

**IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE**

**CIV-2021-409-000433
[2021] NZHC 2598**

UNDER the Sale and Supply of Alcohol Act 2012

BETWEEN NEKITA ENTERPRISES LTD, HARJIT SINGH and SHEREEN SINGH
Applicants

AND CHRISTCHURCH CITY COUNCIL
ALCOHOL LICENSING INSPECTOR and
NEW ZEALAND POLICE
Respondents

Hearing: 28 September 2021

Appearances: K H Cook for Applicants
K South and W S Taffs for Respondents

Judgment: 1 October 2021

JUDGMENT OF DOOGUE J

This judgment was delivered by me on 1 October 2021 at 11.30 am pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Introduction

[1] Nekita Enterprises Ltd (Nekita) held off-licences under the Sale and Supply of Alcohol Act 2012 (the Act) for the following five premises:

- (a) Canterbury Liquor Lyttleton;
- (b) Ferrymead Wine and Spirits,
- (c) Canterbury Liquor Pages Road;
- (d) Wainoni Liquor Store; and
- (e) Woodham Road Liquor Store.

[2] Ms Lavery, the Licensing Inspector for the Christchurch City Council (the Council) and the New Zealand Police applied to the Alcohol Regulatory and Licensing Authority (the Authority) for orders cancelling or suspending the five licences referred to in the previous paragraph as well as the manager's certificates issued to Mr Harjit Singh and Mrs Shereen Singh.

[3] When the applications were filed with the Authority, Mr and Mrs Singh were joint directors and shareholders of Nekita. Mr Singh then resigned, before the hearing, and reduced his shareholding in the company to a minority interest. Mr Singh also surrendered his manager's certificate, precluding its cancellation or suspension by the Authority. Mr John Yoon joined Nekita as an independent director.

[4] After hearing from the parties, the Authority cancelled both the off-licences and Mrs Singh's manager's certificate.

[5] Nekita and Mrs Singh appeal against the Authority's decision. They seek a stay of the decision pursuant to s 153 of the Act until their appeal is heard and determined. The stay application is opposed by both the Inspector and the police.

Background

[6] The Act puts in place regulation of the sale and supply of alcohol for the benefit of the community.¹

[7] The Act's object is to ensure that the sale, supply and consumption of alcohol is undertaken safely and responsibly to minimise the harm caused by excessive or inappropriate consumption of alcohol.²

[8] The harm caused by such excessive or inappropriate consumption includes:³

- (a) any crime, damage, death, disease, disorderly behaviour, illness or injury, directly or indirectly caused, or directly or indirectly contributed to, by the excessive or inappropriate consumption of alcohol; and
- (b) any harm to society generally or the community, directly or indirectly caused, or directly or indirectly contributed to, by any crime, damage, death, disease, disorderly behaviour, illness or injury of the kind described in (a).

General enforcement provisions of the Act

[9] The relevant parts of s 280 of the Act read:

280 Variation, suspension, or cancellation of licences other than special licences

...

- (3) The grounds on which an application for an order may be made are as follows:
 - (a) that the licensed premises have been conducted in breach of any of the provisions of this Act or of any conditions of the licence or otherwise in an improper manner;
 - (b) that the conduct of the licensee is such as to show that he or she is not a suitable person to hold the licence:

¹ Sale and Supply of Alcohol Act 2012, s 3.

² Sale and Supply of Alcohol Act, s 4(1).

³ Sale and Supply of Alcohol Act, s 4(2).

- (c) that the licensed premises are being used in a disorderly manner so as to be obnoxious to neighbouring residents or to the public.

...

- (5) If the licensing authority is satisfied that any of the grounds specified in subsection (3) is established and that it is desirable to make an order under this section, it may, by order,—
 - (a) vary or revoke any condition of the licence imposed by the licensing authority or a licensing committee: or
 - (b) impose any new condition (relating to any matter specified in section 110(1), 116(1), or 117(1)); or
 - (c) suspend the licence for such period not exceeding 6 months as the licensing authority thinks fit; or
 - (d) cancel the licence.
- (6) Instead of making an order under subsection (5), the licensing authority may adjourn the application for any period it thinks fit to give the licensee an opportunity to remedy any matters that the licensing authority may require to be remedied within that period.

[10] The relevant parts of s 285 of the Act read:

285 Suspension or cancellation of manager's certificates

...

- (3) The grounds on which an application for an order under this section may be made are as follows:
 - (a) that the manager has failed to conduct any licensed premises in a proper manner:
 - (b) that the conduct of the manager is such as to show that he or she is not a suitable person to hold the certificate.

...

