

# NORTHERN TERRITORY LIQUOR COMMISSION

## DECISION NOTICE

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**MATTER:** DISCIPLINARY ACTION PURSUANT TO THE *LIQUOR ACT 1978*

**REFERENCE:** LC2019/129

**LICENCE NUMBER:** 80802460

**LICENSEE:** Antony Zaki Habib

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

**LEGISLATION:** Section 102, Section 121 and Part VII of the *Liquor Act 1978*

**HEARD BEFORE:** Mr Russell Goldflam (Acting Deputy Chairman)  
Ms Bernard Dwyer (Health Member)  
Mr Blair McFarland (Community Member)

**DATE OF HEARING:** 15 January 2020

**DATE OF DECISION:** 19 January 2020

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### **DECISION**

1. On 15 January 2020, the Northern Territory Liquor Commission ("the Commission") heard and upheld a complaint against Antony Zaki Habib ("the licensee"), and suspended the liquor licence for a period of 48 hours commencing at 1130 hours on 21 February 2020. These are the reasons for the Commission's decision.

### **REASONS**

#### **BACKGROUND**

2. The licensee is the proprietor and 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. The licensee is himself the nominated manager of the licence.
3. Acting on information received from a member of the public that on 22 March 2019, a man had been seen vomiting on the footpath outside the entrance to the premises, Licensing NT officers conducted an investigation that led to a complaint being accepted

by a Delegate of the Director-General of Licensing (“the Director-General”) on 28 May 2019 under s 68(3) of the *Liquor Act 1978* (“the Act”).

4. On 19 November 2019 a Delegate of the Director of Liquor Licensing (“the Director”)<sup>1</sup> referred the complaint to the Commission under s 69 of the Act. The Director recommended that disciplinary action be taken by way of licence suspension, and specified two grounds for the disciplinary action, that the licensee had supplied liquor to a person who was drunk (contrary to s 102 of the Act), and that the licensee had failed to remove a person from the premises who was drunk (contrary to s 121 of the Act).

## THE HEARING

5. The matter proceeded as a public hearing on 15 January 2020 at Alice Springs. Mr Wood appeared on behalf of the Director. 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.
6. In accordance with Regulation 133 of the *Liquor Regulations 2019*, the complaint, which had been made under s68(1) of the Act but not determined before the commencement of the *Liquor Act 2019*, proceeded and was determined under the *Liquor Act 1978*.

## THE FACTS

7. The licensee indicated that he did not intend to contest the complaint. Accordingly, the hearing proceeded by a recital of the following facts relied on by the Director in support of the complaint.

On Friday 22 March 2019, at approximately 23:00hrs CCTV footage obtained from Bojangles shows a male, now known to Licensing NT entering the premises. The male can be identified as Indian in appearance with a slight build and approximately 160cm tall. He was wearing a tan coloured t-shirt, blue jeans and white shoes. Upon entering the premises there is nothing out of the usual in the appearance or behaviour of this male.

Throughout the footage the male can be seen to be consuming shots, Canadian Club, Jack Daniels, and approaches the bar multiple times. Further to this, the footage also depicts the male fall onto the ground, knock a drink over on the bar and walk into people. The male was removed from the premises at approximately 23:48hrs. At approximately 23:56hrs the male is seen to be vomiting onto the pavement at the front of the premises.

The male’s behaviour indicated that he was drunk; his balance, coordination and behaviour was noticeably impaired. Principal Compliance Officer Chris Wade has spoken to the male who stated he had not been drinking earlier in the evening, had not taken any illicit drugs, was not taking any medication other than paracetamol, and has no health issues.

On 25 March 2019, Principal Compliance Officer (PCO) Chris Wade received a phone call from an informant (the complainant) providing information in relation to his observations of an alleged drunk male vomiting out the front of Bojangles in the early hours of Saturday morning 23 March 2019.

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<sup>1</sup> The powers and functions of the Director-General under the Act were transferred to the Director of Liquor Licensing on 1 October 2019, when the *Liquor Act 2019* commenced.

