

LCRO 205/2017

CONCERNING

an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING

a determination of the [Area] Standards Committee [X]

BETWEEN

QB

Applicant

AND

PC

Respondent

DECISION

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

Introduction

[1] Mr QB has applied for a review of a decision by the [Area] Standards Committee [X] (the Committee), in which the Committee made a finding of unsatisfactory conduct against Mr QB. The Committee fined Mr QB \$3,000 and ordered him to pay costs of \$1,500

[2] An issue has arisen as to whether this Office has jurisdiction to deal with Mr QB's application for review. The question is whether he lodged it out of time.

Timeline

[3] Mr QB is a partner in a law firm. Mr H is a consultant in that firm (the law firm).

[4] On 27 March 2017, the New Zealand Law Society Lawyers Complaints Service (Complaints Service) wrote to Mr QB concerning a complaint it had received about him from Mr PC.

[5] On behalf of Mr QB, Mr H, provided a response to the complaint to the Complaints Service in his letter dated 7 April 2017. Mr H sent the letter to the Complaints Service as an attachment to an email.

[6] Mr H's letter was written on the firm's letterhead, and at the top it included the following information:

Our reference	[Mr H]
Direct Dial	0X XXX XXXX
Email	[Mr H]@[the law firm].co.nz

[7] Mr H's letter began with the following:

I am asked by the Partners and [Mr] QB to formulate a response to [the Complaints Service's letter to Mr QB advising him about the complaint] of 27 March. I am a former Partner, now a Consultant, to [the law firm].

[8] Mr H's letter extensively responds to the complaint that had been made against Mr QB.

[9] The Committee's determination is dated 7 September 2017. According to a letter sent to this Office by Mr QB, dated 20 October 2017, the Committee's determination was emailed to Mr H at the email address he had provided in his letter to the Complaints Service. The email was sent at 4.18pm on 7 September 2017.

[10] Mr H was away at the time that the email was sent.

[11] Mr QB did not become aware of the Committee's determination until 11 September 2017, when Mr H returned to work and checked his emails.

[12] On Mr QB's behalf, and describing himself as counsel for Mr QB, Mr H lodged an application for review with this Office. The application for review was sent together with written submissions as attachments to an email. The email was received by this Office at 5.06pm on 19 October 2017. The prescribed fee was also paid on 19 October 2017.

The Law

[13] 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).

[14] The original wording of s 198 provided that the 30-working day period began on the day that the Committee's determination was made. The effect of this was that the time 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.

[15] Section 198 was amended by the Lawyers and Conveyancers Amendment Bill 2010. When the Bill was first introduced, the general policy statement set out the explanation for amending s 198 of the Act.¹

- (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.

[16] 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 an applicant. This is to ensure that there is sufficient time for an application for review to be lodged.

[17] 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.

[18] There are two critical elements to s 198. First, the section ensures that applicants have adequate time to file an application for review. Secondly, the section

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

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.

[19] The provisions of s 198 of the Act are stated in mandatory terms. There is no statutory discretion to ameliorate their harshness, other than the ability for applicants to rebut the presumption that the decision was served on them within five working days after the decision was delivered.

[20] It is also important to note that an application for review is not lodged unless it is in the prescribed form and accompanied by the necessary filing fee. This means that both must be lodged within the 30-working day period.

[21] In *LCRO 84/2012*, this Office held:

[9] For the avoidance of doubt, the statutory requirement is for a review application to be "lodged with the Legal Complaints Review Officer within 30 working days after the determination...", together with the fee. (Underlining added). There can be no lodgement of documents after the closing time of the Registry, which is generally recognised to be between the normal working hours of 9:00 a.m. and 5:00 p.m. This is supported by *AEL Group Ltd v Kensington Swan Lawyers* 31/7/08, Associate Judge Christiansen, HC Christchurch CIV-2008-409-1225. There the Court found that service on a law firm after 5:00 p.m. on a business day would not be effective (although in the circumstances considered by the Court service by facsimile prior to 5:00 p.m. was effective.) In this case the review application was lodged with this office the following day, when staff were in a position to receive and date stamp it, this being 19 April.

[10] The provisions of s 198 of the Act are stated in mandatory terms and there is no statutory discretion to ameliorate their harshness. I accept this may be a harsh result and there may be reasons why an application was not made within the requisite time. However, the obligation to comply with the procedural requirements in making an application clearly lies with the Applicant. This position is reiterated by previous decisions of this Office that the LCRO has no discretion to extend the timeframe.

Mr QB's submissions

[22] Mr QB submits that the 30-working day period begins to run from 11 September 2017, being the date on which Mr H read and gave Mr QB the email attaching the Committee's determination, which had been sent to Mr H on 7 September 2017.

[23] Mr QB submits that this is when the determination was first brought to his attention. He submits that 30-working days from 11 September 2017 is 23 October 2017. As his application for review was lodged with this Office on 19 October 2017, together with the prescribed fee, it was lodged within the 30-working day period required by s 198 of the Act.

[24] Mr QB submits that s 198 obliges a Standards Committee to serve on, give to, or otherwise bring its determination to the attention of the applicant for review. He submits that he is the applicant for review, not Mr H.

[25] The counterfactual is that the 30-working day period begins to run from 8 September 2017, being the first working day after the determination was sent by email to Mr H, who was acting on Mr QB's behalf. In that event, the last day for lodging an application for review with this Office was at 5 pm on 19 September 2017.

Discussion

[26] The Complaints Service sent both a covering letter and the Committee's determination to Mr H on 7 September 2017. The covering letter was addressed to Mr QB, care of Mr H, at the law firm. Both the covering letter and the determination were sent by email. The covering letter records Mr H's email address. The covering letter begins with "Dear [Mr H]".

