**Appeal number: WA/2019/0038**

**FIRST-TIER TRIBUNAL**
**GENERAL REGULATORY CHAMBER**
**ANIMAL WELFARE**

**STEPHEN BAILEY** **Appellant**

**- and -**

**FOOD STANDARDS AGENCY** **Respondent**

**TRIBUNAL: JUDGE MOIRA MACMILLAN**
**Sitting at Field House, London EC4A 1DZ**
**On 18 February 2020**

**In attendance: Mr William Dean, instructed by the Food Standards Agency**

**RULING ON APPLICATION FOR RECONSIDERATION BY A JUDGE OF THE REGISTRAR'S DECISION OF 26 NOVEMBER 2019**

## DECISION

1. Having considered the matter afresh pursuant to rule 4(3) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, I have decided that the Registrar's Decision of 26 November 2019 should be set aside.

2. Mr Bailey's application for the effect of the Food Standard Agency's decision of 27 September 2019 to be suspended pending the outcome of his appeal is refused.

3. The suspension of the revocation of Mr Bailey's Certificate of Competence shall continue until 23.59 on 27 February 2020, to allow him to put in place any necessary staffing arrangements.

## REASONS

### Background

4. Mr Bailey is a Director of Forage Farm Meats Limited in Tunbridge Wells, Kent. On 27 September 2019 the Food Standards Agency ('the FSA') decided to revoke Mr Bailey's Certificate of Competence ('CoC'), issued under the Welfare of Animals at the Time of Killing Regulations 2015 ('WATOK').

5. The FSA's decision was taken after an Official Veterinarian ('OV') reviewed CCTV footage from 11 September 2019. Mr Bailey was observed lifting a recumbent lamb by its fleece and moving it from the lairage to be killed. The FSA decided that Mr Bailey's actions breached several regulatory requirements, including EU requirements, relating to the avoidance of pain, distress, or suffering and which included failing to ensure that the animal was promptly killed.

6. When deciding the appropriate outcome of the regulatory breaches observed on 11 September 2019, the FSA took into consideration a broadly similar incident that had occurred on 10 July 2019. This had led to Mr Bailey's CoC being suspended pending a period of re-training. The FSA's decision on 27 September 2019 also considered Mr Bailey's role at the premises where the breaches occurred.

7. On 25 October 2019 Mr Bailey appealed to the Tribunal. His grounds of appeal may be summarised as follows:

(a) The lamb's poor condition should have been picked up by the OV during her antemortem inspection, which Mr Bailey says was inadequate.

(b) Having discovered the recumbent lamb shortly after the OV's inspection, Mr Bailey's actions were designed to avoid causing the animal any additional suffering. He moved it because there was a risk it would be trampled again by the other lambs, which were free to re-enter the pen.

(c) Mr Bailey admits that it was wrong to lift the lamb by its fleece. He does not, however, accept that this amounts to an 'unjustifiable or deliberate act causing avoidable pain'. He contends that he took the animal to be slaughtered straight away.

(d) Mr Bailey accepts that lifting the lamb by its fleece was an error of judgement, but denies that it amounts to a 'serious error of judgement'. As such, he contends that the appropriate outcome under the Manual for Official Controls ('MOC') guidance should have been a further suspension of his CoC with a period of re-training rather than revocation.

8. Mr Bailey has asked the Tribunal to suspend the effect of the FSA's decision, pursuant to rule 20 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 ('the GRC Rules'), pending the outcome of his appeal. Before considering his application, the Tribunal invited the FSA to make representations on this issue, which were provided by email on 7 November 2019.

9. On 26 November 2019 the Registrar decided to suspend the effect of the FSA's 27 September 2019 decision until 6 March 2020, or until the withdrawal or determination of the appeal if sooner. The Registrar appears not to have seen the FSA's 7 November 2019 representations when making her decision.

10. On 10 December 2019 the FSA asked for the Registrar's Decision to be reconsidered by a Judge under rule 4(3) of the GRC Rules. This I now do, following an oral hearing to consider Mr Bailey's rule 20 application afresh, which took place on 18 February 2020. Mr Bailey was unable to attend this hearing but was content for it to proceed in his absence.

11. Both parties have provided written submissions on the issue of whether the revocation of Mr Bailey's CoC should be suspended pending the outcome of his appeal.

**Law**

12. Rule 20 of the GRC Rules allows the Tribunal to suspend the effect of a decision which is, or which may be, the subject of an appeal, in circumstances where suspension is allowed pursuant to rule 19A or under another enactment.

13. Regulation 22(3) of WATOK allows the Tribunal to suspend the effect of a decision under appeal, the default position being that decision will continue to apply unless the Tribunal orders otherwise.

