

Applicant

AS

Respondent

Secretary for Justice

Date of Decision:

3 September 2013

DECISION

INTRODUCTION

1. In a decision dated 6 May 2013, the Secretary for Justice (“the Secretary”) declined approval of the Applicant as a lead provider for the Maori Land Court, Maori Appellate Court and Waitangi Tribunal.
2. The Secretary decided that the Applicant did not meet the criteria for approval under the Legal Services Act 2011 (“the Act”) and the Legal Services (Quality Assurance) Regulations 2011 (“the Regulations”) as a lead provider for the following reasons:
 - 2.1. The Applicant does not have service delivery systems, that support him to provide and account for legal aid services or specified legal aid services to an effective, efficient and ethical manner, as required by reg 9 of the Regulations in that there were two complaints against him substantiated by the Legal Services Agency. The first was that in 2009 the LSA received an order for payment from the Inland Revenue Department for not meeting tax obligations. Then in 2012 proceedings were issued in the High Court in respect of unpaid tax. The Secretary was not satisfied that the Applicant had taken sufficient steps to either remedy the initial tax issues, or to prevent a repeat of those issues. He considered therefore, that the Applicant did not have the requisite service delivery systems in place.

2.2. The Secretary decided that the Applicant had not demonstrated experience and competence in the Maori Land Court, Maori Appellate Court or Waitangi Tribunal. He took into account the following factors which he considered applicable under reg 6(2)(c) of the Regulations

2.2.1. He noted that the Applicant had 13 years' experience in Waitangi claims, during which time he has acted for 47 claimants/claimant groups. He found that the Applicant had demonstrated active and substantial involvement in at least three Waitangi Tribunal cases.

2.2.2. The Secretary expressed the view that the Applicant (if granted approval) would not adhere to his obligations under the Act and his contract for services to follow LSA and MOJ policies because:

2.2.2.1. He had been required to resubmit invoices several times before payment could be made as they were not submitted correctly.

2.2.2.2. He delegated appearances to counsel who were not approved providers.

2.2.2.3. There was a substantiated complaint against the Applicant for lack of supervision where an employee of the Applicant continued to work on a file after the client had withdrawn instructions and the Applicant had invoiced for the work. The Secretary considered that this demonstrated a lack of supervision and a lack of oversight of billing.

2.2.2.4. Contrary to his obligations as a lead provider, the Applicant had stated that he considered that it was not necessary for him to appear before the Waitangi Tribunal personally.

2.2.3. The aforementioned substantiated complaints against the Applicant relating to lack of supervision and non-payment of tax.

2.2.4. The Waitangi Tribunal Selection Committee's first-hand knowledge of the Applicant, as to the suitability of the Applicant, whereby it expressed the opinion that the Applicant has a tendency to repeat evidence without providing legal analysis.

2.2.5. The accuracy of information provided by the Applicant leading to the concern that the Applicant was not credible or reliable when that information was considered alongside the verification of a lawyer employed in the Applicant's firm. This may reflect on the Applicant's integrity and honesty.

3. In reaching his decision, the Secretary adopted the recommendation of the Selection Committee which had considered the Applicant's application for approval as a lead provider.
4. The Applicant seeks a review of the Secretary's decision.

BACKGROUND

5. The Applicant was admitted as a barrister and solicitor in New Zealand on 28 July 1998. He commenced practising in the Treaty of Waitangi claims area of the law in 1998. He has continued to practise in that area ever since and has represented claimant groups in a number of Tribunal inquiries.
6. The Applicant is the managing director of an Auckland law firm. He advises that the firm employs seven solicitors and two administrative staff members.
7. At the time of the provider application, the Applicant held approval as a lead provider for the Maori Land Court, The Maori Appellate Court and for the Waitangi Tribunal. He had held that approval from 19 August 2002.

THE APPLICATION

8. The Applicant seeks a review of the Secretary's decision to decline approval as a lead provider. His reasons are set out in a memorandum dated 18 June 2013 as follows:

8.1. **Service Delivery Systems.** That in respect of service delivery systems, the Secretary relied on two complaints upheld by the Legal Services Agency relating to non-payment of taxes and continuing to act when instructions had ceased.