[27] This is consistent with Mr H having responded to the complaint on Mr QB's behalf, including inserting his (Ms H's) contact details on the top of the letter.

[28] Mr H did not open and read the email and attachments until 11 September 2017. There is no suggestion that this is the date on which they arrived in Mr H's email inbox.

[29] No issue has been taken with the manner in which the Committee's determination was served, given to or otherwise brought to the attention of Mr QB through his counsel Mr H. Email is a common, if not the most commonly used, mode of service in matters that come before the Complaints Service and this Office. Indeed, Mr H responded to the complaint on Mr QB's behalf by email to the Complaints Service, dated 7 April 2017.

[30] Moreover, there are no legislative provisions relating to the operation of either the Complaints Service or this Office that preclude email as a means of service.

[31] In my view, it was prudent for the Complaints Service to have forwarded the Committee's determination to Mr H, as counsel for Mr QB.

[32] It is a Standards Committee's responsibility to ensure that it gives written notice of its determination to each of the persons who may, under s 193, apply for a review. In forwarding the determination to Mr H, it was doing precisely that.

[33] In my view it could be potentially problematic for a Committee, having received advice that a particular counsel had been instructed to act for a lawyer who was subject to a disciplinary enquiry, to elect, in the absence of instructions to do so, to communicate directly with the lawyer, as opposed to the lawyer's appointed representative.

[34] There may for instance be circumstances where a lawyer who is subject to a conduct complaint, does not wish to have knowledge of the complaint, or any information pertaining to the Committee's inquiry, brought to the attention of third parties. A lawyer may not for example wish to have staff in his or her office being made aware of the complaint.

[35] The Committee could potentially compromise a lawyer's right to confidentiality, by forwarding a decision directly to the lawyer, in circumstances where the lawyer has instructed counsel, and provided no contact details, other than those of the counsel instructed.

[36] Mr QB elected to have Mr H act for him. Mr H conducted the correspondence on Mr QB's behalf and provided his own contact details.

[37] The requirements in the Act for confidentiality of Committee determinations (and for decisions of this Office) are such that apart from the parties, their lawyers and those provided for in the Act, no one else ought to see a confidential Standards Committee determination.

[38] Mr QB's argument rests on the proposition that he did not personally have the Committee's determination drawn to his attention until 11 September 2017. This was because Mr H was absent from the office on 7 September 2017, which was the date on which the determination was emailed to Mr H by the Complaints Service. Mr H did not return and check his emails until 11 September. On that date, Mr QB had the determination drawn to his attention in accordance with s 198 of the Act.

[39] The issue is whether the expression "the applicant" in s 198 of the Act means Mr QB and only Mr QB, or whether it also includes Mr H, as Mr QB's counsel.

[40] If "the applicant" includes the applicant's counsel, then Mr QB's application for review is clearly out of time, albeit by one day.

[41] Mr H was a consultant at the law firm. Mr H was instructed by Mr QB, and the other partners in the law firm, to respond to the complaint on Mr QB's behalf. Mr H's

letter made it clear that he was doing so. Mr H signed the letter. The letter also provided his contact details.

[42] In conventional terms, Mr H was acting for Mr QB. Counsel acting do so as a buffer between their client and the other party. Where a decision-maker is involved, such as a Standards Committee, counsel also acts as the point of contact for the decision-maker. Correspondence is routed through counsel. This is conventional and unremarkable, and is the meat and drink of lawyers acting on behalf of a client.

[43] The various rules that traditionally apply to conventional courts, tribunals and other statutory decision-makers variously refer to a plaintiff, or a defendant, or an applicant — or any other relevant description of a party to the proceedings. This is done to identify the party.

[44] If a lawyer is acting for that party and has advised the Court, Tribunal or decision-maker of that fact, then it is the lawyer who becomes the point of contact and address for service on behalf of their client. That is the lawyer's role.

[45] The reference in s 198 to "the applicant" is no more than the operation of the conventional approach of describing the role of a party in those review proceedings.

[46] I am satisfied that the Committee's decision was served on Mr QB through his counsel Mr H, on 7 September 2017. The effect of this is that time began to run for Mr QB from 8 September 2017 and, applying this Office's decision in *LCRO 84/2012*, he had until 5pm on 19 October 2017 to lodge his application for review including the prescribed fee.

[47] It is not clear why Mr H's emails were not being checked in his absence. It is surprising that they were not. Prudence would suggest that lawyers ought to arrange to have their mail, faxes and email checked during an extended absence from work.

[48] The result of Mr H's emails not being monitored in his absence was that Mr QB was not advised by his counsel about the Committee's determination until 11 September 2017.

[49] By that date there was still ample time for Mr QB to lodge an application for review with this Office. Indeed, he endeavoured to do so on day 30 (19 October 2017), but at 5.06pm. By that time day 30 had expired.

[50] There is no provision in the Act for this Office to extend the fixed time limit within which an application for review must be lodged. There is good reason for that: it is consistent with the Act's requirements that complaints (and reviews of complaints'

decisions) are to be dealt with fairly, efficiently and effectively. I accept however that in some cases hardship may result in the strict application of the time limit prescribed by s 198 of the Act.

Outcome

[51] This Office has no jurisdiction to deal with the application for review that was lodged by Mr H on Mr QB's behalf. This is because it was not lodged within 30 working days after the date on which the Committee's determination was served, given to or otherwise brought to the attention of Mr QB through his counsel Mr H.

[52] As Mr QB has now raised objection to documents not being sent directly to him, I record that a copy of this decision is to be forwarded to Mr QB personally and to his counsel Mr H.

DATED this 19th day of December 2017

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:

Mr QB as the Applicant
Mr H as counsel for Mr QB
Mr PC as the Respondent
[Area] Standards Committee [X]
The New Zealand Law Society