

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

Appeal 11/21

AND

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

Between

Mr A
Appellant

And

Ms B
Respondent

Decision of the Chartered Professional Engineers Council
Dated 14 December 2021

1. Mr A has appealed a decision made by a Chair of Investigating Committees, of the Registration Authority (“the RA”) acting as Adjudicator (“the Adjudicator”), to dismiss his complaint about Ms B. [BOD 139-146]
2. The appeal panel of the Chartered Professional Engineers Council (“the Council”) has been provided with a paginated Bundle of Documents file held by the RA in relation to the case. References to specific documents within this file are annotated “[BOD nn]”.

The Legislation

3. Legislation considered by the appeal panel is presented in Schedules 1 and 2.
4. Appeals to the Council are by way of rehearing under s37(2) of the Chartered Professional Engineers of New Zealand Act 2002 (the Act).
5. The appeal panel is entitled to confirm, vary or reverse a decision and 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*, the panel is entitled to take a different view from the RA but the appellant carries the burden of satisfying the panel that it should do so.
6. Section 21 of the Act states:

“21 Grounds for discipline of chartered professional engineers

1. *The Registration Authority may (in relation to a matter raised by a complaint or by its own inquiries) make an order referred to in section 22 if it is satisfied that a chartered professional engineer--*
 - (a) *has been convicted, whether before or after he or she became registered, by any Court in New Zealand or elsewhere of any offence punishable by imprisonment for a term of 6 months or more if, in the Authority’s opinion the commission of the offence reflects adversely on the person’s fitness to practise engineering; or*
 - (b) *has breached the code of ethics contained in the rules; or*
 - (c) *has performed engineering services in a negligent or incompetent manner; or*
 - (d) *has, for the purpose of obtaining registration or a registration certificate (either for himself or herself or for any other person), -*
 - (i) *either orally or in writing, made any declaration or representation knowing it to be false 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 subparagraph (i); or*
 - (iii) *produced to the authority or made use of any document knowing that it was not genuine.”*

7. The facts and evidence 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 prima facie evidence that Ms B:

(a) has breached an aspect of the code of ethical conduct as set out in the rules 42(A)-42(I); and/or

(b) has performed engineering services in a negligent or incompetent manner.

8. Rule 56 of the Rules states:

“56 Registration Authority must refer complaint to investigating committee unless grounds for not doing so

The Registration Authority must, as soon as practicable after receiving a complaint, carry out an initial investigation of the complaint in accordance with rule 58 and—

(a) refer the complaint to an investigating committee in accordance with rule 59(b); or

(b) dismiss the complaint on a ground in rule 57.”

9. In hearing this appeal the panel must act as if it were the Adjudicator under rule 56.

Purpose of professional disciplinary processes

10. As noted in para 8.1 of the RA’s submission, the professional disciplinary process does not exist to punish individuals for their conduct nor to appease persons dissatisfied with professional services they have received. The purpose is to ensure professional standards are maintained so that clients, the profession and the broader community are protected.

11. This is addressed in *Z v Dental Complaints Assessment Committee (Z)*¹ where the Supreme Court stated:

“The purpose of disciplinary proceedings is materially different to that of a criminal trial. It 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.”

¹ [2008] NZSC 55

Correspondence and submissions

12. Key correspondence and submissions in this appeal are listed in Schedule 3.

Grounds of appeal and outcome sought

13. In Mr A's Notice of Appeal dated 20 September 2021, he submitted, as grounds that:

".....

- (a) *The adjudicator has claimed that the "recommendations" section of the Organisation C advice is not advice to the Council. However the District Council D issued requests for information in relation to the recommendations, and the Council treated it as advice which it is under Section 47. The adjudicator's definition of advice is tortured as the entire memorandum from Organisation C is advice, and recommendations are advice. It is unreasonable for the adjudicator to redefine the meaning of advice. In addition I had to respond to this advice even though the adjudicator considers it to be unnecessary, the Council clearly deemed it to be necessary to provide a response.*
- (b) *Evidence was not handled correctly and the adjudicator requested additional evidence. Received that evidence and did not notify me. As such I was unable to respond to misleading evidence.*
- (c) *The adjudicator relied on an unreliable witness, Ms E, who appears to have intentionally excluded information that would affect the reliability of her evidence.*
- (d) *The adjudicator excluded large portions of my complaint on the basis of 5(a) above which demonstrates incorrect weighting of the decision and in fact ignores the my [sic] complaint.*
- (e) *The adjudicator went on to make accusations against me, without notification or opportunity to respond, which is a false claim of filing a frivolous, vexatious or not made in good faith complaint.*
- (f) *The adjudicator has claimed that the complaint is insufficiently grave to warrant further investigation but has dismissed the threat to close a hospital made to District Council D and this threat affects my client. It is clear that the threat was made to demand features of the fire sprinkler design which exceed the building code which violates the role of Organisation C under Section 47 of the Building Code. Organisation*

C is not allowed to demand performance criteria which exceed the requirements of the building code. Organisation C should not be violating Section 47 or threatening anyone for simply filing a fully compliant building consent application.

