

Decision Number: 048/2021/HCDLC/127

IN THE MATTER of section 219 of the Sale and Supply of Alcohol Act 2012

AND

IN THE MATTER of an application by Ms Vala' Auina Laumatau Ah Mu for a General Manager's Certificate

BEFORE THE LOWER HUTT DISTRICT LICENSING COMMITTEE

Chair: Cr Simon Edwards
Members: Cr Shazly Rasheed, Ms Rachel Palu

HEARING at the Hutt City Council Chambers, 2nd Floor, 30 Laings Road, Lower Hutt on 12 April 2021

APPEARANCES

Ms Vala' Auina Laumatau Ah Mu (Applicant)
Mr Ken Ah Kuoi (Counsel for Ms Ah Mu)
Mr Garth Rosson, Director of Belarus Ltd T/A Cutlers Entertainment (Support for Applicant)
Ms Karen Hardie, General Manager of Cutlers Entertainment (Support for Applicant)
Ms Tracy Gibson, Licensing Inspector, Hutt City Council and Reporting Officer
Mr Dean Bentley, Environmental Health Team Leader, Hutt City Council
Sergeant Natana Collier-Repia, NZ Police
Sergeant Matthew Barraclough, NZ Police

DECISION OF THE DISTRICT LICENSING COMMITTEE

Decision

The Lower Hutt District Licensing Committee acting pursuant to the Sale and Supply of Alcohol Act 2012 **DECLINES** the application by Ms Vala' Auina Laumatau Ah Mu for a General Manager's Certificate.

Introduction

- [1] In an application dated 14 October 2020, the applicant applied for a new Manager's Certificate.
- [2] The applicant is currently employed as a Temporary Manager at Belarus Limited, trading as Cutlers Entertainment (Cutlers), Lower Hutt. She has been employed at Cutlers since September 2020.
- [3] The applicant recently completed the NZQA unit standards 4646 and 16705 and received her Licence Controller Qualification Certificate in March 2013. She also successfully completed a Licence Controller Qualification Bridging test on 18 March 2014.

- [4] The applicant had previously held a Manager's Certificate issued by Wellington City Council between the period 4 April 2013 to 4 April 2017.
- [5] The Police opposed the application on the grounds of suitability due to the applicant's prior conviction history. The applicant had a total of 146 criminal convictions, 143 of which were for fraud related offences. The majority occurred between 1990 and 1991, 1995 and 1997, two occurred in 2006, one in 2007 for breach of community work and five occurred in 2018. The historic nature of these offences did not attract the Police's opposition when the applicant first applied for a Manager's Certificate in 2013. However, the most recent offending in 2018, which comprised five convictions for using a document for pecuniary advantage, led to the Police opposing the application.
- [6] Ms Gibson, the Lower Hutt District Licensing Inspector, Hutt City Council supported the application.
- [7] Given the opposition from the Police, the matter proceeded to a hearing.

Application

- [8] The applicant was present at the hearing. She gave evidence in association with her Counsel, Mr Ah Kuoi. Her application was supported by her employer, Mr Rosson, the sole Director and Shareholder of Belarus Limited, and Ms Hardie, the General Manager at Cutlers and the applicant's long standing support person. Mr Rosson and Ms Hardie gave evidence at the hearing.
- [9] Mr Ah Kuoi elaborated on the applicant's past stressing the turnaround the applicant had made and her desire to change. He explained that the applicant had raised a family, amidst struggles and abuse. He highlighted that the majority of her offending and convictions had occurred in the 1990s and up to 2007. He submitted that the applicant's historic offending had little weight. He urged the the Committee to disregard that history as it had been accepted, acknowledged, punishments carried out and the applicant had taken steps to remedy her situation. He acknowledged the 2018 offences stating they had occurred over two years ago. Mr Ah Kuoi noted the support of family and the applicant's current employer, for whom the applicant had been working for the past seven months without issue. He also noted that there had been detailed discussion between the applicant and the original reporting Police Officer and support from a former and experienced Alcohol Harm Reduction Officer in Wellington, Detective Sergeant Fraser, who understood the applicant's background.
- [10] Mr Ah Kuoi noted that the applicant's employers regarded her as talented and hard working and that they had a good working relationship with her.
- [11] The applicant confirmed her written statement and elaborated upon it. She added she had been working periodically in the hospitality industry for the previous 10 years in addition to her current full time employment with Cutlers. She referred to the fact that she held a Manager's Certificate from 2013 to 2017 with no opposition from the Police. She accepted her past history of convictions believing they were in the past.
- [12] With regard to the 2018 offences and conviction, the applicant did not excuse her behaviour and was not proud of it. She explained she had told the Police at the

time that her offending was due to a gambling and addiction problems. However, she clarified that she had co-dependency issues. She stated that in order to ensure her then partner stayed with her, she assisted him in his addiction and gambling and that she did not have such issues herself. She explained she had handed herself into her employer and to the Police, was convicted and had served her sentence.