8.1.1. The Applicant submits that he has made payment arrangements about the taxes which are continuing. These arrangements sufficiently address the Secretary's assertion that the Applicant's current compliance with tax obligations "*does not negate the repeated issues with the payment of tax*" in the past.

8.1.2. In respect of the complaint relating to continuing to act when instructions had ceased, the Applicant submits that the Secretary failed to consider the steps he had taken to ensure that inadvertent billing did not re-occur. In letters to the Secretary dated 16 May 2012 and 11 January 2013, he had set out in detail the steps he had taken.

8.2. **Competence and Experience.** Under this heading, the Applicant addresses three matters set out in the Secretary's decision. They are his ability to follow LSA and MOJ policies, the Selection Committee's claim of incompetence and the accuracy of information provided.

8.2.1. In respect of compliance with policy, there are three issues.

8.2.1.1. The first relates to the assertion that the Applicant has been required to resubmit invoices several times before payment can be made because the invoices were completed incorrectly. The Applicant submits that no particular evidence is provided in support of the claim and that the issue was not raised with him prior to the Secretary's decision. The Applicant says that there was a difference of opinion between himself and the LSA over invoices that sought aid for research. The matter was subject to review by the Legal Aid Review Panel which ruled in his favour on 2 separate occasions. He submits that it cannot be said that he violated LSA's grants policy.

- 8.2.1.2. The second issue is with the Secretary's assertion that an employee provided legal services, including appearing as counsel, on a legal aid case. The Applicant says that this matter was not raised with him prior to the Secretary's decision. The Applicant says that the named person was a non-lawyer provider with the Ministry, awaiting the outcome of an application to become a supervised provider, and as such there appeared to be no reason why he could not provide legal services.
- 8.2.1.3. The third issue is the Secretary's statement that the Applicant holds the view that "it is not necessary for him to appear" in contradiction of his obligations as a lead provider. The Applicant says that this matter was not raised with him by either the Selection Committee or the Secretary. He submits that the Secretary has not mentioned the source of the statement made. He points to his further information letter of 16 May 2012 where he acknowledged that appearance before the Tribunal was important and crucial at times. He also asserted that there are times when his appearance is not necessary and where his input to proceedings can be provided by memoranda or by engaging other counsel involved in the proceedings. He maintains that he will attend where it is necessary and/or crucial.
- 8.2.2. In respect of the Selection Committee's claim of incompetence relating to the repetition of evidence, the Applicant submits that no information was provided to support the allegation. He says that full submissions were made in response to the criticism in his letter to the Secretary of 11 January 2013.
- 8.2.3. In respect of the Secretary's questions about the accuracy of the information supplied by the Applicant, he acknowledges that his statement about his involvement in certain Waitangi Tribunal matters was made in error arising out of haste in completing his application for approval against a close off date for the filing of the application. He asserts that he corrected

the error without prompting and refers to paragraph 91 of his letter of 16 May 2012.

- 8.3. **Information not considered by the Secretary.** Under this heading, the applicant submits that the Selection Committee members were conflicted and that no Selection Committee minutes were made available. He says that because of the alleged conflict the Selection Committee should not have considered his application and that the absence of minutes infected the Committee's recommendation with illegality. He says that the Secretary's decision does not refer to or address these issues.
9. The Secretary responded to the application on 29 July 2013 and made the following points:
- 9.1. In relation to the taxation issue:
- 9.1.1. That the remedial action taken by the Applicant to address tax issues occurred after the filing of the application for approval as a lead provider. The issue at hand was whether the Applicant had service delivery systems in place to adhere to his tax obligations at the time of his application.
- 9.1.2. That the Secretary took into consideration whether the proceedings issued by the IRD would impact on the public confidence in the legal aid system and the integrity of approved legal aid providers.
- 9.1.3. That while there were delays in processing invoices the Applicant had been paid regularly and had received payments in excess of \$1,000,000.00 for each of the three years preceding 31 March 2013,
- 9.1.4. That all legal aid lawyers were affected by delays in payment. The Applicant was one of only three legal aid lawyers affected by delays in payments who had issues with the IRD, and that, of those three, the Applicant was the only one who faced action by the IRD as the other two were able to enter into and comply with payment arrangements.

