

Applicant

AC

Respondent

Secretary for Justice

Date of Decision:

20 March 2012

DECISION

INTRODUCTION

[1] This is an application by the applicant to review the decision of the Secretary for Justice to decline approval of her as a provider of legal aid services in the area of Family Law.

[2] Alison Hill for the Secretary, signed a decision on 23 December 2011 in which the reasons for declining approval are set out as:

- (a) the applicant does not meet the Professional Entry requirements and
- (b) the applicant does not have Service Delivery systems that support the applicant to provide and account for legal aid services or specified legal aid services in an effective, efficient and ethical manner.

[3] In support of those reasons, the Secretary records that the applicant has 10 upheld/justified complaints with the New Zealand Law Society between July 2000 and September 2006 (five of which fall in August/September 2006). The Secretary's view is that the complaints reflect on service delivery and professionalism and indicate failings in regard to communication with clients, appropriate office management and acting outside of or beyond instructions. The Secretary also noted that the applicant failed to notify the Ministry or Agency of the complaints and was thus in breach of her contractual obligations.

BACKGROUND

[4] The applicant was admitted as a Barrister and Solicitor in December 1989 and has practised law since admission either as an employed solicitor or as self-employed with supporting staff solicitors. The applicant has been a sole practitioner for the past five years and does not employ staff solicitors.

[5] The applicant has been a practising solicitor for approximately 22 years and has, it appears, since 2001 held approvals under the Legal Services Act 2000. She was at the time of her application under the present legislation an approved provider and was engaged in 21 legal aid assignments in the Family Court and three in the civil jurisdiction of the District Court.

[6] Between 2000 and 2006 the applicant was the subject of 10 complaints made to the Wellington District Law Society (not the New Zealand Law Society as stated in the Secretary's decision). Five of those complaints occurred in 2006. The details of the complaints are set out in the Secretary's decision. It is not necessary for me to repeat them in this decision. The Wellington District Law Society's decision in respect of all of the complaints was to note them as "justified or partly justified". In each case the Society decided that no further action was to be taken against the applicant by way of censure or disciplinary proceedings.

[7] The applicant was the subject of a complaint to the New Zealand Law Society in which a complainant said that the applicant was rude, abusive and obstructive. The New Zealand Law Society released its decision in June 2011 declining to take further action on the complaint.

The Decision under Review

[8] As already noted the Secretary declined to grant approval holding the view that the applicant had been the subject of a complaint which by reason of volume and nature reflected on service delivery, professionalism and conduct.

[9] The Secretary noted that particular account was taken of the applicant's failure to notify the Ministry (or Agency) of the complaints at the time of their determination which he viewed as a breach of her contractual obligations under her contract for services.

The Applicant's Case for Review

[10] The applicant says that the decision declining to approve her as a service provider is wrong because the process followed to reach the decision breached the rules of natural justice and of her contract to provide services in that:

- (a) There was no consultation with her in the course of the assessment as to whether the issues which existed between 2000 and 2006 were still of concern in 2011 at the time of the application for approval as a provider.
- (b) There was not any breach of contract regarding her not notifying the relevant authority of the complaints made at the time. She argues that paragraph 4.6 of the contract requires her to notify the Agency of any complaint which was upheld by the relevant District Law Society and which may impact on her standing as a Listed Provider.
- (c) She further says that at the relevant time the Legal Services Act 2000 specified the criteria for cancellation of a listing. She has not been convicted of any offence under section 11 or section 112 of the Law Practitioners Act 1982 and has not been the subject of any order made under sections 106 or 112 of that Act.
- (d) Her application to become a listed Provider under the present Act requires assessment under the Legal Services(Quality Assurance) Regulations 2011, clause 9 of which requires the production of a Certificate of Standing evidencing the holding of a practising certificate and advice of any complaint upheld against the applicant under the Lawyers and Conveyancers Act 2006.
- (e) The applicant says that she has such a certificate which states that there have been no complaints upheld against her under the Lawyers and Conveyancers Act 2006. She goes on to say that in the interest of full disclosure she provided the Secretary with full details of the earlier complaints. She complains now that following that voluntary disclosure there has been no discussion with her about those matters, the nature of them and the measures taken

to remedy them, all of which results in a breach of the rules of natural justice.

