

Decision Number 60D [2018] 1199

IN THE MATTER OF the Sale and Supply of Alcohol
Act 2012

AND

IN THE MATTER OF an application by **JAMES
CHARLES WHITE** for a Manager's
Certificate under s 219 of the Sale
and Supply of Alcohol Act 2012.

BEFORE THE CHRISTCHURCH DISTRICT LICENSING COMMITTEE

Hearing: 15 May 2018

Committee:

Ms C E Robinson (Chair)
Mr P Rogers
Ms A Keir

DECISION ON APPLICATION FOR MANAGER'S CERTIFICATE

[1] This decision relates to an application by James Charles White ('the applicant') for a Managers Certificate pursuant to s219 of the Sale and Supply of Alcohol Act 2012 ('the Act'). The application was opposed by the New Zealand Police on the basis that the applicant has two convictions for serious offences within the last 5 years.

[2] A hearing of the application was held on 15 May. The hearing was attended by Mr White, Mr White's Employers Paula and Gianni Barbafiera in support, Senior Constable Logan Steele and Inspector Martin Ferguson.

Evidence

[3] The applicant works for the Penny Black Victorian Tea Room ('Penny Black') located at the boutique commercial premises known as 'the Tannery' in Waltham. This is a new business owned by Paula and Gianni Barbafiera. Mr White has three previous convictions including for two serious offences involving blackmail and obtaining by deception. The offences occurred in 2013 and 2014. Mr White was sentenced to 2 years and 1 month in prison. He served 18 months and was then released on Parole in November of 2016. Following his release from prison Mr White obtained employment at the Tanner Street Bakery, which is a business owned by Paula and Gianni Barbafiera.

[4] Mr White presented his submissions and evidence.¹ In his written statement Mr White questioned the relevance of his past convictions to his application for a Manager's Certificate. This was because he saw his offending as a personal matter and unrelated to his ability to manage the sale of alcohol. He, therefore, did not understand how this was relevant to determining public safety or adherence to legislative requirements. He made this submission noting the objects of the Act.

[5] Mr White said there was never any question of his professional integrity and he offered a redacted copy of the Sentencing Notes for his prior convictions as evidence of this.² We note the Sentencing Notes were heavily redacted leaving only the favourable comments made by the presiding Judge. The Police provided us with an unedited copy of the Sentencing Notes. When questioned by Senior Constable Steele as to his reasons for only providing the redacted version Mr White explained it was his only copy and he had thought there were issues of privacy that he wasn't permitted to disclose. He was questioned on his decision to redact information that reflected on him poorly. He thought it would be expected that he would only put forward information favourable to his case.

[6] Mr White was critical of the opposition to his application from the Police because he saw this as act of 'double jeopardy'. Mr White considered he had paid

¹ Submission of Mr James Charles White, 25 April 2018

² *R v James Charles White* [2015] NZDC 12840

his debt to society and wished to get on with his life and did not wish to be punished a second time.

[7] In favour of his application, Mr White noted that he had acted as a Duty Manager for 12 months prior to his imprisonment without incident whilst employed at a bar known as 'Sugarhorse'. There is an issue as to whether he was lawfully entitled to do so. That is because the record reflects that his application for a Temporary Manager's Authority was null and void due to an unpaid fee and his subsequent application for a Manager's Certificate had been on hold pending the outcome of his hearing in 2015. That application was later withdrawn. Mr White said that his employer at the time had not advised him that his application for Temporary Manager's Authority had not been granted. Mr White's recollection of events was not clear. We were not at all clear why Mr White or Mr White's employer at the time did not appreciate that he was not able to act in that role. We do not need to dwell on this further, aside from observing that it is important that employees also take responsibility for ensuring that they have lawful authority to act as a Duty Manager.

[8] In answer to questions Mr White was adamant his convictions related to the personal side of his life and not his professional life. He was insistent that this did not reflect on his ability to undertake the responsibilities as a Duty Manager and did not reflect his character now. He said that we should rely on references from other people as to what he is like now. He did accept that his offences of blackmail and obtaining by deception raised questions of his honesty and personal integrity, however, he qualified that as being evidence of who he was then but not now.

[9] Mr White was also of the view that he should be granted a Manager's Certificate for his employment at Penny Black because the circumstances were 'low risk'. He explained that is because the primary purpose of the business is to serve 'High Tea' and the sale of alcohol was a small part of that business. He also noted the hours of operation are from 9am to 5pm. He said that he would understand the concern if his application involved working at a large 350-person capacity venue or a Bar frequented by young people who are primarily there to consume alcohol.

[10] Mr White was asked questions by the Panel as to the type of rehabilitation or counselling he undertook whilst in prison. He told us that he had undertaken a Family Violence Program in prison and although he asked for psychological treatment (in prison), this did not eventuate. He then told us he was released with a condition imposed by the Parole Board that he would receive one on one psychological treatment, but this was not provided by the Corrections Department. He said that at his first Parole hearing he was told he 'definitely needed' specific psychological intervention. It appears that resourcing within the Department was an issue and although he could have paid for it himself, he told us that it would not have advanced his case for Parole any sooner. As matters stand, Mr White has not received any psychological intervention.

