

Decision No:	45/CERT/947/2022
IN THE MATTER OF	the Sale and Supply of Alcohol Act 2012
AND	
IN THE MATTER OF	An application by Eli James TeAriki Jopson-Caldwell under section 219 of the Act for the grant of a Manager's Certificate

BEFORE THE KAPITI COEAST DISTRICT LICENCING COMMITTEE

Chair: Rob McCann

Members: Phillip Parkinson
Susie Mills

HEARING at PARAPARAUMU on 10 November 2021

APPEARANCES

Eli Caldwell - Applicant
Duane Watt- Employer

Reporting Agencies

Sergeant Lance Morretto (Alcohol Harm Prevention Office - Police)
Ms Antoinette Bliss (Licensing Inspector)

RESERVED DECISION OF THE COMMITTEE

Introduction

1. The applicant Eli James TeAriki Jopson-Caldwell has applied under section 219 of the Sale and Supply of Alcohol Act 2012 for the grant of a manager's certificate.
2. The applicant intends to utilise the certificate on the premises known as The Telegraph Hotel (The Tele), located at 284 Rangiora Road, Otaki which holds both an On and Off licence.
3. The applicant has the support of his employer Duane Watt who is the manager of the Telegraph Hotel.
4. Written references have been supplied by Duane Watt (The Tele), and Motu Esson (Fun Zone).
5. The applicant has noted on the Manager's Certificate Application form a criminal conviction on the 27 May 2021 for Drink Driving with a six-month licence suspension and \$450 fine.
6. Both the Police and Licencing Inspector oppose the application.
7. A hearing took place on the 10 November 2021 with all appearing sworn in.
8. Following the hearing, the applicant withdrew their application for a manager's certificate. The applicant also resigned his employment with the Telegraph Hotel.

Applicants Evidence

Duane Watt, Manager of The Tele

9. The applicant had previously worked at an after-school kids care as a manager and began working at The Tele in May 2021.
10. The applicant's attitude and application was described as good and he was encouraged to obtain a manager's certificate. This was in part to increase the applicants' work hours, which required him to undertake some shifts on his own.
11. While the applicant was undertaking the LCQ course, staff were onsite, but since the drink driving incident staff have been instructed the applicant can not use the acting manager's certificate.
12. Mr Watt is concerned that he will have to let the applicant go and that a personal grievance could eventuate.
13. Mr Watt referred to *Wylie Davies NZARLA 322*, stating that in the case a duty manager with five convictions was given a conditional licence. This was supplied during the hearing.

Cross Examination of Mr Duane Watt

14. Mr Watt agreed with Sergeant Lance Morretto that the agreement to train as a duty manager was in the applicant's employment contract.
15. Mr Watt noted that he was not informed by the applicant about the Drink Driving offence, rather, this information was provided by the Police.
16. Mr Watt was questioned as to how long employees needed to work in the sector before beginning the process to gain their Managers Certificate. Mr Watt noted that he felt six months was enough time and that he usually gives them a few weeks of work before booking employees in for the LCQ course and it usually takes six months for the council to interview a candidate.
17. Mr Watt believed the applicant only realised the decision to drink and then drive was serious after he began the LCQ course on the Monday after the Friday incident.
18. Mr Watt described his business for the committee so they could understand the complexities of the operation. The Tele is a seven day a week operation which includes pokies and a TAB with an older crowd in the daytime and midweek and a younger crowd in the evenings. The Tele provides a courtesy van. Mr Watt noted the public often come from other pubs to The Tele because of the van, and this means these are more people that are offered this service, hence more people that might be considered intoxicated, but that it had been three to four years since they had had to call the Police. The Tele also has an off-licence.
19. Mr Watt explained that the applicant was being exposed to all these activities in a controlled fashion.

Eli Jopson-Caldwell

20. The applicant noted the experience he was gaining at The Tele.

21. The applicant assumed that when he filled in the application form and disclosed the Drink Driving offence, that this would be viewed and read by Mr Watt.
22. The applicant described the night in question that led to the drink driving offence.

