

APPEAL NUMBER 3/13

**In the Matter of the Chartered Professional
Engineers of New Zealand Act 2002**

AND

**In the matter of an appeal to the Chartered
Professional Engineers Council pursuant to
Section 35**

Between

Mr S CPEng IntPE(NZ) MIPENZ

Appellant

And

The Registration Authority

Respondents

Decision of the Chartered Professional Engineers Council dated 30 July 2013

Chartered Professional Engineers Council

The Appeal

1. This is an appeal to the Chartered Professional Engineers Council (“the Council”) under the Chartered Professional Engineers of New Zealand Act 2002 (“the Act”). The appeal is of a decision of the Disciplinary Committee (“DC”) dated 8 February 2013. The DC found that Mr S had breached Rule 45 of the Chartered Professional Engineers Rules (No 2) 2002 (“The Rules”). This being that “A Chartered Professional Engineer must act with honesty, objectivity and integrity in the course of his or her engineering activities”.
2. The DC decided that Mr S should be censured, ordered to pay a fine of \$3,000 and contribute to costs in the sum of \$7,000. Also, The DC determined that Mr S should be named and an article published in Engineering Dimension.
3. Mr S’s Notice of Appeal and appeal documents were received by the Council on 7 March 2013. The Appeal Panel has determined that the appeal cannot be dismissed under S 35 (3) (b) for being received out of time.
4. The parties were informed by letter dated 1 May 2013 of the receipt of the appeal of the appointment of an appeal panel consisting of Mr Jon Williams as Principal, Mr Andrew Hazelton, Ms Sharyn Westlake and Ms Jane Nees as members.
5. The 1 May 2013 letter outlined the timing and process to be followed. This letter also proposed that following the receipt of all submissions and responses the matter be dealt with on the papers. All parties were offered the opportunity for a hearing to be held in person if required.
6. The Registration Authority (“RA”) responded to the Appeal by letter dated 6 May 2013.
7. Mr S requested additional time to finalise his response. An additional 7 days was granted by the panel by email dated 7 June 2013. This was acknowledged and accepted by Mr S by email on 7 June 2013.
8. The Panel met via phone conference on 9 July 2013 to consider the appeal.

Background

9. The Appeal relates to an original complaint by Mr L of IMC to the Registration Authority, dated 8 June 2012. Mr L complained that Mr S made defamatory statements about him and his company on the LinkedIn website.
10. The Complaints Research Officer referred the matter to the Chair of an Investigating Committee. The final findings of Investigating Committee were issued on 10 October 2012. As a result the matter was referred to a Disciplinary Committee which made the decision and imposed the penalties noted in 1, and 2 above.

Notice of Appeal

11. Mr S is not appealing the conclusion reached by the DC that he had breached Rule 45. His grounds for appeal relate to the process and the penalties imposed. In summary his grounds for appeal are:
- a. That the Chair of the IC did not refer the dispute to an alternate dispute resolution process.
 - b. That the IC were incorrect in their finding relating to the peer review and this prejudiced their decision to not opt for mediation or dismiss the complaint.
 - c. Failure by IPENZ to minimize the costs associated with the process.
 - d. The level of fine imposed.
 - e. The imposition of costs.
 - f. The naming of Mr S and the inclusion of an article in Engineering Dimension on the issue.
 - g. The informing of CAB.
12. The relief sought by Mr S is
- a. The fine be reduced or dropped.
 - b. Costs be reduced or dropped.
 - c. That CAB is not notified.
 - d. That no article is written in Engineering Dimension.
13. The Notice of Appeal includes additional information relating to the marina design in question. These do not directly relate to the grounds of appeal or relief sought.

Process

14. In hearing the appeal the Panel has considered.
- a. Was the IC obligated to refer the matter to an alternative disputes resolution process?
 - b. The way and extent to which Rule 45 has been breached.
 - c. Are the penalties imposed justified?
 - i. Where in the range of fines should this breach sit?
 - ii. Is the imposition of costs appropriate?
 - iii. Are the level of costs appropriate?
 - iv. Is it appropriate to notify CAB?
 - v. Is it appropriate that Mr S is named in an article in Engineering Dimension?

