

**Applicant**

**AO**

**Respondent**

**Secretary for Justice**

**Date of Decision:**

**1 February 2013**

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## **DECISION**

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### **INTRODUCTION**

- [1] The Secretary for Justice (the Secretary) issued his decision on December 2012 in which he declined to approve the Applicant as a lead provider for family law proceedings.
- [2] The Secretary recorded the following reasons for declining approval:
- i. Applicant meets the Professional Entry Requirements.
  - ii. Applicant has Service Delivery Systems that support the applicant to provide and account for legal aid services or specified legal aid services in an effective, efficient and ethical manner.
  - iii. Applicant has provided references that support the applicant's experience and knowledge in the area of law to which the application relates.
  - iv. Has demonstrated experience in family as an approved legal aid Family provider from 5 June 2002 to January 2010.
  - v. Applicant has not demonstrated competence in Family for the following reasons.
- [3] The Central Selection Committee (Committee) had knowledge relating to the applicant's competence in family proceedings.

[4] The Committee considered that the applicant as counsel had exhibited poor judgment in managing her cases, appeared out of her depth and her conduct of hearings was below an acceptable standard

[5] The applicant in response to a request from the Committee provided information relating to;

i. Consultation by Kerry O'Brien;

ii. Supervising/mentoring arrangements in place including a copy of an undertaking given to the NZLS when she applied for issue of a practising certificate in June 2012;

iii. The reasons for ceasing practice in January 2010 and the change she will implement in her family law practice in the future; and

iv. A report from her Consultant Psychiatrist.

[6] The Committee also asked that checks be made with the lawyers who gave references in support of the applicant. The referees had also given references to the New Zealand Law Society (NZLS). These checks provided the following comments:

[7] There was a difference of opinion as to her competence prior to ceasing practice in 2010. One view was that *'[the applicant] put herself under too much stress for her clients, had a combative style, made strategic errors in managing cases, was too partisan and not able to see the wider picture'*.

[8] The other was that *'she had overburdened herself but had been competent with good people skills and judgement in family law issues'*. Both referees supported her return to legal practice and confirmed their ongoing support. However they did not consider she needed formal supervision.

[9] The Committee discussed whether the applicant would benefit working as a supervised provider either as an employee or to another barrister. This was seen as an opportunity to ease her way back into the demands of family law practice and demonstrate the level of competence required of a Lead Provider. The applicant indicated she seeks approval as a Lead Provider.

[10] The assessment of the applicant's application has been undertaken with proper consideration and with the intent to support her return to family law practice.

[11] Following consideration of the information available to it and notwithstanding the referees' support the Committee's concerns relating to the applicant's competence have not been allayed.

[12] The Secretary expressly had regard to regulation 6(2) of the Legal Services (Quality Assurance) Regulations 2011 (the Regulations) and concluded that the Applicant did not have the appropriate level of skill to provide legal aid services in the Family area of law.

[13] The Applicant seeks a review of the Secretary's decision.

## **Background**

[14] The Applicant was admitted as a Barrister and Solicitor in New Zealand on 31 May 2002.

[15] She practised as an employed solicitor from that time until June 2005 when she commenced practice as a barrister sole. She remained so until January 2010. She practised principally in the family law area and was an approved lead provider under the LSA.

[16] She ceased to practise in January 2010. At that time she was diagnosed to have earlier suffered a Psychotic episode. That episode occurred during a hearing before Judge Callinicos in December 2009.

[17] Judge Callinicos made a complaint regarding the Applicant's competence. That complaint was considered by the Wellington Standards Committee 2 as an investigation of its own motion. That committee issued a determination on 3 March 2011 in which it decided that the Applicant's conduct of proceedings before the Judge crossed the threshold for unsatisfactory conduct, being conduct that fell short of the standard of competence and diligence that a member of the public was entitled to expect of a reasonably competent lawyer. The Standards Committee decided not to impose any further penalty because the Applicant's mental health condition was seen as a significant factor for consideration of penalty

[18] Following diagnosis of her mental health condition, the Applicant has had extensive psychiatric treatment including admission to ward 27 of Wellington Hospital as a person subject to a compulsory treatment order. Her

Consultant Psychiatrist reported on 8 October 2012 that she is free of psychotic experiences and was well. He said that the Applicant recognises the implications of her illness, remains on medication that has helped and remains steadfastly compliant.

[19] In February 2012, the Applicant applied to the NZLS for the reinstatement of her Practising Certificate to work as a barrister sole. The Applicant states that her application for reinstatement was subject to lengthy investigation. She had an interview with 2 board members, 2 letters from her psychiatrist, and 4 written references from lawyers. After consultation with her and the Family Law Committee, the NZLS was satisfied that a two-year supervision contract would be sufficient for her to return to practice as a barrister in family law. She was granted a practising certificate in July 2012

## THE APPLICATION

[20] The Applicant set out her reasons in support of the application for review in writing dated 17 December 2012 as follows

- i. She had a long career as a Lead Provider in family Law without any formal complaints against her apart from the one already discussed.
- ii. The NZLS reinstated her Practising Certificate to practice as a barrister sole upon her undertaking to adhere to two-year supervision and mentoring contract.
- iii. That, having been overburdened by a heavy caseload in the past, she has determined to make changes in terms of the volume and nature of cases she will engage in.
- iv. That her supervising solicitor and mentoring solicitor have indicated that she is not in need of formal supervision.

