

IN THE MATTER of the Sale and Supply of Alcohol Act 2012

AND

IN THE MATTER of an application by **Michael Stephen DICKERSON** pursuant to Section 219 of the Act for a Manager's Certificate

BEFORE THE DISTRICT LICENSING COMMITTEE AT NAPIER

Chairman: Mr DE Fellows
Members: Councillor F White
Mr J Cocking

HEARING at NAPIER on Thursday 26 February 2015

APPEARANCES

Mr. M.S.Dickerson Applicant
Sergeant R. Wylie NZ Police - in opposition
Mr. J. Sheehan District Licensing Inspector - in opposition

RESERVED DECISION OF THE DISTRICT LICENSING COMMITTEE

INTRODUCTION

1. This is an opposed application by Michael Stephen Dickerson for a Manager's Certificate.
2. The Police and the District Licensing Committee Inspector have opposed the application on the grounds that the applicant is not a suitable person to hold a Manager's Certificate.

BACKGROUND

3. Mr Dickerson has been employed in the hospitality industry sporadically from an early age and in a full time capacity since 2005. For the past 6 years he has been, and is currently, the General Manager of the Thirsty Whale.
4. Application was made on 4th November 2014 two days after the expiration of his Manager's Certificate. The application was accompanied by copies of his Licence Controller Qualification Certificate, the LCQ Bridging Test Completion Certificate and three letters of reference from, his employer, the managing director of an adjacent bar and a retired police officer who regularly frequents the premises.

5. Consequent failure to renew his Manager's Certificate, an application for suspension of the certificate to be heard before the Alcohol Regulatory and Licensing Authority (ARLA), in December, following incidents in February 2014, had to be withdrawn, but an application for the suspension or cancellation of the Thirsty Whale On licence went ahead.

THE HEARING

6. Mr Dickerson's brief of evidence related principally to the contradiction of the Police and Inspectors evidence. He questioned the Police interpretation of the Graduated Response Model (GRM), their assessment of intoxicated patrons, and the conclusions they reached in relation to records kept in respect of managers pursuant to s.231 of the Act. He further refuted the Inspectors allegation of the sale of alcohol at a charity auction held at the Thirsty Whale, the failure of the Inspector to respond to a letter from his lawyer regarding a warning issued to him, and matters relating to the appointment of Temporary and Acting Managers.
7. Mr Sheehan, the Napier Licensing Inspector, confirmed his opposition to the application. He stated that the suitability of Mr. Dickerson was questionable following his failure on two previous occasions to renew his Manager's Certificate. The first certificate, issued by the Napier District Licensing Agency in 2010 was not renewed. The second also issued by the Napier D.L.A. in November 2011, whilst renewed one year later, was allowed to lapse in November 2014. No reasonable explanation was given by Mr Dickerson, other than in August 2011 he was considering a change of occupation, and in November 2014 had mistaken the date of expiry. He refuted that the failure to make an application renewal in November was to avoid the ARLA hearing in December for the application to suspend his Manager's Certificate.
8. Mr Sheehan referred to his report in 2011 on the renewal of Mr Dickerson's certificate in respect of his suitability regarding his experience in controlling licensed premises, and whilst the wrong report had been submitted in evidence, Mr Dickerson accepted the contents which stated:

"For much of the twelve month probationary period since the certificate was most recently issued, the applicant held the position of venue manager at the Thirsty Whale. During that time, the manner in which those premises were being operated frequently came to the attention of the Police and Inspector.

It is no coincidence that during the same period, the Thirsty Whale was over represented in Police Alco-link data. As a result of that over representation, the premises held the highest individual risk rating of any licensed premises within Napier and subsequently held the designation of "problematic" on the Police GRM"

He stated that recent GRM reports had continued to trend too often in the problematic range.
9. In February 2014 Mr Sheehan reported that a fundraising bottle auction was held in the Harpoon Room of the Thirsty Whale, where 30% or more of the auction items were alcohol, most of which was taken from the premises. He confirmed it was not conducted under the authority of an Auctioneer Off licence or a Special Licence, which therefore constituted a sale by unlicensed persons, and that Mr Dickerson was Duty Manager that evening. Mr Dickerson confirmed he was Duty Manager that night but contended that the function in the Harpoon Room was booked by another manager, Amy Miles, in whom he

had a lot of trust, and that he was not aware of the nature of the event, nor that alcohol was being auctioned, as all arrangements had been made by Ms Belinda Currie, a competent promoter and regular user of the Harpoon Room for events.

