

APPEAL NUMBER 14/14

**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

Ms H

Appellant

And

Mr T CPEng MIPENZ IntPE(NZ)

Respondent

Decision of the Chartered Professional Engineers Council dated 20 January 2015

The Appeal

1. This decision relates to 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 Chair of Investigating Committees (‘the CIC’) acting as Adjudicator, dated 17 October 2014.
2. The Appeal relates to a complaint made by Ms H to the Registration Authority (‘the RA’) under cover of a letter dated 10 September 2014. In her letter, Ms H alleged dishonest and fraudulent acts and omissions by Mr T and asked that the RA investigate his conduct. Specifically, Ms H alleged that:
 - i. Mr T has illegally converted his house into two flats without a building consent
 - ii. He has rented the bottom flat to tenants for the last eight years (2006 to 2014)
 - iii. Mr T has failed to pay the correct amount of rates to the Council for the past eight years.

Ms. H advised that Mr. T, in his professional capacity as an engineer, is employed by GHD Ltd, and is engaged through that firm for the majority of his time on projects commissioned by the Auckland Council. She considers that Mr. T’s “fraudulent acts and/ or omissions against the Council are totally unacceptable and bring the engineering profession into disrepute”.

3. The Complaints Research Officer of the RA (‘the CRO’) invited a response on 23 September from Mr T to the points made in the complaint from Ms H. Mr T provided an initial response on 23 September (i.e. the same day) and a substantive submission on 26 September. The CRO completed an initial investigation report on 30 September.
4. The CIC, in her adjudication report of 17 October, considered the parties’ submissions and the CRO’s report, as well as the applicable grounds of discipline under the Act. She concluded that the complaint against Mr T should be dismissed on the grounds in Rule 57(c) of the Chartered Professional Engineers of New Zealand Rules (No 2) 2002 (‘the Rules’) that the complaint is frivolous or vexatious or is not made in good faith.
5. The decision was sent to Ms H by email on 20 October 2014.
6. Ms H has now appealed the CIC’s decision. Her appeal is based on the following grounds:
 - i. That the complaints process adopted by the RA was in breach of the principles of natural justice;
 - ii. The CIC decision was based on a complete misinterpretation of the nature of the complaint;
 - iii. The decision was based on erroneous facts;

- iv. The decision was erroneous in law;
- v. The decision failed to take into account of section 43(b) of the Act and Rule 45 of the Rules.

Background and context for the appeal

7. Mr. T was elected a Professional Member of the Institution of Professional Engineers New Zealand on 23 August 2001. He was first registered as a Chartered Professional Engineer on 2 July 2003 and was placed onto the IntPE(NZ) register on 6 August 2003. His CPEng and IntPE(NZ) registrations are current. In the register, Mr. T's current practice area is described as "*Stormwater reticulation investigation, assessment, treatment and design. Asset management of storm-water roads and Wharf facilities*".
8. Mr. T owns and lives at a property at 20 Laurie Avenue, Parnell, Auckland. He originally purchased the property in a mortgagee sale in 2005. As noted in paragraph 2 above, in her original complaint Ms. H alleged that:
 - i. Mr T has illegally converted his house into two flats without a building consent
 - ii. He has rented the bottom flat to tenants for the last eight years (2006 to 2014)
 - iii. Mr T has failed to pay the correct amount of rates to the Council for the past eight years.

She considers that Mr. T's "fraudulent acts and/ or omissions against the Council are totally unacceptable and bring the engineering profession into disrepute" and asked for an investigation by the RA. In doing so she is in effect asserting that the actions of Mr. T in his personal capacity should be considered in respect of his professional status as an engineer, particularly because he has been working on Council-commissioned projects during the same period.

9. Mr. T has challenged the allegations from Ms. H. With his original submission to the RA, he supplied a copy of the Mortgagee Sale Property Information dated 23 August 1995, which states that "the base has been developed as a separately-contained flat (with its own main entry)...". Other evidence was also supplied by Mr. T to support that description. Mr. T moreover refuted other aspects of Ms. H' allegations but confirmed that he had been renting the flat to tenants, and stated that the property was compliant in terms of building consents in all other respects. He was working with the Council to deal with any concerns about the building status.
10. Ms. H advised in her submission to the RA that she had also made a separate complaint to the Auckland Council. She reported that Council staff had advised her that they had investigated her complaint, and that the Council had served an Abatement Notice on Mr. T, requiring him to convert his house back into a single dwelling house. In his separate submission to the RA, Mr. T advised that the first time he ever received any advice from the Council that there might be a breach of Auckland Council ordinances regarding the downstairs dwelling was this year (i.e. 2014) when he received abatement notices as a result from the complaint from Ms. H.
11. The appeal submission to this Council (i.e. CPEC) from Ms. H (confirmed indirectly by the solicitor for Mr. T) advised that the house had been converted back into a single dwelling by 5 November 2014, thus meeting the conditions of the abatement notice.

