

In the matter of the Chartered
Professional Engineers of New Zealand
Act 2002

Appeal 03/17

AND

In the matter of an appeal to the
Chartered Professional Engineers
Council pursuant to Section 35

From

Mr A
Appellant

Against a decision of

IPENZ (as the Registration
Authority under the Chartered
Professional Engineers of New
Zealand Act 2002)
Respondent

Decision of the Chartered Professional Engineers Council
Dated 23 March 2020

1. Mr A has appealed a decision of the Competence Assessment Board (CAB) of the Registration Authority (RA) declining his application for continued registration as a Chartered Professional Engineer (CPEng).

The Legislation

2. That right of appeal is contained in S35 of the Chartered Professional Engineers Act 2002 (“the Act”). S37 of the Act sets out the scope of the Chartered Professional Engineers Council’s (the Council) jurisdiction which is to deal with

the matter by way of rehearing. For that purpose we have been provided with the complete file (Bundle of Documents - BOD) of the RA relating to the case, which has been paginated. References to documents within this file are annotated "BOD xxx". At a pre-submissions meeting held in February 2019 it was agreed by the parties that additional information should be included. This is contained in the Appellants Supplementary Bundle documents where referenced within this file they are annotated "ASB xxx".

3. Under S11 of the Act:

11 Chartered professional engineer to meet minimum standards for continued registration

1) *The Registration Authority must assess at the frequency required by the rules, and may assess at any other time, whether or not a registered person meets the minimum standards for continued registration contained in the rules.*

2) *If the Registration Authority determines that the person does not meet those minimum standards, it must—*

(a) remove the person's registration; or

(b) suspend the person's registration until the person satisfies the Authority that he or she meets those minimum standards and, if he or she does not do so within 12 months, remove his or her registration.

4. The Rules are the Chartered Professional Engineers of New Zealand Rules (No.2) 2002 ("the Rules"). The Rules were enacted pursuant to S40 of the Act.

5. Rule 6 defines the minimum standards for registration as a Chartered Professional Engineer:

6 Minimum standard for registration as chartered professional engineer

- (1) *To meet the minimum standard for registration, a person must demonstrate that he or she is able to practise competently in his or her practice area to the standard of a reasonable professional engineer.*
- (2) *The extent to which the person is able to do each of the following things in his or her practice area must be taken into account in assessing whether or not he or she meets the overall standard in subclause (1):*
 - (a) *comprehend, and apply his or her knowledge of, accepted principles underpinning—*
 - (i) *widely applied good practice for professional engineering; and*
 - (ii) *good practice for professional engineering that is specific to New Zealand; and*
 - (b) *define, investigate, and analyse complex engineering problems in accordance with good practice for professional engineering; and*
 - (c) *design or develop solutions to complex engineering problems in accordance with good practice for professional engineering; and*
 - (d) *exercise sound professional engineering judgement; and*
 - (e) *be responsible for making decisions on part or all of 1 or more complex engineering activities; and*
 - (f) *manage part or all of 1 or more complex engineering activities in accordance with good engineering management practice; and*

- (g) *identify, assess, and manage engineering risk; and*
- (h) *conduct his or her professional engineering activities to an ethical standard at least equivalent to the code of ethical conduct; and*
- (i) *recognise the reasonably foreseeable social, cultural, and environmental effects of professional engineering activities generally; and*
- (j) *communicate clearly to other engineers and others that he or she is likely to deal with in the course of his or her professional engineering activities; and*
- (k) *maintain the currency of his or her professional engineering knowledge and skills.*

6. Relevant to the interpretation of Rule 6 is Rule 7:

7 Definitions for the purpose of minimum standards for registration

For the purposes of rule 6,—

complex engineering activities means engineering activities or projects that have some or all of the following characteristics:

- (a) *involve the use of diverse resources (and, for this purpose, resources includes people, money, equipment, materials, and technologies);*
- (b) *require resolution of significant problems arising from interactions between wide-ranging or conflicting technical, engineering, and other issues;*
- (c) *have significant consequences in a range of contexts:*

- (d) *involve the use of new materials, techniques, or processes or the use of existing materials, techniques, or processes in innovative ways.*

complex engineering problems means engineering problems that have some or all of the following characteristics:

- (a) *involve wide-ranging or conflicting technical, engineering, and other issues:*
- (b) *have no obvious solution and require originality in analysis:*
- (c) *involve infrequently encountered issues:*
- (d) *are outside problems encompassed by standards and codes of practice for professional engineering:*
- (e) *involve diverse groups of stakeholders with widely varying needs:*
- (f) *have significant consequences in a range of contexts:*
- (g) *cannot be resolved without in-depth engineering knowledge.”*

7. The overriding consideration is that expressed in Rule 6(1), that a Chartered Professional Engineer should be able to practise competently in his or her practice area to the standard of a reasonable professional engineer.
8. The matters listed in Rule 6(2) must be taken into account in making an overall assessment required by Rule 6(1). However, the Rules do not provide for a mandatory “pass mark” for these matters, and nor could they. Ultimately, taking the matters in Rule 6 (2) into account, an objective decision still needs to be made as to whether an applicant meets the overall standard prescribed in Rule 6 (1).
9. Rule 20 prescribes the Minimum standard for continued registration as a Chartered Professional Engineer.

