

**REVIEW AUTHORITY
NEW ZEALAND**

2012 NZRA 000017

Applicant

AL

Respondent

Secretary for Justice

Date of Decision:

30 August 2012

DECISION

INTRODUCTION

1. On 1 June 2012, the Secretary for Justice (Secretary) issued a decision declining to grant approval the Applicant as a Lead Provider in Category 2 Criminal Proceedings and for Police Detention Legal Assistance Scheme.
2. He held that the Applicant did not meet the criteria for approval under the Legal Services Act 2011 (the Act) and Legal Services (Quality Assurance) Regulations 2011 (the Regulations) for the following reasons:
 - a. The Applicant had not appeared as Counsel with substantial and active involvement in at least 3 trials on indictment before a jury or before a judge alone as required by cl 3(b) of the Schedule to the Regulations.
 - b. Substantial and active involvement includes preparation for trial and delivering opening address, cross-examination of Crown witness, adducing evidence from or on behalf of the accused and making closing address to the jury.
 - c. The Applicant's case examples demonstrated preparation work. However, his courtroom trial advocacy was limited to cross-examination of a witness in one trial.
3. The Applicant seeks a review of the Secretary's decision.

BACKGROUND

4. The applicant was admitted as a Barrister and Solicitor in New Zealand in February 2006.
5. He has practised as a barrister sole since November 2007 and has concentrated on the practice of criminal law. He has held approvals as a Category 1 provider, Duty Solicitor and Youth Advocate.
6. The Applicant's application for approval as a lead provider was received by the Secretary on 30 December 2011. In that application he sought approval as a lead provider in Criminal Proceedings 1 and 2, Duty Solicitor, and Police Detention Legal Assistance Scheme.
7. In support of his application he referred to case examples in respect of:
 - a. A charge of indecent assault in which the defendant was discharged after a s 347 application.
 - b. A charge of manslaughter in which the defendant was found guilty and sentenced to imprisonment for 8 years and 6 months.
 - c. A charge of sexual violation and male assaults female in which the defendant was acquitted of multiple charges and found guilty of assault resulting in a sentence of Community Work.
8. The applicant provided work samples in respect of the cases mentioned in paragraph 7(a), (b) and (c).
9. In respect of the case mentioned in paragraph 7(a), the Applicant stated that he reviewed the trial file including briefs of evidence, job sheets, notebook entries and exhibits. He researched the law on the case to a 40% level. He briefed one witness and drafted the handwritten notes in support of the application for discharge under s 347. He did not undertake any further activity in respect of the matter.
10. So far as the charge of manslaughter mentioned in paragraph 7 (b) was concerned, the Applicant reviewed the trial file including briefs of evidence, job sheets, notebook entries and exhibits. He researched the law to a level of 33%. He assisted in the preparation of cross-examination of a prosecution expert, reviewed the notes of evidence

daily, briefed one witness, cross-examined the police photographer and drafted the closing address and sentencing submissions.

11. In respect of the charges mentioned in paragraph 7 (c), the Applicant researched 33% of the case. He had reviewed the file comprehensively. He briefed one witness, assisted in the preparation of notes to support an application to discharge under s 347, and carried out some investigatory work as to the role the complainant's support person played in the tenor and veracity of the complainant's evidence. He cross-examined one witness. He reviewed the notes of evidence daily and assisted lead counsel in the preparation of the closing address.

The Application for Review

12. The Secretary received the Application for Review on 13 July 2012. In the application the Applicant set out his grounds for seeking a review as follows:

- a. That the decision maker declined his application for approval based on the fact that he had not played an 'active and substantial' part in three trials on indictment. He disagrees with the decision based on the Ministry of Justice's definition of 'substantial and active' as set out in the Provider Manual.
- b. That the decision maker declined the application based on the assertion that the Applicant had only cross-examined one witness at trial, when he had cross-examined two witnesses in separate trials.
- c. That the decision maker had not placed enough weight on substantial pre-trial preparation and non-verbal courtroom trial advocacy.
- d. That the decision maker had not taken a global approach to the contents of the application including:
 - i. litigation experience;
 - ii. training undertaken;

iii. extensive courtroom advocacy at summary level.

13. The Secretary responded to the Applicant on 27 July 2012 and made the following points:

- a. Regulation 6 sets out the experience and competence requirements of the criteria to be applied before an applicant can be approved as a lead provider.
- b. The Regulations provide limited discretion to the Secretary for the following reasons:
 - i. Regulation 4 cites the Schedule as a source of the criteria for approval. The Schedule contains mandatory requirements.
 - ii. The Secretary must consider the three sources set out in reg 6 (2) (a), (b) and (c) by applying the requirements in the Schedule, and be satisfied of an applicant's experience as a lawyer in the private sector and be satisfied as well that the applicant has the appropriate level of knowledge and skill in each area or category applied for.
 - iii. That the use of the word 'and' between reg 6 (2) (a), (b) and (c) makes it clear that the requirements are not mutually exclusive, and must all be considered to grant approval.
 - iv. That an applicant would not meet the criteria in reg 6 merely by meeting the requirements of reg 6 (2) (b) on a history as a lawyer alone or by meeting reg 6 (2) (c) because the Secretary is satisfied the applicant has the appropriate knowledge and skill.
 - v. The completion of the NZLS "*Litigation Skills Programme*" supports the application for approval in terms of reg 6 (2) (c) but is not information relevant to meeting reg 6(2) (a) and the Schedule.
 - vi. That 'active and substantial' involvement encompasses participation in two stages:

1. 'pre-court or preparation' – research, client contact, liaising with opposing counsel, drafting submissions and court documents; and
 2. 'court or proceedings' which includes trials/hearings where relevant, - experience and attendance at court, making opening and closing addresses, leading evidence, cross-examination of witness and experts, addressing the court and presenting submissions.
14. The Secretary observed that an applicant does not have to demonstrate all the tasks in every case example provided but overall the case examples, when considered together, must demonstrate active and substantial involvement. Such an approach to assessment allows the Secretary to be confident that an applicant is capable of managing a case from start to finish.
15. The Secretary considered that the Applicant demonstrated substantial 'pre-court or preparation' involvement but did not demonstrate sufficient active involvement in court.
16. The Secretary confirmed that the Applicant had cross-examined a witness in two trials and the matter was incorrectly recorded in the Secretary's decision.
17. The Secretary avers that a global approach to the application for approval was taken. He noted the Applicant's litigation experience which was set out in the *Criminal case examples form*, the number of summary defended hearings undertaken and completion of *Litigation Skills Programme*.
18. The Applicant responded to the Secretary's submissions by memorandum of 24 August 2012 in which he made the following relevant points. I use the word 'relevant' because it is not necessary for me to mention points in reply that are repetitive of those made in the original application for review. The points made are:
- a. The decision to decline approval in Criminal Proceedings Category 2 was based on the fact that he had not made an

opening and closing address and that he needed to demonstrate an ability to undertake a Criminal PC2 trial from start to finish.

- b. That the “*start to finish*” approach would also include sentencing in indictable matters and if so would be inconsistent with the Review Authority’s decision in *AG v Secretary for Justice* [2012] NZRA 009 where it is submitted that the applicant’s substantial sentencing experience in PC 1 proceedings in that matter was sufficient.
- c. That the ‘*start to finish*’ approach is too narrow an interpretation of “substantial and active involvement” when considered alongside the definition set down in the Provider Manual produced by the Ministry

Discussion

- 19. The Applicant accepts in his submissions that the central issue is the Secretary’s interpretation of “substantial and active involvement”.
- 20. I have already held in earlier decisions that my remarks discussing “substantial and active involvement” are compatible with the definition provided in the Ministry of Justice’s Provider Manual. See **RA 009/2012, and RA 005/2012**
- 21. In **RA009/2012**, it is correct that I held that it was not necessary for that applicant to have appeared on an indictable sentencing matter having regard to her substantial sentencing experience in PC1 proceedings. That remark was made in the context of being otherwise satisfied that the applicant had met the requirement of ‘substantial and active involvement’ by reason of her active courtroom involvement in indictable trials.
- 22. The Applicant’s plea that his extensive experience in numerous defended and sentencing hearings in PC1 proceedings demonstrates an ability to lead evidence, cross-examine and make oral legal submissions, and is indicative of extensive and satisfactory courtroom experience. I note that the Secretary has accepted that proposition. He has recorded that those matters satisfy the requirements of reg 6(2) (c) in particular.

23. I accept and agree that in determining an application for approval to provide lead provider services in respect of Category 2 Criminal Proceedings, the Secretary must be satisfied from the totality of information supplied by the case examples and work samples that an applicant has the ability to undertake a trial from start to finish. An applicant is not required to demonstrate that she/he has already undertaken such a trial from start to finish. I do not find that the Secretary has made that stipulation.
24. The Schedule, at cl 3 (b), requires that an applicant must have appeared as counsel with substantive and active involvement in at least 3 trials on indictment before a jury or before a judge alone. That is a mandatory requirement which demands that an applicant provide the Secretary with appropriate case examples and work samples applicable to the category applied for, which will then allow a decision to be made.
25. It follows therefore that the Applicant's plea, that extensive experience in matters of a lesser category can meet the requirement, must fail.
26. The Act and Regulations do not define substantial and active involvement. '*Substantial and active*' are strong words which must be applied in the context of a robust application of the criteria. I have earlier expressed my acceptance of the interpretation applied by the Secretary and as mentioned in the Provider Manual.
27. The question in this case then is whether the Applicant has demonstrated 'substantial and active involvement' in three trials as required by the Schedule.
28. When I apply the test in respect of courtroom activity I am unable to say that the Applicant has demonstrated the required level of involvement in the three examples given. I agree with the Secretary's decision that the Applicant's courtroom involvement having been limited to cross-examination of a witness in two separate trials is insufficient to meet the test.
29. I note that the Applicant otherwise meets the other requirements in terms of experience and skill. He now requires to gather courtroom experience in the category applied for and then consider a further application for approval.

Decision.

30.I accordingly confirm the Secretary's decision of 1 June 2012 under review which declined approval of the Applicant as a lead provider in respect of Criminal Proceedings Category 2 and PDLA.

BJ Kendall

Review Authority