

IN THE MATTER

of the Sale and Supply of Alcohol
Act 2012

AND

IN THE MATTER

of an appeal by **ASHLEIGH
MARIE DAWSON** pursuant to
s 154 of the Act against a decision
of the Palmerston North District
Licensing Committee declining an
application for a manager's
certificate

BEFORE THE ALCOHOL REGULATORY AND LICENSING AUTHORITY

Chairperson: District Court Judge K D Kelly

Member: Mr D E Major

HEARING at WELLINGTON on 8 February 2017

APPEARANCES

Ms N E Flint – for appellant

Ms A M Dawson - appellant

DECISION OF THE AUTHORITY

[1] On 13 September 2016 the Palmerston North District Licensing Committee (DLC) declined an application by the appellant for a manager's certificate to manage the sale and supply of alcohol on licensed premises.

[2] The application was first considered by the DLC at a meeting on 12 July 2016. The DLC had before it the application from the appellant, a report dated 1 July 2016

by the Licensing Inspector, and related documents advising that the Inspector had no objection to the granting of the manager's certificate. The report from the Licensing Inspector stated that the applicant had disclosed a number of offences on her application with the last offence being over three years old.

[3] In its report dated 28 June 2016 the Police Alcohol Harm Reduction Officer advised that the Police were not opposed to the application.

[4] At the meeting of the DLC on 12 July 2016 the DLC resolved that the Inspector provide the Committee a copy of the applicant's current convictions before the DLC proceeded to make a decision on the application.

[5] The DLC reconvened on 13 September 2016 where it had before it a Ministry of Justice Criminal Conviction report. The Committee formed the view that the applicant was not a suitable person to hold a manager's certificate due to multiple undisclosed criminal convictions with the most recent being in 2015. In declining the application, the Committee noted that they were prepared to consider a new application in 12 months time (i.e. September 2017).

Grounds for Appeal

[6] The grounds for appeal brought by the appellant are that:

- (a) the Committee failed to give consideration to the Police advice that the application was not opposed by them;
- (b) the Committee did not advise the appellant of their concerns regarding her omission to fully disclose her conviction history and did not seek the appellant's reasons or views relating to that omission; and
- (c) the Committee's decision appeared to be that the appellant's history was not something that she could overcome and as a result she could not ever hold a position of authority or responsibility.

The Law

[7] Section 222 of the Act provides:

Criteria for manager's certificates

In considering an application for a manager's certificate, the licensing committee or licensing authority, as the case may be, must consider the following matters:

- (a) the applicant's suitability to be a manager:
- (b) any convictions recorded against the applicant:
- (c) any experience, in particular recent experience, that the applicant has had in controlling any premises for which a licence was in force:
- (d) any relevant training, in particular recent training, that the applicant has undertaken and evidence that the applicant holds the prescribed qualification required under section 218:
- (e) any matters dealt with in any report made under section 220.

Appellant's Submissions

[8] The appellant submitted that she did not disclose all of her convictions due to an error on her part. The appellant believed that the application only required disclosure of convictions relating to alcohol. Nevertheless, in response to the question "*has the applicant been convicted of any offence? If yes, what are the details of each offence?*", the appellant stated on her application "*Quite a few past/previous offences (Have cleaned up my act a lot)*". On the application are listed convictions for "*Drunk Driving x 2*", "*Theft of documents*", theft of petrol, and the appellant noted that she had served sentences of community detention and "*Jail x2*".

[9] At the hearing the appellant gave evidence that she completed her application form in the presence of the Licensing Inspector and while being interviewed by the Inspector. The appellant gave evidence that she disclosed all of her convictions, although she had only listed some of them on her application form. The appellant indicated that the Inspector had stated that what she listed was sufficient.

[10] It is submitted that as the Police and the Inspector had full knowledge of her conviction history, she was not attempting to hide her conviction history from the DLC. It is also submitted that as the appellant was aware that the Police would be consulted on the application and they had full access to her full conviction history, it would have served no purpose in her failing to fully disclose her history.

Breach of Natural Justice

[11] The appellant submits that the DLC did not satisfy the requirements of natural justice because it did not advise her of its concerns regarding the disclosure of her

conviction history and nor was she offered the opportunity to rectify the error in her disclosure by completing the application form correctly. The appellant was denied the opportunity to give an explanation while the Committee requested information from other parties in a way which was intended to ensure the appellant was unaware of the DLC's enquiries.