20 Minimum standard for continued registration as chartered professional engineer

To meet the minimum standard for continued registration, a person must demonstrate that—

- (a) he or she—*
 - (i) is still able to practise competently in his or her current practice area to the standard of a reasonable professional engineer; or*
 - (ii) if the person’s practice area has changed materially since the last assessment, meets the minimum standard for registration within his or her current practice area; and*
- (b) he or she has taken reasonable steps to maintain the currency of his or her professional engineering knowledge and skills within his or her current practice area since the last assessment.*

10. Rule 23 prescribes the information that must be provided to demonstrate continued competence:

23 Information that must be provided to demonstrate current competence

- (1) Each candidate who receives a notice under rule 22 must provide to the Registration Authority, by the specified date,—*
 - (a) a form containing the information set out in Schedule 1; and*
 - (b) the supporting information set out in subclause (2); and*
 - (c) a statement signed by the candidate to the effect that all the information is accurate and any evidence provided is genuine; and*

- (d) *consent from the candidate for the candidate's name to be published on the Registration Authority's Internet site for a period not exceeding 21 days, along with an invitation to the public to provide evidence about whether the candidate meets the minimum standard for continued registration.*
- (2) *A candidate must provide the following supporting information:*

 - (a) *evidence of the following (if applicable):*

 - (i) *academic and other relevant qualifications obtained since his or her last assessment; and*
 - (ii) *current registration on other professional engineering registers; and*
 - (iii) *results from other relevant competency assessments since his or her last assessment; and*
 - (iv) *professional development activities undertaken since his or her last assessment; and*
 - (b) *chronological summary of the candidate's work history since his or her last assessment (including a description of employment positions and professional engineering activities in that period); and*
 - (ba) *any evidence provided by the public in response to the invitation described in subclause (1)(d), along with any statement by the candidate in reply; and*
 - (bb) *2 or more work samples from recent engineering activities with annotations explaining how the samples demonstrate that the candidate meets the minimum standard for continued registration; and*

(c) any other information that the candidate wishes to be considered.

(3) The candidate may provide information in hard copy (in which case 3 copies must be provided) or in electronic form.

11. The following outlines how the Act and Rules define how a candidate is assessed.

- (a) Rules 10 and 24, the Assessment Panel must evaluate the candidate.
- (b) Rules 11 & 25, the process by which the Assessment Panel evaluates the application for initial or continued registration.
- (c) Rules 12 and 26, the CAB makes the decision to register (or not) an applicant for initial or continued registration.
- (d) Rules 15 and 29, the RA must notify and implement the decision.
- (e) Rule 75, the RA may appoint a sole assessor or an assessment panel.
- (f) Rule 77, the RA must appoint the Competence Assessment Board (CAB). There is one member on CAB from the RA Board, but they have no vote.
- (g) Rule 80, the RA may appoint a competency assessment reviewer.
- (h) S11 of the Act, the RA must assess the frequency set out in Rule 21 if chartered professional engineer meets the minimum standards for continued registration contained in the Rule 20.
- (i) S24 of the Act, the RA makes decisions relating to the registration of chartered professional engineers.
- (j) S45 of the Act, the function of the Council is to hear appeals on decisions of the RA.

- (k) S37 of the Act, the Council can confirm, vary, reverse the decision or parts of the decision.
12. The CAB is not the RA. The fact the RA board member on the CAB has no vote reinforces this separation. So based on the Rules 12/26 and S45 of the Act, it could be argued that the Council cannot hear an appeal on registration as it is not a decision of the RA.
13. The Council's view is the Act sits over the Rules. S24 of the Act is clear that the RA makes decisions relating to registration. On this basis it is appropriate for the Council to hear appeals relating to registration.
14. Appeals to the Council are by way of rehearing (S37(2) of the Act). We are entitled to confirm, vary or reverse a decision (S37(5) (a)). We may make any decision that could have been made by the decision authority (S37(5) (c)). Following *Austin, Nichols & Co Inc. v Stichting Lodestar* [2008] 2 NZLR 141 we are entitled to take a different view from the CAB but the appellant carries the burden of satisfying us that we should do so.

Background

15. This is the second appeal by Mr A to the Council. The findings of the first appeal, Council reference 14/15, are on the Council website and provided at BOD 576.
16. The outcome of the first appeal is contained in paragraphs 40 - 42 of the decision:
40. *The appeal is therefore declined.*
41. *The Panel, however was concerned that because Mr A declined the further interactive with all the assessors as offered by the Registration Authority he had disadvantaged himself to the point where he was not able to present the full evidence to establish his level of competence. Conversely this potentially prevented the assessors from access to*

evidence which may have answered their concerns and possibly provided a basis for them to alter their findings.

42. *The panel directs the Registration Authority, subject to Mr A's agreement, to hold a further interview with the assessors to establish his level of competence.*

17. A further interview was arranged by the Registration Authority. Following the interview (and subsequent process as detailed in this decision), the Registration Authority issued on 9th October 2017 a decision that Mr A's suspension from the register was confirmed (BOD 686).
18. It is this decision by the Registration Authority that is subject of this appeal.

Chronology

19. The following is the chronology of events leading to this appeal, the hearing and this decision. Both parties have accepted this chronology.
 - (a) Mr A was assessed as competent in 2012 and given a 2 year term (ASB 25).
 - (b) Mr A applied for continued registration in June 2014. This application included 6 work samples relating to projects undertaken in 2013 and 2014 (BOD 1).
 - (c) Mr A was assessed via a Continued Registration Assessment (CRA). The CAB confirmed that Mr A's registration would be suspended in June 2015.
 - (d) Mr A appealed to the Council. The Appeal was declined (BOD 576) in June 2016, but the panel considered that he had disadvantaged himself by not undertaking a second interactive. The Registration Authority (RA) was instructed to offer him this opportunity again.
 - (e) The second interactive was held on 17th November 2016 with 2 of the 3 original panel members.

