

**IN THE HIGH COURT OF NEW ZEALAND  
TIMARU REGISTRY**

**CIV-2008-476-000599**

BETWEEN THE MILL LIQUORSAVE LIMITED  
Appellant

AND ANNETTE ELIZABETH DAVIDSON  
Respondent

Hearing: 7 October 2009

Appearances: C P Brosnahan for Appellant  
C A O'Connor for Respondent

Judgment: 12 October 2009

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**RESERVED JUDGMENT OF HON. JUSTICE FRENCH**

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**Introduction**

[1] On 3 May 2008, an employee of The Mill Liquorsave Limited sold alcohol at the company's Timaru store to a person aged under 18 years. The sale was in breach of s 155(1) of the Sale of Liquor Act 1989.

[2] The breach prompted the local District Licensing Agency to apply to the Liquor Licensing Authority for an order under s 132 suspending the store's off-licence.

[3] The relevant parts of s 132 provide:

- (3) The grounds on which an application for an order under this section may be made are as follows:

- (a) That the licensed premises have been conducted in breach of any of the provisions of this Act or of any conditions of the licence or otherwise in an improper manner:

...

- (6) If the Licensing Authority is satisfied that any of the grounds specified in subsection (3) of this section is established and that it is desirable to make an order under this section, it may, by order,—

...

- (c) Suspend the licence for such period not exceeding 6 months as the Licensing Authority thinks fit; ...

[4] After a hearing, the Authority found the breach proved and ordered the licence to be suspended for 24 hours.

[5] Mill Liquorsave has always acknowledged there was a breach, but appeals the decision to suspend the licence.

[6] The key issue raised by the appeal is whether the Authority's exercise of its discretion under s 132(6)(c) was consistent with the approach it has taken in other cases involving sales by employees.

### **Factual background**

[7] Mill Liquorsave operates some 41 stores nationwide, employing approximately 400 employees. As noted by the Authority, the company has a reputation for its overall corporate professionalism and emphasis on training standards.

[8] On the weekend of 3 May 2008 the police, in conjunction with the Timaru District Licensing Agency, carried out a controlled purchase operation in Timaru.

[9] As part of that operation, two female volunteers both aged 17 were sent to the Timaru Mill Liquorsave store to buy alcohol.

[10] On entering the store, one of the volunteers Jamie selected a 4-pack of RTDs. There were two staff members present. The volunteers engaged in a discussion with the staff about a display, and then Jamie purchased the RTDs.

[11] The salesperson did not ask about age, and made no request for identification.

[12] The other staff member present, who was standing nearby at the time of the transaction, was a duty manager.

[13] At the hearing before the Authority, evidence was given by the company of its extensive training and monitoring regime.

[14] Its systems include a reminder message which automatically appears on the computer screen whenever employees first log on. The employee must agree with the message before they can operate the till. Included in the message is a reminder of the responsibility to identify all persons under the age of 25 years without exception. If a sale is made, there is another prompt asking whether the purchaser is over 25. If the employee presses the 'Yes' key, then the transaction can proceed. If the answer is 'No' however, then a further prompt requires the date of birth of the customer to be entered before the computer will allow the transaction to proceed any further.

[15] There was also evidence the salesperson in question had been trained in the systems and was aware that failing to ask for identification for people under the age of 25 years was a dismissible offence.

[16] When spoken to by the District Licensing Agency Inspector, the salesperson stated that at the time of the sale she thought the two volunteers were about the age of her daughter, who is 23.

[17] Her explanation for not making any enquiries of the customer was that she was "distracted".

[18] In submitting there should be no penalty, Mill Liquorsave relied on a previous decision where an absence of fault on its part had resulted in a decision not

to impose suspension: see *James Robin Dalziell-Kernohan v The Mill Liquorsave Limited* LLA PH 35/2007.

[19] The Authority, however, held the *Kernohan* decision was distinguishable, saying:

[23] We took the view in that case that the sale was an exceptional event that no amount of training or preparation could prevent. The staff member had followed the company's systems and training and had appropriately asked for details of identification. In those circumstances, we took the view that it would be undesirable if not unreasonable to make a suspension order against the licensee, and we declined to do so.