(g) Given all of the above the rules of natural justice were not followed in making the decision which I believe violates Section 25(b) of the Chartered Professional Engineers of New Zealand Act 2002.”

14. The remedy sought by the appellant as set out in the notice of appeal was:

“...an outcome where violating the Code of Ethical Conduct results in consequences, rather than an adjudicator making false accusations against me.”.

15. The panel notes that the outcomes which it can determine under the appeal are referred to in 5 above. The outcomes available to the panel are either to overturn the Adjudicator’s decision, uphold the appeal and refer the complaint back to the RA to place before an Investigating Committee or to uphold the Adjudicator’s decision and dismiss the complaint.

Jurisdictional Issues

16. Under the statutory framework within which the Council may hear an appeal it cannot hear matters that relate to the actions or processes of the RA. It must address the actual decision that the RA has issued. In this regard issues relating to the processes or procedures of the RA are not relevant and they are cured by the rehearing.

17. This is supported by the RA [submission paragraph 3.3] *“This appeal must occur by way of a rehearing. The distinction between an appeal and an appeal by way of a rehearing is discussed in Pratt v Wanganui Education Board², where the Supreme Court stated:*

“There is a difference between an appeal and an appeal by way of rehearing. On an appeal judgment can only be given as it should have been given at the original hearing. On a rehearing judgment may be given as ought to be given if the case came at that time before the court of first instance.”

18. The RA further submitted [paragraph 3.4] *“..the matter must be heard as if it has not been heard before.”* and referring to CPEC Appeal Decision 01/19³ further submitted *“CPEC does*

² [1977] 1 NZLR 476 (SC), at 490

³ CPEC Appeal 01/19

not have jurisdiction to consider procedural issues. Rather, the appropriate avenue to consider procedural issues is by way of judicial review.”

19. The panel agrees with the RA’s submission (18 above) and also notes similarities between this appeal and *CPEC Appeal Decision 01/19*, in which the Council determined that it does not have jurisdiction to consider procedural issues.
20. The RA made reference [submission paragraph 3.5] to CPEC’s decision in *Registration Authority v L*, in which the Council considered procedural issues, the outcome of which was upheld by the District Court⁴. The panel agrees with the RA that *L* is not applicable in this appeal.
21. On the basis of reasoning provided in 16 to 20 above the panel is unable to make a determination on any of the following grounds as they are procedural and consequently lie beyond the Council’s jurisdiction:

Ground (b) - Evidence was not handled correctly...

Ground (c) – The adjudicator relied on an unreliable witness...

Ground (d) – The adjudicator excluded large portions of my complaint ...

Ground (e) – The adjudicator went on to make accusations against me...

Ground (g) – The rules of natural justice were not followed.

22. As submitted by the RA (18 above) the appropriate process for consideration of grounds (b), (c), (d), (e) and (g) is by way judicial review.
23. Where the grounds of appeal include matters of process or procedure, the panel notes that they may provide some context for the appeal, although they do not contribute to the substantive determinations.
24. In light of the preceding discussion, the panel’s focus is on two grounds, namely:

Ground (a) - “The adjudicator has claimed that the *“recommendations”* section of the *Organisation C* advice is not advice to the Council.....”, and

⁴ [2021] NZDC 1167 (DC)

Ground (f) – *“The adjudicator has claimed that the complaint is insufficiently grave to warrant further investigation but has dismissed the threat to close a hospital made to District Council D and this threat affects my client...”*

The original complaint

25. On 15 December 2020 Mr A filed a complaint with Engineering New Zealand. [BOD 2-5]
26. The complaint related to Ms B’s role as a party to an Organisation C review of proposed work at Facility F.
27. Central to the complaint is the content of a building memorandum issued by Organisation C on 24 November 2020 (“the Memorandum”), which Ms B signed as the checker. [BOD 42-46]
28. Mr A alleged in his complaint that false statements were made by Ms B [BOD 3] and in the summary of his complaint [BOD 5] he stated *“It is clear that the advice (an engineering activity of engineering design review) Ms B has provided is highly prejudiced and violates multiple sections of the Code of Ethical Conduct. Denying healthcare to a community and people in need appears to be a human rights violation which does not uphold community standards. Therefore this is significantly above the minimum level for disciplinary action to be taken.”*