- [13] The applicant explained her tumultuous relationship and personal situation in 2018. This included being homeless with children which had led to her re-offending and that her life had turned around since then. She advised that she had now divorced her husband of many years and was regularly consulting with a psychiatrist. The psychiatrist had diagnosed her with “Splitting” – a condition where personal situations affect the ability to make good decisions. She added that she had been seeing a psychiatrist for the past 17 years, although had not been regularly meeting in the period leading up to her 2018 offending.
- [14] The applicant advised she had been working at Cutlers in a full time capacity for approximately seven months as both an Acting and a Temporary Manager. She watched over the premise where she worked including overseeing the supply of alcohol with no other manager on duty. She confirmed she was seeking to make the Temporary Manager position a permanent Manager position.
- [15] Ms Hardie explained she had known the applicant for many years and was aware of when things were not going well for her. She added she had been the applicant’s support person for 10 years. Ms Hardie advised Cutlers was a small business, which relied on a high trust model of staff, and that they were not in the position of being able to hire more staff at this point in time. She added the applicant had been effectively undertaking a Manager’s role for the past seven months as an Acting and Temporary Manager. If the applicant was unsuccessful in gaining her Manager’s Certificate, it would be a huge loss to the establishment and the applicant. Ms Hardie advised the applicant worked effectively to the requirements of the Sale and Supply of Alcohol Act 2012 (the Act), was responsible and capable in her employment and had a family to support. She confirmed if a longer probationary period was enforced, Cutlers would support that, as long as the applicant gained her full Certification.
- [16] Mr Rosson reiterated that the applicant was a competent manager. He explained she had had to turn gang members away and did not sell to underage patrons or those under the influence of alcohol. He concluded that the applicant was an essential part of the business.

Reporting Agencies

NZ Police

- [17] Sergeant Collier-Repia read from his submitted evidence, confirming that the 2018 offending by the applicant was regarded as a “*serious offence*”.
- [18] Sergeant Barraclough advised that the Police followed the guidance of the Authority’s decision in *GL Osborne*¹ when considering whether to object to an application for a Manager’s Certificate. He acknowledged the bulk of the applicant’s offending was historic and there were encouraging signs the applicant

¹ GL Osborne NZLLA 2388/95

was positively turning her life around. However, in the Police view, the applicant's 2018 offending demonstrated a pattern of similar offending. Police also considered Cutlers to be a high-risk premise and that overall, they required an incident free period of five years to confirm the applicant's suitability to hold a Manager's Certificate. He confirmed that had the 2018 offending not occurred then the Police would not have objected to the application.

- [19] Sergeant Barraclough clarified that the original reporting Police Officer was currently on leave. He said that whilst she had met with the applicant and may, as a result of that meeting, had more insight into the applicant, the original Police opposition to the application remained.
- [20] In cross examination, Police referred to the fact that the offence in 2018 concerned a vulnerable member of society. The Police considered that someone under the influence of alcohol to be in a similar vulnerable position.

District Licensing Inspector

- [21] Ms Gibson confirmed her report and explained that towards the end of 2020 officers had conducted an afterhours compliance visit to Cutlers Bar. She advised that in the course of their investigation they discovered that no application for a Manager's Certificate had been received from the Manager acting at the time, the applicant. As no application for a Manager's Certificate had been received within the statutory period of two working days, the Reporting Officer had advised Cutlers that the applicant could no longer act as Manager. The applicant then applied for her Manager's Certificate and Ms Gibson confirmed the Licensing Inspector's advice that this enabled the applicant to work as a "Temporary Manager" until her application for a Manager's Certificate was determined.
- [22] When questioned as to why she had not objected to the application, Ms Gibson advised that, although she was aware of the 2018 offending and realised the seriousness of it, she did not object after taking into consideration:
- the 15 year gap between the applicant's last offence and her prior offending;
 - the fact that the applicant had acknowledged and taken responsibility for all her offending;
 - the fact that the applicant was working on her issues and had completed her jail time and other punishments; and
 - the fact that the applicant had the full support of her employer, who was fully aware of her history.
- [23] Ms Gibson also advised that Wellington City Council's Licensing Inspector had been consulted. The Licensing Inspector had confirmed that no issues had occurred during the three years the applicant had held a Manager's Certificate (2014 to 2017).