[21] The Applicant expanded her submission by referring to the reasons set out in the Secretary's decision:

- i. In reference to the '*difference of opinion as to competence*' and '*having overburdened herself*', (reference paras 4 and 5 on page 1 of the decision), the Applicant acknowledges having overburdened herself with cases and that she had become

emotionally involved because the bulk of her cases were traumatising for her clients. She advised the Committee of her plans for future better case management, being selective with the type of cases she would engage in, reducing her workload and being monitored by her doctor and senior lawyers. She emphasised the support she has from her supervising lawyers and that she was not in need of formal supervision.

- ii. The Applicant next referred to para 5 bullet point 5 of the Secretary's decision which discussed whether the Applicant would benefit working as a supervised provider. She stated that she had worked as a lead provider in the family law field for 8 years without any complaint from clients, other lawyers or LSA staff as to her competence.
- iii. She again emphasised that the NZLS, in granting her return to practice, was satisfied that a two-year supervision contract with Messrs O'Brien and Milliken was sufficient for the purpose.
- iv. The Applicant addressed para 5 bullet point 6 of the Secretary's decision which referred to the Committee having knowledge of her previous practice of family law that gave it concern. She reiterated that she was in practice for 8 years as Lead Provider without formal complaints to the LSA by either clients or lawyers.

[22] The Secretary's response to the Application for Review is set out in a letter of 11 January 2013 in which he places her submissions under 5 headings as follows:

- i. That the decision is based largely on two comments made by her referees.
- ii. The length of her career as a lead provider with only one complaint caused by mental illness.
- iii. Her acknowledgment of being overburdened previously and the changes made for future management of volume and type of cases
- iv. Her supervisor and mentor support the view that she is not in need of formal supervision.

v. The value of the Selection Committee.

[23] As to the referees' comments, the submission is that these were made because the Committee had knowledge relating to the Applicant's cases prior to January 2010 and which the Secretary took into account.

[24] The Secretary acknowledges the Applicant's long career as a lead provider in family and the circumstances relating to the substantiated complaint.

[25] As to the management of cases, the Secretary accepts the Applicant's intention to change but must be satisfied that it has in fact occurred.

[26] In respect of the matter relating to supervision and mentoring, the Secretary submits that the Applicant appears to disregard the Committee's concerns relating to her competence as a family lawyer. The Committee was not assured that the Applicant should be recommended for approval notwithstanding the undertaking and reference check comments.

[27] The Secretary accepted the Committee's recommendations to decline and referred to the concerns set out in the recommendation noting that the additional information supplied by the Applicant did not allay those concerns.

## **DISCUSSION**

[28] The Applicant has been found to have experience in family law proceedings as an approved legal aid provider from 5 June 2002 to January 2010. She recorded 50 cases for 2007; 64 cases in 2008 and 50 in 2009. In each year she conducted more than 10 hearings and appeared on more than 10 occasions in each year for mediation conferences, judicial conferences and interlocutory hearings. The Committee has observed that this is a significant number of cases.

[29] It is relevant that there is no record of complaint by clients, lawyers, Ministry staff or the Judiciary against the Applicant in respect of the conduct and management of her caseload apart from the one case already mentioned which did not result in any penalty being imposed on her.

[30] Section 77(1) of the Act gives the Secretary discretion in deciding whether or not to approve a person as a provider of legal aid services. That

discretion must be exercised fairly having regard to the criteria prescribed in the Regulations.

[31] While the Regulations set out the requirements for assessing the experience of an applicant, there are no prescribed requirements for assessing the skill and competence of an applicant.

[32] The assessment of skill and competence is thus an exercise in judgment by the decision maker and will involve a consideration of the following factors;

- I. the length of time an applicant has been involved in the relevant category;
- II. whether or not there have been complaints about the knowledge, skill or conduct of an applicant in respect of communication with clients, management of cases, or conduct of hearings which establish that an applicant has not practised to an acceptable standard.
- III. Any personal matters that bear on an applicant's character, fitness or suitability to be a provider of legal aid services.

[33] In the Applicant's case, she has been an approved provider for 8 years with one formal complaint that arose out of a mental illness and because of which she did not incur a penalty.

[34] There is criticism that she has a combative style, made strategic errors in managing cases, was too partisan and not able to see the wider picture. That criticism did not specify particulars.

[35] There is also comment that she had been competent with good people skills and judgment in family legal issues.

[36] The Applicant has regained her Practising Certificate and has a formal supervision and mentoring arrangement approved of by the NZLS.

[37] She has regained her health. Her Consultant Psychiatrist has reported that she is steadfastly compliant and recognises the implications of her illness and remains on medication.

## **DECISION**

[38] When I bring together all the matters referred to above, I am able to satisfy myself that the Applicant does have the appropriate level of competence to be a Lead Provider of Family Law services.

[39] Accordingly, I reverse the decision of the Secretary to decline approval of the Applicant as a lead provider of legal aid services in respect of family law proceedings.

[40] Pursuant to s 77(3)(c) of the Act and following usual practice, the approval will be for a period of 3 years from the date of my decision.

[41] I do not consider it necessary to state any condition of the approval having taken into account the formal supervision and mentoring arrangement that the Applicant has with lawyers Milliken and O'Brien and approved of by the NZLS.

BJ Kendall  
Review Authority