

IN THE MATTER

of the Sale and Supply of
Alcohol Act 2012

AND

IN THE MATTER

of an application by **NICHOLAS
ALAN BARRETT** pursuant to S.222
of the Act for a Manager's Certificate

BEFORE THE QUEENSTOWN LAKES DISTRICT LICENSING COMMITTEE

Chairman: Mr L A Cocks
Members: Mr E W Ulwin
Mr J M Mann

HEARING at QUEENSTOWN 7th June 2018

APPEARANCES

Mr N A Barrett - applicant
Ms S L D Dineen – Licensing Inspector – to assist
Sergeant I Collins – Queenstown Police – in opposition

RESERVED DECISION OF THE COMMITTEE

Introduction.

[1] Before the committee is an application by Nicholas Alan Barrett for a manager's certificate. Mr Barrett is 27 years of age from Palmerston North, New Zealand. He has passed the Licence Controller Qualification and successfully completed the QLDC oral test requirement on the second attempt. Mr Barrett is currently employed at the premises 'Flame Bar and Grill', and has been at these premises on a full time basis since June 2016. He started as a front of house waiter and worked his way up to his current position of restaurant supervisor.

The Application.

[2] The application was received by the Agency on the 7th March 2018. In the application Mr Barrett failed to disclose his criminal convictions. The application was opposed by the Police based on suitability because of the convictions recorded against Mr Barrett between 2009 and 2017 as follows:

<u>Offence date</u>	<u>Charge</u>	<u>Penalty</u>
02/07/2009	Operating a vehicle carelessly Excess Blood Alcohol Unlicensed driver	Fine, Disqualification from driving & court cost
19/07/2016	Possession of cannabis	Pre-charge warning
19/05/2017	Excess Blood Alcohol	Fine & Court costs Disqualification

[3] When giving evidence Mr Barrett told us he has been working in the hospitality industry for roughly eight years as a musician, bartender and waiter. In Auckland he worked within the 'Nourish Group' but said he 'fell out of love with Auckland' and moved to Queenstown in 2016 for a fresh start. Mr Barrett believes he has done very well progressing up the ranks at the Flame Bar and Grill to his current role as restaurant supervisor but now sees the need to have a the Managers Certificate to progress further.

[4] Mr Barrett acknowledged he had made some stupid mistakes which resulted in the convictions and the most recent mistake was dishonestly filling out this application for a Managers Certificate by indicating he had no convictions. His explanation for not disclosing his convictions was he had a moment of panic, leading to an extremely poor decision. In response to questions from the Inspector, Mr Barrett said he was aware he was not being honest but thought only more severe crimes needed to be disclosed. He also told us he suffers from anxiety which may have affected his behaviour but is now receiving treatment to address this problem.

[5] Mr Barrett was supported at the hearing by the owners and General Manager of the Flame Bar & Grill. The owners, Mr Jonathan Bisley and his wife Ms Lou McDowell told us the applicant is one of their most treasured/valuable employees. They consider Mr Barrett to be very professional, responsible and great with the customers, making him a massive asset to their business. Mr Hogan, the General Manager also expressed strong support for Mr Barrett and advised us he had been using him as a Temporary Manager.

[6] The reference provided by Mr Scott Ruddock, who previously employed Mr Barrett at The Crab Shack in Auckland, states that Mr Barrett '...was more than capable of overseeing a safe and responsible drinking environment. He was called upon to be an acting manager from time to time and was whole heartedly trusted to run a safe and efficient shift.'

[7] When questioned, neither Mr Barrett nor any of his supporters were aware that a two year stand down period after a drink driving offence has become the accepted practice through previous decisions and has been given the seal of approval by the Alcohol Regulatory and Licensing Authority.

The Police Opposition.

[8] The Police opposed the application on the grounds of the applicant's suitability as well as the convictions. Sgt Collins submitted that although his first convictions are dated July 2009, he had a recent driving with excess breath alcohol conviction on the 19th May 2017 and Police seek a two year stand down from the date of the most recent conviction as is consistent for applicants with a first single conviction.

The Licensing Inspector.

[9] The Inspector considered Mr Barratt's suitability to hold a Managers Certificate as directed by s.222 of the Act is in question due to:

- a. his previous criminal convictions;
- b. his failure to declare convictions on his application form; and
- c. the Police opposition.

The Committee's Decision and Reasons.