[24] In this case there are a number of factors which, with the benefit of hindsight, might well have prevented the sale from occurring. The salesperson was clearly distracted, and there were a variety of reasons for this. One of those reasons was the presence of the duty manager at the point of sale, as well as the duty manager's interaction with the non-purchasing volunteer. We accept that the company has been disadvantaged by its inability to call the salesperson as a witness. On the other hand it is quite clear is [sic] that the salesperson was not off on a frolic of her own. If that had happened, or if there had been a deliberate attempt to sabotage the company's policies and systems, then clearly a suspension order might well be unreasonable and/or undesirable.

...

[27] In our view the interaction with the members of staff should have given both the salesperson and the duty manager a much better opportunity to gauge the age of the volunteer. Furthermore, we would have thought that the type of product being purchased should have been an instant giveaway as to the youthfulness of the purchaser. We noted that in the short time that she had been working, the salesperson had conducted more sales but entered fewer dates of birth than any other employee. This information may not have been available to the company at the time but the signs must have been there. We accept that employees are fallible and can have moments when they lose focus. On the other hand, it was not that difficult to by-pass the prompt system. In this licensing climate the company cannot completely escape responsibility.

[28] In the decision of *Christchurch District Licensing Agency Inspector v Karara Holdings Limited* [2003] NZAR 752, the Court of Appeal stated as follows:

*“This indicates that the function of s.132 is to enable the Licensing Authority to enforce sound management of licensed premises. Its particular role is to enable the Licensing Authority to secure management compliance by licensees, through enforcement steps, in those cases brought before it by the Police or District Licensing Agencies where it appears there have been breaches in licensing standards which are reflected in the grounds for applying for and making orders under s.132.”*

[29] In this case we believe that a suspension of the licence will help secure even better management compliance by this and other licensees. In summary, we do not agree that the licensee has been able to show that it was without fault to the extent of being relieved of any sanction...

[30] In our view selling liquor to minors is one of the worst forms of encouragement of liquor abuse. We accept that in a case such as this there would be no such abuse. Nevertheless it is now nearly nine years since the purchasing age was lowered from 20 to 18. Pursuant to s.4(2) of the Act, we are required to exercise our jurisdiction, powers and discretions in the manner that is most likely to promote the object of the Act. That object is as follows:

**The object of the Act is to establish a reasonable system of control over the sale and supply of liquor to the public with the aim of contributing to the reduction of liquor abuse, so far as that can be achieved by legislative means.**

[31] Normally speaking we would order a suspension of the licence on the day that the sale took place. But in a case such as this where the company has shown that it is a conscientious operator some leeway is appropriate.

[32] For the reasons we have attempted to articulate, we make the following orders:

- [a] Off-licence number 064/OFF/7/2004, issued to The Mill Liquorsave Limited is suspended for 24 hours from 8.00 am on Thursday 4 December 2008 to 8.00 am on Friday 5 December 2008...

[20] As regards the Authority's reference in paragraph [31] to the day the sale took place, the day in question was a Saturday. The decision to impose the suspension on a Thursday rather than a Saturday was obviously considered as having less impact on revenue.

[21] The implementation of the suspension order has been stayed pending the outcome of this appeal.

### **Grounds of appeal**

[22] Mill Liquorsave accepts the Authority does have the power to suspend a licence because of the wrongful actions of the licensee's employees.

[23] However what is submitted is that in the circumstances of this case, the Authority was wrong to exercise that power because:

- i) the breach of the Act was the result of an employee acting contrary to specific direction and training, the employer having done everything it was lawfully required to do to ensure compliance by its employee.
- ii) the Authority did not nominate any fault on the part of the company in terms of its training, supervision or implementation of its training systems, and further did not point to any fault on the part of Mill Liquorsave which in any way led to the breach by the employee so as to justify a suspension.
- iii) the Authority has effectively treated the offence as one of absolute liability rather than applying the strict liability absence of fault test in determining the appropriateness of a suspension.

## **Discussion**

[24] Although the grounds of appeal were formulated in terms of there being a defence, the correct legal position is that the Authority has a discretion whether or not to impose a suspension order.

[25] On the face of it, the discretion conferred by s132(6) is unfettered.

