



**BIRMINGHAM CITY COUNCIL**

**LICENSING SUB COMMITTEE - C**

**WEDNESDAY 11<sup>TH</sup> NOVEMBER 2020**

**ADDENDUM TO STATED REASONS**

**DAHLAK LOUNGE, HAMPTON STREET, BIRMINGHAM B19 3LS**

That having considered a full review of the premises licence under s.53C of the Licensing Act 2003 following an expedited summary review under s.53A of the Act brought by West Midlands Police in respect of the premises licence held by Mr Biniam Yemane Mebrahtu in respect of Dahlak Lounge, Hampton Street, Birmingham B19 3LS, this Sub-Committee determines:

- that the premises licence shall be revoked
- that Biniam Yemane Mebrahtu be removed as the Designated Premises Supervisor
- that having reviewed the interim steps imposed on 15th October 2020 that it will not withdraw or modify the interim steps of suspension of the licence and the removal of the designated premises supervisor Biniam Yemane Mebrahtu under s.53D of the Act. Those steps remain in place pending any appeal

West Midlands Police [WMP] were represented by Chris Jones and PC Abdool Rohomon.

The premises licence holder and DPS Biniam Mebrahtu attended, together with his business partner Mr Victor Joseph. The Sub-Committee noted that the premises licence was held by Mr Mebrahtu alone, and not as a partnership. They were represented by Duncan Craig of counsel.

Environmental Health was represented by Paul Samms, who appeared on behalf of Martin Key who had made a representation.

Three preliminary issues were raised by PC Rohomon:

- That the CCTV footage be viewed in private session
- That if any issue was raised in relation to the Public Sector Equality Duty under the Equality Act 2010, then he was able to address it
- That if any issue arose in relation to the legality of the Superintendent's Certificate, then he was similarly in a position to address it

Mr Craig indicated that he was content that the CCTV be viewed in private, and that he raised no issues in relation to the PSED or the legality of the certificate.

Before the meeting began the Sub-Committee was aware of the amended *Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020*, the updated version of the Guidance entitled '*Closing Certain Businesses and Venues in England*' originally issued by HM Government on 3rd July 2020, and the Guidance entitled '*Keeping Workers and Customers Safe in Covid-19 in Restaurants, Pubs, Bars and Takeaway Services*' issued originally by HM Government on 12th May 2020 and updated regularly thereafter.

The Sub-Committee was also aware of the special local lockdown measures (specifically for Birmingham) which had been announced by HM Government on Friday 11th September 2020, then introduced on Tuesday 15th September 2020. These measures had been an attempt to control the sharp rise in Covid-19 cases in the city.

Furthermore, the Sub-Committee was aware of the further national measures to address rising cases of coronavirus in England as a whole, which had been announced by HM Government on 22nd September 2020. These national measures had been published on the “gov.uk” website on that date, and detailed the new requirements for all businesses selling food or drink (including cafes, bars, pubs and restaurants), ordering that all such premises must be closed between 22.00 hours and 05.00 hours. Other requirements for such premises included seated table service, wearing of masks, and participation in the NHS Test and Trace programme. These measures were an attempt by HM Government to control the sharp rise in Covid-19 cases nationally.

The pandemic had continued to be the top story in the national news across the Spring, Summer and now into the Autumn of 2020; the Birmingham lockdown, and also the new national measures announced on 22nd September, had been very widely publicised and discussed both in news reports and on social media. The Prime Minister, together with HM Government’s Chief Medical Officer and Chief Scientific Officer, had resumed the televised ‘Coronavirus Briefing’ broadcasts which had been a feature of the first few months of the pandemic. In recent days HM Government had also designated a pyramid-style ‘Three Tier’ system for the nation, to indicate the level of risk for each area. Birmingham had been designated as ‘Tier 2’, meaning a ‘high’ level of risk.

The Dahlak Lounge premises had been granted the premises licence on 12<sup>th</sup> March 2020, less than two weeks before the national lockdown was imposed.

