

MAGISTRATES COURTS OF QUEENSLAND

CITATION: *Police v Hand* [2009] QMC 17

PARTIES: **POLICE**
(prosecution)

v

ROBERT WAYNE HAND
(defendant)

FILE NO/S: MAG137591/09(0)

DIVISION: Magistrates Courts

PROCEEDING: Application for restricted licence

ORIGINATING COURT: Magistrates Court at Tully

DELIVERED ON: 10 September 2009

DELIVERED AT: Tully

HEARING DATE: 10 September 2009

MAGISTRATE: Brassington J

ORDER: **I direct that the applicant be issued with a restricted licence with the conditions as attached hereto.**

CATCHWORDS: TRAFFIC LAW – LICENCING OF DRIVERS – restricted licence – meaning of earning a livelihood
Transport Operations (Road Use Management) Act 1995, s 87

COUNSEL: A Lee for defendant

SOLICITORS: Prosecution appeared on own behalf
Lee & Co for defendant

- [1] Conviction for an offence of drink driving under s 79(2) requires the disqualification of a person from holding and obtaining a Queensland driver's license for minimum periods of time. Given the facts of the matter a person may be disqualified for a longer period.
- [2] Disqualification of a driver's license may have very harsh consequences for an individual. Section 87 of the *Transport Operations (Road Use Management Act) 1995* ameliorates to some extent the harsh consequences of such an order by providing for a "restricted license" in certain, limited, circumstances. These circumstances include that:
1. The applicant is the holder of a Queensland driver's license that would, but for this disqualification be valid;

2. That there is no disqualifying offence, suspension or disqualification in the previous five years;
 3. The applicant satisfies the Court that:
 - (a) the applicant is a fit and proper person to hold a restricted licence, having regard to the safety of other road users and the public generally; and
 - (b) a refusal would cause extreme hardship to the applicant or the applicant's family by depriving the applicant of the applicant's means of earning the applicant's livelihood;
 4. The subject offence did not occur while the applicant was engaged in an activity directly connected with the applicant's means of earning the applicant's livelihood.
- [3] Mr. Robert Hand has applied for a restricted license. The application and the subject charge have been adjourned for a consideration of the issue of whether he is eligible to apply for a restricted license. There is no issue that Mr. Hand meets all of the criteria in s 87 for a valid application. The only issue is am I satisfied of those matters in s 87(5): is he a fit and proper person to hold a restricted license and whether refusal would cause extreme hardship by depriving him of the means of earning his livelihood.
- [4] The police prosecutor makes no submission the applicant is not a fit and proper person to hold a driver's license. The applicant is 59 years of age and has only two minor speeding offences in 2000 and 2004. The circumstances of this offence were he had made, after going to a 'send off' of a friend at licensed premises, an ill considered decision to drive home as the person he cared for might need assistance the next day. His interception by police was not because of any observed dangerous or negligent driving but simply a routine check to conduct a random breath test. His blood alcohol concentration was 0.133 as set out in the breath analysis certificate. The reading is high but weighed against the other aspects of the matter, his previous good history and the chastening effects of his conviction, and Court appearance, the reading alone would not lead me to conclude he is not a fit and proper person to hold a restricted license having regard to the safety of other road users and the public generally. Given the previous driving behaviour of the applicant I consider there is very little chance that he will offend in a similar way again.
- [5] The only real issue is the second limb of the test in s 87(5) and whether a refusal would deprive the applicant of the means of earning his livelihood.
- [6] The applicant is not a wage earner. Nor is the applicant 'self employed'. Rather he receives a Disability Support Pension supplemented by a Carer Allowance for the care he provides to Mr Robert McKenzie who is not a family member and who does not reside with the applicant. Centrelink correspondence exhibited in an affidavit describes how the applicant qualifies for the allowance:

To qualify under Section s 954A the care receiver must be providing care and attention that address special care needs that the care receiver is assessed as having under the Adult Disability Assessment tool. For example, assistance with bodily functions on/or to sustain life.

Also, the care and attention must be received by the care receiver on a daily basis, for a total of 20 hours per week and the care and attention

must be received by the care receiver from the carer alone. The care and attention must be received in a private home that is the residence of the care receiver or the carer but not a residence of both care receiver and carer.

Special care needs include assistance with bodily functions and care to sustain life. Assistance with bodily functions includes the following: mobility – which may include assisting the person to transfer in and out of bed, moving around the home, negotiating stairs and positioning in their chair or bed.

