

**REVIEW AUTHORITY
NEW ZEALAND**

RA 004/2017

LEGAL SERVICES ACT 2011

Applicant

AE

Respondent

Secretary for Justice

Date of Decision:

18 October 2017

DECISION

INTRODUCTION

1. In a decision dated 12 September 2017, The Secretary for Justice (“the Secretary”) declined approval of the Applicant as a Lead Provider in Criminal PAL 4, Court of Appeal and Supreme Court, Civil (employment Law), Duty Lawyer and PDLA.
2. She decided that he did not meet the criteria for approval under the Legal Services Act 2011 and the Legal Services (Quality Assurance) Regulations 2011, in particular Regulation 9C(1), in that he was not a fit and proper person to provide legal aid services or specified legal services.
3. The applicant seeks a review of the Secretary’s decision.

BACKGROUND

4. The applicant, who is a lawyer of some 30 years’ experience, was previously an approved provider holding approvals as a Lead Provider in Civil, Family, Criminal, PAL 1-4, Court of Appeal and Supreme Court and to provide specified legal services under the Duty Lawyer and PDLA Schemes. He had provided such legal services for in excess of 20 years.
5. On 4 August 2014, the New Zealand Lawyers and Conveyancers Disciplinary Tribunal made orders suspending the applicant from practice

as a lawyer for a total of 3 years, from 4 April 2014, which was the date he had voluntarily ceased practice.

6. The orders were made as a result of a finding by that Tribunal that the applicant had a sexual relationship with a vulnerable client whom he had previously represented in the Youth Court. He was suspended in respect of that matter for two years. There was a further finding in respect of his lying to the Standards Committee about the relationship and also to the Tribunal. For that, he was suspended from practice for three years, with both periods of suspension to be served concurrently.
7. As a result of that suspension, the Secretary cancelled the applicant's legal aid approvals and his legal aid provider contract for services. She did so under S.103(1)(e) of the Legal Services Act 2011.
8. The applicant's period of suspension ended on 1 April 2017. The New Zealand Law Society's Practice Approval Committee (the PAC) approved the applicant's application for a practising certificate as a barrister sole on 16 May 2017, having satisfied itself that he was a fit and proper person to hold a practising certificate (S.55 of the Lawyers and Conveyancers Act 2006).
9. The PAC decided that the applicant had learned his lesson; that it was highly unlikely that the misconduct would be repeated; that he had insight into his wrongdoing; and had an appreciation of the need for absolute honesty in the future.
10. The Applicant applied on 26 June 2017 for approval as a Lead Provider in Criminal PAL 4, Court of Appeal and Supreme Court, Civil (Employment Law), Duty Solicitor and PDLA. The Selection Committee appointed under S.78 of the Act recommended his approval on 15 August 2017. It considered that the applicant had; paid the price for his actions; learned his lesson; and would not engage in similar improper behaviour in the future.
11. The Secretary declined to accept the recommendation of the Selection Committee. She decided that the applicant was not a fit and proper person because he did not meet the criteria under Regulation 9C for the reason that his approval as a legal aid provider would adversely affect the integrity

of the legal services system (R.9C(3)(i)). The Secretary recorded the following concerns in her decision of 12 September 2017:

- a. The applicant's abuse of his client's trust.
- b. His willingness to exploit a power imbalance between himself and his client.
- c. The dishonesty he displayed.
- d. That there was no guarantee that the applicant would abstain from similar conduct in the future.

THE APPLICATION

12. The applicant advances the following reasons for seeking a review of the Secretary's decision:
 - a. The Secretary failed to give proper weight and consideration to the relevant parts of the NZLCDT decision of 12 June 2014.
 - b. The Secretary was wrong to make adverse comments that he had not "*provided an unequivocal undertaking not to repeat similar conduct in the future*" which resulted in her having "*no guarantee*" of repeat offending.
 - c. He had given undertakings to the NZLCDT and the PAC that he would not repeat similar conduct in the future which undertakings were given in response to questioning about the surety of such an undertaking.
 - d. That the undertakings given were an unequivocal statement about future conduct.
 - e. That members of the Selection Committee did not believe there would be improper conduct in the future.
 - f. That the Secretary can be sure that there will be no repeat offending when regard is had to the following:
 - i) The finding of the NZLCDT where it said "*We accept that the practitioner is well aware of his wrongdoing and does not pose a specific risk in relation to future repetition of this offending*"

- ii) The further comment of the Tribunal *“that he takes full responsibility for his actions”*.
- g. The PAC’s conclusion was reached after a thorough face to face interview.
- h. There is nothing to suggest a propensity for the type of conduct in question.