- 9.1.5. That it was the Applicant's responsibility to meet tax liabilities from payments received and that he had not been able to do so consistently.
- 9.2. That the Secretary considered that the failures to properly supervise employees reflected on the Applicant's experience and competence to be a lead provider, rather than the service delivery systems.
- 9.3. That the Applicant's ability to follow LSA and MOJ policies concerns inter-related issues of invoicing and payment. Delays occurred because the Applicant was slow to respond to requests for information; his estimates and invoices were well over the general comparative range, and his billing raised concerns about his ability to deliver legal aid services in the most effective and efficient manner.
- 9.4. That the Applicant should have known that his employee was not a non-lawyer and was not approved under s 75 of the Act. Clause 4.3 of his Contract for Services and cl 1.3 of the Practice Standards require the Applicant to be familiar with and comply with the Act, the Regulations and policies made under the Act, and his other obligations as a lawyer.
- 9.5. That the criticism of the Applicant, in relation to appearances before the Waitangi Tribunal, was directed towards the Applicant's tendency to send supervised providers to appear as counsel rather than appearing himself. The Granting Aid for Waitangi Tribunal Matters Policy requires that the Applicant should appear for all approved matters (cl 177).
- 9.6. That while details of repeated evidence were not provided by the Selection Committee, the multiple work sample submitted by the Applicant did not address the concerns of the Committee, but did otherwise support the application for approval.
- 9.7. That issues regarding inaccuracy of information arose in two areas. The first related to the Applicant's participation in Waitangi Tribunal matters and the second to his participation in criminal matters. Had the inaccuracies not been detected, they had the potential to significantly support the application for approval.

- 9.8. That the Applicant's submission that he corrected the inaccuracy in respect of the Waitangi Tribunal without prompting is rejected because it was only after verification was sought from an employee that the Applicant acknowledged limited involvement in the matter queried. The verification contradicted the information given by the Applicant.
 - 9.9. That the Applicant provided inaccurate information in respect of his application for approval in Criminal PC1. When the Applicant was asked to clarify the matters raised with him on 11 March 2013, he replied on 19 March 2013 that he did not wish to submit any further information in support of that application. This left the Secretary remaining concerned about the accuracy of the information provided and about the Applicant's credibility and suitability to be a provider.
 - 9.10. That the Secretary noted the submissions made by the Applicant concerning members of the Selection Committee being conflicted. His concerns were raised after the Committee had made its recommendation. These were considered by the Secretary who decided on balance that there was no conflict.
 - 9.11. That, on the issue of Committee minutes, s 78 of the Act and pt 2 of the Regulations refer specifically to Committee meetings. Regulation 12(2) of the Regulations requires a Committee to give its recommendations to the Secretary in writing and with reasons. The recommendation was first provided to the Applicant for his response. The recommendation was thus not "infected with illegality".
10. The Applicant answered the Secretary's response by memorandum dated 21 August 2013. The memorandum is 50 pages long and contains 230 paragraphs. It is not my function to repeat all that the Applicant has said in reply to the Secretary, but rather to discern and distil his arguments in response.
 11. The Applicant's response is considered under the following headings set out by the Applicant, namely:
 - 11.1. The Secretary's decision breached the principles of natural justice.
 - 11.2. The Secretary relied on factual errors.