[26] However, the Authority must exercise its discretion consistently and there is no doubt the Authority has recognised in other decisions that notwithstanding the fact a breach has occurred, it may nevertheless be inappropriate for a licensee to be sanctioned if it can be shown all efforts were made by the licensee to prevent such a breach from occurring: see *Dalziell-Kernohan and Sheehan & Anor v Waitakere Licensing Trust & Anor* LLA PH 1501-5/2008.

[27] The key issue is therefore whether the Authority was right to say as it did “We do not agree that the licensee has been able to show that it was without fault to the extent of being relieved of any sanction.”

[28] Counsel for Mill Liquorsave Mr Brosnahan submits there was nothing more Mill Liquorsave could have done.

[29] Counsel for the District Licensing Agency, Mr O’Connor, however submits that there is an important distinction between this case and other decisions where suspension has not been imposed – namely that in the other cases the employees expressly asked for identification and then either deliberately inserted false details or inadvertently inserted wrong details by, for example, transposing the numbers.

[30] In this case, however, there was no enquiry about age whatsoever, which Mr O’Connor argues demonstrates a flaw in the training either in terms of the ability to assess underage purchasers or the proper operation of the appellant’s systems, monitoring or the effectiveness of the computer system.

[31] Mr O’Connor acknowledged the force of a counter-argument that because in this case the salesperson had admitted to thinking at the time of the sale the volunteers were 23, her pressing of the wrong button and then proceeding with the sale because she was distracted could also be described as inadvertent, or even deliberate.

[32] However, he maintained there was still a distinction between the cases on the basis that an overt express enquiry about age does mean the employee is at least creating the impression they are carrying out the employer’s instructions to the letter, which in turn bears on the rigour of the monitoring and hence exculpates the employer.

[33] The distinction between this case and the other cases is in my view a reasonably fine one.

[34] However, ultimately it is a question of degree. All the cases to a greater or lesser extent involve an element of human error. I agree with the Authority that the sale in this case could not be described as an exceptional event.

[35] High standards are demanded of licensees for good reason. As the Authority noted, the sale of liquor to minors is one of the worst forms of encouragement of liquor abuse. Underage drinking is generally recognised as a significant social problem in this country and general deterrence is an important factor for the Authority to take into account in the exercise of its discretion.

[36] In my view, this case turns on the fact that the Authority did identify shortcomings on the part of the employer, most notably that this particular salesperson had by far the lowest percentage of 'dates of birth' entered in the computer system than any other employee, despite putting through the second highest volume of sales. As the Authority put it, "The signs must have been there". There was also evidence showing it would have been possible for the employer to access the necessary information about her practices from its computer system.

[37] The Authority also identifies an issue about the ease with which the salesperson was able to bypass the system and (implicitly) the adequacy of training regarding the significance of product selection.

[38] A further point made by Mr Brosnahan was that whereas in a previous case (*Thorndon Supermarket v Feast* PH 576-577/03) the Authority had been critical of the duty manager being absent, in this case they found fault with the fact the duty manager was present. I do not consider, however, that there is any necessary inconsistency. In this case it was not so much the fact of the duty manager's presence in itself that was said to be distracting, it was her close proximity and more importantly what she was doing and saying.

[39] In my view, the decision the Authority reached about penalty was one it was entitled to reach on the information before it, and it is one I, too, would have reached on the same material having regard to the objectives of the Act and the need for general deterrence.



[40] I also recognise, on the other hand, as did the Authority, that Mill Liquorsave is a particularly reputable company and that the degree of culpability was low. The Authority has appropriately reflected those facts in imposing what was a nominal suspension.

### **Outcome of hearing**

[41] I find that the Authority has not erred in the exercise of its discretion.

[42] The appeal is accordingly dismissed.

[43] Counsel requested a lead-in time of a month before the suspension order should be activated.

[44] I accordingly order that the suspension order as made by the Authority is varied so that the suspension is to operate for 24 hours from 8 a.m. on Thursday 12 November 2009 to 8 a.m. on Friday 13 November 2009.

[45] As regards costs, my expectation is that counsel will be able to reach agreement. If not and an order is required, then I direct the respondent to file its submissions first, followed by submissions within ten working days from the appellant.

*Solicitors:*  
*Roger Crowley, Wanganui*  
*(Counsel: C P Brosnahan, Wanganui)*  
*Gresson Dorman & Co, Timaru*