[11] Mr White said he was committed to staying at Penny Black for three years and that he was prepared to accept a condition that his Manager's Certificate was limited to his employment at Penny Black.

[12] Mr White had also provided a copy of a reference from Ms Patricia Bowden a Principal at Harcourts Grenadier. The reference stated that Mr White is honest and trustworthy. Mr White said he considered Ms Bowden as a friend who he met when he was working in a café near Ms Bowden's office and that he had known her for 7 years and that she had visited him in prison. Ms Bowden did not attend the hearing.

[13] Mr Gianni Barbafiera then spoke on behalf of himself and his wife Paula Barbafiera. Mr and Ms Barbafiera are Mr White's employers. He said that he and his wife decided to take a chance on Mr White, they were aware of his criminal history and they acknowledged that employing him was not without risk. So far Mr White had not disappointed them; he said that Mr White is a loyal and trustworthy employee. Mr White is well liked by their customers and staff and for that reason they included him in their new business venture, Penny Black. Mr Barbafiera explained that Penny Black mostly sold champagne and Pimms to accompany the tea service and that alcohol was not the primary offering. Mr Barbafiera did not share Mr White's view that a person's past did not affect how he is viewed now. He said it is relevant and was a risk they took on knowingly.

[14] Before the hearing we were provided with the Inspectors Report³ and statement of evidence from Senior Constable Logan Steele in relation to each previous conviction.⁴ This evidence was disclosed to the applicant.

[15] Mr White committed the following offences in 2013 and 2014.

- (a) Driving while driver license was revoked on 14 March 2013 (convicted on 4 April 2013).
- (b) A representative charge of blackmail dated 1 November 2013 (conviction date 8 August 2015).
- (c) A representative charge of obtains by deception dated 13 September 2014 (conviction date 8 August 2015).

[16] Senior Constable Steele produced a copy of the Sentencing Notes for the convictions of 8 August 2015. The Sentencing Notes disclose a sustained period of offending where the applicant took advantage of vulnerable victims with serious consequences for those victims.

[17] Senior Constable Steele was of the view that because of the stand down 'guidelines' following the then Liquor Licensing Authority decision *GL Osbourne* NZLLA 2388/95 ('Osbourne guidelines') a five-year period ought to elapse before a Manager's Certificate is granted due to the serious nature of the offending.

[18] Senior Constable Steele accepted, when answering questions from the Panel, that the Osbourne guidelines are guidelines only, and the concerns do not disappear after 5 years. He accepted it was an issue of risk management for the committee. Senior Constable Steele noted that that the applicant appeared to separate the personal and professional aspects of his life, but in his view sometimes they go hand in hand. He was concerned that it is not clear what might trigger a repeat of the applicant's behaviour in 2013 and 2014.

³ Inspectors Report, 9 April 2018

⁴ Brief of Evidence of Senior Constable Logan Steele,

[19] Based on the evidence we heard we now determine the application in accordance with the criteria in s222 and the Purpose and Object of the Act.

Decision and Reasons

Is the applicant suitable to be a manager?

[20] Based on the evidence before us we have concluded the answer is no, not at this time.

[21] We note the significance of the role of a duty manager. In *Deejay Enterprises Limited* NZLLA 531-532/97 the Liquor Licensing Authority held:

The guiding hand or hands-on operator of any company or the potential holder of a General Manager's Certificate now receive greater scrutiny from both the Police and other reporting agencies. Character and reputation are closely examined. The law and human desires of patrons frequently tug in different directions. The Police cannot be everywhere. Little but a licensee's or manager's character and suitability may stand between upholding the law and turning a blind eye. Self-imposed standards in accordance with the law must be set by licensees and holders of General Managers' Certificates who control and manage licensed premises.

[22] We must be satisfied that the applicant will meet his responsibilities under the Act.⁵

[23] Although we acknowledge that Mr White has taken positive steps to get on with his life since his release from prison some 18 months ago, and he has the support of a generous employer, Mr White did not demonstrate to us that he understood that the serious nature of his offending does reflect on his overall integrity as a person. Mr White was focused on the argument that the 'behaviours' that led to his offending were not illegal. By this he was referring to the fact that the victims of his blackmail and obtaining by deception had engaged in 'commercial sexual relations', which are not illegal. He said his offending was very different because he had not been convicted of sexual offences, but of blackmail and deceptive conduct. He did, however, accept that blackmail was a serious offence. We found the record of his behaviour in the Sentencing Notes to show him to have been manipulative, threatening and dishonest in his dealings with the victims.

⁵ *Sheard* [1996] 1 NZLR 751

[24] In *Re Nishchay's Enterprises Ltd* [2013] NZARLA 837 the meaning of 'Suitability' in the context of an on licence was said to be:

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 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.