Mr Biniam Yemane Mebrahtu attended the meeting, as the premises licence holder and also as the designated premises supervisor.

Members heard the submissions of West Midlands Police, namely that the background to the certificate issued by the Chief Superintendent under s53A(1)(b) of the Act was that, in Birmingham, it had been observed that the death rate, the rate of infection, and the rate of hospital admissions were all steadily increasing; there were more Covid patients in Birmingham hospitals currently than there had been at the start of the March 2020 lockdown.

From the 4<sup>th</sup> July 2020, when the new arrangements for reopening were being publicised and the lockdown was being eased for licensed premises such as pubs

and bars, information on how to trade was readily available to such premises - via the “gov.uk” website, and also the very many news reports, both on television and on general social media. The requirements included no loud music, no dancing, queue management, and 2m social distancing (or 1m with mitigation measures).

On the 16<sup>th</sup> August 2020, West Midlands Police observed a general failure by the Dahlak Lounge premises to follow the Government Guidance. Whilst dealing with an incident nearby in the early hours of the morning, Police found that loud music was emanating from Dahlak Lounge at a volume which could be heard in the street.

Upon entering, Police observed that there was no social distancing or limitation of numbers of patrons as per the Covid-19 requirements, to allow for safe operation. Police described the premises as “packed” with patrons. Under the fire risk assessment, the capacity limit was 120 patrons - 60 on the ground floor and 60 on the first floor. Far more than these numbers were estimated by Police to have been inside. Loud music was playing, making normal conversation impossible, and therefore requiring raised voices – a known risk for Covid transmission. The Police ascribed these failures to unsatisfactory management by the premises licence holder Mr Mebrahtu, who was also the designated premises supervisor.

Police offered advice and help to the licence holder via email, to assist him in understanding what was required to trade in a Covid-safe manner. Police also held a meeting with him on 26<sup>th</sup> August and spent some time explaining the social distancing requirements. The day before the meeting PC Reader had sent a detailed email explaining how the premises should be operated under the Covid-19 Regulations and Government Guidance. He additionally supplied links to the legislation and Guidance in the body of the email. Surprisingly, Mr Mebrahtu was not aware that his premises had any capacity limit for numbers of patrons. Police requested that he supply the Covid-19 risk assessment which is a mandatory requirement under the Government Guidance; Mr Mehbratu stated that the risk assessments had been done for both Covid risk and fire risk. He supplied these on 3<sup>rd</sup> September 2020.

Then from September 2020, the measures imposed by HM Government became stricter – closure at 22.00 hours, music to be limited to 85 decibels, no standing (table service only), wearing of masks, and participation in the NHS Test and Trace

programme. This information was readily available to licensed premises via the “gov.uk” website, television and on social media.

On 10<sup>th</sup> October 2020 Police received a complaint from a member of the public that loud music was emanating from the Dahlak Lounge and that there were numerous cars in the car park. Police attended at around 21.10 hours, which was within the permitted opening hours (closure required at 22.00). Police found that very loud music was indeed emanating from Dahlak Lounge, at a volume which could be heard in the street – despite the shutters to the premises being pulled down and locked, and the premises appearing to all intents and purposes to be ‘closed’. Around twenty people were in the car park. One individual inside the premises was seen to look out of an upstairs window; moments later, the volume of the music reduced significantly. A person, thought to perhaps be a security guard, then unlocked the door from the inside.

Upon entering, Police were astonished to find the situation inside to be even worse than that which had been observed on the 16<sup>th</sup> August. Around 150 people were found on the ground floor; no social distancing whatsoever was being observed and many patrons were standing or walking about. Others were seated together, either on long benches or in booths, but nobody was keeping a Covid-safe distance from others. The music being played had already been turned down, but the Police found that they still could not hear anything above it. Masks were not being worn by many customers, and even some of the staff, except for the security guards; smoking of shisha by patrons was going on.

