

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

**Appeal 13/21**

**AND**

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

**Between**

Mr A  
**Appellant**

**And**

Mr B  
**Complainant**

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Decision of the Chartered Professional Engineers Council  
Dated 29 June 2022

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1. Mr A has appealed a decision made by an investigating committee (“the Investigating Committee”) of the Registration Authority (“the RA”), to refer a complaint about him, by Mr B, to a disciplinary committee [BOD 116-127].
2. The appeal panel of the Chartered Professional Engineers Council (“the Council”) has been provided with a Bundle of Documents file held by the Registration Authority (RA) in relation to the case. References to specific pages within this file are annotated “[BOD nn]”.

## **The Legislation**

3. Appeals to the Council are by way of rehearing (s37(2) of the Chartered Professional Engineers of New Zealand Act 2002 (the Act)).
4. 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.
5. 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.
6. 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.
7. 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."*

8. References made to the Engineering New Zealand Disciplinary Regulations, in the Investigating Committee's decision and in submissions to the appeal panel, are not relevant to the appeal, which is conducted under the provisions of the Act, the Rules (4 above) and the Regulations (5 above).

9. The facts and evidence demonstrate that the criteria established under sections 21(1)(a), (c) 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 Mr A has breached an aspect of the code of ethical conduct as set out in the rules 42(A)-42(I).

10. Rule 60 of the Rules states:

***"60 Investigating committee must determine whether or not to refer complaint or inquiry to disciplinary committee***

*An investigating committee must, as soon as practicable after receiving a complaint or inquiry, investigate the matter and—*

- (a) refer the matter to a disciplinary committee; or*
- (b) dismiss the matter on a ground in paragraphs (a) to (f) of rule 57."*

11. In hearing this appeal the panel must act as if it were the Investigating Committee under Rule 60.

12. The question to be answered by the panel is not whether there are grounds to discipline Mr A but whether there is a ground for not referring the complaint to a disciplinary committee.
13. The aspect of the complaint relating to misrepresentation of Mr A's ability and professional status was dismissed under rule 57(ba) of the Rules.
14. In relation to the aspect of the complaint relating to Mr A's communication with Mr B, regarding the former's removal from the Organisation C list of Heavy Vehicle Specialist Certifiers, the Investigating Committee determined that none of the grounds for dismissal, contained in rule 57 of the Rules are applicable. Accordingly the Investigating Committee determined that the matter must be referred to a disciplinary committee.
15. The matter of misrepresentation referred to in 13 above was dismissed by the Investigating Committee and has not been appealed. It is therefore not considered by the panel.
16. The panel must make its own decision, as to whether or not a ground exists to dismiss the element of the complaint related to Mr A's communication (14 above).

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

17. As noted in para 6.1 of the RA's submission, the professional disciplinary process does not exist to punish individuals for their conduct or 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.
18. This is addressed in *Z v Dental Complaints Assessment Committee (Z)*<sup>1</sup> where the Supreme Court stated:

*"The purpose of disciplinary proceedings is materially different to that of a*

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<sup>1</sup> [2008] NZSC 55

*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.”*

## **Correspondence and submissions**

19. Key correspondence and submissions in this appeal are listed in Schedule 1.

## **Grounds of appeal and outcome sought**

20. In Mr A's Notice of Appeal dated 17 November 2021, he submitted, as grounds that:

“.....

- a. *ENZ has misunderstood Mr A's evidence. ENZ suggests that Mr A failed to deny the allegations made by the Complainant when that is not the case. It therefore erred in this finding.*
- b. *ENZ cannot have reasonably concluded misrepresentation by Mr A in the circumstances for the following reasons:*
  - i. *The Complainant does not provide specifics as to that which was said but instead paraphrases the nature of the conversation. That is not evidence in the strict sense.*
  - ii. *The matter initially comprised of a difference between the Complainant's recollection and Mr A's recollection. It is difficult to meet any threshold in those circumstances that would reasonably result in the finding of a disciplinary nature in relation to Mr A.*
  - iii. *An affidavit was offered by a third party (Mr A's wife) in support of Mr A's position, which does not appear to have been properly considered by ENZ. It is not addressed in their decision, and they did not make enquiries in relation to the same.*
  - iv. *The contemporaneous evidence was that, following a clarification conversation several days later, Mr A voluntarily clarified his*