- (f) Following the interactive, Mr A was informed verbally that the panel would be recommending to CAB that his registration be continued with a 2-year term.
- (g) The panel prepared a draft decision in November 2016 confirming that they would recommend to the CAB that his registration be granted with a term till next assessment of 2 years. (Mr A subsequently obtained a copy of this draft decision via a Privacy Commission request (ASB 103)).
- (h) Prior to the CAB meeting, the panel and the registrar discussed the application and the panel decided to reverse the draft decision (ASB 111). This final decision went to the CAB on 21st December 2016. The CAB confirmed the panel's decision and suspended Mr A (BOD 592).
- (i) Mr A wrote to, and subsequently met with, Engineering New Zealand CEO in February 2017 (BOD 602). The CEO decided that the contents of Mr A's letter and the discussions at the meeting (BOD 622) be considered as a natural justice submission against the December 2016 CAB decision.
- (j) The natural justice submission and other documentation was issued to a sub-committee of the CAB. The sub-committee reported back to the Registrar. The Registrar informed Mr A on 9th October 2017 that the final decision of the RA was that his registration be suspended and that he was strongly recommended to reapply for registration (BOD 686).
- (k) On 21st November 2017 Mr A appealed the 9th October 2017 decision to the Council (BOD 697).
- (l) The Council confirmed the panel to consider the appeal and issued details of the process to be followed. The panel comprised:
 - 1) Jon Williams - Panel Principal
 - 2) Sandra Hardie - Panel Member
 - 3) Rebecca Knott - Panel Member

- 4) Sarah Sinclair - Panel Member (added at a later date to maintain minimum requirement for three members of Council to hear an appeal subsequent to Mr Williams' term on the Council finishing.)
- (m) A pre-submission tele-conference was held with all parties on 28th February 2019
- (n) Submissions were received from Mr A in April 2019, the RA in May 2019 and a final submission in reply from Mr A in June 2019.

Work Samples

- 20. The panel decided that one critical aspect of the appeal was the age of the work samples. It communicated to the parties on 2nd September 2019 asking for submissions on:

“Can work samples from 2013 and 2014 be considered recent engineering activities”.
- 21. Paragraph 11 of the 2nd September 2019 letter indicated that:

“The Council needs to initially decide if work samples from 2013/2014 such can be considered recent engineering activities. If the answer is “yes”, then the appeal can proceed to a substantive hearing. If the answer is “no” then it is difficult to see how the Council could make a substantive ruling in Mr A’s favour.”
- 22. Submissions were received:
 - (a) Mr A - 12th September 2019
 - (b) The RA - 4th October 2019
 - (c) Mr A in reply 11th October 2019
- 23. The panel issued their decision on the validity of the work samples on 1st November 2019. The panel found:

“...that whilst the work samples are not recent engineering activities, this is not cause for the appeal to be dismissed.”

Grounds of appeal and outcome sought

24. The grounds of appeal are detailed in section 5 of Mr A’s 5th April 2019 submission.
25. Ground of appeal 1. “The sub-committee made significant factual errors in its appraisal of Mr A’s work samples and overall competence.” Synopsis of submission for the appellant 5th April 2019. 5 (1)
26. Ground of appeal 2. The RA was biased against Mr A. Synopsis of submission for the appellant 5th April 2019. 5 (2).
27. Ground of appeal 3. Mr A was disadvantaged by procedural failings of the RA. Synopsis of submission for the appellant 5th April 2019. 5 (3).
28. The outcome sought by Mr A is that his CPEng registration be reinstated for a period of 4 years and that he can make an application for costs. Synopsis of submission for the appellant 5th April 2019. 6.3 and 7.

Decision being appealed and evidence considered

29. The “decision” under appeal is the 9th October 2017 decision of the CAB that Mr A’s registration be suspended (BOD 686). Attached to the decision was a report prepared by a sub-committee of the CAB comprising Mr D and Dr Q (BOD 688).
30. Paragraphs 3.3 and 3.4 of the RA’s 8th May 2019 submissions seek to clarify who the decision maker is and what is under review. They state:

“Neither the Assessment Panel or the Sub-Committee are decision makers, rather, they make recommendations. Accordingly, it is not their recommendations that are under review, only the October Decision.”

31. Mr A's submission in reply dated 7th June 2019 in paragraphs 2.4 to 2.13 seeks to provide clarification on this point. It notes at paragraph 2.7 based on *Austin Nichols v Stichling Lodestar*:
- "..an appellant bears the onus of satisfying the appeal court that it should reach a different decision from the one on appeal. That task would be impossible if the reasons behind the decision could not be reviewed and Mr A's rights on appeal would be fundamentally undermined."*
32. The panel agrees with Mr A on this point. The reasons behind the decision and the evidence associated with those reasons must be considered by the panel in reviewing the decision.
33. Under S15 of the Chartered Professional Engineers of New Zealand (Appeals) Regulations 2002 (the Regulations) the Council may receive any evidence that the Registration Authority would have been entitled to receive on the decision being appealed.
34. In preparing for this appeal, Mr A has obtained, under the Privacy Act, copies of communications between the assessment panel and the RA and copies of relevant minutes for meetings of the CAB.
35. At the pre-submission teleconference Mr A requested that these documents be added to the bundle of documents for the appeal. He also requested that a supplementary bundle of evidence relating to his work samples be included.
36. The panel accepted the inclusion of these additional documents on the basis that:
- (a) The RA "would have been entitled to receive" the supplementary bundle information if they had requested further details from Mr A
 - (b) The communications between the panel and the RA are clearly relevant to the recommendations made by the assessment panel to inform the decision of the RA.

