LEGISLATIVE & INDUSTRY UPDATE

Committee name	Licensing Committee
Officer reporting	Glen Egan, Office Managing Partner, Legal Services
Papers with report	None
Ward	All

HEADLINE

This report advises Licensing Committee of a recent decision of the High Court concerning the application of the Public Sector Equality Duty to licensing functions.

RECOMMENDATION

That the Committee note the report.

SUPPORTING INFORMATION

The Queen (on the application of) We Love Hackney Limited v London Borough of Hackney

Section 149 of the Equality Act 2010 requires all local authorities to "advance equality of opportunity in the exercise of all functions and not to discriminate on the grounds of "protected characteristics" being:

- age,
- disability;
- gender reassignment;
- pregnancy and maternity;
- race;
- religion or belief;
- sex;
- sexual orientation.

In July 2018 the London Borough of Hackney adopted a Revised Statement of Licensing Policy changing the core hours policy for licensed premises and extended two special policy areas: Alcohol would no longer generally be sold after midnight and the special policy areas in Shoreditch and Dalston were extended, the effect of which was to introduce a rebuttable presumption that new licences in those areas would be refused unless the applicant could demonstrate that there would be no "negative cumulative impact" on the licensing objectives. These changes were informed by an Equalities Impact Assessment (EIA).

We Love Hackney is an association of local businesses and residents established in 2015 to lobby Hackney on licensing matters. When Hackney approved its Revised Statement of

Licensing Policy, the Association formed a limited company We Love Hackney Ltd to seek judicial review.

The basis of their legal challenge was that Hackney's EIA was flawed because "the LGBTQ+ community will be prejudiced by the changes because, for this community, the bars and clubs of Hackney are important cultural spaces" and that Hackney had failed "to have any regard to how the core hours policy will affect the equality of opportunities between those of different races (including ethnic and national origin) concerning how and when they are able to socialise".

Hackney were concerned that the establishment of a company to mount the legal challenge would make it difficult for them to recover their costs if they successfully defended the claim. Hackney estimated that their costs would amount to £ 100,000, yet the share capital of We Love Hackney Ltd was only £ 10. The company's legal costs were being funded via crowd funding which had raised £ 20,000 and had a target of £ 53,000.

The normal practice of the courts in judicial review proceedings is to order the losing party to pay the other party's costs. In order to protect their liability for costs, We Love Hackney Ltd requested the court to make a "Cost Capping Order" limiting their liability to £35,000. A "Cost Capping Order" can be made by the court if it is satisfied that the subject of the proceedings "is of general public importance", that the public interest "requires the issue to be resolved" and that in the absence of a Cost Capping Order the application for judicial review would be withdrawn.

Hackney strongly opposed the application for a Cost Capping Order and argued that the company had been set up to protect its directors from having to pay costs to the Council if their claim was unsuccessful. In this regard, it argued that one of the company's directors was a director of 6 companies in the entertainment / hospitality industry and that all directors had a commercial interest in the outcome of the litigation. The claim was not being brought in the public interest and, in order to protect its own financial position, Hackney asked the court to order the Company to provide "security for costs" as a condition of continuing with the judicial review.

Judgement

At a preliminary hearing Mrs Justice Farbey held that the people who were affected by the changes introduced by Hackney were "amorphous and somewhat protean", but went on to consider whether any groups were either directly or indirectly affected by the changes.

The Judge rejected an argument that the changes affected "anyone who works in licensed premises, or who goes for a late night drink, or who wishes at some stage to invest in licensable activities in Hackney". Further, the effect of the changes were "hard to measure" and that she "was not persuaded on the evidence before me that any section of the community - whether residing, investing, working or socialising in Hackney - speaks with a uniform voice about the effects of the Special Licensing Policy".

The court did not therefore accept that the proceedings were "public interest proceedings" and also held that " the suggestion that those well-resourced individuals who drive the litigation will, in the absence of a Cost Capping Order , be denied access to justice is not realistic".

The Judge ordered We Love Hackney Ltd to provide security for costs in the sum of £ 60,000 in order to continue the claim. Following this Judgement We Love Hackney Limited withdrew its application for judicial review.

Conclusion

This is the first time that the High Court has considered the Public Sector Equality Duty in a licensing context. The case illustrates the difficulty of assessing the impact of licensing changes where the clientele of establishments and their protected characteristics are difficult to identify.

BACKGROUND PAPERS

High Court Judgement