

Tasmanian Liquor and Gaming Commission

Appeal against a determination of the Commissioner for Licensing made 24 March 2022

Mr James Hoyle

V

Commissioner for Licensing

Appellant

Respondent

Background

1. Mr James William Hoyle is the holder of an On liquor licence for the premises Phoenix, 63 Brisbane Street, Launceston.
2. On 24 March 2022, the Commissioner determined to suspend the liquor licence of Mr Hoyle for a period of 14 days as a result of his failure to pay a fine of \$860 relating to disciplinary action taken against him for failure to comply with conditions of the out-of-hours permit for Phoenix in contravention of section 34A(2) of the Act and failing to comply with a direction specified in a written notice in contravention of section 40(2) of the Act. The suspension was to take effect from 11 April 2022.
3. On 30 March 2022, Mr Hoyle paid the fine in full. This payment was acknowledged on 5 April 2022 in an email from a Liquor and Gaming Branch officer who also advised that the suspension would still apply from 11 April 2022.
4. On 7 April 2022, Mr Hoyle appealed this decision in writing to the Commission pursuant to section 211 (1) (e) of the *Liquor Licensing Act 1990*. A temporary hold was placed on the licence suspension by the Commissioner on 8 April 2022 pending the outcome of the appeal.

The appeal

1. On 2 May 2022, the Commission determined that the appeal would be heard on 6 June 2022 solely on the basis of written evidence pursuant to section 213 (4A) of the Act. The written evidence considered is set out in attachment A to this decision.
2. The appellant was advised of this on 9 May 2022 and invited to submit written evidence in relation to the appeal, to be provided to the Commission by 20 May 2022. No further submission was received by the Commission.
3. The Commission considered the appeal on 6 June 2022.
4. After hearing an appeal, the Commission may under section 214 (1) (c) of the Act confirm the Commissioner's decision, or alternatively revoke the decision,

or alternatively direct the Commissioner to take such action as the Commission considers appropriate.

Grounds of appeal

5. The appellant's appeal document is very scant and consists of a 7-line email in which he submits that:
 - a two-week suspension of his liquor licence will kill his business;
 - that this is incredibly excessive; and
 - is not fair or right.

Legislation

6. Section 105(1)(d) of the Act provides that:
 - (1) "The Commissioner may, by written notice served on the licensee or permit holder, cancel a liquor licence or liquor permit, or suspend a liquor licence or liquor permit for such period as the Commissioner considers appropriate, if –
 - (d) a licensee or permit holder fails to pay a fine under section 102."

Consideration of grounds of appeal

7. The Commission has found it helpful to set out the timelines associated with this matter:
 - 20 December 2021 – the Commissioner wrote to the appellant advising of his decision relating to disciplinary action to be taken regarding contraventions of the conditions of the relevant out-of-hours permit;
 - In the same communication, the appellant was advised that the Commissioner determined to fine him for both contraventions totalling \$860 payable by 3 January 2022;
 - On 21 January 2022 (18 days after the fine was due to be paid), an officer from the Liquor and Gaming Branch made enquiries to the appellant regarding the non-payment of the fine, at which point it was discovered that an administrative error had occurred and the disciplinary letter and invoice had not been sent;
 - 25 January 2022 - a new disciplinary outcome letter was emailed to the appellant with an amended due date for payment of the fine by 8 February 2022.
 - 24 March 2022 (8 weeks and 2 days later), the Commissioner advised the appellant that he has determined to suspend his liquor licence for 14 days as the fine had not been paid;
 - 30 March 2022 – the appellant paid the fine in full;
 - 5 April 2022 – a Branch officer acknowledged receipt of the payment and advised the appellant that the 14-day suspension still applied;
 - 7 April 2022 – the appeal was lodged with the Commission and the Commissioner placed a temporary hold on the suspension on 8 April 2022 pending the outcome of the appeal.

8. In considering the merits of this appeal, the Commission was provided with limited information from either the Commissioner in support of his decision to suspend the licence or the appellant appealing against it.
9. There are no reasons given anywhere as to why the Commissioner exercised the discretionary power he has under section 105(1)(d) to the extent that he did. In the written decision dated 23 March 2022, he states:

I am satisfied on the basis of the evidence provided that the licensee has failed to pay a fine imposed under section 102 and that it is appropriate to suspend his licence for a minimum of 14 days, and if not paid in that time, the licence is to remain suspended until the fine is paid.

