

**Applicant**

**AN**

**Respondent**

**Secretary for Justice**

**Date of Decision:**

**30 January 2013**

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**DECISION**

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**INTRODUCTION**

1. In a decision dated 26 October 2012, the Secretary for Justice (the Secretary) approved the Applicant as a lead provider in respect of Family Law subject to three conditions which were:
  - a. The Applicant is mentored for a maximum of three years by a lead provider agreed to by the Secretary with 7 years' experience of Family law. The mentor must provide a six-monthly report to the Secretary on how the legal aid matters are being managed, in particular where work is delegated and the supervision and management of cases and caseloads. This condition is to be reviewed annually.
  - b. The Applicant undergoes training by attending Irene Joyce's course on work allocation, delegation and supervision administered through the NZLS Council of Legal Education or from Ms Joyce directly through her Professional Edge consulting firm within six months from the date of approval.
  - c. The approval excludes providing legal aid services in property relationship proceedings as the Applicant does not currently hold indemnity insurance.
2. Without making it a condition of approval the Secretary proposed that the Applicant limit the number of staff she will supervise in her practice. The

suggested limit was 1 practice manager, 2 supervised lawyers and 2 non-lawyers such as law clerks or qualified legal executives.

3. In a decision dated 11 December 2012, the Secretary removed the condition relating to training because the Applicant had commissioned a report from Irene Joyce of Professional Edge on the management of her practice.
4. The Applicant has accepted the condition excluding her from providing services in respect of property relationship proceedings.
5. She does not accept the condition relating to mentoring and seeks a review of the Secretary's decision to impose that condition for a period of 3 years subject to annual review

## **BACKGROUND**

6. The Applicant was admitted as a barrister and solicitor in New Zealand on 22 May 1998. She was an employed lawyer until August 2001. She has been self-employed from then down to the present.
7. The Applicant had held approval as a lead provider in Family under the previous legislation, but at the time of her application her approval had been cancelled.
8. The Applicant has been involved in litigation with the former Legal Services Authority (LSA) concerning complaints made against her, and concerning aspects of delivery of her services.
9. The LSA Cancellation Consideration Panel (Panel) cancelled her approval as a lead provider on 5 January 2010.
10. The Panel upheld the cancellation in a decision of 8 April 2010. The Applicant sought review of that decision in the High Court. The Court directed that the decision to cancel approval be reviewed as the Panel had failed to take into account a relevant factor namely the audit report and had breached natural justice in failing to provide the Applicant with references to other decisions to which it referred when deciding whether cancellation of her listing approvals should be upheld.

11. The matter was then considered by the Court of Appeal. The Court of Appeal held that the audit report had not been given genuine consideration by the Panel and that the favourable aspects of the audit report were material to the outcome. It further held that the Applicant had suffered a breach of natural justice as a result of the non-disclosure of material referred to in para 10.
12. The Court of Appeal quashed both decisions of the Panel rather than referring the matter back for a fresh consideration on the basis that intervening events effectively prevented such a course. The Legal Services Act 2011 (the Act) has a substantially different regime in relation to the cancellation of a provider's approval.
13. The Applicant was the subject of proceedings before the New Zealand Lawyers and Conveyancers Disciplinary Tribunal where she faced two charges being one of misconduct and one of unsatisfactory conduct arising from a complaint made in November 2009 by the LSA. The Tribunal found that each of the charges had not been proved and held that there was no evidence to justify a finding on each.
14. The information on file shows that the Applicant has had a strained relationship with the Agency which is somewhat understandable given the history of the litigation

## **THE APPLICATION**

15. The Selection Committee made a recommendation to the Secretary on 11 October 2012 in which it recommended approval of the Applicant which excluded property relationship proceedings as the Applicant did not hold indemnity insurance.
16. It noted the following matter which it brought to the Secretary's attention:
  - a. the number of client complaints substantiated by the LSA;
  - b. invoicing in her name and guideline rate for work undertaken by a secondary provider;
  - c. the number of lawyers she was supervising;

- d. the quality of that supervision;
- e. allowing non approved lawyers and non-lawyers to undertake work on legal aid files; and
- f. that referees were ambivalent about her performance.

17. Arising out of those matters, the Secretary imposed the condition 1 as to mentoring referred to above in granting approval as a lead provider in Family.

18. The Applicant challenges the condition and says:

- a. Most of the client complaints were wrongly substantiated.
- b. The invoicing issue was only part of the cancellation decisions which were quashed by the Court of Appeal.
- c. That she was never informed that the number of lawyers she was supervising was ever an issue. She is now no longer employing or supervising any lawyers, and that the Secretary is aware of that situation.
- d. That the statement that she allowed 'non approved lawyers and non-lawyers to undertake work on legal aid files' is based on misinterpretation of the policy, statute and contract.
- e. That she did not know of any ambivalence by referees and no concern in that regard was raised with her by the Selection Committee.