[12] It is submitted that the DLC in making its decision, erred in taking the appellant's error into account without advising her either that she had made the error or that the Committee considered the oversight relevant.

[13] At the hearing before the Authority, the appellant advised that her last offending was in December 2014 subsequent to her being released from prison in mid-2014. This was a difficult time in the appellant's life and it took her approximately a year upon being released from prison to find a job. The appellant is now working 20 hours a week and studying 20 hours a week to be a beautician. The appellant's employment is just sufficient for her to live on and to rent a 2-bedroom apartment which she shares with her nine year old daughter, of whom she has shared custody. The only other financial assistance the appellant receives is through a student allowance. The appellant advised the Authority that her current employer suggested that she apply for her manager's certificate as he requires a manager for his bar. The appellant's place of employment is small and if the appellant is not successful in obtaining her manager's certificate, she is likely to lose her employment as her employer needs to engage a qualified manager and is unlikely to want to employ the appellant as well.

Decision and Reasons

[14] The issue for the Authority in this appeal is whether having regard to the circumstances around the non-disclosure of convictions and the appellant's conviction history the DLC erred in refusing the appellant's application.

[15] An appeal brought pursuant to s 154 of the Act is by way of a rehearing (s 157). The applicable principles are set out in *Mangere-Otahuhu Local Board v Level Eighteen Limited* [2014] NZARLA PH 627-228, at [12]:

"The appeal is by way of a rehearing. As was pointed out in Eden Park Catering Limited [2012] NZLLA 135 *there is a difference between an appeal de*

novo and an appeal by way of a rehearing. In an appeal by way of a rehearing, a judgment may be given as it ought to have been given if the case at that time came before the Court of first instance.”

[16] As was stated in *Mangere-Otahuhu* at [15], the onus on the appellant before the Authority is to satisfy the Authority that the decision in the original hearing was wrong. Accordingly, this Authority has approached this appeal by looking at the circumstances around the non-disclosure of conviction history and the conviction history in order to determine whether the appellant is suitable, at this time, to be granted a manager’s certificate.

Non-disclosure of Convictions

[17] As stated in *Ferguson v McCullough* LLA PH 915/07, a licence is a privilege, not a right. And in *Re Judd* [2014] NZARLA 94 this Authority said at [6]:

*“The test of suitability is lower for a general manager’s certificate than it is for a licence, although as set out in *Police v Manson* [2015] NZARLA 590 (as indicated by the automatic cancellation if faced with a ‘third strike’), the bar has been set higher than it was under the 1989 Act.”*

[18] *Ferguson v McCullough* involved dishonesty on the part of the respondent where the Authority considered Mr McCullough’s evidence to be “*patently implausible*” and where evidence was given “*without regard to the need to be open and honest*” at [29].

[19] In *C D Rowson* LLA 1375/95, this Authority said that:

“In our view an applicant’s failure to honestly answer the question regarding previous convictions weighs fairly heavily against an individual applicant being considered suitable to hold a general manager’s certificate.”

[20] Again, in that case the applicant acted dishonestly in disclosing one of six convictions.

[21] In *Johns* LLA 74/98 an applicant also disclosed only one of a number of convictions. And, again that case involved dishonesty. There the Authority accepted the Inspector’s advice there was that the “*discrepancy cannot be reasonably*

reviewed as an oversight and there was a deliberate attempt to suppress the conviction information for the purpose of misleading the agencies involved in the processing of the applicant's application". This was not outweighed by testimonials by way of written references.

[22] In *L Gale* LLA PH 193/02, when applying for the renewal of a manager's certificate the applicant was asked whether he had been convicted of any offence since his certificate was issued or last renewed. He ticked the answer "no". The position of the Police was that this incorrect statement brought the applicant's character and reputation into focus and there was an implied intention to deceive, characteristics that should not be welcome in the running of any licensed premises.

