

**IN THE ALCOHOL REGULATORY AND LICENSING AUTHORITY  
TE MANA WAETURE TAKE WAIPIRO**

**[2021] NZARLA 32**

UNDER the Sale and Supply of Alcohol Act 2012

AND

IN THE MATTER of an appeal pursuant to s 154 of the Act against a decision of the South Waikato District Licensing Committee declining the renewal of an off-licence for premises situated at 60 Chambers Street, Tokoroa, known as ‘Thirsty Liquor Tokoroa’

BETWEEN TWO BROTHERS WHOLESALE LIMITED

Appellant

AND MEDICAL OFFICER OF HEALTH,  
WAIKATO DISTRICT HEALTH BOARD

Respondent

AND NEW ZEALAND POLICE and  
the LICENSING INSPECTOR,  
SOUTH WAIKATO DISTRICT COUNCIL

s 204(3) parties

Hearing: 25 March 2021 (at Rotorua)

Authority: Judge K D Kelly  
Ms J D Moorhead  
Mr R S Miller

Counsel: Ms P Kaur and Dr Joan Forret for the Appellant  
Ms K South for the Respondent and the New Zealand Police  
Ms J Smale – Licensing Inspector

Judgment: 13 April 2021

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**DECISION OF THE AUTHORITY**

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## **Introduction**

[1] On 28 January 2021, following a hearing on 18 January 2021, the South Waikato District Licensing Committee (DLC) declined to renew the off-licence issued to Two Brothers Wholesale Limited (Two Brothers) for premises situated at 60 Chambers Street, Tokoroa and known as ‘Thirsty Liquor Tokoroa.’

[2] By way of a Notice of Appeal dated 9 February 2021 Two Brothers now appeals the decision of the DLC to the Authority.

[3] At the hearing before the Authority, the decision of the DLC was stayed pending the determination of the appeal.<sup>1</sup>

## **Summary of result**

[4] The appeal is dismissed. Pursuant to s 158 of the Act the decision of the DLC is confirmed.

[5] Pursuant to s 135(2) of the Act, the licence shall expire 30 days from the date of this decision.

## **The applicant and application**

[6] As set out in the Licensing Inspector’s s 129 report on the application,<sup>2</sup> the applicant was incorporated in 2016 and initially had two directors: Mr Jaspreet Singh and his brother Mr Taranjeet Singh. Mr Taranjeet Singh resigned as director on 13 July 2020 although he remains a 50% shareholder alongside Jaspreet Singh.

[7] The premises have operated since 2016 when they were first licensed. The licence was renewed in 2017 making this application the second renewal application for the premises. Two Brothers has sought to renew its licence without change to its conditions.

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<sup>1</sup> Refer minute of the chairperson of the Authority dated 26 March 2021

<sup>2</sup> s 129 report of Julie A Smale dated 27 September 2020/ 6 November 2020

[8] Two Brothers also operates the Trees Tavern on-licence and the Blackbull off-licence in Tokoroa. A concern for Two Brothers is that a refusal to grant this renewal application will have implications for the renewal of its other licences.

## **Objections and attitude of reporting agencies**

### *Objections*

[9] The renewal application was the subject of one public objection but the DLC determined that the objector did not have status to object, as it did not have a greater interest in the application than the public generally (per s 128).<sup>3</sup>

### *New Zealand Police*

[10] By way of an email dated 24 June 2020, Sergeant Robert (Rob) Foster of the Taupo Police opposed the application on the basis that Mr Taranjeet Singh has a 2017 conviction for a drink driving offence. Subsequently, however, by way of an email dated 3 August 2020 Sgt Foster withdrew his opposition as he became aware that Mr Singh is no longer a director of Two Brothers.

### *Medical Officer of Health*

[11] By way of a letter dated 25 August 2020,<sup>4</sup> Mrs Nicole Zeier, the Medical Officer of Health delegate, opposed the application based on concerns about the applicant's suitability and the operation of the premises. Specifically, the Medical Officer of Health expressed concerns about:

...claims of exploitation of workers' rights in the stores operated by this applicant and operating the premises without a duty manager on site. If this is the case, the suitability of the applicant (s 105(b) to operate a licensed premises is a matter for concern.

The Medical Officer of Health .... believes this matter should be heard by way of public hearing. Consideration of truncation of the licence or conditions of the licence may be relevant.

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<sup>3</sup> Directions Minute of DLC dated 7 December 2020

<sup>4</sup> The reporting time in relation to the Medical officer of Health under ss 129 and 105 of the Act was extended by the Epidemic Preparedness (Sale and Supply of Alcohol Act 2012 – Licence Application Inquiries) Immediate Modification Order 2020 which continues in force until the Epidemic Preparedness (COVID-19) Notice 2020 expires or is revoked.

*Licensing Inspector*

[12] In her s 129 report on the application dated 27 September 2020 (and revised on 6 November 2020), the Licensing Inspector Ms Julie Smale reported that:<sup>5</sup>

This Inspector has inquired into the application, and based on the information provided, the application meets the criteria in the Act. Subject to no new or contrary evidence being presented, this inspector does not oppose this application.

[13] In terms of the suitability, at the time of her report the Licensing Inspector said that she believed the applicant to be suitable to hold a licence.<sup>6</sup>

[14] The Licensing Inspector expressed no concerns with the application although she recommended that the applicant provide annual refresher training to staff using a qualified external trainer.<sup>7</sup>

[15] Before the Authority, the Licensing Inspector states that she now opposes the renewal which she says she foreshadowed in the proviso in her 27 September / 6 November 2020 report.

[16] In relation to this, as a preliminary matter, the Authority notes that the Licensing Inspector has already provided the DLC with an addendum to her earlier report, this addendum being dated 13 January 2021 (five days before the DLC hearing). In this supplementary report, the Licensing Inspector stated that her position (i.e. not opposing the licence renewal) had not changed. The Licensing Inspector noted:<sup>8</sup>

Had I been in a position to have seen the information provided by the applicant in relation to the Improvement Notices prior to writing my report, I may have been in a different mind about my opposition.

However, I have seen the applicant's evidence as produced by Counsel today, and I am satisfied that the applicant has put matters in place to ensure that these serious issues do not arise again.

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<sup>5</sup> at page 6

<sup>6</sup> at page 2

<sup>7</sup> at page 5

<sup>8</sup> Licensing Inspector's s 129 report dated 13 January 2021 at [2]

[17] As a consequence, this is likely to be the first time that the appellant has heard that the Licensing Inspector now views the application differently to how she viewed it before the DLC.

[18] While the obligation on the Licensing Inspector to report on an application under s 129 and s 103 differs from the discretion that the Police and Medical Officer of Health have to express matters in opposition to an application, as this Authority noted in *Sargent v Kapiti Supermarket Ltd*,<sup>9</sup> it is important that compliance with the statutory obligations of the reporting agencies is upheld as failure to do so may result in breaches of natural justice. In that case, the Police changed its stance on an application after the time for expressing opposition had expired. While not directly germane to a report by a licensing inspector, similar considerations of natural justice arise. As no separate submissions have been filed by the Licensing Inspector pursuant to s 204(3), the only position of the Licensing Inspector that the appellant will be aware of is that which is set out in the Licensing Inspector's reports that were before the DLC. That is also all that the Authority has before it.

[19] While reporting agencies may be heard on an appeal, and may make submissions about why the grounds of appeal cannot succeed, that is a different matter to a reporting agency purporting to change its stance on an application where it had previously indicated no opposition to the application. The appropriate course of action, if a reporting agency has some concern that it considers ought to be put before the Authority, is for that agency to indicate it wishes to be heard before the Authority and to file submissions in accordance with any timetable directions made by the Authority. This allows the appellant to respond as it sees appropriate avoiding the potential for breaches of natural justice.

[20] This appears to have been understood by the Licensing Inspectorate, at least in part, as she said to the DLC at the end of the hearing:<sup>10</sup>

I'll stand by what I've written, and I don't oppose the renewal of the licence. I am concerned about what we've heard from MBIE, and I may, if I think necessary, recall the application pursuant to section 201(4) if I have concerns about what eventuates from the investigation.

[21] Notwithstanding that s 201(4) refers to the powers of the DLC and the Authority to rehear any matter (and not a Licensing Inspector), for present purposes because the Licensing Inspector simply seeks to adopt the submissions of the Medical Officer of Health and of the

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<sup>9</sup> *Sargent v Kapiti Supermarket Ltd* [2015] NZARLA PH 194 at [16]- [18]

<sup>10</sup> DLC transcript at page 44

Police, concerns about natural justice or of a potential abuse of process do not arise. It is important that reporting agencies exercise care in this regard.

### **Improvement Notice and Witness Summons**

[22] Prior to hearing the application, on 4 December 2020, counsel for Two Brothers notified the DLC that it had been served an Improvement Notice by the Labour Inspector employed by the Ministry of Business, Innovation and Employment (MBIE). This Notice, dated 10 August 2020, states that the Labour Inspector reasonably believes that Two Brothers is failing, or has failed to comply with a number of minimum employment standards set out in the Employment Relations Act 2000 and the Holidays Act 2003. Specifically, the Notice states that the nature and extent of non-compliance with minimum employment standards are failures to:

- (a) identify the employer in employment agreements (making it difficult for an employee to identify who their employer is);
- (b) describe the work to be done and the location of work (so employees do not have an accurate idea of what work is asked of them or where that work is to be done, thereby leaving employees in a vulnerable position);
- (c) keep ongoing and accurate records (such that employees have failed to receive their minimum entitlements including but not limited to accurate holidays, holiday pay, paid public holidays, alternate holidays, and time and a half for working on public holidays); and
- (d) retain wage and time records (meaning that employees cannot accurately have their entitlements determined, if at all).

[23] The Notice states that the latter three matters are systemic issues that are likely to impact other employees, both past and present.

[24] Two Brothers considered that this Notice needed to be brought to the attention of the DLC as it may have been relevant to the renewal application. The Authority considers that the appellant was right to do so. In light of the Notice on 11 December 2020 the Chairperson of the DLC summonsed Labour Inspector Ms Erin Spence to appear and give evidence in relation to

MBIE's investigation into the business activities of Two Brothers, and the findings of that investigation.

