

APPEAL NUMBER 16/14

**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 E (and others)

Appellant

And

Dr R CPEng

Respondent

Decision of the Chartered Professional Engineers Council dated 20 March 2015

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 Chair of the Investigating Committee acting as the Adjudicator (CIC) dated 15 September 2014.
2. The CIC dismissed the complaint “due to lack of evidence” and there being “no grounds for referring these allegations to an Investigating Committee.” No specific reference to the Act or the Chartered Professional Engineers of New Zealand Rules (No 2) 2002 (“the Rules”) was provided as a basis for this dismissal.
3. The Council received a notice of Appeal on 30 October 2014. The Appeal was addressed as being submitted by Mr E and Professor A. It noted that it was submitted on behalf of all 54 complainants. Where this decision refers to “Mr E” it also refers to Professor A and the other complainants.
4. All correspondence with Dr R has been via his legal representatives Buddle Findlay. For clarity this decision will refer to the all communications being with “Dr R”.
5. The Appeal was submitted beyond the 28 day deadline contained within Section 35(3) (b) of the Act. In accordance with item 3.3 of the Council’s Practice Note on Appeals, Mr E was advised of the need to apply for a waiver for the appeal to filed out of time.
6. The application for a waiver was received by the Council on 12 November 2014. The waiver was copied to Dr R and the Registration Authority, as parties to the original decision, for their comment.
7. Comments were received from the Registration Authority on 12 November 2014 indicating no objection to a waiver being granted. Comments from Dr R were received on 24 November 2014. Dr R outlined a number of objections to the granting of the waiver.
8. At a meeting of the Council on 12 December 2014 the application for waiver was reviewed. The Council considered that the delay was modest and that neither party was particularly prejudiced by the delay. Accordingly the waiver was granted.
9. The Council appointed an Appeal Panel (“the Panel”) comprising Mr Jon Williams as Principal, Mr Roly Frost and Mr Ross Tanner as members.
10. The Panel issued a letter dated 17 December 2014 to all parties informing them of the acceptance of the waiver, and the appointment of the panel.
11. The 17 December 2014 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. Both parties were offered the opportunity for a hearing to be

held in person if required. Both parties subsequently agreed to the matter being considered on the papers.

12. Mr E submitted his Notice of Appeal along with additional submissions dated 17 December 2014. Dr R provided his submission on 30 January 2015. Mr E provided his reply to the submission on 9 February 2015.

13. The Panel met via telephone conference on 5 March 2015 to consider the appeal.

Background

14. The Appeal relates to Dr R's involvement in the design of the CTV Building in Christchurch that collapsed as a result of the 22 February 2011 Christchurch earthquake, killing 115 people.

15. Mr E submitted a complaint to IPENZ dated 26 May 2014. The specific aspects of Dr R's involvement in building included in the complaint were:

a) Breaches of rule 43 of the Rules

A chartered professional engineer must, in the course of his or her engineering activities, take reasonable steps to safeguard the health and safety of people.

- i. Dr R was aware of the dangerous state of the CTV Building prior to the 22 February 2011 earthquake by having a copy of the Holmes report and chose not to take any action:
- ii. Dr R did not inform the Christchurch City Council after the Darfield (September 2010) and Boxing Day 2010 earthquakes that drag bars had been installed in 1991.

b) Breaches of rule 45 of the Rules:

A chartered professional engineer must act with honesty and with objectivity in the course of his or her engineering activities.

- iii. Dr R destroyed a CD containing information regarding the CTV Building after the 22 February 2011 earthquake and collapse of the CTV Building
- iv. Dr R resigned as a member of IPENZ whilst an investigation was in progress regarding his negligence, competence, and ethical behaviour.
- v. Dr R made an application to the High Court questioning the jurisdiction of his own professional body to investigate the complaint lodged against him.
- vi. Dr R Attempted to confuse the issue during the Royal Commission hearing into the collapse of the CTV Building by not offering any help to assist in understanding why the building collapsed in such a fashion.

- vii. Dr R failed to inform IPENZ of his involvement with the CTV Building when applying for CPEng qualification/accreditation.
16. The initial process of investigating the complaint was in accordance with Rule 58. The complaint was investigated by the Complaints Research Officer (CRO) prior to being referred to the CIC.
17. The CRO and CIC reports do not reference consideration of mediation or another dispute resolution process, Rule 58 (d). The Panel notes that the CIC is not required to propose an alternative dispute resolution process. The Panel also notes that such a process was unlikely to resolve this issue.
18. The CRO investigation included discussions with both parties. The CRO submitted his report dated 6 August 2014 to the CIC.
19. The CRO's report notes that Dr R was first entered into the CPEng register on 5 May 2011.
20. The CIC issued her findings on 14 September 2014. She summarised the complaint under the following 6 headings. Items i and ii from paragraph 15 above are combined into allegation i. The CIC's findings are noted against each heading.
- i. **The Holmes report and drag bars allegations.** Dismissed on the ground that the Registration Authority has no jurisdiction and therefore there can be no grounds for discipline.
 - ii. **The destroyed CD allegation.** Dismissed on the grounds that it is an abuse of the process and thus to be deemed frivolous or vexatious and that there are no applicable grounds for discipline.
 - iii. **The resignation allegation.** Dismissed on the grounds of there being no applicable grounds for discipline
 - iv. **The declaratory judgment allegation.** Dismissed on the grounds that it is an abuse of the process and thus to be deemed frivolous or vexatious.
 - v. **The Royal Commission conduct allegation.** Dismissed on the grounds that it is an abuse of the process and thus to be deemed frivolous or vexatious.
 - vi. **The non-disclosure allegation.** Dismissed due to lack of evidence.
21. The CIC dismissed all allegations and found that there were no grounds for referring the allegation to an Investigating Committee.