[23] In evidence, however, the applicant showed that he discussed with his employer the need to disclose his previous convictions for speeding and for driving with excess breath alcohol content. Based on incorrect advice from the lawyer, the applicant failed to disclose traffic convictions on the application. The Authority accepted that the applicant took the view that the relevant convictions meant conviction of a criminal nature, or against the Sale of Liquor Act 1989. The Authority said:

"[7] ... He said that he was wrong, but he was honestly wrong. He said that there was no intention to deceive.

[8] Having listened to him we are not prepared to ponder otherwise. From time-to-time people have difficulty in understanding their obligations under the law, and some have problems with the completion of forms. In the case of Johns LLA 974/98 we stated:

'We take a very serious view of any failure to report correctly a complete list of convictions'.

[9] However, in the light of Mr Gale's evidence on this occasion we are prepared to give him the benefit of the doubt."

[24] In a similar way, unlike in *Ferguson v McCullough*, *C D Rowson* and *Johns*, the Authority does not consider that the failure of the appellant to disclose her full conviction history was the result of dishonesty or an attempt to evade the requirements of the application on her part. Accordingly, the Authority considers that

she should be afforded the benefit of the doubt as regards the non-disclosure. This is particularly in light of her evidence that she completed her application form in the presence of the Licensing Inspector with whom she discussed her criminal history.

[25] Further the Authority acknowledges that there was no opposition by the Police who would be seized of the appellant's criminal history.

[26] In the circumstances, the Authority is not willing to hold the non-disclosure against the appellant when considering her suitability to hold a manager's certificate.

Natural Justice

[27] In *Re Erebus Royal Commission; Air New Zealand Limited & Iman* [1983] NZLR 662 at [671], the Privy Council articulated the rules of natural justice:

"The first rule is the person making a finding in the exercise of such a jurisdiction must base his decision upon evidence that has some probative value in the sense described below. The second rule is that he must listen fairly to any relevant evidence conflicting with the finding and that any rational argument against the finding that a person represented at the enquiry whose interests ... may be adversely affected by it, may wish to place before him or would have so wished if he had been aware of the risk of the finding being made.

The technical rules of evidence applicable to civil or criminal litigation form no part of the rules of natural justice. What is required ... is that the decision to make the finding must be based on some material that tends to logically support the existence of facts consistent with the finding and that the reasoning supportive of the finding, if it be disclosed, is not logically self-contradictory.

It is axiomatic that the purpose of the rules of natural justice is to afford fairness to the party that may be adversely affected by a decision, that is, the applicant who sought the manager's certificate."

[28] By way of correspondence between the Palmerston North DLC and the Ministry of Justice between 14 July 2016 and 1 September 2016 it is clear that the DLC sought to obtain details of the appellant's criminal record information "*without the individual's written consent*". While this is ambiguous as to its intent, and the Authority heard no evidence clarifying this intent, it is clear from the DLC's decision of

12 July 2016 that the DLC required further information about the appellant's convictions in order to verify the information provided by the applicant.

[29] Upon discovering that there was a discrepancy this was not put before the appellant and the appellant was afforded no opportunity to speak to the discrepancy. The Authority is of the view that this matter should have been put to the appellant for an explanation before determining in September 2016 that the application was to be refused because of the applicant's suitability due to this lack of disclosure. Although not stated, the implication appears to be that the applicant was unsuitable due to some dishonesty on her part, without testing that.

[30] That said, the DLC's final position in respect to the application may not have differed given the appellant's conviction history, even if this opportunity had been provided to the appellant.

Stand-down period

[31] As expressed in *Deejay Enterprises Limited* LLA531-532/97 some two decades ago but still relevant today:

"The 'guiding hand' or 'hands-on operator' of any company, or the potential holder of a General Manager's Certificate, now receive greater scrutiny from both the Police and other reporting agencies. Character and reputation are closely examined. The law and human desires of patrons frequently tug in different directions. The Police cannot be everywhere. Little but a licensee's or manager's character and suitability may stand between upholding the law and turning a blind eye. Self imposed standards in accordance with the law must be set by licensees and by holders of General Managers' Certificates who control and manage licensed premises."

[32] While a high standard of integrity is expected of manager's, as recognised in *D T Hayford v Christchurch District Licensing Agency* (High Court, Christchurch AP 201/92, 3 December 1993), people change. There it was said in respect of a licensee's suitability [at page 10]:

"... A finding should not be infinite. Insofar as the appellant has, ..., said that he has recognised that a change of his ways is needed and claims to have achieved this, it may well be that he should be given another chance. That will

be for the Tribunal having the authority of deciding whether or not a new licence is to be granted. I would not want it said that because this Court has said he is unsuitable to carry on a licence that he should permanently be regarded in this situation.”