12. In his report to the RA, the CRO noted that “the ownership of rental property is not in itself an engineering activity, so I have some difficulty in seeing how an abatement notice in connection with that could be considered to be evidence of negligence or incompetence in the performance of his (Mr. T’s) engineering services”. The CIC agreed with the substance of the CRO’s report in making her determination.

Process

13. Ms H’ Notice of Appeal dated 13 November 2014, and an accompanying sworn affidavit, were received by the Council on 17 November 2014.
14. The parties were informed by letter dated 24 November 2014 from the Deputy Chair of the Council of the receipt of the appeal and that an appeal panel would be appointed at the next meeting on the Council on 12 December 2014. The letter of 24 November also outlined the timing and process to be followed.
15. On 16 December, the Deputy Chair wrote again to the parties advising that the Council had appointed an appeal panel consisting of Mr Ross Tanner as Principal, Ms Sharyn Westlake and Ms Jane Nees as members. Ms Westlake was however subsequently replaced on the panel by Mr Jon Williams (then Deputy Chair, and now Chair of the Council) when a replacement member was appointed to the Council by the Minister just prior to the Christmas break, thus bringing Ms Westlake’s (extended) term of appointment on the Council to a conclusion.
16. In respective correspondence with the Deputy Chair on 25 and 27 November, the parties agreed on a truncated timetable for submission of a response by Mr. T, and reply by Ms. H. Mr. T, through his solicitor Mr. Beard, made his Submission on Appeal dated 16 December 2014, which was also accompanied by two sworn affidavits. Ms. H made a Submission in Reply on 17 December 2014 (together with a further sworn affidavit) and then also submitted a corrected version of each of these latter documents on 19 December 2014. The Registration Authority advised the Deputy Chair by email on 9 December that the RA did not wish to make any submission in regard to the appeal, preferring to rely on the submissions by Mr. T and Ms. H.
17. The appellant and the respondent had also agreed that the Appeal Panel should consider the appeal on the basis of the papers i.e. submissions provided.
18. The Principal of the Appeal Panel advised the parties by email (19 and 24 December) on further developments in terms of process, and sought to ensure that each party (including Mr. T’s solicitor) had received all of the respective submissions. He advised that a hearing would likely be held in the week commencing 12 January. The Panel met via telephone conference on 14 January 2014 to consider the appeal.

Hearing and consideration of the appeal

19. 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 but the appellant carries the burden of satisfying us that we should do so.

20. In hearing the Appeal the Panel has considered whether there are any grounds for discipline under section 21 of the Act, and whether the CIC's decision to dismiss the complaint was correct i.e.

Section 21 Grounds for discipline of chartered professional engineers

(1) The Registration Authority may (in relation to a matter raised by a complaint or by its own inquiries) make an order referred to in section 22 if it is satisfied that a chartered professional engineer—

- (a) has been convicted, whether before or after he or she became registered, by any court in New Zealand or elsewhere of any offence punishable by imprisonment for a term of 6 months or more if, in the Authority's opinion, the commission of the offence reflects adversely on the person's fitness to practise engineering; or
- (b) has breached the code of ethics contained in the rules; or
- (c) has performed engineering services in a negligent or incompetent manner; or
- (d) has, for the purpose of obtaining registration or a registration certificate (either for himself or herself or for any other person),—
 - (i) either orally or in writing, made any declaration or representation knowing it to be false or misleading in a material particular; or
 - (ii) produced to the Authority or made use of any document knowing it to contain a declaration or representation referred to in subparagraph (i); or
 - (iii) produced to the Authority or made use of any document knowing that it was not genuine.

21. Clearly, the criteria established under Sections 21 (1) (a), and (d) of the Act do not apply in this case. The questions that the Panel has therefore considered are:

- a) Has Mr. T performed engineering services in negligent/incompetent manner?
- b) Is there evidence of a breach of the Code of Ethical conduct set out in the Rules (43-53 respectively)?

to warrant the imposition of penalties as defined in Section 22 of the Act.

Findings

22. The Appeal Panel has carefully read all of the submissions and supporting documents provided by the appellant and the responses to them by the respondent's solicitor, as well as the original submissions to the RA and subsequent report by the CRO and CIC.
23. As noted above, the Council must satisfy itself that, for there to be any sanction or penalties imposed on an engineer, that engineer must have performed engineering services (our underlining) in a negligent or incompetent manner. Although there is no definition of the term 'engineering services' in either the Act or the Rules, we have interpreted the term in a manner as would a reasonable person i.e. services that require the application of technical engineering knowledge and competence. There is no such evidence in this case. The ownership and management of a property by Mr. T does not constitute 'engineering services'. Moreover there is no complaint, either by

Ms. H or any other, that pertains to allege negligence or incompetence in terms of the provision of engineering services to the Council in the course of Mr. T's professional services to that organization.

