

PUBLIC PROTECTION COMMITTEE: 07 February 2017

Report of the Head of Shared Regulatory Services

Licence Fees: European Court of Justice Ruling – Hemming v Westminster

1. Background

- 1.1 The purpose of this report is to advise members of the recent European Court of Justice ruling in the Hemming v Westminster Case. The ruling has implications for the way in which local authorities can charge for the cost of administering and enforcing certain licensing regimes.

2. Summary of Hemming v Westminster City Council

- 2.1 The European Services Directive aims to make it easier for service providers to operate across Europe. One of its key provisions is that licence fees can only be used to cover the costs associated with the administration of licensing regimes covered by the Directive. Local Authorities therefore cannot make a profit from licensing or deter service providers by levying unreasonable fees. The Directive is enacted in the UK by the Provision of Services Regulations 2009, and Regulation 18(4) provides that charges under an authorisation scheme must be reasonable and proportionate to, and not exceed, the cost of the procedures and formalities under the scheme. The Services Directive **does not** currently apply to taxi related fees (drivers, operators and vehicles), or fees and charges under the Gambling Act 2005 and Licensing Act 2003.
- 2.2 In 2012, sex shop owner Timothy Hemming instituted legal proceedings against Westminster City Council contesting that the level of licence fees charged by Westminster City Council were not reasonable. Westminster's sex shop fees were in excess of £26,000; the fees included costs for the management of the regime and enforcement activities against unlicensed operators; it was this latter aspect of the fee that Hemming asserted not to be 'reasonable and proportionate' under the legislation. The case has progressed subsequently through the upper Courts and the findings of each Court are summarised below.

Administrative Court (May 2012) & Court of Appeal (2013)

- 2.3 The Administrative Court (and subsequently the Court of Appeal) ruled that licence fees must not exceed the cost of administering the licensing process and that this could not include the costs of enforcement against unlicensed operators. However the judgement did make it clear that the costs of compliance and enforcement against licensed operators could be included in the licence fee.

2.4 **Supreme Court (April 2015)**

Westminster Council appealed the decision of the Court of Appeal and, in April 2015, the Supreme Court overturned the Court of Appeal's decision and made it clear that local authorities could set their fees at a level that would enable them to recover the full costs of managing and enforcing the licensing regime, including the costs incurred in proceedings taken against unlicensed operators.

2.5 The Supreme Court also gave consideration to how such fees should be structured. It identified two different approaches to charging licence fees:

- Type A - An application fee is charged to cover the authorisation procedures involved in the processing of the application, then successful applicants are charged an additional fee that covers the running costs and enforcement of the licensing regime.
- Type B – The applicant is charged one fee upfront that covers all costs of the application process, and running/enforcement costs of the licensing regime. If the applicant is unsuccessful the portion of the fee that covers the running/enforcement costs is refunded to the applicant.

2.6 The Supreme Court had concerns about whether the fee structure identified as Type B was compatible with the EU Services Directive and felt that reference to the European Court of Justice was necessary for clarification.

2.7 **The European Court of Justice (ECJ) (November 2016)**

The ECJ ruled that the Type B approach of fee setting (outlined in 2.5 above) was not compatible with the EU Services Directive, arguing that the Directive

'precludes the requirement for the payment of a fee, at the time of submitting an application for the grant or renewal of a authorisation, part of which corresponds to the costs relating to the management and enforcement of the authorisation scheme concerned, even if that part is refundable if that application is refused.'

2.8 As with many other local authorities, the current position in Cardiff is that fees are charged in a Type B approach with all costs included in the initial application. It is extremely rare for applications under these licensing regimes to be refused a licence, however a refund would be given in those circumstances.

3. Implications for the Council

- 3.1 The ECJ ruling presents a number of issues for Local Authorities in discharging duties under certain licensing regimes. Licensing Authorities now need to consider how to structure their fees under the Type A approach as mentioned in 2.5 above. The judgement suggests that there should be 2 separate fees in place; one to cover the authorisation costs e.g. the cost involved in receiving and considering an application, and an additional fee only paid by successful applicants to cover the running and enforcement of the licensing regime.

It is worth noting on this point that the Supreme Court view – which still holds – was that there is nothing to stop licensing authorities making the payment of such a fee a condition of holding a licence. This would mean that authorities could withhold a licence until payment of the relevant fee had been received:

‘...nothing in article 13(2) precludes a licensing authority from charging a fee for the possession or retention of a licence, and making this licence conditional upon payment of such fee. Any such fee would however have to comply with the requirements, including that of proportionality, identified in section 2 of Chapter III and section 1 of Chapter IV. But there is no reason why it should not be set at a level enabling the authority to recover from licensed operators the full cost of running and enforcing the licensing scheme, including the costs of enforcement and proceedings against those operating sex establishments without licences.’

- 3.2 As indicated in 2.1 above, the Services Directive does not currently apply to taxi related fees (drivers, operators and vehicles), or fees and charges under the Gambling Act 2005 and Licensing Act 2005. It will apply to licensing regimes such as sex establishments, street trading, animal related licences (pet shop, animal boarders etc.), and houses in multiple occupation. Responsibility for these fees are shared between this Committee and the Joint Committee for Shared Regulatory Services.
- 3.3 In light of the ECJ judgement, the Shared Regulatory Service will, in consultation with legal services, begin a review of the process of issuing licenses and the associated fees to ensure compliance with the Services Directive. Local authorities are awaiting further guidance from the Local Government Association and Government on this matter. It is envisaged that any changes to fee structures will be in place by June 2017.

- 3.4 Importantly, the opinion of the Advocate General and the commentary contained in the judgement of the ECJ go beyond the specific issues that had been referred to it, and make further challenges on the issue of licensing fees highly likely. The opinion and the commentary in the ruling appears to reopen the issue of whether including the costs of enforcing licensing regimes within licence fees is compatible with the Services Directive, with a strong indication that the Advocate General and ECJ believed that it is not. The Supreme Court's view on this issue remains in place at the current time, meaning councils can continue to include these costs in their licence fees.

4. Achievability

This report contains no equality personnel or property implications.

5. Legal Implications

- 5.1 The legal implication appear through the body of this report

6. Financial Implications.

- 6.1 The Licensing Service is required to be self financing within the limitations of statute.
- 6.2 The Type A approach may increase the administrative burden on the Licensing Section especially if it involves pursuing non-payment of the 2nd fee; however these costs will need to be considered and factored into the new fee structure.

7. Recommendation

- 7.1 It is recommended that the report is noted and Committee receive a further report on this matter to ensure the Councils licensing processes reflect those advocated by the European Court of Judgement.

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HEAD OF SHARED REGULATORY SERVICES

29 December 2016

This report has been prepared in accordance with procedures approved by Corporate Managers.

Background Papers: None