LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2020] NZLCRO 90

Ref: LCRO 084/2020

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
BETWEEN	**WF** Applicant
AND	**BP** Respondent

DECISION

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

Introduction

[1] Mr WF has applied for a review of a decision by the [Area] Standards Committee which had, following completion of a conduct investigation, entered an unsatisfactory conduct finding against Mr WF. That finding was accompanied by various penalty orders.

[2] The Standards Committee delivered its decision on 23 March 2020.

[3] Mr WF lodged his application to review the Committee's decision on 14 May 2020.

[4] The Lawyers and Conveyancers Act 2006 (the Act) states that review applications must be filed within 30 working days after a copy or notice of the determination is served on, given to or otherwise brought to the attention of the applicant

for review.[1] In the absence of proof to the contrary, service of the Committee's decision is presumed to have occurred on the fifth working day after it is made, given or performed or exercised.[2]

[5] In order to comply with the statutory timeframe prescribed for filing a review application, Mr WF was required to file his review application on or before 5 PM on Thursday 7 May 2020.

[6] Mr WF's application was clearly filed out of time.

[7] The approach historically adopted by Legal Complaints Review Officers (Review Officers) when considering applications filed out of time has been to decline to proceed the review.

[8] It has been noted in many decisions that there is no provision in the Lawyers and Conveyancers Act 2006 for a Review Officer to extend the timeframe within which an application for review must be lodged.[3]

[9] It has also been observed that in some cases hardship may result in the strict application of the time limit prescribed by s 198 of the Act.[4]

[10] In normal circumstances, Mr WF's failure to file his application in time would be fatal to his review application, however, as the time frame engaged by his application traverses in part a time of most uncommon circumstances, being the time during which New Zealand was subject to lockdown as a consequence of the COVID-19 crisis, a more careful assessment as to whether Mr WF's application is able to proceed is required.

[11] The need for a more attentive consideration is rendered more critical, as a consequence of Parliament's recent passing of an amendment to the Epidemic Preparedness Act 2006, that amendment implemented through sch 6 of the COVID-19 Response (Further Management Measures) Legislation Act 2020.[5]

[12] The new sch 2 of the Epidemic Preparedness Act 2006 provides at cl 1:

> (1) In relation to a proceedings before it, a court may, in its discretion, extend or shorten the time appointed by rules of court or an enactment, or fixed by court order, for doing an act or taking a step on the terms that the court thinks just if satisfied that it is necessary or desirable to do so because of circumstances relating to COVID-19.

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[1] Section 198(b) of the Act.
[2] Section 198(b) of the Act.
[3] *D v T* LCRO 36/2009 (27 March 2009), *LCRO 190-2017* (6 November 2017), and *KX v WA* LCRO 84-2012 (30 April 2012).
[4] *D v T* LCRO 36/2009 (27 March 2009), *LCRO 230-2017* (15 December 2017).
[5] Epidemic Preparedness Act 2006, sch 2, cl 1.

(2) In this schedule, **court** includes a tribunal.

[13] The first question to consider is whether a review conducted by Review Officers properly falls within the definition of work carried out by a tribunal.

[14] That inquiry is necessary in order to establish whether the discretion allowed under sch 2 of the Epidemic Preparedness Act 2006 which permits courts or tribunals to extend the timeframe for filing applications, ameliorates the strict approach Review Officers have historically adopted when considering review applications that have been filed out of time.

[15] The function of a Review Officer is to exercise the powers of review conferred on the Review Officer by the Act.[6]

[16] The Review Officer's role is a creature of statute.

[17] Whilst it is commonplace for the office from which the administration of the work of the Review Officers is managed to be referred to as the Legal Complaints Review Office, the Lawyers and Conveyancers Act 2006 does not provide for the creation of a Legal Complaints Review Office.

[18] Review Officers are appointed by the Minister of Justice, following consultation with the New Zealand Law Society.[7]

[19] Review Officers are appointed under a ministerial warrant.