*Revocation. That fact does not appear to have been considered and would suggest not only the truth of Mr A's understanding, but also his honesty and integrity in relation to clause 5(a)(i) of ENZ's Code.*

- c. The matter is trivial or insufficiently grave to warrant referral to the Disciplinary Committee, in the circumstances where disclosure of the Revocation was made swiftly*
  - d. Too much time has lapsed to make a disciplinary hearing practicable or desirable, especially given the basis of the Complaint is recollections as to conversations that were had in October 2018.*
  - e. The Appealed Decision leads to a negative precedent whereby any miscommunication with a Chartered Professional Engineer can be framed as an ethical issue capable of being subjected to a disciplinary hearing when there is no evidence of an intention to mislead.*
  - f. The Upheld Complaint concerns communication and professionalism and ENZ has stated that such matters can be resolved by way of ADR.*
  - g. Mr A has offered an apology to the Complainant for any misunderstanding.*
  - h. The Appealed Decision does not outline how ENZ has reached its findings (for instance in advancing the Complainant's narrative and ignoring Mr A's) and as a decision-making body it should provide the basis for the outcome, such that the decision-making process can be transparently reviewed."*
21. The remedy sought by the appellant as set out in the notice of appeal was that:  
*"the Upheld Complaint is dismissed, or in the alternative, Mr A seeks that the Upheld Complaint is referred to ADR instead of the Disciplinary Committee"*
22. The panel notes that the outcomes which it can determine under the appeal are referred to in 6 above.

## Jurisdictional Issues

23. Under the statutory framework in which the Council may hear an appeal it cannot hear matters that relate to the actions or processes of the 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, usually, cured by the rehearing.
24. The panel agrees with the RA (submission para 3.13) that the Council does not have jurisdiction to consider alleged procedural issues and that the appropriate avenue to consider procedural issues is by way of judicial review.
25. The panel notes similarities between this appeal and *D v City Council H (D)*<sup>2</sup>, in which the Council determined that it does not have jurisdiction to consider procedural issues.
26. Where the grounds of appeal include matters of process or procedure, the panel acknowledges that while they provide some context for the appeal, they do not contribute to the substantive determinations in this case.

## The original complaint

27. In December 2018 Mr B, raised concerns with Engineering New Zealand that Mr A had misrepresented his abilities and professional status to him and that Mr A's conduct around Mr B's enquiries to him was unprofessional. [BOD 3, 4]

## Decision being appealed and evidence considered

28. The decision under appeal is the 15 October 2021 decision of the Investigating Committee [BOD 117-127], in particular the decision to refer the matter of Mr A's communication regarding his removal from Organisation C's list of Heavy Vehicle Specialist Certifiers, to a disciplinary committee.

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<sup>2</sup> CPEC Appeal 01/19

29. 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.
30. The evidence considered by the panel in arriving at its decision included:
  - (a) Notice of Appeal received 17 November 2021,
  - (b) The paginated Bundle of Documents [BOD 1-130],
  - (c) Submission from counsel for Mr A received 11 February 2022,
  - (d) Submission from the RA received 25 February 2022
  - (e) Submission from Mr B received 2 March 2022, and
  - (f) Submission in response from counsel for Mr A received 11 March 2022.

## Hearing

31. With the agreement of the parties the panel conducted the hearing on the papers.
32. The panel met by video link on 10 June 2022, and 27 June 2022 to deliberate and consequently reach a consensus decision.

