

NORTHERN TERRITORY LIQUOR COMMISSION

DECISION NOTICE

MATTER: DISCIPLINARY ACTION PURSUANT TO THE LIQUOR ACT

REFERENCE: LC2018/154

LICENCE NUMBER: 80802460

LICENSEE: Antony Zaki Habib

PREMISES: **Bojangles Restaurant and Saloon**
80 Todd Street
ALICE SPRINGS NT 0870

LEGISLATION: Section 121 and Part VII of the *Liquor Act*

HEARD BEFORE: Mr Russell Goldflam (Acting Deputy Chairman)
Ms Pauline Reynolds (Health Member)
Mr Blair McFarland (Community Member)

DATE OF HEARING: 19 February 2019

DATE OF DECISION: 22 February 2019

DECISION

1. On 19 February 2019, the Northern Territory Liquor Commission ("the Commission") heard and upheld a complaint against Antony Zaki Habib ("the Licensee"), and imposed a monetary penalty of \$3,850, to be paid within 28 days of 19 February 2019. These are the reasons for the Commission's decision.

REASONS

BACKGROUND

2. The Licensee is the proprietor of Bojangles Restaurant & Saloon ("the premises"), a bar in the central business district of Alice Springs which is licensed to sell liquor from 11:30 am to 2:00 am the following day, seven days a week. On weekdays, the premises open at 11:30 am and trade until 2:00 pm, which is also the time the town's takeaway liquor outlets commence trading.
3. On 17 May 2018, at about 12:20 pm, a brightly and distinctively dressed Aboriginal female ("SM") entered the premises. While on the premises she was served two schooners of beer, and drank from at least three other glasses of beer she obtained from other patrons. Towards closing time at about 2:00 pm, after having been assisted to

leave the premises, SM sat down on the footpath next to the front saloon-style swinging doors of the premises. Three minutes later, at 2:05 pm, SM lay down and apparently fell asleep.

4. Within a minute, a proprietor of the neighbouring Rock Bar, a competitor of the Licensee, emerged from his premises, walked over to SM, photographed her prone body on the footpath, and then returned to the Rock Bar.
5. A minute later, a Bojangles employee ("Jamie") came out of the premises, approached SM and attempted to move her across the road, where there is a public park. Two security officers on duty at the premises, Mr Hay and Mr Kalkal, came out of the premises and prevailed on Jamie to put SM back where she had been lying so that they could arrange for medical assistance. Jamie picked SM up, deposited her back on the footpath, and went back inside the premises. Mr Kalkal called an ambulance, while Mr Hay remained with SM to look after her, placing his jacket over her. An ambulance arrived at 12:20 pm and conveyed SM to the Alice Springs Hospital.
6. Meanwhile, the Rock Bar proprietor had sent the photograph he had taken of SM (presumably either by email or SMS) to Mark Wood, the Manager of Licensing Liquor, Gambling and Racing, who immediately dispatched two Licensing NT Compliance Officers to the premises to investigate the matter.
7. As a result of this investigation, on 22 May 2018 Senior Compliance Officer Holly Sowerby made and signed a complaint against the Licensee that he had contravened a provision of the *Liquor Act* ("the Act"), namely s 121, which provides that a licensee must remove a person from the licensed premises if the person is drunk.
8. On 27 November 2018, the Director-General of Licensing ("the Director-General") referred the complaint, accompanied by a brief of evidence, to the Commission for hearing.

THE HEARING

9. The matter proceeded as a public hearing on 19 February 2018 at Alice Springs. Mr Timney appeared on behalf of the Director-General. The Licensee appeared unrepresented. The Commission thanks them both for their attendance and assistance. As Mr Habib was unrepresented, the hearing was conducted with a minimum of formality.
10. The Commission proceeded on the basis that the "reasonable satisfaction" standard of proof enunciated in *Briginshaw v Briginshaw* (1938) 60 CLR 336 is applicable to the determination of complaints under s69 of the Act.
11. At the outset of the hearing, Mr Habib succinctly and clearly identified the sole issue in contention, as follows:

We believe the lady wasn't drunk. She only had two drinks. It was only light beer. We think she had medical problems.... We called the ambulance. They recognised her. That's how we know she had a medical condition.