[33] While Hayford was not an application for a manager’s certificate, the courts have recognised that a person should not be considered unsuitable for a manager’s certificate or licence, as the case may be, for an indefinite period of time. That is why in *Re Osborne* LLA 2388/95 (13/10/1995) this Authority said in respect of a manager’s certificate, there should be an appropriate stand-down period:

“The same approach, in our view, should apply to Managers’ Certificates.

Without fettering ourselves in this or other applications, it may be helpful if we indicate that we commonly look for a five year period free of any serious conviction or any conviction relating to or involving the abuse of alcohol, or arising in the course of an applicant’s duty on licensed premises.

We regard Mr Osborne’s convictions on 25 October 1991 as fitting squarely within this categorisation.

Less serious convictions are also weighed. By way of example is an isolated excess breath/blood alcohol conviction, or a single driving offence disclosing no pattern of offending. Nevertheless all convictions must be weighed as required by s.121(1)(b). In these and similar cases we frequently indicate that a minimum of two years from the date of conviction may result in subsequent favourable consideration – providing suitable reports from both the Police and a Licensing Inspector are received. In all situations we usually regard time as running from the date of conviction, rather than the date of offending.

[34] Osborne dealt with an application for a general manager’s certificate which was not renewed following a public hearing some 2 years earlier.

[35] In *Re Pompey* LLA PH623/04 (6 September 2004), it was made clear that the stand-down period should run from the date of offending rather than the date of conviction as stated in *Osborne*.

[36] *Osborne* has been endorsed by this Authority since the enactment of the 2012 Act in *Re Judd* [2014] NZARLA 94 where we said [at 6]:

In terms of the Authority’s decision G L Osborne NZLLA 2388/95, two years should elapse since the date of the offence before an application for a General Manager’s Certificate will be entertained.

[37] And, in *Re NZ LNQ Ltd* [2014] NZARLA 94, this Authority said [at 4]:

The decision in G L Osborne NZLLA 2388/95 and subsequent authorities indicate that an applicant for a General Manager's Certificate is unlikely to be granted such a certificate until at least two years have elapsed conviction-free after a drink-drive conviction. Where there are two drink-drive convictions, the period is usually extended to five years.

[38] It is also recognised that there may be exceptional circumstances pertaining to an application. As stated in *Police v Manson* [2015] NZARLA 590:

[19] While each case must be considered on its own merits, it is interesting to note that the facts of the Osborne case itself bear some similarity to the current case. Mr Osborne had convictions for theft by failing to account and theft as a servant. He was then convicted of driving with an excess breath alcohol level and incurred a subsequent conviction for careless driving. The Authority found that the dishonesty convictions fell squarely within the five year categorisation. Whether a five year stand down period was imposed in respect of that or the lesser two year stand down for the breath alcohol conviction, the result was the same. The application for a manager's certificate was refused even though he had a number of supporting references from prominent citizens and longstanding experience in the industry.

[20] The purpose, of what is commonly referred to as a "stand down period", is in order for the applicant to be able to establish an incident free period, thereby ensuring that standards are upheld. The ultimate aim being that of achieving the object of the Act.

[21] In Warren Richard Stewart [2005] NZLLA PH 881 the Authority set out its reasoning as follows:

[23] "In Mr Stewart's case, the only issue is the convictions. We heard enough about him to acknowledge that he satisfies all other criteria including his character and reputation. Notwithstanding the comments of William Young J in Schroeder's case referred to in paragraph [17], we have continued to point out that any conviction involving liquor abuse is likely to place a General Manager's Certificate at risk. We believe that by setting this standard we are sending a message to all holders and future applicants. We are reluctant to allow too many exceptions to this basic philosophy.

[24] We are to a large extent influenced by the provisions of s.4 of the Act, which assume considerable dominance in all our decision making, and which are set out below. As can be seen, Parliament has specifically required us to exercise our jurisdiction in a manner most likely to promote the reduction of liquor abuse....