[25] It equally applies to suitability under s222 of the Act. The character and reputation of an applicant is of crucial importance. An applicant's private life is relevant and is to be weighed in determining suitability.⁶

[26] We have considered the positive reference from Mr Barbafiera. We agree with Mr Barbafiera that a person's history is relevant and that the nature of Mr White's offending does present a risk. While it is a risk that Mr Barbafiera has been prepared to undertake in the conduct of his and his wife's own business, we note the very high standards that are expected of a Duty Manager. We find that the positive experiences outlined by Mr Barbafiera do not yet outweigh the very serious nature of Mr White's offending.

[27] The nature of Mr White's offending raises serious issues about his honesty and integrity, particularly in regard to manipulating vulnerable people. We agree with Inspector Ferguson that people under the influence of alcohol are also vulnerable. We are required in making our decision to ensure that alcohol related harm is minimised. Harm includes harm directly or indirectly contributed to by the excessive or inappropriate consumption of alcohol. Mr White's evidence has not satisfied us that will be the case.

[28] We agree with Senior Constable Steele that a period should elapse to enable Mr White to 'prove himself', therefore, giving greater confidence that Mr White is suitable.

⁶ See *NR Davies* LLA Decision 1240/97, *GW Beer* LLA Decision 620/97 and *Strange* LLA Decision 1632/96.

Convictions

[29] The Osbourne guidelines which have been applied in several Alcohol Regulatory Licensing Authority decisions suggest that where there are two or more convictions a five year stand down period should apply. Although it is a guide, we are mindful that the Osbourne guidelines have been applied consistently since 1995, with some modification, for example it is now accepted the time should run from the date of the offence.⁷ The Liquor Licensing Authority, under the previous legislation, has also considered that the period of imprisonment ought to be accounted for since the date of the last offence because the person was unable to offend during that period.⁸

[30] It is important that our decision continues to maintain a very high standard of persons holding a Manager's Certificate because of their frontline responsibility for ensuring the Object of the Act is met.⁹ We are required to act cautiously and should only depart from the guidelines in exceptional circumstances to maintain consistency and high standards.¹⁰

[31] In relation to the blackmailing offence recorded as occurring on 1 November 2013, it is a representative charge, not a one off. The Sentencing Notes reveal that the offending continued for a sustained period of 10 months, until July of 2014.¹¹ The offence of obtaining by deception has a date of 13 September 2014. The Sentencing Notes record that it was a one-off event but within a continuum of 4 to 6 weeks.¹²

[32] Only 3 years and 8 months have elapsed since the last recorded offence date. Eighteen months of that was served in prison and 8 months on Parole.

[33] Whether we include or exclude the period Mr White served time, we end up well short of the five-year guideline.

⁷ *SA Judd* [2014] NZARLA 94, 95 and 96

⁸ *Thompson* [2003] NZLLA 894 at

⁹ *Police v Manson* [2015] NZARLA 590 at [23] and see *Dawson* [2017] NZARLA PH 46

¹⁰ *Ibid*, [25].

¹¹ *R v James Charles White* [2015] NZDC 12840 at [5].

¹² *Ibid* at [1].

[34] We have considered the positive references provided, including from Mr Barbafiera, however, this does not amount to exceptional circumstances that mitigate the 5 years stand down. Although each case is to be considered on its own merits, we observe that even in *Osbourne* the applicant had a number of high profile written references attesting to his otherwise good character.

[35] Mr White has offered to accept a condition limiting the exercise of his Manager's Certificate to Penny Black. We also do not consider that sufficient mitigation to overcome the recent criminal history. Although Penny Black may present a lower risk of consequences should Mr White resort to his previous offending, we do not find this to be a sound basis for determining a Manager's Certificate. We agree with Senior Constable Steele that we should give weight to the *Osbourne* guidelines as a starting point. We do not find the nature of the premises that Mr White is employed in to be an exceptional circumstance that justifies departure from the guidelines.

[36] We have also considered whether we can view the first 12-month term of the certificate as a probationary period. However, we firstly need to be satisfied that the applicant is suitable. We have concluded that he is not. In this case, given the nature of the convictions and the period of time that has elapsed, it does not mitigate our earlier concerns as to suitability of the applicant.

[37] On the evidence before us we do not find any reason to depart from the 5-year guideline. As the Authority noted in the *Osbourne* decision and recognised in other decisions,¹³ our decision is not indefinite, and it may well be that in time Mr White should be given another chance, however, that will be a matter for the District Licensing Committee whenever that may be.

Recent industry experience, training and qualifications.

[38] Mr White has experience working in the café industry and holds a current LCQ certificate. In the last 18 months his experience is in an unlicensed café, although we recognise the opportunity provided at Penny Black.

¹³ See Dawson [2017] NZARLA PH 46

Any other matters dealt with in a report made under s220.

[39] We have addressed all other matters in our reasoning above.

Conclusion

[40] We find on the evidence before us and having taken in to consideration the criteria set out in s222 of the Act that declining to grant a Manager's Certificate to James White is reasonable and will accord with the Object of the Act. Accordingly, for the reasons set out above we decline the application for a Managers Certificate.

DATED at CHRISTCHURCH this 23rd day of May 2018.

A handwritten signature in black ink, appearing to read 'CER', with a long, sweeping flourish extending to the right.

Cindy E. Robinson

Chairperson of the Christchurch District Licensing Committee