- 11.3. The Applicant has taken sufficient steps to resolve issues regarding service delivery systems.
 - 11.4. The Secretary misapplied reg 6(2)(c) in deciding that failure to comply with Ministerial policy was relevant to the experience and competency criteria.
 - 11.5. The Applicant's claim that the Selection Committee members were conflicted was not properly considered by the Secretary.
12. The Applicant relies on the decision in *AC v Secretary for Justice* [2012] NZRA 003 to say that the Secretary did not give the Applicant prior notice of the decision to terminate and/or grant the Applicant an opportunity to make submissions opposing that decision.
13. The assertion is that the Secretary's decision relied on new factors or findings that were not part of the Selection Committee's recommendation or the Ministry's summary of the application. Thus depriving the Applicant of the opportunity to comment prior to the making of the decision. The factors include:
- 13.1. The frequent provision of incorrect invoices;
 - 13.2. The breach of s 75 of the Act;
 - 13.3. Over representation of clientele by supervised providers; and
 - 13.4. The provision of inaccurate information with the provider application.
14. The Applicant submits that, in addition to the new factors mentioned above in paragraph 13, the Secretary relied on new information which was not put to him prior to the decision being made such as:
- 14.1. The reference to two IRD proceedings;
 - 14.2. The reference to multiple failed tax arrangements;
 - 14.3. The view that tax obligations were not adhered to until after the IRD proceedings began in March 2012;
 - 14.4. The allegation of inflated estimates of cost;
 - 14.5. The accuracy of information provided; and

- 14.6. The Applicant did not take the opportunity to respond to the evidence repetition allegation.
15. As to the remedial measures taken to ensure the efficacy of service delivery systems in relation to his tax obligations, the Applicant submits that remedial measures are in place and that he has been tax compliant since July 2012. He says that the Secretary has been blind to the Ministry's acknowledgments that delays in payment have caused inconvenience and problems for the Applicant resulting in inability to meet costs of operating his legal practice. He argues that the Secretary should have considered his remedial actions at the time of decision rather than at the time of his application. He goes on to say that the Secretary did not consider adequately the information set out in his letters of 16 May 2012 and 11 January 2013 where he provided detailed information of the remedial steps taken to ensure service delivery and compliance with tax payment obligations.
16. As to the misapplication of reg 6(2)(c), the Applicant submits that the Secretary has broadened the meaning of the regulation to include an ability on the Secretary's part to consider an Applicant's knowledge of, and conduct in relation to, the Ministry's policy and regulations. He submits that the regulation is concerned with the knowledge and skill an Applicant has in each area of law to which the application relates. The Secretary has as a result misinterpreted the regulation to the detriment of the Applicant. The Applicant goes on to say that the case examples provided demonstrate experience and competence. The Secretary has acknowledged this by recording that the Applicant has met the criteria under reg 6(2)(a) and cl 10 of the schedule to the Regulations.
17. Having regard to the requirements of reg 6(2)(c), the Applicant submits that he meets the criteria of the regulation in that he has continuously practised before the Waitangi Tribunal for 15 years; has had no complaints about his knowledge, skill or conduct in respect of communication with clients, management of cases or conduct of hearings; and that there are no personal matters that bear on his character, fitness or suitability to be a provider of legal aid services.
18. As to the Selection Committee's conflicts of interest and concern with the Applicant's level of active and substantial involvement, the Applicant says that answers to those concerns were provided in his letters of 16 May 2012

and 11 January 2013. He further asserts that the Tribunal did not criticise his conduct, nor did it contain any criticism of evidence repetition.

19. The Applicant has addressed the Secretary's concerns about the accuracy of information provided in support of his applications for approval. He gave a lengthy explanation in paragraphs 184 -189 of his letter of 11 January 2013. Relating to the Waitangi Tribunal matters, he expanded on that explanation by saying that he had been involved in two inquiries with shared features. There was a great deal of proximity between the two neighbouring inquiries which led to confusion when he was recalling events for the purpose of his provider application. He submits the error was the result of a mistake. If there had been an intention to mislead he would not have made statements at the time of his application referring to the lessening of his involvement as the inquiry proceeded.
20. In respect of the application before the Northern Selection Committee in respect of Criminal PC1, the Applicant says that the effect of the inaccuracy as having a bearing on the application for the Maori Land Court, Maori Appellate Court and Waitangi Tribunal was not raised with him by the Selection Committee or by the Secretary. His Criminal lead application included three case examples. On the Criminal lead application form it was stated that one of the case examples relied on occurred in 2011. That was incorrect. The case was heard in 1999 as the case example clearly showed. The Applicant takes responsibility for the clear inaccuracy, but says that it was made in the haste of meeting the deadline for submission of the application for approval. There was no intention to mislead the Northern Selection Committee.

