LCRO 176/2014

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Standards Committee
BETWEEN	**FG** Applicant
AND	**PL AND ML** Respondents

The names and identifying details of the parties in this decision have been changed.

DECISION

Introduction

[1] FG seeks a review of a Standards Committee decision delivered on the 29 May 2014.

Background

[2] At the time the decision was delivered FG was residing [overseas].

[3] The Committee's decision was emailed to FG on the day it was delivered. FG provided immediate acknowledgement of receipt of the decision.

[4] On the 24 June 2014, FG forwarded, by registered post, an application for review to the Legal Complaints Review Office (LCRO).

[5] She followed that up with an email enclosing her application which arrived at the LCRO on the morning of Sunday 14 July at 5.51 am.

[6] The application was returned to FG together with a letter advising that her application had been filed out of time. FG instructed counsel who filed submissions supporting argument that the application had been filed within time.

Relevant principles

[7] Section 198 of the Lawyers and Conveyancers Act 2006 (the Act) provides:

> **Applications for review**
>
> Every application for a review under section 193 must—
>
> (a) be in the prescribed form; and
>
> (b) be lodged with the Legal Complaints Review Officer within 30 working days after a copy or notice of the determination, requirement, or order made, or the direction given, or the performance or exercise of the function or power, by the Standards Committee (or by any person on its behalf or with its authority) is served on, given to, or otherwise brought to the attention of, the applicant for review (which, in the absence of proof to the contrary, is presumed to have occurred on the fifth working day after it is made, given, or performed or exercised); and
>
> (c) be accompanied by the prescribed fee (if any).

[8] In previous decisions of this Office it has been emphasised that the LCRO has no jurisdiction to extend the time limit for the filing of review applications.[1]

Application for Review

[9] FG's counsel argues that extension should be granted for the filing of her application on grounds that:

- The amended s 198(b) creates a rebuttable presumption and that it was intended that applicants have the benefit of being able to rebut the presumption by proof that the determination was brought to their attention after the five working day period.

- The presumption applies unless the applicant proves that the determination was not brought to his/her attention until some later date.

[1] *JL v RP* LCRO 249/2011 and *KX v WA* LCRO 84/2012.

- It was not intended to give the LCRO the right to shorten the presumption period by bringing proof that the determination came to the applicant's attention within less than five working days.

- In the alternative it is argued that the same five day presumption should be applied when determining when the application has been "lodged".

[10] Under the original wording of s 198, the 30 working day period began on the day the Standards Committee determination was made. The effect of this was that the time period for filing a review application had already started to run before the applicant was aware the determination had been issued and provided with a copy.

[11] Section 198 was amended by the Lawyers and Conveyancers Amendment Bill 2010.

[12] When the Lawyers and Conveyancers Amendment Bill was first introduced the general policy statement set out the explanation for the amendment to s 198:[2]

> (a) New section 198(b) ensures that those applications must be lodged within a 30-working-day period commencing on the day after a copy or notice of the decision or action is brought to the attention of the applicant for review.
>
> (b) New section 198(b) also ensures that, in the absence of proof to the contrary, a copy or notice of that kind is presumed to have been brought to the attention of the applicant for review on the fifth working-day after the decision or action.
>
> (c) By contrast under section 198(b), the 30-working-day period for lodging those applications starts when the decision or action is made or taken. The period for lodging those applications thus starts to run before the relevant decisions or actions are brought to the attention of possible applicants for review.

[13] It is clear that the reasoning for the amendment was to clarify that the 30 working day period runs from the day after the determination is served on, given to or otherwise brought to the attention of the applicant. This is to ensure there is sufficient time for applicants to lodge a review.

[14] The second part of s 198(b) (the presumption of service) need only be addressed if it is not clear when the applicant was provided with a copy of the determination, where the determination has not been served on or given to the applicant. This may occur where for example the applicant's latest whereabouts or contact details were unknown and the determination had to be brought to their attention by some other means than the common forms of service.

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[2] Lawyers and Conveyancers Amendment Bill 2010 (120-1), cl 10.1.

[15] It would present as illogical if the 30 working day period would not begin to run until five days after FG received the email, when it is clear that the determination was served on her by email on 29 May 2014. There is no dispute that the email was sent.

[16] If Parliament intended that an applicant was to have a 35 working day period to file a review (as would be the effect of FG's submissions), the Act could have been amended to specifically state this.

