

**REVIEW AUTHORITY
NEW ZEALAND**

[2021] NZRA 002

Applicant

DH

Respondent

Secretary for Justice

Date of decision:

3 May 2021

DECISION

INTRODUCTION

[1] In a decision dated 9 December 2020, The Secretary for Justice (“the Secretary”) declined approval of the Applicant as a Lead Provider for Criminal PAL 3.

[2] The Secretary decided that the Applicant did not meet the criteria for approval under the Legal Services Act 2011 and the Legal Services (Quality Assurance) Regulations 2011 as a provider for the following reasons:

- [a] DH did not have the relevant period of recent experience as specified in the Schedule to the Regulations;
- [b] DH did not demonstrate substantial and active involvement in the number of trials, cases or proceedings as specified in the Schedule to the Regulations.

[3] In reaching that decision, the Secretary recommended that DH:

- [a] Gain further experience at PAL 3 level to show the 36 month minimum period of recent experience; and
- [b] Provide at least four examples of PAL 3 or 4 proceedings where she has been substantially and actively involved.

[4] The applicant seeks a review of the Secretary's decision.

BACKGROUND

[5] The applicant has practised almost exclusively in the field of Criminal Law since gaining her practising certificate in July 2017.

THE APPLICATION

[6] The applicant seeks a review of the Secretary's decision declining approval as a lead provider for Criminal Legal Aid PAL 3 for the following reasons:

- [a] That she has completed all of the requirements for PAL 3 namely 3 years experience at PAL 3 together with experience in at least 4 x PAL 3 or PAL 4 trials and has provided more than the minimum number of case examples than is required by the regulations.
- [b] That the Secretary has not given reasons why she has not met the requirements.
- [c] That she has been practising in Criminal Law since the day of gaining her practising certificate and has been exposed to high volume criminal work in all categories. She summarised her relevant experiences follows:
 - [i] Having conducted over 30 Judge Alone Trials in category 1 and 2 matters, leading evidence in at least 10 of them;

- [ii] Having conducted 2 category 2 trials in 2020 one of which was assault and the other an indecent assault. Her involvement in these trials included dealing with initial court appearances, bail matters, legal arguments, cross-examination of witnesses, delivering opening and closing addresses and receiving verdicts;
- [iii] Appeared as Junior Counsel in three Category 3 Jury Trials where she cross-examined crown witnesses, delivered opening and closing addresses and briefed witnesses;
- [iv] Appeared as Junior Counsel in 2 Category 4 Jury Trials (murder and attempted murder). She cross examined crown witnesses in both matters including an expert pathologist;
- [v] She has had substantial and active involvement in all aspects of trial including drafting submissions (including High Court appeals and appearing in the Court of Appeal to challenge a pre-trial ruling for which she drafted the legal submissions and made oral submissions at the hearing);
- [vi] Completed the Law Society's Litigation skills program in 2019 and in respect of which she received a reference from (now) retired High Court Judge Paul Heath in which he referred to DH having conducted a criminal jury trial on a murder charge. That reference commented supportively on her abilities where she displayed a good court voice, good articulation of a position and a good sense of presenting an opening and closing conforming to the theory of the case. Confidence was expressed in DH's ability;
- [vii] That she has been engaged for the past 3 years in managing a file involving multiple high value burglaries including the highly publicised [redacted]. She has taken the matter from

initial plea, then Case Review, 2 pre-trial hearings, bail and EM bail hearings, handling disclosure and liaising with the Crown. The matter was originally assigned to her, but reassigned to her employer upon Jury Trial election. She conducted a jury trial under supervision in 2020.

The Secretary Response

[7] The Secretary responded to the application for review on 31 March 2021. The Secretary has now had regard to *D v Secretary for Justice* [2016] NZRA 1 and has concluded that DH does satisfy the requirement of 36 months recent experience working on PAL 2 proceedings.

[8] The Secretary, nevertheless, holds the view that DH, while meeting the requirement of 36 months recent experience at PAL 2, has not met the minimum requirement of substantial and active involvement in at least 4 approval level 3 or 4 criminal proceedings provided for by Clause 4 of the Schedule.