DISCUSSION

21. There are three issues that I must consider in reaching a decision on this application for review. They are:
 - 21.1. Breach of the principles of Natural Justice;
 - 21.2. The sufficiency of the Applicant's service delivery system; and
 - 21.3. The Applicant's competency to be a lead provider.

BREACH OF THE PRINCIPLES OF NATURAL JUSTICE

22. The Applicant relies on my decision in *AC v Secretary for Justice* to support his submission that there has been a breach of the principles of natural justice in respect of his application to be a lead provider for the Maori Land Court, Maori Appellate Court and Waitangi Tribunal. His submission is that the Secretary failed to discuss the decision with the Applicant prior to notice of termination or give him the opportunity to make submission opposing that decision.
23. In *AC v Secretary for Justice* at [20], I held that the principles of natural justice apply to the Secretary when making a decision in respect of an application by a practitioner. I observed, at [30], that:
- in cases where all the criteria are met which include a certificate from the New Zealand Law Society that the applicant is a person of good standing and is already an approved provider under the previous legislation, it must be that there will have to be circumstances of significant concern which require the Secretary to override the criteria and decline approval and then only after giving the practitioner notice of the concerns and the opportunity to respond to them.
24. In this case, I find that the Applicant has been fully informed of the matters that were adverse to his application for approval. The recommendation of the Selection Committee to decline approval and the reasons for the recommendation were communicated to the Applicant in October 2012. There then followed lengthy correspondence from the Applicant addressing the issues raised in the recommendation. That correspondence went through to February 2013. The Secretary made his decision on 6 May 2013 to decline approval.
25. The Applicant has submitted that the Secretary's decision was based in part on factors or findings that were not part of the Selection Committee's recommendation or the Ministry's letter and/or were factually incorrect, thus depriving him of the opportunity to comment on them prior to the decision being given.
26. I have considered all the voluminous material provided in respect of this application for review. I note that after receiving advice of the

recommendation and earlier, in response to queries from the assessor of his application, the Applicant addressed issues around invoicing, client representation and the provision of inaccurate information. It cannot be said that he has been disadvantaged. I find that the factual errors claimed are semantic rather than substantial and thus do not impact adversely on the Secretary's decision.

27. I find that there has been no breach of the principles of natural justice by the Secretary in reaching his decision.

SUFFICIENCY OF THE APPLICANT'S SERVICE DELIVERY SYSTEM

28. The Secretary has found that the Applicant does not have the requisite service systems in place that support him to provide and account for legal aid services in an effective, efficient and ethical manner. He based his decision on the fact that the Applicant had twice been the subject of IRD proceedings and was not satisfied that the Applicant had taken sufficient steps to remedy those or to prevent a re-occurrence of them.
29. Regulation 9 of the Regulations requires an applicant to have a service delivery system that supports the applicant to provide and account for legal aid services in an effective, efficient and ethical manner. Such a service delivery system will have arrangements for managing scheduling conflicts; managing conflicts of interest; an internal complaints process; an information for clients form; a standard letter of engagement to be provided to new clients at the commencement of a retainer; and evidence of the applicant's office management practices (reg 9(2)).
30. It is clear that these requirements are designed to meet the purpose of the Act which is concerned with the provision of legal services to persons of insufficient means in the most effective and efficient manner (s 3).
31. While it may be said that issues with the IRD reflect on office management practices, they are nevertheless personal to the taxpayer in the same way as disputes with other creditors are. In the Applicant's case there has been lengthy and again voluminous discussion on the matter of his taxes which has led to withdrawal of the proceedings in the High Court, an arrangement to pay which is being adhered to, and the engagement of a new accountant.
32. When I bear in mind the client-focus requirement of a service delivery system and the personal aspect of the tax issues, I find that the Secretary

was in error to find that the Applicant did not have an adequate service delivery system in place. Having made that finding, it is not necessary for me to decide when the assessment of the service delivery system should take place. (ie at the date of the application as the Secretary contends, or at the time at which the decision is made as the Applicant contends).

