

LICENSING PANEL (LICENSING ACT 2003 FUNCTIONS) ADDENDUM

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ADDENDUM

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**IN THE BRIGHTON & HOVE CITY COUNCIL
LICENSING SUB-COMMITTEE**

**IN THE MATTER OF THE REVIEW OF THE PREMISES LICENCE
MOONLIGHT 171 CHURCH ROAD HOVE BN3 2AB**

**PREMISES LICENCE HOLDER'S
SKELETON ARGUMENT**

INTRODUCTION

1. The application for a review of the premises licence has been sought by Sussex Police in relation to Moonlight Store, 171 Church Road, Hove BN3 2AB ('the premises').
2. The ground for review is the failure of two test purchases at the premises, one on the 11 August 2021 and a second test purchase on the 9 December 2021, almost four months later.

REPRESENTATIONS

3. The application has been supported by the Licensing Authority as a Responsible Authority. The supporting letter dated 25 January 2022 makes it clear that the only licensing objective of concern is the protection of children from harm:

'This representation is made as the Licensing and Trading Standards have concerns that the licensing objective of Protection of Children from Harm is not being upheld.'
4. It is relevant to note that there are no residential representations submitted in support of the application by the police.
5. Indeed, one interested party who has taken the time to write in support of the premises. The interested party states:

'As a regular customer of Moonlight store, having visited over 100 times since June of 2020, when I moved to the area, I can wholeheartedly say that their ID checks are much more thorough than what I have experienced from the Tesco superstore just next door. As a 26 year old man, and a firm regular of the store, I am still ID'd every time I go in there to buy booze or ciggies. Furthermore, around 5 months ago, I witnessed a group of youths asking people outside of the store to buy them alcohol, which I of course refused before walking into the store. When I walked in, the staff member said to me he could see them outside on the CCTV, and said he was watching vigilantly as to which customers engaged with the youths to ensure that no customers bought the youths the alcohol they were asking for.'

6. This is particularly relevant as this Committee will be fully aware that reviews against off-licences in the past that have attracted considerable support from the local community and councillors for the police and licensing authority position, where the community has had concerns of under-age sales or other matters undermining the licensing objectives.

FACTS PERTINENT TO THE REVIEW

7. Neither test purchase was failed by either the DPS or a member of management at the premises.
8. There are no allegations of crime and disorder or failure to promote any other licensing objective by any party that can be said to be relevant to this application.

LEGAL POSITON

9. The Licensing Act 2003 creates specific offences in relation to sales to underage persons. The key offence in relation to this matter is S.146, the sale of alcohol to children. This section creates a *criminal offence*, but it is right, of course, to stress that reviewing the premises licence following a failed test purchase is an acceptable alternative to prosecution under the protection of children from harm licensing objective.
10. It should be noted however that the Licensing Act 2003 creates an additional offence of 'persistent sales of alcohol to children' (S.147A). The offence requires two or more sales to children within a three-month period of each other. So, whilst this offence is

not being litigated here, it is relevant as a guide to this proceeding as it was created specifically to deal with multiple sales of alcohol to children.

11. S.169A Licensing Act 2003 states:

Closure notices for persistently selling alcohol to children

(1) A relevant officer may give a notice under this section (a “closure notice”)...

(2) A closure notice is a notice which—

(a) proposes a prohibition for a period specified in the notice [of not less than 48 hours but not exceeding 336 hours] on sales of alcohol on the premises in question; and

(b) offers the opportunity to discharge all criminal liability in respect of the alleged offence by the acceptance of the prohibition proposed by the notice.

12. Therefore, it is the Government’s position that:

a. A suspension of the premises licence of *between* 48 hours and 336 hours instead of prosecution is a reasonable means of dealing with two or more failed test purchases; and, more importantly

b. That there is no automatic requirement to either prosecute or review the premises licence for such an offence. In fact, in creating the offence and the remedy of closure notices, the Government acknowledges that there must be a significant degree of judgement exercised when determining what action should be taken in the circumstances of failed test purchases.

RELEVANT GUIDANCE

13. Guidance has been issued by the Home Office in relation to the offence of persistent sales of alcohol to children. It states that the following factors need to be taken into account when determining the correct penalty in relation to the offence:

‘Mitigating factors These may include situations where: a negligent staff member had not followed the premises stringent standard practice/age verification scheme despite good and established training schemes; the sale of alcohol forms a large part of the business and a longer closure period would cause financial hardship or threaten the

survival of the business; and if the premises licence holder is willing to make a minor variation/accept conditions on his licence.'