The Secretary's Response

[11] The Secretary submits in reply as follows:

- (a) The applicant had the opportunity to provide details of the complaints as late as 5 December 2011 when she provided copies of the letters of determination in respect of the 10 complaints.
- (b) The applicant did not describe any changes she has made to her service delivery systems since the complaints.
- (c) The applicant did have an obligation to notify the Agency of the complaints because on the reasonable reading of the contract it would be for the Ministry (or Agency) to consider the impact of the complaints on a provider's standing as a Listed Provider.
- (d) That notwithstanding that an applicant meets the criteria for approval, the Secretary may nevertheless decline approval because section 77 of the Act confers on the Secretary a discretion to do so.
- (e) In the exercise of that discretion the Secretary considered the following factors;
 - (i) the complaints were serious raising questions about professionalism service delivery and conduct
 - (ii) the failure of the applicant to comply with the contractual obligation to inform the appropriate agency at the time of the complaints
 - (ii) the overarching purpose of the Act which was to improve the quality of legal aid services

The Applicant's Response

[12] She submits that the Secretary's criticism about details in respect of her service delivery systems were irrelevant in that there was no necessity for expanded detail about change because the details were in her application for approval and had been in place since the time she had become a sole practitioner five years previously.

[13] She submits that in that case if there were concerns about her delivery system then as a matter of natural justice, those concerns should have been raised with her prior to the decision.

[14] In relation to the Secretary's assertion that the applicant had been in breach of her contract to provide services, she submits that the Secretary has been in breach of clause 9 by failing to consult with her in the course of the assessment.

[15] The Secretary's decision is contrary to the recommendation of the Selection Committee. She submits that the Secretary was under an obligation to notify her of his intention not to follow the recommendation and thus give her an opportunity to address any ongoing concern. By not doing so he has breached natural justice.

Discussion

[16] Natural justice is a body of principles of the common law which requires all administrative decision-makers to "act in good faith and fairly to listen to both sides" – *Board of Education v Rice* [1911] AC 179 (HL). The role and scope of natural justice is flexible and its application to a decision is assessed in light of a number of factors, including the importance of the right or interests affected, and the circumstances and context that the decision is made within. In *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 (CA), Cooke J at 141 said:

"... The requirements of natural justice vary with the power which is exercised and the circumstances. In their broadest sense they are not limited to occasions which might be labelled judicial or quasi judicial".

In *Birss v Callahan (Secretary for Justice)* [1984] 1 NZLR 513 (CA), the court held that natural justice principles applied to the decision to suspend an employee pending the investigation of charges made against him. It held that social stigma and the loss of livelihood that the employee faced required that the employer provide him with prior notice of the decision to suspend him and grant him an opportunity to make submissions opposing that decision.

[17] The flexibility and applicability is illustrated by the decision in *Peters v Collinger* [1993] 2 NZLR 554, at 567:

“In determining the presence and level of natural justice, one must start with the body’s rules themselves. Subject to anything in the rules, other relevant factors will include the nature of the interest at stake, whether an adverse decision would amount to a finding of misconduct and the severity of the sanction which the body is empowered to impose. Those criteria – by no means exhaustive- will be important when deciding what the parties intended or implied in their contract. In one form or another they are all concerned with the seriousness of the proceedings. Expulsion from an organisation essential to one’s trade or livelihood, or a finding of unethical professional conduct, is not to be approached in the same light as a refusal to send a bridge club member to a regional bridge tournament”.

[18] In this matter the issues are whether the rules of natural justice apply to decisions made under the Legal Services Act 2011, and whether natural justice requires the Secretary to notify the practitioner of an adverse decision and provide that practitioner with an opportunity to respond before the decision becomes final.

[19] The Act and its Regulations do not expressly prescribe that the decisions of the Secretary follow the principles of natural justice.

[20] I find that the principles of natural justice apply to the Secretary when making a decision in respect of an application by a practitioner. In *Ngati Apa Ki Te Waipounamu Trust v Attorney-General* [2004] 1NZLR 462, the Court of Appeal at p 471 stated that:

“where legislation empowering a person to make a decision omits positive word importing obligation of natural justice the common law will impose it”.

See also *Wiseman v Borneman* [1971] AC 297 where it was held that the principles of natural justice will be supplemented into legislation where the

statutory processes do not give effect to the common law procedural protections and that the purpose of the legislation would not be frustrated in doing so.

[21] The purpose of the Act is set out in section 3 and states that the Act is to facilitate access to justice by providing those with insufficient means with legal services, and delivering those services in an effective and efficient manner. The supplementation of natural justice principles does not frustrate the purpose of the Act.

[22] It follows that the Secretary is obliged to give the practitioner an opportunity to respond to the decision which the Secretary intends to make adverse to that practitioner. In *Khalon v Attorney-General* [1996] 1 NZLR 458, at p 466, the Court noted an opportunity to respond should be given where the challenge to a finding relates to the way in which the decision maker has exercised a value judgment rather than the completeness of the material which had been considered.