[20] A stated purpose of the Act is to provide for a more responsive regulatory regime in relation to lawyers and conveyancers.[8]

[21] The regulatory regime established under the Act provides for a three-tier approach to the investigation of conduct complaints.

[22] Disciplinary investigations which engage a consideration of the question as to whether a lawyer has been guilty of conduct at the more serious end of the disciplinary spectrum (misconduct) are heard before the New Zealand Lawyers and Conveyancers Disciplinary Tribunal.

[23] The fact that the more serious conduct issues are determined by a statutory body specifically described as a tribunal, may raise further question as to whether the

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[6] Section 192 of the Act.
[7] Section 190(2) of the Act.
[8] Section 3(2)(b) of the Act.

work of a Review Officer falls comfortably within the definition of work carried out by a tribunal.

[24] Black's Law Dictionary defines tribunal as a "court or other adjudicative body".[9]

[25] It is undeniably the case that Review Officers carry out an adjudicative function.

[26] A number of decisions from the High Court have reinforced that a Legal Complaints Review Officer is a quasi-judicial officer.[10]

[27] In *U v Legal Complaints Review Officer*, Faire J listed the following provisions of the Act as illustrating that a Review Officer is a quasi-judicial officer:[11]

> (a) Section 206(2) of the Lawyers and Conveyancers Act 2006 grants the LCRO the power to hold hearings or, with the consent of the parties, to reach a determination on the papers;
>
> (b) Section 206(5) states that the LCRO is entitled to regulate her own procedure, subject to the requirements of the Lawyers and Conveyancers Act 2006 and rules made thereunder;
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> (c) Counsel and witnesses have the same privileges and immunities as if they were in a court of law when appearing before the first defendant pursuant cls 8 and 9 of the Third Schedule of the Lawyers and Conveyancers Act 2006;
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> (d) By s 211, the LCRO has the power to confirm, modify or reverse any decision of a Standards Committee and to exercise any of the powers which were, or could have been, exercised by the Standards Committee;
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> (e) By s 209 of the Lawyers and Conveyancers Act 2006, the LCRO has the power to direct the Standards Committee to reconsider the matter and, in that case, the Standards Committee must have regard to the direction given by the first defendant and the reasons for it;
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> (f) The LCRO is entitled to order costs pursuant to s 210(1) of the Lawyers and Conveyancers Act 2006. Such orders are enforceable as a final judgment pursuant to s 215(1);
>
> (g) Clause 11 of the Third Schedule provides the LCRO with an immunity from civil or criminal liability in relation to acts or omissions in the course of carrying out her functions, duties or powers unless she has acted in bad faith; and
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> (h) Section 262 provides that wilfully obstructing or deceiving the LCRO is an offence punishable on summary conviction to a fine not exceeding $25,000.

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[9] Bryan Garner *Black's Law Dictionary (11th ed, 2019)* (online loose-leaf ed, Thomson Reuters) at Tribunal.

[10] See *Zhao v legal Complaints Review Officer* [2013] NZHC 1052, [2013] NZAR 917 at [18], *Deliu v Hong* HC Auckland CIV-2011-404-3758, 18 December 2012 at [13].

[11] *U v Legal Complaints Review Officer* HC Auckland CIV-2010-404-6350, 3 June 2011 at [54]-[62]. The LCRO is referred to as the defendant in these proceedings.

[28] In undertaking their decision-making role in their capacity as quasi-judicial officers, Review Officers are clearly carrying out adjudicative work in the nature of that conducted by a tribunal.

[29] Regulation 5 of the Court Security Regulations 2019 records those bodies designated as a tribunal under the Courts Security Act 1999. Legal Complaints Review Officers are listed in sch 2 of the Regulations as a designated tribunal.

[30] I am satisfied that the Legal Complaints Review Officer constitutes a tribunal for the purposes of sch 2 of the Epidemic Preparedness Act 2006.