Decision being appealed and evidence considered

29. The decision under appeal is the 24 August 2021 decision of the Adjudicator, to dismiss the complaint by Mr A about Ms B. [BOD 139-146]
30. That decision noted in its final paragraph [BOD 146] – *“...I am satisfied Ms B provided engineering services in accordance with what a reasonable engineer would have done in the same circumstances. Accordingly, I do not consider there is any applicable ground for discipline and have decided to dismiss the complaint in accordance with rule 57 of the CPEng Rules”*
31. Under s15 of the Regulations, the Council may receive any evidence that the RA would have been entitled to receive on the decision being appealed.
32. The evidence considered by the panel in arriving at its decision included:
 - (a) Notice of Appeal 20 September 2021,
 - (b) The paginated Bundle of Documents [BOD 1-153],

- (c) Submission from Mr A dated 13 October 2021,
 - (d) Submission on behalf of Ms B dated 29 October 2021
 - (e) Submission from the RA dated 1 November 2021, and
 - (f) Submission in response from Mr A dated 2 November 2021.
33. The panel’s focus was on the substantive matters that were raised in the original complaint, and which also have been cited in the notice of appeal, specifically Ms B’s actions with respect to Organisation C’s review of proposed work at the Facility F.

Hearing

34. With the agreement of the parties the panel conducted the hearing on the papers.
35. The panel met by video link on 19 November 2021, 9 December 2021 and 13 December 2021 to deliberate and consequently reach a consensus decision.

Discussion and Findings

Context

36. Mr A, Principal Fire Engineer of Company G, was engaged by Organisation H to provide advice on fire safety in respect of a proposed extension to the Facility F.
37. Paragraph 4.1 of Ms B’s submission noted that on 9 October 2020, Company G issued a fire report drawing set for the proposed extension. The referenced report is not included in the documentation.
38. Ms B submitted [paragraph 4.2] that under s46 of the Building Act 2004 certain applications for building consent are required to be provided to Organisation C.
39. S47 of the Building Act states:

“47 Fire and Emergency New Zealand may give advice on applications under section 46

- (1) Fire and Emergency New Zealand may, within 10 working days after receiving a copy of an application for a building consent under section 46, provide the building consent authority concerned with a memorandum that sets out advice on the following matters in respect of the building to which the application relates:*

- (a) provisions for means of escape from fire:*

(b) the needs of persons who are authorised by law to enter the building to undertake fire-fighting.

(2) Fire and Emergency New Zealand must not, in the memorandum referred to in subsection (1), set out advice that provides for the building to meet performance criteria that exceed the requirements of the building code.

(3) If Fire and Emergency New Zealand does not provide a memorandum within the period specified in subsection (1), the building consent authority may proceed to determine the application without the memorandum.”

40. A copy of the application for building consent was provided to Organisation C in accordance with s46 and the Memorandum was prepared by Ms I of Organisation C, checked by Ms B and approved by Mr J of Organisation C on 24 November 2020 [BOD 42-46]. In the process of preparation of the Memorandum, the fire report drawing set by Company G. and the architectural drawings were reviewed.

41. In deciding whether to grant a building consent the Council has obligations under s48(3)(a) which states:

“48 Processing application for building consent

(3) In deciding whether to grant or refuse an application for a building consent, the building consent authority must have regard to—

(a) a memorandum provided by Fire and Emergency New Zealand under section 47 (if any); and ...”

42. On 14 December 2020, the day before filing his complaint with Engineering New Zealand, Mr A issued a report reviewing the proposed extension and considering compliance with the New Zealand Building code and sections 112 and 17 of the Building Act. [BOD 6-21].

43. The Council granted the application and building works progressed.

44. The panel has seen no evidence from either the Building Consent Authority or Organisation H of any concerns on their part regarding Ms B.

Standard of care expected of a chartered professional engineer

45. It is the role of the panel to determine if there are any grounds to dismiss the complaint and accordingly the panel must determine if prima facie evidence exists as a basis for an investigating committee to investigate further. In this regard the panel has identified the relevant rules contained in part 3 of the Rules, as outlined in 46 to 49 below.

Take reasonable steps to safeguard health and safety

46. Rule 42B of the Rules requires that a chartered professional engineer *“must, in the course of the engineer’s engineering activities, take reasonable steps to safeguard the health and safety of people.”*

Act Competently

47. Rule 42E of the Rules is presented in Schedule 2 and of particular relevance to the matter being appealed are requirements contained in that rule that *“a chartered professional engineer must ... (ii) only undertake engineering activities that are within the engineer’s competence; and (iii) undertake engineering activities in a careful and competent manner...”*
48. The technical elements of the matter being appealed are addressed below in the context of the requirements of the Rule 42E (a), (ii) and (iii).