37. In summary, the evidence considered by the panel in making this decision is:
- (a) Bundle of Documents (BOD) pages 1 - 701
 - (b) Letter from the RA to Mr B (Mr A's previous counsel) dated 8 February 2018 with attached:
 - 1) Draft decision of the assessment panel
 - 2) Email correspondence between the assessment panel members and the Registrar dated 2nd December 2016.
 - (c) Appellants supplementary bundle (ASB) pages 1 - 173, received 8th April 2019.
 - (d) Submissions as noted above.
 - (e) 12th December 2019 hearing.

Question to be answered by panel

38. The question to be considered by the panel is: Did the CAB (as a delegate of the RA) err in its 9th October 2017 decision.
39. Following the grounds of appeal:
- (a) Did the CAB rely on advice from the sub-committee (and via the sub-committee the assessment panel) that was factually wrong?
 - (b) In providing advice to the CAB, did the sub-committee or the assessment panel exhibit any bias in their dealings with Mr A?
 - (c) Were there procedural failings that contributed to the CAB making a wrong decision?
40. In addition to considering the above, prior to making a substantive finding, the panel needs to decide, based on the evidence before it:

- (a) If Mr A has met his obligations under Rule 23 (Information that must be provided to demonstrate current competence), and
- (b) has shown that he meets the requirements of Rule 20 (Minimum standard for continued registration as a chartered professional engineer).

Hearing

- 41. A hearing date of 12th December 2019 was agreed. The hearing to take place in Wellington.
- 42. Present at the hearing were:
 - (a) Jon Williams - Panel Principal
 - (b) Sandra Hardie - Panel Member
 - (c) Rebecca Knott - Panel Member
 - (d) Sarah Sinclair - Panel Member
 - (e) Mr A - Appellant
 - (f) Mr B - Counsel for Mr A
 - (g) Mr C - Counsel for Mr A
 - (h) Christine Anderson - RA - Senior Legal Counsel
 - (i) Helen Davidson - RA - General Manager Legal and Policy
 - (j) Peter Lourie - RA - Registrar
 - (k) Mr D - CAB
- 43. The hearing was recorded. It was agreed that a transcript would only be prepared if the decision was appealed to the district court. All submissions were taken as read. The notes below highlight where additional emphasis or detail was provided at the hearing.

Mr A

44. On behalf of Mr A, Mr B presented their 5th April 2019 submission and 7th June 2019 submission in reply.
45. In its 1st November 2019 letter to the parties the panel referenced McMullen J in *May v May* (1982) NZFLR 165,170 as being the basis for overturning an original decision. Counsel for Mr A considered that *May v May* is appropriate for a discretionary hearing whereas *Austin Nichols v Stichling Lodestar* should be considered for re-hearings.
46. The panel confirmed that they would review the appropriate authorities in their consideration of the appeal.

Factually Wrong

47. In 2.10 of the in-reply submission, Mr A posits that the CAB effectively adopted the sub-committees' reasons as its own. That the sub-committee report was given significant weight when the CAB was making its decision.
48. Mr D was a member of the CAB at the time the decision was made. He confirmed that CAB based their final decision on the recommendation of the sub-committee that he led.
49. The competence assessment process tests an individual's submissions and interview responses against the practice area description (PAD) being requested by the applicant.
50. Mr A's application contained a PAD of "Design and observation of low to medium rise commercial, residential and industrial building structures in all major construction materials (steel, concrete, timber, masonry) (BOD348).
51. Assessment panels are provided guidance (BOD 428) to review an applicant's PAD and if the evidence does not match the PAD, agree and amended PAD with the applicant.

52. The assessment panel in the initial decision (BOD 355), amended the PAD to “Assessment, design of seismic strengthening and construction monitoring for residential, medium rise commercial and industrial buildings”. In the draft decision (ASB 105) and the final decision (BOD 590) amended the PAD to be “Structural design and construction monitoring for low rise commercial, residential, commercial and industrial buildings”.
53. The sub-committee report (BOD 688) references the original PAD not the PAD amended by the panel to align more closely with the evidence submitted.
54. Mr D acknowledged this point, and, that had the sub-committee been aware of the revised PAD, some comments in the report would not have been necessary. However, he did not consider that it would have changed the recommendation that the sub-committee made.
55. With the 1st November 2019 letter, the panel included an annotated version of Schedule 2 that was a part of Mr A’s 5th April 2019 submission. The panel indicated items that they considered required further discussion.
56. Schedule 2 directly references the sub-committees report. The sub-committee and Mr A’s commentary references interactions that pre-date the previous CPEC appeal. Whilst the previous CPEC panel has commented on these issues, as they have been raised in this appeal within a different context, the panel will re-consider them.

Schedule 2

57. Item 1 - 2 no further comments
58. Item 3 - Mr A considers that the 7 Street A project is complex. The panel asked Mr D if lack of complexity was a determining factor in the sub-committee recommendation? He stated that it was not.
59. Item 4. Mr A acknowledged that there were no medium rise examples in his portfolio. In the feedback from the assessment panel (BOD 473) additional

evidence relating to medium rise structures was not requested. The revised PAD proposed by the second panel is limited to low rise buildings.