- (5) If the licensing authority is satisfied that either of the grounds specified in subsection (3) is established and that it is desirable to make an order under this section, it may, by order,—
 - (a) suspend the certificate for such period not exceeding 6 months as the licensing authority thinks fit; or
 - (b) cancel the certificate.
- (6) Instead of making an order under subsection (5), the licensing authority may adjourn the application for any period it thinks fit to

give the manager an opportunity to remedy any matters that the licensing authority may require to be remedied within that period.

[11] The Authority, relying on a decision of the Employment Relations Authority (ERA), found that Nekita had failed to pay four employees minimum wage entitlements, failed to pay employees holiday pay, and failed to keep time and wage records and holiday and leave records for 59 employees, all of which were admitted breaches.⁴

[12] The Authority found this was improper conduct in terms of s 280 and held:

[253] The rules of conduct in the present case are the employment standards set down in employment legislation namely the Minimum Wage Act, the Wages Protection Act, the Holidays Act and the Employment Relations Act which apply to Nekita's licensed premises as they do to any business.

[254] Paying employees at a different hourly rate to that in their employment contracts, failing to pay employees minimum wage entitlements, failing to pay holiday pay, and the failure to keep time and wage records and holiday and leave records for employees as required by law is improper conduct. It is conduct that no responsible licensee or manager, or other reasonable employer for that matter, would accept.

[255] Given the findings of the ERA, the Authority is satisfied that Nekita has engaged in improper conduct. Accordingly, the grounds of the applications pursuant to s 280(3)(a) have been made out against Nekita.

[13] The Authority found that Nekita was unsuitable to hold a licence. In reaching that finding they relied on findings in the ERA that the breaches against the four employees arose from the operation of a dual-payment system over a period of up to four years. These breaches were "ongoing, persistent and deliberate breaches of the minimum wage requirements for those four employees".⁵ The Authority found that this goes directly to the character and reputation of Nekita.

[14] The Authority observed:

[264] The evidence as it stands today is such as to demonstrate that the grounds have been established. This is not a licensing application where Nekita is being evaluated against the criteria for holding a licence. As an enforcement application, once the grounds have been established, the

⁴ *Christchurch City Council Alcohol Licensing Inspector v Nekita Enterprises Ltd* [2021] NZARLA 139-145 at [245].

⁵ *A Labour Inspector of Ministry of Business, Innovation and Employment v Nekita Enterprises Ltd* [2020] NZERA 509 at [34].

historical nature of the breaches and any changes made, go to the question of desirability in making an order rather than the establishment of the grounds. We discuss desirability shortly.

[15] The Authority concluded that Mrs Singh was not suitable to be a manager of licensed premises and made numerous serious adverse credibility findings against Mrs Singh that are not the subject of any appeal. An instructive example of their findings against Mrs Singh can be found in the following four paragraphs:

[270] Mrs Singh also accepted that she received the Labour Inspectorate's report in November 2019, and Super Liquor's letter of termination in February 2020. To say that she was not aware, or did not appreciate the importance, of the allegations made when Mrs Singh also says that she did not operate at her husband's will or as a puppet for him, defies credibility. Mrs Singh's evidence that she did not fully digest the seriousness of Super Liquor termination letter because she was in shock likely reflects that she understood full well the seriousness of the matter before her.

[271] Under cross-examination, Mrs Singh said that she expressed her disappointment in Mr Singh in light of the Labour Inspectorate's report. She could only have done so if she had read the report.

[272] Mrs Singh also said that she only had a brief look at the termination letter at the time it was sent and that she was in shock. Mrs Singh accepted under cross-examination, however, that she later read the letter but said that she did not read it in detail. This defies credibility particularly given she was already aware of the Labour Inspectorate's report.

[273] While Mrs Singh may not have had knowledge of the breaches in 2012-2016, the Authority is satisfied that Mrs Singh knew of the allegations prior to the ERA determination. The Authority finds Mrs Singh's evidence that she did not know what conduct she was supposed to have done and that she "was not involved in Nekita's bottle stores during the times that the ERA were dealing with it" such that she did not demonstrate a lack of candour and that she has been "honest and upfront", to be in direct contradiction to her acknowledgement of the Labour Inspectorate's report and the termination letter she received months before the ERA hearing.

[16] The Authority was concerned at Mrs Singh's total avoidance and obfuscation on a central issue, namely what she had done to investigate the dual-payment system and any shortfall to employees after she became aware of the practice, having been served with the ERA proceedings where she was personally named as a respondent.

[17] The Authority found:

[282] The evidence is not that Mrs Singh had certain designated areas of authority during this period and that Mr Singh had others but that Mrs Singh had no apparent areas of responsibility and did not involve herself with Nekita.

Moreover, the evidence establishes that Mrs Singh took no interest in understanding what was occurring in a company for which she was a director and 50% shareholder. Repeatedly before the Authority, Mrs Singh denied responsibility for Nekita and sought to divorce herself from the actions of Nekita in the past. In effect she seeks to rely on her having been a director in name only with little or no responsibilities that go with being a director.

