



Decision No. **394/2017**

IN THE MATTER

of the Sale and Supply of Alcohol Act
2012

AND

IN THE MATTER

of an application by **Nickholas Anthony Pole** pursuant to s.219 of the Act for a
Manager's Certificate.

BEFORE THE WHANGAREI DISTRICT LICENSING COMMITTEE

Chairman: Commissioner John Williamson

Members: Paul Dimery, Mervyn Williams

IN ATTENDANCE

Team Leader Environmental Health: Reiner Mussle

Committee Administrator: M/s Deb Martin

Democracy Adviser: Hsi-en Soo

Team Leader Democracy: Nicolene Pestana

HEARING held at Rust Ave, Whangarei District Council Chambers on Friday 29th September 2017

APPEARANCES

Applicant: Nickolas Anthony Pole

Licensing Inspector: Michael Henehan

Alcohol Harm Reduction Officer: Sergeant Howard Clement

- in opposition:

RESERVED DECISION OF THE COMMITTEE

INTRODUCTION

1. On the 16th June 2017, Nickholas Anthony Pole made application to Whangarei District Licencing Committee under sec.219 of the Sale and Supply of Alcohol Act (the Act) for a new Managers Certificate. This application was brought before the Committee for a hearing because the application was opposed by NZ Police on the basis of two drink driving offence convictions committed by the applicant. These offences were committed in April 2011 and January 2014 and on the basis of these the applicant was considered to be an unsuitable person to hold a Managers Certificate.

BACKGROUND TO THE APPLICATION

2. The applicant, Nickholas Pole, has been employed since November 2016 at the Porthouse Bar and Eatery, located at 163 State Highway 15A, Ruakaka. The premises has an on-licence and are owned by the applicant's father, Gerry Pole. The applicant works alongside three certificated managers and the premises employs a total of 14 staff, some of whom are part time. Generally, the applicant views his role as managing the premises on behalf of his father who has health issues and who wishes to take a less hands on role in the premises.

3. The applicant has previous experience in the hospitality industry while working at Matakana House from 2007 until 2012. His role there evolved general duties to bartender. He had also worked with his father at Bream Bay Club as a bartender from May 2015 to May 2016. In 2011 the applicant completed his LCQ qualification and successfully completed the LCQ bridging test in 2017.
4. The applicant identified in his application that he had been convicted of excess breath alcohol as a person under 20 in 2011 and excess blood alcohol in 2014.
5. Upon receiving the application, the District Licencing Inspector, Mike Henehan and the NZ Police Alcohol Harm Reduction Officer Sergeant Howard Clement interviewed the applicant on July 11th 2017. Both interviewers considered that the applicant interviewed well, displaying a good knowledge of the Act and showing maturity and focus on his career.
6. The application was accompanied by two references. One from his father as employer and the other from a known family friend.
7. Following the interview Sergeant Clement indicated that he had no objection to the application for a Manager's Certificate. However, upon being advised of the GL Osbourne, LLA, PH 2388/95 guideline decision which identified the "guideline on period of stand down" following an alcohol related conviction before considering an application for General Manager's Certificate, Sergeant Clement advised that NZ Police now opposed the application.
8. The matter was put before the Committee as an opposed application for hearing and determination.

THE HEARING

9. The hearing was held on 29th September starting at 9.00am.
10. The District Licencing Inspector, Mike Henehan summarised the application identifying the applicants experience, qualifications and convictions. He affirmed that the applicant had shown maturity and focus at interview but was guided in his recommendation by the Osborne decision identifying it as "guidance on the period of stand down".
11. Mr Henehan read the decisions relevant section as: G L Osbourne LLA.PH.2388/95
"Without fettering ourselves in this or other application, it may be helpful if we indicate that we commonly look for a five-year period free of any serious conviction relating to or involving the abuse of alcohol, or arising in the course of an applicant's duty on licenced premises. 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 Licencing Inspector are received. In all situations, we usually regard time as running from the date of conviction, rather than the date of offending".
12. Upon questioning by the Committee, Mr Henehan indicated that he saw no evidence that the applicant abused alcohol and there was no history of offences on licenced premises.

THE APPLICANTS EVIDENCE

13. The applicant, Nick Pole, addressed the Committee, acknowledging his mistake in his younger years and identifying that his father ran the Porthouse premises. He explained that his father had had a stroke and that he wanted the applicant to take over running the premises which required him to have a Manager's Certificate.