“That night I finished early and didn’t have work at The Tele that night, so me and some of my mates from my programme we ended up going to the pub and we were drinking jugs and we lost track of how many jugs. And when I decided to get in the car and drive, I felt fine. I know it was a bad decision and we are on the light beers now or none if we are driving. But I felt fine, I was driving fine, and I know it says I was called ahead because I was recklessly driving but that was because when I was coming out of Waikanae there’s this part where all these animals cross the road like rabbits and pukeko sprint across so I thought I’d go wide to avoid them when I see them on the edge and then I went too wide and over-corrected a touch. And then I got pulled up when I was coming home to Otaki.”

Cross Examination of Eli Jopson-Caldwell

23. The applicant was asked whether having worked at The Tele, he should have understood that having a few jugs would put him over the legal limit.
24. The applicant noted he and his friends were sharing the jugs and he didn’t notice he had drunk so much. That when he said he ‘felt fine’ he didn’t think he was drunk.
25. The applicant under cross examination noted that he had not thought about the financial implications of having a crash and damaging either his or someone else’s vehicle. He noted he was celebrating, but not trying to ‘get plastered and hammered, and I thought I was still in that ballpark of safe’.
26. The applicant did not believe he had drunk and driven to that extent, prior to the drink driving offence.
27. The applicant confirmed that when he filled in the manager’s application form and disclosed the drink driving offence, he had put the form in Mr Watt’s office, and it was sent from there. He also explained that he was ashamed and embarrassed and that he should have directly informed Mr Watt.
28. The applicant noted that he initially withdrew the application when he realised it would cost his manager money and there was no chance of winning it. When Mr Watt said he was willing to fight, he changed his mind and proceeded with the application.
29. When questioned as to whether the Salt and Wood staff could have done anything different, he noted he and his mates were behaving in a subtle manner, and it would not have been obvious.
30. The applicant was questioned about whether he would be able to make judgement calls as a duty manager in often stressful situations. The applicant noted he can easily tell people they can’t leave yet and to wait for Mr Watt to drive them home, or tell them to leave, because he understands “it’s not just my behind on the line.” He noted that whenever there was an incident that was, ‘out of his hands of too much for me’, he immediately contacted Mr Watt or the other duty manager.

Reporting Agencies

Evidence of the Police Inspector Sergeant Lance Morretto

31. Sergeant Lance Morretto read his statement which is summarised here.
32. Police are not satisfied that this applicant meets the requirements for such a certificate to be issued and the grounds for opposing this application are:
33. The applicant has a conviction on 30 June 2021 - Breath Alcohol Level Over 400 Mcgs/Litre Of Breath (the evidential breath provided a result of 547 micrograms of alcohol per litre of breath).
34. The applicant also was fined by way of infringement notice on 14 February 2018 - W657 - Possessed alcohol in an alcohol banned area.
35. The Authority has reiterated in *N R DA VIES LLA Decision 1240/98*, that in considering applications, the applicant's character and reputation is of crucial importance. Both on and off duty conduct is to be weighed.
36. In *DJ Enterprises Limited LLA 531 - 532/97* it was said:

"The guiding hand or hands on operator of any company or the potential holder of General Manager's Certificates 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 take 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 licensee's and holders of General Manager's Certificates to control and manage licensed premises".

37. Police are also mindful of the leading decision in *G L Osborne NZLLA 2388/95*.

"If an applicant for a General Manager's Certificate has an isolated conviction, then the Authority will normally grant an application for a General Manager's Certificate after approximately two years. However, if there has been persistent offending, particularly involving the abuse of alcohol, the Authority requires a period of at least five years to elapse from the date of offending before it will consider favourably an application for a General Manager's Certificate".

38. In the *Johns LLA decision 974/98* the Authority stated "We take a very serious view of any failure to report correctly a complete list of convictions. Police believe that appropriate stand down period of two years is required before this applicant can be considered suitable for a manager's certificate.

Cross Examination of Police Inspector Sergeant Lance Morretto

39. Sergeant Lance Morretto when questioned about *Wylie vs Davies* (a case cited by Mr Watt), outlined that it wasn't uncommon for people with some convictions that aren't alcohol related to obtain their manager's certificates, and this depended on the seriousness of the offending and whether alcohol was involved.

Evidence of Licensing Inspector, Ms Antoinette Bliss

40. Antoinette Bliss read her statement.

41. The matters which a licensing committee must consider in regard to an application for a Manager's Certificate are contained in section 222 of the Act:

(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

42. Pursuant to section 218 of the Act and sections 23(2) and (4) of the Sale and Supply of Alcohol Regulations 2013 (the Regulations), the applicant has provided evidence of holding the prescribed qualification (the Licence Controller Qualification). This qualification was issued on 8 June 2021 and incorporates the required unit standards 4646 and 16705.