...

[284] While in many small closely held companies, directors fulfil the dual roles of governance and management, this does not obviate a director's responsibility to establish the policy or rules that are to be implemented, or to scrutinise and supervise the implementation of those policies. In the case of a licensee holding a licence to sell or supply alcohol, a director cannot avoid her responsibilities as director of the licensee company by saying that she had no role in the company and that she was not aware of what was going on.

[18] They also found that Mr Singh was the directing mind and will of the company from inception, and that Mrs Singh was tainted by association:

[287] In so far as Nekita failed to provide minimum employment entitlements to staff and to maintain proper record keeping practices, the Authority considers that Mrs Singh is tainted by association in circumstances where rather than relying on Mr Singh to undertake his delegated responsibilities, Mrs Singh abdicated her responsibilities completely by taking a hands-off approach to her obligations as licensee.

...

[289] To the extent that unsuitability is established on the part of Nekita, that is necessarily shared by Mrs Singh as a director of Nekita. Her unwillingness to make even the most modest of inquiries into the operations of Nekita, and the breaches admitted by her codirector husband, even when these were spelled out in the termination letter from Super Liquor goes to Mrs Singh character. By her own admission, upon being faced with what can only be described as serious allegations, all Mrs Singh did was express disappointment in her husband.

The applicants' case

[19] The applicants' case on appeal is that the Authority erred in:

- (a) concluding that the findings of the ERA in relation to the employment issues were evidence of improper conduct pursuant to s 280(3)(a) of the Act;

- (b) finding that conduct no responsible licensee, manager or reasonable employer would accept was improper conduct pursuant to s 280(3)(a) of the Act;
- (c) ruling that the findings of the ERA put beyond doubt that Nekita is unsuitable to hold a licence;
- (d) finding that the nature of proven breaches and any changes made go to the question of desirability of making an order rather than establishment of the grounds (particularly where, as in this case, the breaches were historic);
- (e) finding that Shereen Singh was not a suitable person to hold a manager's certificate;
- (f) finding that it was desirable to make an order cancelling the licences and manager's certificate, and failing to consider whether suspension was a viable alternative to cancellation; and
- (g) finding that Mr Singh would have continued ongoing influence resulting in conduct contrary to the objects of the Act.

Legal principles

[20] Section 153 of the Act provides:

153 Effect of appeal against other decisions

...

- (2) A decision to which this section applies has effect during the period allowed for filing an appeal against the decision and, if an appeal is filed against the decision, also has effect while the appeal is pending.
- (3) However, the appellate tribunal may, on its own initiative or on an application made for the purpose, order that a decision to which this section applies is not to have effect while the appeal is pending.
- (4) Despite subsection (3), an appellate tribunal may not make an order under that subsection in relation to a decision made under section 286

(which relates to the suspension of licences for non-compliance with public health or fire precaution requirements).

- (5) Where an appellate tribunal makes an order under subsection (3) in relation to a decision to refuse to renew, to suspend, or to cancel any licence or manager's certificate, the licence or manager's certificate must, if the appeal is not finally determined on or before the expiry of the licence or certificate, be deemed to be extended until the final determination of the appeal.

[21] In *Cats Niteclub (1991) Ltd v Police*, Hansen J confirmed that the Court's discretion in relation to stay applications in this context is wide-ranging.⁶ The onus is on the applicant to satisfy the Court that a stay should be granted. His Honour noted that:⁷

... this Court is unlikely to grant the suspension unless it is satisfied the appeal is bona fide; unless it is satisfied that there is some substantive merit in the appeal; and unless the consequences of the appeal are such it would be completely unjust not to allow the suspension.

[22] In *DJM Enterprises Timaru v McCrostie*,⁸ Chisholm J observed that when deciding whether or not to grant a stay it is necessary for the Court to balance competing considerations, including those set out in *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd*.⁹ The factors identified in *Dymocks* were summarised in that decision as follows:¹⁰

- (a) If no stay is granted will the applicants' right of appeal be rendered nugatory?
- (b) The bona fides of the applicants as to the prosecution of the appeal.
- (c) Will the successful party be injuriously affected by the stay?
- (d) The effect on third parties.

⁶ *Cats Niteclub (1991) Ltd v Police* [1996] 3 NZLR 581 (HC) (this decision was under s 147A of the former Act). See also *Ka Pai Kaiti Trust v Kaiti Club Hotel Ltd* [2018] NZHC 1332.

⁷ At 6.

⁸ *DJM Enterprises Timaru Ltd v McCrostie* HC Timaru CIV-2007-476-581, 5 December 2007 at [7].

⁹ *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 13 PRNZ 48 (HC).

¹⁰ At [9].