Lower Hutt Licensing Committee Decision and Reasons

Legislation

- [24] The object of the Act is to ensure that alcohol was sold and supplied safely and responsibly and that any harm caused by the excessive or inappropriate consumption of alcohol was minimised.²
- [25] Subpart 7 of the Act deals with the Management of Licensed Premises and the requirements for the issuing of a Manager's Certificate.
- [26] Sections 216 to 221 set out the criteria for applying for and hearing an application for a Manager's Certificate.
- [27] Section 222 of the Act sets out the criteria to be considered in applications for a Manager's Certificate. In deciding whether to issue a Manager's Certificate, the Licensing Committee or Authority must consider the following matters:
- (a) *the applicant's suitability to be a manager;*
 - (b) *any convictions recorded against the applicant;*
 - (c) *any experience, in particular recent experience, that the applicant has had in controlling any premises for which a licence was in force;*
 - (d) *any relevant training, in particular recent training, that the applicant has undertaken and evidence that the applicant holds the prescribed qualification required under section 218;*
 - (e) *any matters dealt with in any report made under section 220.*

Discussion and Findings

- [28] The Committee heard evidence from the Licensing Inspector that the applicant displayed the appropriate knowledge in terms of the legislation and host responsibility requirements and held the relevant training certificates. The Committee was satisfied that the applicant had relevant training and holds the prescribed qualifications.
- [29] The information around the applicant's role as Temporary Manager was unclear and there was a potential issue concerning whether the applicant was lawfully entitled to continue acting as a Temporary Manager pending the filing or outcome of the application. However, the Committee appreciated that the view of the Licensing Inspector was that the applicant could and this had been relied on by the applicant and her employer.
- [30] The primary concern advanced by the Police was the applicant's recent offending. The Police evidence was that the five 2018 convictions were serious and involved the violation of trust of a vulnerable person for pecuniary gain on multiple occasions.

² Section 4(1) of the Act

[31] The Police considered that the seriousness of the applicant's recent offending and similarity of it to her historic offending required a stand-down period of five years before the issue of a Manager's Certificate could occur.

[32] The role of Certified Managers in achieving the objective of the Act cannot be understated.³ Sections 222(a) and (b) specifically require the Committee to consider an applicant's suitability and any convictions. The former Sale of Liquor Act 1989 contained a similar provision concerning convictions⁴ and case law under both statutory schemes provides guidance as to how that consideration applies under the current law.

[33] In the judgment of GL Osborne⁵, the former Authority provided some guidance on the 'stand down' period following a conviction, stating:

Without fettering ourselves in this or other applications, it may be helpful if we indicate that we commonly look for a five-year period free of any serious conviction or any conviction relating to or involving the abuse of alcohol or arising in the course of an applicant's duty on licensed premises.

[34] In *Re Pompey*⁶, the former Authority made it clear that the stand-down period should run from the date of offending rather than the date of conviction as stated in *Osborne*.

[35] The Authority in *Dawson*⁷ said that recognition by the Courts that a person should not be considered unsuitable for a Manager's Certificate for an indefinite period of time was the reason why it said there should be a stand-down period. Further, in *Police v Manson*⁸, the Authority said:

The purpose of what is commonly referred to as a "stand down" period, is in order for the applicant to be able to establish an incident free period, thereby ensuring that standards are upheld. The ultimate aim being that of achieving the object of the Act.

[36] In the *Police v Manson*⁹, the Authority considered reducing the stand-down period and noted there may be exceptional circumstances where this may occur.

While we agree with the DLC that the Osborne decision is a guideline, rather than a rule, it is one that in our view should not be departed from lightly and only where justified by the circumstances. However, the Authority has in the past reduced the stand down period required to take into account exceptional circumstances. It would be an extremely rare case where convictions such as these have been incurred and no stand down period at all was required.

[37] The applicant in *Police v Manson*¹⁰, had committed four offences in the two years preceding his application. These involved theft by a person in a special relationship, breach of community work (arising out of the theft conviction),

³ *Police v Manson* [2015] NZARLA 590 at [23]

⁴ Section 121(1)(b) Sale of Liquor Act 1989

⁵ *GL Osborne* NZLLA 2388/95 at p5

⁶ LLA PH623/04 (6 September 2004)

⁷ [2017] NZARLA PH 46 at [33]

⁸ *Police v Manson* [2015] NZARLA 590 at [20]

⁹ *Police v Manson* [2015] NZARLA 590 at [19]

¹⁰ *Police v Manson* [2015] NZARLA 590 at [25]