60. Item 5 - 6 No comment
61. Item 7. Mr A responded to the assessment panels requests dated 12 February 2015 (BOD 473) on 19 February 2015 (BOD 473). He followed up on 6 March 2015 (BOD 472). One of the assessors (BOD 472) and the RA (BOD 471) responded on 6 March 2015. These responses did not acknowledge the comments provided by Mr A in his 12 February 2015 email. They instructed him that a second interactive was required.
62. Items 8 - 10. No comment
63. Item 11. The documentation for work sample 3, 56 Street B was discussed in some detail. Mr A acknowledged that one of the comments in the design report relating to the 150PFC was incorrect. However, this particular member was not a part of the final design. The final design was correct.
64. Mr D acknowledged that the final design appeared to be acceptable.
65. The appendix to the sub-committee report (BOD 695). States *“This means that the Building A can only achieve half of the strength calculated by Mr A and this is a significant and worrying oversight for such a basic calculation and puts lives and the asset at risk. Did not check the design further...”*.
66. Mr D acknowledged that the comments relating to putting lives and the asset at risk are incorrect. And that the emotive language used could have had a bearing on the decision of the CAB.
67. Following this discussion Mr D clarified the nature of the sub-committee review. It was:
 - (a) Holistic and not to the same level as the original panel’s.

- (b) Was focussed on the process and whether the questions that had been asked of Mr A were appropriate.
 - (c) Was not a detailed technical review.
68. Items 12 - 14. No comment
69. Item 15. Same comments as for item 7.
70. Items 16 - 19. No comment.
71. Item 20. Assumptions are provided in the work sample (BOD 118). Mr D acknowledged that these were acceptable.
72. Item 21. The comment is subjective. The sub-committee review is not in sufficient detail to refute how calculations are presented.
73. Item 22. Mr A considered this work sample was complex engineering. The panel asked Mr D if lack of evidence of complexity across the work samples was an issue. He considered it wasn't material. The holistic commentary in the assessment panels final report (BOD 597) states "*He is responsible for complex projects requiring up to date and detailed knowledge of his engineering field and the relevant regulatory environment*".
74. Item 23 - 24. Same as item 11.
75. Item 25. No comment.
76. Item 26. Same as item 11.
77. Item 27. Same as item 22.
78. Item 28. No comment
79. Item 29. Same as item 22.
80. Item 30 - 38. No further comment based on level of technical review that the sub-committee undertook.

Bias

81. The way in which bias might be interpreted is outlined in Mr A's 5th April 2019 submission, paragraphs 5.13 to 5.20. The RA has taken no issue with this interpretation in their submission.
82. It is accepted by all parties that some of the comments made in email correspondence are inappropriate (ASB 150). The comments imply that the panel had already made up their mind about the outcome of the second interactive.
83. Mr A's counsel noted that bias is further indicated in comments within the sub-committee report (BOD 694). "*The work samples provided are no more than samples, or snippets...*". The work samples provided by Mr A take up over 300 pages of the bundle of documents. It is incorrect to describe them as "snippets".
84. The test for apparent bias noted in 5.16 of Mr A's 5th April 2019 submission (Muir v Commissioner of Inland Revenue) requires that "*...circumstances as established might lead a fair minded lay observer to reasonably apprehend that the Judge might not bring an impartial mind to the resolution...*". Mr A's counsel notes that comments made by the assessors (ASB 150 and 86) would surely lead a lay person to consider that Mr D and Mr E were entering into the second interactive interview with a biased view and preconceived assumption on what the outcome would be.
85. Mr A's counsel summarised that the overarching commentary contained within the sub-committee report are negative and that these are due to the bias of the sub-committee. This bias having been built from an overview of the interactions between Mr A and the RA.

Procedural Failings

86. Alleged procedural failings are outlined in Mr A's 5th April 2019 submission 5.42 to 5.58.

87. 5.44 notes the delay of 8 months from submitting his application to getting the first interactive interview in 2014. The panel asked the RA to comment on the expected time for an interview. They noted that from the time documents were submitted to an assessment panel being selected was typically 3 months, it may then take 3 months for an interview to be arranged. Whilst 8 months is longer than ideal it is not considered excessive.
88. At 5.49 Mr A considers he was unjustly criticised for not undertaking the requested written assignment prior to the second interactive (ASB 87). Mr A contends that the original CPEC appeal panel only instructed that a second interactive interview be held. No other activity was required. The panel suggest that Mr A had taken a too literal approach to the original CPEC panel instruction. Mr A could have requested (or the RA could have on their own account) clarification from the CPEC panel.
89. At 5.51 Mr A considers that the process of the second interview was deficient. The RA commented and the panel agrees:
- (a) Most panels are only 2 people. A staff assessor and a practice area assessor.
 - (b) The majority of the questioning will be by the practice area assessor.
 - (c) In many professional situations questions will be “vague”. Engineers need to be able to clarify what is being asked in situations like this and respond accordingly.
90. The phone call from Mr Kelly and the draft decision is noted in 5.52. The RA has acknowledged, and the panel agrees, that the process around the communication immediately following the second interactive was not what should be expected from the RA.
91. The sub-committee lists (BOD 689) the documentation that it reviewed. Given the extended duration and complexity of this matter, Mr A considers that they

should have been given all the information prior to making a final recommendation.

Registration Authority

92. They noted that their submission be taken as read and did not need to clarify any points.
93. Mr D provided details on the sub-committee review process.
94. It was not a technical review. The sub-committee did not receive all of the information only what is listed in their report (BOD 689):
 - (a) Mr A's application for continued registration dated 16th June 2014
 - (b) The assessment panels reports (30th April 2015 and 17th November 2015)
 - (c) Mr A's "natural justice" submission dated 19th August 2015
 - (d) Mr A's submission to the Appeals Panel dated 25th February 2016
 - (e) The Appeal Panels decision dated 6th June 2016
 - (f) The panels revised report following the second interactive
 - (g) Mr A's letter to the Registration Authority dated 14th February 2017
 - (h) The summary of Mr A's meeting with the Registration Authority on 21st April 2017 (with his annotations).
95. The sub-committee (and assessment panels in general) focus on the evidence that is provided.
96. The sub-committee considered that "professionalism" is important and the "attitude" of the applicant impacted on the recommendation that was made.

