

**APPEAL NUMBER 01/19**

**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 A

**Appellant**

**And**

City Council B

**Respondent**

## **Decision of the Chartered Professional Engineers Council**

1. This is a decision on an appeal to the Chartered Professional Engineers Council (the “Council”) under the Chartered Professional Engineers of New Zealand Act 2002 (the “Act”), the Chartered Professional Engineers of New Zealand Rules (No.2) 2002 (the “Rules”) and the Chartered Professional Engineers of New Zealand (Appeals) Regulations 2002 (the “Regulations”).
2. The appeal relates to a complaint by City Council B to Engineering New Zealand (“ENZ”) about Mr A CPEng Int PE (NZ) made on the 2<sup>nd</sup> of December 2016. City Council B’s complaint relates to several property developments involving a number of individual dwellings all in City B.
3. City Council B claimed that, in his capacity as a Chartered Professional Engineer, Mr A:
  - (a) Signed and submitted Producer Statements – Design (PS1) without supplying sufficient supporting information;
  - (b) Signed and submitted Producer Statements – Construction (PS4) for building work that did not comply with the relevant requirements of the issued building consent and/or without supplying sufficient information;
  - (c) Provided engineering services that did not meet a reasonable standard, including applying incorrect design assumptions, failing to apply relevant standards, and submitting standard drawings that were inappropriate for the specific site;

- (d) Misrepresented work as being his own when it had been carried out by another party;
  - (e) Did not act with honesty, objectivity and integrity; and
  - (f) Behaved unprofessionally, including criticising City Council B's staff.
4. During the earlier Investigating Committee hearing City Council B had confirmed that it would withdraw the aspect of the complaint relating to misrepresentation of others' work as Mr A's own. (DC Decision para 15)
  5. In support of its complaints City Council B provided examples covering 37 separate properties and statements from City Council B's staff members and contractors which demonstrated inappropriate conduct by Mr A.
  6. For reasons set out in its Decision, the Disciplinary Committee of ENZ decided to uphold all aspects of the complaints about Mr A, except in respect to the allegation of dishonesty. The Decision of the Disciplinary Committee was issued on the 18<sup>th</sup> of April 2019.

#### **Background and Context for the Appeal**

7. The City Council B complaints related to engineering services performed by Mr A during 2015 and 2016 at 37 properties in City B. The 37 individual properties used as examples by City Council B to support its complaint were the subject of consideration in the Decision of the Disciplinary Committee.

8. City Council B's original complaint also included statements from Mr E, Mr F, Mr G, Mr H, Mr J and Mr K. Mr A was provided with a copy of the complaint in February 2017 and on the 26<sup>th</sup> of March 2017 he provided a written response.
9. In December 2017, the Investigating Committee conducted interviews with Mr A and staff at City Council B.
10. The Investigating Committee engaged a qualified engineer to provide ENZ with expert advice on City Council B's complaint.
11. Mr A provided the Investigating Committee with comments on the subsequent expert report on the 28<sup>th</sup> of June 2018. Prior to the hearing of the complaints by the Disciplinary Committee all parties were invited to make submissions and the Disciplinary Committee was provided with submissions from both Mr A and City Council B.
12. The information provided to the Disciplinary Committee was incorporated into their Report and Decision.
13. In its decision the Disciplinary Committee, in summary, found:
  - (a) That Mr A provided insufficient supporting information for the PS1 statements;
  - (b) That the evidence supported the City Council B complaint that Mr A had acted in a way that would not be reasonably expected of a professional engineer in issuing PS4 statements for work that did not

comply with the relevant requirements of the issued building consents and/or without supplying sufficient information;

(c) That in respect to the complaint about an engineer's obligation to act competently in any engineering work they undertake, Mr A's engineering services across all of the 37 cases were of a standard that was neither expected nor acceptable to the profession and that the public should reasonably be able to expect better from a Chartered Professional Engineer;

(d) In respect of the allegation of unprofessional behaviour, the Disciplinary Committee found Mr A's behaviour across all of the examples identified by City Council B to be at a standard below expected or acceptable for the profession.

(e) That they had not been provided with evidence to suggest that Mr A intended to be dishonest.

