

APPEAL NUMBER 02/15

**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

X Ltd

Appellant

And

Mr R FIPENZ CPEng

Respondent

Decision of the Chartered Professional Engineers Council dated 17 May 2016

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 Adjudicator’s Decision dated 23 February 2015.

Background

2. X Ltd utilises a KartSport circuit and 390cc karts in an operation known as R K.
3. On 2 July 2010, Mr. W, a Chartered Professional Engineer (CPEng) inspected the R K operation and on 10 July 2010 issued to the Operations Manager Mr C, a Certificate of Examination of Amusement Device.
4. This certificate was issued under the Amusement Devices Regulations 1978.
5. Two of the conditions imposed by Mr. W were that the maximum operating speed should be 90 Km/hour and the maximum safe operating load shall be one person minimum 14 years of age and minimum 140cm tall.
6. On completion of a number of minor items communicated in a letter dated 5 July 2010, Mr. W then informed Mr. C that he was required to submit an application for a Permit-to-Operate an amusement device to the Department of Labour (DoL), now the Ministry of Business Innovation and Employment (MBIE).
7. On receipt of the application for a permit, the Department of Labour commissioned Mr. R FIPENZ CPEng to assist it to undertake a number of tasks related to the assessment of the application. In a report Mr. R submitted to the DoL on 5 October 2010, he concluded that AS3533 - 2009 remained the guiding document for all Amusement Devices, including rental karts of the type proposed by R K, and that the racing environment was not a valid model on which to base such an operation. Furthermore he considered the safety environment of R K was not substantially different from other rental kart operations where roll-over protection, head rests and seatbelts were standard.
8. Notwithstanding Mr. R’s conclusions, and despite safety concerns being raised by a number of other parties, the Department of Labour subsequently issued R K a permit to operate.
9. However, as a result of concerns from the Department of Labour the Registration Authority’s Chief Executive ordered an inquiry into Mr. W’s role as the professional engineer who certified this amusement device; an operation which permitted children as young as 14 years of age with no previous driving

experience to drive powerful go-karts capable of up to 90 Km/hour without any condition requiring either roll bars or seat belts.

10. The matter was considered by an Investigating Committee and referred to a Disciplinary Committee. The Disciplinary Hearing dismissed the inquiry. However in dismissing the matter the DC made it clear in their decision that the Registration Authority was correct to inquire into the situation.
11. On 22 October 2014 Mr. Chris Grenfell of Edmonds Judd - Lawyers on behalf of X Ltd raised a complaint against Mr. R complained about the conduct of Mr. R in respect of:
 - a. His report
 - b. Mr. R conduct during the IPENZ enquiry into Mr. W's conduct; and
 - c. The certification of Full Throttle Karts
12. This complaint was investigated by the Complaints Research Officer, who in an initial investigation report dated 13 February 2015 recommended that the complaint be dismissed as none of the allegations had been substantiated and that no evidence had been provided that Mr. R has carried out any form of misconduct.
13. This recommendation was reviewed by the Chairman of the Investigating Committee acting as Adjudicator, who endorsed the recommendation and in a ruling dated 23 February 2015 dismissed the complaint.

The Appeal

14. An appeal to the dismissal of the complaint was lodged by Mr. Chris Grenfell of Edmonds Judd – Lawyers acting on behalf of X Ltd in an email dated 18 March 2015
15. The appeal is advanced on the basis that the Chairperson of the Complaints Committee acting as Adjudicator erred on dismissing the complaint as:
 - d. In preparing his investigation report the Complaints Research Officer:
 - i. Misdirected himself as to his role;
 - ii. Failed to obtain (or request) evidence from the complainant;
 - iii. Failed to adhere to the principles of natural justice, and as a result,
 - e. The Adjudicator received and relied upon a faulty investigation report in dismissing the complaint;
 - f. The Adjudicator has misdirected himself as to his role in the complaints process;
 - g. The basis for the Adjudicator's dismissal of the complaint is not supported by the facts.

