Lap dancing clubs: is one too many?

Sex entertainment venues: Zia Akhtar reports on local authority licensing powers & the 'nil cap' policy

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IN BRIEF

- The issue of sexual entertainment venues spans a wide spectrum of legal issues, including environmental, employment and local authority concerns, all of which impact on the licensing of the industry.
- A number of local councils have effectively enacted bans of such venues by implementing the 'nil cap' policy (thereby restricting the number of permitted venues to zero).

Lap dancing clubs are classified under s 27 of the Policing and Crime Act 2009 (PCA 2009) as 'sexual entertainment venues' (SEVs). They were licensed to operate under the local authority's power to grant them a licence and the entertainment they offered was any live performance or display of nudity for the purpose of 'sexually stimulating' any member of the audience.

The ban by Edinburgh City Council on all strip clubs in March 2022 (against which the United Sex Workers union has now sought to launch a legal challenge) and the ongoing public consultation issued in 2021 by Bristol City Council has brought the issue of the 'nil cap' policy by local authorities into the legal spotlight.

Licensing concerns

Schedule 3 of the Local Government (Miscellaneous Provisions) Act 1982 (LG(MP)A 1982) allows a licence for a period of one year which can be renewed for the same duration by the council's licensing committee. The decision of the suitability of a sex establishment has to take into consideration the criteria set down in the Home Office guidance which states that local authorities should not consider objections that are based on 'moral grounds/values'.

The licence is granted based on the 'layout, character or condition of the premises' in respect of which the application is made. With these discretionary powers, the council can object to an application for a new licence, or revoke an existing one, and it can make its decision solely on discretionary grounds. The licence application can be rejected if the local authority considers that the number of sex establishments (eg lap dancing clubs) is equal to or exceeds the number that it considers appropriate for the 'relevant locality' (para 12(3)(c), Sch 3, LG(MP)A 1982).

The granting of licences is made considering opposition in the local areas, but after an application is rejected there is no right of appeal. The Home Office has defended this policy by stating: 'The absence of a right of appeal against a local authority licensing committee's decision is counter-balanced by the additional conditions prospective licensees must satisfy such as having regard to the characteristics of the area and the use to which other premises in the vicinity are put'.

Lap dancing clubs' image has suffered of late, and several councils have considered banning them by implementing the 'nil cap' policy which implies zero tolerance of the clubs. This is primarily due to the environmental impact of the clubs and the belief that they breach the public sector equality duty (PSED) to which all councils are bound under the Equality Act 2010 (EqA 2010). The public law aspects of the underground world of lap dancing clubs need to be discussed in the context of an environment risk assessment due to their proximity to population centres, and also to take into consideration the judicial review challenges that have been raised, and are likely to follow the ban on lap dancing clubs by the local authorities under their powers.

Environmental risk assessments

The health and safety issue which councils are required by law to undertake is to evaluate the intimate experience of lap dancing which is based on the virtual sex experience which the dancers are trained to provide, and the motivation and stimulation of the observing customer.

This requires a balancing exercise in considering the likely impact on the participants and the members of the public. The Licensing Act 2003 (LA 2003) applies to the regulated entertainment industry, including SEVs, and local authorities have powers under LA 2003 with the aim of 'protecting the public and local residents from crime, anti-social behaviour and noise nuisance caused by irresponsible licensed premises; giving the police and licensing authorities the powers they need to effectively manage and police the night-time economy and take action against those premises that are causing problems' (see the Home Office's *Revised Guidance issued under section 182 of the Licensing Act 2003*, April 2018).

Manchester City Council has imposed the following duties on lap dancing clubs. Their standard conditions state:

> 'The exterior of the premises must be presented in a manner appropriate for the character of the area. There shall be no advertisement or promotional material used by the premises that is unsuitable to be viewed by children, for example, by way of sexually provocative imagery. Any exterior signage shall be discreet and shall not display any imagery that suggests or indicates relevant entertainment takes place at the premises. Any external displays or advertising may only be displayed with the prior approval of the Licensing Unit Manager of Manchester City Council'.