14. The analysis undertaken by the Disciplinary Committee concluded that Mr A had exhibited a concerning pattern of poor and unacceptable practice over a long period of time. He had not provided sufficient information with his PS1's and PS4's and had subsequently behaved unprofessionally when questioned by City Council B staff. The Disciplinary Committee observed that many attempts had been made by City Council B to assist Mr A and that this was an aggravating factor to the complaint. Mr A had not responded in a meaningful way, nor changed his record keeping practices when advised by City Council B

that site inspection records were insufficient to achieve code compliance certification. The scale of Mr A's misconduct and his apparent lack of insight into his actions and his unwillingness to change throughout the process was of deep concern to the Committee.

15. As a result, the Disciplinary Committee took the view that Mr A's actions were not consistent with the elements of competence required of a Chartered Professional Engineer found in Rule 6(a)-(d) and (h).
16. The committee also found that Mr A had met the grounds for disciplinary action under s21 of the Act.
17. Having heard submissions from both the City Council B and Mr A, the Disciplinary Committee in exercising its delegated powers ordered the following:
  - (a) Mr A's registration as a Chartered Professional Engineer is removed, and he may not apply for reregistration before the expiry of a two-year period; and
  - (b) Mr A is to pay \$19,000 towards the costs incurred by the registration authority inquiring into Mr A's conduct (approximately 50% of ENZ total cost);
  - (c) That the Registration Authority (subject to any appeal) will notify the Registrar of Licensed Building Practitioners appointed under the Building Act 2004 of the order and a reason for it; and

- (d) Publish the Disciplinary Committee's final decision on the complaint on its website, in a public press release, and any other communication it considers appropriate.
18. In its orders, the Disciplinary Committee lifted Mr A's name suppression.

### **Purpose of professional disciplinary processes**

19. Most professions have professional disciplinary processes. The purpose of such professional disciplinary processes is not to punish an individual for their conduct or to appease those who are dissatisfied with the professional services they have received. Rather, they exist to ensure professional standards are maintained and to protect clients, the profession and the broader community (RA submissions paragraph 4.1)
20. The leading case in support of this principle is *Z v Dental Complaints Assessment Committee (2008 NZSE 55)* where the Court stated that in relation to proceedings such as these the purpose of a professional disciplinary body is to:
- “Ascertain whether a practitioner has met appropriate standards of conduct in the occupation concerned and what may be required to ensure that in the public interest, such standards are met in the future. The protection of the public is the central focus”.*
21. In its decision the Disciplinary Committee identified the pattern and scale of poor practice by Mr A. They mentioned that some examples highlighted more significant shortcomings than others. They also noted that some examples, on their own, may seem relatively minor or possibly not sufficient to require a

disciplinary response. The Disciplinary Committee however considered that taken together “the examples demonstrate a serious and worrying pattern of poor professional practice, rigour and attention to quality practice that, accumulatively are of significant concern to us.” The Disciplinary Committee found that Mr A had not met the standard reasonably to be expected of a professional engineer in the eyes of the public or the profession.

### **Hearing and consideration of the Appeal**

22. Through his counsel Mr D, Mr A filed a Notice of Appeal to the Council (undated).
  
23. The Notice of Appeal claimed, firstly, that the Decision of the Disciplinary Committee did not follow the procedure set out in the Engineering New Zealand Disciplinary Regulations which applies to an Engineering New Zealand member going through a disciplinary process. To avoid confusion Mr A’s Notice of Appeal ought properly to have referred to Part 4 of the CPEng NZ Rules (No 2) 2002. Secondly, it was claimed that the penalty imposed was unfair in light of the gravity of the breach concerned and thirdly that the reasoning, findings and conclusions reached in the Decision were manifestly at odds with the evidence presented at the hearing. Specifically:

*The specific grounds of the appeal are as follows:*

1. *Denial of Representation*

- (a) *ENZ Disciplinary Regulations s(19) defies the way in which Disciplinary Committee must consider disciplinary matter.*
- (b) *S19(2) states:*
- “the Complainant, Engineering New Zealand member complained about, and any person alleged to be aggrieved have the right to be heard and represented and present evidence at the hearing”.*
- (c) *ENZ set a date for the hearing of this matter and were immediately advised the solicitor for Mr A was not available on the dates set;*
- (d) *ENZ replied by email “we weighed up any disadvantage that may be caused by the delay of the hearing until next year to both the Complainant and Mr A against any prejudice that may have result if Mr A had to seek alternative representation. In our view the disadvantage caused by the delay outweighed the prejudice to Mr A”;*
- (e) *Mr A was unable to obtain alternative counsel and was unrepresented at the hearing;*