43. Aside from the formal qualification, the applicant advises that all other training related to the sale and supply of alcohol has been undertaken on the job.

44. The applicant has provided a written reference from Duane Watt, owner of The Telegraph Hotel, detailing his experience in the sale and supply of alcohol to the public.

45. The applicant is currently employed as a bar person at The Telegraph Hotel and has worked in this capacity since May 2021.

46. On 19 August 2021 I discussed with the applicant and his employer my concerns in relation to his recent conviction and his limited experience working in medium risk premises, advising more experience was required.

47. Pursuant to section 220(3) of the Act, The Horowhenua Alcohol Harm Prevention Unit, New Zealand Police have inquired into, and have opposed, the application on the grounds of suitability.

48. The applicant declared the conviction for driving with excess breath alcohol on the application form.

Suitability:

49. The applicant is over the age of 20 years, in accordance with section 216 (1) of the Act.

50. The applicant has provided a character reference from Motu Esson, the Operations Manager of Fun Zone Out of School Care, who has known the applicant since he was 16 years old.
51. The applicant was interviewed on 14 October 2021, and he was able to demonstrate good knowledge on the principles of host responsibility, and the requirements of a duty manager in respect of the Act.
52. As noted in the commentary to the Act at section 105.04, there is no statutory definition of "suitability". The former Authority referred to the Concise Oxford Dictionary definition of "well fitted for the purpose, appropriate" and stated in *Re Jays LLA 994/94, 15 July 1994*, that:

Differing aspects of suitability will be given different weight by decision makers (sic) under the Act. Among them are experience in the hospitality industry, management ability and personal integrity.

53. The Authority has reiterated in *N R Davies LLA Decision 1240/98*:

"In considering such applications, the applicant's character and reputation of the applicant is of crucial importance. As we have commented in other applications, both on and off duty conduct is to be weighed".

54. In *Deejay Enterprises Limited LLA 531 - 532/97* it was said:

"The guiding hand or hands on operator of any company or the potential holder of General Manager's Certificates 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 take 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 licensee's and holders of General Manager's Certificates to control and manage licensed premises".

Convictions:

55. As noted in the commentary to the Act at section 227.03, in December 2018 the Authority reviewed its approach to suitability, convictions and stand-down periods, which dates from *Re Osborne LLA PH2388/95, 13 October 1995*.

"If an applicant for a General Manager's Certificate has an isolated conviction, then the Authority will normally grant an application for a General Manager's Certificate after approximately two years.

56. In *Wylie v Davis [2018] NZARLA 322*, Judge Kelly stated:

[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.

[61] The Authority remains of the view that Osborne should not be departed from lightly and a DL C ought to justify ff self when doing so.

[65] The weight to be applied to each of the criteria in s 222 is a matter for the DLC. While the DLC must actively and thoughtfully consider the respondent's suitability and convictions (per s 222(a) and (b)), there is nothing in this appeal that shows that the DLC did not correctly understand the matters to which it was required to consider. It has justified its departure from Osborne.

57. Given the applicant's lack of experience and nature of conviction, and the opposition from NZ Police, the Inspector opposed the application and recommended that the District Licensing Committee determine the application by way of a public hearing.

Cross Examination of Licensing Inspector, Ms Antoinette Bliss

58. The Inspector noted that six months experience would be necessary before applying for a manager's certificate, and that factoring in how long it takes to get through the process should not form part of that six months.
59. The Inspector disputed the process took six months, suggesting it took about a month.
60. The Inspector noted the drink driving conviction does affect the applicant's suitability, and that there has to be a 'high bar' set regarding responsibility.
61. The Inspector did not think the applicant was being pressured to proceed (by Mr Watt) despite the conviction, rather she believed they wished to proceed to a hearing to determine the application.
62. The Inspector noted that regardless of the drink driving issue, she would have asked Mr Watt to give the applicant further training, so that he had had six month's experience before progressing the application.