***Appeals***

***22.****—(1) A person who is aggrieved by a decision of the competent authority to refuse, suspend or revoke a certificate, temporary certificate or licence, or to refuse to modify a certificate or licence, may appeal against it.*

*(2) The right of appeal is to the First-tier Tribunal.*

*(3) A decision to suspend or revoke a certificate, temporary certificate or licence is not suspended pending an appeal unless the First-tier Tribunal orders otherwise.*

*(4) On appeal the First-tier Tribunal may either overturn or confirm the decision, with or without modification.*

14. WATOK does not address how the Tribunal should approach an application for an order under regulation 22(3). There is, however, guidance to be found in case law. In *Secretary of State for Environment, Food and Rural Affairs v Georgina Downs [2009] EWCA Civ 664,* an appeal relating to compliance with EU directives on pesticides, Sullivan LJ made the following observations:

*"[8] …The approach to be adopted in respect of applications for a stay is clearly set out in the notes to CPR 52.7. A stay is the exception rather than the rule, solid grounds have to be put forward by the party seeking a stay, and, if such grounds are established, then the court will undertake a balancing exercise weighing the risks of injustice to each side if a stay is or is not granted.*

*[9] It is fair to say that those reasons are normally of some form of irremediable harm if no stay is granted because, for example, the appellant will be deported to a country where he alleges he will suffer persecution or torture, or because a threatened strike will occur or because some other form of damage will be done which is irremediable. It is unusual to grant a stay to prevent the kind of temporary inconvenience that any appellant is bound to face because he has to live, at least temporarily, with the consequences of an unfavourable judgment which he wishes to challenge in the Court of Appeal."*

15. The same test was applied by Judge Jacobs in the Upper Tribunal case of *Camarthen County Council v M & JW (SEN) [2010] UKUT 248 (AAC)*, this time in the context of an application to suspend the effect of a First-tier Tribunal decision relating to special educational needs.

*"16. Neither counsel referred me to the decision of Sullivan LJ in Department for the Environment, Food and Rural Affairs v Downs [2009]*

*EWCA Civ 257, but it is cited in the White Book under CPR rule 52(7). The judge set out the correct approach at [8] ….*

*17.Applying Sullivan LJ's approach, I have to ask two questions. The first is: have solid grounds been put forward by the authority for the effect of the tribunal's decision to be suspended? If it has, the second question is: on balance should the effect of the decision be suspended?*

*18.Authorities are unlikely to be helpful in cases involving a judgment of balance, as so much depends on the facts and circumstances of the particular case."*

16. Judge Jacobs observed that the two questions he had identified may sometimes be conflated. He decided that the strength of an appellant's grounds of appeal ought not to operate as a threshold criterion in an application for suspension, although it may still be relevant to a decision on suspension in circumstances where an appeal is almost certain to succeed.

**Submissions**

17. Mr Bailey relies on his general grounds of appeal in support of his application to suspend the revocation of his CoC. His grounds focus mainly on the strength of his appeal. Mr Bailey also cites his 40 years' experience of working with livestock, without any prior welfare concerns before the 10 July 2019 incident. He challenges the strength of the FSA's evidence and contends that the regulator's decision does not follow the process set out in the MOC, extracts from which are attached to his Notice of Appeal.

18. Mr Bailey also briefly addresses his application for suspension in his witness statement dated 6 January 2020 and in his skeleton argument dated 9 January 2020. He submits that he needs his CoC to perform his duties at the plant, and describes it as 'vital for sorting the correct sheep for processing'. He does not accept the FSA's assertion that someone else at the plant can perform his tasks, because he is the principal at the site and has 'a vast amount of skill'. He submits that, if the revocation is re-imposed pending the outcome of the appeal, he may 'suffer an unnecessary loss' but does not explain how this might occur.

19. Mr Bailey submits that the key consideration for the Tribunal in relation to his rule 20 application is whether continued revocation pending the outcome of the appeal is appropriate and fair. He submits that it is not. Mr Bailey draws the Tribunal's attention to the fact that there have been no further animal welfare concerns since the Registrar suspended the FSA's decision.

20. The FSA submits that there must be a positive reason for the Tribunal to depart from regulation 22(3)'s default position. It contends that its response to Mr Bailey's grounds of appeal is, at the very least, arguable, and that its case will be prejudiced if the revocation is suspended. At the oral hearing I asked Mr Bell if he could expand on

this argument. Mr Bell explained that the FSA's case would be undermined simply by virtue of the revocation no longer being in place when the Tribunal made its substantive decision.

