

APPEAL NUMBER 1/14

**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 H MIPENZ

Appellant

And

Mr M CPEng MIPENZ

Respondent

Decision of the Chartered Professional Engineers Council dated 24 February 2014

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”) and the Chartered Professional Engineers of New Zealand Rules (No 2) 2002 (The Rules).
2. The appeal is of a decision of the Chair of the Investigating Committee (“CIC”) acting as the Adjudicator dated 21 November 2013. The CIC found the complaint against Mr M should be dismissed and not referred to an Investigating Committee under the provisions of Rule 57 (a) and (c) of The Rules.
3. Mr H’s Notice of Appeal dated 4 December 2013 was received by the Council on 4 December 2014. The Appeal Panel has determined that the appeal cannot be dismissed under S 35 (3) for being received out of time.
4. The parties were informed by letter dated 10 January 2014 of the receipt of the appeal and of the appointment of an Appeal Panel consisting of Mr Jon Williams as Principal, Mr Anthony Wilson, and Mr Ross Tanner as members.
5. The 10 January 2014 letter outlined the timing and process to be followed. This letter proposed that if all parties were in agreement, then the following documents would comprise the submissions to be considered as a part of the Appeal:
 - a. Mr H’s complaint dated 20 September 2013 and two attachments.
 - b. Cardno report issued to WDC in April 2013 and forwarded to the RA on 26 September 2013
 - c. The past and future of Wanganui’s Wastewater Treatment plant. Report by Mr H dated 26 August 2013.
 - d. Letter from Chief Executive Wanganui District Council to Mr M dated 10 October 2013.
 - e. Letter from Mr M to the RA dated 31 October 2013
 - f. Complaint Review Officers report dated 8 November 2013
 - g. Adjudicators report dated 21 November 2013
 - h. Notice of Appeal from Mr H dated 4 December 2013

The letter also proposed that the matter be dealt with on the papers. All parties were offered the opportunity to make further submissions and for a hearing to be held in person if required. All parties agreed to the process proposed and to the matter being considered on the papers.

6. The Panel met via phone conference on 10 February 2014 to consider the appeal.

Background

7. The Appeal relates to a complaint made by Mr. H regarding comments made by Mr. M in public meetings and technical reports relating to the performance and recommended remedial actions for the Wanganui Waste Water Treatment Plant
8. Mr. H considered that Mr. M had performed work in a negligent or incompetent manner, had breached the code of ethics by commenting on the work of others and had misrepresented his experience.
9. The CIC found that there is no applicable ground of discipline under Section 21(1) (a) to (d) of the Act (Rule 57 (a)) and that under the provision of Rule 57 (c), the complaint has not been made in good faith.

Notice of Appeal

10. In the Notice of Appeal and other documentation Mr. H restated his belief that Mr. M had:
 - a. Reviewed the work of MWH without advising them
 - b. Displayed incompetent and unethical behavior
11. The relief sought by Mr. H is to have his complaint reconsidered.

Process

12. 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) of the Act). We may make any decision that could have been made by the decision authority (section 37(5)(c) of the Act). 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.
13. In hearing the appeal the Panel has considered whether there are grounds under S57 of the Rules for referring the complaint to a full investigating committee. More specifically:
 - a. Does Mr. M have a responsibility as a Chartered Professional Engineer for statements made in reports and meetings on behalf of the company he works for where such works have been undertaken by a team?
 - b. Has Mr. M breached the codes of ethics? [S21 (1) (b) of the Act (Rule 57 (a))]
 - c. Has Mr. M performed engineering services in a negligent or incompetent manner? [S21 (1) (c) of the Act (Rule 57 (a))]
 - d. Has Mr. H acted in good faith in making his complaint? [Rule 57 (c)].

Findings

Does Mr. M have a responsibility for statements made on behalf of his business?

14. Mr. H acknowledges that Mr. M was acting and making statements on behalf of his company Cardno BTO. However, Mr. H implies that in his role, Mr. M should take professional responsibility for the contents of the reports and the statements made.

The Panel agrees with this. In reviewing, authorizing, and presenting the findings, Mr. M needs to fulfill his obligations as a Chartered Professional Engineer.

Has Mr. M breached the code of ethics?

