

IN THE MATTER

of the Sale and Supply of Alcohol Act 2012 ("Act").

AND

IN THE MATTER

of an application by **VISHAL VARGHESE** for a Manager's Certificate pursuant to s.219 of the Sale and Supply of Alcohol Act 2012 ("Act").

BEFORE THE WHANGANUI DISTRICT LICENSING COMMITTEE

Chairman: Mr Stuart Hylton
Member: Mr Robert Moore
Member: Ms Annette Main

HEARING at the Whanganui District Council Chambers on 2 July, 2021.

APPEARANCES

Vishal Varghese – Applicant

Steve Turfrey – Whanganui District Council Chief Alcohol Licensing Inspector – in Opposition

Senior Constable Keith Thomson – Police – in Opposition

DECISION OF THE COMMITTEE

Application

[1] This decision relates to an application by Vishal Varghese (“the applicant”), for a new Manager’s Certificate pursuant to s.219 of the Sale and Supply of Alcohol Act 2012 (“Act”). The application was made on 6 May 2021.

[2] The applicant declared within the application a declared drink driving conviction issued in the New Plymouth District Court on 8 January 2021. The conviction related to a traffic accident on the 11th December 2019 where the applicant was the sole driver of the car and returned a reading of 892 (Mcgs) micrograms/litre of breath. The legal limit being 400 (Mcgs) micrograms/litre of breath.

[3] The court sentenced the applicant to a zero alcohol licence, fine of \$400, disqualification from driving for 28 days and the application of an alcohol interlock device.

[4] The drink driving offence is the applicants only recorded conviction.

Opposition

[5] The application attracted section 220 reports of ‘opposition’ from both the Police and Inspector.

[6] The Police report dated 17 May 2021 records opposition to the application on the grounds of suitability based on the drink driving conviction. The Police report referenced NZLLA case Law – 2388/95 *GL Osborne* which highlights the general approach taken by the *Authority* and this Committee to manager certificate applications containing alcohol convictions.

[7] The Inspectors report dated 25 May 2021 records opposition to the application on the same grounds as the Police. The Inspectors report also records that the applicant has the relevant experience, training and knowledge to hold a managers certificate.

[8] Due to the reported opposition the matter was set down for public hearing in accordance with section 202(3) of the Act.

Hearing

[9] The Committee noted that in considering this application it must consider the applicant’s suitability, any convictions, the applicants experience and any relevant training. The Chair asked the reporting agencies whether there was any concerns with the applicant’s experience, knowledge and training to which they affirmed there was none.

[10] The Committee therefore noted that the hearing was to focus on the suitability of the applicant based on the drink driving conviction, as raised by the Police and Inspector.

Applicant's Evidence

[11] The applicant gave an account of the drink driving incident including the events that lead to the accident happening. The applicant stated he was not in a good emotional state leading up to the incident due to issues with his study in New Plymouth.

[12] The applicant stated that when he applied for the certificate it was for him but as time has gone on the certificate had become critical to the survival of the restaurant he currently works at. The applicant is currently working at the restaurant as an 'Acting Manager' as there is no other person employed there with a manager's certificate.

[13] The applicant under cross examination said he had been made aware of the Osborne case and the general two years stand down period after a one off alcohol offence but was under the impression it only related to managers that already had a certificate.

[14] The applicant explained to the Committee the intricacies of the interlock car system which was still fitted to his vehicle. He also advised that if a stand down period was to be imposed the restaurant should be able to continue trading during this period but without the ability to sell alcohol.

Police's Evidence

[15] Constable Thomson's brief of evidence was attached to the hearing agenda and taken as read.

[16] Upon questioning Constable Thomson explained the vehicle interlock system to the hearing. He told the hearing that a person is unable to apply to have the interlock device removed from their vehicle if they have recorded a positive breath alcohol reading on the interlock device in the preceding six months. He also advised that following the interlock system being removed from the vehicle the person also receives a three year zero alcohol licence.