### **DLC hearing and decision**

[25] Before the DLC, Two Brothers acknowledged that in a previous decision of the Authority in *Wilkinson v Sharmas and Sons (2009) Limited*, the Authority said that a breach of employment legislation may be relevant to the suitability of a licensee.<sup>11</sup> In reliance on that decision, however, Two Brothers argued that before suitability could be seriously challenged there needed to be a nexus between the employment matters in question, and the operation of the premises in relation to the safe and responsible sale, supply and consumption of alcohol.<sup>12</sup>

[26] The DLC considered *Sharmas and Sons* but found that it could be distinguished because that involved an enforcement application such that "the onus of establishing suitability was ... squarely on the applicant" whereas here, in relation to a renewal application: "The onus to establish suitability is reversed".<sup>13</sup>

[27] The DLC said, however, that: "...in our view, there is a clear nexus between the employment standards breaches and the ability of the company, and its staff, to sell and supply alcohol safely and responsibly".<sup>14</sup>

There has been strong evidence presented to us of the deception and/or absence of record keeping, deliberately rostering workers off on statutory days to avoid paying penal rates, the non-payment of holiday pay, overtime rates and over working and under recording of hours worked.

The MBIE Investigation discovered a **systemic pattern** of illegal behaviours over the five years that were enquired into, and this gave Two Brothers Wholesale Limited an unfair advantage in the alcohol industry.

The findings have largely been accepted by the applicant, via its alter ego, Jaspreet Singh, and they are in the process, albeit slowly, of rectifying the deficiencies found by the Labour Inspectorate. However, he said that they were 'mistakes' by his admin person who is no longer employed by the company. We prefer the evidence of the Labour Inspector who said there was evidence of deliberate re-rostering to avoid penal payments and that the required employment standards had been wilfully ignored for years.

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<sup>11</sup> *Wilkinson v Sharmas and Sons (2009) Limited* [2016] NZARLA 441 at [21]

<sup>12</sup> DLC decision at [16]

<sup>13</sup> DLC decision at [18] and [86] – [87]

<sup>14</sup> DLC decision at [85] and [88] – [95]

When we questioned Erin Spence, the Labour Inspector, she believed that due to the “severe” lack of record keeping uncovered, there would most likely be other deficiencies that could not be detected. Her investigation was initiated following a complaint by one person on behalf of three workers. The other two workers declined to be interviewed, no doubt in fear of their ongoing status to live and work in New Zealand.

She added that the applicant was on its second extension of time to fulfil the tasks given and provide the requested information to MBIE. **She doubted that Jaspreet Singh has the skills or knowledge to operate compliantly under the employment related standards of New Zealand.**

When we spoke with Jaspreet Singh, we were surprised to discover that there had been no formal staff training undertaken, or recorded, for the last five years. This coupled with allegations that some workers were required to work 12 hour shifts and up to 4 hours alone without support or comfort breaks etc. the issue of worker distress and fatigue became evident.

The assessment of intoxication and the identification of minors requires skill, knowledge and commitment, let alone a clear and alert mind. The large turnover of staff and multiple outlets owned by the applicant further exacerbates our concerns.

We asked Mr Singh if he ever had, or would in the future, engage a third-party trainer to assist him with his business. He said no. We asked if he thought a business advisor would be worthwhile to assist him get the business up to speed. He said no, but his counsel advised, in closing, that he would be prepared to engage a business support adviser if the licence was to be renewed.

(DLC emphasis)

[28] In relation to the operation of the premises after the date on which Mr Taranjeet Singh resigned as a director of Two Brothers, the DLC said:<sup>15</sup>

Initially the Police opposed the application as one of the directors, Taranjeet Singh had recently incurred a DIC conviction. That opposition was withdrawn when Taranjeet Singh resigned as a director but continued on as a 50% shareholder of the business.

It is our understanding that it is the shareholders of a business that wield the power and dictate the direction of a company, not the directors. Directors do the bidding of the shareholders. We suspect little has changed in the management of Two Brothers Wholesale Limited by the technical removal of Taranjeet Singh as a director.

[29] The DLC concluded:<sup>16</sup>

As higher Authorities have often said, holding a licence to sell alcohol is a privilege, not a right, and must only be given to persons, and companies, of

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<sup>15</sup> DLC decision at [75] – [76]

<sup>16</sup> DLC decision at [18] and [96] – [98]



integrity who try to operate within the provisions of the Act and other legislation, as opposed to trying to find ways to get around them.

After standing back and cross-checking the evidence and submissions before us we have come to the inevitable conclusion that the applicant has not established its suitability to permit us to approve a renewal of the licence.

Upon that finding, we believe that if we were to approve a renewal it would not contribute to achieving the object of the Act in this vulnerable community of Tokoroa.

### **Relevant statutory provisions**

[30] Section 131 of the Act sets out the criteria to which a DLC, and the Authority on appeal, must have regard when deciding whether to renew a licence:

- (1) In deciding whether to renew a licence, the licensing authority or the licensing committee concerned must have regard to the following matters:
  - (a) the matters set out in paragraphs (a) to (g), (j), and (k) of section 105(1):
  - (b) whether (in its opinion) the amenity and good order of the locality would be likely to be increased, by more than a minor extent, by the effects of a refusal to renew the licence:
  - (c) any matters dealt with in any report from the Police, an inspector, or a Medical Officer of Health made by virtue of section 129:
  - (d) the manner in which the applicant has sold (or, as the case may be, sold and supplied), displayed, advertised, or promoted alcohol.
- (2) The authority or committee must not take into account any prejudicial effect that the renewal of the licence may have on the business conducted pursuant to any other licence.

[31] Relevant to s 131(1)(a), paragraphs (a) to (g), (j), and (k) of section 105(1), read:

- (1) In deciding whether to issue a licence, the licensing authority or the licensing committee concerned must have regard to the following matters:
  - (a) the object of this Act:
  - (b) the suitability of the applicant:
  - (c) any relevant local alcohol policy:
  - (d) the days on which and the hours during which the applicant proposes to sell alcohol:
  - (e) the design and layout of any proposed premises:
  - (f) whether the applicant is engaged in, or proposes on the premises to engage in, the sale of goods other than alcohol, low-alcohol refreshments, non-alcoholic refreshments, and food, and if so, which goods:
  - (g) whether the applicant is engaged in, or proposes on the premises to engage in, the provision of services other than those directly related to the sale of alcohol, low-alcohol refreshments, non-alcoholic refreshments, and food, and if so, which services:

...

- (j) whether the applicant has appropriate systems, staff, and training to comply with the law;
- (k) any matters dealt with in any report from the Police, an inspector, or a Medical Officer of Health made under section 103.

[32] Relevant to s 131(1)(b), s 106(2) in turn provides a ‘legislative aid’<sup>17</sup> when forming an opinion on the amenity and good order of a locality.

- (2) In forming for the purposes of section 131(1)(b) an opinion on whether the amenity and good order of a locality would be likely to be increased, by more than a minor extent, by the effects of a refusal to renew a licence, the licensing authority or a licensing committee must have regard to the following matters (as they relate to the locality):
  - (a) current, and possible future, noise levels;
  - (b) current, and possible future, levels of nuisance and vandalism.

[33] The object of the Act in s 4, referred to in s 105(1)(a), is:

- (1) The object of this Act is that—
  - (a) the sale, supply, and consumption of alcohol should be undertaken safely and responsibly; and
  - (b) the harm caused by the excessive or inappropriate consumption of alcohol should be minimised.
- (2) For the purposes of subsection (1), the harm caused by the excessive or inappropriate consumption of alcohol includes—
  - (a) any crime, damage, death, disease, disorderly behaviour, illness, or injury, directly or indirectly caused, or directly or indirectly contributed to, by the excessive or inappropriate consumption of alcohol; and
  - (b) any harm to society generally or the community, directly or indirectly caused, or directly or indirectly contributed to, by any crime, damage, death, disease, disorderly behaviour, illness, or injury of a kind described in paragraph (a).

## **Grounds of Appeal**

[34] The grounds of appeal are that the DLC erred by:

- (i) taking into account irrelevant considerations and failing to take into account relevant considerations in its evaluation of Two Brothers’ suitability such that the finding is wrong on the evidence;

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<sup>17</sup> *Lower Hutt Liquormart Ltd v Shady Lady Lighting* [2018] NZHC 3100 [28 November 2018] at [66]

- (ii) forming a view that there is a clear nexus between the employment standards breaches and the ability of the company, and its staff, to sell and supply alcohol safely and responsibly, such that the finding is plainly wrong on the evidence;
- (iii) taking into account irrelevant considerations and failing to take into account relevant considerations in finding that Two Brothers does not have appropriate systems, staff and training to comply with the law, such that the finding is plainly wrong on the evidence;
- (iv) forming its opinion (to refuse to renew the licence) on speculation such that the finding is plainly wrong on the evidence;
- (v) failing to have regard to the matter contained in s 131(1)(d) of the Act, namely the manner in which Two Brothers has sold, displayed, advertised, and promoted alcohol, including the manner in which the director of Two Brothers has done so at other premises;
- (vi) failing to balance the evidence before it, thereby forming a view that was unfair and unreasonable in the circumstances resulting in a disproportionate outcome; and
- (vii) using the licensing process to punish Two Brothers over alleged employment breaches that are currently being determined by the relevant governing body and which do not directly impact on Two Brother's ability to meet the object of the Act: this error resulting in a double punishment of Two Brothers in the event that the Employment Relations Authority awards financial penalties for the same breaches, which are within its jurisdiction but which are not within the jurisdiction of the DLC.

### *Relief Sought*

[35] Two Brothers submits that the Authority should reverse the decision of the DLC, thereby renewing the off-licence for Thirsty Liquor Tokoroa.

## **Submissions for appellant**

### *Issue on appeal*

[36] In response to a question from the Authority, Ms Pervinder Kaur, counsel for Two Brothers said that the gist of the appeal is that the DLC failed to properly undertake its evaluative function in so far as it found that the adverse employment matters going to Two Brothers' suitability under s 131(1)(a) and s 105(1)(b) of the Act outweighed other matters going to suitability (e.g. that the appellant was trying to comply with the Improvement Notice), as well as the other criteria in s 131 such that the employment matters became an issue of greater consequence than was appropriate in the circumstances.

### *Ground 1: Evaluation of Two Brothers' suitability*

[37] Two Brothers submits that the DLC misdirected itself by imposing an evidential onus on Two Brothers to establish its suitability. It is submitted that this is so fundamental an error that it infected and tainted the DLC's objectivity, and the reasonableness of its decision.

[38] It is submitted that the correct approach for the DLC to have taken, and the approach that the Authority must now take on appeal, is to evaluate the application. In exercising this inquisitorial function, it is submitted that notions of proof may not be helpful or appropriate.

[39] It is also submitted that the DLC found that Two Brothers is unsuitable to hold a licence primarily because of non-compliance with employment standards. Two Brothers submits that while the Authority said that a breach of employment legislation may be relevant to the suitability of a licensee, the Authority also said that there needs to be a nexus established between the employment matter in question and the operation of the licensed premises as regards the safe and responsible sale and supply and consumption of alcohol.