- (e) The novelty and importance of the questions involved.
- (f) The public interest in the proceedings.
- (g) The overall balance of convenience.

[23] The factors identified in *Dymocks* are non-exhaustive.¹¹ Other factors that may be relevant to the exercise of the Court's discretion in this case include:

- (a) The apparent strength of the appeal.¹² (A stay will not be granted if there is no real prospect of the appeal succeeding).¹³
- (b) The reasons given by the Authority (as a specialist Tribunal) for refusing the application.¹⁴
- (c) Operational concerns and the seriousness of them. (Where there are operational concerns the Courts are less likely to grant a stay.)¹⁵
- (d) The timeframe of the stay operating (the likely delay until the appeal is heard and a decision given).¹⁶
- (e) Evidence of hardship in the absence of a stay is not enough (it will often be the case that the refusal to renew a licence will cause some degree of hardship).¹⁷ Evidence of serious financial difficulties arising in the absence of a stay (for example impending liquidation, bankruptcy, job

¹¹ *Property Ventures Investments Ltd v Commissioner of Inland Revenue* [2010] NZCA 217, (2010) 20 PRNZ 757 at [11].

¹² *Property Ventures Investments Ltd v Commissioner of Inland Revenue*, above n 12, at [11]; based on *Body Corporate No 188529 v North Shore City Council (No 6)* HC Auckland CIV-2004-404-3230, 11 February 2009.

¹³ *McCarthy Enterprises Ltd v Paulin* [2016] NZHC 2316 at [5].

¹⁴ *Three Bros Ltd v Rotorua District Licensing Agency* HC Rotorua (1999) M76/99, 18 August 1999 at 6.

¹⁵ *Three Bros Ltd v Rotorua District Licensing Agency*, above n 15, at 5.

¹⁶ *Linwood Food Bar Ltd v Davison* [2014] NZHC 2062, [2014] NZAR 1277 at [15].

¹⁷ *L & H Graces Place Mangere Ltd v Abbott* [2017] NZARLA 395 at [31].

losses) may, however, be relevant.¹⁸ Ultimately, however, the licensee's commercial interests are subject to the object of the Act.¹⁹

- (f) That a stay may improve, rather than preserve, the position of a party can be relevant.²⁰

The apparent strength of the appeal

Authority erred in finding ERA breaches evidence of improper conduct

[24] The applicants' case is that the Authority erred here in both law and fact. They say that breaches of employment law do not amount to improper conduct under the Act because there is no causal nexus between such conduct and the object of the Act, which is to minimise the harm caused by alcohol. The applicants submit the proposition that there is such a nexus is novel and has not been the subject of any High Court decision. Second, they say, on the facts before the Authority, the conduct complained about was historic and not operative at the time of the hearing.

[25] In *Two Brothers Wholesale Ltd v Medical Officer of Health (Waikato District Health Board) (TBWL)*, the Authority reviewed its past decisions on the nexus between a breach of employment law and the ability of the licensee to sell and supply alcohol safely and responsibly.²¹ The Authority was considering an appeal against a District Licensing Committee decision declining to renew TBWL's off-licence.

[26] In *TBWL* the Authority was considering suitability rather than improper conduct. I see no conceptual difference between suitability and improper conduct when it comes to considering the causal nexus with the ability of the licensee to sell and supply alcohol safely and responsibly. The outcome is the same no matter the mechanism that causes the harm. In that case, the Authority agreed with the submission that a combination of lack of formal training, requiring staff to work long

¹⁸ *Pizza on the Run Ltd v Abbott* [2017] NZARLA 242 at [24]; *Avondale Peninsula Hotel Ltd v Police* HC Auckland HC130/96, 24 October 1996 at 5.

¹⁹ *Medical Officer of Health (Wellington Region) v Lion Liquor Retail Ltd* [2018] NZHC 1123, [2018] NZAR 882 at [50]–[51]; *Lyger Investments Ltd v Young* [2018] NZHC 3222 at [45].

²⁰ *Brook Valley Community Group Inc v Brook Waimarama Sanctuary Trust* [2017] NZCA 377, (2017) 23 PRNZ 598 at [21].

²¹ *Two Brothers Wholesale Limited v Medical Officer of Health (Waikato District Health Board)* [2021] NZARLA 32.

hours without breaks, failing to provide minimum employment entitlements, lack of record keeping and a willingness to sell beers on a single-serve basis in a vulnerable community were matters going to suitability.

[27] The conduct complained of in this case has all those hallmarks and, in addition, significant evidence of failing to pay employees minimum wages and their holiday pay entitlements.

[28] However, the decision in *TBWL* may not be a complete answer to this ground of appeal. The applicants essentially say both decisions of the Authority on this issue were wrong and should be revisited by the High Court. Although their proposition is not novel, they are correct that this has not been the subject of any High Court decision.

