been the true complaint against the Claimants, then the proper procedure would have been to have gone through the offence ticket process, which could not have resulted in suspension or termination of their licences, at least at this stage. If it had been pursued as serious misconduct, termination of the licences for

mere failure to register employees would in any event have been a disproportionate penalty.

22. For the Council, Mr Verduyn submits that that is not a proper reading of the letter. When Ms Kennedy said that she was not able to draw "any conclusion beyond inference" made it clear, Mr Verduyn submitted, she meant that she considered it proved on the balance of probabilities that the Claimants had indeed employed illegal workers. That issue was at the heart of the complaint against the Claimants, and it was the issue upon which Ms Kennedy properly focused during the hearing when she asked questions. The reference to failure to register the employees was simply a throwaway remark of something that she merely noted; the decision to terminate, he submitted, was based upon a finding of fact that the Claimants had employed illegal workers. Mr Verduyn properly emphasised that Ms Kennedy is not a lawyer and her letter – which, he submitted, shows that she dealt with the matters before her with care - should not be construed in an over-legalistic manner.
23. However, it was incumbent upon Ms Kennedy to make a finding of fact on the central issue before her, namely whether the employees were illegal workers. In my view, unfortunately, she singularly failed to make any such finding. All she did in her letter was to note concerns about the evidence, and she based her decision to terminate merely upon those concerns. Looking at the letter fairly, she simply did not grapple with the core factual issue that was before her, and made no finding in respect of that matter. I do not accept, however, Mr De Mello's submission that she based her termination decision upon a failure to register the employees. The reference to that is something that Ms Kennedy merely noted in her decision letter after indicating she was not satisfied that the appeal should be granted. It was not, in my view, taken into account as a plank upon which her decision to terminate was based.
24. In those circumstances, it seems to me that Ms Kennedy's decision was unfortunately but clearly made upon the basis of a fundamental procedural error. She could not make a decision to terminate the licences in these disciplinary hearings based as they were upon the proposition that the Claimants had employed illegal workers without bringing her mind to bear upon, and making a clear finding of fact in respect of that issue.
25. Consequently, this decision must be quashed.
26. However, I do not accept Mr De Mello's submission that, having quashed the decision, the court can and should make the decision itself because there is only one decision to which a decision-maker in the shoes of the appeal body could come. The appeal body in this case was entitled, and indeed bound, to make findings of fact in relation to the core issue. In my judgment, this court cannot – and, certainly, should not - make those findings. That is a task properly for the appeal body on the basis of the evidence it considers appropriate to hear.
27. Consequently, this matter must be remitted to the Council, so that the matter can be referred to an appropriate appeal body which can make those findings and can, upon the findings it makes, make a decision as to which of the three options open to it under the 2006 Regulations is appropriate.

28. Mr Verduyn, upon instructions, has confirmed that the disciplinary hearing that Mr Croxford engaged in under Regulation 10 was based upon an allegation that the Claimants had employed illegal workers. That was a crucial issue in that that was the central issue upon which Mr Croxford was engaged and had been the core issue upon which the appeal body will be engaged. He confirmed that suspension or termination would not be appropriate without a positive finding in relation to that issue. If the appeal body is not satisfied to the appropriate standard of proof that the Claimants had not engaged illegal workers, that body will therefore be bound to allow the appeal.
29. If, as Mr De Mello concedes, the Claimants were engaging lawful workers, but workers unregistered under the 2006 Regulations, that has no part to play in the regulation 10 proceedings for serious misconduct - although it may attract other sanctions under the 2006 Regulations that apply to offence tickets.
30. However, for those reasons, this judicial review will be allowed, and the decision of Ms Kennedy dated 4 April 2014 will be quashed.