THE APPLICANT'S COMPETENCY TO BE A LEAD PROVIDER

33. The Secretary has determined that the Applicant has not demonstrated experience and competence in the Maori Land Court, Maori Appellate Court and Waitangi Tribunal for the reasons set out under the heading of Applicant's suitability to be a provider. In doing so, he has relied on reg 6(2)(c) of the Regulations. As I observed in *AO v Secretary for Justice*, [2013] NZRA 027 at [31], the Regulations do not prescribe the requirements for assessing the skill and competence of an Applicant.
34. I held that the assessment of skill and competence will involve a consideration of the following factors:
- 34.1. The length of time an applicant has been involved in the relevant category;
- 34.2. 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.
- 34.3. Any personal matters that bear on an applicant's character, fitness or suitability to be a provider of legal aid services.
35. The Applicant has submitted that factor (b) above concerns complaints about an applicant's skill or conduct with a focus on client care and hearings-related conduct. He submits that the Secretary has misinterpreted the competency criteria as all complaints are not captured by it. The Secretary was wrong to include complaints made by the Ministry or Agency as part of his assessment of competency under that heading.
36. I accept his submission.

37. The Applicant has been practising before the Waitangi Tribunal for 15 years as a lead provider. There have been no complaints in that time about his knowledge, skill or conduct in respect of communication with clients, management of cases or conduct of hearings.
38. In that regard he satisfies competency factors (a) and (b) set out in paragraph 34 above.
39. Are there, then, any personal matters that bear on the Applicant's character, fitness or suitability to be a provider of legal aid services? It is clear that the Applicant has had a conflicted relationship with LSA and the Ministry. I have already held that his tax issues do not impact on his service delivery system. Likewise, I do not consider that they are matters that impinge on his competence to be a provider. They are personal to him.
40. The Applicant does not have any convictions recorded against his character. He has been the subject of an audit by the LSA on two occasions with no action taken against him as a result.
41. I have mentioned the Applicant's conflicted relationship with officials. I conclude that his relationship is not a matter going to the assessment of competency. I conclude that the Applicant is challenging and argumentative by nature. He has been successful before the Legal Aid Review Panel. He is as well prolix in everything he presents in writing. The material I have had to consider is testament to that observation. I do not find that he has stubbornly refused to follow LSA and Ministry policies.
42. The Selection Committee has been critical of the Applicant stating that he has a tendency to repeat evidence without providing legal analysis. The Applicant roundly disputes that criticism. As was the case for the Secretary, I have no ability to determine the substance of the criticism. I do, however, consider it against the position that there has been no criticism by the Waitangi Tribunal of his performance, skill or suitability as a lawyer.
43. The Applicant has explained, with his accustomed prolixity, how the inaccuracy of the information provided in his applications for approval came about. I am prepared to give him the benefit of the doubt when I weigh them against the years of experience he has as a lead provider and the number of cases he has been involved in.

44. I find that the Secretary did not balance his criticisms of the Applicant against the positive aspects of length of practice and absence of complaint in respect of client-related matters, management of cases or conduct of hearings.

45. I therefore find that the Applicant has met all the criteria for approval as a lead provider for the Maori Land Court, Maori Appellate Court and Waitangi Tribunal.

DECISION

46. 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 the Maori Land Court, Maori Appellate Court and Waitangi Tribunal.

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

48. Although I have found that criticisms of the Applicant's competence by the Secretary are not valid or are of only minor significance, I invite him to carefully consider the need to have and develop an amicable working relationship with the LSA and MOJ.

BJ Kendall

Review Authority