[23] The obligation to give warning and invite submissions in response to findings that affect the rights or interests of a party does apply to administrative decisions. I refer to *Birss v (Callahan) Secretary for Justice* discussed in para [16] above.

[24] In this case the decision of the Secretary affects the livelihood of the practitioner and also raises questions in respect of professional conduct. As such natural justice principles require that the Secretary must give the practitioner notice of the adverse finding and invite a response from her.

Decision

[25] Section 86 of the Legal Services Act provides that the Review Authority may determine a review by confirming, modifying or reversing the decision under review. The section confers an unfettered discretion on the Review Authority. It is well established however that there is a requirement that the discretion be exercised fairly having regard to all the relevant information.

[26] It is noteworthy that the Act does not require an applicant to establish any prescribed grounds for review although clause 26 of the relevant Quality Assurance Regulations does require an applicant to state the grounds or reasons for seeking a review.

[27] With those matters in mind I conclude that consideration of the application should proceed as a consideration *de novo* but on the papers as specified in clause 27.

[28] The essence of the application for review is that the Secretary made a decision to decline the applicant's approval as a service provider by acting unfairly against her and in breach of natural justice.

[29] At the heart of the Secretary's response to her application is the assertion that section 77 of the Act confers on the Secretary a discretion to make a decision if a person meets the criteria prescribed in the regulations. The Secretary further asserts that he may still decline approval notwithstanding that the applicant meets the criteria which are set out in clauses 5 to 9 of the Quality Assurance Regulations

[30] It is the case that the Secretary does hold a discretion, but that discretion must be exercised cautiously and fairly and subject to the principles of natural justice. In cases where all the criteria are met which include a certificate from the New Zealand Law Society that the applicant is a person of good standing and is already an approved provider under the previous legislation, it must be that there will have to be circumstances of significant concern which require the Secretary to override the criteria and decline approval and then only after giving the practitioner notice of the concerns and the opportunity to respond to them.

[31] In this case the applicant has met all the criteria for approval as a provider. She has the recommendation of the Selection Committee established under section 78 who had considered the historic complaints and had decided that they were some time ago. The Committee considered she was competent and confident in court with many years' experience.

[32] She has practised principally in family law and has been an approved provider of legal aid services for at least 10 years. She has not been the subject of any complaint to the Law Society for the past five years.

[33] The previous complaints between 2000 and 2006, appear to be minor and while upheld did not result in censure or any disciplinary action.

[34] The applicant provided the information about the complaints in a situation where it is open to discussion whether she was required to make disclosure having regard to the relevant provision of her then applicable contract to provide

services. For the purposes of this decision I have found it unnecessary to express an opinion about that matter.

[35] When I have regard to the historical nature of the complaints, and the fact of no censure or disciplinary action against the applicant when considered alongside the other circumstances, I consider that the Secretary failed to discuss these matters with the applicant and that there was resulting unfairness to her. I hold that the requirement to discuss matters with an applicant is important in the case of a provider approved under the previous legislation who can have a reasonable expectation of gaining approval under the present Act. I do not consider that the matters of concern set out in the Secretary's decision were of such severity that approval as a provider should have been declined.

[36] For all of those reasons my decision is to reverse the Secretary's decision under review. It follows that the applicant will have approval as a lead provider for family law.

[37] I make the observation that my decision would make it unnecessary to make a referral to a complaints procedure in respect of acknowledged complaints which now have only historical interest.

[38] I note that a document on file entitled "**Secretary for Justice Decision**" is not signed by the Secretary personally. Alison Hill, Director Provider and Community Contracts, has signed it. The Legal Services Act 2011 does not permit the Secretary to delegate the power to approve or decline provider contracts. See sections 77(5a) and 77(1) and (3) which provide that no person may provide legal aid services unless approved by the Secretary and that approval to provide legal aid services is to be made by the Secretary. The Act does not provide for the delegation of this power but does not expressly prohibit it. Section 114 of the Act does not appear to permit the Governor-General to make Orders in Council creating regulations that would permit other departmental officers undertaking the function on behalf of the Secretary.

[39] I note that the definition of "Secretary" in section 3 of the Act is narrowly defined and means the "Secretary for Justice"

[40] In this case I have not found it necessary to determine whether the Secretary's failure to personally sign the decision leads to an invalid decision or whether it is a procedural breach. I do note *AJ Burr Ltd v Blenheim Borough Council* [1980] 2 NZLR 1 where the Court determined that only in comparative

rare cases of flagrant invalidity, the decision in question is recognised as operative unless set aside.

[41] I invite the Secretary to consider personally signing all decisions made under the provider provisions of the Act.

BJ Kendall
Review Authority