On 25 March 2019 Senior Compliance Officer (SCO) Holly Sowerby hand delivered a CCTV request to the Licensee/ Nominee of Bojangles, Mr Tony Habib. The footage was subsequently collected by SCO Sowerby on the 26 March 2019.

On 27 March 2019 PCO Wade completed a file note detailing his conversation with the informant.

On 28 March 2019 SCO Sowerby reviewed the CCTV footage and discovered that more footage was required. SCO Sowerby submitted another CCTV request to the licensee.

On 1 April 2019 PCO Wade submitted a file note detailing his conversation with the male who was identified as the drunk patron. The male, to be identified as MA, admitted to PCO Wade that he had been consuming alcohol earlier that evening of 22 March 2019 at another premises, and that he believed he had consumed tequila shots at Bojangles. MA said he had no underlying health issues to account for his behaviour that evening and he had not taken any illicit drugs.

SCO Sowerby collected the second lot of CCTV footage from Bojangles on 2 April 2019.

On 3 April 2019, the complaint, pursuant to s 68 of the Act was submitted by SCO Sowerby to the Delegate of the Director-General of Licensing. The complaint was resubmitted on the 14 and 28 May 2019. The complaint was accepted by the delegate on the 28 May 2019 and the licensee was afforded the opportunity to respond in writing. The licensee did not respond to the allegation.

A full examination of the CCTV obtained, evidenced that on 22 March 2019 Bojangles sold or otherwise supplied alcohol to a person who was drunk; and failed to exclude or remove a drunk person, in accordance with the Act.

In summary, the footage indicated that at 23:00hrs (the time stamp on the footage is out by 13 minutes, therefore the actual time would have been 23:13hrs) on 22 March 2019 MA, in the company of three males, entered the premises past crowd controllers Kassem and Tupou, on his way in. MA can be described as Indian in appearance with a slight build; black hair; moustache and beard; and approximately 160cm tall. He was wearing a tan coloured t-shirt, blue jeans and white shoes. MA appeared well and his gait was normal. MA and his male companions purchased shots of Fireball whiskey and stubbies of Jack Daniels from the main bar at 23:01hrs.

MA had finished the first stubby by 23:16hrs. At 23:17hrs MA put his empty stubby on the bar counter however he put it down on an angle. The stubby fell over and rolled toward the floor; however it was stopped by the edge of the bar. MA then bumped into the bar and had to grab onto it to avoid falling backwards. At 23:19hrs MA talked to CC Kassem at the entrance. MA was

holding onto the saloon door and as he let it go it swung into the face of a female entering. At 23:20hrs MA fell off a bar stool onto the floor.

At approximately 23:26hrs MA had another shot. At 23:26hrs MA knocked a drink over at the bar. At 23:27hrs MA had another shot. At 23:30hrs MA bought another Jack Daniels stubby from the main bar. MA went to pick up the drink and dropped it and it fell onto the bar. The female employee that served him picked it up for him. At 23:35hrs MA dropped his stubby on the ground, another male patron picked it up for him. CC Kassem observed the patron pick up the stubby and give it back to MA. At 23:38hrs MA dropped a cup of water on the ground. At 23:40hrs MA knocked an empty glass off a counter. At 23:45hrs MA rested his head on his hand and appeared asleep. At the same time an employee collected a glass from in front of MA.

After the employee moved on MA's arm slipped and he knocked his stubby off the counter onto the ground.

At 23:47hrs MA knocked over a stool and it fell to the ground. Robert Habib (serving at the bar) realised that it was MA that knocked over the stool and signalled to CC Tupou to remove MA. MA is seen to vomit on the pavement outside Bojangles at 23:56hrs.

There is a noticeable decline in MA's outward behaviour between when he entered Bojangles at 23:00hrs to when he was removed at 23:47hrs. The noticeable behaviour indicating MA was drunk was observed by Bojangles employees on at least four separate occasions.

On 24 June 2019 SCO Sowerby tried to call CC Kassem to arrange an interview, however he did not answer. SCO Sowerby left a message for him to call her back.

