

DURHAM COUNTY COUNCIL

At a Meeting of **General Licensing and Registration Sub-Committee (2)** held in Council Chamber, County Hall, Durham on **Tuesday 2 February 2016 at 10.00 am**

Present:

Councillor C Carr (Chairman)

Members of the Committee:

Councillors O Gunn, D Hicks, A Hopgood and P May

Also Present:

H Johnson – Licensing Team Leader
C Rudman – Licensing Manager
G Seed – Senior Trading Standards Officer
G Proud – Solicitor – Litigation
Mr Fella – appellant
Mrs Fella – appellant's wife
M Davies – appellant's Solicitor

1 Apologies for Absence

An apology for absence was received from Councillor I Jewell.

2 Substitutes

Councillor O Gunn substituted for Councillor I Jewell.

3 Declarations of Interest

Councillor D Hicks informed all parties that although he had been a customer of the firm of Solicitors representing the appellant he did not know Mr Davies personally. There were no objections from the appellant or his Solicitor to the Councillor remaining in the meeting and determining the appeal.

4 Appeal Against the Refusal to Grant a Street Trading Consent

Consideration was given to the report of the Licensing Team Leader regarding an appeal against the refusal to grant a street trading consent (for copy see file of Minutes).

A copy of the application, together with the objections received from Trading Standards, the letter of appeal from Mr Fella's Solicitor and the letter from the Licensing Manager were attached to the report for Members consideration. Trading Standards had provided additional information which was also attached to the report.

At this point Mr Davies, Solicitor for Mr Fella referred Members to the letter of appeal at Appendix 3 in the report, and noted that an earlier letter from Mr Fella sent on 18 November 2015 was not included in the Bundle.

The Licensing Team Leader advised that this was an e-mail stating Mr Fella's intention to appeal. Mrs Fella read out the e-mail for the benefit of the Sub-Committee and the Solicitor acknowledged that it did not add anything significant to the letter of appeal at Appendix 3.

C Rudman, Licensing Manager addressed the Sub-Committee and stated that he had reached his decision having taken into account the information presented by Mr Fella and Trading Standards, and the Council's current Street Trading Policy.

The objectives of the Street Trading Policy were set out in Section 2.1 and of particular relevance were those relating to protecting public health and safety and the safeguarding of public places that may be adversely affected by undesirable or uncontrolled street trading activities. In developing the policy consideration had been given to the legal requirements of the Local Government (Miscellaneous Provisions) Act 1982 and the Council's duties under Section 17 of the Crime and Disorder Act 1998 to take all reasonable steps to reduce crime and disorder. The grant of a street trading consent was a matter which fell within the discretion of the Council. There were fewer limitations on the grounds on which an application may be refused and the Authority was entitled to have regard to matters that were considered to be relevant, subject to the requirement that the Authority must act reasonably.

Section 11.5 of the Policy required applicants to comply with any other relevant legislation which may influence their business, in addition to conditions attached by the Licensing Authority. Annex H of the Policy provided guidelines on the suitability of applicants. The primary aim was to protect the public and to achieve this the Council looked at the suitability of applicants who by nature of their business interacted with the public and vulnerable people. The Council must therefore consider the suitability of that person, having regard to relevant information such as whether the applicant had been convicted of any relevant offence, had been the subject of enforcement action, or had been refused a street trading consent or had a consent revoked.

He concluded that based on the information from Trading Standards he considered it appropriate to refuse the licence because it included the sale of cigarettes and other age related products. The Licensing Authority would not be minded to refuse to grant the consent if Mr Fella agreed to withdraw the sale of cigarettes and other age related products from his application.

Following a question from Councillor Carr, the Licensing Manager advised that if Mr Fella was selling other age related products he would question his ability to control these sales.

Mr Davies was invited to ask questions of the Licensing Manager. In response the Licensing Manager confirmed that the decision of the Council had been based on the evidence of Trading Standards and that the matters in Annex H of the Street Trading Policy would normally be taken into account in assessing the suitability of an applicant.