10. The Commissioner's letter of 24 March 2022 to the appellant says similarly:

As the fine has not been paid, you are advised that in accordance with section 105(1)(d) of the Act, I have determined to suspend your licence for a minimum of 14 days. Your licence will remain suspended longer than 14 days should the fine remain unpaid, and will remain suspended until the fine is paid.

11. In considering this, the Commission notes that the application of section 105(1)(d) gives the Commissioner discretionary power to respond to a failure to pay a fine issued under section 102 of the Act – he *may* suspend a liquor licence for such period he considers appropriate but he is not compelled to do so nor for the period of 14 days that he settled on. The non-payment simply enlivens the discretion, which must then be properly exercised.
12. A suspension of a liquor licence is the second most serious disciplinary action that can be imposed under the *Liquor Licensing Act*; only the cancellation of the licence is graver. While suspending the appellant's licence was open to the Commissioner, the Commission takes note of the most cogent proposition put by the appellant that the penalty of a two-week licence suspension is excessive.
13. Despite the initial administrative error by the Branch, it took no action to confirm the receipt by the appellant of the second disciplinary action letter and accompanying invoice (as far as the Commission is aware). It appears there was no follow-up with him on this second occasion regarding the continued non-payment of the fine (for 8 weeks and 2 days). It does not seem unreasonable to check both these matters given a previous administrative error and the severity of the action that ensued.
14. Had this occurred, the appellant may well have paid the fine, although the Commission acknowledges that he may have continued to avoid payment. However, had advice been provided to him that a possible consequence of continued non-payment of a fine was suspension of his licence – and that the Commissioner was considering this – there may have been a very different outcome.

15. The Commissioner and his staff no doubt become frustrated by the actions of individuals who refuse to comply with lawful disciplinary direction. Mr Hoyle is such a person. However, on receipt of the suspension advice, he paid the fine and it is the Commission's view that that should have been the end of the matter.
16. The fine was a relatively small one. There are no other matters of which the Commission is aware that would, following a proper exercise of the discretion given to the Commissioner, warrant the further imposition of the serious action of suspension. As stated before, the Commissioner did not indicate any reasons for that action.
17. The purpose of section 105(1)(d) is to ensure that fines are paid. Once payment was made, this purpose had been given effect and the Commission considers that in the circumstances of this case, no further action directed to protection of the public was required. The primary purpose of disciplinary action is the protection of the public.

Conclusion

18. In the absence of any reasons from the Commissioner as to why he exercised his discretion under section 105(1)(d) to take the action to suspend the appellant's liquor licence for 14 days for the non-payment of an \$860 fine, the Commission considers that that this action was excessive. This is especially so when no timely warning was given to the appellant that this action was a possible consequence of the non-payment and was being considered by the Commissioner; and that the suspension still applied despite the eventual payment of the fine.

Decision

19. The Commission directs the Commissioner for Licensing to revoke the suspension of the appellant's liquor licence under section 106 of the *Liquor Licensing Act 1990*.

Decision made by the Commission on 6 June 2022.

Jenny Cranston (Chair), David Hudson (Member), Andrew Walker (Member)

ATTACHMENT A

1. Decision made by the Commissioner for Licensing dated 20 December 2021, sent to the appellant on 25 January 2022, regarding the disciplinary action outcome of two contraventions of the *Liquor Licensing Act 1990*, including an invoice to pay a fine.
2. File note detailing phone conversation with Mr Hoyle, signed by Michelle Khan and dated 21 January 2022.
3. Email to Mr Hoyle attaching disciplinary action outcome letter and invoice, sent on 25 January 2022.
4. Memorandum signed by Commissioner for Licensing dated 23 March 2022.
5. Decision made by the Commissioner for Licensing to suspend Mr Hoyle's liquor licence, dated 24 March 2022.
6. Email to Mr Hoyle with receipt of the fine payment and advising suspension will still occur, sent on 5 April 2022.
7. Notice of appeal of the Commission's decision received on 7 April 2022.
8. Email sent to Mr Hoyle on 8 April 2022 accepting the notice of appeal and advising the suspension will be put on hold, pending the outcome of the appeal.
9. Letter from the Commission to the appellant advising of the date and time of the appeal hearing, dated 9 May 2022.
10. Letter from the Commission to the Commissioner for Licensing advising of the date and time of the appeal hearing, dated 9 May 2022.