Staff hurriedly began pulling patrons out of their seats, exhorting them to “move, move, you’ve got to move”, and ordering those seated in booths to “get out”, on the basis that the premises had exceeded its capacity limit.

Police observed that the door through which they had entered, which had been unlocked for them by somebody inside, was in fact a front fire escape. There was also a rear fire exit, but this was found to lead only to the outdoor smoking area – an entirely enclosed area, with no means of escape beyond that. A second front fire exit was also unsatisfactory to Police, given the small size of the door to it, and the presence of a trip hazard created by the flooring and the irregular-sized door. Emergency lighting and signage was not in place at the front fire exit; indeed, sofas and benches had been placed in the path of the main escape route. The shutters had

also been pulled down and locked. The premises' view was that this was to stop people from getting in.

This was all completely unacceptable in terms of fire safety but was made infinitely more serious by the fact that many patrons inside were smoking shisha, which by its nature increases the risk of fire. The view that PC Rohomon took was that the premises were enclosed for the purposes of The Health Act 2006 and that, in consequence, the smoking of shisha was unlawful. Moreover, as the Police explained, ventilation arrangements are key to compliance with the Health Act 2006 when smoking shisha, yet the Dahlak Lounge had the main shutters pulled down and locked. Any outbreak of fire would have had disastrous consequences, even if proper social distancing and a proper limit of numbers had been in place (which they were not) – and yet Police had observed around 150 people on the ground floor, which had a capacity limit of 60 persons.

The licence holder claimed to Police that the fire assessment had confirmed that he could have 220 persons on the premises (160 on the ground floor and 60 on the first floor); upon examining the fire risk assessment document, Police observed that the capacity had changed to “220” in total for both floors (not 120 in total as shown in the old fire risk assessment-60 on the ground floor and 60 on the first floor), yet the document was still dated 1<sup>st</sup> July 2020. Also unsatisfactory was the reliance on what was called the “extra fire exit” to justify the increase in the capacity limit; this turned out to be the irregular sized door with the trip hazard. It was also apparent that the layout of the premises had altered considerably from the deposited plan; there was now a stage in place; there was the installation of the “extra fire exit door”; and the bar counter had been extended. The layout of the furniture had changed. Mr Craig submitted that seating which was not fixed was not covered by the regulations. Irrespective of this, the Licensing Sub-Committee was concerned that the seating (whether fixed or unfixed) did not accord with the deposited plan was positioned in a manner which did not comply with Covid19 Guidance to maintain social distancing between tables and had been positioned so as to block a fire exit. PC Rohomon submitted that there were no useable means of escape in the event of fire. One exit led to the smoking area which was not a means of escape; the “extra fire exit” was locked; and the shutters were down.

The Covid risk assessment produced by the licence holder was also found to be wholly unsatisfactory. It was regarded by Police as having been approached by the

licence holder as a mere tick-box exercise, rather than a proper consideration of what was required to trade safely during the pandemic. Police had requested CCTV from the premises, but this had not been forthcoming. Mr Craig was later to accept responsibility for not forwarding CCTV footage timeously. He maintained that he had forwarded the files, but that the emails had bounced back.

The CCTV footage had been viewed by the Sub-Committee in advance of the hearing, and extracts were shown in private session.

- Footage was shown on body worn camera of the police approach to the shuttered outside of the premises
- Footage was then shown from camera 1 and was timed at 20.32 on 10<sup>th</sup> October 2020. PC Rohomon said that it was a scene of “carnage” and that there was so much wrong with the footage. It was a free for all; there was no social distancing; people were standing up throughout the premises; people were dancing; the rule of six was not being observed; no one was wearing masks; upwards of 20 shisha pipes were being smoked; the seating blocked the fire exit (which was locked in any event); the tables and benches were closer than 2m and there were no mitigation measures in place to allow for 1m distancing. It was, he said, “a total mess and there was no control”. The Sub-Committee agreed with this finding.
- Footage was then shown of the premises at 21.16 after the police had arrived. There was a gap in the footage between the first clip and this clip. The police were not given any footage showing what had happened after the operators of the premises became aware of the police presence outside. This clip showed a very different picture. People were now mostly seated, although it was clear that the tables and benches were close together- in some instances, as close as 20cms. The Sub-Committee saw a table of 8 being reduced in number as the previous occupants were ushered towards the staircase leading to the first floor. Even still, a man who had been in this party then gets up and embraces someone from the next-door table which is clearly closer than 2m. Shisha pipes were still clearly evident.