Mr Davies contended that the decision had not taken into account any mitigating circumstances relating to the offence that had been committed. The Licensing Manager advised that his decision had been based on the submissions of both parties. He understood that tobacco had been sold to a child which brought into question the suitability of Mr Fella.

Mr Davies submitted that the aim of the Policy was to ensure that all applications, consents and prohibitions were dealt with in a consistent, fair and proportionate way and that each application would be considered on its own merits. The objections of Trading Standards were based on impropriety but he asked the Licensing Manager if he agreed that no account had been taken of the circumstances in which the sales had occurred.

The Licensing Manager disagreed with this statement. It was clear that Mr Fella had been happy to supply cigarettes to the children because he knew their family.

Following a question from Councillor Carr the Licensing Manager confirmed that he had copies of all the interviews at the time he made the decision to refuse consent. He added that at any point in the process, had any information come to light which would have changed his views, the consent would have been granted.

G Seed, Senior Trading Standards Officer was then invited to address the Sub-Committee. She stated that the views of Trading Standards were set out in Appendix 2 and their objections surrounded the sale of cigarettes made by Mr Fella which was initially witnessed by an off-duty Police Officer. Details of the sales made to the children were included in the Bundle. She was concerned that money may not have changed hands and that children may be able to approach the van and receive cigarettes from Mr Fella without paying.

The photographs at Appendix 5 in the Bundle clearly showed the exchange of cigarettes to the girl. The child was 11 years and 9 months old and was known to Mr Fella, which was his only mitigation. Trading Standards did not believe that this was sufficient to grant consent. The girl could have purchased the cigarettes for her grandmother but used them herself. Handing free cigarettes to children was a method of operation that was of concern.

She had also witnessed Mr Fella selling other age related products. Mr Fella had been seen selling video games and whilst the sale had been legitimate, Trading Standards would object to the sale of any age related products because Mr Fella did not appear to have a full understanding of the rules.

Finally, G Steed referred to the second interview with Mr Fella at page 54 in the Bundle when Mr Fella, when asked if cigarettes were a good seller, had stated that he made 'absolute coppers, it's not worth carrying them'. She therefore asked why he had felt the need to appeal when the consent would be granted if he agreed to withdraw the sale of age related products.

Councillor Carr referred Members to the interviews with Mr Fella. He asked the Officer to confirm the statement on page 45 of the Bundle that Mr Fella had understood the law regarding the sale of cigarettes and that he knew that a person had to be over the age of eighteen, and also the statement on page 47 when Mr Fella had said that 'they would never get them' when asked 'if a young kid asked for cigarettes and said they were for their mum, their dad, whatever'. The Officer confirmed that this was correct.

In response to further questions from the Member, the Senior Trading Standards Officer confirmed that the admission by Mr Fella that he was guilty on page 51 was an accurate reflection of that part of the interview, and that the witness statement provided by the Police Officer had been signed by the Officer as a true account.

Following a question from Councillor Hopgood, the Member was informed that video games had not been mentioned during interview but the sale had been witnessed via bodycam.

Upon further questioning, the Officer confirmed that the van was located approximately 50 yards from the property and that she had seen the child leave and return to that property. She had not spoken to the child or the family about the transaction as there were standard procedures that had to be followed which she outlined to Members.

Mr Davies expressed concern that the impression had been given that random children could approach the van and Mr Fella would automatically supply cigarettes to them. The Officer had expressed concern that children approached the van and that it was enough for Mr Fella to know who they were. However the evidence before the Sub-Committee related to a particular child from a particular house who was seen returning to that property.

Mr Davies referred to the first interview with Mr Fella and asked if the Officer agreed that the issue was whether or not, in legal terms, a sale had taken place. In the second interview he asked if it was apparent that Mr Fella hadn't sold the cigarettes to the children as they were for the mother/grandmother and that she had not bought them but had taken them home. The Officer considered this to be irrelevant as Mr Fella had supplied the child with the cigarettes.

Mr Davies continued that the sale of the cigarettes to the child was accepted but that it was about the context in which the sale had been made. Both the mother and grandmother had made statements in support of Mr Fella. Ultimately the Sub-Committee would decide upon Mr Fella's suitability and the context in which the sale was made was relevant to this. The statements of the mother and grandmother corroborated that the child was carrying out an errand.

