

**IN THE DISTRICT COURT
AT CHRISTCHURCH**

**I TE KŌTI-Ā-ROHE
KI ŌTAUTAHI**

**CIV-2021-009-002654
[2023] NZDC 5097**

BETWEEN

[DARVESH KHALAH]
Appellant

AND

THE DIRECTOR OF LAND TRANSPORT
Respondent

Appearances: K Cook and H Coutts for the Appellant
N Wood for the Respondent

Hearing: 21 March 2023

RESERVED DECISION OF JUDGE R E NEAVE

Introduction

[1] Mr [Khalah] (“the Appellant”) used to be the holder of a passenger endorsement on his driver’s licence.

[2] In February of 2019 he was charged with offences of sexual violation in relation to a [complainant – details deleted] which allegedly occurred when he was previously employed at [business deleted].

[3] That matter proceeded to trial and the Appellant was found guilty. However that conviction was ultimately quashed by the Court of Appeal and the Crown elected not to proceed with a re-trial after the complainant declined to give evidence a second time. Mr [Khalah] was therefore discharged pursuant to s 147 of the Criminal Procedure Act 2011, in October 2020. This discharge has the legal force of an acquittal.

[4] Following this the Director of Land Transport (“the Respondent”) nonetheless sought to revoke his passenger endorsement. In March 2021 the Respondent wrote to the Appellant with a proposal to revoke the endorsement. A supplementary notice was given in May and a second supplementary notice was given in July. In respect of each of those the Appellant made submissions.

[5] In spite of those representations, the Respondent’s final decision was to revoke the passenger endorsement. The Respondent, through his delegate, determined that Mr [Khalah] was not a fit and proper person to hold a passenger endorsement and he was not to apply for such endorsement for a further 10 years.

[6] Mr [Khalah] appeals against that decision. In particular, he alleges that the weight attached by the Respondent to the charges and the quashed verdict fails to give proper weight to his effective acquittal, the presumption of innocence and that the decision of the Respondent is thus unreasonable.

The relevant law

[7] The decision to revoke the endorsement is made in reliance on clauses 27, 35 and 82 on the Land Transport (Driver Licensing) Rule 1999 (the Rule) and ss 30 C, D, E of the Land Transport Act 1998 (the Act). These provisions are as follows:

Land Transport (Driver Licensing) Rule 1999

27 Obtaining passenger endorsement

- (1) A person is entitled to obtain a passenger endorsement on that person’s driver licence if—
 - (a) the person has made an application in accordance with Part 3; and
 - (b) the person holds, and has held for at least 2 years, a New Zealand full licence of a class other than Class 6; and
 - (c) *[Revoked]*
 - (d) *[Revoked]*
 - (e) the person produces a medical certificate in accordance with clause 44; and
 - (f) the person consents to the carrying out of checks as to whether or not the person is a fit and proper person to be the holder of a passenger endorsement, and consents to the carrying out of those checks from time to time during the period of validity of the endorsement; and

- (g) the Director is satisfied in accordance with clause 35(1) that the person is a fit and proper person to be the holder of a passenger endorsement.
- (2) Despite subclause (1), a person need not comply with paragraph (d) of that subclause if,—
- (a) at the close of 2 May 1999, the person held a Class CL or Class DL licence; and
 - (b) the person applies for a passenger endorsement before 3 May 2001.

35 Criteria and procedure in relation to fit and proper person test

- (1) In determining whether the applicant for, or the holder of, an endorsement specified in column 1 of the table to this subclause is a fit and proper person for the purposes of this rule, the Director may consider, and give such relative weight as the Director considers fit to, the criteria in subpart 2 of Part 4A of the Act set out in column 2 of the table to this subclause in relation to that type of endorsement.

Table to clause 35(1)

Type of endorsement	Criteria in subpart 2 of Part 4A of Act
Driving instructor	section 30C section 30D
Passenger	section 30C section 30D (in the case of a person who is driving or intends to drive small passenger service vehicles) section 30E (in the case of a person who is driving or intends to drive large passenger service vehicles)
Testing officer	section 30C section 30D
Vehicle recovery	section 30D

- (2) The Director may, for the purpose of determining whether or not a person is a fit and proper person for the purposes of this rule,—
- (a) seek and receive such information as the Director thinks fit; and
 - (b) consider information obtained from any source.
- (3) If the Director proposes to take into account any information that is or may be prejudicial to the person, the Director must disclose that information to the person and give the person a reasonable opportunity to refute or comment on it.
- (4) Nothing in subclause (3) requires the Director to disclose any information the disclosure of which would be likely to endanger the safety of any person.
- (5) Nothing in this clause limits or affects the provisions of Part 4A of the Act in respect of any transport service driver.