12. Mr Timney tendered the brief, which included two statutory declarations by Ms Sowerby, her signed complaint, correspondence between Licensing NT and the Licensee, transcript of an interview Ms Sowerby and a colleague conducted with Mr Hay, and high quality CCTV footage of the premises covering the period from when SM entered the premises until she was conveyed away by the ambulance.
13. A detailed log of the relevant parts of the CCTV footage prepared by Ms Sowerby was tendered to assist the Commission when it viewed the footage the subject of entries on the log.
14. Mr Timney also tendered case notes made by an attending St Johns Ambulance officer.
15. The Director-General called three witnesses, Ms Sowerby, Mr Hay and Mr Kalkal. During the Director-General's case, Mr Habib, who had been present at the premises during the events the subject of the complaint, interposed observations of his own, and accordingly, he too became a witness in the hearing. The Commission administered an affirmation to all witnesses, including Mr Habib.

THE EVIDENCE

16. By the time Ms Sowerby and a colleague arrived at the premises at 2:30 pm on 17 May 2018, SM had been taken to hospital, so Licensing NT officers did not have the opportunity to observe SM for themselves. However, Mr Hay, Mr Kalkal and the St Johns Ambulance officer had all observed SM, and the Commission received evidence of the observations made by each of these people.
17. In his interview with Compliance Officers on 5 October 2018, Mr Hay stated:

She was very drunk. And I was like OK, so I carried her, and then we sat down and then she just slid down to the floor. So I took my jacket off and covered her with it, it was a bit cold that day... She shouldn't have been that drunk.... When I got to her she was nodding off, she was kind of sleeping, she was bowed down sleepy. So I tapped her on the shoulder and said you have to go. Helped her up, and she was unsteady. No balance.
18. Mr Hay's evidence before the Commission was to similar effect. Although, as it happens, 17 May 2018 was his first day on duty at the Licensee's premises, Mr Hay had significant prior experience as a crowd controller, and the Commission accepts that he is qualified to assess whether a person is intoxicated. He was an impressive witness.
19. Mr Hay's employer on 17 May 2018 was Mr Kalkal, an independent contractor engaged by the Licensee to provide security services to the Licensee. Mr Kalkal gave evidence that he has recently become an employee of Mr Habib, and it was clear to the Commission that he was in Mr Habib's camp, because as the hearing progressed Mr Kalkal freely interposed comments in support of the Licensee. Nevertheless, in his evidence, Mr Kalkal deposed that "she was intoxicated, I would say", a statement which, having in effect been made against interest, was accorded significant weight by the Commission. In addition, Mr Kalkal confirmed that he had written and signed a report of the incident as follows:

1 x F intox indi Passed out near front door
Woke her up and rang paramedics

20. The St John's report supports the Licensee's contention that SM was suffering from an unrelated medical condition, because it reports that she complained of leg or ankle pain, and was observed to be limping. However, the report also included the following notes:

Handed over from hotel security that Pt had been drinking large amounts of ETOH...
Pt alert but ? intoxicated and able to answer questions. ... Clinical Impression:
Alcohol excess ... ETOH like smell on breath; alcohol use reported by other; patient
admits to alcohol

21. The Licensee is to be commended for having installed a comprehensive CCTV surveillance system with 24 cameras, which enabled Licensing NT to assemble a clear and substantially complete visual record of SM over the entire period of almost two hours that she was on the premises. That record includes the following salient features:

- a. 12:20 pm SM, on entering the premises, walks stiffly but not unsteadily from the front door to the bar with two males, where together they buy a jug of beer
- b. 12:22 pm SM is poured a schooner from the jug, which she drinks (the first drink)
- c. 12:45 pm SM enters the female toilet, easily opening the door. She walks stiffly, but otherwise without noticeable impairment
- d. 12:47 pm Mr Habib serves SM at the bar with a schooner of beer (the second drink)
- e. 1:00 pm SM is seated at a table in the beer garden, gesticulating animatedly. She appears to brush beer off the table with her arm into the lap of the man sitting next to her, which annoys him
- f. 1:11 pm SM takes another patron's glass of beer and drinks it (the third drink)
- g. 1:20 pm SM stands up and moves to the other side of the table. She is swaying, unsteady and hanging on to the table for support as she manoeuvres around it
- h. 1:22 pm SM grabs an empty glass which is filled for her from a jug held by another patron (the fourth drink)
- i. 1:36 pm SM moves from the table to a nearby bench. She is staggering, and someone assists her to sit down. Another patron holding a glass assists SM to drink from it (the fifth drink)
- j. 1:40 pm SM stands up and immediately sits down in the same place
- k. 1:53 pm SM tries to stand up, but falls back into her seat
- l. 1:57 pm Mr Hay approaches SM and motions for to leave the premises. She is unable to stand unaided, and starts to fall over. He catches her and supports her with both hands to walk out of the beer garden
- m. 1:58 pm Mr Hay lets go of SM as they approach the female toilet. She tries to push the door open and falls on the floor. Female patrons assist her into the toilet
- n. 2:02 pm SM exits the toilet, and, unable to walk unaided, is assisted off the premises by a female patron, who helps her to sit down on the footpath with her back against the front wall of the premises
- o. 2:05 SM lies down on the footpath

22. Section 7 of the Act provides:

Meaning of *drunk*

A person is ***drunk*** if:

- (a) the person's speech, balance, coordination or behaviour appears to be noticeably impaired; and
- (b) it is reasonable in the circumstances to believe the impairment results from the person's consumption of liquor.

23. The Licensee told the Commission that he had watched the relevant CCTV footage prior to the hearing. As noted above, the Licensee contended at the commencement of the hearing that he believed that SM was not drunk and that her grossly impaired state was due to a medical problem. In the light of the evidence, these contentions were fanciful, and did Mr Habib no credit.

24. In his final submissions, Mr Habib adopted a rather different approach. He speculated that SM may have been drinking before she entered the premises. He contended that she may have had as few as three glasses of beer on the premises, which isn't enough to get drunk. He said that "the guys didn't notice her". The difficulty with these submissions is that none of them is directly relevant to the only real issue in contention, namely whether SM was drunk on the premises.

25. Having regard to all the evidence, the Commission finds that SM was drunk, as defined in the Act. She may well have appeared to be noticeably impaired from 1:00 pm onwards. She certainly appeared to be noticeably impaired from 1:20 pm onwards. The Commission finds that to genuinely believe that the noticeable impairment was not the result of her consumption of liquor would have been unreasonable.

26. The Commission upholds the complaint. The Commission also considers that it is appropriate to take disciplinary action.

DISCIPLINARY ACTION

27. When the Commission pronounced its decision to uphold the complaint, Mr Habib for the first time conceded that SM had indeed been drunk. The Commission is encouraged that the Licensee, however belatedly, now accepts responsibility for his misconduct.

28. Nevertheless, the Commission remains concerned about Mr Habib's remarkably cavalier response to this complaint. When first confronted by Ms Sowerby, who arrived at the premises a few minutes after the ambulance had taken SM away, Mr Habib denied having seen SM inside the premises. This initial denial was demonstrably false. The CCTV shows that Mr Habib had personally served SM with a drink at 12:47 pm, and that at 2:08 pm he had walked out of the premises, where he remained for several minutes talking to other staff while SM was lying on the footpath a few feet away from him.