## Discussion and Findings

### Standard of care expected of a chartered professional engineer

33. Part 3 of the Rules, being the Code of ethical conduct, establishes the standard of care expected of a chartered professional engineer.
34. The panel considers that the matter being appealed is addressed under rule 42F(a)(i) of the Rules which reads:

***“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...*

35. With the exception of matters covered by rule 42F, the matter being appealed does not raise questions as to Mr A's competence or other matters covered by the code of ethical conduct and consequently the panel confines its consideration to the provisions of rule 42F(a)(i).
36. In considering if there are any grounds to dismiss the complaint the panel must determine if prima facie evidence exists as a basis for a disciplinary committee to investigate and make a finding that the appellant's misconduct, if proven, was such that it would tend to affect the good reputation and standing of Chartered Professional Engineers generally in the eyes of reasonable and responsible members of the public. Viewed another way, as a question - would the conduct complained of, if acceptable, tend to lower the standing and reputation of Chartered Professional Engineers in the eyes of reasonable and responsible members of the general public?

#### **Specific elements of the appeal**

37. The various elements of the matter being appealed are addressed below against the respective grounds, in the order presented in the submissions on behalf of the appellant.

#### Ground 1 – “ENZ has misunderstood Mr A's Evidence....”

38. The element presented at 14(b) of the appellant's submissions “*Misrepresented his professional abilities*” was dismissed by the Investigating Committee (refer paragraphs 63 and 69 of their decision) and is not the subject of the appeal.
39. Counsel for Mr A submitted (15) “*..the only admission that Mr A made was that he had told the Complainant that he had no issues with Organisation C in the First Call, but that he had misunderstood the Complainant either because of call quality or the context in which the information was requested*” and further (16) “*...by misinterpreting Mr A's evidence to be an admission of something more than it was, ENZIC [the RA] has erred.*”
40. Mr B submitted (page 1 – under Paragraph 4. Alleged “misunderstanding”) “*The*

*appellant seeks to categorise the complaint as a misunderstanding, swiftly clarified. There is no evidence of a misunderstanding, and one would expect that an explanation to that would have been made at the earliest opportunity. In fact the claim was made very late in the process, and only in response to the Investigating Committee's provisional decision (as noted in paragraph 40 of its decision)."*

41. The RA referred in its submission (8.8) to an apparent reluctance on Mr A's part to disclose his revocation [as a Heavy Vehicle Specialist Certifier], submitting that it considers that the Investigating Committee's interpretation was a reasonable one.
42. The role of the panel is not to make a determination on the actions of the Investigating Committee, as might be interpreted from the stated ground, rather it is to consider the evidence and arrive at its own conclusion on the substantive matter(s). The question of Mr A's responses to Mr B on the matter of revocation is the key consideration before the panel.
43. The matter being complained about by Mr B relates to an approach from Company E, asking whether he would accept Mr A as certifying engineer for some hi-rail equipment Company E were manufacturing.
44. Mr B's email to the RA on 17 December 2018 [BOD 3-4] established his role and that of his employer Company F in the certification and operation protocols related to hi-rail vehicles, and raised his concerns about Mr A.
45. The email referred to in 44 above recorded that Mr B had heard that there may have been issues between Mr A or his firm (Company G) over heavy vehicle certifications or exams related to qualifications for heavy vehicle certification work. The email also stated that he had called Mr A on 10 October 2018 and told him that he *"had heard hearsay that he, or his staff had had issues with Organisation C and/or difficulties passing Organisation C certifier exams, possibly around truck drawbars, and asked him if there was any substance to it."*