[29] On appeal the applicants will also have to contend with the line of authority that has found improper conduct includes conduct that is wrong by reference to rules of conduct that do not necessarily relate to the object of the Act.²² Breaches to such fundamental employment legislation as occurred here appear to sit well within that class of case.

[30] At its highest, in light of the conduct findings of the Authority, this ground of appeal could be described as weak. However, I remind myself this can only be a preliminary assessment without the benefit of the full argument on appeal.

[31] As to the submission the breaches were historic and desisted in 2016, there is cogent evidence to the contrary, at least in terms of staff working long hours without breaks and continuing to sell beers on a single-serve basis in a vulnerable community.

²² *Cooke v CZ Lucky Ltd* [2020] NZARLA 163-164 at [167]-[173].

The Authority erred in ruling the findings of the ERA put beyond doubt that Nekita is unsuitable

[32] Again, there does not appear to be anything on the face of the ruling that is erroneous. The Authority has already ruled that failure to comply with employment laws reflects directly on suitability in *TBWL*, noting:²³

[261] More recently, in *Two Brothers Wholesale Limited v Medical Officer of Health (Waikato District Health Board)*, this Authority recognised that the failure to provide minimum employment entitlements to staff; to maintain proper record keeping practices; and to attempt to diffuse responsibility for these practices, amongst other things, go to the matter of suitability. This is especially the case, as was the case in *Two Brothers*, where there are systemic faults in a licensee's employment practises in circumstances where it gained an advantage as a result of those practices.

The Authority erred in finding that the historical nature of proven breaches and any changes made go to the question of desirability rather than establishment of the grounds

[33] Again, this ground of appeal appears to be weak. The Authority's reasoning merely follows the wording of s 285 of the Act. The Authority held:

[264] The evidence as it stands today is such as to demonstrate that the grounds have been established. This is not a licensing application where Nekita is being evaluated against the criteria for holding a licence. As an enforcement application, once the grounds have been established, the historical nature of the breaches and any changes made, go to the question of desirability in making an order rather than the establishment of the grounds. We discuss desirability shortly.

[34] Even if the order of consideration of these factors was ultimately decided to be in error, it is difficult to see how any appeal would be successful on this ground. Regardless of what stage of the inquiry the matters raised were considered, the fact is that it appears on the face of the judgment that all matters were considered and taken into account by the Authority.

²³ *Two Brothers Wholesale Limited v Medical Officer of Health (Waikato District Health Board)* [2021] NZARLA 32 at [133].

The Authority erred in finding that Shereen Singh was not suitable

[35] The applicants say the Authority erred in its finding that Mrs Singh lacked credibility before the Authority. In particular, they say the Authority was wrong to find against Mrs Singh on the basis of:

- (a) finding her culpable because of inaction as a spouse director of a small closely held company;
- (b) failing to have regard to the agreed fact that Mr Singh was the directing mind and will of the company from its inception;
- (c) finding Mrs Singh was tainted by association with Nekita; and
- (d) finding that Mr Singh would have continued ongoing influence resulting in conduct contrary to the objects of the Act.

[36] On a review of the transcript, the Authority appears to have made legitimate findings of fact that could justify a finding Mrs Singh had failed in her duties as a director of Nekita.

[37] The Authority found:

[282] The evidence is not that Mrs Singh had certain designated areas of authority during this period and that Mr Singh had others but that Mrs Singh had no apparent areas of responsibility and did not involve herself with Nekita. Moreover, the evidence establishes that Mrs Singh took no interest in understanding what was occurring in a company for which she was a director and 50% shareholder. Repeatedly before the Authority, Mrs Singh denied responsibility for Nekita and sought to divorce herself from the actions of Nekita in the past. In effect she seeks to rely on her having been a director in name only with little or no responsibilities that go with being a director.

...

[284] While in many small closely held companies, directors fulfil the dual roles of governance and management, this does not obviate a director's responsibility to establish the policy or rules that are to be implemented, or to scrutinise and supervise the implementation of those policies. In the case of a licensee holding a licence to sell or supply alcohol, a director cannot avoid her responsibilities as director of the licensee company by saying that she had no role in the company and that she was not aware of what was going on.

[38] In *Sayed v McGlone* the Court considered the effect of the “total unsuitability of Mr Sayed” in the context of an off-licence.²⁴

[39] In upholding the Authority’s decision to cancel the licence, Cooper J held:²⁵

[19] ... I accept Mr Nabney’s submission that it was Mr Sayed’s conduct which led the Authority to cancel the licence, not that of Ms Crawford. Nevertheless, the off-licence is operated by a partnership in which they were the only partners. She cannot distance herself from Mr Sayed in circumstances where she and he constitute the partnership to whom the off-licence was granted. Nor could the Authority properly make a distinction for the purposes of the off-licence between the two, although it noted in its decision that the consequence was that she had in effect become “tainted with the way in which the licensee has operated”.

