

Applicant

AG

Respondent

Secretary for Justice

Date of Decision:

30th September 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 of Legal Aid services in the Waitangi Tribunal area of law.
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 she had not demonstrated experience and competence in the Waitangi Tribunal.
3. In reaching the decision to decline approval, the Secretary accepted the recommendation of the Waitangi Selection Committee (the Committee) which had considered the application for approval and had reported on it,
4. The Applicant seeks a review of the Secretary’s decision.

BACKGROUND

5. The Applicant has been practicing in the Waitangi Tribunal area of law. She applied for approval as a Lead Provider on 28th March 2013. At that time she had been practising for two years and 4 months. She was admitted as a Solicitor of the High Court of New Zealand on 20th November 2010. She was an employed solicitor until she commenced practise as a barrister sole early in March 2013. She is a Supervised

Provider for Maori Land Court, Maori Appellate Court and Waitangi Tribunal.

6. The application for approval was considered by the Committee on three occasions. The first occasion was on 8th May 2013. The Committee recommended that the Secretary decline approval for the following reasons.
 - a. The application was confused and the Applicant may not have produced her best examples of work in the area of law
 - b. It did not consider that she had played a major role.
 - c. The transcript of cross-examination provided was confusing and indicated that the applicant had not properly prepared for the hearing.
7. The Secretary invited the Applicant to make a further submission which could be referred back to the Committee.
8. The Applicant provided two further case examples and three work samples included in which were cross-examination questions. The Committee concluded that while the questions demonstrated preparation it was unable to make an assessment of competence and skill. It concluded that the Applicant did not have the experience and competence to be a lead provider.
9. It advised the Secretary of its recommendation to decline on 13th January 2014. The Secretary gave the Applicant an opportunity to respond to the recommendation on 14 January 2014. The Applicant did not respond to that invitation. The Secretary declined approval on 24th March 2014. He found that the Applicant had demonstrated substantial and active involvement in at least three substantial proceedings as required by Clause 10(b) of the Schedule to the Legal services (Quality Assurance) Regulations 2011. He also found that the Applicant had 18 months recent experience working on Maori Land or Waitangi Tribunal cases as required by cl 10(a) of the schedule to the regulations and as well a sound knowledge of the Treaty of Waitangi and Waitangi Tribunal jurisprudence as required by cl 10(c) of the same schedule.
10. The Secretary found that the Applicant had the requisite experience as a lawyer working on Waitangi Tribunal cases. (Reg 6(2)(b)).

11. He determined that the Applicant did not have the advocacy skills to allow approval of the application and accordingly declined approval.
12. The Committee considered the application for approval as a lead provider again on 13th June 2014. It concluded that, although the Applicant had provided transcripts of her cross-examination, she required more experience before the Tribunal in a leading role as counsel and despite meeting the minimum criteria she had not demonstrated the level of competence in leading of witnesses and cross-examination. It did not recommend approval.
13. The Secretary acted on that recommendation and declined to approve the Applicant as a lead provider and recorded that in his decision of 23rd June 2014.

THE APPLICATION

14. The Applicant seeks a review of the Secretary's decision and advances the following in answer to the Secretary's view that she has not demonstrated competence in the leading of evidence and cross-examination in Maters before the Waitangi Tribunal:
 - a. The Secretary was in error in placing the weight that he did on perceived lack of experience and competence and thus misdirected himself as to that experience.
 - b. That she has led, briefed and prepared evidence for dozens of witnesses in various jurisdictions which is sufficient to demonstrate a significant degree of experience and competence.
 - c. That the work submitted related to questioning in the Tribunal and was good work in that area of the law.
 - d. That the Committee relied on work which was over a year old at the time of the latest decision.
 - e. The work recently submitted in respect of cross-examination examples showed a refinement of her skills.
15. The Secretary has responded by acknowledging that the Applicant had met the relevant experience requirements in the Waitangi Tribunal but had concerns about her level of competence and skills. The Secretary was required to be satisfied that the Applicant had the appropriate level

of knowledge, skill and competence to provide legal aid services in the Waitangi Tribunal. He reiterated that the examples which the Applicant had provided illustrated a limited experience in adducing evidence and cross-examining witnesses and that she did not demonstrate competency in those skills.

16. The Secretary further submitted that he had afforded the Applicant at least three opportunities to submit relevant information in support of her application for approval.

17. The Applicant replied to the Secretary's response as follows:

- a. The Secretary's continued reliance on the "confusing cross-examination" in the Maori Land Court case was an error in that that example had been overtaken by the more reliable examples that she had submitted.
- b. The Secretary had failed to take into account the limitations on Counsel in gaining extensive experience in cross examination in the Waitangi Tribunal as was mentioned in *AC v Secretary for Justice*.¹

DISCUSSION

18. The issue for discussion in this application is a narrow one. The Applicant has been shown to have met the minimum requirements for approval as a lead provider of legal aid services in the Waitangi Tribunal. What is at issue is whether or not she has demonstrated that she has the competence to do so.

19. The Committee has assessed the Applicant's competence on three occasions and has on each made a recommendation that she has not displayed sufficient competence, particularly in the area of cross-examination.

20. That is a different question from what was discussed in *AC supra*. There the Authority was considering the sufficiency of the level of skill and knowledge of that applicant.

21. Here the Applicant has been on notice from the time of the first recommendation of the Committee in May 2013 that her competence was of concern.

¹ [2014] NZRA 003/2014

22. Apart from submitting further examples of her work, it was open for the Applicant to provide further evidence as to her competence from the referees who supported her application for approval as a lead provider. They are people with whom she has worked as junior counsel in matters before the Waitangi Tribunal.

DECISION

23. I must take into account that the Applicant's competence has been the subject of consideration and comment on 3 occasions from May 2013 to June 2014 and that on each occasion there has been a recommendation to decline approval.

24. I find that the Secretary was not in error when he accepted the Committee's recommendation to decline approval on the three occasions that the recommendation was given. It has to be noted that the Committee's recommendations were based on information which the applicant had provided.

25. Accordingly, pursuant to Section 86(1) of the Legal Services Act 2011 I confirm the decision of the Secretary dated 23rd June 2014.

Dated at Auckland this 30th day of September 2014.

BJ Kendall

Review Authority