Notice of Appeal

22. Mr E's Notice of Appeal addressed the first 5 of the 6 allegations noted in paragraph 20 above. Allegation vi was not appealed as the CRO noted in paragraph 5.16 of his report that this allegation was the subject of another disciplinary process.
23. Mr E contests the findings of allegations i, ii and iii.
24. The remedy sought by Mr E is that the allegations i, ii and iii be referred to a Disciplinary Committee. The Appeal Panel notes that this option is not available to the current Appeal Panel and that the only remedy available is for the allegations to be

referred to an Investigating Committee (IC). If the IC determined that there were grounds for discipline under section 21 of the Act, the matter would then be referred to a DC.

Process

25. 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.
26. In hearing the Appeal the Panel has considered whether the CIC's decision to dismiss the complaint was correct.
27. The Panel has considered only the specific matters that have been appealed. Other documentation provided by the RA has been read and referenced in reaching the Panel's findings.

Commentary

28. The Panel notes and acknowledges the deep feelings and emotions associated with the events that have led to this complaint. It also acknowledges the public interest in the event and the outcomes of complaints such as this one. However the Panel can only consider findings in the context of the Act and Rules under which it operates.
29. The Panel considers that all of the aspects of the complaint brought by Mr E are very serious. They are in no way "frivolous" or "vexatious". Whilst the CIC has drawn these words from rule 57 (c) of the Rules, the panel does not consider that she is correct in this case. The Panel finds that the CIC was wrong to dismiss specific items on this basis.
30. The Panel has first considered its jurisdiction to hear each specific allegation of the appeal and then considered the allegation on its merits.

Findings of the Appeal Panel

31. Allegation i - Holmes report and drag bars allegations

- a. Allegation i, relates to actions or inactions of Dr R prior to his being entered in to the CPEng Register on 5 May 2011.
- b. Section 21 of the Act provides the grounds for disciplining chartered professional engineers. The Act does not provide for disciplining engineers based on their performance prior to becoming chartered.
- c. The requirements for Dr R to become initially registered as a chartered professional engineer are covered by section 8 of the Act. As noted in paragraph 22 above, this is the subject of a different complaint, which is being considered under separate jurisdiction by IPENZ.

- d. The Panel dismisses allegation i. **Holmes report and drag bars allegations**, as there are therefore no grounds under which the alleged actions or inactions of Dr R can be considered in terms of discipline under section 21 of the Act.

32. Allegation ii, the destroyed CD allegation,

- a. Allegation ii was considered by the Royal Commission of Inquiry. We note that Dr R gave evidence under oath to that Commission, and was cross-examined, also under oath, about the transfer of information from a CD to a hard drive computer disk. No evidence has been provided to the panel that all information from the disk was not transferred to the drive. Likewise no evidence has been provided that it has. All that we have available to us is the transcript of hearings before the Royal Commission. We do not have any powers of investigation at this point.
- b. On this basis the Panel must take Dr R's statements under oath to the Royal Commission to be factual to the best of his knowledge.
- c. The Panel dismisses allegation ii, **the destroyed CD allegation**, as there are no grounds for discipline under section 21 of the Act.

33. Allegation iii, the resignation allegation.

- a. The Panel has viewed Dr R's letter of resignation from IPENZ dated 28 February 2014. The letter has also been provided to Mr E.
- b. The Panel considers that the letter answers the question raised as item 8 in Mr E's Notice of Appeal dated 17 December 2014. The Panel considers that Dr R resigned his membership of IPENZ for genuine reasons relating to his dissatisfaction with their performance. Dr R has not breached the Code of Ethical Conduct contained in Part 3 of the Rules.
- c. The Panel dismisses allegation iii, **the resignation allegation**, as there are no grounds for discipline under section 21 of the Act.

Outcomes

34. The **Panel** finds that the CIC was correct in her decision to not refer the complaint to an Investigating Committee.
35. As **noted** paragraph 29 above the Panel considers the nature of the complaints to be very serious and neither frivolous nor vexatious. The CIC was wrong to use rule 57 (c) as the basis for dismissing allegation ii.
36. The **Panel** dismisses allegations i, ii and iii on the basis of rule 57 of the Rules, there is no applicable grounds for discipline under section 21 (1)(a) to (d) of the Act.

Costs

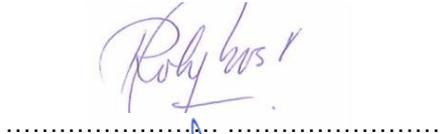
37. The **costs** associated with this appeal shall remain where they fall.

Dated this 20th day of March 2015

Mr Jon Williams
Principal



Mr Roly Frost



Mr Ross Tanner