16. X Ltd advanced five complaints being:

- h. Mr. R did not act in an objective manner in preparing the report (the 'Report') in relation to the X Ltd karting operation ('R K').
- i. The assumptions and conclusions of the Report demonstrate a lack of professional competence which could have endangered the health and safety of users of R K.
- j. Mr. R did not disclose a potential conflict of interest.
- k. Mr. R failed to adequately or appropriately undertake the certification of Full Throttle Karts and thereby endangered (and continues to endanger) the health and safety of users of the Full Throttle Karts operation.
- l. Mr. R made use of confidential information obtained from X Ltd for his personal benefit.

Process

- 17. 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 Adjudicator but the appellants carry the burden of satisfying us that we should do so.
- 18. The Panel can only consider the matters that relate to the performance of chartered professional engineers as required by the Act and the Rules. The IPENZ complaints and Council appeals process cannot consider commercial or contractual matters. Complainants should address such matters through conventional legal channels.
- 19. At the time to which the complaints relate Mr. R was a Chartered Professional Engineer. The Council has jurisdiction to hear the appeal.
- 20. The appeal was received within the statutory deadline.
- 21. At its meeting of 5 June 2015 The Council appointed a panel of comprising Messrs. Anthony Wilson (Principal), Jon Williams and Ross Tanner to hear the appeal.
- 22. The Panel met in person on 31 March 2016 and heard the matter on the papers.

Commentary

- 23. The Panel in considering the appeal noted that the matters to be considered are those set out in the notice of appeal and specifically records that the appeal is not a rehearing of the earlier enquiry initiated by the Registration Authority
- 24. Considering the five specific complaints in turn;
 - a. *'Mr. R did not act in an objective manner in preparing the report (the 'Report') in relation to the X Ltd karting operation ('R K')'*.

The panel has reviewed the report and the subsequent debate in both the original inquiry and the submissions by both parties to the appeal. The conclusion of the panel is that the report is comprehensive, appropriately, but not exhaustively, researched, and objective. In general the report is complimentary of the development of the X Ltd facility but (in the opinion of the panel) correctly questions whether a practice that may be acceptable for competition karting is automatically applicable for rental karting.

- b. *'The assumptions and conclusions of the Report demonstrate a lack of professional competence which could have endangered the health and safety of users of R K.'*

A difference of opinion between two professional engineers does not mean that one (or both) is not competent. No evidence was presented that the conclusions of the report 'could have endangered the health and safety of users...'

- c. *'Mr. R did not disclose a potential conflict of interest.'*

No evidence of any actual or potential conflict of interest was presented to the panel. Mr. R relationship to Full Throttle Karts at the time at which he wrote the report was a standard commercial relationship between client and consultant.

- d. *'Mr. R failed to adequately or appropriately undertake the certification of Full Throttle Karts and thereby endangered (and continues to endanger) the health and safety of users of the Full Throttle Karts operation.'*

The panel was not presented with any evidence that the certification of Full Throttle Karts was inadequate or inappropriate. If X Ltd has concerns about the certification they need to take the matter up with the regulator (MBIE).

The panel notes the difference of opinion between two engineers as to the relevance and application of various standards and that this is discussed in detail in the CRO's report.

- e. *'Mr. R made use of confidential information obtained from X Ltd for his personal benefit.'*

No evidence as to what confidential information it is alleged Mr. R obtained for his personal benefit was provided to the panel. Photographs taken in 2010 for the purposes of preparing his report are a legitimate engineering technique, and given that the track is available for hire by the public, and that the track layout is clearly visible in publicly available satellite images, cannot be regarded as confidential.

Findings of the Appeal Panel

25. The Panel declines the appeal.

Costs

26. The costs associated with this appeal shall remain where they lie.

Dated this 17th day of May 2016

Mr. Anthony Wilson BE FIPENZ FICE FCIWEM CPEng
Principal

Mr. Jon Williams BE FIPENZ CPEng

Mr. Ross Tanner MA(Hons) MPA(Harvard) CFInstD