[31] On 14 May 2020, in response to a phone call received from Mr WF, a case manager provided advice to Mr WF concerning the process for lodging the required filing fee.

[32] In follow up correspondence, the case manager:

(a) Advised the time frames for filing an application.

(b) Confirmed that a filing fee was required to be lodged with the application.

(c) Provided advice as to the information that needed to be filed with the application.

[33] Mr WF filed his application by email on the afternoon of Thursday 14 May 2020, and when doing so, confirmed that the filing fee would be paid separately, on that day. Mr WF's application made no reference to his ability to file his application having been affected by COVID-19 related circumstances.

[34] On receipt of Mr WF's application, a case manager sought confirmation from the Complaints Service, as to the date that the Standards Committee decision had been forwarded to Mr WF.

[35] The Complaints Service confirmed that the application had been e-mailed to Mr WF at 8.04 am on 23 March 2020.

[36] On 15 May 2020, the Service Manager of the Legal Complaints Review Office advised Mr WF that his application had been received on the 35th working day after the Standards Committee had served a copy of its decision on him. He was advised that the application appeared to have been filed out of time, and invited to make submissions on the question as to whether the application could be accepted. He was informed that Review Officers were considering the impact (if any) COVID-19 events may have on the

Officers' strict approach to not accepting applications for review that had been filed out of the statutory time frame.

[37] On 15 May 2020, Mr WF forwarded correspondence to the LCRO noting that:

(a) the Committee's decision was deemed to have been served on, given to, or otherwise brought to his attention, on the 5th working day after the date of the decision; and

(b) he would be deemed to have received the decision on 30 March 2020 with the 30-working day period commencing at that point; and

(c) on these calculations, his application would have been filed in time.

[38] Mr BP (the complainant) was advised that Mr WF had filed an application to review the Committee's decision and informed that a Review Officer would be considering the question as to whether the application had been filed in time.

[39] On 18 May 2020, the Service Manager provided Mr WF with a copy of an LCRO decision that traversed issues relating to time frames for filing applications.

[40] On 20 May 2020, Mr WF responded further to the LCRO. In that correspondence he submitted that:

(a) he had never advised the Standards Committee that he would accept service by e-mail; and

(b) there was no proof that the Committee decision was brought to his attention on 23 March 2020; and

(c) 23 March 2020 was the date that the Government had announced its decision to move to a COVID-19 level 4 alert, that to commence 2 days after the announcement; and

(d) following the Government announcement, his sole focus was on attending to his clients' interests and staff matters; and

(e) a judgment of the United Kingdom Supreme Court,[12] supported his argument that service by e-mail could be problematic.

[12] *Barton v Wright Hassall LLP* [2018] UKSC 12.

[41] Mr BP instructed his lawyer (Mr NH) to respond to Mr WF's argument that his application had been filed in time.

[42] Mr NH submitted that:

(a) The week days that fell during the level 3 and level 4 lockdown periods, were working days: and

(b) Section 192A of the Act emphasises the requirement for the orderly and efficient operation of the LCRO; and

(c) Section 29 of the Interpretation Act 1999 defines non-working days "very specifically".

(d) most law firms had continued to operate during the lock down periods; and

(e) Mr WF had not provided any explanation as to why the level 3 and 4 alerts prevented him from lodging his application in a timely fashion.

[43] Turning firstly to Mr WF's argument that the date of service is properly deemed to have been five days after the Committee despatched the decision, with respect to Mr WF, I do not agree that the deeming provision in s 198 of the Act has any application here.

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

> **Applications for review**
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> Every application for a review under section 193 must—
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> (a) be in the prescribed form; and
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> (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).

[45] 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.

[46] 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 states:[13]

> (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.

[47] 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.

[48] 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.

[49] 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 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.

[50] 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.

[51] 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.