[25] "We believe that raising the bar for the holders of General Manager's Certificates, and keeping it at a certain height, has the potential to bring about a reduction in the abuse of liquor nation-wide. If certain otherwise meritorious applicants suffer in the process, that may not be too high a price to pay in order to achieve this long-term goal".

[22] In our view this applies equally, if not more so, to the 2012 Act. In terms of the purpose of the Act as set out in s.3(2), the characteristics of the new system are that it is reasonable and its administration helps to achieve the object of the Act. That object has been strengthened when compared to the previous legislation and now requires the minimisation of harm as opposed to its reduction. It is set out in section 4(1) as follows:

[a] The sale, supply and consumption of alcohol should be undertaken safely and responsibly; and

[b] The harm caused by the excessive or inappropriate consumption of alcohol should be minimised.

[23] The role that managers of licensed premises play in ensuring that the object of the Act is met, should not be underestimated. The licensing regime has been further strengthened by the addition of the “three strikes” principle where managers who incur three negative holdings within three years are subject to an automatic cancellation of their certificates. In our view the bar has been set even higher.

[24] At paragraph [16] of its decision the DLC said: “We note that the arbitrary stand-down period in Osborne is merely a guideline, not a rule and as such, we are not obliged to follow the principle.”

[25] While we agree with the DLC that the Osborne decision is a guideline, rather than a rule, it is one that in our view should not be departed from lightly and only where justified by the circumstances. However, the Authority has in the past reduced the stand down period required to take into account exceptional circumstances. It would be an extremely rare case where convictions such as these have been incurred and no stand down period at all was required.

[26] We also agree with the Police submission that it is desirable for there to be consistency in the decision making of the various DLCs, particularly those in the same region, on matters such as this, where there are guidelines available.

[39] As stated in *Osborne*, and endorsed in *Re Judd*, a two year period should elapse since the date of the applicant’s last offence before an application for a manager’s certificate will be entertained. In the present appeal, the appellant’s last conviction date was 21 April 2015 in respect of offending which the appellant advises occurred in December 2014 (this was not apparent from the Criminal Convictions report provided to the Authority).

[40] The appellant has annual convictions from April 2007 through to April 2015. The appellant’s last conviction for an alcohol related offence was in June 2011. Offences since then are what can be characterised as “dishonesty offences” for which the applicant was sentenced to community detention and reparation/restitution.

In August 2014, however, the appellant was convicted for “*Procure/Possess Methamphetamine/Amphetamine*”. This is of concern. As stated by this Authority in *Re Tua* [2008] NZLLA 375, there is a connection between the sale of alcohol and drugs. In that decision the Authority said:

“Both items are of course drugs, although one is legal and one is not. We have a policy that attempts to ensure that people who have an involvement with the drug sub-culture, do not enter the hospitality industry in a managerial leadership role.”

[41] Nevertheless, the Authority recognises that this conviction is now some two and a half years old and did not involve the appellant selling or dealing in drugs.

[42] The two-year stand-down period is a guide or a norm such that the DLC could have issued a manager’s certificate in September 2016, given that 26 months had elapsed since the date of the last offence.

[43] It is not unreasonable, however, that a stand-down period of closer to three years was stipulated in light of the appellant’s conviction history.

[44] While the appellant was released from prison in mid-2014 she subsequently continued to offend. The appellant has said that she is determined to, and has, turned her life around. The Authority hopes that is the case. Weighing in the appellants’ favour too are the fact that the application is not opposed by the Inspector or the Police.

[45] Having considered the application and the circumstances around it, however, the Authority is of the view that a stand-down period until September 2017, as imposed by the DLC, is appropriate.

[46] The Authority is mindful that the appellant has said that she may lose her employment if she is not successful in her appeal. Unfortunately that is not a matter on which the Authority can place much weight, our focus necessarily being on whether the applicant has established a sufficient period of time, incident free, to satisfy us that she will uphold the standards required by the object of the Act. A further period of stand-down until September 2017, it is hoped, will provide the DLC, the necessary confidence it, and the Authority, require.

Conclusion

[47] The appeal is dismissed.

[48] Pursuant to s 158 of the Act the decision of the DLC is confirmed.

DATED at WELLINGTON this 14th day of February 2017

J S Mitchell
Secretary