15. Mr. H has advanced a number of bases on which he considers that the Mr. M has displayed unethical behavior. Part 3 of the Rules sets down the code of ethical conduct for Chartered Professional Engineers. The Panel has considered each item:
- a. 43. Take reasonable steps to safeguard health and safety. Not raised as an issue in this complaint. The panel does not consider this rule to have been breached.
 - b. 44. Have regards to effects on the environment. The reason behind the work being undertaken by Mr. M is to improve the environment in Wanganui. The panel does not consider this rule to have been breached.
 - c. 45. Act with honesty, objectivity and integrity. In reviewing the documentation the Panel can see no evidence of Mr. M acting dishonestly, without objectivity or without integrity. While there may be a technical disagreement between Mr H and Mr M on the nature of the problem and its solution, this does not amount to dishonesty or lack of objectivity (see further discussion in paragraph 16 below).The panel does not consider this rule to have been breached.
 - d. 46. Not misrepresent competence. In presenting the findings of a team it is appropriate to claim the competence of the whole team or in this case the corporate entity. A reading of Mr M's CV and the credentials of Cardno BTO indicates considerable experience in waste water and sewerage treatment projects. In selecting Cardno BTO to undertake the work, Wanganui District Council confirmed their acceptance of Cardno BTO's competence in this area. The panel does not consider this rule to have been breached.
 - e. 47. Not misrepresent chartered engineer status. Not raised as an issue in this complaint. The panel does not consider this rule to have been breached.
 - f. 48. Inform others of the consequence of not following advice. Not raised as an issue in this complaint. The panel does not consider this rule to have been breached.
 - g. 49. Not promise, give or accept inducements. Not raised as an issue in this complaint. The panel does not consider this rule to have been breached.
 - h. 50. Not disclose confidential information. Not raised as an issue in this complaint. The panel does not consider this rule to have been breached.

- i. 51 Not misuse confidential information for personal benefit. Not raised as an issue in this complaint. The panel does not consider this rule to have been breached.
- j. 52. Disclose conflicts of interest. Not raised as an issue in this complaint. The panel does not consider this rule to have been breached.
- k. 53. Not review other engineers' work without taking reasonable steps to inform them and investigate. The Panel disagrees with paragraph 5.9 of the CIC's report. The scope of the work undertaken by Mr. M would of necessity involve a review of the basis for the original design.

The Executive Summary of the 24 April 2013 report titled Wanganui Waste Water Treatment Plant, Evaluation of long-term improvements for consent compliance states "Evaluation of the original design concept is a necessary component of this study".

However, Wanganui District Council engaged Cardno BTO to undertake this work. It is reasonable to expect that the Council would have informed MWH that a review was being undertaken. MWH have not raised any ethical issues with respect to the review. The panel does not consider this rule to have been breached.

In summary the Panel does not consider that Mr. M has breached the code of ethics.

Has a Mr. M performed engineering service in a negligent or incompetent manner?

- 16. There are often many different engineering solutions to a specific problem. Engineers may disagree on what is the best solution. The role of the engineer is to present their findings and reasoning to their client to allow the client to make an informed decision. The appropriateness or otherwise of the initial design is not for this Panel or an IPENZ investigating committee to determine. Likewise, with the content and recommendations of the Cardno BTO review.

The issue for consideration by this Panel is "is there any evidence that Mr. M has performed in negligent or incompetent manner?"

The reports issued under Mr. M's signature acknowledge the various technical authors. Based on his CV, Mr. M has the appropriate background and qualifications to review the report. The report has been subject to an independent peer review by AECOM. This is a sound and robust engineering process and does not indicate either negligence or incompetence by Mr. M.

Has Mr. H acted in good faith in making his complaint Rule 57 (c)?

- 17. Mr. H is acting on his own behalf. He does not represent the Council or the original designers. As a rate payer he has an interest in how the Council spends its money. He does not appear to represent any wider rate payer grouping.

The Panel disagrees with paragraph 5.17 of the CIC report. We do not consider that Mr. H's complaint can be considered vexatious or not in good faith

(reference to Rule 57 (c)). It could be argued that Mr. H does not have sufficient “personal interest” in the matter to raise the complaint. Whilst he has an active technical interest in the subject matter, he is not a directly affected party. He is however a Wanganui ratepayer, and also a member of IPENZ.

Findings of the Appeal Panel

18. Whilst there are some minor comments within the CIC report that the panel does not agree with, the process followed and conclusions reached are correct.

Outcomes

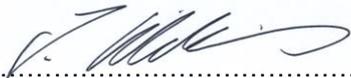
19. As noted in item 12 above the Appeal Panel may confirm, vary or reverse a decision (section 37(5)(a) of the Act).
20. The Appeal Panel confirms the decision of the Chair of the Investigating Committee. There is no applicable ground for discipline under Section 21 (1) (a) to (d) of the Act. Under Rule 57 (a) this is sufficient grounds for not referring the complaint to the Investigating Committee.
21. The appeal is dismissed.

Costs

22. The costs incurred by all parties to this appeal will remain where they lie.

Dated this 24 February 2014

Mr Jon Williams
Principal


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Mr Ross Tanner


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Mr Anthony Wilson


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