82 Revocation of driver licence or endorsement

- (1) A person may be issued with a notice under subclause (2) if—
 - (a) the person fails to comply with a requirement under clause 77 in the manner specified in clause 78(1)(b); or
 - (b) the person fails to pass a test or successfully complete an approved course that the Director has required the person to undergo or complete; or
 - (c) the Director is satisfied that the person has ceased to be a fit and proper person to hold an endorsement; or
 - (d) in the opinion of a health practitioner, the person is one whose physical or mental condition is such that, in the interests of public safety, the person—
 - (i) should not be permitted to drive motor vehicles of a specified class or classes; or
 - (ii) should only be permitted to drive motor vehicles subject to such limitations as may be warranted by the mental or physical condition of the licence holder; or
 - (e) the person is the holder of a driving instructor endorsement and fails to comply with clause 25; or
 - (f) the person holds a testing officer endorsement and fails to comply with clause 32; or
 - (g) the person is the holder of a passenger endorsement and has been prohibited from holding or obtaining a passenger endorsement under section 29A of the Act.
- (2) The Director may, if the Director considers it appropriate to do so, issue 1 or more of the following notices to a person to whom this clause applies:
 - (a) a notice revoking a driver licence:
 - (b) a notice revoking an endorsement:
 - (c) a notice imposing conditions on the use of an endorsement of a kind specified in clause 56(1):
 - (d) a notice imposing conditions on the use of a driver licence of a kind specified in clause 56(1).
- (3) A notice issued under subclause (2) must—
 - (a) state the date and time from which the driver licence or endorsement is revoked, or has conditions attached to it (which must not be earlier than the date and time when the notice is delivered to the person); and
 - (b) state, as appropriate, the period during which the person may not apply for a driver licence, or an endorsement; and
 - (c) state the reasons for the revocation of the driver licence or endorsement or the imposition of conditions on the use of the driver licence or endorsement; and
 - (d) outline the rights of appeal given by section 106 of the Act.

- (4) A notice issued to a person under subclause (2) may apply to a particular class of licence or type of endorsement or to every class of driver licence or type of endorsement held by the person.
- (5) The period specified under subclause (3)(b) must not exceed a period that the Director considers to be reasonable in the circumstances.

Land Transport Act 1998

30C General safety criteria

- (1) When assessing whether or not a person is a fit and proper person in relation to any transport service, the Director must consider, in particular, any matter that the Director considers should be taken into account—
 - (a) in the interests of public safety; or
 - (b) to ensure that the public is protected from serious or organised criminal activity.
- (2) For the purpose of determining whether or not a person is a fit and proper person for any of the purposes of this Part, the Director may consider, and may give any relative weight that the Director thinks fit having regard to the degree and nature of the person's involvement in any transport service, to the following matters:
 - (a) the person's criminal history (if any):
 - (b) any offending by the person in respect of transport-related offences (including any infringement offences):
 - (c) any history of serious behavioural problems:
 - (d) any complaints made in relation to any transport service provided or operated by the person or in which the person is involved, particularly complaints made by users of the service:
 - (e) any history of persistent failure to pay fines incurred by the person in respect of transport-related offences:
 - (f) any other matter that the Director considers it is appropriate in the public interest to take into account.
- (3) In determining whether or not a person is a fit and proper person for any of the purposes of this Part, the Director may consider—
 - (a) any conviction for an offence, whether or not—
 - (i) the conviction was in a New Zealand court; or
 - (ii) the offence was committed before the commencement of this Part or corresponding former enactment; or
 - (iii) the person incurred demerit points under this Act or a corresponding former enactment in respect of the conviction; and
 - (b) the fact that the person has been charged with any offence that is of such a nature that the public interest would seem to require that a person convicted of committing such an offence not be considered to be fit and proper for the purposes of this section.

- (4) Despite subsection (3), the Director may take into account any other matters and evidence as the Director considers relevant.