On 9 July 2019 SCO Sowerby took a photograph of the security incident register book at Bojangles, for the night of 22 March 2019. The register identified that CC Tupou's identification number that evening was number 20. CC Tupou wrote in the register '00:01 – Evicted Indi M RSA' – translating to Evicted Indian Male RSA. Although brief, this entry is the best matched entry to identify the removal of MA. The time would also be correct as noting earlier that the CCTV footage time stamp was out by approximately 13 minutes.

On 11 July 2019 SCO Sowerby tried to call CC Kassem at 14:05hrs to request an interview. He did not answer the call. SCO Sowerby sent him a text message from her mobile phone asking him to call her.

On 12 July 2019 CC Kassem called SCO Sowerby at the office at 10:56hrs. SCO Sowerby advised Kassem that she was investigating an incident that occurred at Bojangles on 22 March 2019 and requested an interview from him. Kassem said he did recall the incident and the male involved, however he declined to be interviewed.

8. The licensee admitted the truth and accuracy of the recited facts, and the Commission, which had viewed the CCTV footage supplied by the Director with the referral of the complaint to the Commission, finds the recited facts to be proved.
9. 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.

10. The Commission makes the following findings:

- While on the premises MA was supplied with and consumed the equivalent of approximately 7 or 8 standard drinks over a period of approximately 30 minutes.
- The same female bar attendant served MA with most of these drinks.
- At least three other bar staff were working alongside that attendant at the same bar during this period.
- MA frequently exhibited noticeable signs of being drunk on the premises from at least 2317 hours until his removal at 2347 hours.
- Employees of the licensee observed MA exhibit noticeable signs of being drunk on several occasions, including at 2319 hours, 2330 hours, 2335 hours and 2347 hours.
- MA was drunk on the premises.
- The licensee's employees supplied MA with liquor while he was drunk on four occasions, at 2326 hours, 2327 hours, 2328 hours and 2329 hours.

11. The Commission upholds the complaint, although not on the grounds specified by the Director pursuant to s 69(2)(b) of the Act, which were, as noted above, that the licensee breached s 102 and s 121 of the Act.

12. As the licensee repeatedly reminded the Commission during the hearing, he himself was not at the premises at the relevant time, and accordingly the Commission proceeds on the basis that the licensee did not himself breach either of these provisions of the Act. Although he could have been prosecuted in court for doing so by way of s 123A of the Act ("Prosecution of licensee for actions of employee"), s 123A refers in its terms only to the prosecution of a licensee, and not to a complaint being made against a licensee. For this reason, the Commission doubts that s 123A is applicable to a complaint under Part VII of the Act.

13. That said, the Commission does not express a concluded view that the grounds specified by the Director are erroneous, or that the complaint could not have been upheld on those grounds. As discussed by the Commission in its decision delivered on 4 December 2018 to uphold a complaint against the licensee of the Todd Tavern ("the Todd Tavern complaint"), the duties imposed by s 121 extend to licensees who are absent from the

premises at the time.<sup>2</sup> The Commission now observes that this also applies to the duties imposed by s 102. However, the Commission considers that on this occasion the benefit of any doubt about the issue should be extended to the licensee, who appeared unrepresented at the hearing.

14. The Commission notes that s 69(5)(a) of the Act confers power on the Commission to take disciplinary action against a licensee if it is satisfied that “a ground for taking disciplinary action exists”. In the view of the Commission this power is not fettered by a requirement that a ground of which it is satisfied be the same ground or one of the same grounds specified by the Director.

15. In this matter, the Commission is satisfied that there were two breaches of the Act by employees of the licensee, namely:

- s 102: an employee of the licensee supplied liquor to a person who was drunk; and
- s 121: an employee of the licensee failed to remove a drunk person from the licensed premises.

16. The licence is subject to a condition headed “Failure to Comply”, which provides that:

The licence will be subject to a condition that a breach of the *Liquor Act 1978* by any person employed by or on behalf of the Licensee, shall constitute and be deemed to be a breach of the licence conditions by the Licensee.

17. Accordingly, the Commission upholds the complaint on the ground set out at s 67(3)(c) of the Act, that the licensee contravened a licence condition.