14. This guidance is given specifically in relation to premises where there have been two or more failed test purchases.

15. There is little guidance in relation to a single failed test purchase; however the S182 Guidance issued under the Licensing Act also specifically deals with the offence of persistent sales of alcohol to children. It states at Para 11.29:

'The Government recognises that the majority of licensed premises operate responsibly and undertake due diligence checks on those who appear to be under the age of 18 at the point of sale (or 21 and 25 where they operate a Challenge 21 or 25 scheme). Where these systems are in place, licensing authorities may wish to take a proportionate approach in cases where there have been two sales of alcohol within very quick succession of one another (e.g., where a new cashier has not followed policy and conformed with a store's age verification procedures).'

16. It is submitted that the section underlined above describes the facts of this case almost to the letter.

17. Para 11.20 of the S182 Guidance states in relation to reviews:

'In deciding which of these powers to invoke, it is expected that licensing authorities should so far as possible seek to establish the cause or causes of the concerns that the representations identify. The remedial action taken should generally be directed at these causes and should always be no more than an appropriate and proportionate response to address the causes of concern that instigated the review.

18. The Act and guidance clearly envisage that the specific circumstances are taken into account when determining what would be a proportionate and fair determination in such a case. The range of options as set out in the case of both a review and also a prosecution for the more serious offence of persistent sales, is deliberately broad to allow for the fact that failed test purchases can be the result of actions outside of the control of the premises licence holder, as was the case here.

Mitigating factors

19. The following are identified as mitigating circumstances in the guidance. I have referred to the relevant paragraphs of the DPS' witness statement and the statement of the member of staff who failed the test purchase (statement name and paragraph number).

a. *A negligent staff member had not followed the premises stringent standard practice/age verification scheme despite good and established training schemes:*

- *Training was in place prior to the fail in August 2021: [Tony Gad, para 5]*
- *Proactive re-training and engagement with the authorities was immediately undertaken [Tony Gad, paras 8 to 13]*
- *The staff member responsible for the second failed test purchase was given training as set out above as well as support and supervision [Tony Gad, paras 27, 28 and 29 & staff member statement paras 3 to 5 and para 7]*
- *The staff member responsible had failed to follow the stringent standard practice/ age verification scheme despite good and established training as set out above [staff member para 8]*
- *The Police, in their review application, recognise that the management of the premises is proactive: 'Sussex Police do feel this premises have responded to our stepped approach and have worked with us to try and improve...'*

b. *The sale of alcohol forms a large part of the business and a longer closure period would cause financial hardship or threaten the survival of the business*

- *The business is the sole source of income for the family. Sale of alcohol is essential to that business which would not be able to survive the loss of the premises licence [Tony Gad, para 1, 31 and 37]*

c. *The premises licence holder is willing to make a minor variation/accept conditions on his licence.'*

- *A minor variation was made following police advice following the first failed test purchase to add conditions to the premises licence.*
- *A proposal has been made by the premises licence holder as part of this review to significantly enhance the premises licence and add/*

amend conditions that will place a higher burden on the premises licence holder, including a cost burden, that in and of itself should be considered a proportionate and appropriate response.

CONCLUSION

20. Two failed test purchases is a serious matter. This is recognised by the police when they state in their review application:

'Sussex Police do feel this premises have responded to our stepped approach and have worked with us to try and improve but they have still failed underage test purchases on two separate occasions involving two different members of staff. This is a serious concern, undermining the licensing objective of protection of children from harm and further action should be considered.'

21. It is also recognised by the premises licence holder who has at every stage sought to work with the authorities in coming up with proactive means of ensuring staff are given all the tools to ensure that they understand the importance of conducting age verification checks.

22. However, it would be wrong to suggest that the mere fact of two failed test purchases should in and of itself lead to a revocation of the premises licence. The Licensing Act and Guidance envisage that failed test purchases need to be assessed in the context of the particular circumstances of each case. In particular:

- a. Was training provided to staff?
- b. Was there follow up on training?
- c. Is there evidence to demonstrate that staff were aware of their obligations and some form of check in place to assess this?
- d. Is there evidence demonstrating that every effort has been made to ensure customers are aware of the law?
- e. Is the DPS/ premises licence holder willing to work with the authorities to ensure that they are proactively seeking to minimise the risk of underage sales?
- f. Were any failed test purchases as a result of a sale by the DPS or senior management?
- g. Has there been reflection on the reasons for any failure and has that manifested itself in proportionate and appropriate proposals?