30D Additional criteria for small passenger service and vehicle recovery service

Without in any way limiting the matters that the Director may consider under section 30C(2), when the Director is assessing whether or not a person is a fit and proper person in relation to any small passenger service, or to any vehicle recovery service, the Director must consider, in particular,—

- (a) any history of serious behavioural problems:
- (b) any offending in respect of offences of violence, sexual offences, drugs offences, arms offences, or offences involving organised criminal activities:
- (c) any offending in respect of major transport-related offences, particularly offences relating to safety or to road user charges:
- (d) any persistent offending of any kind:
- (e) any complaints in respect of the person or any transport service operated by the person that are of a persistent or serious nature.

30E Additional criteria for large passenger service

Without in any way limiting the matters that the Director may have regard to under section 30C(2), when the Director is assessing whether or not a person is a fit and proper person in relation to any large passenger service, the Director must consider, in particular,—

- (a) any history of serious behavioural problems that indicate a propensity for violence:
- (b) any offending in respect of offences of violence or sexual offences:
- (c) any offending in respect of major transport-related offences, particularly offences relating to safety or to road user charges.

[8] The Respondent considered that the Appellant ceased to be a fit and proper person and thus he was required to revoke the endorsement.

[9] The Appellant's right to appeal is contained in s 106 of the Land Transport Act 1998 which states:

106 General right of appeal to District Court

- (1) Any person who is dissatisfied with any decision made under this Act by the Director in respect of the grant, issue, revocation, or suspension of a land transport document sought or held by that person may appeal to the District Court against that decision.

- (2) The court may confirm, reverse, or modify the decision appealed against.
- (3) Every decision of the Director appealed against under this section continues in force pending the determination of the appeal, and no person is excused from complying with any of the provisions of this Act on the ground that any appeal is pending.
- (4) Even though an appeal under this section may have been determined in favour of the Appellant, the Director may, subject to the like right of appeal, refuse to deal with in accordance with the provisions of this Act the matter of the grant, issue, revocation, or suspension of the land transport document concerned on any sufficient grounds supported by facts or evidence discovered since the hearing of the appeal.
- (5) Subsection (1) does not apply—
 - (a) if a right of appeal to the District Court against the decision concerned is conferred by any other section of this Act:
 - (b) to any decision made in relation to a class exemption, including a decision to grant (or not to grant), to amend, or to revoke a class exemption.

[10] There can be no doubt that the primary purpose of the legislation is the protection of public safety. The Respondent has a duty to ensure that only those who do not present a risk to the public are entitled to carry passengers. That may be because an individual presents a danger due to their manner of driving, or presents an unsatisfactory risk to the safety of passengers, or there is a risk that the driver might commit offences against members of the public, who often may be quite vulnerable. The public clearly has an interest in the Respondent fulfilling this duty.

[11] It is clear those considerations were at the forefront of the Respondent's mind in reaching the conclusion that Mr [Khalah] was no longer a fit and proper person.

[12] The issue in this case is whether or not in reaching that conclusion he erroneously placed too much weight on the fact of the charge and the jury's verdict.

[13] The Respondent's ultimate decision is contained in his notice of final decision as at 8 November 2021.

The Respondent's decision

[14] The decision sets out the various submissions received, although I should note that the detailed information as to the allegations made at the trial appears to have been received from the police.

[15] I will come back to that issue shortly.

[16] The Respondent noted the Appellant was found guilty and, after relating the allegations at trial, he goes on to refer to the Court of Appeal's decision. The Director says at paragraph [5] of his decision:

The Appeal was upheld, and it was found that the Trial Judge had failed to adequately address the jury in summing up on the matter of the standard of proof required. Due to this technicality in court, the trial was deemed a mistrial and a new trial was set for February 2021.

[17] This reference to the defect in the summing up as a "technicality" appears to be a parroting of comments made by the police. Quite frankly, this is an appalling comment. The trial was found to be unsafe due to a fundamental defect in one of the most important issues upon which a jury should be directed, namely the burden and standard of proof. The summing up with regards to this was regarded as so deficient the Crown did not contest the appeal. The appeal was essentially allowed by consent. This was a remarkable state of affairs. There were a number of other issues raised which were alleged to be deficiencies in summing up. The Court of Appeal did not rule on those, simply because it did not need to in the face of the Crown's concession on the fundamental issues. I regard this use of the word "technicality" as infecting the whole of the Respondent's reasoning process.