97. The recommendation of the sub-committee (and assessment panels in general) is holistic and takes in to account the work samples, the responses to questions at the interactive and the interactions with the applicant.
98. Mr D acknowledged that interactions between Mr A and the RA *“had a bias as to how we would have written our report”*. His view was that the nature of the responses from Mr A indicated a lack of professionalism. Mr Williams had previously noted that *“there isn’t a reference in that (the final assessment panel report) to a holistic concern over professionalism”*.
99. The report was based on the original PAD. Had the sub-committee been aware of the revised PAD they would have removed some comments from their report. This is interpreted by the panel to include (BOD 690):
- (a) *“There was no evidence of engineering design for medium rise construction...”*
 - (b) *“There was no evidence of industrial work...”*
- However, he did not consider being aware of the updated PAD would have changed their recommendation.
100. Mr D confirmed that the review of the work samples and the comments in the appendix of the report did have a bearing on their recommendation to the CAB
101. In closing the RA noted that around 16 people (2 assessment panels, the CAB, the sub-committee and the original CPEC appeal panel) had reviewed Mr A’s application and found that he had not adequately demonstrated competence.

Reply by Mr A

102. Counsel for Mr A responded and summarised their case:
103. The sub-committee acknowledged that:
- (a) They undertook a limited review of the work samples.

- (b) The errors noted were not errors.
- (c) They summarised the assessment panels decisions, which Mr A contends were subject to bias.

On this basis the sub-committee recommendation is unsafe to rely on.

- 104. In taking a “holistic” review the sub-committee should have taken into account all available information. This should have included all correspondence between the panel and the RA including the draft decision.
- 105. It was acknowledged that Mr A’s communications had become combative in nature. However, this was due to the way he was treated by the RA starting with the 8-month delay for the first interactive.
- 106. The linking of the evidence to the PAD is a particular focus of the sub-committee report. The sub-committee should have been reviewing the latest PAD.
- 107. In closing the panel was asked to consider if the sub-committee decision on competence was a just process.

Considerations of the panel

General

- 108. The entire process of Mr A’s application for continued registration has been drawn out and not to a standard that should be expected.
- 109. The communications from both parties has contributed to the breakdown of what should be a supportive and professional relationship between the applicant and the RA.
- 110. Had Mr A completed the written submission prior to the second interactive (refer paragraph 88), then discussions at the second interactive could have been more focussed and potentially achieved an accepted outcome.

Factually Wrong

111. The second interactive focussed on the areas directed by the original CPEC appeal panel (BOD 582):
- (a) *Timber Design: Knowledge of when to use stainless or galvanised fixings.*
 - (b) *Steel Design: Knowledge of scaling factors for tension braced systems and recent developments in EBF design*
 - (c) *Concrete Design: Knowledge of shrinkage rates and capacity design procedures.*
 - (d) *Masonry Design: Knowledge of situations where on-specific design codes application may be not appropriate.*
112. In Mr A's letter to Engineering New Zealand CEO dated 14th February 2017 (BOD 602) he raised a number of issues with the final report issued by the assessment panel (BOD 587). The sub-committee did not acknowledge or respond to these comments in their report.
113. The sub-committee review was not a technical review (refer paragraph 94), however the report raised some significant technical issues (different to those raised by the assessment panels) and raised some major issues with some of the designs. The comments included emotive language like “...put lives and the asset at risk.” (BOD 695).
114. Mr A has addressed these comments in his submissions on appeal. In all instances he was able to demonstrate that his designs were acceptable.

Bias

115. As noted in paragraph 82, the comments made by the assessment panel (ASB 150) clearly indicate that they had a preconceived view on the outcome of the second interactive:

“It is very disappointing to know that the Registration Authority will not back a panel when it finds a candidate incompetent....”

“Pressure from his boss is not sufficient reason to withhold the inevitable judgment”

116. Mr D acknowledged at the hearing (paragraph 98) that the sub-committee was impacted by the nature of the ongoing dispute between the RA and Mr A. He further acknowledged that their report was biased based on this.

Procedural

117. The sub-committees report reviews Mr A’s submissions against his originally applied for PAD (BOD 688):

“Design and observation of low to medium rise commercial, residential and industrial building structure in all major construction materials (steel, concrete, timber, masonry)”.

The PAD had been amended by the assessment panel in their initial report (BOD 355), the draft report (ASB 105) and final report (BOD) 590 to:

“Structural design and construction monitoring for low rise commercial, residential, commercial and industrial buildings”.

118. The PAD is the basis for assessing the candidate’s evidence against. Mr D (paragraph 99) acknowledges that the sub-committee was reviewing the evidence against the original PAD. He stated, being aware of the change to the PAD would have changed some of the wording in the report but not the overall recommendation.

119. The sub-committee report (BOD 692) states:

“It appears that as a part of the Panel’s holistic assessment they believed that Mr A’s CPD was not keeping Mr A abreast with changes in his practice area.”

This is at variance with the assessment panels final report (BOD 588) which states:

“In the opinion of the panel Piotr has recently undertaken adequate steps to remain current in his practice area”.