23. In this case, it is clear that the premises licence holder has been proactively seeking to give staff the tools to make the correct decisions when it comes to assessing age, both in providing training, supervision, notices and reminders to staff. There is evidence of a proactive approach to keeping records and also ensuring customers are aware of the challenge policy in place at the premises. By the police own admission, the management at the premises has been keen to work with them and implement changes that have been proposed. Finally, the staff member who failed the test purchase has himself confirmed that the failure was despite all of the above measures being in place to ensure that they could make the correct assessment.
24. The DPS has set out at paras 34 to 37 of his statement further measures that can be implemented at the premises. These are:
- a. A suspension for two weeks to allow all measures to be implemented.
 - b. A change of layout to ensure all alcohol is visible to staff, and an alarm to alert staff if a customer is taking alcohol from fridges. These measures will ensure that there is more time given for staff to assess anyone seeking to purchase alcohol. If the Committee is minded to impose this condition, we propose that the premises licence holder is permitted to supply a revised layout plan (if needed) without the need to make a further application.
 - c. External test purchases for the next two years to be undertaken to ensure that processes are being maintained and properly followed.
 - d. A new electronic till prompt system that requires staff to confirm checks have been undertaken to assess age for all alcohol purchases (and sales of other age restricted goods), rather than staff being asked to only record where a refusal is made. This will also allow the DPS the enhanced ability to assess whether staff are carrying out their duties fully and properly.
 - e. Beefed up current conditions to ensure that, amongst other things, initial staff training is provided by an external source, as well as additional refresher training every six months, alongside more regular refresher training 'in house'.
25. For these reasons it is submitted that revoking the premises licence would not be appropriate, proportionate or reasonable in the circumstances. To do so would take the family's only source of income, which should only be contemplated in the most extreme circumstances where there is no other choice. The government has given a wide range of powers for dealing with failed test purchases for good reason: people make mistakes. Where there is no evidence that the premises licence holder has

deliberately sought to put profit above the promotion of the licensing objectives, which given the facts of this case cannot be said to be the case, and where they have identified further steps that can be taken, including enhanced training, better till systems and reconfiguration of the premises, it is submitted that these measures should be imposed.

PIERS WARNE

TLT LLP

**IN THE BRIGHTON & HOVE CITY COUNCIL
LICENSING SUB-COMMITTEE**

**IN THE MATTER OF THE REVIEW OF THE PREMISES LICENCE
MOONLIGHT 171 CHURCH ROAD HOVE BN3 2AB**

WITNESS STATEMENT OF TONY GAD

1. My name is Tony Gad and I am the DPS at Moonlight in Hove. Moonlight is a family business and I have been in the role of DPS for more than 10 years. It is our only source of income for me and my partner. We have 1 child who live with us and one on the way. My sister Sara also manages the shop.
2. We employ three other staff members. We check carefully that our staff have the right to work in the UK. We are also careful about training staff properly. I will explain more later.
3. I am making this statement to ask the Licensing Sub-Committee not to revoke the premises licence. We understand that mistakes have been made in the past, but we have always looked to work with the authorities and we take our responsibilities very seriously.
4. I have set out below what we have done to ensure as best as possible that we prevent sales of alcohol to under 18's.

Prior to August 2021

5. We have always tried to ensure that our staff are happy and understand the rules about serving under age customers with alcohol. Before August 2021, our training of staff involved:
 - a. Going through a written training provided by Donna and highlighting the importance of checking to the staff.
 - b. We gave them time for them to go through the training and at the end provide them with exam. We have previously provided Donna 3 exam samples which we use for staff training to check their understanding.