21. The FSA contends that animal welfare at a slaughterhouse before and at the time of killing is an important issue of public concern. It submits that Mr Bailey will suffer minimal prejudice if the revocation of his CoC continues until his appeal is decided, because Forage Farm Meats Limited has other workers who can undertake the relevant tasks. The FSA submits that any prejudice that might arise to Mr Bailey at this stage will be of short duration because the substantive hearing has been set for early April. The suspension of the revocation by the Registrar until this point must have also reduced the degree to which Mr Bailey's interests have been prejudiced.

22. The FSA submits that Mr Bailey has admitted the breach in part, in that he accepts that he picked up the lamb by the fleece, and that a sanction is likely. It contends that, by suspending the revocation of Mr Bailey's CoC, the Tribunal would be putting him in a better position than the sanction he suggests is appropriate in his grounds of appeal, which is suspension of his CoC with re-training.

**Decision**

23. Mr Bailey submits that the key consideration I must consider is whether continued revocation of his CoC pending the outcome of his appeal is appropriate and fair. I agree with him to the extent that any exercise by the Tribunal of the rule 20 power must also give effect to the overriding objective set out in rule 2. This includes dealing with the case fairly and justly. I must also consider whether Mr Bailey has put forward solid grounds for the effect of the FSA's decision to be suspended.

24. I note that Mr Bailey's submissions focus mainly on the strength of his grounds of appeal. Such arguments do not necessarily amount to a solid ground for the purposes of deciding whether to suspend the decision. The Tribunal's powers under rule 20 may be exercised in relation to a decision that may be the subject of an appeal. In such circumstances no grounds of appeal would yet exist.

25. One of Mr Bailey's grounds of appeal is that the FSA decision has not been taken in accordance with the MOC. I find that this argument, as put forward by Mr Bailey, is a solid ground for the purposes of his application under rule 20 for suspension of that decision.

26. I have considered whether, on balance, the effect of the FSA's decision should be suspended. I have decided that it should not. I accept the FSA's submission that the default position set out in regulation 22(3) should only be departed from for a positive reason. Although Mr Bailey has outlined some negative impacts of the revocation of his CoC, I find that he has not suggested an impact that equates to irremediable harm.

27. I find that the loss of Mr Bailey's extensive experience has necessarily had a prejudicial effect on operations at Forage Farm Meat Limited, but that this has been mitigated to some extent by the company's ability to use alternative members of staff.

The grounds of appeal refer to another member of staff having taken over Mr Bailey's duties in the lairage following the FSA's decision. On 11 September 2019 Mr Bailey was himself providing cover, pending the employment of a replacement member of staff. I find that there is insufficient information about Mr Bailey's experience and role, in comparison to other members of staff, to conclude that the revocation of his CoC has had a serious impact on the company's ability to operate.

28. Although Mr Bailey has referred to the possibility that he might suffer an unnecessary loss, he has not explained either the nature of that loss or how it might arise. I find that there is no evidence upon which I can conclude that Mr Bailey's livelihood, or the viability of the company, is likely to be negatively impacted by the continued revocation of his CoC pending appeal.

29. I have considered Mr Bailey's submission that there has been no issue raised about his conduct since the revocation of his CoC was suspended. I find that this is relevant, in so far as it forms part of Mr Bailey's lengthy, unblemished record of working with livestock. I have considered this when making my decision.

30. I have balanced these considerations and the potential prejudice to Mr Bailey against the important public issue of the welfare of animals in a slaughterhouse before and at the time of killing. I have also considered the public interest in maintaining confidence in the FSA as regulator, and in WATOK's regulatory regime. I have taken as my starting point the default position, set out in regulation 22(3) which is that the decision under appeal should remain in force, in the absence of an order from the Tribunal.

31. Although Mr Bailey has explained why he believes that the revocation of his CoC should be suspended, I find that the reasons he has given are not sufficiently weighty to justify departing from the default position set out in regulation 22(3). I find that Mr Bailey's reasons as currently described are closer to 'temporary inconveniences' than to 'irremediable harm'. Although this is not necessarily a bar to suspension I find that, on balance and in the circumstances of this case, the revocation of Mr Bailey's CoC should not be suspended pending the outcome of his appeal.

32. Accordingly, the Registrar's Decision of 26 November 2019 is set aside with effect from 23.59 on 27 February 2020.

33. Mr Bailey's application for the revocation of his CoC to be suspended pursuant to rule 20 of the GRC Rules is refused.

34. This decision is entirely without prejudice to the final outcome of the appeal.

(Signed)

**DATE: 20 February 2020**

**Moira Macmillan**
**Tribunal Judge**