Closing Submissions

63. Police Inspector Morretto clarified that with regard to the six-month experience issue, Police do not think it is appropriate to apply prior to that time period. That if an application can in at 4½ months, Police would look at the type of environment and in this kind of environment oppose the application.
64. Inspector Moretto noted he had a good conversation with the applicant and that he was a pleasant young man. He noted when the issue of the drink driving came up, and this was discussed, the applicant informed him that he was going to withdraw.
65. Inspector Moretto noted that the applicant had obviously changed his mind later and that while he was entitled to do that, there was some concern there might be some indirect pressure to keep the applicant in the picture, noting the pressure on Mr Watt's business, the number of duty managers and a recent injury to one of those managers.
66. Inspector Moretto referred back to case law: NR Davies, DJ Enterprises Ltd decision, and GL Osborne decisions and submitted that the applicant is unsuitable to hold a manager's certificate because of the very recent conviction directly relating to the abuse of alcohol and occurring less than 3 months before submitting this application.
67. Police hold concerns that this is aggravated by the fact that the applicant also has a previous alcohol-related offence, albeit it a minor one of possessing alcohol in a banned area.
68. Furthermore, at the time of driving with excess breath alcohol on May 27 this year, the applicant would have been working at the licensed premises he is currently employed at for approximately 2 weeks.
69. Police further submit the applicant falls well short regarding industry experience to manage a licensed premises, having only 5 months at the time of this hearing.
70. Therefore, police submit that the applicant fails to meet much of s.222 criteria for the Sale and Supply of Alcohol Act 2012 because of a lack of experience, suitability, and a recent conviction.
71. Police submit a minimum 2 year stand down for the applicant in this circumstance is appropriate.
72. The Licensing Inspector submitted that case law and the Act tell us that on and off duty conduct must be taken into consideration and agreed with the Police submission that a 2 year stand down period was required.

Committee's Decision

73. When considering a Manager's Certificate, the matters the committee must consider are contained in section 222 of the Act:

222 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*

- d) *had in controlling any premises for which a licence was in force:*
- e) *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:*
- f) *any matters dealt with in any report made under section 220.*

74. As noted in the commentary to the Act at section 105.04, there is no statutory definition of "suitability". The former Authority referred to the Concise Oxford Dictionary definition of "well fitted for the purpose, appropriate" and stated in *Re Jays LLA 994/94*, 15 July 1994, that:

Differing aspects of suitability will be given different weight by decision makers (sic) under the Act. Among them are experience in the hospitality industry, management ability and personal integrity.

75. The Authority has considered the issue in *Re A Karambayev Ltd (2013) NZARLA 1214* and held at [17] that: "... the meaning of 'suitability' has not changed as a result of the enactment of the Sale and Supply of Alcohol Act 2012."

76. Under the previous legislation, the High Court has stated in *Re Sheard [1996] 1 NZLR 751* at 758

The real test is whether the character of the applicant has been shown to be such that he is not likely to carry out properly the responsibilities that are to go with the holding of a license.

77. The Liquor Licensing Authority has noted in *Deejay Enterprises Limited (LLA Decisions 531/97-532/97)*:

Each application is dealt with on a case by case basis. In determining suitability we assess the likelihood of a potential licensee or manager upholding the law in light of the evidence provided.

And

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. The character and reputation are closely examined. The law and human desire of the 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.

78. In *Two Brothers Wholesale Ltd v Medical Officer of Health, Waikato District Health Board (2021) NZARLA 32* the Authority confirmed a DLC decision to decline a licence. In that case the Authority stated that suitability is not to be considered in a vacuum and should not be construed narrowly.

It is not correct that suitability must only be considered in the context of the operation of licensed premises as regards the safe and responsible sale and supply and consumption of alcohol. As is clear from Nishchay :S- an assessment of suitability is much wider and includes considerations of the character and reputation of the applicant and its honesty as well as considerations of the operation of premises...

[104] In addition, as stated by Gendall J in Vaudrey, there will be cases where the matters to which the decision-maker is required to have regard are so fundamental or critical that they assume an elevated mantle. This confirms that not all the matters that go to an assessment of suitability need to carry the same weight for a decision-maker. Nor do all of the criteria in s 131 need to carry the same weight for a decision-maker.