- driving with excess breath alcohol and a further breach of community work. His application for a Manager's Certificate was declined due to his recent offending.
- [38] In *Dawson*¹¹, the appellant had annual convictions from April 2007 to April 2015. Her last alcohol related offence was in June 2011 and dishonesty offences occurred from then with a possession of methamphetamine offence in 2014. The applicant also continued to offend after her release from prison in 2014. In the applicant's favour, the application was not opposed by the Inspector or the Police. After considering its earlier decisions concerning a stand-down period for convictions and focusing on whether the applicant had established a sufficient incident free period to satisfy that she would uphold the standards required by the object of the Act, the Authority found that a stand-down period of just over three years was required. As this timeframe had not passed, the application for a Manager's Certificate was declined.
- [39] The Committee accepted that the applicant's offending during the period May to September 2018, which resulted in convictions on 18 March 2019, were serious albeit not associated with alcohol. This was acknowledged by the applicant. Although the *Osborne* guidelines were a guide, they have been applied consistently in various decisions by the Authority and suggested that for serious offences, a five year stand-down should apply unless there were exceptional circumstances.
- [30] Two years and seven months have elapsed since the applicant's last offence.
- [41] The applicant presented as a credible applicant. The Committee accepted she had the skills and character to fulfill many of the qualities required to manage licensed premises. While the applicant was the first to acknowledge the detrimental impact of her past offending, her life experience also provided her with courage and insight. The applicant had a difficult journey and the Committee accepted that her story had also been one of struggle and survival. The applicant resolve to press forward and get her life on track again, together with the support from her employer and Manager, illustrated this. While Detective Sergeant Fraser provided an email in support of the applicant's ability as a Certified Manager, there was little weight that could be placed on the email as Detective Sergeant Fraser did not attend the hearing to give evidence. The Committee noted that his view was in conflict with the opposition from the Police.
- [42] The Committee accepted that the offending prior to 2007 was historic. To her credit, the applicant had distanced herself from the difficulties of her past for a period of over 10 years. That, in the Committee's view, weighed in the applicant's favour. However, the more recent serious offending required consideration of a stand-down period of five years. It also highlighted the applicant's vulnerability to the influence of others and showed a propensity for her judgment to become compromised in particular circumstances. Given the responsibility required of a person holding a Manager's Certificate, the Committee was required to act cautiously. While the Committee appreciated that the applicant had made various changes to turn things around and was now in a stable home environment, she did reoffend in 2018 when she had access to

¹¹ [2017] NZARLA PH 46 at [40] to [46]

counselling care. The Committee considered more time was required to continue and solidify current changes.

- [43] Overall, due to the background of similar offending arising out of vulnerable relationships, and while the many positive aspects of the applicant's application might justify a reduction to a stand-down period of three and a half years or four years, the Committee was not satisfied that they added up to the exceptional circumstances required to mitigate a five year stand-down period to one of two years and seven months.
- [44] The Committee considered whether a Certificate limiting the exercise of a Manager's Certificate to Cutlers only, would assist. However, this would not overcome the main concern around whether sufficient time had elapsed to confirm the applicant's ability to overcome her vulnerability. The Committee also accepted that as a tavern, Cutlers was a high risk premise. Mr Rosson also vouched for the applicant's ability to deal with gang members.
- [45] The Committee considered whether the first 12 month term of a Manager's Certificate for the applicant could be viewed as a probationary period. However, in order for this to occur, the Committee must first find that the applicant was currently suitable to hold a Manager's Certificate. The Committee was prevented from that finding solely due to the applicant's most recent convictions.
- [46] The Committee, in reaching its conclusion, considered the applicant's evidence and Ms Hardie's evidence that the applicant would receive reduced hours and effectively be demoted if the application was not successful. Unfortunately, this was not a matter on which the Committee could place much weight. The main focus of the application was whether a sufficient incident-free period had elapsed to confirm that the applicant would uphold the standards required by the object of the Act.
- [47] After weighing up all of the information before the Committee, consideration of the matters of s222 of the Act and in particular ss222(a) and (b), the Committee found they could not support granting an application for a Manager's Certificate at this time. The Committee was however impressed with the applicant's overall capabilities. As recognised in *Osborne* and other decisions, the Committee's decision was not indefinite and it might well be that in time, the applicant should be able to establish suitability. Should that occur, and providing there were no further convictions or other matters arising, the applicant might be more successful in a fresh application in one to two years' time. However, ultimately, that would be a matter for the Lower Hutt District Licensing Committee at the time.

Conclusion

- [48] The Lower Hutt District Licensing Committee, acting pursuant to the Sale and Supply of Alcohol Act 2012, **DECLINES** the application by Ms Vala' Auina Laumatau Ah Mu for a General Manager's Certificate.
- [48] The Committee would be prepared to consider a further application from Ms Ah Mu at a future date, subject to no other adverse factors during this time.



A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

Cr Simon Edwards
Chair, Lower Hutt District Licensing Committee

Dated at Lower Hutt this 30th day of April 2021