

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

COMPLAINANT R

of Whangamata

Applicant

AND

LAWYER D

of Auckland

Respondent

DECISION

Introduction

[1] Lawyer D has, through his counsel, Mr XX, raised concerns about the LCRO's procedures in relation to a decision issued on 19 June 2009.

[2] The LCRO decision relates to an application made by the executor of the estate of complainant R's mother, the original complainant, seeking a review of a 1 April 2009 decision of the Auckland Standards Committee 1 on a complaint by complainant R's mother against Lawyer D.

[3] The LCRO reversed the decision of the Standards Committee. Lawyer D was invited to make written submissions on costs and penalties.

[4] On 26 June Mr XX wrote to the LCRO on behalf of Lawyer D, and outlined what he considered were substantive and procedural errors. He sought a rehearing of the review.

[5] The LCRO treated the letter as an application for a rehearing of the review. A copy of Mr XX's letter was forwarded to the review applicant who was invited to respond. The response was subsequently forwarded to Mr XX who was invited to forward any additional information.

[6] The following is a decision on Mr XX's application for a rehearing of the review and addresses the various grounds that he raised.

That the application for review was not in appropriate form and does not provide a basis for the LCRO's decision

[7] The grounds forwarded by the review application were that Lawyer D had still not provided the information that had been sought and which would enable progress of the issues between the parties. Lawyer D had received a copy of application and was invited to respond.

[8] This review application was based on a different issue than that which arose in the original complaint. The LCRO's review was confined to the original complaint and the Standards Committee's decision on that complaint.

[9] Mr XX's objection is that the basis of the review application bore no relationship to the LCRO's decision. He says that the application did not identify any errors in the Standards Committee decision, notwithstanding that the Guidelines asked the applicant to identify any errors. The contention is understood to be that Lawyer D was entitled to rely on the review application as identifying 'the issue' for the review, and as the review application did not identify any errors in the Standards Committee decision Lawyer D was entitled to assume that this was sufficient to dispose of the matter.

[10] The Lawyers and Conveyancers Act does not include any specific grounds for a review application. The provisions of the Act relating to the review process empower the LCRO to revisit all aspects of a determination by a Standards Committee. Section 203 of the Act makes it clear that the scope of a review is confined to the Standards Committee's final determination and allows the LCRO to review any and all aspects of any enquiry or investigation relating to a final determination.

[11] The LCRO Guidelines reflect the overall legislative provisions and are drafted so as to make information about the Act and the processes accessible to members of the public in general. This approach accords with the purpose of the Act which is intended to protect consumers and maintain public confidence in the provision of legal services. These purposes may be found in sections 3(1)(b) and 3(2)(b) of the Act. The Guidelines cannot be considered exhaustive of all the provisions of the Act.

[12] The scope of an LCRO review is confined to matters relating to the Standards Committee's determination, and cannot extend to consider grounds forwarded by the applicant that may or may not (as in this case) have any bearing on the Standards Committee decision, or indeed relate to the original complaint. The statutory provisions therefore prevent a review applicant from raising new complaints at the review stage.

[13] The review process is activated when a review application is made, giving rise to the powers of the LCRO to review a Standards Committee's determination on the complaint, regardless of the grounds set out in the application. In this case the LCRO identified that the Standards Committee's decision appeared to not have addressed the issue that was the subject of the complaint, and that the ground for the review application had raised additional matters not previously considered by the Committee. It was open to the LCRO to reconsider the complaint and substitute her determination of the complaint for that made by the Committee. This ground is dismissed.

Failure to observe principles of natural justice

[14] Mr XX made submissions concerning the application of the principles of natural justice to tribunals hearings. The obligation to observe the principles of natural justice are explicitly included in section 206 of the Lawyers and Conveyancers Act (erroneously referred to as section 200). Mr XX also referred to the Bill of Rights. Section 27 of that Act enshrines the right of every person to the observation of the principles of natural justice by any tribunal which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law. There is no argument that these principles apply to the LCRO review.

[15] The objection raised by Mr XX is understood to be that Lawyer D had understood that the focus of a review would be on the grounds forwarded by the applicant, and that he was unaware that the LCRO's review would focus on the Standards Committee decision. To that end Mr XX argued that the Guidelines request that a review applicant set out the grounds for the application and identify any errors made by the Committee. What appears to be implicit in this submission is that Lawyer D was misled into believing that the review would focus on the reasons given by the review applicant. The submission is understood to be that there was an absence of formal notice as to the issue under consideration in the review.