19. The Applicant's counsel, Peter Gorringe, addressed condition 1 as follows:

- a. The condition involves an assumption that the matters which the Selection Committee brought to the Secretary's attention were valid.
- b. The other five points were in issue historically and judicially it is now established that the Panel's decisions were defective and legally no longer exist.

- c. Mentoring will have an impact on the Applicant's practice in that there will be cost to the Applicant each six months. In addition there is the difficulty of identifying a suitable practitioner as a mentor who would likely have to be from outside Hamilton.
- d. The Applicant assesses her need for mentoring to be in the area of business development in respect of her practice as a whole rather than a focus on legal aid aspects and will seek assistance through the Business Mentors' Network.
- e. Delegation, supervision and management of cases overlap with condition 2 (now deleted). The Lawyers' Disciplinary Tribunal directly addressed supervision by the Applicant during 2009, favourably.
- f. Non-approved and non-lawyers working on legal aid files is vexing in that :
  - i. The only time a non-approved lawyer was working legal aid files was the short period in August-September 2009.
  - ii. Non-lawyers, such as staff members were approved by the Agency and at all times their work fell within the agency's policy and their provider contracts.
  - iii. The decision of the Lawyers' Disciplinary Tribunal is sympathetic to the Applicant on these matters.
  - iv. The Applicant's practice is now totally different from 2008-2009. She is the only legal practitioner and employs one person who is a part time receptionist-paralegal. The Ministry has adjusted its policy to clarify the limits on work on legal aid files that can be done by non-lawyers. The ambiguities have been removed. It is therefore difficult to see justification for the type of mentoring that the first condition requires.

20. The Secretary's response was given on 11 December 2012. He refers to reg 10 of the Legal Services (Quality Assurance) Regulations 2011 (Regulations) which prescribes the conditions the Secretary may impose including a mentoring condition (r 10(1)(b) – "*the condition that the*

*provider be mentored in a manner specified by the Secretary*”). He notes that the relationship between the Applicant and the LSA was strained at times. The mentoring condition was considered appropriate in view of that relationship. The Secretary and the Applicant have discussed the condition to see if a variation could be reached. That has not been achieved.

21. The Secretary maintains that the condition should remain.

## **DISCUSSION**

22. This review must consider the reasonableness of the condition that the Secretary has imposed.

23. All of the matters that were taken into account by the Secretary in reaching his decision to impose a mentoring condition occurred under the LSA. There is now a substantially different regime under the 2011 Act as was noted by the Court of Appeal at para 114 of its decision of 5 October 2012 when it made reference to the establishment of a performance review committee.

24. The Applicant has reduced the size of her practice and is effectively a sole practitioner.

25. Complaints against the Applicant were found not proven by the Lawyers and Conveyancers Disciplinary Tribunal.

26. Both the High Court and the Court of Appeal decided that the decisions of the Cancellation Consideration Panel and the Complaints Review Panel to cancel the approval of the Applicant as a legal aid provider were flawed because of failure to consider and fully evaluate the audit report and because of unfairness leading to breach of natural justice. The Court of Appeal quashed the decisions. Were it not for the supervening event of the 2011 Act the Applicant would have been entitled to resume work as a lead provider.

27. The purpose of the audit report mentioned in the decisions was to enable the LSA to assess the quality and value of the services provided by the Applicant. The Court of Appeal referred to the favourable aspects of the audit report in paras 56, 64 and 65 of its decision.

28. I find para 65 to be relevant to the discretion which the Secretary has about the imposition of a condition. The Court said, "*The fact that the audit report was very favourable to the Applicant in terms of her performance on the ten randomly selected files was particularly relevant to the second stage of the inquiry. It was a factor which was material in deciding whether, with the reduced staff level she offered, she could have provided reasonable assurance to the LSA that she could deliver services to an appropriate standard in the future*".

29. Section 77(3)(e) of the Act provides that an approval does not confer an entitlement on the provider to provide the services to which the approval relates. That means the Secretary is able to exercise control over the number of legal aid cases that this Applicant may have at any period and avoid the kind of issues that have occurred in the past.

## **DECISION**

30. I find that the Selection Committee and subsequently the Secretary did not consider the decisions of the High Court and the Court of Appeal and the Disciplinary Tribunal.

31. I have noted that the audit report provided to the LSA was very favourable to the Applicant in terms of her performance.

32. The issues brought to the attention of the Secretary by the Selection Committee are now historical.

33. I consider that the performance review provisions of the Act can be used to address any concerns the Secretary may have about the Applicant's performance in the future management of cases and caseloads.

34. I also consider that the Secretary and the Applicant can establish a harmonious relationship without the imposition of a condition.

35. Accordingly, pursuant to s 86(1) of the Act, I now reverse the decision of the Secretary which imposed condition 1 on the approval granted to the Applicant as a lead provider in respect of Family.