Findings

120. Ground of appeal 1. “The sub-committee made significant factual errors in its appraisal of Mr A’s work samples and overall competence.” Synopsis of submission for the appellant 5th April 2019. 5 (1)
121. The level of technical evaluation of the sub-committee is discussed in paragraphs 67 and 94. It has been acknowledged that the sub-committee was “factually wrong” in some of their technical comments.
122. The decision to decline Mr A’s continued registration by the CAB was heavily influenced by the sub-committee report.
123. The panel upholds ground of appeal 1.
124. Ground of appeal 2. The RA was biased against Mr A. Synopsis of submission for the appellant 5th April 2019. 5 (2).
125. The relationship between Mr A and the RA broke down following the first interactive assessment in 2015.
126. It was acknowledged (paragraph 105) that Mr A’s communications had become combative. However, the RA, CAB, assessment panel and sub-committee need to maintain objectivity throughout the entire process.
127. The attitude of the assessment panel (paragraph 82) and the admission by Mr D (paragraph 98) illustrate that the RA (via its delegations to the CAB and the assessment panel) exhibited bias against Mr A.
128. The panel upholds ground of appeal 2.

129. Ground of appeal 3. Mr A was disadvantaged by procedural failings of the RA.
130. The panel considers the following to be significant procedural failings:
- (a) Communications with Mr A following the second interactive (paragraph 19 (f) - (h)),
 - (b) Inconsistency on the adequacy of Mr A's CPD (Paragraph 119),
 - (c) Sub-committee reviewing Mr A's competence against the incorrect PAD (paragraph 117).
131. It is unclear if the final outcome of the Mr A's assessment would have been any different if these procedural issues had not occurred. However, the panel finds that Mr A was disadvantaged by them.
132. The panel upholds ground of appeal 3.

Outcome

133. The appeal is upheld.
134. Whilst the sub-committee made factual errors in its assessment, was biased in its decision making and there were procedural failings, it does not necessarily follow that Mr A meets the current competence requirements of Rule 20.
135. Our 1 November 2019 letter found that the 2013 and 2014 work samples cannot be considered "recent engineering activities" required under Rule 23. The panel cannot make a decision in 2019 to confirm Mr A's current competence.
136. Placing the panel in the position of the RA in 2017, we can make any decision that the RA could have made at that time.
137. The draft decision (ASB 105) recommended a term to next assessment of 2-years (from 2017). The panel finds reinstating the draft decision as being the most robust outcome for this long and complicated process.

138. The 2-year term from 2017 has now expired requiring Mr A to collate new “recent work samples” and reapply for continued registration.
139. The panel considers that Mr A has not demonstrated good professional judgment in his engagement with the RA during this process. It strongly recommends that he consider how he develops a better understanding of how to communicate to achieve a desired outcome.
140. By its own admission the RA, CAB and the assessment panel have not communicated and performed to a standard that should be expected of a professional body. The panel hopes that the lessons learned from the process have been communicated to all those involved in processing initial and continued registration assessments.

Costs

141. Under S37 5 (d) of the Act the Council may make and order as to the payment of costs.
142. This has been a protracted process and has placed significant cost on Mr A, the RA and the Council. Mr A acknowledges (Synopsis of submission for the appellant 5th April 2019, 5.48) that ENZ’s conduct has not solely delayed this appeal.
143. As noted in paragraph 139 Mr A has not displayed good professional judgment in his interactions with the RA. This has contributed to the length of the process and increased the costs to all parties.
144. Both parties are invited to make submissions on costs. Mr A to provide his submissions 7th February 2020. The RA to provide their submission by 14th February 2020. Mr A to provide any comments on the RA’s submission by 21st February 2020. All submissions to be copied to all parties.

Decision on Costs

145. Submissions on costs (SOC’s) were received:

- (a) Mr A - 7th February 2020
- (b) Registration Authority - 14th February 2020
- (c) Mr A (in reply) - 21st February 2020

146. Under S37 5 (d) the Council may:

“make any order as to the payment of the costs of the appeal that it thinks fit”.

As noted by the RA (SOC - 4.2) there is no guidance in the Act, the Rules or the Appeals Regulations about the exercise of this discretion”.

147. Also as noted by Mr A (SOC - 3.2) this is a *“broad discretionary power”* and *“the laws of natural justice need to be observed when this power is being exercised”*.

148. The Council has only issued an order on costs in one of their previous hearings (decision 10/14 V v RA). In this case the RA was required to pay costs to the Council associated with commissioning an independent expert. The panel in this hearing offered the appellant the opportunity to make a submission on cost. No submission was received.

149. In all other cases costs, the Panels decided that costs incurred by the parties should lie where they fall.

150. The panel agrees with the RA (SOC - 4.5) that *“the District and High Court Rules do not apply to these proceedings, and that these proceedings are governed by the Act, the Rules and the Appeals Regulations which provide that the ability to award costs is at the Panels discretion.”*

151. Mr A states (SOC - 4.1) *“There can be no doubt that Mr A was the successful party”*. The RA rejects this (SOC - 3.1 and 3.2).

152. The panel agrees with Mr A on this point. At para 137 above, the panel reinstated the assessment panels draft decision. This draft decision found that

Mr A was competent in 2017. On this basis the panel considers that Mr A was the “successful party”.