By way of clarification G Proud, Solicitor advised that the appellant had been asked to provide any written evidence he wished to be considered in advance of the meeting. The statements may have been prepared for the pending court case but could also be considered by the Sub-Committee.

Following a final question of the Senior Trading Standards Officer from Mr Davies, the Officer confirmed that selling cigarettes from the van, if not allowed, should be discouraged.

At this point Mr Davies addressed the Sub-Committee on behalf of Mr Fella. He stated that Mr Fella had traded from the van for upwards of 40 years. It was only within the last 15 years that consent had been required. The objections of Trading Standards concerned 2 transactions; the first was witnessed by an off-duty Police Officer and the second by Trading Standards. Trading Standards was of the view that there was evidence of an offence/offences having been committed that rendered Mr Fella unsuitable. However, the Street Trading Policy highlighted that where an offence had been committed this would have an impact on suitability but this was not an absolute bar to consent being granted. It was relevant therefore to consider the context within which the transactions occurred. Mr Fella's business involved visiting set locations where customers approached the van. Stopping points were as little as 20 or 30 feet apart. In The Ridings there was a property close to where the van parked which was occupied by people that Mr Fella had known for many years. He was aware that the mother or grandmother sent the child out on occasions to collect cigarettes for them. The grandmother was incapacitated and the mother preferred to send the child on the errand.

Mr Fella knew that he shouldn't sell to under 18's but in his mind he had not been selling to a child but to a parent or grandmother. He referred Members to *Morrisons v Reading BC* which was about whether or not a sale had taken place during a test purchase. The point he was making was that it may not be clear to all and sundry what did and did not constitute a sale. Mr Fella, in knowing that he should not sell, took the view that he was not selling to a child but to a mother/grandmother. Members may consider this to be naïve or irresponsible but it was done in good faith. The streets in which Mr Fella operated were in a deprived area and he allowed credit. To his cost he realised that he had broken the law but whether he was a suitable person was affected by the context in which those offences took place. It was not the case that a child could approach his van asking for cigarettes and be given them as a matter of course.

The Street Trading Policy should be applied in a consistent, fair and proportionate way. It was not part of any defence by Mr Fella that he did not sell to an underage child; this was accepted but there had been incidents over two days where it was known that the children were the children of a family who lived nearby. Mr Fella had accepted that sales had occurred on more than two occasions as he had an arrangement with the family.

The Policy discussed the consideration of each case on its merits. It was Mr Fella's case that the Committee could and should examine the context of the offences when deciding his suitability.

He submitted that Trading Standards had been misleading and referred to the letter of 4 December 2015. The statement within that letter that 'whilst specific details of the investigation could not be fully disclosed at this stage it has been our findings that tobacco has been supplied by Mr Fella to underage children'. He considered that this contradicted the section of the Policy that talked about transparency.

The letter also referred to a program of test purchasing but there was no suggestion that Mr Fella had ever failed any test purchases. Mr Fella had on occasions been invited to events held by the local school and the Police. The fact that such organisations were willing to have him on their premises suggested that he was a reputable trader.

In conclusion, he asked the Sub-Committee to consider the lengthy period Mr Fella had traded without blemish and that whilst he had made a mistake regarding the law, he was a suitable person to hold a consent. He did not seek to excuse the error he had made but it was a mistake and this should not affect his suitability to hold a consent. If Mr Fella were to break the law in future there were means available to the Council to take action.

Mr Fella confirmed that the submissions of Mr Davies were accurate.

Questions were asked of the appellant and his Solicitor. Councillor Gunn noted that the letter of the Licensing Manager had stated that the consent would not be refused if Mr Fella agreed to withdraw his application to sell cigarettes and other age related products, yet during the second interview Mr Fella had stated that he only made 'coppers' from cigarettes.

The Member was informed that the value of cigarettes was not in profit but the fact that they attracted customers to the van who then purchased other items. They were 'loss leaders'.

Councillor Gunn understood the comments about 'loss leaders' and the need to diversify but she asked how his business would be affected if he no longer sold cigarettes.