[40] In applying the wrong legal test (i.e. by imposing an onus on Two Brothers) and by distinguishing *Sharmas and Sons* as the DLC did, Two Brothers submits that the DLC did not undertake the 'balancing exercise' required of it.

[41] Two Brothers accepts that it breached employment legislation, but it is submitted that the DLC focussed on the allegations or evidence that spoke against renewal of the licence and

discounted the evidence that spoke in favour of renewal. For example, it is submitted that the DLC referred to the “over working and under recording of hours worked”<sup>18</sup> but failed to note that these allegations were not substantiated.<sup>19</sup>

[42] It is also submitted that the DLC took into account unsubstantiated allegations, for example, by referring to MBIE discovering a “systemic pattern of illegal behaviours” which Two Brothers says has been taken out of context. It is submitted that the evidence of the Labour Inspector is that a systemic fault is one is where “someone’s system is set to consistently result in errors”, but that the evidence does not refer to a ‘systemic pattern of illegal behaviours’.

[43] Further Two Brothers submits that the errors in relation to the Holidays Act 2003 were not deliberate. Rather, it is submitted that the Labour Inspector said these breaches were the result of a misunderstanding about how the Holidays Act worked.<sup>20</sup>

[44] Further it is submitted that the DLC said “there was evidence of deliberate re-rostering to avoid penal payments and that the required employment standards had been wilfully ignored for years”, when the Labour Inspector’s evidence is:<sup>21</sup>

There’s no evidence that it was deliberate. I retract that. There is no evidence that the recordkeeping issues and things like that were deliberate. It is acknowledged that rostering people off to not pay their public holidays, that was deliberate, but I believe in that context, it was a misunderstanding of how the Act worked.

[45] Two Brothers submits that suitability is not determined in a vacuum and the evidence is that:

- (a) Mr Jaspreet Singh is the sole director of the licensee company, has held a manager’s certificate for several years, and operates other premises without incident;
- (b) Mr Jaspreet Singh employs qualified staff in sufficient numbers and has reasonable systems in place to monitor their performance; and

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<sup>18</sup> DLC decision at [88]

<sup>19</sup> DLC transcript at page 32

<sup>20</sup> DLC transcript at pages 41-42

<sup>21</sup> DLC transcript at pages 41-42

- (c) Two Brothers has not failed a controlled purchase operation (CPO) at any of its premises.

[46] That is, it is submitted that the employment issues are but one matter that goes to the overall evaluation of suitability.

[47] It is also submitted that Mr Taranjeet Singh's 2017 conviction appears to have played a part in the DLC's reasoning notwithstanding that the conviction is dated and the DLC has since renewed the licences for Two Brothers' other premises (i.e. prior to Mr Taranjeet Singh resigning as director). It is submitted that there is no evidence to support the DLC's statement that little has changed in the management of the company since Mr Taranjeet Singh ceased to be a director.

[48] Moreover, it is submitted that there is no evidence of any history of alcohol-related harm under Mr Jaspreet Singh's sole directorship, or under the previous management of the business when shared with Mr Taranjeet Singh. To that extent, it is submitted, 'nothing has changed' but this is a positive feature of the application and it is unreasonable to criticise Two Brothers without evidence of harm.

[49] In addition, it is submitted, contrary to what the DLC said about directors doing the bidding of shareholders, that the evidence is that Mr Taranjeet Singh has no input into the business other than as a shareholder. The statement by the DLC, it is submitted, lacks an evidential foundation and undermines the role that Mr Jaspreet Singh plays in the business.

*Ground 2: Nexus between employment standards breaches and the safe and responsible sale and supply of alcohol?*

[50] Two Brothers submits that based on *Sharmas and Sons*, there needs to be established a nexus between the employment matters in question and the operation of the premises in relation to the safe sale, supply and consumption of alcohol before suitability can be seriously challenged.

[51] It is submitted that in *Sharmas and Sons* the Authority referred to *Te Awamutu Wines & Spirits (1998) Ltd* saying:<sup>22</sup>

As the respondent has pointed out, a decision of this Authority — *Te Awamutu Wines & Spirits (1998) Ltd* ... — held that the grounds under the Employment Relations Act are different to those in relation to the objects of the Act. In that case, this Authority said that “*overbearing and insensitive behaviour particularly with sexual connotations*” should not be tolerated, but the Authority is concerned with drinking safely in licensed premises. Accordingly, in that case the pattern of behaviour was held not to be a significant issue in the operation of the off-licence.

[52] Two Brothers submits in relation to the present renewal application, that there is no evidence that would have established a link between the non-compliance with employment standards and the safe and responsible sale and supply of alcohol which is what this Act is concerned about. Furthermore, it is submitted that there have been no concerns or incidents relating to the operation of the premises for five years and, significantly, none of the reporting agencies have raised concerns about the amenity and good order of the locality or of any potential risk of alcohol-related harm.

[53] Two Brothers submits that there is no evidence of worker distress and fatigue discussed by the DLC<sup>23</sup> but instead Mr Jaspreet Singh’s evidence is that it has one person who opens the store and a second person joins later in the day with the second person covering the duty manager’s break. Further the evidence is that if no one is available to cover breaks, the premises are closed for 20-30 minutes. It is submitted that at no point was Mr Singh asked whether any staff work 12 hour shifts every day of the week. Instead it is submitted that the DLC assumed a pattern of working more than 40 hours per week and on that basis formed the conclusion that staff face distress and fatigue.

[54] While it is not disputed that staff work 12 hour shifts, it is submitted that staff sometimes only work five hours and between the three managers, each manager works about 25 hours per week. It is also submitted that it is not uncommon for people to work 12 hour shifts in many professions and that what is relevant instead are the conditions of employment.

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<sup>22</sup> *Te Awamutu Wines & Spirits (1998) Limited* PH 558/2006 at [18]

<sup>23</sup> DLC decision at [93]

[55] Two Brothers submits that the DLC has made a general assumption that anyone working a 12 hour shift is distressed and fatigued and will not have a clear and alert mind. It is submitted that this assumption is unreasonable particularly given the absence of a history of non-compliance.

[56] It is further submitted that the DLC does not discuss the evidential basis for it concluding that there is a clear nexus between the employment standard breaches and the sale and supply of alcohol. Two Brothers submits that the non-compliance with employment legislation does not infringe the object of the Act.

*Ground 3, 4 and 6: systems, staff and training to comply with the law; opinion based on speculation; failing to balance the evidence*

[57] Two Brothers submits that these three grounds are ‘intertwined’ and addresses them together.

[58] It is submitted that the DLC erred when it said that Mr Singh produced in evidence two schedules of employees when these schedules were in fact attached to the Improvement Notice issued by the Labour Inspector. It is submitted that relying on these schedules and finding that Two Brothers did not have enough staff to cover the licence hours, the decision of the DLC is plainly wrong.

[59] Conversely, it is submitted that the DLC failed to have regard to the evidence for Two Brothers, and the revised list of employees that was provided following the hearing. This list, it is submitted, shows 12 staff across all of Two Brothers’ premises with six staff (including Jaspreet Singh) working at Thirsty Liquor Tokoroa, four of whom hold managers’ certificates (including Jaspreet Singh), with a fifth staff member having completed his Licence Controller Qualification (LCQ) and having applied for a manager’s certificate. In relation to the DLC’s criticism of high staff turnover,<sup>24</sup> it is submitted that this is based on the wrong evidence.

[60] The DLC decision, it is submitted, also fails to record that Two Brothers conducts informal in-house training and has implemented a formal Staff Training Policy following the recommendations of the Licensing Inspector. The decision also criticises Two Brothers for

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<sup>24</sup> DLC decision at [74]



producing a blank training register or record,<sup>25</sup> but fails to record that this was provided as a template only as part of the Staff Training Policy.

[61] Further, it is submitted that the DLC was wrong to speculate without evidence that: "...it is good luck, rather than good management, that Thirsty Liquor Tokoroa has not been caught out selling alcohol to a minor or an intoxicated person"<sup>26</sup>; that the high turnover is "yet another indicator of an unhappy workforce and work environment"<sup>27</sup>; and that "two workers declined to be interviewed, no doubt in fear of their ongoing status to live and work in New Zealand."<sup>28</sup>

[62] On the other hand, what the DLC did not do, it is submitted, is to have regard to Two Brothers' proven compliance history, and the fact that none of the reporting agencies raised any issues regarding its systems, staff and training.

[63] In this regard, it is submitted that the DLC misdirected itself and drew adverse conclusions which are untenable on the evidence.

[64] A further criticism that Mr Singh would only engage a business advisor if the renewal application was granted,<sup>29</sup> it is submitted, does not recognise that before the DLC counsel for Two Brothers said that because of what it heard Two Brothers was going to engage a specialist employment lawyer and 'work through the issues straight away'.<sup>30</sup>

[65] The DLC also failed to have regard to the evidence of the Labour Inspector who said that Mr Singh has been helpful throughout the process in relation to the Improvement Notice.<sup>31</sup>

[66] In short, Two Brothers submits that the DLC has afforded the employment issues, going to suitability, greater weight than is appropriate in the circumstances.

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<sup>25</sup> DLC decision at [67]-[68]

<sup>26</sup> DLC decision at [72]

<sup>27</sup> DLC decision at [74]

<sup>28</sup> DLC decision at [91]

<sup>29</sup> DLC decision at [95]

<sup>30</sup> DLC transcript at page 47

<sup>31</sup> DLC transcript at pages 34 and 40

*Ground 5: the manner in which alcohol has been sold, supplied, displayed, advertised or promoted*

[67] Two Brothers submits that the DLC was required by s 131(1)(d) to have regard to the manner in which Two Brothers has sold, supplied, displayed, advertised or promoted alcohol and to give genuine attention to Two Brothers' track record as a licensee.

[68] It is submitted that there are no concerns raised by reporting agencies about this criterion, and that Two Brothers' history of compliance with the Act is a relevant consideration to which the DLC failed to have regard.

*Ground 7: using the licensing process to punish Two Brothers*

[69] Finally, it is submitted that the DLC has used the licensing process to punish Two Brothers for the employment breaches that are currently being determined by the Labour Inspector. It is submitted that these breaches do not directly impact on Two Brothers' ability to meet the object of the Act and there is no evidence that Two Brothers has sold or supplied alcohol irresponsibly.

[70] By refusing to renew the licence, Two Brothers says, the DLC has punished it for something that is not within its jurisdiction and which will result in a 'double punishment' should the Employment Relations Authority impose financial penalties for the same breaches.

[71] It is also submitted that if the licence renewal is refused, there will be no business that can be sold.