## **DISCIPLINARY ACTION**

18. The Commission considers that the ground of complaint it has upheld is no less serious than the grounds the Director specified, and that the disciplinary action recommended by the Director to suspend the licence is appropriate in relation to the ground the Commission has upheld.

19. The contravention of the licence is serious. The Supreme Court of the Northern Territory has held that the proper conduct of licensed premises is of such public importance that licensees who are granted the privilege of selling liquor can reasonably be expected to assume responsibility for the acts of their employees when selling liquor on their behalf.<sup>3</sup> As the Commission stated in the Todd River complaint, licensees cannot avoid their duty by personally absenting themselves from the premises,<sup>4</sup> and s 121(1) imposes a duty on licensees to provide sufficient staff to enable continuous active surveillance of patrons to check for signs of drunkenness. In short, the Act does not permit licensees to turn a blind eye to their responsibilities.<sup>5</sup>

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<sup>2</sup> Accessed at [https://justice.nt.gov.au/\\_data/assets/pdf\\_file/0011/616844/Decision-Notice\\_ToddTavern\\_041218.pdf](https://justice.nt.gov.au/_data/assets/pdf_file/0011/616844/Decision-Notice_ToddTavern_041218.pdf), [26] to [32]. See also *Northern Territory Liquor Commission and Others v Rhonwood Pty Ltd* (1997) 6 NTLR 209; 117 NTR 1 (“*Rhonwood*”).

<sup>3</sup> *Rhonwood*, cited in Todd River complaint, at [23].

<sup>4</sup> At [31].

<sup>5</sup> At [32].

20. The Commission accepts the submission of Mr Wood that in imposing disciplinary action, the Commission should apply the principles of proportionality, parity and deterrence. In this case, given the licensee's history of non-compliance, which will be detailed below, the Commission considers that specific deterrence is an important factor. Not only should the action taken send a message to other licensees, but action is warranted that sends a message to Mr Habib.
21. In considering what disciplinary action to impose, the Commission has had regard to the following circumstances that are favourable to the licensee:
- a. At the hearing the licensee did not contest the allegations made by the complainant. That said, the Commission notes that the evidence provided by the Director in his referral of the complaint to the Commission, including extensive and graphic CCTV footage of the events the subject of the complaint, was compelling.
  - b. The licensee's staff did, belatedly, remove the drunk patron from the premises.
  - c. Despite having previously informed the Commission that he would be unable to attend the hearing for medical reasons, the licensee attended the hearing.
  - d. The licensee has installed and operates a high quality CCTV surveillance system for the premises.
  - e. The licensee provides employment to about 20 people.
22. The Commission does not accept the licensee's submissions that the contravention was mitigated by the fact that the patron had "pre-loaded" before entering the premises. As Mr Wood submitted, licensees should expect that patrons entering licensed premises towards midnight on a Friday have probably already consumed liquor elsewhere.
23. Similarly, the Commission does not accept that the licensee's actions since 22 March 2019 to reduce the risk of future similar breaches of the Act by his employees mitigates the seriousness of this contravention. The licensee informed the Commission that he had not continued the casual employment of the bar attendant who had supplied most of the drinks to the patron. He stated that Crowd Controller Kassem had been counselled, and that his hours of work had been reduced. The licensee said he has employed a new bar manager. However, the Commission received no evidence that the licensee has made any systemic changes to ensure that his predominantly casual employees are properly trained, supervised and managed.
24. When invited to respond to the complaint by Licensing NT, the licensee elected not to do so. Similarly, an employee of the licensee, Mr Kassem, declined to assist investigating officers with their inquiries. There was of course no obligation for either of them to assist the investigators, so this is not a matter that the Commission is entitled to consider as being adverse to the licensee. By the same token, however, the licensee is unable to claim any credit for having co-operated with the investigators.