[10] When considering an application for a manager's certificate we are required to consider the matters set out in s 222 of the Act 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 had undertaken and evidence that the applicant holds the prescribed qualification required under section 218; and***
- (e) ***any matters dealt with in any report under section 220.***

[11] In this application the relevant considerations are suitability, and convictions and both matters were highlighted by the Police and the Inspector in their evidence and submissions. Because the applicant and his supporters seemed to be unaware of the legal and statutory principles governing the standards of conduct expected from the holders of manager's certificates, we set them out below.

[12] S. 214(2) explains the responsibilities entrusted to a duty manager. He or she 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.***

[13] In contrast, while a licensee must be suitable, he, she or it does not have to be present when alcohol is being sold or supplied. In practice a licensee may be an absentee owner, provided of course there are competent and capable managers who not only ensure that the business is being run in accordance with the Act and the conditions of the licence, but that it is run in such a way as to contribute to the reduction of alcohol related harm. A duty manager has to be competent, trustworthy and responsible. Parliament had high expectations about the ability of duty managers when it passed the legislation.

[14] Although *Deejay Enterprises Limited* LLA 531 – 532/97 was decided well before the current Act came into force the comments made by the Liquor Licensing Authority are still relevant to-day. As the the issue is about the integrity and honesty of a manager:

"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 holders of General Manager's Certificates who control and manage licensed premises."

[15] The hospitality industry is one of the few workplaces where the "off duty" conduct of managers is on the same footing as their "on duty" conduct. In *Henry v Strange* LLA 1632/96, the Liquor Licensing Authority stated:

"A serious question raised by this application is how off-duty conduct involving the consumption of alcohol should be weighed when considering the suitability of an individual to continue to hold a General Manager's Certificate.

In many occupations off-duty conduct is commonly ignored. An exception may arise when the conduct impacts upon work performance. Few trades or professions have a direct legislative link which requires that conduct - including out of hours activities, be considered under the quasi-disciplinary procedure of s.135 of the Act. Nevertheless, that burden is imposed by Parliament on licensees (under s.132) and managers under the Sale of Liquor Act 1989. Their conduct and suitability may be examined at any time if an application is brought before this Authority."

[16] Other cases have talked about the drive to raise the standards of managers. Current expectations are that the management of licensed premises should be conducted by persons of integrity who are committed to supervising the sale and supply of liquor, and concerned to give meaning to the term, 'host responsibility'. For example in *Warren Richard Stewart LLA PH 880-881/2005* (a case that has close relevance to the present facts) the Liquor Licensing Authority stated:

"We believe that raising the bar for the holders of General Managers Certificates and keeping it 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."

[17] In the well known case of *Graham Leslie Osborne LLA 2388/95* the Liquor Licensing Authority set out guidelines suggesting the ways in which applicants with previous convictions should be dealt with. For example a stand-down incident-free period of two years was suggested for an isolated excess breath/blood alcohol conviction. Five years was suggested for serious offending or convictions relating to or involving the abuse of alcohol. Licensing Committees should deal with applicants. Such guidelines were given the seal of approval by the Alcohol Regulatory and Licensing Authority in its decision of *NZ LNQ Limited [2014] NZARLA PH 229*:

"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-driving conviction. Where there are two drink-drive convictions, the period is usually extended to five years."

[18] While it is true that the applicant only has one conviction there are two other examples of unsuitability. One was his Police pre-charge warning for possession of cannabis in July 2016, and the other, his dishonesty by failing to disclose his conviction. In such a scenario as this, we would suggest a stand-down incident-free period of three years. That is the period of time in which an applicant has the opportunity of establishing that he or she has learned lessons of value from previous bad decisions, and that he or she had made efforts to turn things around. An incident-free period provides the necessary corroboration.

[19] Of course the applicant in this case is able to point to the major support that he has been able to attract as well as his impeccable record within the industry. Not that many people are fortunate enough to find the type of caring employers that Mr Barratt has been able to do. There is no question that the impact on us of the evidence from Mr Bisley, Mr Hogan and Ms McDowell was considerable. It seems to be the case that Mr Barratt has an excellent future in the industry. We have been persuaded to reduce the stand-down period

accordingly. But given the factual situation outlined above, his application for a manager's certificate will become a process rather than an event.

[20] For the reasons we have attempted to set out the application will be adjourned for twelve months. Mr Barratt can be appointed as a temporary manager. At the end of that period of time, we request further reports from the Police and Inspector. If those reports are favourable then we propose to grant the application 'on the papers' without further hearing. If the reports are unfavourable then a further hearing is likely.

DATED at Queenstown this 18th day of June 2018.



L A Cocks
Chairperson