46. Mr B's email further stated *"His response was no, there were no issues, he didn't do transport, there was no issue with his qualifications, no issues around drawbars, and no Company G issues."* The panel has seen no evidence that the preceding statement by Mr B has been challenged by Mr A.
47. Mr B noted that he was not comfortable with Mr A's response to his question (46 above) and made further enquiries. He stated [BOD 5 – paragraph 2] that he *"discovered that Mr A had been subject to complaints about his heavy vehicle and EWP work (specifically in April 2011), that there had been an issue around Mr A and staff members taking materials into an exam room, and that he had been revoked by Organisation C as a "vehicle inspector and inspecting organisation" in 2012."*
48. Mr A was made aware of the concerns of Mr B including the issues around the telephone calls of 10 and 25 October 2018, in an email from Ms Stacey Campbell of Engineering New Zealand on 8 August 2019. [BOD 27, 28].
49. The panel has read three lengthy letters from counsel for Mr A dated 16 December 2019 [BOD 8-15], 26 November 2020 [BOD 43-89] and 3 September 2021 [BOD 106-109] respectively. Only in the last of these three letters [BOD108, para 3(f)] was the first indication given by Mr A in respect of any alleged misunderstanding in the first call or related issues of call quality or the context in which the information had been requested by Mr B. These alleged issues are also addressed in the appellant's submission (15).
50. The panel considers that the alleged issues regarding Mr A referred to in 47 above, whether ultimately proven or not, are matters of legitimate concern for Mr B to have investigated in his role in responding to Company E's approach regarding approval for Mr A to certify hi-rail vehicles.
51. Referring to the breadth of Mr B's statement in 46 above, the panel is satisfied that irrespective of any alleged call quality or context issues the evidence indicates that Mr A can have been in no doubt that Mr B had concerns regarding issues between Mr A and/or his firm and Organisation C. The panel considers that awareness should have triggered an immediate disclosure of any such

issues, including those relating to the exams and to revocation as a certifier.

52. Further to 51, the panel does not consider it conceivable or reasonable for an experienced professional in Mr A's position, being questioned about alleged issues with Organisation C to state that there were none, while he engaged on some specifics (qualifications, drawbars, Company G issues), but omitted to mention both the exam issue and the revocation. Had he disclosed the exam issue and revocation, details of both being supported by evidence, he could have taken the opportunity to provide whatever clarification he may have considered appropriate.
53. The panel has read the affidavit of Ms I, which was sworn on 3 February 2022 and received on 11 February 2022, but considers that it has not provided any further evidence to assist in the decision making process.
54. That Mr A saw fit to offer an apology in November 2020 (letter dated 26 November 2020, para 24) while potentially conciliatory also indicates that he acknowledged an issue existed.
55. The panel considers that the evidence presented is not sufficient for the ground to be proven.

Ground 2 – “ENZ cannot have reasonably concluded misrepresentation by Mr A...”  
and Ground 3 – “The Appealed Decision does not outline how ENZ has reached its findings”

56. The appeal is conducted by way of rehearing and the Council has no jurisdiction to address any alleged shortcomings of the RA, such as allegations that the Investigating Committee did not outline how it reached its findings. Accordingly, the focus of the panel with regard to Grounds 2 and 3, is on the substance of the complaint in the context of the evidence available.
57. Counsel for the appellant submitted (21) *“It is relevant that once the ENZIC refers a complaint to the ENZ Disciplinary Committee (the ENZDC), the ENZDC has wide ranging power to impose a severe sanction detrimental to the*

*livelihood of ENZ members. Such sanctions include, but are not limited to, a fine of up to \$10,000, publication of the ENZ member's name and details of their alleged breach, removal and/or suspension of membership."*

58. Counsel further submitted (29) *"Mr A has had membership with ENZ for almost five decades, without any question as to his professional conduct, but for the Upheld Complaint. Mr A's membership to ENZ is his professional lifeblood. That the ENZDC could potentially publish Mr A's name and remove and/or suspend his membership is a severe consequence."*
59. With regard to 57 and 58 above, the panel notes that the references to members and by implication to the Engineering New Zealand Complaints Resolution and Disciplinary Regulations, are not relevant to an appeal under the Act. The applicable (broadly similar) provisions are those contained in the Act, which apply specifically to engineers with CPEng registration. However, the panel also notes that the maximum fine that may be imposed under the Act is \$5,000.
60. As submitted by the RA (8.19) the Investigating Committee was not considering the available disciplinary orders under section 22 of the Act, its role being to determine whether the grounds of dismissal contained in rule 57 applied. That is also the role of the panel in hearing the appeal.
61. The potential sanctions and the appellant's history referred to by his counsel in (57 and 58 above) would be legitimate matters to take into account if the complaint were being considered by a disciplinary committee and if that disciplinary committee upheld the complaint and accordingly was considering applicable penalty orders.
62. The factors referred to in 61 above are not in the panel's view a reason to overturn the Investigating Committee's decision to refer Mr B's complaint about a specific event which did not concern Mr A's history, to a disciplinary committee.
63. The important distinction leading to the preceding statement is that the role of the Investigating Committee (and in this instance the panel) is solely to

determine whether or not a ground exists under rule 57, paragraphs (a) to (f) of the Rules (rule 60 of the Rules), to dismiss the matter.