25. In considering what disciplinary action to impose, the Commission has had regard to the following circumstances that are adverse to the licensee:

- a. The licensee's dismal record of compliance with the Act, noting that:
  - i. On 14 December 2016 the licensee was granted the Bojangles licence.
  - ii. On 13 December 2017, an employee of the licensee was detected unlawfully selling takeaway liquor to a Bojangles patron. There was no suggestion that the licensee was aware of this, and on 26 November 2018 the ensuing complaint against the licensee was dismissed by the licensee on technical grounds. However, these proceedings should have alerted the licensee to the importance of effectively supervising and managing his staff.<sup>6</sup>
  - iii. On 26 November 2018, the same day that the above complaint was dismissed, police attended Bojangles and detected a drunk patron who had not been removed. The licensee was prosecuted, and on 13 August 2019 was convicted in the Local Court of breaching s 121, and ordered to pay \$4,800.
  - iv. On 30 November 2018, four days after that breach, the Commissioner of Police suspended the licensee's licence for 48 hours using his powers under s 48B of the Act, 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."<sup>7</sup>
  - v. On 17 May 2018 at about 1400 hours a drunk patron was observed unconscious on the footpath outside the entrance to the premises. On 22 February 2019 the Commission upheld the ensuing complaint and imposed a monetary penalty of \$3,850. In doing so, the Commission expressly warned the Licensee that in the event any further complaints of this nature against him were upheld, he should expect to receive a substantially more severe penalty. This was one month before the current contravention, which arose from markedly similar conduct.
- b. Throughout the hearing, the licensee complained that these and previous proceedings against him were "unfair". The articulated basis of this complaint was that he was being blamed for the poor conduct of his employees. The Commission is concerned at what appears to be a serious lack of insight by the licensee of the nature of his responsibilities as both the licensee and the licensee's nominated manager. Indeed, the Commission has a nagging doubt about the licensee's fitness to discharge those responsibilities in accordance with the Act.
- c. The contravention was serious: the Commission considers that to supply such a large amount of liquor to a person over such a short period could endanger a person's health. The patron vomited copiously onto a public footpath in the entertainment precinct of Alice Springs on a Friday night, at a time when there was significant pedestrian traffic. This was, in a word, disgusting.

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<sup>6</sup> Northern Territory Liquor Commission decision LC2018/142, 26 November 2018, accessed at [https://justice.nt.gov.au/\\_data/assets/pdf\\_file/0016/601018/Decision-Notice-Bojangles\\_261118.pdf](https://justice.nt.gov.au/_data/assets/pdf_file/0016/601018/Decision-Notice-Bojangles_261118.pdf)

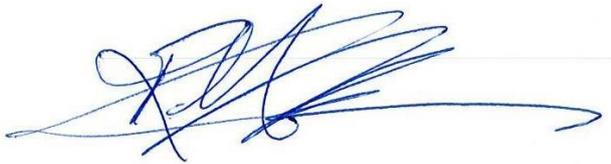
<sup>7</sup> NT Police Fire & Emergency Services, *Media Release*, 30 November 2018

26. Mr Wood informed the Commission that penalties imposed for contraventions of this nature against other licensees have included both monetary penalties (such as that imposed by the Commission on this licensee on 22 February 2019, as noted above), and licence suspensions of one or two days, which on some occasions have been suspended periods of suspension.
27. The Commission doubts the validity of ordering licence suspension which is itself suspended. The Act does not expressly authorise that form of disciplinary action. In any case, in the circumstances of this matter, the Commission considers that a suspended period of suspension would be ineffective to meet the requirements of specific deterrence.
28. The Commission considers that in accordance with the principle of parity, a period of in excess of two days should not be imposed. Otherwise, the Commission would have been inclined to impose a significantly longer period of suspension.
29. In all the circumstances, and noting that the contravention occurred on a Friday, which is a particularly busy trading day for the licensee, the Commission has determined to impose a suspension of licence for 48 hours to commence on a Friday. In case the licensee seeks to have this decision set aside on appeal, the Commission has fixed 21 February 2020 as the date for the commencement of the suspension.

## **NOTICE OF RIGHTS**

30. 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.
31. 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 (now the Director) 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)).
32. 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.
33. 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.

34. 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, Senior Compliance Officer, Licensing NT.



RUSSELL GOLDFLAM  
ACTING DEPUTY CHAIRPERSON  
NORTHERN TERRITORY LIQUOR COMMISSION

20 January 2020

On behalf of Commissioners Goldflam, Dwyer and McFarland