[18] The Respondent noted at [33] that "where a person has been acquitted of criminal offending the agency is entitled to consider the alleged behaviour that was the subject of the criminal charges".

[19] He further stated at [35]:

Holding a passenger endorsement is a privilege and by virtue of your position you are placed in a position of trust. The circumstances as previously stated in this notice would indicate the situation was aggravated by the repeated

nature, the threats to keep quiet, the age of the victim and the position of trust held as a more senior person in the workplace.

[20] Finally it was noted that the Appellant's behaviour was said to have fallen well short of that expected of a person who holds an endorsement subject to fitness and propriety.

[21] It is abundantly clear that the Respondent has taken the view that the factual allegations upon which the charges were based are made out.

[22] However, I am bound to pose the question: on what was this assessment based?

[23] The Respondent submits that he is entitled to go behind the acquittal and look at all the circumstances of the case and the information available to it. This includes complaints and offending history, as well as any history of serious behavioural problems. Offending presumably can be considered, even where there are no convictions to establish the fact.

[24] This is all correct as far as it goes.

[25] The Respondent noted that the matter before him was whether Mr [Khalah] had ceased to be a fit and proper person. The material relied upon, according to Mr Cook, was the Police summary of facts, the notes of evidence at trial and the sentencing notes.

[26] There is an immediate problem in respect of that. A Police prepared summary of facts, absent a guilty plea, has no evidential value whatsoever. At best it is the police's opinion of the high point of their case. It may be turned into the factual basis of a conviction where there is a plea but where a case has gone to trial the summary of facts is utterly worthless. Further, the notes of evidence relied upon by the Respondent were incomplete. The Respondent did not have access to the complainant's evidential interview, nor a transcript of it. Further, the Appellant's DVD interview was not considered by the Respondent, nor does it appear that a transcript of that interview was made available.

[27] The Respondent says this information could have been provided by Mr [Khalah]. That is as may be if the Respondent had engaged in a proper review of all the rest of the evidence.

[28] It is submitted for the Respondent that the decision maker did not allow himself to be unduly influenced by the reference to the word, “technicality”. However, I cannot accept that. In the decision itself the defect is described by the decision maker as a technicality and is a ground upon which he was relying. It is not recorded that this was merely the Police’s opinion and a thoroughly flawed one at that.

Appellant’s argument

[29] Mr Cook argues that the decision maker in the case merely obtained the notes of evidence (and indeed, as noted above, obtained less than that) has not spoken to any of the witnesses, heard the Appellant, nor seen the Police disclosure. In his original submissions he did suggest that the Respondent ought to have conducted some kind of hearing given the nature of the allegation. However, that argument was not pursued at the appeal hearing, rightly in my view.

[30] Mr Cook went on to submit that the decision maker had relied on evidence given during a flawed process for an entirely different reason, namely whether the Appellant was guilty or not guilty.

[31] Whilst I agree with the former part of the statement, that the decision making process was flawed, the fact that it was for a different purpose does not assist the Appellant. As I have noted, I accept the Respondent’s submission that the Respondent’s enquiry is obviously wider and entitled to take into account different kinds of material.

[32] Mr Cook submits that the standard of proof in this case, whilst undoubtedly the civil standard, needed to be applied flexibly in light of the allegations being made and the highly criminal nature of them.

[33] He refers to the decision maker's statement that (on any view) the jury must have found the complainant's evidence credible. It was also noted that the trial Judge observed in his sentencing notes that he had "no concerns about the complainant's truthfulness". Mr Cook said it was impossible to justify this reasonably.

[34] I agree that the Respondent's decision ignores the fact the jury were given an improper framework within which to make its decision. Indeed, once the Appellant was acquitted, there was effectively no decision on which the decision maker was entitled to rely. It is one thing to review the evidence fully and reach the same conclusion. This is not what the Respondent has done. It is quite another matter to rely on the jury decision which was made on a thoroughly flawed basis. It has been set aside by the Court of Appeal and overtaken by the Appellant's subsequent discharge which has the effect of an acquittal.

Analysis

[35] The Respondent is clearly entitled to have regard to the fact of the charges. Further, the fact of the charge clearly gives rise to safety concerns. Further still, once the allegations contained in the charges have hardened into facts as evidenced by a guilty verdict, the Respondent's conclusion would obviously be inevitable.