Behave appropriately

49. Rule 42F of the Rules is presented in Schedule 2 and of particular relevance to the matter being appealed, is the requirement of clause (a) that *“a chartered professional engineer, in performing or in connection with the engineer’s engineering activities, - (a) must (i) act with honesty, objectivity and integrity; and (ii) treat people with respect and courtesy.”*

Specific elements of the appeal

50. The substantive elements of the matter being appealed are addressed below under the two grounds referred to in 24 above, both matters being within the jurisdiction of the Council to consider.

Ground (a) – Adjudicators ruling that the “recommendations” section of the Organisation C advice is not advice

51. Ground (a) as submitted is presented in 13 above.

The Memorandum

52. The panel considers that the central issue in ground (a) and for the appeal itself is the building memorandum issued by Organisation C on 24 November 2020 (“the Memorandum”).

53. As part of his narrative in Ground (a), Mr A has made submissions on the definitions of 'advice' and 'recommendations' such as were contained in the Memorandum.
54. The panel considers that the respective definitions of 'advice' and 'recommendations' are not relevant, the key point being the distinction between the content of the Memorandum shown as being offered under s47 of the Building Act and that outside of s47. The panel also observes that neither advice nor recommendations can be interpreted as instructions to any party.
55. The panel is satisfied that items 1.1 and 1.2 of the Memorandum constitute advice under s47 of the Building Act and that the items under the heading "*Fire and Emergency Recommendations*" are not offered as being under s47 of the Building Act. For the avoidance of any doubt, such as has been claimed by Mr A, Organisation C might in future similar exercises consider communicating information that they offer as recommendations in a separate document even if presented at the same time as the building memorandum.
56. In para 3 of his submission Mr A states "*The Organisation C memorandum dated 24 November 2020 in Section 1.1 instructs District Council D to consider if the advice in my report is adequate or to demand a revision of my design to demonstrate compliance of the whole building.*"
57. Having carefully read section 1.1 of the memorandum, the panel notes that there is no mention by Organisation C of any instruction to District Council D and the concluding paragraph in Section 1.1 of the memorandum notes "*Organisation C advises the BCA to satisfy itself that the information provided in the fire report is adequate as-is or require the applicant to revise the extent of the assessment to demonstrate the compliance of the means of escape from the building.*"
58. The statement by Organisation C in 57 above appears under the Heading "*Organisation C Advice Under Section 47*", it is written as advice, consistent with the role of Organisation C under s47(1) of the Building Act, and in any event under s48(3)(a) of the Building Act, it is entirely up to the BCA to determine the extent to which it heeds the advice.
59. In para 6 of his submission Mr A states "*Under the heading of Organisation C Recommendations there is a speculation that the current condition of the building is compromised and suggests that my original design is not viable. There is no basis for making this false claim.*"

60. The panel does not agree with Mr A's interpretation (59 above) that there is any speculation as to the condition of the building being compromised or any suggestion that the design is not viable.
61. Technical issues that have been raised that relate to the points discussed in 53 to 60 above, are addressed in the paragraphs which follow.

Limited review to be agreed in advance

62. On the first page of his complaint [BOD 3] Mr A quotes an extract from the Memorandum (Section 1.1) - *"Where a limited review of the building is proposed, this should be agreed in advance with the BCA. The consent documentation provided to Organisation C for review does not indicate that a limited review has been agreed with the BCA..."*
63. In relation to the previous statement Mr A submits *"There is no requirement in the Building Act to have some prior agreement. The process for formally deciding how to proceed is after the building consent application has been made. The statement made by Ms B. is a lie and is intended to manipulate the BCA into taking inappropriate action. This is not a fair or reasonable claim for a Chartered Professional Engineer to be making. This request also requires more onerous requirements than those required by the New Zealand Building Code which violates Section 47B of the Building Act."*
64. In her response to Mr A's complaint [BOD 70] Ms B accepts *"that there is nothing in the Act that specifically requires a building consent applicant to reach agreement with a BCA about how s112 will be approached before a building consent application is made."* She further submits - *"However, in my experience and opinion this approach is nevertheless good practice and this is what the paragraph Mr A has identified says. The language is not mandatory: it says that a limited review approach 'should' be agreed in advance with the BCA."*
65. Ms B further submitted [BOD 70] *"I absolutely reject Mr A's assertion that this comment was 'a lie and is intended to manipulate the BCA into taking inappropriate action'. There is no basis to describe the comment as a lie, which implies a deliberate mistruth. There is even less reason to say there is a deliberate intention to manipulate the BCA, with a suggestion of some impropriety. This is a baseless allegation."*
66. With regard to Mr A's statement (63 above) that the request requires more onerous requirements than required by the building code, the panel notes that this element of the

complaint refers to the process of submission and consideration of a consent application whereas s47(2) of the Building Act refers to 'performance criteria' for the building.