[72] It is further submitted that it is foreseeable that Two Brothers' suitability will be challenged and the renewal applications opposed for Two Brothers' remaining Tokoroa premises based on the DLC's decision in respect of this licence.

[73] It is also submitted that there has been recent publicity from the Government about the need to overhaul the Holidays Act due to its complexity, especially for shift workers, and that the evidence shows that the unintended breaches are being addressed with monies having been paid to current and former employees. It is also submitted that new systems have been put in place and that Two Brothers is obtaining specialist employment law advice.

[74] Two Brothers submits that there is not a lot more it can do to remedy past errors other than what is being done and it is unreasonable to thwart the prospect of positive changes being implemented to achieve compliance with employment legislation by refusing to renew the off-licence for Thirsty Liquor Tokoroa.

### **Submissions for respondent**

[75] Ms Karyn South for the Medical Officer of Health and the New Zealand Police submits that Mr Jaspreet Singh is an experienced businessman and employer. Despite his years as an employer and his experience in the alcohol industry, however, it is submitted that Mr Singh patently does not understand the requirements of New Zealand employment law and did not take seriously enough these requirements in order to train his administrative staff about the requirements of the Employment Relations Act 2000, the Holidays Act 2003, and the Minimum Wage Act 1983.

[76] It is submitted that following an investigation in mid-2019, the Labour Inspectorate issued Mr Singh with an Improvement Notice which requires various breaches of employment law to be corrected. As at the date of the hearing before the Authority, advice from MBIE shows that not all of these have yet been corrected.<sup>32</sup>

[77] The breaches identified in the Improvement Notice, it is submitted, are serious, varied and relate to numerous employees (in some case all employees), across three stores. Failing to identify an employer, makes it harder for an underpaid employee to identify their correct employer especially when the operator is involved in different companies, as is the case here. The failure to describe the work being done and the location of work, in turn, makes it easier for an employer to change the work of an employee and to move employees to different addresses. It also makes it difficult to monitor the hours worked by each employee. The failure to keep wage and time records, in turn, is a serious failing that reflects on the suitability of Two Brothers and there is no good reason why these records were not kept when it is a legal requirement to do so. Even where some employees kept their own records and handed these over to Two Brothers, it is submitted that these were not kept as records.

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<sup>32</sup> Refer email from Labour Inspectorate Manager Compliance Mr Callum McMillan, to the Authority dated 24 March 2021

[78] It is submitted that the terms of the Improvement Notice are not minor and demonstrate that the conduct in question cannot be explained away as mere mistakes by an experienced employer. A 'mistake', it is submitted, suggests inadvertence or accidental conduct. Instead, it is submitted that a clear pattern emerges from the terms of the Improvement Notice and the evidence before the DLC that directly reflects on Two Brothers' suitability. All of this conduct shows that basic entitlements for employees were diminished while cost or overhead savings were made by Two Brothers to its advantage.

[79] It is also submitted that before the DLC Mr Singh sought to minimise his involvement in the administration of the business and to shift the blame for the state of his business records to his former administrator and to his accounts person. It is submitted that it is Mr Singh's responsibility to train administrative staff so they can properly carry out their functions, to ensure staff receive holiday pay and other leave entitlements, and to keep wage and time records to enable the calculation of arrears without difficulty.

[80] It is also submitted that despite the evidence of the Labour Inspector that Mr Singh acknowledged the breaches immediately, Two Brothers was 'very deficient' in keeping proper records over many years such that for some employees it is impossible to calculate minimum entitlements.

[81] While Mr Singh has been very good at providing what he thinks the Labour Inspector has been asking for, it is submitted that he does not have the information that is required and which he is required to keep. It is also submitted that the evidence shows that Mr Singh's previous administrator was not competent and that directions as regard these employment matters came directly from Mr Singh who told his administrator what to do.

[82] The evidence, it is submitted, while not of migrant exploitation, is of extremely bad employment practices. The evidence is also that the faults in Two Brothers' employment practises is systemic. The evidence demonstrates that Mr Singh rostered staff to work 12 hour shifts and patently disregarded minimum employment standards by asking staff to work without breaks. It is submitted that it is an obvious and foreseeable outcome that workers who do not receive breaks and who do not receive holiday entitlements are likely to experience fatigue.

[83] That is, the evidence establishes that Mr Singh and his brother lack the ability to understand employment law requirements and it is submitted that this clearly impacts on an assessment of Two Brothers' suitability under the Act. It is also submitted that Mr Singh has accepted these breaches occurred and has acknowledged that his conduct led to non-compliance over several years.

[84] The matters set out in the Improvement Notice, it is submitted, also go to whether Two Brothers has systems, staff and training to comply with the law (s 105(1)(j)). While Mr Singh says that he believes that he has systems in place to make sure the store is managed according to the law, it is submitted that Mr Singh was not complying with three pieces of applicable employment legislation nor was he managing the store according to these laws.

[85] Further, prior to the Inspector's report on the application, there was no formal training policy in place and there is no evidence that formal training had ever been provided to staff. The staff training policy that was produced by Mr Singh in evidence, it is submitted, has a number of shortcomings and was created as an afterthought being taken from a template that does not reflect the nature of the store or the business. When specifically asked about his training programme, it is submitted that Mr Singh admitted before the DLC that he only recently started training in response to issues raised by the Licensing Inspector.

[86] In light of the fact that the evidence shows a total absence of formal staff training and that the business has been operating without training protocols, it is submitted that it is hardly surprising that the DLC concluded that the lack of a failed controlled purchase operation or of a sale to an intoxicated person was more good luck than good management. It is submitted that the DLC was rightly concerned about the quality of training materials and the fact that formal training had not been conducted.

[87] In terms of the manner in which Two Brothers has sold, displayed, advertised or promoted alcohol (s 131(1)(d)), it is submitted that the store sold alcohol of a type that fits the categorisation of 'cheap stuff'. When asked if his store sold *Kingfisher* beer, which is a high strength beer with 7.2% alcohol by volume served in large 500 ml servings, it is submitted that Mr Singh replied "single cans, yes" and that he did so because "there's demand for it". When Mr Singh was asked whether he ever removed any products from sale that were not appropriate

given the nature of the community, Mr Singh replied that he could not ever remember doing so.

[88] It is submitted that these matters show a lack of understanding and concern about the causes of alcohol-related harm in the community especially given that Tokoroa is a vulnerable community with severe social deprivation relative to other rural towns. Further, it is submitted that these matters show a lack of willingness to consider and cater the store's product range in a way that minimises alcohol-related harm to the community.

[89] Taken together, it is submitted that these matters significantly contribute to an overall picture of Mr Singh and Two Brothers being unsuitable to operate this off-licence.

[90] It is further submitted that Two Brothers' reliance on *Sharmas & Sons* is misplaced and that sometimes an employment matter will be so egregious that a lack of suitability can be determined on the basis of that matter alone.

[91] In any event, it is submitted that *Sharmas & Sons* can be distinguished in that it was an ill-framed enforcement application brought under the wrong section of the Act and for which there was a poor evidential foundation. Further, whereas *Sharmas & Sons* involved one employee who worked in one premises. Here the employment breaches relate to three premises and to all employees. It is submitted that *Sharmas & Sons* is a decision that should very much be limited to its facts and the form of the application which was considered in that case.

[92] That said, it is submitted that to the extent that a nexus is needed between the conduct in question and the object of the Act:

- (a) the Act does not put a gloss on 'suitability' and s 105(1)(b) of the Act ought not be read to mean 'suitability to meet the object of the Act' or 'suitability to safely and responsibly sell or supply alcohol': s 105(1)(b) refers to an applicant's suitability without such qualifications;
- (b) the Parliament prioritised administration as being important as it created obligations on licensees to keep records (e.g. ss 231 and 232), and permits agencies to require the production of records to verify compliance (s 267);

- (c) any nexus does not need to be linked back to a particular store or licence: in this case Mr Singh benefitted from an uneven playing field where he enjoyed overhead savings due to his poor business practices that other operators do not similarly enjoy - this creates a risk that other operators will cut corners or discount prices in order to compete; and
- (d) Two Brothers does not have appropriate systems in place to ensure its staff are trained or are adequately rostered to ensure fatigue does not arise: there is a clear risk that the sale of alcohol may not be undertaken safely and responsibly, and that the harm caused by the excessive or inappropriate consumption of alcohol will not be minimised.

[93] Finally, it is submitted that the submission that Two Brothers is being punished by the DLC is without merit as there is nothing punitive about a decision not to renew a licence. Rather, declining to renew a licence is simply the proper function of a DLC when after considering an application, it determines that the relevant criteria in the Act are not met.

## **Decision and reasons**

### *Approach on appeal*

[94] This Authority has recently reiterated the approach to be taken on appeal including in *Selby v Kiw-E Otaki Limited* where we said:<sup>33</sup>

An appeal brought pursuant to s 154 of the Act is by way of rehearing.<sup>34</sup> As the Authority said in *Mangere-Otahuhu Local Board v Level Eighteen Limited*,<sup>35</sup> the onus is on the appellant before the Authority to satisfy the Authority that the decision in the original hearing before the DLC was wrong. *Mangere-Otahuhu Local Board v Level Eighteen Limited* reflects what the Supreme Court said in *Austin, Nichols & Co Inc v Stichting Lodestar*:<sup>36</sup> “... the appellant bears an onus of satisfying the appeal court that it should differ from the decision under appeal. It is only if the appellate court considers that the appealed decision is wrong that it is justified in interfering with it.”

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<sup>33</sup> *Selby v Kiw-E Otaki Limited* [2020] NZARLA 210 at [68] and following

<sup>34</sup> s 157

<sup>35</sup> *Mangere-Otahuhu Local Board v Level Eighteen Limited* [2014] NZARLA PH 627-228 at [15]

<sup>36</sup> *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141 at [146]

In *Mangere-Otahuhu Local Board v Level Eighteen Limited* the Authority said that it will be slow to draw different factual conclusions from a DLC as the DLC will have had the advantage of hearing the evidence at first instance.<sup>37</sup> As Davison J said in *Rainger v General Distributors Limited*, however, there is less need for the Authority to hesitate in the circumstances as the Authority is as much a specialist body as the DLC in the field of alcohol regulation.<sup>38</sup> The central point is that what the Authority is required to do on appeal is to make its own assessment of the merits of the application. It is not sufficient for the Authority to simply decide that the DLC's decision was one which was open to it on the evidence. Instead what the Authority is required to do is to independently assess the evidence and the merits of the application and to reach its own conclusion.

The approach to be taken by the Authority when determining whether to grant an application for a licence has otherwise been well traversed by the superior courts.