[17] When questioned on the applicants reading of 892 (Mcgs) micrograms/litre of breath, Constable Thomson told the Committee that the reading was over twice the permissible level i.e.400 Mcgs and that a reading over 1000 Mcgs was considered 'really high'.

Inspector's Evidence

[18] The Committee took the Inspectors report as read and Mr Turfrey reiterated that he had no impediment to the certificate being issued after the 'stand down' period recommended in the *Osborne* case.

[19] Mr Turfrey advised the Committee that he had interviewed the applicant as part of the application process and was satisfied that in terms of his knowledge, experience and training, he was suitable to be granted a certificate.

Committee's Decision and Reasons

[20] In considering this application the Committee considered the criteria under s. 222 i.e.

- (a) the applicant's suitability to be a manager:
- (b) any convictions recorded against the applicant since the certificate was issued or last renewed:
- (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](#).

[21] The matter in question, as raised within the s. 220 reports by Police and the Inspector, is the applicant's suitability to be a manager considering his drink drive conviction in 2020.

[22] In all other respects it was established through the hearing and reports that the applicant had the necessary experience, training and qualifications to be granted a managers certificate.

[23] Therefore had it not been for the drink driving offence we would have no hesitation in granting the application. The drink driving offence was also a first that had not been repeated.

[24] None the less the applicant had demonstrated poor judgement when he drove with an excess blood alcohol level which placed others in risk.

[25] The Committee holds the view that persons holding a Manager's Certificate are in a position of responsibility which requires the exercise of good judgement around the sale, supply and consumption of alcohol. The incident and conviction demonstrated a lapse in judgement on the applicant's part and therefore the Committee believes there should be a consequence for that error in judgement.

[26] This view is supported by well referred to cases of *Hesp (2014) NZARLA PH10* and *Deejay Enterprises Limited NZLLA 531-532/97*.

[27] When considering an alcohol related offence by an applicant for Manager's Certificate we are obliged to consider the GL Osborne decision. In that decision the Authority stated - *"Without fettering ourselves to 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 of licensed premises...Less serious convictions are also weighted. By way of example is an isolated excess breath/blood alcohol conviction, or a single driving offence disclosing no pattern of offending... In these and similar cases we frequently indicate that a minimum of two years from the date of*

conviction may result in a favourable consideration – providing suitable reports from Police and Inspector are received.”

[28] In *Pompey LLA PH623/04* it was made clear that the stand-down period should run from the date of offending rather than the date of conviction.

Conclusion

[29] Although the Osborne case are the Authorities ‘guidelines’ they provide a reasonable test to ensure that the standard for persons holding a Manager’s Certificate remains high and our decisions are consistent.

[30] The two year stand down period from the alcohol related incident is the starting point based on the *Osborne* case. The Committee did not hear any evidence that provides compelling arguments to deviate from the Osborne stand down period.

[31] Whilst we acknowledge the applicant’s place of work may struggle to operate if the applicants certificate is further delayed, this is not something this Committee can take into account in its deliberations. There was no representation or evidence to this effect from the applicant’s employer at the hearing and in any event any licensee has their own responsibility to engage a sufficient number of certified managers to fulfil their requirements under the Act.

[32] If we apply the standard two year stand down period from the incident in this case, the applicant would be free from **11th December 2021** to be issued with a manager’s certificate.

[33] Accordingly, for these reasons, the application for Manager’s Certificate is **approved** to be issued on or after the **11th December 2021**, subject to –

- the DLC receiving reports from the Police and Inspector that indicate there were no subsequent reasons why the applicant should not be issued a certificate.

[34] The appeal provisions under s.154 and 155 of the Act apply to any party to proceedings who is dissatisfied with the decision or any part of the decision.

DATED at Whanganui this the 5th day of July 2021



.....
Chairman – Stuart Hylton