[9] The Secretary has analysed the 2 PAL 3 and 2 PAL 4 case examples provided by DH in support of her application for approval. In all of the examples, DH was junior counsel. Her involvement across all the cases involved research, client discussions, preparation of submissions, briefing evidence, cross examination of witnesses at trial, along with notes for an opening address and sentencing submissions.

[10] The Secretary accepted that DH did not have to provide four examples where she did make a significant contribution to all or most key parts of 4 PAL 3 or 4 proceedings. See *AE v Secretary for Justice* (RA 005/12).

[11] The Secretary has formed the view that DH's involvement in one of the PAL 4 case examples was limited and not at the level that could be considered to be substantial and active involvement.

[12] The Secretary further considered that DH's involvement across the remaining 3 PAL 3 and 4 examples was the equivalent of substantial and active involvement in 2 PAL 3 or 4 proceedings such that she fell short of meeting the requirement set out in the Schedule. The Secretary's view was that DH had to demonstrate substantial and active involvement in at least 2 further PAL 3 or 4 proceedings.

[13] The Secretary expressed the view that DH was not far from establishing that she was sufficiently experienced and competent to be approved at PAL 3 level.

[14] DH has referred to the Secretary's acknowledgement that the letters of 10 February and 8 March 2021 were "*not particularly elucidating in what was wrong with DH's application and what she needed to do to satisfy the Secretary that she was ready for PAL 3*". DH has therefore provided a letter from her employer, who was the Lead Counsel in the murder trial referred to. He has stated that DH's involvement in the trial was significant and that she undertook the following tasks leading him to conclude that DH's involvement in the trial was substantial and active. They are:

- [a] Attendance with Lead Counsel and client at Waikeria Prison to prepare his brief of evidence, and review of evidence for trial;
- [b] Reading all disclosures ahead of trial;
- [c] Research into medical matters involving the deceased's head injuries;
- [d] Cross-examination of the Crown Pathologist and ESR Scientist;
- [e] Reviewing the notes of evidence each day for errors and corrections;
- [f] Input into discussions with Counsel and prosecution as to wording of question trail for the Jury;

[g] Attendance at trial each day, taking notes throughout and providing assistance to lead counsel as required;

[h] Other tasks as part of the trial including liaison with the defendant's family.

[15] DH seeks to introduce a further case example to clarify her concern that the issue with her application is unclear by reason of the fact that the Secretary's reservations with her application are unclear as has been acknowledged by the Secretary.

[16] She has submitted the PAL 3 case of [redacted] where the defendant was charged with the offences of sexual violation and indecent assault. DH was 'co-counsel' with lead counsel [redacted]. DH cross-examined the complainant, and delivered the closing address. She also prepared that clients brief of evidence and engaged in discussion relating to the question trail for the Jury, s 9 discussions and read all of the evidence. Not Guilty verdicts were returned.

[17] Her submission in response is that she has met all the requirements of the Schedule and that there is no clear reason to decline her application for approval at PAL 3 level.

Discussion

[18] In this matter, DH has had continuous active involvement in the criminal jurisdiction since her admission. She has the support of her employer, a level 4 provider. She has the support of her former employer now a District Court Judge and of Paul Heath a retired judge of the High Court. Both speak encouragingly of her abilities and ability to learn new skills.

[19] The Secretary has, in that context, commented that DH is not far from having sufficient experience and competency to be approved at PAL 3 level.

[20] The conclusion I reach is that the PAL 3 example, in particular, described above, demonstrates that DH does possess the necessary level of skill, experience and competency.

DECISION

[21] When I consider the level of experience displayed by DH from the materials before me, I find that the Secretary set too high a threshold for her to meet before gaining approval for PAL 3 criminal proceedings.

[22] I therefore, pursuant to s 86(1) of the Legal Services Act 2011, reverse the Secretary's decision to decline approval of DH to provide legal aid services in respect of PAL 3 criminal proceedings.

B J Kendall
Review Authority