- c. When a new starter joined the team I make sure that they spent enough time with me as the DPS and then I had the new starter to spend time with around older/ more experienced staff members before they worked alone.
- 6. I have read Donna Lynsdale's representations and want to just comment on some of the points she has raised from her visit in March 2021.
 - a. All licensing issues found during the visit were dealt with immediately. The member of staff the officers met on the day could not operate CCTV or locate the training records because they were a junior member of staff and they are not permitted to operate CCTV or have access to our records. The issue with the display of the licence was resolved as soon as it was pointed out. We have now provided a locked i-pad so if police wish to view CCTV we can give the staff member the password and they can show the CCTV. The police have seen this in action.
 - b. We also were very disappointed to see that there was food out of date on display. All staff were told that their first duty when they make a start is to check the out of dates items first. We immediately made sure that staff were reminded of how important this is.
 - c. In relation to sales of drinks without English labelling, at the time All our suppliers were struggling to get stock with English labels and we had to take what they had on offer rather than our usual products. We had sticky labels in English with ingredients which we instructed staff to put on the products. During a visit in March, this was not done for a small number of products. The stickers are on the back of the products, near the barcode so are not always easy to see and some of the products were actually stickered during the visit in August. I have attached example photo. However, we accept that we need to be more careful to ensure that all products are properly stickered.
 - d. In relation to the allegations of selling alcohol to street drinkers we have not been aware that this was a concern. In March 2021 we had a visit by Donna and another officer asking for CCTV footage for certain day/ time which we provided her with. We understood that they were looking for a particular group of people. The CCTV confirmed that we had no customers in the shop at the time she asked for. Donna said that maybe they had been in a different store. She confirmed that there is nothing to worry about. This has not been raised since by anyone and we are careful to refuse anyone we suspect of being a street drinker.

August after the first failed test purchase

7. After we were told of the failure, all staff were called down to the shop to inform them the outcome of the test purchase and we gave them refresher training.
8. The person responsible for the sale was given verbal warning and made to do refresher training and examined him, which he passed before being allowed to sell alcohol. He still works for us and is very careful about checking for underage sales.
9. An email was sent to Donna asking her about the challenge 25 course she informed us the council provided. We intended to put all our staff through this additional training. She told us at a meeting that due to COVID they were unable to carry on training for the meantime but when they are back and running she will let us know.
10. A clear note was printed and placed in a visible place leading from the store room to the front of the shop reminding all staff stating that it was shop policy- we do not care how many times you refuse to sell; what's really important is to make the right sale to the right person. Always check ID. A photo of this notice is attached.
11. A daily message to staff was sent via WhatsApp to remind them to ask for ID if they think person is under 30. We have continued to send this message since August.
12. Refresher training carried out every month.
13. We followed the police licensing advice they gave during the meeting and made an application to update the conditions on our licence as requested.

After the second fail

14. When I found out about this, I was very angry to begin with given all the time and money we invest in ensuring that our staff are trained and understand what they must do.
15. We Notified all our staff about the second fail.
16. A warning and suspension was given to the staff member who failed the test purchase. We made it clear that he would not be allowed to sell alcohol again until he

had completed an online training course by DG Training. He was told not to return to work unless he passed the test.

17. We also introduced a document (in both in Arabic and English to avoid any possibility of misunderstanding) relating to sales of alcohol and cigarettes to all employees. All staff have to read and then sign the document monthly.
18. Verbal refresher training is also given to all staff carried on a monthly basis.
19. We have increased the number of posters for challenge 25 and asking to remove any face mask cover if asked. As it was the face mask that the staff member said had been part of the issue.
20. We have signed up with a company called DG Training to provide additional independent training. We have assigned the course to staff members, and they were sent a link to their personal emails to do the training. I can confirm all staff have completed and passed the training.
21. Sara created a note to staff telling them to always ask for face mask to be removed if they think a person might be under 40, to help assess their age (it takes time and slows down the sale) and also allows compare the face with the ID provided if they look under 25 to make sure it's the same person
22. We have been in contact with Hannah from the police licensing asking for advice and guidance by calling and emailing her.
23. We have also made contact with external companies who carry out test purchases to provide us with quotations to allow us to undertake unannounced tests of our staff.
24. We have also re-arranged our time so that I am present during night and Sara (who holds her own personal license) is present more during day shift for monitoring.
25. I just want to say something about the other comments the police have made in their review. The police suggest that the training log on the 9 December showed 4 names all of whom were shown in the log to have been trained on the 2 December. This is correct. It showed refresher training that they had been given.
26. We have staff training records that show refresher training for our staff on 12/8/21, 9/9/21 and 7/10/21 which was 'verbal training, all staff'. After the 7 October, training

continued but this was logged in the Staff Refresher Training Log. All of this is available to the officers to inspect.