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[13] Lawyers and Conveyancers Amendment Bill 2010 (120-1) at the explanatory note, referring to cl 10.1.

[52] In *KX v WA* LCRO 84/2012 (30 April 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.

[53] Mr WF (and I will deal with this argument in more detail when addressing COVID-19 implications) says that his attention was understandably distracted by the Government announcement on 23 March 2020, this to suggest (although not directly stated by him) that his attention, being thus diverted, was not drawn to the Committee's decision until some days after its receipt.

[54] He argues that there is no proof that the Committee's decision was brought to his attention on 23 March 2020.

[55] Mr WF bolsters this argument by submission that he had not confirmed to the Committee that he would accept service by e-mail. He places reliance on the Supreme Court of the United Kingdom decision *Barton v Wright Hassall LLP* [2018] UKSC 12 (referred to at [40(e)].

[56] I do not consider that the authority relied on by Mr WF assists him.

[57] The Complaints Service has confirmed that all communications with Mr WF had, during the course of the Committee's investigation of the complaint, been conducted by email.

[58] The authority relied on by Mr WF engaged a situation where a claim had been forwarded to a lawyer's office in circumstances where the lawyer had not advised the claimant that the lawyer's office was authorised to accept service of the documents.

[59] Both the District and High Court Rules provide comprehensive guidance as to how parties are to identify their service address for service of documents, but the circumstances engaged by the litigating of civil claims, are quite different from those engaged when a lawyer is defending a conduct complaint.

[60] Mr WF was not receiving documents on behalf of a client. He was receiving a decision detailing the outcome of a disciplinary inquiry that directly involved him as the subject of the complaint.

[61] Consistent with the consumer protection objectives of the Act, the processes for conducting inquiry into complaints (including delivery of decisions) are intended to be "user friendly" and relatively informal.

[62] Mr WF does not suggest that he did not receive the decision on 23 March 2020 (he says that there is no proof of him having received it), rather he says that he was distracted on that day and should receive the benefit of a finding that, in the absence of evidence otherwise, the decision should be deemed to have been served five days after it was sent.

[63] Mr WF appears to be suggesting that the email from the Complaints Service may not have come to his attention until some days after receipt, and that as a consequence, he should receive benefit of argument that the application be deemed to have been served five days after the date that the Committee decision was despatched.

[64] I am satisfied that the decision was sent to Mr WF on 23 March 2020. The Complaints Service has confirmed that to be the case,[14] and there is no evidence provided to establish otherwise.

[65] It is not the case that an email is said to be received when the recipient's attention is drawn to the email.

[66] That argument, if widely accepted, would compromise the ability to serve documents by e-mail to the point where communication by email was totally ineffective.

[67] Email is a common, if not the most commonly used, mode of service in matters that come before the Complaints Service and this Office.

[68] 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.

[69] This is consistent with the provisions of the Contract and Commercial Law Act 2017, which at s 211(a) provides that "information is not denied legal effect solely because it … is in electronic form or is in an electronic communication."

[14] Complaints Service, correspondence to LCRO (15 May 2020).

[70] Having concluded that the decision was served on Mr WF on 23 March 2020, he was then required to file his application for review on or before 5 pm, Thursday 7 May 2020.

[71] Attention then turns to the question as to whether Mr WF's application should receive the benefit of the discretion provided under sch 2 of the Epidemic Preparedness Act 2006, and be accepted for review.

[72] In considering the exercise of the discretion available, a Review Officer must be satisfied that it is necessary or desirable to allow the extension, because of "**circumstances relating to COVID-19**" (emphasis added). Every case must be considered on its particular facts.

[73] Neither "necessary" or "desirable" require extensive amplification of their readily understood meanings. Necessary simply conveys a sense of something that must be done. Desirability suggests, particularly in this context, the appropriateness of doing the right thing, specifically remedying those situations where there is potential for an injustice to occur.