24. The Appeal Panel has therefore also considered whether there is evidence of a breach of the Code of Ethics. Ms. H submits in her appeal (the Fifth Ground of Appeal) that the (CIC's) Decision failed to take account of section 43(b) of the Act and Rule 45 of the Rules. In respect of Rule 45: "A chartered professional engineer must act honestly and with objectivity and integrity in the course of his or her engineering activities". (Our underlining, again). It is therefore the view of the Panel that in respect of Rule 45, given the interpretation we have provided above, there are no grounds for discipline of Mr. T. Ms. H also refers, in the same ground for appeal, to a (sub-) Section 43(b) of the Act. There is no such subsection. Section 43 of the Act empowers the Registration Authority to delegate any of its functions or powers, which is not relevant in this case.
25. It is therefore the view of the Appeal Panel that there is no applicable ground of discipline under section 21(1) (a) to (d) of the Act.
26. We now however discuss and deal with all of the grounds of appeal submitted by Ms. H.

i. That the complaints process adopted by the RA was in breach of the principles of natural justice;

Given, as we have noted above, this Appeal hearing constitutes a rehearing of the complaint, this ground of appeal is no longer relevant. Ms. H had stated in her Appeal that certain documents submitted by the Respondent to the RA were not sent to her as Appellant to reply to. For this Appeal, all of the documents relevant to the Appeal have been copied to both the Respondent and Appellant. We note however that the solicitor for the Respondent advised that he had not been sent copies of the Appellant's Submissions in Response to the Respondent's Submissions. The Principal of the Appeal Panel had endeavoured to ensure that this omission was corrected by the Appellant.

ii. The CIC decision was based on a complete misinterpretation of the nature of the complaint;

Ms H submits to this Council (Submissions, 13 November 2014) that the facts and evidence described in her submissions and supported in her accompanying affidavit justify a finding that her complaint was not frivolous but about a very serious matter, namely that Mr T purchased a house that he knew had been illegally converted into two flats without a building consent; he has rented the bottom flat to tenants for the last eight years (2006 to 2014); Mr T has failed to pay the correct amount of rates to the Council for the past eight years. Furthermore, the Appellant submits that, based on evidence in her affidavit Mr T clearly intended to continue to hide the fact that the house had been illegally divided into two flats, from the Auckland Council.

The discussion in this decision set out above demonstrates that such considerations do not relate to the provision of engineering services to the Council i.e. that require the application of technical engineering knowledge and competence.

This Ground of Appeal therefore fails.

iii. The decision was based on erroneous facts;

In support of her Appeal on this Ground, Ms. H makes a number of additional submissions, drawing on points she had previously made to the RA. Those submissions for the most part relate to the relationship between Mr. T, as owner and occupier of the property at L Avenue, and the Council. In terms of these submissions therefore, for the reasons also previously discussed, this Ground of Appeal also fails.

There is one additional point of submission made by Ms. H in reference to Mr. T's conduct and character, to which we shall refer under 'General Comments' below.

iv. The decision was erroneous in law;

Under this Ground of Appeal, Ms H's claims that the Adjudicator failed to note that Mr T was "in breach of his statutory duty to the Auckland Council under section 46(1) of the Building Act insofar as he failed to inform the Council of the change of use of the building in writing....." It is also claimed that the Adjudicator failed to make any reference to the fact that Mr T was "knowingly defrauding the Council and all ratepayers of Auckland by failing to pay rates which were levied on the correct basis".

The submissions made by Ms H in respect of this Ground of Appeal do not relate to the provision of engineering services to the Council. This Ground of Appeal therefore also fails.

v. The decision failed to take into account of section 43(b) of the Act and Rule 45 of the Rules.

We have dealt with this Ground of Appeal effectively in paragraphs 23-25 above. The ownership and management of a property by Mr. T does not constitute 'engineering services'. Moreover there is no complaint, either by Ms. H or any other, that pertains to allege negligence or incompetence in terms of the provision of engineering services to the Council in the course of Mr. T's professional services to that organization. This Ground of Appeal fails.

General comments

27. The following are general comments that the Appeal Panel notes:

- There are a number of allegations made by Ms. H that relate to Mr. T's personal conduct and character, in the course of her original submission to the RA, and in more detail, in her submissions and affidavits to this Council. These allegations are disputed by the Submissions in Response made by the solicitor for Mr. T, and his own supporting affidavits. The Appeal Panel has confined its review and comments strictly to the grounds for discipline in the Act and in the Rules. This is not the appropriate forum to make any comment or judgement on the matters of conduct or character that are alleged or rebutted, other than the point made immediately below.
- We have set out our view that there are no grounds in the Act for further action or penalty in this instance, given that ownership and management of this property by Mr. T do not constitute engineering services to the Auckland Council. If the actions of Mr. T are not fully compliant with the requirements of the Building Act, and applicable Council bylaws, this should be addressed via the complaint that Ms H has raised directly with Auckland Council.

28. The CIC was correct to dismiss the complaint, but this Appeal Panel differs in terms of its own reason for doing so.

Outcome

29. The Appeal is declined on the basis that there is no applicable ground of discipline under section 21(1) (a) to (d) of the Act.

Costs

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

Dated this 20th day of January 2015



Mr Ross Tanner
Principal

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Ms Jane Nees

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Mr Jon Williams

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