THE SECRETARY’S RESPONSE

- 13. In her response dated 9 October 2017, the Secretary reiterated her reasons for declining the applicant’s application for approval.
- 14. She responded to the applicant’s criticism of her decision by stating that her primary consideration was the protection of vulnerable legal aid clients and that based on the material provided by the applicant she was not satisfied that the applicant was not a future risk to legal aid clients.
- 15. The Secretary stated that she was not bound by the decisions of the NZLCDT or the PAC for the reason that they were considering the applicant’s registration as a lawyer, which is a different question to the assessment required of the applicant’s fitness to provide legal aid services. She was not persuaded that those decisions assisted in determining that the risk of repeat conduct did not exist.
- 16. The Secretary stated that she would have expected a recorded unequivocal undertaking not to repeat similar conduct in the future to have been included in the material that she had to consider.
- 17. The Secretary stated she was not prepared to approve the applicant as a legal aid provider when he had provided reasons against the prospect of future similar conduct as being a “remote possibility”.
- 18. The Applicant was critical of the Secretary when he submitted that he had not been given the opportunity to respond to issues of concern. The Secretary’s response was that the applicant was given such an opportunity and responded by letter of 17 July 2017 and that there was no obligation to give the opportunity to provide the same information again.

DISCUSSION AND DECISION

19. The primary question in this matter is whether the applicant is a fit and proper person to be a provider of legal aid services. Both the Lawyers and Conveyancers Act 2006 and the Legal Services (Quality Assurance) Regulations 2011 have similar requirements for determining whether or not a person is fit and proper. The primary focus in each situation is to determine whether the recorded misconduct would affect the integrity of each of the legal profession and the legal aid services and be a breach of practice standards.
20. It is relevant to note that the applicant's misconduct was the same misconduct considered by the Secretary, the LCDT, the PAC and the Selection Committee. The Secretary alone decided that the applicant was not a fit and proper person. She determined, that in the absence of a documented unequivocal undertaking from the applicant that there would be no repeat of the conduct, she could not grant approval when balanced against the need to protect vulnerable legal aid clients.
21. An assessment of the risk of future similar conduct is essential to consideration of the finding as to whether or not an applicant is a fit and proper person. Both the LCDT and the PAC had the benefit of face to face interaction with the applicant. The LCDT was able to conclude that the applicant did not pose "*a specific risk to the public in relation to future repetition of this offending*".
22. The PAC after a lengthy interview with the applicant reached the conclusion that the applicant was "*highly unlikely*" to repeat his misconduct".
23. Those risk assessments had to be made in the context of the Applicant's return to legal practice and his involvement with clients as members of the public and in circumstances where some of them, like legal aid clients, would be vulnerable persons.
24. It is correct that the Secretary is required to make her own judgment as to whether an applicant is a fit and proper person to be approved for the provision of legal aid services. Such a decision is logically based on information gained and the advice of the Selection Committee as to suitability after it has assessed the application and the applicant.

25. In this matter, the Selection Committee had reported that it had personal knowledge of the applicant's work as a legal aid lawyer. It also had the information of two professional bodies namely the LCDT and the PAC who had determined that the applicant posed no concernable risk of repeating his misconduct.
26. Something more is required before a decision to decline the recommendation of the Selection Committee is made. There would be a requirement to have overlooked an important aspect of the application; to have been plainly wrong; or to have made a recommendation against the weight of the information.
27. The Secretary is rightly concerned to protect the integrity of the legal aid services system and to ensure that vulnerable legal aid clients are protected. She was critical that there was no documented record of an unequivocal undertaking by the applicant that there would be no repeat of his misconduct. That concern should have been met by asking the applicant for such an undertaking. Given the applicant's submission that he had unequivocally given that undertaking, I am satisfied that he would have complied.
28. As to the protection of vulnerable legal clients, I find that they are members of the public who were considered at the time that the LCDT and PAC made their findings of no specific risk. The Secretary was dismissive of the applicant when he said that he would interview a vulnerable client with the door to the interview room open. She was of the view that privacy required that the door remain closed. Considerations of safety have to be weighed against that statement. An open door may be required when considerations of safety to the client and to the interviewer have to be taken into account. The client requires protection from the interviewer. The interviewer likewise requires protection from unfounded allegations made about conduct said to have occurred during the interview.
29. The applicant in his letter dated 26 June 2017 to Provider Services of the Ministry of Justice stated that he was seeking approval for Criminal Category 4. He was not seeking approval in categories 1-3 where Youth Advocacy is part of category 1. That statement further alleviates the Secretary's concern for the protection of vulnerable legal aid clients.

30. I find that the Secretary erred in finding that the applicant was not a fit and proper person to have approval to provide legal aid services. I summarise my reasons as follows:
- a. The applicant has been found to be a fit and proper person by the LCDT and PAC.
 - b. The Selection Committee appropriately recommended approval to the Secretary.
 - c. The applicant has unequivocally undertaken that there will not be a repeat of the misconduct leading to his suspension and the cancellation of his provider contract.
 - d. There are no matters that persuade me to find that decisions and recommendation of the LCDT, PAC and the Selection Committee should be overridden.
 - e. Six years have passed since the misconduct occurred during which time the applicant has taken steps to rehabilitate himself and to ensure that similar conduct will not occur, the most important of which is having engaged in counselling.
31. I accordingly reverse the decision of the Secretary pursuant to S.86(1) of the Legal Services Act 2011 and do so on the basis that the Applicant has not sought approvals in respect of Criminal PAL 1-3.

BJ Kendall
Review Authority