The local authority licensing committee ensures safety at work under the Health and Safety at Work etc Act 1974 (HSWA 1974) (as amended) which places a duty of care for employees, casual workers, self-employed workers, clients, visitors and the general public. Under s 2 (1): 'It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees.' Section 2 (2) states: 'Without prejudice to the generality of an employer's duty under the preceding subsection, the matters to which that duty extends include in particular (a) the provision and maintenance of plant and systems of work that are, so far as is reasonably practicable, safe and without risks to health'.

Lap dancers have a corresponding common law duty to take care when performing, and have been classified as workers, granting them rights under

employment law despite their casual employment status. The vocation of lap dancing has been recognised as an occupation that workers depend upon for their livelihoods. In *Nowak v Chandler Bars Group Ltd* UKET 3200538/2019, a claim by a lap dancer that she was dismissed without any reasonable grounds for dismissal was upheld. The employment tribunal stated that sex work is a form of labour that workers depend upon for their livelihoods. There was a basis for redress even if there was no written contract, because there was an implied agreement that arose from a 'mutuality of obligations' and the claimant had an implied contract which 'are expressly within limb (b)—that dancers do not compete with the Respondent' (para [68]). This brought the claim within the definition of s 230 of the Employment Rights Act 1996 (ERA 1996) and reg 2(1) of the Working Time Regulations 1998 (SI 1998/1833).

Public sector equality duty & judicial review challenges

Risk assessment is not just for hazards at the workplace: it also includes the PSED, which is set out in s 149, EqA 2010. This is the reason why Bristol City Council has an ongoing public consultation since it announced its provisional policy in the middle of 2021 that its licensing committee intends to revoke the licence of the two lap dancing clubs in the city. The council has declared that it will have a due regard when carrying out its functions to apply the PSED.

Section 149, EqA 2010 states that: 'A public authority must, in the exercise of its functions, have due regard to the need to—

a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and
c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.'

Local authorities have an increased responsibility under s 149, EqA 2010 to take a 'proportionate approach' because of the successful challenges against licensing clubs under their discretionary rules. In court proceedings against a Spearmint Rhino club in 2017, Sheffield City Council admitted failure to comply with their equality duty in permitting the lap dancing club a licence. This was despite 71 objections initiated by members of the public (who wished to remain anonymous) against the council for breach of the PSED duty when re-licensing the strip club. The judge gave leave to proceed based on the fact that the council had made no reference to the PSED in its determination notice or minutes. It had dismissed the numerous concerns raised about the impact of such venues on gender equality as 'moral objections'.

Mrs Justice Jefford made the following observations in the permission order allowing the judicial review to go ahead:

> 'There is no direct evidence that the Defendant [Sheffield City Council] has had due regard to the [PSED] (as it is required to do under s 149 of the Equality Act 2010). The decision gives no indication that it has been considered'.

In 2018, the entire PSED policy of Sheffield City Council was challenged after the objectors won the right to judicial review based on the council not properly considering its PSED in its entire SEV licensing policy. The council settled the claim prior to the judicial review hearing by revising its policy guidelines.

The adoption of the nil cap policy by Bristol City Council and by other local authorities in the UK is a possibility in the near future. This would overlook a significant fact, which is these clubs could be considered as part of the landscape of English cities, and they would be pushed underground if they were to be removed from the metropolis of the towns. This is an important consideration that local authorities cannot ignore, as it will cause environmental problems without any visibility or control.

Conclusion

The expansion of the hospitality sector and the exponential growth of the sex industry has brought a convergence of interest for regulators and policy makers. The issue of lap dancing has been much debated recently due to the spectrum of law that it transcends. This includes environmental, employment and local authority law, all of which impact on the licensing of the industry. It has led to rules of conduct inside the clubs, such as the 'no touching policy', which are practically unenforceable.

Lap dancing professionals have employment rights which they have established by raising their claim and establishing that they are socially productive labour whose work falls under limb (b), ERA 1996. This provides them with the ability to seek redress in the employment tribunals and be granted the appropriate remedies. The breach of the PSED duty by councils in issuing a licence is a matter that has to take into consideration 'a protected characteristic' and gender-based equality is a priority against victimisation. In the light of the assessment that dancers are professionals, there can be no breach of the PSED if they are allowed to continue their work, and local authorities should not arrive at their judgments subjectively. **NLJ**

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