64. The panel further notes that even if the matter were referred to a disciplinary committee, the committee may still dismiss the complaint and in the event that it upholds the complaint would determine appropriate penalties.
65. Further to 63 above it is the panel's view that the subject matter of the complaint is not at the serious end of the scale. Penalties, if any, would reflect this and would also take into account Mr A's offer to apologise. The gravity of the matter complained about is discussed further under Ground 4.
66. The substance of the complaint which centres on the alleged lack of disclosure by Mr A in the first phone call (10 May 2018) has been addressed by the panel under Ground 1 (39 to 55 above).
67. The panel considers that neither Ground 2 nor Ground 3 provides a basis for dismissal of the complaint.

Ground 4 – “The matter is trivial or insufficiently grave to warrant referral to the Disciplinary Committee, in the circumstances where disclosure was made swiftly”

68. This ground refers to rule 57(ba) of the Rules.
69. The appellant referred to the Government Expectations for Good Regulatory Practice (GEGRP) (39) in terms of proportionate, fair and equitable treatment of parties being regulated and also submitted (40) *“In consideration of alignment with existing standards, it is relevant that: “...
  - (a) The Medical Council of New Zealand, another regulatory body, includes as one of its guiding factors the requirement to impose the least restrictive penalty in the circumstances.
  - (b) The High Court, in considering complaints against a lawyer and a nurse respectively, held that a penalty ought to be the least restrictive that can reasonably be imposed in the circumstances.”*

70. In paragraph 41 of the appellant's submission reference was made to two cases *"in which it has been held that an ENZ member has not acted with honesty and integrity"*.
71. The first case referred to in 70 above (*Registration Authority v Mr J Disciplinary Committee Determination, 15 September 2016*) involved an own motion complaint by the Registration Authority which led to a finding that engineer had misrepresented his competence to a building consent authority, breaching rule 45 of the Rules. Penalty orders were made against the engineer.
72. In the second case referred to in 70 (*Appeal Committee Decision on Complaint about Mr K, 2 August 2019*), the appellant, about whom the complaint was made, was a member of Engineering New Zealand (not a Chartered Professional Engineer). The Disciplinary Committee had found, and the Appeal Committee confirmed, that Mr K had signed a report which stated that he had visited the site when he had not. Disciplinary orders were made against Mr K.
73. Counsel for Mr A submitted (43) *"An assessment of the above cases against the Appeal reveals that:*
- (a) *There has been no suggestion that Mr A deliberately attempted to mislead the Complainant. However, ENZIC's decision treats Mr A as if he did.*
  - (b) *There has been no weight given to parity. The ENZIC has given no reason as to why it did not consider the previous cases relevant to its conclusion and/or what cases it did consider relevant.*
  - (c) *Because the ENZIC did not give reasons, neither Mr A nor the Council can be sure as to why the ENZIC decided that Mr A's inadvertence in disclosing his previous disqualification, but swiftly disclosing that in the Second Call, came up to the same standard of deliberateness exposed in the above previous cases."*
74. The RA noted (8.14) *"In his submissions, Mr A said the complaint should be dismissed on the basis that it is insufficiently grave to warrant further investigation, or, alternatively, the complaint should be referred to alternative*

*dispute resolution. Mr A submits those outcomes would be the least restrictive penalty imposed and consistent with one of seven guiding principles outlined by the High Court in Daniels v Upheld Complaints Committee and Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand.”*