[40] I find there to be no meaningful distinction for present purposes between a partnership and a small closely held company such as Nekita, particularly where the husband and wife are co-directors.

[41] The second alleged failure on this aspect of the findings is that the Authority failed to have regard to the agreed fact that Mrs Singh’s husband was the directing mind and will of the company from inception. It is incorrect to state this was not taken into account. It was specifically referred to at [294] of the judgment:

[294] It is recognised that Mr Singh was the directing mind and will of Nekita at the time of the breaches and that he has since resigned as a director of Nekita and has undertaken to have no further involvement with the management of Nekita. That goes to whether or not it can be said that Nekita will continue to be controlled by him notwithstanding that he has transferred most of his shares to Mrs Singh. While on the face of it these changes are such that Mr Singh will not be in a position to exert control over Nekita, the Authority has residual concerns about Mr Singh’s ongoing influence given Nekita was his ‘baby’, his relationship to Mrs Singh and because he has not stepped away from Nekita completely.

[42] The third alleged failure is that the Authority were erroneous in their finding that Mrs Singh was tainted by association with Nekita. This seems to be a repetition of the first alleged failure under this ground albeit in a slightly different guise.

[43] The Authority dealt with this as follows:

²⁴ *Sayed v McGlone* [2010] NZAR 562

²⁵ At [19].

[287] In so far as Nekita failed to provide minimum employment entitlements to staff and to maintain proper record keeping practices, the Authority considers that Mrs Singh is tainted by association in circumstances where rather than relying on Mr Singh to undertake his delegated responsibilities, Mrs Singh abdicated her responsibilities completely by taking a hands-off approach to her obligations as licensee.

[288] When Mrs Singh received the Labour Inspector's report in November 2019 she said that she took advice and accepted that she had to take some responsibility for what it contained as director and shareholder. This responsibility, however, did not arise in November 2019 but arose when Mrs Singh became a director in 2002. It was then that her obligations in relation to Nekita arose.

[44] In my view, that was available reasoning based on the legitimate findings of fact the Authority made.

[45] In granting the Inspector's application to cancel a licence in *Ferguson v McCullough*, the Authority held:²⁶

[29] We regard a licence as a privilege not a right. However the privilege comes with obligations, one of which is to be honest with the reporting agencies and with the Authority ...

...

[33] ... If a licensee is unable to be honest and transparent in his dealings with the reporting agencies, and in his appearance before us, then there is a complete absence of suitability. Such a person will bend and break other rules at will.

[46] Mrs Singh likewise had serious adverse credibility findings made against her by the Authority. On that basis I consider this ground of appeal can be described as weak.

[47] The fourth and final allegation in this respect is that the Authority erred in finding that Mr Singh would have ongoing influence resulting in conduct contrary to the objects of the Act. The respondents' counsel, Ms South, submitted the Authority did not make such a finding because they merely expressed that they had:²⁷

²⁶ *Ferguson v McCullough* LLA PH915/2007, 19 September 2007.

²⁷ *Christchurch City Council Alcohol Licensing Inspector v Nekita Enterprises Ltd*, above n 4, at [294].

... residual concerns about Mr Singh's residual concerns about Mr Singh's ongoing influence given Nekita was his 'baby', his relationship to Mrs Singh and because he has not stepped away from Nekita completely.

[48] I consider that submission is based on semantics and is not particularly convincing. Having said that, it seems to me as a matter of common sense the Authority was entitled to find some evidence for concern in a situation where there is propinquity arising from marriage and long-standing joint business interests.

[49] Cancellation was the natural and inevitable consequence of the findings made by the Authority. It is implicit in the decision that, as Nekita and the Singhs are unsuitable, cancellation must follow and that suspension was not appropriate. Suitability is the cornerstone of the licensing regime.

[50] This was a comprehensive 73-page decision, issued after a two-and-a-half-day hearing, with the Authority acutely aware of what was at stake. The Authority made numerous damning credibility findings against Mrs Singh on issues that were directly relevant to her suitability and character, having had the benefit of seeing her give evidence for four hours. On a review of the transcript, the inferences they drew appear logical and soundly based.

[51] The law is well settled that an appellate court will be reluctant to reverse the factual findings and findings as to credibility the tribunal at first instance made with the benefit of observing witnesses first-hand.

[52] Having considered the grounds of appeal and the Authority's full decision, I find the chances of success are low. However, this conclusion is not in and of itself determinative of the application.

Operational concerns and the seriousness of them

[53] The applicants submitted that Nekita is currently "compliant" with its obligations. This submission is not supported by the evidence. Monitoring events conducted by the police or the Council, and even the applicants' own consultants, Alcohol Consulting Group (ACG), have found Nekita's premises operating in

non-compliance with a statutory requirement or promoting alcohol in a manner that fails to achieve the object of the Act, namely the minimisation of alcohol-related harm.