As Heath J said in *Re Venus NZ Ltd*,<sup>39</sup> the Act does not articulate a specific test for the Authority to apply when determining whether to grant an off-licence application. Rather, a series of criteria are identified in s 105(1) that the Authority must take into account in determining whether to issue a licence. In any given application, one or more of these criteria may assume prominence.

...

As Gendall J said in *Christchurch Medical Officer of Health v J & G Vaudrey Ltd*,<sup>40</sup> the role of the DLC or the Authority in considering the relevant factors in s 105 of the Act is an evaluative one:<sup>41</sup>

Thus, when the relevant body receives an application, they must consider it against s 105 in deciding "whether to issue a licence". There is no presumptive position, and certainly no foregone conclusion. I think the reality of the position is that if the object of the Act cannot be achieved by the application, then it cannot succeed.

So, in my view, the position can be summarised as follows:

(a) The role of the relevant body upon receipt of an application for licensing or re-licensing is an evaluative one, requiring the decision maker to make a merits-based determination on the application.

(b) In considering an application, the relevant body is fundamentally required to assess whether a licence ought to issue. In so doing, it must:

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<sup>37</sup> *Mangere-Otahuhu Local Board v Level Eighteen Limited*, above n 35 at [17]

<sup>38</sup> *Rainger v General Distributors Limited* [2019] NZHC 3483 at [58]

<sup>39</sup> *Re Venus NZ Ltd* [2015] NZHC 1377, [2015] NZAR 1315

<sup>40</sup> *Christchurch Medical Officer of Health v J & G Vaudrey Ltd* [2015] NZHC 2749, [2016] 2 NZLR 382

<sup>41</sup> *Christchurch Medical Officer of Health v J & G Vaudrey Ltd*, above n 40 at [54] –[56]



(i) consider any objections made by persons who have a greater interest in the application than the public generally;

(ii) consider any opposition filed by the constable in charge of the Police station nearest to where the application is filed, a Licensing Inspector, and the Medical Officer of Health;

(iii) have regard to the criteria stipulated in s 105 of the Act ...; and

(c) The relevant body must finally cross-check whether the application is capable of meeting the object of the Act.

(d) ...”

In *Medical Officer of Health (Wellington Region) v Lion Liquor Retail Limited*<sup>42</sup> Clark J summarised the applicable principles in respect of the renewal of a licence.<sup>43</sup> These principles include that a DLC, and the Authority, after having regard to the criteria in the Act, is then to step back and consider whether there is any evidence indicating that granting the application will be contrary to statutory object in s 4. Or as Heath J articulated a “test”:<sup>44</sup>

Although the “Object” of the 2012 Act is stated as one of 11 criteria to be considered on an application for an off-licence, it is difficult to see how the remaining factors can be weighed, other than against the “object” of the legislation. It seems to me that the test may be articulated as follows: is the Authority satisfied, having considered all relevant factors set out in s 105(1)(b)–(k) of the 2012 Act, that grant of an off-licence is consistent with the object of that Act?

This evaluative function of the Authority is an assessment of risk:<sup>45</sup>

The factors to be considered in the course of assessing an application for a licence or for renewal, as the appellants submitted, stand to be assessed in terms of their potential impact upon the prospective risk of alcohol-related harm.

A causal nexus is required between the evidence to suggest that the grant of the application, contrary to the object of the Act, will increase the risk of alcohol abuse and the relevant risk.<sup>46</sup> However, as the evaluative function is an assessment of

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<sup>42</sup> *Medical Officer of Health (Wellington Region) v Lion Liquor Retail Limited* [2018] NZHC 1123

<sup>43</sup> *Medical Officer of Health (Wellington Region) v Lion Liquor Retail Limited*, above n 42 at [46]

<sup>44</sup> *Re Venus NZ Ltd*, above n 39 at [20]

<sup>45</sup> *The Medical Officer of Health (Wellington Region) v Lion Liquor Retail Limited*, above n 42 at [43] and [47]

<sup>46</sup> *Otara-Papatoetoe Local Board v John Enterprises Ltd* [2012] NZHC 1406, [2012] NZAR 717 at [31], *Auckland Medical Officer of Health v Birthcare Auckland Ltd, Auckland* [2015] NZHC 2689 at [50] and *Medical Officer of Health (Wellington Region) v Lion Liquor Retail Limited*, above n 42 at [60]

risk and it is the risk profile which is relevant, there is no requirement to link specific alcohol-related harm to specific off-licences, or as Clark J said in *Lion Liquor*, ‘for the premises to be at the centre of the harm’.<sup>47</sup>

.... As Clark J put it:<sup>48</sup>

The Act looks to minimise alcohol-related harm. Where there is an evidential foundation enabling a link to be drawn between a real risk of alcohol-related harm and the grant or renewal of a licence, the harm must be minimised not ignored or condoned.

The weight to be applied to each of the criteria in s 105 is a matter for the DLC or the Authority. As Gendall J said in *Christchurch Medical Officer of Health v J & G Vaudrey Ltd*,<sup>49</sup> the principles relating to the requirement to ‘have regard to’ can be summarised as these:

- (a) the phrase “have regard to” bears its ordinary meaning;
- (b) the decision maker must actively and thoughtfully consider the relevant matters;
- (c) to do so requires the decision maker to correctly understand the matters to which he or she is having regard;
- (d) the weight to be given to such matters is generally within the discretion of the decision maker;
- (e) there will be cases where the matter(s) to which the decision maker is required to have regard are so fundamental or critical that they assume an elevated mantle.

[95] It is in light of these principles that the Authority determines this appeal.

*Onus?*

[96] In relation to the question about onus, as we recently confirmed in *McCutcheon v Level Eighteen Ltd*,<sup>50</sup> there is no onus on an applicant to prove its suitability. While that may have been considered to be the position in the past, the correct position has been subsequently clarified by the higher courts.

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<sup>47</sup> *The Medical Officer of Health (Wellington Region) v Lion Liquor Retail Limited*, above n 42 at [64]

<sup>48</sup> *The Medical Officer of Health (Wellington Region) v Lion Liquor Retail Limited*, above n 42 at [67]

<sup>49</sup> *Christchurch Medical Officer of Health v J & G Vaudrey Ltd*, above n 40

<sup>50</sup> *McCutcheon v Level Eighteen Ltd* [2021] NZARLA 26 at [62]

[97] As already stated, in *Christchurch Medical Officer of Health v J & G Vaudrey Ltd*,<sup>51</sup> Gendall J said that the role of the DLC or the Authority in considering the relevant factors in the Act is an evaluative one, requiring the decision-maker to make a merits-based determination on the application.<sup>52</sup> In *Medical Officer of Health (Wellington Region) v Lion Liquor Retail Limited* citing Heath J in *Re Venus NZ Ltd*<sup>53</sup> and Moore J in *Auckland Medical Officer of Health v Birthcare Auckland Ltd*,<sup>54</sup> Clark J confirmed that the breadth of the decision-maker's functions suggest that the application of rules involving onus of proof may be inappropriate, and similarly there is no onus on the reporting agencies to prove the application should not be granted.<sup>55</sup> Subsequently, in *Lower Hutt Liquormart Ltd v Shady Lady Lighting Ltd*, (albeit in the context of an appeal brought under s 162 of the Act in relation to a decision of the Authority to decline a new off-licence) Churchman J said: "the case law clearly indicates that rules as to onus of proof will be of little relevance."<sup>56</sup>

[98] Given this, the Authority agrees with Two Brothers that the DLC erred in suggesting that there is an onus on Two Brothers to establish its suitability or that unlike an enforcement application, the onus is 'reversed'. This is no longer an accurate reflection of the law.

[99] The extent of this error, however, is not considered to be as fundamental as is suggested and there is nothing before the Authority that shows that it somehow infected or tainted the DLC's decision to the extent that is submitted. As we said in *Patels Superette 2000 Limited v Muir*,<sup>57</sup> while there is no onus of proof on an applicant, it is for an applicant to put its best foot forward if it expects a DLC to favour the application over significant opposition which is itself supported by evidence. In this case the focus for the DLC was on the breaches set out in the Improvement Notice which were acknowledged and accepted by Mr Singh. In so far as Two Brothers might wish to explain what it has done subsequently to rectify these breaches, that is a matter about which only the applicant is likely to have evidence.

[100] For present purposes, given that we agree that the DLC erred, the question that the Authority must ask itself is whether this is of such significance that the Authority ought to

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<sup>51</sup> *Christchurch Medical Officer of Health v J & G Vaudrey Ltd* above n 40

<sup>52</sup> *Christchurch Medical Officer of Health v J & G Vaudrey Ltd*, above n 40 at [54] –[56]

<sup>53</sup> *Re Venus NZ Ltd*, above n 39 at [60]

<sup>54</sup> *Auckland Medical Officer of Health v Birthcare Auckland Ltd*, above n 46 at [52]

<sup>55</sup> *Auckland Medical Officer of Health v Birthcare Auckland Ltd*, above n 46 at [113]

<sup>56</sup> *Lower Hutt Liquormart Ltd v Shady Lady Lighting Ltd*, above n 17 at [39]

<sup>57</sup> *Patels Superette 2000 Limited v Muir* [2019] NZARLA 75 at [228]

conclude, contrary to the findings of the DLC, that Two Brothers is suitable to hold a licence and that its systems, staff and training are in fact such that Two Brothers will comply with the law. That is, should the Authority reach a different conclusion in the only sense that matters and reverse the decision of the DLC thereby renewing the licence? The answer to this entails a consideration of the evidence before the DLC which follows.

*Ground 1: Did the DLC err in its evaluation of Two Brothers' suitability?*

[101] In *Re: Sheard*, Holland J said on appeal:<sup>58</sup>

The Authority in its decision refers to the fact that there is no special statutory meaning of “suitability”. That does not surprise me. Suitability is a word commonly used in the English language and is well understood. In an earlier decision the Authority has adopted the definition in the Concise Oxford dictionary as “well fitted for the purpose, appropriate”.

I do not find it helpful to refer to other decisions on different facts as to the meaning of that word. Where a statute uses an unambiguous and well understood word or expression and chooses not to enlarge on the ordinary definition of the word or expression by a special interpretation in the statute it is usually unwise for a Court to add to the ordinary meaning of the word as a general guide for all cases, as distinct from applying the word to the particular facts before it.

In this case the applicant has been declared unsuitable, primarily because of his previous convictions and record in managing licensed premises.

Obviously the applicant's past conduct will be very relevant to the consideration of suitability. The real issue is whether the evidence of that past conduct will indicate a lack of confidence that the applicant will properly carry out the obligations of a licensee. ...