79. The applicant Eli Caldwell is new to the industry and has had relatively little work experience from which we could judge suitability. The applicant in his own evidence stated that whenever there has been an issue that he feels is out of his hands or too much for him, he immediately contacted Mr Watt or the other manager (who is on the premises most of the time).
80. It is the view of the committee that a Duty Manager must be able to make such decisions independently, and this evidence further reflects the inexperience of the applicant, though conversely, it indicates a willingness to learn from those with more experience.
81. The decision making related to the drink driving offence must also be taken into consideration, and this does not reflect the appropriate self-imposed standards referenced in *Deejay Enterprises Limited*. Rather, it demonstrates poor decision making at the very start of a career in the hospitality industry.
82. Turning our attention towards the applicant's experience, the evidence before the Committee suggested that the Tele potentially fast-tracks employees before they have the requisite experience to undertake the role required of a manager. The evidence from Police indicates there are pressures on The Tele's business that might be influencing such applications.
83. It was noted by the Committee, that this fast-tracked process, as outlined in the hearing, would be opposed by both the Police and the Licencing Inspector who both indicated a minimum of five months experience was required.
84. Accordingly, based on the evidence, the Committee finds that the applicant does not have the necessary experience to be granted a Manager's Certificate.
85. Turning to the convictions recorded against the applicant. As noted in the commentary to the Act at section 227.03, in December 2018 the Authority reviewed its approach to suitability, convictions and stand-down periods, which dates from Osborne LLA PH2388/95, 13 October 1995. In *Wylie v Davis [2018] NZARLA 322*, Judge Kelly stated:

[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.

[61] The Authority remains of the view that Osborne should not be departed from lightly and a DLC ought to justify itself when doing so.

[65] The weight to be applied to each of the criteria in s 222 is a matter for the DLC. While the DLC must actively and thoughtfully consider the respondent's suitability and convictions (per s 222(a) and (b)), there is nothing in this appeal that shows that the DLC did not correctly understand the matters to which it was required to consider. It has justified its departure from Osborne.

86. In *Osborne LLA 2388/95 (13/10/1995)* the Liquor Licensing Authority said in respect of a manager's certificate, there should be an appropriate stand-down period in respect of serious convictions:

"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.

87. Both agencies, based on the relevant case law, and the facts, believe an appropriate standdown period of two years is required before the applicant can be considered suitable for a Manager's Certificate. The Committee agrees with this recommendation.
88. In the applicants verbal evidence, Mr Watt submitted that *Wylie v Davis [2018] NZARLA 322 (19 December 2018)* pointed to a duty manager that had five convictions and still received a Manager's Certificate. Mr Watt provided a copy of the case.
89. Having reviewed *Wylie v Davis*, we note the court said;

While the Police do not think the DLC has imposed a long enough stand-down period, the DLC has clearly considered an appropriate period and has constrained the exercise of the manager's certificate during its initial probationary year. In doing so the DLC has sought to ensure that the applicant is able to establish an incident free period, thereby ensuring that standards are upheld. If this can be done, the ultimate aim of achieving the object of the Act will be met. The Authority sees no basis for interfering with the decision of the DLC.

90. The committee note that the applicant in that *Wylie v Davis* had significant relevant experience, and the offending was not alcohol related. In making the decision the DLC said

"We consider the conviction for giving a false statement, may well have been made under duress. Considered with her age and situation at the time, and the 10 year time lapse, we give it scant regard.

The breach of community work was alleged by Ms Davis to have been at a time when she was pregnant and was advised to stop work. The penalty of \$600 intimates that the breach was of more than minor nature, however the offence occurred some 4 ½ years ago, which somewhat softens our attitude to the matter.

91. The facts in *Wylie v Davis* are substantially different to the applicant *Eli Caldwell*. In *Wylie v Davis* the offending was significantly different in nature, often had mitigating factors, was historical, and did not involve alcohol.
92. Rather than supporting the proposition that the applicant should be afforded leniency and be granted a Manger's Licence, *Wylie v Davis* supports the decision in *G L Osborne* 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.

Decision

93. Accordingly, the District Licensing Committee, having read the application and the submissions and reports filed by the parties, and having listened to the capable submissions which were made by all parties, and having taken particular notice of the objects of the Act set out in Section 4, and having addressed the criteria for a Manager's Certificate set out in Section 222, declines the application by *Eli Caldwell* for a Manager's Certificate.
94. A stand-down period of two years from the date of the drink driving conviction is required before the applicant can reapply for a Manager's Certificate.

Dated at Paraparaumu on 01 day of June 2022



Commissioner Rob McCann
Chair
Kāpiti Coast District Licensing Committee