Personal hygiene which includes help with dressing and undressing, bathing, assistance with using toilet, grooming. Eating and drinking which may include cutting up food, feeding the person their food and drink and supervising to ensure they consume the food. Communication which may include signing or interpreting. Treatment which may include helping the person take medication, changing dressings, operating and monitoring medical equipment. Care to sustain life includes supervision to prevent wandering, removing the person from harm and preventing the person from injuring themselves.

- [7] I am satisfied that extreme hardship can be proved by the applicant by diminution of income. The finding is dependent on the relevant circumstances (see *Registrar of Motor Vehicles (Tasmania) v Eeles* (1984)1 MVR 161). Loss of the Carer's allowance would mean the applicant would lose a payment of \$105 a fortnight. This does not seem a large amount but the applicant does not have a high income. He deposes that his outgoings are \$735 per fortnight. Without his Carer's allowance he would not be able to meet his outgoings. His life style is frugal and the decrease in income would cause him extreme hardship as his disposable income is so limited.
- [8] Loss of the Carer's allowance is inevitable without a license because, as the applicant deposed in sworn testimony
- [9] Therefore, I am satisfied by the applicant of the issue of extreme hardship to the requisite standard.
- [10] The only real issue then is whether the loss of the Carer's allowance is deprivation of the means of earning his livelihood. That question requires consideration of whether the receipt of a Carer's Allowance is '*earning a livelihood*' and thus the Courts jurisdiction is enlivened to grant a restricted license or is the term "*earning his livelihood*" restricted to paid employment.
- [11] Mr. Lee informed me he is unaware of any direct authority on the issue. I too have found no consideration of the point. Livelihood is not defined in the provision. Hence, the matter is determined according to the interpretation of the statute. The principles of statutory interpretation applicable here are:
 - 1. The interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation (s 14A(1) of the *Acts Interpretation Act 1954*).
 - 2. Reference to extrinsic materials is permitted by s 14B of the *Acts Interpretation Act 1954* to either confirm any interpretation conveyed by the

ordinary meaning of the provision or to provide an interpretation of an ambiguous or obscure provision.

3. In determining whether consideration should be given to extrinsic material, and in determining the weight to be given to extrinsic material regard is to be given to the desirability of a provision being interpreted as having its ordinary meaning (s 14B(2)(a)).

[12] The equivalent provision to s 87 of the *Transport Operations (Road Use Management) Act 1995* was originally inserted into the *Traffic Act* in 1984 by the *Traffic Act Amendment Act 1984*. There were no explanatory notes but I have a copy of the Second reading speech where the then Minister sets out the purpose of the legislation which is to ameliorate the harsh consequences of disqualification where the result is those convicted have “*lost their means of employment and livelihood.*”¹ The Second Reading Speech reported in Hansard does not particularly elucidate the meaning of livelihood. It refers to the purpose of the providing an avenue “*for a person convicted of drink-driving, as a first offence only, to be granted a special licence by the court at the time of hearing. This provision will allow those offenders to drive a vehicle in the course of their employment.**When an application is granted by a court, the court shall issue an order directing the issue of a provisional licence to the applicant during the period of disqualification and subject to a restriction that the license shall be used only in circumstances directly connected with the applicant’s ability to earn a livelihood.*”² The extrinsic material does not really resolve the question albeit it supports an interpretation that the main focus of the provision is with respect to paid employment. This is not surprising. There are limited circumstances where work for remuneration is not a form of employment or self-employment. However, clearly the applicant does work and receives a form of remuneration that cannot be described as employment or self-employment.

[13] In the light of the ambiguity the term livelihood should be accorded its usual and ordinary meaning. I am satisfied the dictionary definition of livelihood encompasses the applicant’s situation in that the definitions do not restrict the meaning of livelihood to remunerated employment. For example, the Oxford English Dictionary³ defines the term as follows:

2. a. *A (person's) means of living. Also as a mass noun: means of living; maintenance, sustenance. Esp. in to earn (also gain, get, make, or seek) a livelihood.*

b. *(A person's) physical sustenance; an instance of this. Also: food, provision s*

c. *fig. and in figurative contexts, with reference to spiritual, cultural, or emotional sustenance.*

Income, revenue, stipend. Also (in pl.): emoluments. Obs.