[102] Subsequently, in *Nishchays' Enterprises Limited*, the Authority said:<sup>59</sup>

The applicant sought to establish its suitability by adopting a narrow assessment of the meaning of that term. This approach was criticised in *New Zealand Police v Casino Bar No 3 Ltd* (CIV 2012-485-1491; [2013] NZHC 44). The High Court rejected the proposition that it was the manner in which the business would be operated as the determinate factor. Rather, suitability is a broad concept and the assessment of it includes the character and reputation of the applicant, its previous operation of premises, its proposals as to how the premises will operate, its honesty, its previous convictions and other matters. It also includes matters raised

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<sup>58</sup> *Re: Sheard* [1996] 1 NZLR 751 at 758

<sup>59</sup> *Nishchays' Enterprises Limited* [2013] NZARLA PH 387 at [53] – [54]

in reports filed under s 33 of the Act and those reports may raise issues pertaining to the object of the Act as set out in s 4. Thus, whether or not the grant of the licence will result in the reduction or an increase in liquor abuse is a relevant issue.

*Casino Bar No 3 Ltd* did not specifically refer to the test for suitability contained in *Sheard* [1996] 1 NZLR 751 where Holland J said 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 go with the holding of a licence.” However, the judgement inferred that the test applied when the learned Judge referred with approval to Holland J's statement in *Sheard* : “Suitability is a relatively broad concept and, in the context of an assessment of an application under s 13 of the Act, it relates to the suitability of the applicant to be granted the privilege of an on-licence to dispense liquor”. Traditionally, that test has been interpreted as meaning whether or not an applicant will comply with the penal provisions of the Act. In fact, the test is much wider. To carry out the responsibilities that go with the holding of a licence includes whether or not liquor abuse issues are likely to arise. Thus, it includes the object of the Act as set out in s 4. The *Sheard* test is not simply about how a business is likely to operate in the future. It is dependent on an assessment of the more generalised factors referred to in the previous paragraph. It includes how a licensee will deal with liquor abuse issues that may arise from the establishment of the business. The usefulness of the *Sheard* test is that it gives a focus to the wider exercise contemplated in the *Casino Bar No 3 Ltd* decision by reminding one of the reason for the exercise.

[103] While *Two Brothers* is correct in saying that suitability is not to be considered in a vacuum, 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. Whether or not the grant of the licence will result in the reduction or an increase in liquor abuse is a relevant issue as are considerations about how a licensee will deal with liquor abuse issues that may arise from the establishment of the business, but suitability is not restricted to these matters.

[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.

[105] The evidence of there being employment breaches by Two Brothers is not disputed. The breaches are in fact accepted by Mr Singh.<sup>60</sup>

I accept our mistakes in payroll and calculating holidays and holiday pay, etc. I regret those mistakes, but that does not mean that we have not sold and supplied alcohol safely and responsibly.

[106] Before the DLC, however, Mr Singh said further:<sup>61</sup>

I accept that we made mistakes. Our administrative person used to manage our payroll, but there have been several mistakes discovered, I have now decided to change our payroll system to Smartpay for all my companies. The team at Smartpay will be doing the wages each week. Staff will have their own login to log into the smart payroll for time check-ins, leave records and apply for leave, etc.

I am also now more involved in checking timesheets and rosters regularly, logging into the payroll system to check everything is compliant each week. In past, I think I have relied more on our administration staff to manage that process.

I'll just add to that, that administration person has finished the job, because she is no longer required.

I am closely working with the Labour Inspector, and would like to continue to do so, to make sure the corrective action I put in place and that we do not get into this situation going forward.

[107] As at the date of the DLC hearing, Mr Singh acknowledged that all of the issues in the Improvement Notice had not yet been rectified.<sup>62</sup> As already noted, as at the date of this hearing, it remains the case that not all issues are rectified.

[108] While Mr Singh said the errors were the result of his misunderstanding of employment law,<sup>63</sup> in response to a question from the chair of the DLC, Mr Singh also accepted that it is his responsibility to make sure that the business is compliant and that it is his job, not that of his administrator, to know the law.<sup>64</sup> Mr Singh accepted that it is not fair to have his

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<sup>60</sup> DLC transcript at page 11

<sup>61</sup> DLC transcript at page 13

<sup>62</sup> DLC transcript at page 19

<sup>63</sup> DLC transcript at page 21

<sup>64</sup> DLC transcript at page 24

administrator expect to operate in a role when she does not know the rules, when he himself did not know or follow these rules.<sup>65</sup>

[109] Mr Singh also sought to put his failure to understand the law down to English being his second language<sup>66</sup> despite him saying in evidence that he has been in New Zealand since the age of 12 and that he had completed years 8 to 13 of schooling in New Zealand.<sup>67</sup> While the Authority is not in a position to assess Mr Singh's command of English, it defies credibility somewhat for Mr Singh to say that his failure to understand the law is in part due to English being his second language.

[110] In this regard too, as Mr Singh has stated, he has been an employer since 2007 when he owned a grocery store, and has operated licensed premises in Tokoroa and Rotorua since 2016.<sup>68</sup> Notwithstanding this, Mr Singh sought to put the lack of proper systems (to make sure staff are getting properly paid) down to his lack of experience of the industry and of employment relations.<sup>69</sup> Again, this is difficult to take at face value. Mr Singh is neither an inexperienced licensee nor an inexperienced employer.

[111] The evidence of the Labour Inspector is that the Improvement Notice arose out of a complaint that employees were not receiving their minimum wage because they were required to record incorrect hours on their timesheets. While there was insufficient evidence to substantiate these claims, the Labour Inspector said that other breaches were found relating to the Employment Relations Act, the Minimum Wage Act and the Holidays Act which resulted in the Improvement Notice being issued.<sup>70</sup>

[112] In terms of its investigation the Labour Inspector said: "We had a bit of a mission in regard to getting the information we wanted, I think due to a lot of the information not being available. Two Brothers failed to keep substantial employment records, so we got what records we could eventually".<sup>71</sup> In response to a question from the DLC, the Labour Inspector confirmed that Two Brothers was 'very' deficient in keeping proper records.<sup>72</sup>

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<sup>65</sup> DLC transcript at page 25

<sup>66</sup> DLC transcript at page 25

<sup>67</sup> DLC transcript at page 9

<sup>68</sup> DLC transcript at page 9

<sup>69</sup> DLC transcript at page 26

<sup>70</sup> DLC transcript at page 32

<sup>71</sup> DLC transcript at page 33

<sup>72</sup> DLC transcript at page 33

[113] The Labour Inspector confirmed that time and wage records that are required to be retained under the Holidays Act had not been kept ‘for many years’ and this means that calculating public holidays and employee entitlements is impossible. This in turn meant that minimum wage entitlements could not be calculated.<sup>73</sup>

[114] The Labour Inspector has confirmed that Mr Singh has been very good in getting what he thinks is being asked for but the Labour Inspector needs more than what Mr Singh has got. The Labour Inspector has acknowledged that Mr Singh has tried to clarify what is required and that he immediately acknowledged the breaches. Mr Singh has set out to amend his capabilities, which the Labour Inspector says ‘unfortunately are not fantastic’, and that he has been helpful during the whole process.<sup>74</sup> The Labour Inspector said:<sup>75</sup>

Mr Singh has produced information that he thought was what the improvement asked for. It wasn’t, so we had to get additional information. We are currently working through the process of getting Two Brothers to comply with the Improvement Notice, but due to the severe lack of records, and I mean to be absolutely honest, the ability of the employer to understand the requirements, it’s a long process and Two Brothers are currently not complying with the Improvement Notice, but they are working on it.

[115] In response to a question from the DLC, the Labour Inspector said that there are systemic faults in Two Brothers’ employment practises.<sup>76</sup> Further, Two Brothers was purposefully not rostering employees on holidays. Instead staff were on variable hours which meant that they would not have known what they would have been paid if they worked a holiday.<sup>77</sup>

[116] In response to a further question by the Licensing Inspector about whether there was deliberate deception, the Labour Inspector replied:<sup>78</sup>

There’s no evidence that it was deliberate. I retract that. There is no evidence that the recordkeeping issues and things like that were deliberate. It is acknowledged that rostering people off to not pay their public holidays, that was deliberate, but I believe in that context, it was a misunderstanding of how the Act worked.

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<sup>73</sup> DLC transcript at page 33

<sup>74</sup> DLC transcript at page 34

<sup>75</sup> DLC transcript at page 35

<sup>76</sup> DLC transcript at page 35

<sup>77</sup> DLC transcript at page 36 - 37

<sup>78</sup> DLC transcript at page 41



[117] The Labour Inspector confirmed that they looked at whether there was migrant exploitation occurring and concluded that the issues affected all staff regardless of their immigration status but clarified that “In this case, I believe what we see is not necessarily a case of migrant exploitation, just extremely bad employment practises.”<sup>79</sup>

[118] The lack of employment advice or assistance was also a concern and the Labour Inspector said:<sup>80</sup>

Mr Singh has shown that he doesn't understand employment law, and although he tries to comply, he doesn't understand what practises and processes need to be put in place for compliance to be achieved. It concerns me that even after November, December, January, four/five months, we're still working through very basic information of what should have been done a month into the improvement notice. It does concern me that the only thing that has been put in place is a new payroll system, where I think what would be a far better thing would be to have employment advice received, so that he does understand his obligations under all employment law and not just the Holidays Act.

[119] In relation to this, the Authority sought an update from the Labour Inspector prior to the hearing and was advised that since January 2021 Two Brothers has engaged an accountant to assist in complying with the steps in the Improvement Notice, has agreed on a methodology for the calculations of minimum entitlements. Two Brothers was given until 2 April 2021 as the due date for completing the steps required of it.<sup>81</sup> It is also accepted that Two Brothers has paid wage arrears to people who need to be paid.

[120] While the Authority agrees that steps are being taken to rectify the relevant matters, the due date for improvement has been extended now just shy of five months since the date first imposed in the Improvement Notice of 10 November 2020. This likely reflects the same issue, namely that Mr Singh doesn't understand what practices and processes need to be put in place for compliance to be achieved, although we have not had the benefit of any direct evidence on this delay. The Authority notes in this regard that the view of the Labour Inspector is that: “With the information we have, with the systems that Two Brothers Wholesale have in place, I don't believe that the Improvement Notice can be complied with. It comes down to what actions we will take cos of the non-compliance”.<sup>82</sup>

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<sup>79</sup> DLC transcript at page 38

<sup>80</sup> DLC transcript at page 39

<sup>81</sup> Email from Labour Inspectorate Manager Central, Callum McMillan, dated 24 March 2021

<sup>82</sup> DLC transcript at page 43

[121] There is also no doubt that Two Brothers has gained an advantage as a result of its practices. As the Labour Inspector aptly put it:<sup>83</sup>

Two Brothers have had major issues in relation to underpaying their employees, which means that if there is another liquor outlet in Tokoroa, they are playing by different rules. It just simply means that when you've got two employers who don't have to play by the same rules, then you don't have fair workplaces within the same environment.