(f) *The Decision to hold the hearing to avoid disadvantage to the Complainant and deny representation to the Respondent was contrary to s19(2);*

2. *New Information presented at the Hearing*

(a) *At the hearing the compliant (sic) presented information which had not been advised to the respondent prior to the hearing. The submissions made were different from the complaint;*

(b) *The respondent had no opportunity to review this information and provide a response to this information provided only on the date of hearing;*

(c) *To admit information at the hearing not previously advised to the Respondent is in breach of natural justice and denying the respondent the opportunity to review and provide an informed response to the new information;*

3. *The Penalty imposed is unfair in light of the gravity of the breach concerned.*

(a) *The severity of the penalty imposed upon the respondent in comparison to the gravity of the breach is unfair; and*

(b) *Reference is made to the two-year deregistration in comparison to NZLS' decisions and CPEC decisions.*

24. The Decision sought on appeal by Mr A was that the matter be reheard with Mr A being permitted representation and that all evidence be provided prior to the hearing and, in the alternative, the penalty imposed is reduced to 3 months deregistration.
25. In summary, therefore, there are three grounds of appeal alleged by Mr A: denial of representation, inability to respond to new information, and an unfair and severe penalty.
26. Submissions in response to the Notice of Appeal were sought and obtained from both City Council B and on behalf of the Registration Authority both dated 18 November 2019.
27. Subsequently, again through his solicitor Mr C, Mr A made an Application for a Stay on Penalties. Subsequent to submissions being prepared in writing on behalf of Mr A as well as the Registration Authority and City Council B that application was declined in a separate Decision by this panel dated 20 September 2019.
28. As a result of having received an abundance of documentation from the Registration Authority and comprehensive and extensive submissions from all the parties, the panel invited the parties to decide whether the matter would be set down for a hearing in Wellington or whether all parties accepted that the Appeal could be decided on the papers. All parties decided that the matter could be dealt with on the papers which is what has occurred.

### **Consideration of the appeal**

29. Appeals to the Council are by way of a rehearing (s37(2) of the Act). Appeal panels are entitled to confirm, vary or reverse a decision (s37(5)(a) of the Act) and they may make any decision that could have been made by the Decision Authority (s37(5)(c)).
30. Following *Austin Nichols & Co Inc v Stitching Loadstar* [2008] 2 NZLR 141, a panel is entitled to take a different view from the Investigating Committee, but the Appellant, Mr A, carries the burden of satisfying the panel that it should do so. In considering whether or not the grounds for appeal have been made out, the panel considered whether there were indeed grounds for discipline pursuant to s21 of the Act which provides as follows:

**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 practice 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 and 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 sub paragraph (i); or*

*(iii) Produced to the authority or made use of any document knowing that it was not genuine.*

31. The facts and evidence clearly demonstrate that the criteria established under sections 21(1)(a), and (d) of the Act do not apply in this case. The panel is therefore tasked with considering whether there is a prima facie case that Mr A:

(i) Has breached an aspect of the code of ethical conduct set out in the rules 42(A)-42(I) as amended in 2016; and/or

(ii) Has performed engineering services in a negligent or incompetent manner.

### **Jurisdictional Issues**

32. There is a preliminary issue with regard to jurisdiction that needs to be addressed. The grounds in Mr A's appeal referred to in paragraph 23 above are, in respect of the first two grounds, alleging defects in process and procedure.