67. The panel accepts Ms B's submission that reference to agreement in advance to a limited review was not mandatory and was a statement made in a manner which she considered to represent good practice, based on her experience. The panel can see no evidence to support Mr A's assertion that the statement was a lie and intended to manipulate the BCA into taking an inappropriate action.

Full base build means of escape assessment

68. In the 'Recommendations...' section of the Memorandum [BOD 45] Organisation C noted "*It appears that it has been several years since a full base build means of escape assessment has been carried out for this building. Without a detailed understanding of the current condition of the existing means of escape design features (which may have become compromised over time) it is unclear whether the existing delayed-evacuation strategy (and the required level of protection to occupants) is still viable.*" Organisation C then recommended "*that the applicant carry out a base build means of escape assessment for this whole building as soon as possible*".
69. In referring to the recommendations of Organisation C (68 above) Mr A stated in his complaint that "*The claims and expectations made are unreasonable.*" His complaint on this matter culminated in a statement which read "*I believe that this is an action intended to harass my client and I.*" [BOD 4]
70. In her response to Engineering New Zealand, on this aspect of Mr A's complaint [BOD 70, 71] Ms B noted that the quote and associated recommendation appear under the 'Organisation C Recommendations' heading of the Memorandum, distinct from the heading that refers to s47 of the [Building] Act.
71. Ms B further responded "*in this instance, Organisation C's concerns about this issue were heightened because of the vulnerable nature of some building occupants, who more heavily rely on the building's passive and active fire safety systems to ensure their safety in the event of a fire. It is important that these systems are not compromised over time. Organisation C is aware of several buildings where this has occurred. In addition, the original assessment against the fire-related clauses of the building code carried out in 2013 was made against compliance documents that have now been superseded.*"

72. Ms B acknowledged that Mr A is entitled to take the view that the sort of base build assessment recommended to his client in the Memorandum is unnecessary but noted that she had a different view and endorsed the recommendation.
73. Further, Ms B stated [BOD 71] *“I do not accept that this difference of opinion supports Mr A’s view that the recommendation is intended to harass him or his client. Instead, it is driven by concern for a vulnerable occupant group and to ensure that fire safety assessment of the building is appropriately robust.”*
74. The panel acknowledges Ms B’s perspective on this matter and has seen no evidence that the recommendation by Organisation C for a full base build assessment is unreasonable or that Organisation C was not entitled to make such a recommendation, especially one that was outside of their advice under s47 of the Building Act.
75. Further, the panel has seen no evidence that the recommendation was an action intended to harass Mr A’s client and himself.

Requirement for fully compliant sprinkler system

76. In his complaint, Mr A took issue with a statement from the ‘Recommendations’ section of the Memorandum which read *“Organisation C notes that this whole building is expected to have a fully compliant sprinkler system so that it can have a delayed evacuation strategy.”* [BOD 4, 45]. The statement by Organisation C went on to read *“If the system is modified to Appendix B of the Acceptable Solutions, it will not be possible to maintain an approved evacuation scheme for this licensed facility.”*
77. Mr A regards the first of the Organisation C statements referred to in 76 above as false on the basis that the delayed evacuation strategy does not depend on the use of sections of the sprinkler standard that are removed by Appendix B, but instead depends on the internal sprinklers that actually exist.
78. In her response to Engineering New Zealand in relation to Mr A’s complaint, [BOD 71] Ms B notes that the comments relate to the evacuation scheme requirements for the building *“which arise under Fire and Emergency New Zealand Act and the Fire and Emergency New Zealand (Fire Safety, Evacuation Procedures, and Evacuation Schemes) Regulations 2018 (Regulations)”*. Ms B acknowledges that the matters are not strictly relevant to the assessment

of compliance with the Building Code, adding that was why the comments were not in the part of the Memorandum which relates to s47 of the Building Act.

