

**REVIEW AUTHORITY
NEW ZEALAND**

2014 NZRA 000003

Applicant

AC

Respondent

Secretary for Justice

Date of Decision:

22nd August 2014

DECISION

INTRODUCTION

1. In a decision dated 23rd June 2014, The Secretary for Justice (“the Secretary”) declined approval of the Applicant as a Lead Provider for proceedings in the Waitangi Tribunal
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 reason that *“the issue of the applicant’s skill in cross-examination before the Tribunal outweigh the other factors in his favour”*.
3. The applicant seeks a review of the Secretary’s decision.

BACKGROUND

4. The Applicant has been practicing solely in the Waitangi Tribunal area of law for the past four years or more. He has done so as an employed lawyer.
5. He is also under the Legal Services Act a Supervised Provider for Maori Land Court, Maori Appellate Court and Waitangi Tribunal. His supervisors are Kathy Ertel, his present employer, and Linda Thornton who is an associate of the applicant’s employer

THE APPLICATION

6. The applicant seeks a review of the Secretary's decision and advances the following in answer to the Secretary's view that he does not have sufficient skill in the leading of evidence and conduct of cross-examination in matters before the Waitangi Tribunal;
 - a. The Secretary found him to be competent in all aspects required by the Ministry.
 - b. He has been found to meet all the criteria for a lead provider except that it is considered he did not show sufficient experience in cross-examination.
 - c. He has led evidence before the Waitangi Tribunal and has cross-examined tangata whenua and technical witnesses.
 - d. He has benefited from the supervision of AD and AE who have many years of extensive experience in the work of the Tribunal. He will continue to work alongside them.
7. In response to the Application for review, the Secretary has essentially relied on the reasons for the decision given on 23rd June 2014.
8. He has said that he was satisfied that the applicant's experience collectively demonstrated active and substantial involvement in Waitangi Tribunal proceedings. The Secretary considered that the applicant's submitted examples of cross –examination and leading of oral evidence did not give the required level of assurance of his skill in that area. He failed to assure the Secretary that he had the appropriate level of knowledge and skill to provide legal aid services in the Waitangi Tribunal.
9. The Secretary has acted on the recommendations of the Waitangi Tribunal Selection Committee.
10. In reply to the Secretary, the applicant submits,
 - a. That the factor of the level of his experience in leading evidence and cross-examination has been given too much weight in the Secretary's decision making process.

- b. That he does nevertheless have an appropriate amount of experience and skill in cross-examination.
- c. That the '*other skill factors*' which the Secretary took into account in favour of the applicant are very significant.
- d. That his involvement in actual cross-examination occurred in the context of a 12 week hearing where he led evidence and cross-examined witnesses both tangata whenua and technical experts.
- e. That he has prepared the questions for cross-examination and has been present at hearings during cross-examination by leading counsel and has actively participated in the framing of questions during the hearings.
- f. That his active participation involved
 - i. Help with the preparation of questions
 - ii. Drafting of questions
 - iii. Suggesting lines of questions
 - iv. Taking notes and suggesting further questions during questioning by leading counsel.
 - v. Debriefing with Counsel following the questioning.

11. The applicant refers to the Northland Inquiry which is very pressed for time. The result is that a practice has developed where one lawyer is appointed to lead cross-examination on behalf of all claimant counsel for a technical witness. Leave is then reserved to other counsel to ask for leave to cross-examine. Time limits are dramatically constrained. The applicant says that he has put questions where leave has been granted and has been mindful of the time restraints and has avoided prolonged or unnecessary questions.

12. Ms AE who is a supervisor of the applicant confirms the limited opportunity for cross-examination in Northland but says that the applicant has shown himself to be more than capable when the opportunities to cross-examine have arisen.

13. He argues that while skill and experience in cross-examination should be a factor in deciding his application, an undefined quantity of cross-examination should not be a defining factor upon which to judge the application, particularly where he has convincingly satisfied the other criteria.

DISCUSSION

14. The issue for discussion in this application is a narrow one in that the Secretary has satisfied himself that the applicant has the required level of knowledge and skill in all respects except in cross-examination before the Tribunal.

15. The applicant has some practical experience of conducting cross-examination before the Tribunal.

16. He has demonstrated that he has been active in the preparation of questions for cross-examination and has been present and assisted lead counsel in the conduct of cross-examination at hearing.

17. In **RA 005/2012**, I said at paragraph 17 that “*substantial and active involvement will encompass such steps as researching the law, interviewing witnesses, briefing of evidence, drafting documents, examining witnesses, cross-examination, making submissions, making opening/closing addresses.....*”.

18. I did say that such considerations would rule out an appearance of Counsel who was merely an observer of the proceedings.

19. The skills set out do not have to be shown to have been provided equally. What is required is an assessment as to whether the applicant has demonstrated a set of knowledge and skills which viewed in their totality meet the requirements set out in the regulations.

DECISION

20. I take into account that there are limitations on Counsel in gaining extensive experience in cross examination in the Waitangi Tribunal.

21. Those limitations are;

- a. The length of time that proceedings before the Tribunal take and therefore the limited number of matters that reach a hearing,
- b. The restrictions placed on cross-examination by the Northland Inquiry

22. When I consider the evidence that the applicant has knowledge and skill in all aspects of Waitangi Tribunal proceedings (albeit in differing degrees of involvement); the limitations referred to in paragraph 21 and the supportive reference of his supervisors as to the level of his skill and competence, I conclude that the Secretary has erred in following the recommendation of the Selection Committee that the applicant should have demonstrated more experience in cross-examination.

23. I accordingly find that the applicant does meet the requirements set out in the Schedule to the Legal Services (Quality Assurance) Regulations in respect of proceedings before the Waitangi Tribunal.

24. I therefore pursuant to Section 86(1) of the Legal Services Act 2011 reverse the decision of the Secretary made on 23rd June 2014 declining approval of the applicant as a lead provider of legal aid services in respect of proceedings before the Waitangi Tribunal,

25. The result is that he has approval as a lead provider. I do not find it necessary to impose any conditions on such approval.

Dated at Auckland this 22nd day of August 2014

BJ Kendall
Review Authority