10. Following consultation with the Police after the event, Mr Sheehan was informed that they were satisfied with the issue of a warning to Ms Myles, rather than proceeding further, so he issued a similar warning to Mr Dickerson. Mr Dickerson took umbrage of this warning, as he considered he was not a party to the unauthorized sales that night, and referred the matter to his lawyer who wrote to the Inspector requesting its withdrawal, a point which was argued in cross examination.
11. Mr Sheehan referred to issues involving the display of duty manager signage, and the authorization of such personnel, following Mr Dickerson's failure to renew his Manager's Certificate. He stated that Mr. Dickerson had appointed himself as Temporary Manager, without informing the authorities as required, and without proper authorization. Dates and times of appointments for this and other Acting Manager records were incomplete and suggested there had been some modification made to the entries during the delay between asking for the register and its production. The inference that he had tried to deceive the Inspector were strongly refuted by Mr Dickerson, as was the day on which the Inspector met him on the premises, although dates appearing out of context were unexplained.
12. Evidence given by Sergeant Raymond Wylie, the Liquor Licensing Harm Prevention Sergeant confirmed his opposition to the issue of a Manager's Certificate. He explained the GRM points allocation, and the methodology of collecting and reporting data. He admitted that the data and results were not foolproof, but provided indications of trends of alcohol abuse. He presented a statistical data sheet covering the Thirsty Whale and four other unnamed On licence premises in the same vicinity, for the previous four year period. The Thirsty Whale was constantly, and by far, shown as the most problematic premises in the area.
13. Mr Dickerson challenged the reliability of this data, and argued that the Thirsty Whale was the most patronised of the premises shown on the data sheet, and with up to 40,000 customers over the summer months, had only recorded 3 arrests attributed to clientele from his premises. He also observed that the GRM had shown immediate and considerable improvement, once issues were drawn to his attention. The Police suggested that whilst this was correct, it occurred either after receiving a warning and assistance from them, or on occasions leading up to licence renewal times. The remainder of the times could indicate a distinct lack of vigilance and management responsibility.
14. Sgt Wylie referred to an incident in February 2014 where he and his colleague noted intoxicated patrons at the bar of the Thirsty Whale. Mr Dickerson as Duty Manager at that time was advised of their assessments yet refuted that the patrons were showing signs of intoxication. Sgt Wylie referred to the obligations of a duty manager outlined in s.214 of the Act. He confirmed that he had filed an application for the suspension of Mr Dickerson's Manager's Certificate on the grounds of failing to comply with s248. Sale or supply of alcohol to intoxicated people, s.249 Allowing people to become intoxicated and s.252 Allowing intoxication on licensed premises. These offences also formed the basis of his application for the suspension or cancellation of the On licence for the premises.

15. The managerial appointments and failure of their notification raised by the Licensing Inspector were confirmed by Sgt Wylie, who was of the opinion that Mr Dickerson was aware that such notification would have been opposed by the Police. Mr Dickerson stated that apart from the mistake of his nomination as Temporary Manager, the appointments of himself as Acting Manager for the separate 48 hour periods ,did not require notification as provided in s.231(3):

“It is not necessary to comply with subsection (1) in respect of the appointment of a temporary manager or an acting manager for any period not exceeding 48 consecutive hours.”

Mr Dickerson further stated that his ability as a capable restaurant manager had not been denied by the Licensing Inspector and whilst concurring with this, Sgt Wylie also supported the Inspectors view that a restaurant manager and a duty manager have very distinct and separate roles.

DECISION AND REASONS

16. We must have regard to the matters set out in s.222 of the act when considering any application for a Manager’s Certificate. These are as follows:

- (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.*

17. Initial concerns rest with Mr Dickerson’s failure to apply for renewal of his Manager’s Certificate on two occasions, the latter occasion when he was the General Manager responsible for the recording of information in the register for all managers. In *Budo Promotions Limited LLA PH 453/2004* the Authority stated:

“Allowing his certificate to expire on two occasions was a matter of carelessness by Mr Littlewood. At page 121 of its report on the Sale of Liquor in New Zealand, the Working Party (otherwise known as the Laking Committee) said: *“It is the Working Party’s view that if a licence has mistakenly been allowed to expire, that lapse raises doubts as the suitability of the licensee”* We accept that view.”