Mrs Fella advised that her husband traded in areas of deprivation where customers smoked heavily. Trade would be reduced by 30 – 40% if cigarettes sales were withdrawn.

In response to questions from Councillor Hopgood the Sub-Committee was advised that the family had five children and Mr Fella could provide cigarettes to any of them. Mrs Fella explained that either the mother or the father paid for the cigarettes once a week and he kept a paper record of what they had received. Mr Davies referred the Member to the second interview in which Mr Fella had advised that the child had purchased milk and sweets or ice-cream from the van before acquiring the cigarettes. G Proud added that the earlier incident on 1 July 2015 witnessed by the Police Officer referred only to the sale of cigarettes.

Mr Davies advised that he had photographs showing the proximity of the van to houses and was informed that these should have been submitted in advance. The photographs were circulated and G Seed noted that during surveillance the van had been observed in a different location to that shown on the images. This was accepted by Mr Davies.

In response to a query from Councillor Carr, Mr Fella advised that a site van usually operated in a static location such as a park and just carried ice cream, however he was more of a mobile store. The trade in ice cream had been affected by supermarkets.

Following a question from Councillor May the Sub-Committee was informed that Mr Fella had previously been refused consent because of an objection by the Police, but this had been overturned on appeal. Mr Davies explained that the objections raised by the Police had been vague and had been based on an incorrect assumption that Mr Fella mixed with known criminals.

Councillor Carr advised that this would not be taken into account in their deliberations.

For the benefit of Mr Fella a discussion took place to clarify the options available to the Sub-Committee in reaching a decision. The Sub-Committee could grant the consent in full, grant subject to restrictions or refuse. Mr Davies advised that Mr Fella, rather than not being able to trade at all, would accept restrictions on the consent if this was considered to be the appropriate course of action by the Sub-Committee. During this discussion it came to light that Mr Fella was still trading because he understood that he could continue operating until the outcome of the appeal.

The Licensing Team Leader advised that Mr Fella had been informed during a telephone conversation after the consent had expired that he should no longer trade.

G Seed referred to the submissions made that the children had been part of the same family, given that the sales were in entirely different locations, and each of the sales had been treated differently. This was disputed by Mr Davies who referred to the second interview when the discussion related to one family.

At this point the Sub-Committee adjourned for 10 minutes.

After re-convening the parties were invited to sum up.

The Licensing Manager stated that the issue was of Mr Fella's suitability to sell age related products and whether he could be trusted to do so. There had been an admission made by Mr Fella about the improper supply of cigarettes to children. Even if he knew the family this showed a disregard for legislation and good practice. Members had also heard about other age related products for sale which may or may not be sold to children. His actions gave the impression that this was acceptable, and also Mr Fella had continued to trade which demonstrated a

disregard of the law. Mr Fella was not a suitable person to supply age related products.

G Seed advised that ice cream vans were appealing to children and to sell cigarettes from them went against everything they represented. Mr Fella was aware that he should not do so but happily sold and supplied cigarettes to children for their family, even if they had no money. Trading Standards objected to cigarettes being sold from an ice cream van.

Mr Davies stated that Trading Standards preferred that no cigarettes should be sold from ice cream vans but the Street Trading Policy allowed this. The issue was whether Mr Fella was a suitable person to do that. Mr Fella not only knew the family but saw them taking the cigarettes back to the family home, which was witnessed by the Senior Trading Standards Officer. This wasn't an arrangement that depended upon the trust of a child. The cigarettes had to be paid for and if the children had bought them for their own use this would have come to light when the parents made payment. Mr Fella had accepted that it was wrong and had stopped selling and supplying cigarettes to the children.

At 12.23pm the Sub-Committee retired to deliberate the application in private. After re-convening at 12.37pm the Chairman delivered the Sub-Committee's decision.

In reaching their decision, the Sub-Committee had considered the written and verbal representations of Trading Standards, the Licensing Authority, Mr Fella's Solicitor and Mr and Mrs Fella. The Sub-Committee had also taken into account the Council's Street Trading Policy.

Resolved:

That Street Trading Consent be granted with a condition that the Applicant is not to sell tobacco or other age related products.