It also means that employees can be disadvantaged by those same processes. If you have an employer who doesn't pay public holidays, they are financially disadvantaged. If there was an employer who doesn't provide breaks, then that employee's also disadvantaged within their own workplace. They are required to work longer hours. It means that they are more fatigued in the workplace. Health and safety becomes an issue.

Once again, health and safety is outside the jurisdiction of the Labour Inspectorate, but it also forms part of what we see to be a fairer workplace. The notion the employer didn't pay holiday pay, its just a signal of a larger scale employment practise that disadvantages the employees and can cause harm to them if its not rectified or it continues to occur.

[122] Mr Singh acknowledged that staff in Thirsty Liquor Tokoroa sometimes work 12 hour shifts, although sometimes this is also less namely between five and 10 hours.<sup>84</sup> In response to a question from Mrs Zeier, Mr Singh said that sometimes the premises close for 20 – 30 minutes but this is not every day and that sometimes staff go without a break, although he says that he's had a chat with them and they're happy to work through as the store is quiet between 10.00 am and 5.00 pm.<sup>85</sup> Whether or not staff are happy ignores the fact that there is a positive obligation on Two Brothers to provide breaks for its staff.

[123] In terms of formal training, Mr Singh said that he only started staff training, which he conducts himself, following a recommendation from the Licensing Inspector.<sup>86</sup> In response to a question from the DLC as to whether he was competent to provide this training, Mr Singh said: "I'm getting online all the time. I'm training myself as well so I can provide and pass it on."<sup>87</sup> When asked by the DLC whether Mr Singh had thought about employing an external

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<sup>83</sup> DLC transcript at page 40

<sup>84</sup> DLC transcript at page 15

<sup>85</sup> DLC transcript at page 16

<sup>86</sup> DLC transcript at page 17

<sup>87</sup> DLC transcript at page 30

trainer or a business adviser to help make sure he's running the business correctly, Mr Singh replied that he had not.<sup>88</sup>

[124] In terms of the type of products being sold on the premises, the evidence is that Mr Singh considered that Kingfisher beer which has 7.2% alcohol by volume, is "just like everything else in the store, there's quite a few other products that are 7.2%" and he sells it, including as single cans because "there's a demand for it".<sup>89</sup> The Authority considers that the DLC was right to be concerned about this especially given the vulnerability of Tokoroa. As this Authority said in *Shady Lady Lighting Ltd v Lower Hutt Liquormart Ltd*, the vulnerability of an area raises the threshold of suitability in terms of whether the grant of the licence will result in an increase in alcohol-related harm.<sup>90</sup> On appeal Churchman J found no error of law arising from the Authority's conclusion in this regard.<sup>91</sup>

[125] On the other hand, the evidence of Mr Jaspreet Singh is that:

- (a) he has appeared before the Hamilton DLC in 2014 and has been granted a new licence for Thirsty Liquor Bader Street in Hamilton although he resigned as a director of that company in 2015;<sup>92</sup>
- (b) he has not previously appeared before the Authority and has not failed a controlled purchase operation;<sup>93</sup>
- (c) he has duty managers at the store's point of sale and there is a point of sales system that prompts staff to ask customers for identification;<sup>94</sup>
- (d) he has now produced a formal staff training policy after reading the Licensing Inspectors' report;<sup>95</sup>
- (e) he has a general induction programme and an inhouse training programme;<sup>96</sup>

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<sup>88</sup> DLC transcript at page 30

<sup>89</sup> DLC transcript at page 28

<sup>90</sup> *Shady Lady Lighting Ltd v Lower Hutt Liquormart Ltd* [2018] NZARLA 198 at [127]

<sup>91</sup> *Lower Hutt Liquormart v Shady Lady Lighting Ltd*, above n 17 at [65]

<sup>92</sup> DLC transcript at pages 10 and 23

<sup>93</sup> DLC transcript at page 10

<sup>94</sup> DLC transcript at page 10

<sup>95</sup> DLC transcript at page 10

<sup>96</sup> DLC transcript at page 11

- (f) he has a host responsibility policy and uses the 'SCAB' Intoxication Assessment Tool developed by Hospitality New Zealand, the New Zealand Police, and the Health Promotion Agency;<sup>97</sup>
- (g) the store never sells alcohol cheaply or in competition with any other competitor in town and the store's prices are generally higher than other stores in the area;

[126] That Mr Singh was a director of a company that obtained a licence for premises seven years ago and for which he has had no involvement for six years, is of little relevance to this appeal.

[127] As regard the premises not having failed a controlled purchase operation which would have brought Two Brothers to the attention of the Authority, this is also of little assistance as there is no evidence before the Authority of what controlled purchase operations were in fact undertaken. While it is reasonable to assume there may have been a controlled purchase operation at some time in the past, the Authority has no evidence of this and therefore little can be read into this.

[128] The fact that Mr Singh has duty managers at the store's point of sale, and that there is a point of sales system that prompts staff to ask customers for identification is also of limited consequence. While this is recognised as a useful system to ensure compliance with the Act as regard sales to underage persons, it does not directly address the issues raised by the reporting agencies and the Labour Inspector.

[129] Balanced against this too is the acknowledgement that there have been no formal training systems in place until recently. While the Authority acknowledges that a staff training policy is now in place, the concern of the DLC is that Mr Singh said he only recently put this in place in response to the Licensing Inspector's report and recommendations.<sup>98</sup> This is reflected in the DLC decision where the DLC said:

As an appendix to his evidence Jaspreet Singh produced a blank Training Register/Record. It is one that is freely available from the Health Promotion Agency (HPA) website.

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<sup>97</sup> DLC transcript at page 11

<sup>98</sup> Singh BoE dated 13 January 2021 at [17]

When asked why the [training record] was blank, he conceded that it was only after a recent conversation he had had with the Licensing Inspector that they had decided to formally conduct and record staff training sessions.

We find this extraordinary for such a high-risk business of 5 years standing, to have not been conducting formal training sessions and recording staff training days and achievements.

Jaspreet Singh further advised that he, personally, had been conducting the training that they had allegedly been doing and he has not considered engaging a third party partner trainer to upskill his staff. He conceded that he had no formal skills as a trainer.

[130] The Authority is satisfied that this is a fair reflection of the evidence before the DLC and the Authority shares in the DLC's surprise that there has been no formal training in place to date.

[131] In relation to the store never selling alcohol cheaply or in competition with any other competitor in town, the Authority shares the observations of the Labour Inspector that because Two Brothers has been underpaying its employees, it will be operating under different conditions to other liquor outlets in Tokoroa. While there is no direct evidence of price wars occurring in Tokoroa, the lack of fair workplaces within the same environment is of itself a concern. In any event, Mr Singh has indicated he is willing to sell high alcohol beer as single cans where "there's a demand for it".<sup>99</sup> As already noted, the Authority considers that the DLC was right to be concerned about this given the vulnerability of Tokoroa. As the test is stated in *Nishchays*, the ultimate question for the Authority is whether or not we have confidence that Two Brothers will carry out the responsibilities that go with the holding of a licence including, but not limited to, whether or not liquor abuse issues are likely to arise. The short answer is that we do not have confidence in Two Brothers.

[132] Considering all of the evidence before the DLC, the Authority is not satisfied that the DLC erred in its evaluation of Two Brothers' suitability.

[133] On our own evaluation of the evidence, the Authority is also of the view that Two Brothers is not suitable to hold an off-licence. Suitability is a broad concept and the evidence raises significant concerns about the provision of minimum employment entitlements to staff,

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<sup>99</sup> DLC transcript at page 28

a lack of record keeping practices, an attempt to diffuse responsibility for these practices, a lack of formal training, and a willingness to sell products without recognition of the vulnerability of the community in which they are sold. All of these matters go to the matter of suitability.

[134] For these reasons this ground of appeal fails.

*Grounds 3, 4 & 6: Did the DLC err in finding that Two Brothers does not have appropriate systems, staff and training to comply with the law; in forming its opinion to refuse to renew the licence based on speculation; and by failing to balance the evidence before it?*

[135] Based on the evidence that we have already traversed, the Authority is not satisfied that the DLC erred in finding that Two Brothers does not have appropriate systems, staff and training to comply with the law. The Improvement Notice breaches have been accepted by Two Brothers. These matters go directly to the operation of the premises even if there is no direct evidence of alcohol-related harm.

[136] Based on our evaluation of the evidence the unavoidable conclusion that must be reached in respect of s 105(1)(j) is that Two Brothers does not have the necessary systems, staff and training to comply with the law.

[137] Even if overstated, the Authority does not accept that the DLC was wrong to speculate that: "...it is good luck, rather than good management, that Thirsty Liquor Tokoroa has not been caught out selling alcohol to a minor or an intoxicated person"<sup>100</sup>; or the high turnover is "yet another indicator of an unhappy workforce and work environment"<sup>101</sup>; and that "two workers declined to be interviewed, no doubt in fear of their ongoing status to live and work in New Zealand."<sup>102</sup>

[138] These are logical inferences that can be drawn from the evidence before the DLC. The evidence is of undeniably poor management practices. Mr Singh himself said that seven out of twelve staff listed in the Improvement Notice five or so months prior had since left the premises, as had the administrator.<sup>103</sup> Nor can it be forgotten that the very reason the employment

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<sup>100</sup> DLC decision at [72]

<sup>101</sup> DLC decision at [74]

<sup>102</sup> DLC decision at [91]

<sup>103</sup> DLC transcript at pages 14- 15

practices came to light was because of a complaint to the Labour Inspectorate on behalf of three employees. Given the nature of the issues raised, and the evidence that the employment issues affected all staff regardless of their immigration status, it is not a long bow to draw that staff might be unwilling to come forward out of concern of their personal positions.

[139] The Authority is not satisfied that the DLC misdirected itself in these respects.

*Ground 2: Did the DLC err in forming the view that there is a clear nexus between the employment standards breaches and the ability to sell and supply alcohol safely and responsibly?*

[140] The DLC concluded that there was a clear nexus between the employment standards breaches and the ability of the company, and its staff, to sell and supply alcohol safely and responsibly.<sup>104</sup> In doing so the DLC sought to distinguish this application from the Authority's decision in *Sharmas & Sons*.

[141] It is important to put *Sharmas & Sons* in context. The Authority agrees with Ms South for the respondents that the Authority did not say, as has been routinely misreported, that employment law breaches do not matter unless a nexus can be proved between the conduct and the object of the Act. The Authority is aware that this reading has been perpetuated by ill-informed reporting of the case.