The Police said that it was this footage which had convinced them to apply for a summary review and to seek revocation. The scene 40 minutes before had been “carnage”, and the following scene demonstrated that the operators clearly knew

what they **should** have been doing because they had taken some steps to comply with the regulations as shown in the second clip. WMP were therefore concerned that the premises licence holder was being reckless in his style of operating and was endangering public health by risking the spread of Covid-19. All in all, the scene discovered on the 10<sup>th</sup> October was in stark contrast to the licensee's declaration in September that the premises was both fully Covid-compliant and fully fire risk compliant.

The Police explained that the premises' decision to trade in this unsafe manner, which was not compliant with the Government Guidance, was an overt risk to the health of individuals, families and local communities, at a time when the country is experiencing a national emergency. The Covid-19 virus is a pandemic which has required all licensed premises to act responsibly and in accordance with the Government Guidance when trading, in order to save lives. It was therefore a flagrant risk to public health for any licensed premises to breach the Government Guidance by trading in an unsafe manner.

Paul Samms made representations on behalf of Environmental Health and supported the case for revocation.

Duncan Craig made submissions on behalf of the licensee. He agreed that the plan was defective, and agreed that the plan differed in several respects to the original plan. He maintained that the plan could be cured by depositing a fresh plan showing the alterations. The Sub-Committee felt that this missed the point. The public had been put at risk as a direct consequence of these alterations, the impeding of the (locked) fire escape being just one example of this.

Mr Craig maintained that there were in fact four useable fire exits. He pointed to one which would have required patrons to climb stairs to make use of the first-floor exit. He pointed to another which would have required customers to go through the kitchen and then the office in order to make use of it. He maintained that the shuttered front door was a useable exit. He said that the shutters were there to discourage people from entering, and not as the police had claimed to give the appearance that the premises were closed.

In respect of the Covid Risk Assessment he maintained that it was not a tick-box exercise and that his client had paid money to have it produced. He was taken to one

example of what appeared to be a “ticking of the box” by his client which contained an incomplete assessment of a risk to which his client had entered “yes” in the box. He agreed that some of the risks had not been complied with (the doors being pinned back for example) but maintained that many others had. He “held his hands up” to there not being total compliance. An example was given of a statement in the risk assessment that the premises would only operate at 30% of the fire risk capacity. This would have been 66 people if the “amended” and unsigned fire risk assessment was to be accepted, and not the 152 people who were on the premises. He maintained that his client, “acting in good faith”, had read that to mean that the capacity would be reduced by a third.

It was, he said, a matter of opinion whether the Covid Risk Assessment was, in this case, a tick-box exercise. In Mr Craig’s professional opinion it was not. The Sub-Committee disagreed. Mr Craig did not seek to blame WMP for not providing feedback on the Covid Risk Assessment when it was sent to the police.

In respect of the smoking of shisha, he maintained that his client “understands that he is compliant”. The Sub-Committee disagreed and preferred the submissions of PC Rohomon that the premises were enclosed.

As to the gap in the CCTV footage, Mr Craig could offer no explanation other than that an engineer had been contacted with a view to retrieving the footage.

He invited the Sub-Committee not to speculate about the evidence.

He closed his submissions by inviting the Sub-Committee to remove the DPS; suspend the licence for three months and impose suggested conditions.

The Sub-Committee applied its mind to the task in hand which was to take such steps as were appropriate and proportionate under s.53C in order to promote the licensing objectives. It also bore in mind paragraphs **11.1** and **11.26** of the Guidance issued under s182.

