IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.No.1248/84

1452

BETWEEN FALLWELL of Takapuna, Electrician

APPELLANT

AND THE MINISTRY OF TRANSPORT

RESPONDENT

Hearing: 1 November, 1984

Counsel: N. Browne for Appellant
D. Jones for Respondent

Judgment: 1 November 1984

ORAL JUDGMENT OF VAUTIER, J.

The appellant Fallwell was on 14 June, 1984 convicted on a charge of driving a motor vehicle at a speed which, having regard to all the circumstances, might have been dangerous to the public. In respect of this conviction he was fined and, in addition, he was disqualified from holding or obtaining a motor driver's licence for a period of eight months. On 27 July, 1984 he made application in terms of s.38 of the Transport Act 1962 seeking an order that he be granted a

limited driving licence in terms of that statutory provision. The application was heard on 2 August, 1984 and was refused by District Court Judge N.L. Bradford, Esq., in the District Court at North Shore. It is in respect of that refusal that this appeal is brought.

It is mentioned that at the hearing the application was amended to exclude any reference to the limited licence sought extending to permit the applicant to drive to Rotorua for the purposes of attending to a property owned by him there. The facts presented before the District Court indicated, as the Judge mentions in his decision that the applicant had assets well in excess of $1,000,000 and was able to refer to only one mortgage of $200,000. There was also reference to his having an income of $28,000 a year from his business as an electrician and from his property-owned activities. He spoke of the need to attend constantly to these properties as he carried out all the maintenance of the properties himself. One of the properties in question consisted of a building comprising eight residential flats.

Reference was made to the previous decisions in which this statutory provision and its pre-decessor have been considered. In Dalton v. Auckland City; Porter v. Auckland City [1971] NZLR 548, Henry, J. adopting a dictum of Lord Denning construed the words "undue hardship" in this context as meaning excessive or greater

hardship than the circumstances warranted. At that time the grant of the limited licence could be made upon the basis of undue hardship to the applicant. Now, the situation is that the Court must be satisfied that the order of disqualification has resulted or will result in extreme hardship to the applicant whether in relation to employment or otherwise. The Court is further authorised to grant the limited licence only to the least extent that is necessary to alleviate the hardship found.

In addition there has been introduced the requirement that the limited licence may not be applied for before a period of one month has elapsed from the imposing of the disqualification. It has, therefore, been made very clear by the Legislature that it has been considered appropriate to impose more stringent conditions upon the granting of these limited licences.

In the next case referred to, that of Hoani v. Napier City Council M.83/78 Napier Registry, judgment 16 August, 1978 White, J., the Judge was applying the test as it was put in the Dalton case but in the next decision referred, Barbera v. Auckland City Council, M.393/80 Auckland Registry, judgment 13 May, 1980 Barker, J. was concerned that the phraseology of the section as it now appears and on p.5 of his decision he said this:

> "...every case must depend on its own facts and there are no guidelines as to the meaning of the word 'extreme'..."

He went on to say:

> "The onus of proof is clearly on him (the applicant) ... Clearly, 'extreme' means something more than 'undue'."

Mr Browne in support of the appeal submits, and I agree, that it is relevant and proper in view of the fact that the Legislature has drawn a distinction in the section as now framed between extreme hardship and undue hardship to consider the ordinary English meaning of the words used. In the Concise Oxford Dictionary, as Mr Browne mentioned, extreme is given the meanings, "furtherest or very far advanced in any direction; utmost; uttermost; going to great lengths". The submission here is that the appellant would suffer economic loss by the continuance of the disqualification through his inability to take the equipment necessary when he was attending to carry out electrical repair jobs and to do repair and service work on his properties if he was compelled to depend on public transport. It is also submitted that it was relevant to take into account that the appellant claimed in his evidence that he could not afford to employ other tradesmen to carry on the electrical business or the repair and maintenance work on the flats or a driver to enable him to be transported to these businesses. It was also submitted that there was evidence to be considered amounting to undue hardship to the appellant's wife and his mother through their having to drive him from place to place for these purposes.

The further submission is that the Judge in the District Court paid too much attention to the fact that the appellant had such extensive capital assets and insufficient attention to his income position.

I have considered the evidence myself and am quite unable to come to the conclusion that the Judge reached a wrong conclusion on the aspects of fact involved. There is certainly no indication that he misdirected himself as to what was meant in the section by the words "extreme hardship" or "undue hardship".

It is to be noted that in the case of Hoani referred to, White, J. said:

> "... in considering undue hardship it has not been shown that the decision was wrong in the sense that the hardship was excessive simply because he could not drive and his weekly pay was reduced. Loss of pay might well be offset by spending less per week in the bar."

Admittedly in that case the Judge did in the end conclude that while there was no undue hardship to the applicant himself there could be said to be undue hardship to his wife and family in that there was demonstrated a loss of some $1,500 over the period of 12 months would result from the change of form of employment which the appellant would have to undergo.

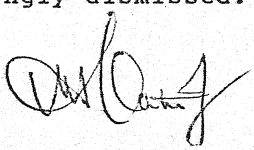
In the next decision however, that of Barbera, the Judge had, I note, to consider very much the same kind of situation as was presented to the District Court in the present case. This is illustrated by what is said in the passage on p.6 of the judgment:

> "In the present case, I consider that the learned Magistrate was quite correct in holding that the appellant has not proved any undue hardship to either his wife or the company. I do not doubt that there will be some financial loss to the company if a courier or delivery service is employed, or to the appellant if he has to use public carriers for deliveries to his pizza parlour, or to the appellant and his wife if a real estate agent is employed to collect rent or, alternatively, if chauffeurs or taxis are employed at the expense of the business in the rent-collecting exercise. Alternatively, there could be inconvenience to the wife if she, herself, acts as chauffeur to the appellant. However, such inconvenience does not amount to undue hrdship, let alone extreme hardship."

The Judge there took the view that the mere fact that some financial loss might have to be incurred by the employment of courier or delivery services or the use of public carriers for the deliveries or taxis in a rent collecting business could not in itself be regarded as evidencing a state of extreme hardship or even undue hardship. That is precisely the situation in my view in the present case. At the time of the application there was only some six and a half months of the disqualification still to run. On the evidence as a whole it is quite clear to me that the number of occasions on which this appellant would have been obliged to use taxis or something by way of the use

of carriers would be comparatively small. He speaks of doing all the work on the flats and other properties himself. If he was in fact doing that then of course there would be only his own movement from place to place to be taken into account and the small amount of equipment which one man could deal with in this way. I can see no basis upon which I could conclude that the Judge reached a wrong conclusion as to the factual questions involved.

The appeal is accordingly dismissed.



SOLICITORS

Kensington Haynes & White, Auckland for Appellant.

Meredith Connell & Co. Auckland, for Respondent