[142] *Sharmas & Sons* was an enforcement application brought by the Auckland District Licensing Inspectorate. Secondly, what was alleged was a breach of s 105(1)(b) of the Act.

[143] Section 105(1)(b) is not an offence provision under the Act and could never found a s 280 enforcement application. Rather, s 105(1)(b), is a criterion to which a district licensing committee or the Authority must have regard when tasked with evaluating an application for a licence.

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<sup>104</sup> DLC decision at [85]

[144] As we recently pointed out in *McCutcheon v Level Eighteen Limited*,<sup>105</sup> on a plain reading there is no relevant standard described in s 105(1)(b) that is capable of being ‘proved’ to have been breached as would be required in an enforcement application.

[145] As we stated in *Sharmas & Sons*, given s 105(1)(b) is a criterion only relevant to the task of evaluating whether a licence ought to be granted in the first place, the enforcement application would have been dismissed at the outset had the respondents not accepted that they understood the applicant to have been relying on s 280(3)(b) of the Act as the ground of the application. We note that this was properly recognised by the DLC and by Ms Kaur in the following exchange:<sup>106</sup>

M CLEARWATER      Okay, also in Sharma and Son, the inspector erroneously relied on Section 105 as an enforcement criteria, which was wrong.

MS KAUR              Yeah.

M CLEARWATER      In fact, it should have been Section 280.

MS KAUR              Yes.

M CLEARWATER      It was by the good grace of Jonathan Wiles that allowed the matter to proceed.

MS KAUR              Yes.

M CLEARWATER      So, you would accept that that application was probably lacking in merit in itself.

MS KAUR              Yes.

[146] Read in its proper context, the applicant in *Sharmas & Sons* did not establish that the grounds of the application had been made out.

[147] As the Authority has previously said in *Rapira-Davies v Gogo Bar Ltd*,<sup>107</sup> and in subsequent enforcement applications, the applicant has the burden of proving the grounds of

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<sup>105</sup> *McCutcheon v Level Eighteen Limited*, above n 50 at [71]

<sup>106</sup> DLC transcript at pages 8 - 9

<sup>107</sup> *Rapira-Davies v Gogo Bar Ltd* [2016] NZARLA PH 283



the applications. The standard of proof is that described in *Triveni Puri*,<sup>108</sup> namely ‘on the balance of probabilities’ but in accordance with decisions of *Spring v King*,<sup>109</sup> and *Z v Dental Complaints Assessment Committee*,<sup>110</sup> the standard of proof is at the higher end of that standard. This was recently reinforced by the High Court in *TS & RK Bhullar Ltd v Commissioner of Police* where Lang J said:<sup>111</sup>

An application for the suspension of a liquor licence or manager's licence is undoubtedly penal in nature. Stronger evidence is therefore required before proof to the required standard is achieved. This led Woolford J to observe in *General Distributors Ltd v De'Ath* that the standard of proof in such cases must be very close to that of a criminal prosecution.

[148] *Sharmas & Sons* is not authority for the general proposition that a breach of the requirements to keep accurate wage and time records or holiday and leave records, or to pay the minimum wage (as was determined to be the case by the Employment Relations Authority in that case) can never be relevant to an assessment of suitability. In fact the Authority said the opposite and accepted that a breach of employment legislation may be relevant to the suitability of a licensee.<sup>112</sup> While with hindsight this may have been better expressed, the Authority said that the applicant had not demonstrated how the employment breaches by the respondents would lead to the kind of risk which the Act seeks to minimise.

[149] Moreover, in a licensing application such as the one presently before the Authority, s 131(1)(a) expressly requires the Authority to have regard to ‘the suitability of the applicant’ (s 105(1)(b)) and ‘whether the applicant has appropriate systems staff and training to comply with the law’ (s 105(1)(j)). As already noted, the principles relating to the requirement to ‘have regard to’ are such that the decision-maker must actively and thoughtfully consider the relevant matters. Unlike in an enforcement application, the weight to be given to such matters is generally within the discretion of the decision-maker and there will be cases where the matter to which the decision maker is required to have regard is so fundamental or critical that it can assume an elevated mantle.<sup>113</sup>

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<sup>108</sup> *Triveni Puri* [2012] NZHC 2913

<sup>109</sup> *Spring v King* NZLLA 1414/93

<sup>110</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

<sup>111</sup> *TS & RK Bhullar Ltd v Commissioner of Police* [2019] NZHC 3397 at [27] – [28]

<sup>112</sup> *Wilkinson v Sharmas & Sons*, above n 11 at [21]

<sup>113</sup> *Christchurch Medical Officer of Health v J & G Vaudrey Ltd*, above n 40

[150] In short, the application in *Sharmas & Sons* as Ms South has pointed out, and the DLC recognised, was ill-framed. That decision is therefore limited to its facts and is not of wider precedent value especially in relation to licensing applications which involve notions of evaluation rather than notions of proof.

[151] We find no error on the part of the DLC in distinguishing *Sharmas & Sons* as it did.

[152] Moreover, the Authority agrees with Ms South that as the lack of appropriate systems to ensure staff are properly trained, that staff are required to work long hours without breaks on some days, and the fact that Mr Singh was willing to sell high alcohol beers on a single serve basis in a vulnerable community, establish a causal nexus between the evidence to suggest that the grant of the application, contrary to the object of the Act, will increase the risk of alcohol abuse and the relevant risk.<sup>114</sup>

[153] The Authority considers that the employment breaches are such that both the appellant's suitability (s 105(1)(b)) and its systems, staff and training (s 105(1)(j)) assume an elevated mantle.

[154] For these reasons these grounds of appeal must also fail.

*Ground 5: Did the DLC err by failing to have regard to the manner in which Two Brothers has sold, displayed, advertised, and promoted alcohol including at other premises?*

[155] The short answer is 'no'. The exchange between the DLC and Mr Singh about the products sold (including *Kingfisher* beer) goes directly to this criterion in s 105(1)(j).<sup>115</sup>

[156] Moreover the manner in which Two Brothers has sold, displayed, advertised, and promoted alcohol including at other premises did not feature in Ms Kaur's submissions before the DLC other than to say that there have been no reported issues or concerns about the way in which Mr Singh has sold and supplied alcohol in the premises.<sup>116</sup> That these were of greater significance to Two Brothers' application is not borne out by counsel's submissions. Instead,

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<sup>114</sup> *Otara-Papatoetoe Local Board v John Enterprises Ltd*, above n 46 at [31]; *Auckland Medical Officer of Health v Birthcare Auckland Ltd*, above n 46 at [50] and *Medical Officer of Health (Wellington Region) v Lion Liquor Retail Limited*, above n 42 at [60]

<sup>115</sup> DLC transcript at page 29

<sup>116</sup> DLC transcript at page 5

as Ms Kaur put it in her opening submissions before the DLC, the key issue is about the suitability of the applicant based on non-compliance with minimum employment standards.<sup>117</sup>

*Ground 7: Did the DLC use the licensing process to punish Two Brothers over alleged employment breaches that are more properly with the jurisdiction of the Employment Relations Authority?*

[157] As Clark J reiterated in *Medical Officer of Health v Lion Liquor Retail Limited*, there is no presumption that an application for a licence will be granted or that a licence will be renewed. This is made reasonably plain by the fact the approach to renewal is virtually the same as the process engaged by an application for an initial licence. The Authority, after having regard to the criteria for renewal in s 131 is then to step back and consider whether there is any evidence indicating that granting the application will be contrary to the statutory object in s 4.<sup>118</sup>

[158] It follows then that there is nothing punitive about a decision not to renew a licence. Declining the renewal of a licence is precisely what the Parliament envisaged ought to be done by a decision-maker when that decision-maker considers, after having regard to the criteria in s 131, that the grant of the application will be contrary to the object of the Act.

#### *Determination of Application*

[159] As confirmed in *Rainger v General Distributors Limited* Davison J, on appeal the Authority is required to make its own assessment of the merits of the application.

[160] Having regard to the criteria in s 131 (and s 105 as relevant), we note that there is no relevant local alcohol policy. No issues have been raised with respect to the days on which and the hours during which the applicant proposes to sell alcohol (s 105(1)(d)), the design and layout of the premises (s 105(1)(e)), or the sale of other goods or services (s 105(1)(f) and (g)). Section 105(1)(k) (i.e. any matters dealt with in any report from a reporting agency) mirrors s 131(1)(d) and there are no matters of concern beyond those issues already touched upon. The amenity and good order of the locality (s 131(1)(b)) is not in issue other than to the extent that

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<sup>117</sup> DLC transcript at page 5

<sup>118</sup> *Medical Officer of Health v Lion Liquor Retail Limited*, above n 42 at [46]

Tokoroa is a vulnerable community, a matter to which we have already referred. There are no issues of noise, nuisance or vandalism or other amenity and good order concerns raised in this appeal.

[161] The two key issues are the suitability of the applicant (s 105(1)(b)) and Two Brothers' systems, staff and training (s 105(1)(j)) which we have already discussed.

[162] For the reasons already stated, we find that Two Brothers is unsuitable to hold a licence and that it lacks appropriate systems, staff, and training to comply with the law.

[163] Standing back, the Authority is satisfied that the grant of the application, contrary to the object of the Act, will increase the risk of alcohol-related harm by virtue of these matters.

## **Summary**

[164] By way of summary in relation to each ground of appeal:

*Ground 1: Did the DLC err in its evaluation of Two Brothers' suitability?*

No

*Ground 2: Did the DLC err in forming the view that there is a clear nexus between the employment standards breaches and the ability to sell and supply alcohol safely and responsibly?*

No

*Grounds 3, 4 & 6: Did the DLC err in finding that Two Brothers does not have appropriate systems, staff and training to comply with the law; in forming its opinion to refuse to renew the licence based on speculation; and by failing to balance the evidence before it?*

No

*Ground 5: Did the DLC err by failing to have regard to the manner in which Two Brothers has sold, displayed, advertised, and promoted alcohol including at other premises?*

No

*Ground 7: Did the DLC use the licensing process to punish Two Brothers over alleged employment breaches that are more properly within the jurisdiction of the Employment Relations Authority?*

No

## **Result**

[165] For the reasons stated, the appeal is dismissed.

[166] Pursuant to s 158 of the Act, the decision of the DLC is confirmed.

[167] Having confirmed the decision of the DLC such that the licence is refused, pursuant to s 135(2) of the Act the Authority orders that the licence shall expire 30 days from the date of this decision.

K D Kelly  
District Court Judge  
Chairperson, Alcohol Regulatory and Licensing Authority