[17] The Standards Committee made its determination on 29 May 2014, the determination was served on FG by email on that day. Under s 198(b) FG would have 30 working days after the date that the determination was **served on** her (and not when acknowledged by FG as submitted by her counsel) to lodge her application for review.

[18] FG needed to lodge her application for review by Friday 11 July 2014. Her application was received by email on Monday 14 July 2014 (being the first working day after she sent the email on Sunday 13 July 2014) and the hard copy of the application was received on Tuesday 15 July 2014. Both copies of the application were received out of time.

[19] The time difference between New Zealand and [overseas] did not work to the detriment of FG. If time was calculated from when the email was acknowledged by FG ([overseas] time) even if the filing time was calculated in this way the application was still lodged out of time. FG acknowledged the email on 30 May 2014 at 00.17 New Zealand time (29 May 2014, 2.17 p.m. Overseas time), applying the 30 working days after 30 May 2014, the application needed to be lodged with the LCRO and accompanied by the fee by 14 July 2014.

[20] In the alternative, counsel for FG argues that as the word "lodged" is not defined in the Act a presumption should be read into the Act that a period of five working days from the proved date of sending the application for review should be given. Counsel submits that for postal lodging to be workable some reasonable time following the proved posting date needs to be allowed before the application is treated as being out of time. He argues that to make the Act workable the LCRO (in this case) is entitled to "fill the gap" in the legislation.

[21] He relies on *Nicholson v Brown* where Barker J applied the dictionary definition of "lodged" and stated "The definition of "lodge" is "to deposit in Court or with some appointed officer a formal statement of (an information, complaint, objection etc)".[3]

[22] The *Nicholson* case concerned the construction of s 73(3) District Courts Act 1947 (now repealed) and whether filing a notice of motion of appeal without the filing fee allowed the Registrar to reject the notice. Barker J held that the Court had jurisdiction under Rule 11 High Court Rules (repealed) to amend the defect of a document being lodged without any accompanying filing fee.

[23] FG's case can be distinguished from *Nicholson v Brown*, the Act does not provide jurisdiction for the LCRO to amend a defect.

[24] Section 198(b) clearly states that every application for review **must** be **lodged with** the Legal Complaints Review Officer within 30 working days.

[25] Section 198 (b) makes clear that it is the responsibility of a party seeking to file a review, to file their application within 30 days of receiving notice of the determination. This is not a case where there is any uncertainty as to when the determination was served on FG, indeed she helpfully acknowledges receipt of the application as soon as it is received. The starting point under s 198, is the requirement for parties to file their review within 30 days of receipt of the determination, allowance for additional time, applies to those cases where there is uncertainty as to the exact time that the proceedings have been served or brought to the attention of the applicant. There is no uncertainty here.

[26] To read into s 198(b) a five day presumption after proof of posting would create inconsistency when receiving applications and determining whether they have been received in time.

[27] The failure to pay a prescribed fee for the bringing of an appeal or other application that a decision be reviewed will be fatal to an application.[4] Section 198(c) specifically states that the application for review must be accompanied by the prescribed fee. The fee was received at the LCRO on the 15 July 2014.

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[3] *Nicholson v Brown* (1993) 7 PRNZ 310 (HC).
[4] *Cahayag v Removal Review Authority* [1998] 2 NZLR 72 (CA).

[28] There are two critical elements to s 198. Firstly, the section ensures that applicants have adequate time to file an application for review. Secondly, the section imposes obligation on an applicant to file their application promptly. This is intended to ensure that the statutory objective of having complaints dealt with expeditiously is achieved.

[29] With every respect to FG's counsel's submissions, the commencing point for s 198, is the requirement for applicants to lodge their applications within 30 days of receipt of the determination. FG provided prompt acknowledgement of receipt of the determination, and at that point, in my view, argument as to presumptions as to when the documents were received, and arguments as to whether the applicant or LCRO carry the burden of establishing proof to the contrary as to time of service, fall away.

Conclusion

[30] For the above reasons I decline to consider the application for review on the basis that I have no jurisdiction to do so because the formalities prescribed by s 198 of the Act were not complied with.

DATED this 28th day of November 2014

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R Maidment
Legal Complaints Review Officer

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

FG as the Applicant
ED QC as the Applicant's representative
PL as the Respondent
ML as the Respondent
BR as the Respondent's representative
Standards Committee
The New Zealand Law Society