79. With regard to the impact of system modifications to Appendix B on the maintenance of an approved evacuation scheme, Ms B further notes [BOD 72] that nothing in the Memorandum suggests that the building is dangerous, but it attempts to highlight that the approach to the sprinkler system described in Mr A's fire report may have implications for the evacuation scheme in the altered building.
80. The panel accepts Ms B's response that there is nothing improper about providing information about other regulatory regimes that Organisation C administers, as separately identified information in a design memorandum, which she notes is standard practice for her organisation.
81. In his complaint [BOD 5] Mr A notes *"Organisation C recommends that the applicant ensures that the new parts of the sprinkler system are design [sic] so that it will not undermine the ability to retain an approved evacuation scheme for the building. This statement by Ms B is intended to deny my client profession [sic] representation and undermine my clients belief in my competency. It is a recommendation to not use my services. This is dishonest and unprofessional conduct. Given that my client is proceeding with the work they are exposed to the fear created by this unnecessary and unreasonable threat to deny life saving healthcare to the patients at Facility F."*
82. The panel can see absolutely no way that the content of the Memorandum can be interpreted as a threat as Mr A has asserted, nor does the panel see any merit in Mr A's assertion that the statement by Organisation C (checked by Ms B) is intended to deny his client professional representation, undermine his client's belief in his competency or represent a recommendation not to use his services.
83. Furthermore, any concerns that he may have had, whether or not soundly based would no doubt be allayed, and his position vindicated, by the fact that the work proceeded.
84. The panel does not attempt to determine the correctness of the respective opinions of Mr A and Organisation C (Ms B), noting that both have documented their positions and the rationale behind them. This appears to be a situation that arises often where two professionals have differing opinions but where one is not necessarily correct and the other incorrect and therefore negligent or incompetent.

Ground (f) - The Adjudicator's determination that the complaint is insufficiently grave to warrant further investigation

85. Ground (f) as submitted by Mr A is presented in 13 above.
86. The various grounds for not referring a complaint to an investigating committee are clearly established in rule 57 of the Rules (Schedule 2).
87. The wording in Mr A's Ground (f) "*The adjudicator has claimed that the complaint is insufficiently grave to warrant further investigation...*" implies that the Adjudicator based his decision not to refer the matter to an investigating committee on rule 57(ba) of the Rules which reads "*(ba) the alleged misconduct is insufficiently grave to warrant further investigation*". That is not the case, the Adjudicator did not consider there was any applicable ground for discipline, a position which is consistent with rule 57(a) of the Rules [BOD 146] which reads "*(a) there is no applicable ground of discipline under section 21(1)(a) to (d) of the Act*".
88. The role of the panel is to make its own determination as to which, if any of the grounds for not referring the matter to an investigating committee, under rule 57 of the Rules, is applicable. The panel will exercise that decision based on the discussions addressing the substantive elements of the complaint, under Ground (a).

Conclusion

89. The panel considers that Ms B has met her obligations under rule 42B of the Rules with regard to taking reasonable steps to safeguard the health and safety of people and that no evidence has been presented to the contrary.
90. The panel has seen no evidence which would indicate a breach of rule 42E of the Rules by Ms B, that rule requiring a chartered professional engineer to only undertake engineering activities within their competence and undertake engineering activities in a careful and competent manner. The panel further notes that Mr A stated in paragraph 45 of his submission in response, while addressing alleged ethical shortcomings of Ms B, "*I do not think Ms B is negligent or incompetent...*"
91. The panel considers that there is no evidence to suggest that Ms B has failed to meet her obligations as a chartered professional engineer under rule 42F of the Rules, in particular 42F(a)(i) act with honesty, objectivity and integrity, and 42F(a)(ii) treat people with respect and courtesy.

Outcome of Appeal

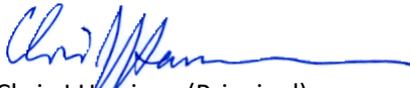
92. The panel finds that there is no applicable ground of discipline under s21(1)(a) to (d) of the Act and accordingly upholds the decision of the Adjudicator and dismisses the appeal, under rule 57(a) of the Rules.
93. In accordance with s35 of the Act either party may appeal this decision to the District Court within 28 days.

Costs

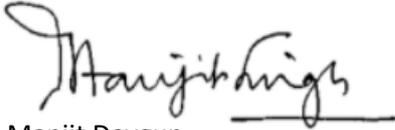
94. The panel has considered the matter of costs and has determined that any costs incurred by the parties shall lie where they fall.

Dated 14 December 2021

Signed by the Appeal Panel



Chris J Harrison (Principal)



Manjit Deygun



Alan A Winwood

Schedule 1 - Legislation

1. The 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.
2. The Rules are the Chartered Professional Engineers of New Zealand Rules (No.2) 2002 ("the Rules") that were enacted pursuant to s40 of the Act.
3. The Chartered Professional Engineers of New Zealand (Appeals) Regulations 2002 ("the Regulations") set out the requirements pertaining, amongst other matters, to the hearing and deciding of appeals.

Schedule 2 – Extracts of the Act and the Rules

s21 of the Act:

“21 Grounds for discipline of chartered professional engineers

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

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

Rule 42B

“42B Take reasonable steps to safeguard health and safety

A chartered professional engineer must, in the course of the engineer’s engineering activities, take reasonable steps to safeguard the health and safety of people.”