[54] The Authority found:²⁸

[300] Before the Authority, Mrs Singh also accepted that Nekita's Pages Road premises in Aranui is in one of the most deprived suburbs in Christchurch. Despite this, when questioned about why a fridge for single sales was located at the entry to the store and why there was a trolley of single sale ciders and beers on display with a sign saying "Seven for \$10.00" (which ACG said equated to a unit price of \$1.43 and said was "extremely cheap alcohol"), Mrs Singh replied that they only have a handful of customers who buy those and they are not promoted.

[301] Moreover, in response to whether Mrs Singh saw a problem with her Wainoni Road manager (also in deprived Aranui), saying that Woodstock (a 'ready-to-drink') and single cans were the most popular purchase at Wainoni Road, Mrs Singh replied that Woodstock was 'just a core product' and that 'they have not caused any harm by selling single beers'.

[302] The Authority finds these responses most underwhelming. These responses demonstrate that Mrs Singh either does not understand or is not bothered by the risks associated with single sales, and the promotion of very cheap alcohol in deprived localities. These matters are of considerable concern to the Authority in such localities and are matters that go to the object of the Act.

[303] As we said in *Shady Lady Lighting v Lower Hutt Liquormart Ltd*, the vulnerability of an area, in effect, raises the threshold of suitability in terms of whether the grant of the licence will result in a reduction or an increase in alcohol-related harm. On appeal, Churchman J found no error of law in this approach. While that case involved an application for a licence, the same principle applies in relation to a manager's certificate. In terms of managing the risk of alcohol-related harm, the vulnerability of an area makes it all the more important that managers of premises understand the risks associated with the sale and supply of alcohol.

[304] Even when these matters were pointed out by ACG, Mrs Singh failed to appreciate the seriousness of these concerns and sought to promote the fact that ACG had reviewed each premises. This touches on the very concerns about implementation raised by the Applicants.

[305] Mr Yoon is also an inexperienced licensee. While there is no doubt Mr Yoon's legal acumen will assist with the governance and obligations of Nekita to comply with the law, Mr Yoon will not play a part in the day to day management of Nekita when the issues facing Nekita are ones of implementation.

[306] In the same vein, while it is undoubtedly positive that Nekita now seeks to engage expert employment advice and the services of the ACG, the

²⁸ *Christchurch City Council Alcohol Licensing Authority v Nekita Enterprises Ltd*, above n 4 [footnotes omitted].

pressing issue is about how well Nekita's premises will be managed on the ground and this will fall on Mrs Singh's shoulders alone. For the reasons stated, the Authority is not satisfied that Mrs Singh is suitable for this task.

[307] The Authority is not satisfied that Mrs Singh has taken the breaches by Nekita and her husband seriously until such time that the applications were filed with the Authority. While the Authority is satisfied that Mrs Singh has taken steps to remedy past failings, these can only be described as having been implemented very late, after the applications were filed with the Authority.

[308] There can be no doubt that Mrs Singh's past complacency has been reflected in systemic failures of the licensee in the past. While she may not have been aware of what her husband was doing at the time, as a director she ought to have been, or at least made inquiries. When she did become aware, nothing was done until she faced the threat of cancellation of the licence and of her manager's certificate.

[309] This past complacency reflect not only on her suitability but Nekita's suitability to hold a licence while she remains involved with the company.

[55] Mrs Singh's failure to grasp the obligations of a licensee to reduce alcohol-related harm is also reflected in [12] of her affidavit where she states, in spite of ACG's findings and the findings of the Authority:

I do not believe there have been any operational issues that might be described as at a level that suggests the off-licences are trading in a manner that are contrary to the objects of the Sale and Supply of Alcohol Act.

[56] Additionally, the police and the Council continued to find breaches whenever they monitored the premises. On 23 July 2020, the Inspector visited one of the applicants' stores in Lyttelton and found it was being operated without a duty manager present. The staff member exhibited a lack of understanding in respect of basic requirements of the Act. The duty manager displayed as being on duty was not on the premises and the staff member actively misled the Inspector as to the named duty manager's whereabouts. He had not received any training for nine months and was due to work (as the duty manager) at another of the applicants' stores the following day.

[57] Eight of the applicants' other stores were also visited on 23 July 2020. The Inspector identified issues with duty manager appointments at each store and staff training issues at five.

[58] Further, the applicants' staff rosters obtained during July and again in December 2020 show that the licensed premises continued to be operated in breach of minimum employment standards. Stores were often operated by a single staff member for shifts of up to 11 hours. The rosters show no provision for staff to be relieved while they take their statutory breaks or who would act as duty manager while such breaks were taken. Such rosters were put to Mrs Singh at the hearing. She provided no satisfactory explanation as to how the stores operated under this rostering model and expressed no exasperation at all with regard to the systemic rostering of people without the breaks legally required.

