LCRO 218/2015

| | |
|---|---|
| **CONCERNING** | an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006 |
| **AND** | |
| **CONCERNING** | a determination of a Standards Committee |
| **BETWEEN** | **CL**<br>Applicant |
| **AND** | **A STANDARDS COMMITTEE**<br>Respondent |

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

## DECISION

### Introduction

[1] Mr CL seeks a review of a Standards Committee determination dated 28 August 2015.

### Background

[2] On 28 August 2015, a Standards Committee issued a determination following an own motion investigation that arose from Mr CL's response to a complaint made against him.

[3] The determination issued on 28 August 2015, was promptly recalled, following the discovery of a minor error in the determination. The determination was reissued by email on the same day, at 4.01 pm.

[4] The Committee's determination was dispatched by post to Mr CL directly, and to counsel who had represented him in the complaint proceedings, Mr NH.

[5] Mr CL filed an application to review the Committee's determination with the Legal Complaints Review Officer (LCRO) on 12 October 2015.

[6] Mr CL was advised that his application had been received 31 working days after the determination was released. Mr CL was provided with previous determinations from the LCRO, in which the Office had affirmed that strict compliance was required with the time-frames for lodging review applications. Applications received out of time will not be accepted.

[7] Mr NH filed comprehensive and informative submissions with the LCRO on 17 November 2015, in support of argument that the time for accepting Mr CL's application should be extended.

[8] Those submissions traverse a number of points, and I do not propose to respond in detail to each and every one of them, but rather to focus on the critical issues raised. I emphasise however that all arguments advanced by Mr NH have been considered.

**Request for a hearing**

[9] Mr NH advised that if his submissions were not accepted, he would seek an opportunity to appear at a hearing before a Review Officer, "so that the jurisdiction issue might be more fully considered".[1]

[10] It is not the practice of the LCRO to allocate hearings to determine issues of jurisdiction, specifically argument as to whether an application has been filed in time.

[11] The Office of the LCRO is tasked with advancing reviews in an expeditious manner. The process is designed to be relatively informal, and consistent with the objective of promoting the consumer protection objectives which underpin the legislation which establishes the Lawyers Complaints Service. The review process is intended to be one which is not encumbered by a technical approach.

[12] Mr NH's submissions are, as has been noted, comprehensive and thorough. Irrespective of the fact that it is not the practice of this Office to deal with jurisdiction arguments in the manner proposed by Mr NH, I am nevertheless confident that Mr NH has comprehensively marshalled the arguments for Mr CL and what can be said has been said. The matter can be fairly dealt with on the papers without need for a hearing.

**Relevant principles**

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

---

[1] Submissions, 17 November 2015 at [53].

**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] In previous determinations of this Office it has been emphasised that the LCRO has no jurisdiction to extend the time-limit for the filing of review applications.[2]

[15] 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.

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

[17] When the Lawyers and Conveyancers Amendment Bill was first introduced the general policy statement set out the explanation for the amendment to s 198:[3]

(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 determination 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 determination or action.

(c) By contrast under section 198(b), the 30-working-day period for lodging those applications starts when the determination or action is made or taken. The period for lodging those applications thus starts to run before the relevant determinations or actions are brought to the attention of possible applicants for review.

---

[2] *JL v RP* LCRO 249/2011 and *KX v WA* LCRO 84/2012.
[3] Lawyers and Conveyancers Amendment Bill 2010 (120-1), cl 10.1.

[18] 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.

[19] 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.

[20] 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.

**Application for Review**

[21] It is not contended that the amended determination was not forwarded both to Mr NH, and to Mr CL, on the afternoon of Friday 28 August at 4.01 pm.

[22] Mr NH says he received the email at 6.07 pm on Friday 28 August 2015, Mr CL the following day.

[23] Mr NH argues that notice of a Standards Committee determination must be provided to the applicant, and that service on an applicant's counsel does not meet the requirements of the Act.

[24] That submission, whilst understood in its advancement, places little emphasis on the fact that Mr CL was served contemporaneously with the determination being served on Mr NH.

[25] Because both Mr NH and Mr CL are said to have received the emails after 5 pm on Friday 28 August 2015, it is argued that the LCRO must calculate the time service runs from the following Monday.

[26] Reduced to its essence, Mr NH is arguing for the proposition that service time-frames run, not from the time an email was dispatched, but from when the recipient opens the email.

[27] Before that issue is addressed, I record that I do not accept Mr NH's argument that service of a determination cannot be properly effected by way of service on an applicant's counsel. That proposition presents as manifestly at odds with the long established principle that counsel on the record, if authorised by their client, is able to

receive documents on behalf of their client. The Standards Committee forwarded a copy of the determination to Mr NH, presumably because he had been instructed by Mr CL to represent him in the complaint inquiry. In those circumstances, it presents as entirely proper that a copy of the determination be forwarded to Mr NH.

[28] Mr NH's argument that calculation of relevant time periods must be done by reference to the time that Mr CL opened the email, places reliance on ss 158(1) and 194 to 197 of the Act. He argues that a practitioner's right to a fair hearing may be prejudiced if the practitioner is not served personally.

[29] Section 158 emphasises the obvious requirement that a Standards Committee must provide parties who have been the subject of their inquiry, with a copy of their determination.

[30] Ignoring for one moment that Mr CL was personally served, I do not consider that the sections of the Act that Mr NH places reliance on, support the proposition that an applicant must be personally served with the Committee's determination. Sections 194 to 197 establish who may apply for a review.