That the certificate expired a few weeks from an ARLA hearing in respect of the application by the Police for the suspension of the certificate raises doubt as to the applicant merely “mistaking” the date of expiry

18. We accept that the GRM indicator is of value as a rough indicator of activities and can be abused by respondents to information requested by the Police. However, some accuracy must be placed on the data, and its value as a tool towards assessment of premises management, which Mr Dickerson challenged, as he himself used the results to point out that following his implementation of the advice given by the Police and Inspector, the GRM showed a marked reduction from the problematic category. It could therefore be adduced that as the premises has carried a high level GRM rating over the past four years, the responsible management of those premises is brought into doubt.

19. The charity auction involving the sale of alcohol in the Harpoon Room, was not carried out under the authority of any license held by the Thirsty Whale. Whilst we accept that Mr Dickerson was not aware of the nature of the fund raising event, as he was not party to the arrangements, we would expect any duty manager to have enquired into the activity, notwithstanding his trust in the promoter, and should have at least ventured into the Harpoon Room as part of his managerial responsibilities. The Act at s.214 (2) states:

A manager on duty on any licensed premises is responsible for-

(a) the compliance with and enforcement of-

(i) the provisions of this Act: and

(ii) the conditions of the licence in force for the premises: and

(b) the conduct of the premises with the aim of contributing to the reduction of alcohol related harm

We find it an error of judgment that all information of the event was not sought; he was the duty manager in respect of s214. Alcohol was sold in breach of the Act, the premises was used as an Off licence in breach of its conditions, we are therefore unsympathetic in regards to the letter from Mr Dickerson's lawyer in relation to the points raised.

20. Sufficient evidence has been provided to confirm that, following Mr Dickerson's failure to apply for the renewal of his Manager's Certificate, he mistakenly represented himself as Temporary Manager without notifying the Police or Licensing Committee, and once advised, followed this by contriving to allow the licensee to appoint himself Acting Manager for 48 hour periods there-by avoiding notification to the authorities. The Act at s230 (1) states inter alia:

Despite any other provision of this Act, a licensee may appoint an acting manager-

(a) for any period not exceeding 3 weeks at any time where a manager is unable to act because of illness or absence: and.....

The appointment as Acting Manager over two consecutive week-ends to replace a manager who presented a doctors certificate following dentistry problems, ponders the question, why not be appointed for the length of her incapacity covering the whole time? No reason was forthcoming from Mr Dickerson.

- 21 These above matters alone poorly reflect on the applicant's ability to manage licensed premises as required by the Act. We now turn to the recent hearing *Thirsty Whale Bar and Restaurant Limited [2014] NZARLA PH953-955*. This hearing was to determine an application to suspend or cancel the On license among other applications. The basis of the application related to breaches of the Act:

S248(1) The licensee or a manager of any licensed premises who sells or supplies alcohol to an intoxicated person commits an offence.

S249(1) The licensee or a manager of any licensed premises who allows any person to become intoxicated on the premises commits an offence.

S252(1) The licensee or manager of any licensed premises who allows an intoxicated person to be or remain on the licensed premises commits an offence.

22. Mr Dickerson was the Duty Manager when these offences were alleged to have been committed, and the Authority concluded;
"The Authority is satisfied on the evidence (which reaches the *Trevini Puri Limited v Commissioner of Police [2013] NZRA 88* standard) that in respect of O'Connor ss248, 249 and 252 of the Act were breached"
and further stated;

“Aggravating features are:

- **That at the time the sale took place Mr. Dickerson (the duty manager) was at the front desk and did not observe what was happening in the bar. This could indicate a systemic problem if s214 of the Act is to be complied with.”**

23. Of great concern in relation to Mr Dickerson’s suitability to be a manager is the reference in the decision that, independent assessments of two patrons at the Thirsty Whale, by two experienced police officers, concluded that both patrons were intoxicated in accordance with the definition in the Act, yet according to Mr Dickerson neither patrons showed any signs of intoxication.

25. We quote an extract from the well referenced *Deejay Enterprises Limited NZLLA 531-532/97*

“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 holders of General Manager’s Certificates who control and manage licensed premises.”

26. We are satisfied that Mr Dickerson has failed to meet his obligations as a manager in the past, and is not a suitable person to hold a Managers Certificate. The application is declined.

DATED at NAPIER this 9th day of March 2015



Dave Fellows
Chairman
Napier District Licensing Committee