[16] The requirements of natural justice were set out by Fisher J in the following way:

There is a single underlying principle which I believe emerges from the decisions and policy and policy which underlie them: a party should normally be given the opportunity

to respond to an allegation which, with adequate notice, might be refuted. The key elements are surprise and potential prejudice. If an adverse finding is foreseeable there is no surprise. Even where there is surprise, there could be no prejudice unless better notice might have allowed the affected party to do something about it. Khalon v Attorney-General [1966]1 NZLR, 458, 466

[17] It is difficult to see how it could be said that there was either surprise or prejudice in this case. The scope of an LCRO review could not have been a surprise since the Act explicitly provides the scope of a review as the determination of the Standards Committee. The review provisions include the power to review the evidence and, where considered appropriate, allow the LCRO to confirm, modify or reverse the Committee's decision. These powers are reflected in the Guidelines. The nature of review and the LCRO powers are set out full in the Act and it is anticipated that practitioners will be familiar with these procedures. That the respondent may have made erroneous assumptions as to the nature of the review is not considered to be a sound basis for claiming that there was no information about, and thus no notice of, the issue arising for the review.

[18] It is also difficult to see how it could be said that the respondent was prejudiced. He had been given notice of the complaint made against him by the complainant, and the opportunity to respond to the allegation. This information was before the LCRO. The respondent was also informed of the application for a review of the Standards Committee decision, and given an opportunity for further response.

[19] In these circumstances it would be difficult to find support for a claim that the respondent had no information about the nature of the review process, or that he had been denied an opportunity to respond to the allegations that had been made. This ground is dismissed.

Factual error

[20] The next ground raised by Mr XX was that the LCRO had erred in fact by concluding that Lawyer D's failure to respond to Mr YY endured for a period of 4 months. Mr XX referred to a telephone call that had been made by Lawyer D to Mr YY on 11 September.

[21] It is accepted that the telephone call of 11 September was not referred to in the LCRO decision. This was information before the LCRO for the review, and had been noted. The telephone call had not been given substantive weight for the reason that it was not apparent that the telephone had constituted a response to the earlier 15 August letter. It may be, on reconsideration, that insufficient weight was given to that

contact. The original complaint by Complainant R's mother was simply that her solicitor Mr YY had been unable to get a response to correspondence he had sent to Lawyer D. A review of the Standards Committee's determination involved reconsideration of evidence relating to the complaint. The issue for the review was whether there had been unreasonable delay by Lawyer D in responding. The LCRO considered the delay was unreasonable. The delay was calculated to be four months.

[22] Whether the omission referred to is a sufficient basis for a rehearing of the review turns on whether, if the 11 September telephone call had been taken into account, there would likely have been a different outcome to the review. If the telephone call is taken into account the calculations would show a delay of three months. In these circumstances the LCRO decision would not be different for the reason that a three month delay in responding to a colleague's correspondence is also considered to be unreasonable, and in contravention of the Rules, namely Rule 10.1.

[23] Mr XX did not point to any other information that was not put before the LCRO.

[24] This submission does not disclose a proper basis for a rehearing. This ground is dismissed.

No reference made by LCRO about the nature of the services being rendered by Lawyer D.

[25] Mr XX submits that given the nature of services involved that there were justifiable reasons for the delay in responding. His complaint is that the LCRO gave no consideration to the nature of the transactions involved in the correspondence.

[26] The LCRO noted that the complaint was simply about a lawyer's delay in responding to correspondence from a colleague. The LCRO was not obliged to consider the nature of the services being provided by Lawyer D, and noted that it would have been sufficient to acknowledge receipt of the correspondence and explain any further delay. Any difficulties concerning the substance of the transactions does not address a complaint alleging a failure to reply at all, particularly in the light of two reminder letters also having been sent and not answered. This omission is not a proper basis for rehearing the review. This ground is dismissed.

That the Standards Committee considered 'all of the circumstances' in deciding to take no further action, and this was a decision it was entitled to make.

[27] The Standards Committee determination does not prevent the LCRO from considering the complaint de novo. That the review process provides for a review of

the evidence envisages that the LCRO will, where he or she considers it appropriate to do so, reconsider all aspects of the complaint. The Act provides for the LCRO to confirm, modify or reverse a Standards Committee determination. In this case the LCRO provided reasons for reversing the decision of the Standards Committee. This submission is not a sufficient basis for a rehearing. This ground is dismissed.

That the LCRO failed to consider or to refer the matter to mediation or conciliation

[28] Mr XX referred to what he termed the policy of the Lawyers and Conveyancers Act to seek mediation or conciliation between the parties before proceeding to determine the complaint. It is assumed that Mr XX refers to section 201 of the Act which give the LCRO the discretionary power to postpone a review for those purposes where the LCRO considers that to do so would constructively contribute to resolving the complaint. The LCRO did not consider it appropriate to exercise this power in this case. This is not a sufficient reason for a rehearing of the review. This ground is dismissed.

Decision

None of the grounds forwarded are sufficient to support the application for a rehearing of the review. The application is dismissed.

DATED this 10th day of August 2009

Hanneke Bouchier
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:

Complainant R as Applicant
Lawyer D as Respondent
Mr XX as Respondent's Counsel
The Auckland Standards Committee 1
The New Zealand Law Society