[74] Simply put, sch 2 of the Epidemic Preparedness Act 2006 is intended to ensure that no party's opportunity to pursue an available legal remedy, is frustrated as a consequence of being adversely impacted by COVID-19 circumstances.

[75] As noted, each case is to be considered on its individual merits, but it is my view that it would not have been intended by Parliament that the mere fact that the normal timeframe allowed for filing a review application overlapped with the various government-imposed lockdown levels, would in itself provide sufficient grounds for an extension to the timeframe for filing a review application.

[76] It would be expected that an applicant provide evidence to support their argument that COVID-19-related circumstances materially compromised their ability to file the application in time.

[77] It is not sufficient for an applicant to plead that their capacity to file an application was frustrated by COVID-19 circumstances, without adequately particularising the aspects of those circumstances that made it difficult or impossible for them to comply.

[78] If the legislature considered that the most appropriate way to protect parties whose ability to take a step in proceeding before a court or tribunal had been compromised by COVID-19 related circumstances was to specify a period of time during

which time frames for filing applications were suspended, it would have adopted that approach.

[79] In allowing a discretion to tribunals to extend time frames in circumstances where the decision maker considers it necessary or desirable to do so, it inevitably follows that applicants are required to provide explanation of their circumstances.

[80] The evidential burden on applicants should not, consistent with the consumer protection focus of the Act, be unduly onerous, but nor should the burden be negligible.

[81] An applicant's failure to lodge their application in time must be demonstrably linked to circumstances which, examined reasonably and carefully, would lead to fair conclusion that the applicant was unable to meet their obligations to file in time.

[82] Factors which may be considered of relevance could include:

(a) An applicant's ability to access files.

(b) Difficulty in accessing the technology needed to download review documents or dispatch the review application.

(c) An applicant's isolation from family members or other persons whose assistance they require in the preparation of the review application.

(d) The time available to an applicant to prepare their application prior to the imposition of the period of lockdown.

(e) Difficult family circumstances.

[83] The list is by no means exhaustive.

[84] To the extent that Mr WF introduces argument that COVID-19 circumstances affected his ability to file his application in time, his reliance on COVID-19 factors is minimal. He simply argues that his attention was focused in the early days of lockdown, on looking after clients and staff.

[85] He does not suggest that his ability to run his office or that his ability to communicate through usual channels was compromised.

[86] His attention being diverted in the initial lockdown stages was understandable, but the argument advanced does not reach the threshold sufficient to persuade me that it is either necessary or desirable that time be extended.

[87] I consider it significant that whilst Mr WF received the determination on the eve of the level 4 lockdown, he nevertheless had 30 working days (6 weeks) to file his application.

[88] It could be expected that a lawyer would be mindful of the need to comply with statutory time frames, and would be particularly motivated when wishing to address an issue relating to a disciplinary conduct finding, to ensure that any documents that needed to be filed, were promptly filed.

[89] Mr WF contacted the Office of the LCRO on 14 May 2020 prior to filing his application. I am advised by the Service Manager who spoke with Mr WF on that day, that the purpose of his call was to clarify the method for paying the required filing fee.

[90] I think it probable that Mr WF in making that inquiry on the 35th working day was proceeding on a mistaken assumption that s 198 of the Act allowed parties an automatic right to file on the 35th day.

[91] Mr WF misunderstood the way in which s 198 of the Act is to be applied.

[92] I am not persuaded that COVID-19 events played any significant part in the reasons for the delay.

[93] Having concluded that there are no grounds which persuade me that it is necessary or desirable to extend the time limit for Mr WF to lodge his application for review, I find that his application was not lodged within 30 working days after the date on which the Committee's determination was served, given to or otherwise brought to his attention.

[94] Mr WF's application for review is not accepted for filing.

DATED this 11th day of June 2020

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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:

Mr WF as the Applicant
Mr BP as the Respondent
[Area] Standards Committee
New Zealand Law Society