153. However, whilst the panel considers Mr A was the successful party, this in itself does not necessitate the panel awarding costs in his favour.
154. The panels first decision is should any costs be awarded. This appeal differs from the majority of appeals that have come before the Council:
 - (a) It relates to a decision not to continue the registration of an engineer (CRA). There have only been two previous appeals relating to CRA’s (appeal references 13/15 and 3/16).
 - (b) The appellant had legal representation. Of the almost 60 appeals that have come before the Council less than 10% of the appellants have had legal representation. There has only been one appeal against a decision of the CAB where the appellant has had legal representation (appeal reference 13/15). This appeal was unsuccessful.
 - (c) In other appeals against a decision of the CAB the issue under appeal has been the interpretation of the level of complexity of the engineering work samples submitted. This is a subjective decision. In this appeal the CAB was factually wrong in the technical assessment of the work samples.
 - (d) The panel considers that had Mr A not been legally represented in this appeal, the outcome would most likely have been different. As illustrated by Mr A’s first appeal to the Council (appeal reference 14/15).

Based on the above the panel finds that it is appropriate to award costs.

155. Mr A details his costs (Reply SOC - Schedule A) as being \$62,238.45 of legal costs and \$1,898.50 of disbursements. Both figures include GST.

156. The RA has provided no indication of their costs. Instead they have submitted that costs should lie where they fall (SOC-6.1):
- (a) Mr A's success being limited,
 - (b) the order being unprecedented and contrary to public interest.
 - (c) Mr A's behaviour having contributed to the costs
 - (d) the RA behaving in accordance with its statutory obligations through the process.
157. Mr A has applied for full reimbursement of all costs (SOC - 4.5). As an alternative he proposes that the High Court rules of two thirds of actual costs be used as a starting point.
158. The RA (SOC- 4.15) states that *"It is not in the public interest for the Registration Authority to be exposed to adverse costs awards"* and *"Exposing the Registration Authority to significant liability for costs may have unintended consequences on its future decision making which could affect its ability to carry out its statutory functions"*.
159. The panel acknowledges that exposing the RA to adverse costs awards may impact on how the RA approaches appeals. We do not see how this can impact on the RA's ability to carry out its statutory functions. The process must also not deter people who have legitimate concerns from appealing.
160. Mr A responds to this (Reply SOC - 4.8) noting that *"statutory bodies are not immune [from costs] merely by virtue of being statutory bodies"*. A case against the Earthquake Commission is cited, EQC v Whiting and Ors (2015).
161. The panel considers that the RA is a different type of entity to the EQC. The commercial nature of the EQC process is not in any way aligned to the responsibilities and duties of a professional registration body.

162. The RA (Submission on Costs - 3.11) notes *“it was not strictly open to the panel to make findings on procedural matters such as bias”*.
163. Bias was clearly one of Mr A’s grounds of appeal. The panel found that this bias contributed to the decision of the RA (via the consideration of the information and recommendation of the CAB) to not register Mr A.
164. The primary subject of the appeal was that *“The sub-committee made significant factual errors in its appraisal of Mr A’s work samples and overall competence”*. The bias and procedural failings contributed to the final decision of the RA.
165. Mr A stated (Reply SOC - 4.9):
- “In summary, the Council is bound to exercise its discretion under s 37 in accordance with the rules of natural justice. In its most basic sense, natural justice is simply fairness. It would be fair to award costs to Mr A as sought. It would also be fair to be guided by established and relevant legal principles in making the decision, when little other guidance is available. Contrastingly, it would be unfair to ignore those principles merely because they are from another jurisdiction, or to invent some new ones (such as an immunity against adverse costs for the RA) against all logic and the intent of Parliament.”*
166. The panel agrees with this statement. In the absence of any other guidance or established precedence within the panels jurisdiction fairness is best served by following established legal principles from other jurisdictions.
167. The panel considers it appropriate to use the District Court Rules (the District Court being the body that considers appeals relating Council decisions) as a guide to the quantum of costs to be applied. It does not consider that District Court Rule S14.2 (1) a:
- “the party who fails with respect to a proceeding or an interlocutory application should pay costs to the party who succeeds”*

is applicable to all decisions on appeal to the Council. The appropriateness of applying costs needs to be considered on a case by case basis

168. S14.2 of the District Court Rules

Principles applying to determination of costs

The following general principles apply to the determination of costs:

- (a) an award of costs should reflect the complexity and significance of the proceeding:*
- (b) costs should be assessed by applying the appropriate daily recovery rate to the time considered reasonable for each step reasonably required in relation to the proceeding or interlocutory application:*
- (c) an appropriate daily recovery rate should normally be two-thirds of the daily rate considered reasonable in relation to the proceeding or interlocutory application:*
- (d) what is an appropriate daily recovery rate and what is a reasonable time should not depend on the skill or experience of the solicitor or counsel involved or on the time actually spent by the solicitor or counsel involved or on the costs actually incurred by the party claiming costs:*
- (e) an award of costs should not exceed the costs incurred by the party claiming costs:*

169. Given the specialist nature of this appeal the panel considers that they could be classified as “Category 3 proceedings” under S14.3 of the District Court Rules.

170. The panel has considered the detail of the costs claimed by Mr A. In consideration to the costs claimed the panels assessment of the time required associated with the preparation of the Reply SOC, and the daily rates claimed

being in line with the District Court guidance, the panel considers the amounts claimed by Mr A to be reasonable. The panel also notes (as is highlighted by Mr A in Reply Submission - 6.3) the RA has not challenged the quanta of costs claimed.

171. The panel finds that the RA should pay Mr A's costs as follows:

- (a) 100% of disbursement costs - \$1,898.50
- (b) Two thirds of legal costs - \$41,492.30
- (c) Total costs being the sum of these - \$43,390.80

172. In accordance with S35(2) of the Act either party may appeal this final decision to the District Court within 28 days.

Dated this 23 day of March 2020

Signed by the Appeals Panel



Jon Williams - Principal



Sandra Hardie



Rebecca Knott



Sarah Sinclair