Rule 42E

“42E Act competently

A chartered professional engineer—

- (a) must—*
 - (i) ensure that the engineer’s relevant knowledge and skills are kept up to date; and*
 - (ii) only undertake engineering activities that are within the engineer’s competence; and*
 - (iii) undertake engineering activities in a careful and competent manner; and*
- (b) must not—*
 - (i) misrepresent, or permit others to misrepresent, the engineer’s competence; or*

- (ii) knowingly permit other engineers for whose engineering activities the engineer is responsible to breach paragraph (a)(ii) or (iii) or subparagraph (i).

Rule 42F

“42F Behave appropriately

A chartered professional engineer, in performing, or in connection with, the engineer’s engineering activities,—

(a) *must—*

- (i) *act with honesty, objectivity, and integrity; and*
- (ii) *treat people with respect and courtesy; and*
- (iii) *disclose and appropriately manage conflicts of interest; and*

(b) *must not—*

- (i) *offer or promise to give to any person anything intended to improperly influence a decision relating to the engineer’s engineering activities; or*
- (ii) *accept from any person anything intended to improperly influence the engineer’s engineering activities; or*
- (iii) *otherwise engage in, or support, corrupt practices.*

Rule 56

“56 Registration Authority must refer complaint to investigating committee unless grounds for not doing so

The Registration Authority must, as soon as practicable after receiving a complaint, carry out an initial investigation of the complaint in accordance with rule 58 and—

- (a) *refer the complaint to an investigating committee in accordance with rule 59(b); or*
- (b) *dismiss the complaint on a ground in rule 57.*

Rule 57

“57 Grounds for not referring complaint to investigating committee

The Registration Authority may dismiss a complaint without referring it to an investigating committee if the chairperson of investigating committees decides under rule 58 that—

- (a) *there is no applicable ground of discipline under section 21(1)(a) to (d) of the Act; or*
- (b) *the subject matter of the complaint is trivial; or*
- (ba) *the alleged misconduct is insufficiently grave to warrant further investigation; or*
- (c) *the complaint is frivolous or vexatious or is not made in good faith; or*

- (d) *the person alleged to be aggrieved does not wish action to be taken or continued; or*
- (e) *the complainant does not have a sufficient personal interest in the subject matter of the complaint; or*
- (f) *an investigation of the complaint is no longer practicable or desirable given the time elapsed since the matter giving rise to the complaint.*

Rule 58:

“58 Way in which decision on whether or not to refer complaint to investigating committee must be made

The Registration Authority must carry out an initial investigation of a complaint against the grounds in rule 57 in the following way:

- (a) *the Registration Authority must notify the person complained about of the general nature of the complaint before commencing the investigation; and*
- (b) *a complaints research officer must carry out the initial investigation of the complaint and recommend to the chairperson of investigating committees that the complaint proceed or be dismissed on a ground in rule 57; and*
- (c) *the complaints research officer, or chairperson of investigating committees, may seek to verify the information provided in the complaint by a statutory declaration from the complainant; and*
- (d) *after considering the complaints research officer’s recommendation, the chairperson may explore (with the complainant and the person complained about) the possibility of the complaint being referred to conciliation, mediation, or another dispute resolution process for 60 days or any other time period that the chairperson thinks fit; and*
- (e) *if alternative dispute resolution is not used or if it fails to resolve the dispute within the requisite time period, the chairperson must decide whether the complaint should be—*
 - (i) *referred to an investigating committee in accordance with rule 59(b); or*
 - (ii) *dismissed on a ground in rule 57”*

Schedule 3

Key correspondence and submissions

1. Paginated documentation pack provided (153 pages) provided by RA, containing:

Part One – Documents provided to Adjudicator

- 001 Complaint by Mr A – covering email from Mr A to Engineering New Zealand - 15 December 2020 [BOD 2]
- 001.1 Complaint by Mr A – letter from Mr A to Engineering New Zealand – 15 December 2021 [BOD 3-5]
- 001.2 Assessment in Accordance with Section 112 Building Act 2004 (Project No. P5460) Facility F – 14 December 2020 [BOD 6-21]
- 001.3 Assessment in Accordance with Sections 17 and 112 Building Act 2004 (Project No. P4279) Facility F – 5 August 2013 [BOD 22-41]
- 001.4 Organisation C Building Memorandum – 24 November 2020 [BOD 42-46]
- 002 Email exchange between Mr A and Engineering New Zealand – 25 March 2021 [BOD 47-48]
- 003 Email to Mr A from Engineering New Zealand with summary of concerns – 26 March 2021 [BOD 49-51]
- 003.1 Email to Mr A from Engineering New Zealand with amended summary of concerns – 27 March 2021 [BOD52-54]
- 003.2 Email to Mr A from Engineering New Zealand -30 March 2021 [BOD 55-58]
- 004 Email to Ms B from Engineering New Zealand with concerns - 31 March 2021 [BOD 59-62]
- 005 Response to complaint from Ms B – covering email – 23 April 2021 [BOD 63-67]
- 005.1 Response to complaint from Ms B – letter – 23 April 2021 [BOD 68-73]