[31] It is s 198 that specifically prescribes the time-frame in which a party may seek a review, and which directs that an application (expressed in mandatory terms) must be filed within 30 working days of the determination being served on, given to, **or otherwise brought to the attention of the applicant** (emphasis added). The section clearly provides for, and contemplates, that service may be properly effected by means other than personal service on the applicant.

[32] Mr NH submits that the Act does not provide for any special or exclusive method of service, and in that absence, reliance is to be placed on the High Court Rules. Whilst the Act may not provide for any exclusive or special method of service, I do not consider that there is such confusion around the issue of service in this case, to require reference to the scope and reach of the service provisions in the High Court Rules. There is no need, in my view, to overlay the relatively straightforward process prescribed for service under the Act, a process designed to ensure an expeditious and non-technical approach designed to enable lay people to progress applications, with the formal apparatus of the High Court service rules.

[33] Mr NH submits that the LCRO should adopt as date of receipt of the notice of determination, Monday 31 August 2015, as there cannot, as a consequence of increasing demand on email servers, be certainty that the email arrived at the time of dispatch. He suggests that the five day period allowed under s 198(b) was designed to

cater for the very concern he raises, concern that there may be delay in the delivery of an email.

[34] No evidence is advanced by Mr NH to support conclusion that there was delay in the delivery of the email. It is customary for email programmes to record the time at which an email is received. Whilst Mr NH submits that the email was received and acknowledged by him at 6.07 pm on Friday 28 August 2015 that simply records the time that Mr NH responded to the email and does not, with any degree of certainty, establish that he received the email at that time.

[35] Nor is there any evidence proffered as to when Mr CL received the email. Whilst I accept Mr NH's proposition that on occasions there may be delay in the delivery of an email, if there had been delay of such consequence, Mr CL could readily have established that by producing evidence of the time he received the email.

[36] Mr NH submits that the LCRO has discretion to extend the time for filing of a review. He argues that as there is no right to appeal a determination of the LCRO other than by way of seeking judicial review, a LCRO should adopt a "clean slate" approach to each case, and with a view to resolving issues such as arise in this case, in favour of the person in jeopardy. He submits that previous determinations of this Office which have placed emphasis on the inability of the LCRO to extend time-frames do not reflect a correct approach, or an approach consistent with the objectives of the legislation. In support of this argument, Mr NH refers to the general powers of the LCRO to carry out its functions under the Act (s 202), the need to ensure just outcome, and the need for Review Officers to decide cases before them, properly. Mr NH emphasises the seriousness of disciplinary matters for practitioners, and cautions the LCRO that procedure should be the "handmaiden not the mistress" of substantive justice.[4] The LCRO is cautioned against the adoption of a restrictive approach.

[37] I do not agree that the LCRO should confer to itself a degree of discretion in determining issues of jurisdiction, nor that the general powers accorded to a LCRO to carry out his or her functions under the Act, provide an authority for a LCRO to extend statutory time-frames.

[38] It is trite but necessary to emphasise that the imposition of a specified time-frame for filing applications (as in most jurisdictions which deal with resolution of complaint) has the specific purpose of ensuring that applications are filed promptly.

---

[4] Above n 1, at [48].

[39] Whilst criticism is made of the practice of this Office to refuse applications filed out of time, that approach presents as consistent with the mandatory approach required by the section. If the legislature had intended that the LCRO be provided with a discretion to extend the time-frame for receiving applications, it would have said so. Whilst amendment to the Act in 2012, provided for greater certainty by direction that, in the absence of proof, service is presumed to have occurred on the fifth working day after the determination is delivered no consideration was given at the time that amendment was introduced, to allowing a discretion to the LCRO to extend time-frames.

[40] A significant number of Committee determinations are now delivered by email. Many parties specifically request that all communications be conducted by email. It can reasonably be assumed that as copies of the determination were forwarded both to Mr CL and Mr NH's email addresses, both had indicated their agreement to communications being conducted in that manner.

[41] I do not accept that demanding adherence to the statutory time-frames, presents as an affront to natural justice principles. Mr CL had six weeks to organise for his application to be filed. He is a lawyer who would no doubt be familiar with the need to comply with statutory time-frames, and the consequences of failing to do so. He had the benefit of legal counsel. There is no affront to principles of fairness in the LCRO requiring review applications to be filed within the time-frames required by the Act.

[42] Nor can responsibility for complying with those time-frames be avoided by the advancement of argument, unsupported by corroborative evidence, that an email was received hours after its dispatch. Uncritical acquiescence to that argument would substantially undermine this Office's ability to properly ensure legitimate compliance with time-frames. It would be an argument of easy convenience, for an applicant to attempt to avoid compliance, by raising of argument that an email was received hours or days after dispatch, without producing evidence to substantiate the time of receipt.

[43] There is unrefuted evidence that the Standards Committee determination was dispatched to both Mr CL and Mr NH at 4.01 pm on the afternoon of 28 August 2015. Indeed, the determination had in fact been first sent to them at 2.58 pm on that day, but replaced with the later determination that amended a minor error relating to the spelling of Mr CL's name in one paragraph of the determination.

[44] If argument is to succeed that an email arrived after 5 pm that argument should be supported by evidence that conclusively establishes the time of arrival.

**Conclusion**

[45] 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 6th day of April 2016

_____

R Maidment
**Legal Complaints Review Officer**

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

Mr CL as the Applicant
Mr NH as the Counsel for the Applicant
Standards Committee
The New Zealand Law Society