29. The Licensee has held his liquor licence since 14 December 2016. This is the first occasion on which he has been the subject of a complaint accepted by the Director-General resulting in disciplinary action.

30. The Licensee states that following the incident the subject of this complaint, he has implemented measures to reduce the risk of harm associated with the supply of liquor on the premises, and the risk of further breaching the Act. He states that he has ceased the sale of jugs and glasses, limits transactions to one can per person, and restricts sales to three cans per customer during the morning session.
31. There is however real doubt as to how effective these measures have been. Pursuant to s48B of the Act, the Commissioner of Police suspended the Licensee's licence for 48 hours commencing on 30 November 2018. According to NT Police, this suspension was imposed following the detection of "a number of alleged breaches of the Liquor Act in the past week, as well as ongoing issues of antisocial behaviour in and around the licensed premises."¹
32. The Director-General recommended that a further licence suspension be imposed by the Commission.
33. The Commission has previously upheld two complaints that a licensee had breached s121 of the Act, resulting in the imposition of monetary penalties of \$4,620 and \$3,850 respectively. It is unclear to the Commission why on this occasion suspension was recommended. The Commission accepts the Licensee's submission that suspension would be a substantially more severe penalty than a monetary penalty, and would adversely affect not only the Licensee, but also his employees.
34. The Commission considers that a monetary penalty is appropriate in this case. The applicable maximum monetary penalty is \$15,400.
35. The Commission considers that overall, the circumstances of the breach and the circumstances of the Licensee are similar to those in a recently heard s121 complaint against the Licensee of the Todd Tavern. The Commission imposed a monetary penalty of \$3,850 on that Licensee. The Commission considers that the same penalty should be imposed on this Licensee.
36. The Commission warns the Licensee that in the event any further complaints of this nature against him are upheld, he should expect to receive a substantially more severe penalty.

NOTICE OF RIGHTS

37. Section 120ZA of the Act provides that a reviewable decision is a Commission decision that is specified in the Schedule to the Act. Any application for review of a reviewable decision must be lodged within 28 days of the date of the decision.

¹ NT Police Fire & Emergency Services, *Media Release*, 30 November 2018

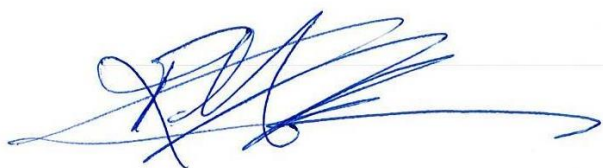
38. The Schedule specifies decisions made pursuant to s68 (“Decision to dismiss complaint” and s69(3) (“Decision to take disciplinary action against licensee”) as reviewable decisions. Section 68 confers power on the Director-General to dismiss complaints against licensees, and accordingly has no application to this decision. Section 69, which is headed “Commission’s power to take disciplinary action” confers on the Commission both the power to uphold a complaint and take disciplinary action (s69(4)(b)(ii)), and the power to dismiss a complaint (s69(4)(b)(i)).

39. However, s69(3), the provision in the Schedule, does not in its terms refer to a decision to uphold a complaint and take specified disciplinary action. It provides:

The Director-General must give the licensee details about the referral when referring the matter to the Commission.

40. In this matter, the Commission has decided to uphold the complaint and to take disciplinary action. It is unnecessary for the Commission, which has not had the assistance of argument on this issue, to determine whether or not this decision is a reviewable decision, and the Commission expresses no view on the issue.

41. If this decision is a reviewable decision, in accordance with section 120ZB(1)(a) and (c) of the Act, the affected persons would be the applicant and the person who made the complaint, namely Holly Sowerby, Compliance Officer, Licensing NT.



RUSSELL GOLDFLAM
ACTING DEPUTY CHAIRPERSON
NORTHERN TERRITORY LIQUOR COMMISSION

22 February 2019

On behalf of Commissioners, Goldflam, Reynolds and McFarland