- 006 Email to Mr A from Engineering New Zealand forwarding Ms B's response – 30 April 2021 [BOD 74]
- 007 Email from Mr A to Engineering New Zealand - 30 April 2021 [BOD 75–76]
- 008 Email to Ms B from Engineering New Zealand - 27 April 2021 [BOD 77–82]
- 009 Email from Ms E to Engineering New Zealand - 6 May 2021 [BOD 83–87]
- 009.1 Letter from Ms E re Ms B - 6 May 2021 [BOD 88]
- 009.2 Report by Mr K into the Complaint by Mr A of Harassment by Organisation C Staff (extract) 7 November 2020 89 – 98
- 010 Email to Ms E from Engineering New Zealand - 6 May 2021 [BOD 99–104]
- 011 Email to Ms B from Engineering New Zealand with update – 21 May 2021 [BOD 105]

Part Two – Administrative documents not provided to Adjudicator

- 012 Email to Mr A from Engineering New Zealand - 1 May 2021 [BOD 107]
- 013 Email to Mr A from Engineering New Zealand - 21 May 2021 [BOD 108]
- 014 Email to Ms B from Engineering New Zealand – 22 May 2021 [BOD 109-111]
- 015 Email to Mr A from Engineering New Zealand - 23 June 2021 [BOD 112–114]
- 016 Email exchange with Ms B from Engineering New Zealand - 2 July 2021 [BOD 115–117]
- 017 Email exchange with Ms B from Engineering New Zealand - 3 August 2021 [BOD 118-119]
- 018 Email to Mr A from Engineering New Zealand - 3 August 2021 [BOD 120–122]

Part Three – Additional Information Not Provided To Adjudicator

- 019 Email exchange between Mr A and Engineering New Zealand 9 & 14 April 2021 [BOD 124–125]

- 019.1 Organisation C Building Memorandum - 30 March 2021 [BOD 126–132]
- 020 Email exchange between Mr A and Engineering New Zealand - 14 & 22 April 2021 [BOD 133]
- 021 Email from Mr A - 22 April 2021 [BOD 136–137]

Part Four – Adjudicator’s Decision

- 022 Adjudicator’s decision - 24 August 2021 [BOD 139–146]
- 023 Email to Mr A from Engineering New Zealand enclosing decision - 24 August 2021 [BOD 147]
- 023.1 Letter to Mr A from Engineering New Zealand - 24 August 2021 [BOD 148]
- 024 Email to Ms B from Engineering New Zealand enclosing decision - 24 August 2021 [BOD 149]
- 024.1 Letter to Ms B from Engineering New Zealand - 24 August 2021 [BOD 150]

Part Five - Appeal

- 025 Notice of Appeal by Mr A - 20 September 2021 [BOD 152–153]
2. Notice of Appeal dated 20 September 2021
 3. Email to the parties from CPEC Chair confirming Notice of Appeal (20 September 2021)
 4. Email from the RA confirming it wishes to make submissions (20 September 2021)
 5. Email from the RA to the parties containing link to the paginated bundle of documents and seeking advice from as to anything that was missing which should be included (28 September 2021)
 6. Email from Mr A to the RA noting Part 3 of the bundle was missing the memorandum that he had attached to the email (28 September 2021)
 7. Email from the RA to Mr A and CPEC Chair confirming that the bundle had been updated with the missing memorandum and re-paginated. (28 September 2021)

8. Letter from panel principal to the parties confirming appeal panel membership, outlining the appeal process, establishing the schedule for submissions and addressing communications. (30 September 2021)
9. Submission from Mr A (13 October 2021)
10. Submission on behalf of Ms B (29 October 2021)
11. Submission from the RA (1 November 2021)
12. Submission in response from Mr A (2 November 2021)
13. Email from panel principal to parties outlining hearing options namely hearing on the papers or hearing by video link and seeking their respective positions with regard to the nature of the hearing (12 November 2021)
14. Emails in response from counsel for Ms B, Mr A and the RA agreeing to the matter being heard on the papers (12 November 2021)
15. Email from panel principal confirming that the appeal would be heard by the panel on the papers (12 November 2021)