[59] The evidence at the hearing was not that Nekita had compliant rosters (in terms of minimum employment entitlements), merely that they had contracted with I.R. Thompson Associates Ltd and were going to ensure that they become compliant. There is no basis or evidence to suggest that, even if operating now, they would be operating lawfully in terms of their employment obligations. Nekita's breaches appear to have continued, despite the ERA proceedings commencing in 2019.

[60] When questioned about the visa requirements for visa-dependent employees, Mrs Singh knew none of the details.

[61] The law is clear that where there are operational concerns the Court is less likely to grant a stay.

The timeframe of the stay operating

[62] The appeal can be heard at short notice with an estimate of three hours. The date of 4 October 2021 was offered for the appeal. That date was not suitable for counsel for Nekita, who is relinquishing his role. New counsel will need to be instructed. It is difficult at this stage to identify when the matter will likely be heard but I do not anticipate delays of the Court's or the respondents' making.

Evidence of hardship

[63] Evidence of hardship in the absence of a stay is not enough.²⁹ Evidence of serious financial difficulties arising in the absence of a stay may, however, be relevant.³⁰ Here there is no evidence, other than the vague assertions of Mrs Singh, that Nekita has any financial difficulties whatsoever. Mrs Singh has sworn an affidavit that:

Neikita is simply not in a position to continue to pay staff for the many weeks, possibly months that would pass before any appeal would be heard. Additionally there is a significant amount of accrued employment obligations owed to the employees which are unlikely to be paid if this application is not successful.

[64] These statements require scrutiny.

[65] The statement that “there is a significant amount of accrued employment obligations owed to employees which are unlikely to be paid if this application is not successful” is telling.

[66] “Accrued employment obligations” clearly refers to accrued holiday pay and redundancy. Against the factual background of recent profligate wealth, Mrs Singh is effectively threatening that accrued employee obligations owed to employees are “unlikely to be paid” if the stay is not granted.

[67] Mrs Singh failed to mention that, in the 12 months immediately prior to the Authority’s determination, Nekita has sold 10 of its premises for \$5.1 million. I do not accept that Nekita is “simply not in a position to continue to pay staff” between the date of cancellation and when an urgent appeal can be heard.

[68] There is a wholly inadequate foundation of financial hardship on the part of Nekita to justify the exercise of discretion for a stay. No independent evidence has been provided.

²⁹ *L & H Graces Place Mangere Ltd v Abbott*, above n 18, at [51].

³⁰ *Pizza on the Run Ltd v Abbott*, above n 19, at [24]; *Avondale Peninsula Hotel Ltd v Police*, above n 19, at 5.

[69] Even if such evidence were provided, the licensee's commercial interests are subject to the object of the Act.³¹ Granting a stay would enable extended ongoing trading of a problem premises. Continued operation, especially over the busiest time of year in the lead up to Christmas with its greater risk of alcohol-related harm, in the face of significant ongoing operational concerns is contrary to what was expressly intended by Parliament and the Authority.

[70] As to the contention that the potential sales of the remaining off-licences will collapse, for the reasons set out in the affidavit of the Inspector the respondents do not accept those sales are legitimate arms-length transactions to buyers unconnected to the Singhs.

Conclusion

[71] As to the substantive merits of the appeal, I have expressed my doubts about the applicants' likely success on the grounds advanced by them. I must, however, stand back and view this matter in the round and determine whether it would be unjust not to allow the stay. I do so on an assessment of the balance of convenience.

[72] I accept the applicants have bona fides in seeking a ruling from this Court on the issue of whether breaches of employment legislation amount to improper conduct.

[73] There is no evidence that if a stay is not granted the applicants' right of appeal will be rendered nugatory.

[74] Similarly, there is no independent evidence of economic hardship arising in the event a stay is not granted.

[75] The issues of Nekita's and Mrs Singh's suitability and the ongoing operational concerns are real, and the applicants have failed to convince me that they no longer exist. These factors support the refusal to grant a stay.

³¹ *Medical Officer of Health (Wellington region) v Lion Liquor Board Ltd*, above n 20, at [50]-[51]; *Lyger Investments Ltd v Young*, above n 20, at [45].

[76] In summary and taking all these matters into account, the applicants have failed to satisfy the Court on the balance of convenience that a stay should be granted in this case.

Result

[77] The application for stay is refused.

[78] Costs shall issue in favour of the respondents on a 2B basis.

Doogue J

Solicitors:
Ellice Tanner Hart, Christchurch
Crown Solicitor, Christchurch
CC:
K Cook, Christchurch