33. We earlier referred to S37 which identifies and limits the matters that can be addressed on appeal. This panel is limited to matters of substance and merit.
34. Under the statutory framework in which the Council may hear an appeal it cannot hear matters that relate to the actions or processes of the Registration Authority other than the actual decision it has issued.
35. Given the nature of the grounds of the appeal and the submissions in support by Mr A, (specifically the denial of representation and new information presented at the hearing by the complainant) these matters are procedural in nature and as such the appropriate course of action for Mr A would have been to apply to the High Court for these matters to be the subject of judicial review proceedings.
36. To this end we received submissions addressing the issue of jurisdiction from both the Registration Authority and counsel for City Council B. As stated in the submissions on behalf of City Council B at paragraph 8:

*“... The appeal process involves the determination on the merits of the matter. This involves substitution of the appellant entities’ decision with that of the decision makers. In contrast, judicial review is concerned with issues with the decision making process and whether proper procedures were followed. This includes consideration such as whether all relevant and no irrelevant considerations were taken into account and whether the decision was one which, upon the available material, a reasonable decision maker could have made. Thus these two grounds should be dismissed on a jurisdictional basis.”*

37. To this end counsel for City Council B referred us to *Fraser v State Services Commission* [1984] 1 NZLR 116; *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 and *Pring v Wanganui District Council* CA27/99 in support of that proposition.
38. Between the parties there is considerable discussion within the legal submissions as to whether in fact the allegations in respect to these two particular grounds (that of denial of representation and the introduction of new information) were factually correct.
39. We consider that his panel is unable to assess the merits of the respective arguments on these particular grounds of appeal as we are satisfied that we have no jurisdiction to do so and that the appropriate course of action on matters of process are through judicial review by the High Court. While we have read the submissions on these matters from all parties, we consider those submissions must not be addressed by us and only be put by Mr A before the High Court to decide.
40. To conclude, therefore, we agree with and accept the submission on behalf of the Registration Authority that these grounds of appeal should be dismissed on the basis that there is no jurisdiction for them to be heard and therefore it is inappropriate for us to assess the merits of submissions put before us by the parties in respect of those two grounds of appeal.
41. This leaves us with the final ground of appeal: that the penalty imposed is unfair in light of the gravity of the breach concerned. Putting aside the

submissions on the first two grounds of appeal does not impede our ability to make a decision on the final ground of appeal.

42. Furthermore, it is notable that Mr A has not denied any of the complaints in respect to the findings by the Disciplinary Committee of negligence nor that the negligence was severe. His appeal is that the penalty is too harsh.
43. The penalty imposed has been set out in paragraph 20 above being removal from the register for 2 years from the date of the decision.
44. Whether or not the decision was unfair in light of the gravity of the breach concerned, or in fact too severe, was informed by the Disciplinary Committee findings that the breaches were “at the upper end of the scale” (Decision paragraph 339) when taking into account the severity and the on-going nature of Mr A’s conduct. We also note again that the City Council B’s evidence contained details of 37 examples of Mr A being negligent, all in City B. All 37 examples provided by City Council B did not meet the standard to reasonably be expected of a Chartered Professional Engineer.
45. As Mr A has not challenged the findings of negligence nor of the severity of negligence it falls for us only to consider whether in fact the penalty was appropriate given the narrow nature of the ground of appeal.
46. To this end we have again been helped by counsel for both City Council B and the Registration Authority who have drawn our attention to relevant cases. In a decision dated 19 September 2018 the Disciplinary Committee addressed a complaint about Mr D. Counsel for Mr A referred to the Decision on Mr D who

was suspended for a year. Mr A asserted that this supports an argument that his removal from the Register was too severe. However, a review of that decision reveals that the complaint only involved 1 incident (not 37) and that Mr A's conduct was at the higher end of the scale. Again, counsel for City Council B referred us to another decision of the Disciplinary Committee in which a CPEng was removed from the Register for 2 years. Again, in that instance the offending involved a total of 6 incidents not 37.

47. Given that the overriding principle is the protection of the public we agree that the decision to impose a penalty requiring Mr A's registration to be removed for two years is fair and appropriate. If removal from the Register was for a reduced period of time, it is our conclusion, from the body of evidence provided, that the risk of continued negligent conduct causing potential harm to the public is very real. From a review of all the materials submitted the panel concludes that it is satisfied that the appeal should be declined.

### **Decision**

48. The Appeal is declined, and the decision of the Adjudicator is upheld which includes a costs order of \$19,000 which was not the subject of this appeal.

### **Costs**

49. In respect of this Appeal the Panel orders that costs shall lie where they fall.

**Dated this 26th day of February 2020**



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Sue Simons  
Principal



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Chris J Harrison



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Alan Winwood