¹ Hansard 1984 p 2336

² Hansard op cit. p 2336

³ accessed online 31 August 2009

Property yielding an income, landed or inherited property; an estate, inheritance, patrimony. Common in the 15th and 16th centuries. Now hist. and rare.

- [14] The Macquarie Concise Dictionary defines the term as *means of maintaining life; maintenance ..life support*. Earning is defined in the Macquarie Dictionary as *the act of one who earns*. Earns is further defined as 1. *to gain by labour or service* 2. *to merit as compensation; as for service* 3. *to get as one's desert or due* 4. *to gain as due return or profit*.
- [15] Hence the term “*earning his livelihood*” bears the meaning of gaining by labour or services the means of living or maintaining his life. The conclusion that the term *earning a livelihood* is not restricted to paid employment is supported by how the Courts have defined the term “*work*”. Work is another word with the usual meaning of remunerated labour. However, the term ‘work’ (not defined in the then Regulation) was determined by the Federal Court in *Minister for Immigration, Local Government and Ethnic Affairs v Montero* - (1991) 24 ALD 443 to include labour not for reward. In that case the Court considered the interpretation of the undefined term ‘work’ that the term should be accorded its ordinary meaning. In that case the Federal Court determine that while the word generally means activity for monetary reward it is a term not actually restricted to paid employment. The Court said:

The term “work” is not defined in the Act. It is a word in common usage and it is to be accorded its ordinary meaning, there being nothing in the context of the Act to suggest otherwise. The word “work” describes “exertion directed to produce or accomplish something; labour; toil” and “employment; a job, esp. that by which one earns a living”: Macquarie Dictionary.

It is a term which frequently connotes activity of the mind or body undertaken in exchange for monetary reward, and may aptly be used to describe a person's occupation or employment, which again, will usually be pursued by that person for monetary reward. The payment of a monetary or other material benefit will be a strong indication that the activity undertaken is “work”. But monetary reward is not a necessary component of “work” which has a wider meaning in the Act: Broussard v Minister for Immigration and Ethnic Affairs, supra.

- [16] The only judicial determination of the term livelihood I have found also found that the term has a meaning beyond paid employment is the case of *Imber Pty Ltd v Joanne Bedell* (1994) 178 L. SJ.S 193. The case concerned entitlement to compensation where the claimant would be statute barred unless she derived her entire livelihood from her employment as a netball umpire. While she was a paid umpire she also received a family allowance. Judge McCusker found she was not eligible because she did not derive her entire livelihood from her employment as an umpire and said:

In my opinion, the word ‘livelihood’ extends beyond in concept of an exchange of work for wages. This is in ordinary language and usage: see Commissioner of Police v District Court of N. SW (1993)31 NSWLR 606.

- [17] It is also necessary to consider the effect of s 87(5A) of the *Transport Operations (Road Use Management) Act 1995* which provides

(5A) For subsection (5)(a)(ii), if the applicant is not self-employed, the applicant must produce to the court an affidavit made by the applicant's employer confirming the applicant would be deprived of the applicant's means of earning a living if the application is refused.

- [18] Given the interpretation of livelihood I have determined is correct I consider s 87(5A) must be read as confined to those circumstances where the applicant is employed. The applicant of course must satisfy me to the requisite standard (the balance of probabilities) of those matters in s 87(5)(a)(ii). This has been done by the production of the sworn affidavit exhibiting the Centrelink material – the source of his livelihood. This coupled with the sworn testimony of the applicant persuades me that I am satisfied of the matters in s 87(5)(a)(ii).

- [19] Accordingly, being so satisfied of the matters in s 87:

1. the applicant is a fit and proper person to hold a restricted licence, having regard to the safety of other road users and the public generally; and
2. a refusal would cause extreme hardship to the applicant or the applicant's family by depriving the applicant of the applicant's means of earning the applicant's livelihood;
3. he is an otherwise eligible applicant in that:
 - (a) In the previous five years the applicant's licence has not been disqualified, suspended or cancelled and he has not been convicted of a disqualifying offence under s 79 or 80(5A) of the *Transport Operations (Road Use Management) Act 1995* or s 328A of the Criminal Code
 - (b) he held at the time of the offence and now a valid Queensland license
 - (c) the offence he is convicted of is not one of the specified offences in s 87(5)(dc)
 - (d) the subject offence did not occur while the applicant was engaged in an activity directly connected with the applicant's means of earning the applicant's livelihood.

- [20] I direct that the applicant be issued with a restricted licence with the conditions as attached hereto.