14. Upon questioning by the Committee, the applicant explained the circumstances surrounding the two EBA convictions. The first was in 2011 when he was 19. He had taken a taxi home from the hotel. He had slept for seven hours or so, had driven and was breath tested at 251mcgs/litre of breath. The adult limit at the time was 400mgcs/litre. The second offence happened when he drove to a friend's place, had approximately six drinks over a four hour period and was breath tested at a checkpoint. The blood test was 107 against a limit of 80mg/100ml.
15. The applicant affirmed that neither conviction related to where he was working at the time, and that he did not drink while working, and that he considered that he had learned his lesson as a consequence of the convictions.
16. Mr Pole indicated after questioning that his father's premises had four certificated managers, but that his father should not work behind the bar and that gaining his Manager's Certificate was important to having a full complement of certificated managers available to cover all operating hours.

THE OPPOSING EVIDENCE

17. Sergeant Clement read his pre-circulated statement and confirmed that the convictions are regarded as serious relating to an application for a Manager's Certificate. However, that is because there were two convictions which could indicate a pattern. Sergeant Clement confirmed that after interview, he had not opposed the application until he was made aware of the Osborne decision.
18. In response to a question from the Committee about how far over the limit was 251mgsc/l at the time, Sergeant Clement thought that at that level they were unlikely to get a conviction. The limit for under 20 was 250mgsc/l at the time so legally he was over the limit. The adult limit was 400mgcs/l.
19. Sergeant Clement was asked what the stand down period would be for the identified offences if the person involved already had a Manager's Certificate. Sergeant Clement identified that the first conviction would be a negotiated 28-day suspension and a repeat conviction would be referred to ARLA.

THE DELIBERATION PROCESS

20. The Committee acknowledges the Osborne decision as being a guiding decision which gives a basis for considering the circumstances of convictions relating to applicants for Manager's Certificates.
21. The Committee has also been provided with ARLA practice notes pages 282b to 284 dated 1st July 2017 which gives further guidance as to how Osborne might be interpreted since the LLA decision in 1995.
22. It seems to the Committee that Osborne suggests that "isolated excess breath/blood alcohol is considered in the context of less serious conviction" and "which might disclose no pattern of offending" and "in these and similar cases we frequently indicate a minimum of two years from the date of conviction may result in subsequent favourable consideration" are important considerations in the context of this application.
23. A recent ARLA decision *Police v Manson (2015) NZARLA 590*, commented in para 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".



24. It seems to the Committee that it has some discretion to consider the circumstances of the convictions and of the applicant, in coming to its decision. We consider that we can take into account : the age of the applicant at the time of the convictions; the relative seriousness of each conviction; the time elapsed when considering whether or not there is a pattern; an assessment of what has been learned and whether or not there might be exceptional circumstances relating to this applicant.
25. The Committee is not at liberty to judge the fact of each conviction. It does consider though, that the circumstances of each were quite different and that the applicant was mindful of his responsibilities at the time relating to drinking and driving, and that the offences were at the "less serious" end of the alcohol abuse continuum. The Committee considers that the convictions three years apart, with the last one being three years and nine months ago, do not reveal a pattern of offending.
26. The Committee considers that it has before it an applicant who is very experienced in the industry, is confident, presents well and is knowledgeable about the Act. Those officers who interviewed him were of a mind not to oppose until they became aware of the Osborne guideline.
27. The Committee believes that the applicant is genuine in his wish to help build the family business and that his father's ill health creates some exceptional circumstances around his application. We consider that he has learned from past mistakes and has a responsible attitude to what is expected of the holder of a Manager's Certificate and potential licensee.

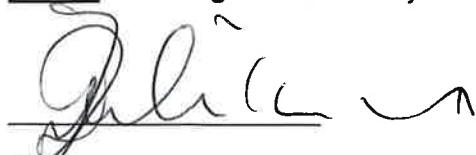
DECISION

28. The application of Nickholas Anthony Pole for a Manager's Certificate is GRANTED for a period of one year with the following condition imposed.
That the applicant is able to use this initial Manager's Certificate for the first year to work in the licensed premises of Porthouse Bar and Eatery, 163 State Highway 15A, Ruakaka only. Any employment in any other licenced premises within the first year of this Manager's Certificate will need to be brought before the Committee for consideration.

REASONS FOR DECISION

29. The Committee is satisfied that the applicant is well aware of the requirements of the Act and of the responsibilities expected of the holder of a Manager's Certificate. We are satisfied that he has learned the lessons about drinking and driving.
30. The applicant is well experienced in the hospitality industry and has expressed his determination to make a good account of himself in his family business.
31. The Committee considers that there are some exceptional circumstances in the applicants desire to take a responsible position in the family business subsequent to his father's ill health.
32. The one year granting of the Manager's Certificate is, in effect a trial period with the limitations that this Certificate can only be used within the family business.
33. The Committee is mindful of the guidelines of Osborne and believes that this decision falls within the provisions which that decision gives guidance about.

DATED at Whangarei this 9TH day of October 2017



Chairman
Whangarei District Licensing Committee