27. In relation to the staff member who failed the December test purchase, the police say that they were told his training record was with the accountants. This is correct. This was because he had started 2 day's earlier and his HMRC Starter Checklist/ form had been sent to the accountant but training sheet was accidentally included in the envelope which had been passed on to the accountant. The training record was returned and we provided it to the police. I attach the email showing this.
28. The day of the visit would have been the day the staff member was signed off to work without supervision and would have been the day we would sign the training log to show he had all the training and was ready to work. However, the failed test purchase meant that we could not sign him off.
29. Sara was with him that day, but she went out of the shop quickly for 15-25 minutes to collect money/ change and get her car closer to the shop as she had few delivery items from Cash n Carry in her car and came back to find police licensing present and the test purchase failed.
30. On the 04/01/22 he was officially removed from the payroll on the basis that he told us he had lost confidence and wanted to take time away. We have offered training and understand he is also taking the training offered by the Police.

Offer of additional measures

31. We appreciate that the police and licensing authority have asked for our licence to be revoked. This would be terrible for our family as the shop is the only source of income and removing alcohol would mean that we would have to close the shop because customers would simply go elsewhere.
32. We were devastated to learn of the failure of test purchases as we have a child and recognise how important it is to protect against sales to children. We have always looked to work with officers and will continue to do so.
33. We have proposed below a number of measures that we are prepared to put in place to ensure that as far as possible we ensure that staff are given all of the tools to

make a correct decision when looking at customers and assessing their age. These are:

Licence suspension

34. The premises will cease sales of alcohol (suspension of premises licence) for two weeks to allow for the initial refresher training set out in the conditions below and changes required by the conditions to be made to the premises. We would ask that such suspension can be agreed by the premises licence holder and Licensing Authority to have immediate effect, or begin on an agreed date following the determination of this matter, rather than at the end of the appeal window following determination.

New conditions

- a. All alcoholic products will be immediately visible to a member of staff at the till area. Fridges holding alcohol will be fitted with a sensor or alarm that rings/ buzzes whenever it is opened.
- b. At least twice per calendar year for 2022 and 2023, the premises licence holder will engage an external company experienced in such matters to undertake a test purchase at the premises and produce a report confirming whether the test was passed or failed. The result of the test purchase will be made available to Sussex Police, Licensing and Trading standards officers on request, along with any recommendations from the report following the test. Thereafter, and subject to agreement with Sussex Police, this condition can be removed by minor variation.
- c. An electronic system will be installed on the tills to require the staff member making any sale of alcohol to confirm prior to the sale that ID has either been requested and provided, or that a visual check has been carried out to ensure that the customer is believed to be over 25 years old.

Amendment of the following conditions (as numbered on the premises licence):

35. Condition 4 of Annex 2 to be amended as follows:

4 c) Any refusals made for alcohol service e.g. underage, will also be recorded (either in electronic or written form) each time a refusal is made. The record will include the time, date and reason for refusal as part of the log. This will include refusals at point of sale, point of delivery, or click and collect. The DPS will inspect the log every 2 weeks and

sign to say that the log has been inspected. In particular the DPS is to inspect the refusals logs for patterns, such as increase or decrease in the number of refusals or staff members refusing less frequently than usual or less frequently than colleagues. Any concerns raised by the analysis should be raised with the individual staff member and any notes retained with the refusals log. The log will be kept for a minimum of 24 months.

36. Condition 8 of Annex 2 to be amended as follows:

- A. An external consultant/ training company will be retained to provide initial training to any staff member employed in a customer-facing role involving sales of alcohol. Refresher training will be provided to all staff members by the external training provider at least every 6 months. The training will cover:
 - a. The lawful selling of age restricted products
 - b. Refusing sales of alcohol to a person who is drunk
 - c. Refusing sales of alcohol for consumption off the premises to people who may have alcohol dependency issues
- B. Further verbal/ reinforcement refresher training covering the above will be carried out by the DPS at least every 8 weeks for all staff members employed in a customer facing role involving the sales of alcohol. This training need not be given in any 8 week period covered by the refresher training given by the external consultant/ training company.
- C. All such training undertaken by staff members, including the refresher training/ verbal reinforcement shall be fully documented and recorded All training records shall be made available to Sussex Police, officers of the Licensing Authority and Trading Standards upon request.

37. We hope that this committee can see that we have always taken our responsibilities seriously. We have never tried to hide behind excuses and have worked hard to understand what has gone wrong and improve where we can. We believe that the above changes to our operating practices will hold us to an even higher standard. We would ask that you do not take away our livelihood and give us a fair chance to show how these changes will work.

I can confirm that the content of this statement is true to the best of my knowledge and belief.

Signed.....Tony Date. 26 February 2022