The Sub-Committee was mindful that the promotion of the licensing objectives is ultimately a forward-looking exercise. Deterrence is also a proper consideration. In ***East Lindsey District Council v Abu Hanif [2008] EWHC 3300 (Admin)***, a licensing

case involving the employment of illegal workers, the High Court (Jay J) made important observations of more general application to licence review decisions:

*“The question was not whether the respondent had been found guilty of criminal offences before a relevant tribunal, but whether revocation of his licence was appropriate and proportionate in the light of the salient licensing objectives, namely the prevention of crime and disorder. This requires a much broader approach to the issue than the mere identification of criminal convictions. It is in part retrospective, in as much as antecedent facts will usually impact on the statutory question, but importantly the prevention of crime and disorder requires a prospective consideration of what is warranted in the public interest, having regard to the twin considerations of prevention and deterrence.”*

Similarly, in ***R (Bassetlaw District Council) v Worksop Magistrates’ Court [2008] EWHC 3530 (Admin)***, the High Court considered a case where a licence review followed sales of alcohol to underage test-purchasers. Slade J (at §32), referred to deterrence as a proper consideration in the context of licence reviews.

The Sub-Committee found that the licensing objective of the prevention of crime and disorder is engaged. A breach of the Regulations is a criminal offence and so engages the prevention of crime and disorder licensing objective. The Sub-Committee’s attention was drawn to the case of ***R (Blackpool Council) v Howitt [2008] EWHC 3300 (Admin)*** where breaches of the newly imposed smoking ban were a criminal offence. There does not have to be a criminal prosecution or conviction for this objective to be engaged.

All in all, the Sub-Committee considered the licence holder to have failed to take his responsibilities seriously. It found that the activities identified above amounted to a flagrant disregard for the licensing objectives generally, including those of public safety and public nuisance.

The Sub-Committee agreed with the Police that the causes of the serious crime appeared to originate from unsatisfactory internal management procedures at the premises. The Sub-Committee found the Police observations relating to Covid, fire risk and shisha to be alarming, and not something that inspired the slightest

confidence in the management arrangements at the premises. All in all, the Sub-Committee considered the licence holder to have failed to take his responsibilities seriously.

The Sub-Committee considered whether it could impose other steps short of revocation, including modification of licence conditions and suspension of the licence for three months (as urged by Mr Craig), but considered that this would offer little to address the real issues, which were the unsatisfactory practices and the irresponsible attitude shown by the licence holder, both of which were a significant risk to public health in Birmingham.

The Sub-Committee determined that the removal of the designated premises supervisor was a very important safety feature given that it was this individual who was responsible for the day to day running of the premises, ie the decision to defy the Government Guidance in order to trade as usual. Mr Craig invited the committee to remove the DPS, but offered the Sub-Committee no replacement DPS for the Sub-Committee's consideration. The Sub-Committee considered that, in the circumstance, the revocation of the licence and the removal of the DPS was the appropriate and proportional course to take.

The Sub-Committee is required under s.53D of the Act to review the Interim Steps that have been taken by the Licensing Sub-Committee under s.53B. In conducting a review of the Interim Steps, s.53D(2) sets out how it should approach such a review:

*In conducting the review under this section, the relevant licensing authority **must**—*

*(a) consider whether the interim steps are appropriate for the promotion of the licensing objectives;*

*(b) consider any relevant representations; and*

*(c) determine whether to withdraw or modify the interim steps taken.*

The Sub-Committee took the view that, given the conduct of the operator of these premises, that it is appropriate and proportionate that these steps remain in place.

In reaching this decision, the Sub-Committee has given due consideration to the City Council's Statement of Licensing Policy, the s.182. Guidance and the Guidance issued by the Home Office in relation to expedited and summary licence reviews, as

well as the submissions made by the Police, the Environmental Health Officer and Mr Craig at the hearing.

All parties are advised that there is a right of appeal to the Magistrates' Court against the Licensing Authority's decision within 21 days of being notified of these reasons.