[36] However, once the verdict was set aside, the Respondent was only left with the fact of the charge.

[37] As noted above, the Respondent has in essence taken the view that the jury's conclusion means that the Appellant is not a fit and proper person. The Respondent supports this with the sentencing remarks. I agree with Mr Cook, that in reaching that conclusion, he has failed to give proper weight to the decision of Court of Appeal and the effect of the Appellant's subsequent acquittal.

[38] Given the failure of the trial Judge to give proper direction on the requisite burden of proof, the jury did not receive the correct advice on how to approach its task. On that basis it is not safe to conclude that the jury must have found her to be a credible

witness. Furthermore, once the decision is set aside legally, the Appellant is once again entitled to the presumption of innocence until he is found guilty.

[39] Subject to the cautions of the Supreme Court in *Z v Dental Complaints Assessment Committee*,¹ the Respondent is required to make a proper analysis of all relevant matters to come to a conclusion on the Appellant's status as a fit and proper person.

[40] The Respondent does not seem to have had access to, or have sought the evidence-in-chief of the complainant, or at least a transcript of it. The Respondent found that she had not been shaken in cross-examination but without knowing what the allegations were, he was not in a position to assess the value or effectiveness of the cross-examination. In point of fact I do not share the Respondent's view that the complainant was not shaken. There were matters raised in cross-examination which, at the very least, ought to raise some questions as to the validity of her account. Simply because the complainant did not accept the criticisms, does not mean they were not valid criticisms. They should all have been factored into the Respondent's decision making process. All this seems to illustrate the way in which the Respondent has simply defaulted to the jury's verdict without independently considering the evidence.

[41] In particular in cross-examination at trial, the Appellant's counsel obtained a concession that the complainant had talked to her therapist about the issues prior to making an official complaint. That is always a matter of concern. Equally there was the significant concession that at least one of the allegations made must have occurred whilst there was a customer in the building. There is a degree of improbability about this allegation one is bound to observe. None of these matters appear to have been considered by the Respondent.

[42] It also should be noted that the Respondent did not have access to the Appellant's DVD interview and therefore is in no position to assess his denials and their credibility. If he were going to make an independent review of the evidence, which was required in this case, examining such material was surely a minimum

¹ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1.

requirement. All of that material would clearly have been available had it been sought for consideration, even in a redacted form to protect the identity of the complainants.

[43] As previously noted, there was no consideration of the summing up or the addresses of counsel so the Respondent was in no position to assess the arguments placed before the jury and if the Respondent was going to rely upon the verdict – which is what he has clearly done – it was incumbent upon him to do so on consideration of all the relevant material.

[44] Furthermore, it seems to me the Respondent has misapplied the law in relation to the distressed state of the complainant. The complainant's emotional state is of somewhat dubious evidential value and, whilst it is something that can be considered, there is no suggestion the Respondent subjected it to any proper analysis.

[45] Equally he seems to regard the fact of the complaint to the [complainant] as having evidential value. Section 35 of the Evidence Act 2006 illustrates that this evidence is only valuable in rebutting arguments as to delayed complaints. It does not add to the credibility of the complainant's account.

[46] It seems inevitable to me that one must conclude the Respondent has simply deferred to the jury's verdict. He has not made his own assessment which is what he was required to do. This is quite apart from the fact that once the verdict was overturned, it essentially ceased to exist and was not available to be relied upon. It is for the Respondent to determine the Appellant's status as a fit and proper person, not for someone else to determine that and then for him to simply accept that. Once the verdict was set aside, absent a review of the evidence, the Respondent was simply left with the fact of the charge and the complaint. That is insufficient.

[47] Even if I were asked to make an independent assessment, I could not do so either. I do not have all of the original evidence. I do not have the arguments of

counsel. I do not have the Appellant's or the complainant's account. It is therefore impossible to reach a valid conclusion under these circumstances.

[48] It seems to me on the basis of the evidence considered by him, the Respondent could not properly have formed the view that the Appellant was no longer a fit and proper person. The result must be that the appeal is allowed and the decision is quashed. Given the time lapse since the Appellant obtained his passenger endorsement, the matter will have to be reconsidered in any event, bearing in mind the conclusions reached in this judgment.

R E Neave
District Court Judge

Signed at Christchurch on the day of 2023 atam/pm