Findings

15. Appeals to the Council are by way of rehearing (section 37(2) of the Act). We are entitled to confirm, vary or reverse a decision (section 37(5)(a)). We may make any decision that could have been made by the decision authority (section 37(5)(c)). Following *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141 we are entitled to take a different view from the Chair of the Investigating Committee or the Disciplinary Committee, but the appellant carries the burden of satisfying us that we should do so.
16. The DC found that Mr S had breached Rule 45 which requires a Chartered Professional Engineer to act honestly and with objectivity and integrity in the course of his or her engineering activities.
17. Although the finding of the Disciplinary Committee was not appealed, the panel does not consider the actions of Mr S to be either dishonest or acting without integrity. However, the Panel finds that Mr S has breached Rule 45 in that he failed to show objectivity in his comments.
18. The following findings follow the Notice of Appeal noted in item 12 above.
 - a. Under Rule 58 (d) the Chairperson of the IC may “explore the possibility of the complaint being referred to conciliation or mediation”. There is no obligation to do so. Mr S could have appealed against this action prior to the formation of the Disciplinary Committee. No relief is being sought for this issue. The Panel notes that it is not possible to re-litigate this point after the matter has passed to the DC.
 - b. The DC determined that there has been no breach of Rule 53. The issues relating to peer review therefore have no bearing on the penalties imposed by the DC. The Panel makes no further note on this issue.
 - c. The RA formed the DC in accordance with the requirements of Rule 85. The timing and location of the hearing was adjusted to align with Mr S’s visit to New Zealand. The panel considers that the costs associated with conducting the Disciplinary Hearing are in line with past practice and are reasonable.
 - d. In the range of possible negative outcomes that can result from the failings of a Chartered Professional Engineer, the Panel finds that the actions of Mr S are at the lower end. There is no evidence provided of any reputational or financial loss. Accordingly the Panel finds that the fine imposed was out of proportion to the gravity of the breach. The Council is particularly conscious that a maximum fine of \$5,000 can be imposed under the Act.
 - e. The question then is what should the penalty be?
 - f. In circumstances such as this the Council considers that the real penalty to Mr S is a reputational one and having to meet the costs of the disciplinary process. For that reason the Council considers that Mr S should not be fined, but that he should instead be censured in accordance with section 22 (1) (d) of the Act.
 - g. It also follows from this that the Panel finds the imposition of costs associated with this to be appropriate. The engineering profession as a whole should not pay for costs associated with disciplining an individual who has been found to have broken the Rules and been censured. The Panel considered that while there is a case for

Mr S to pay all costs associated with the process, it finds that the imposition of a proportion of these costs being \$7,000 is appropriate.

- h. The purpose of providing information relating to disciplinary procedures in Engineering Dimension is to inform the engineering profession at large of the consequences of their actions. The Panel finds that it is appropriate and in accordance with Section 22 (5) of the Act for Mr S to be named in an article outlining the issue and this appeal decision can also be published in full. The Council considers that the profession should note that in line with other professional organisations it is appropriate that those who have not met an appropriate standard meet the costs of the disciplinary process and we encourage Disciplinary Committees in the future to visit the full costs of the process on Chartered Professional Engineers who have breached the rules unless there is a very good reason not to.
- i. The Panel finds that the specific notification of the CAB is not necessary in this case as the competence of Mr S to practice has not been brought into question.

Outcome

19. The Disciplinary Committees' findings are amended as follows:

- a. Mr S should be censured for breach of Rule 45.
- b. Mr S should not be fined for this breach.
- c. Mr S is ordered to pay the costs of the matter in the sum of \$7,000
- d. That an article outlining this issue is to be published in Engineering Dimension naming Mr S.
- e. That the CAB not be informed of this decision.

20. A copy of this decision may be published by the Registration Authority.

Dated this 30 July 2013

Mr Jon Williams
Principal



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Mr Andrew Hazelton



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Ms Jane Nees



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Ms Sharyn Westlake



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