75. The RA submitted (8.18) that *“the principles in Roberts are broadly applicable to a disciplinary committee’s power to make disciplinary orders under section 22 of the CPEng Act. The principles have general application to professional disciplinary proceedings in the light of the Supreme Court’s decision in Z v Dental Complaints Assessment Committee.”*
76. Further the RA submitted (8.19) that the Committee was not considering the available disciplinary orders under s22 and submitted *“the question that was before the Committee was whether the grounds contained in rule 57 applied. The Committee were therefore not required to consider the guiding principles outlined in Roberts as it was not considering penalty.”*
77. The RA submitted (8.20) that RA v Mr A and the Appeal Committee’s decision on Mr K were decisions relating to a disciplinary committee’s decision under s21 of the Act or an appeal on orders made by a disciplinary committee adding *“... this assessment was outside of the scope of the Committee’s assessment of the complaint. In the present complaint, the Committee considered there was an applicable ground of discipline, in that the behaviour appears inconsistent with his obligations under the Code to act with honesty and integrity. However, the Committee explicitly states in their decision, that whether Mr A’s actions are a breach of the Code and reach the threshold for disciplinary [action] is a matter for a disciplinary committee to decide.”*
78. The panel accepts and agrees with the RA’s submissions in 77 above and reiterates the distinction that its task in hearing the appeal is to establish whether or not any ground under rule 57 of the Rules is applicable.
79. At paragraph 45 counsel submits *“...there has been no deliberateness by Mr A in failing to make a relevant disclosure, but a swift correction of that failure at the earliest possible stage, [sic] the matter is insufficiently grave for referral to*

*the ENZDC.”*

80. The matter of Mr A’s actions and his response regarding disclosure are addressed under ground 1 (39 to 55 above).
81. The panel considers that ground 4 has not been proven, a key factor being the role of the Investigating Committee, and the Council in this instance, as addressed in 76 to 78 above.

Ground 5 – “Too much time has lapsed to make a disciplinary hearing practicable...”

82. The panel considers that much of the submitted material related to this ground relates to the procedures followed by the RA, which lie beyond the jurisdiction of the Council to consider. Refer to 23 to 26 above.
83. The only avenue available for the panel to overturn the decision on the basis of the allegation that too much time has elapsed to make a disciplinary hearing practicable, would be under rule 57(f) of the Rules (*“an investigation of the complaint is no longer practicable or desirable given the time elapsed since the matter giving rise to the complaint”*).
84. Counsel for the appellant submitted 49 *“The Upheld Complaint was with the ENZIC for approximately 16 months before its decision was given. This is in addition to the 18 months that the Upheld Complaint was with ENZ and/or its Adjudicator. The decision was not provided in a reasonably practicable timeframe given the time elapsed since the Events....”*
85. Further the appellant submitted (50) *“Although recollections of the Events were given throughout that timeframe. The parties were asked to give further information and/or respond to allegations up until approximately two years following the Events and provide responses regarding the Events almost three years following the Events. It is inappropriate to refer the Upheld Complaint to a Disciplinary Committee in light of the nature of the evidence being disputed recollections of the Events that occurred three years prior.”*
86. The RA submitted (8.49) *“Mr B provided his concern, which included his*

*recollection of events, in December 2018. Mr B's complaint has not changed throughout the investigation. ...."*

87. The RA also submitted (8.56) *"The only new information relating to the events which occurred in October 2018, provided after Mr A's response in December 2019, was Mr A's evidence that he was driving during both conversations and that Mrs I was also present during the first conversation. The Registration Authority considers that Mr A had multiple opportunities to provide this information at an earlier date and is uncertain why he did not."*
88. The panel notes that it was not until his counsel's letter of 3 September 2021 (paragraph 3(f)) that Mr A introduced his evidence concerning call quality and the offer of an affidavit by Ms I. It is not clear to the panel why these matters referred to in 87 were not introduced by Mr A in his earlier communications with the RA.
89. The panel also notes a request by the Investigating Committee on 28 October 2020 for further information about Mr A's business partner, all of which would have been discoverable facts, irrespective of time and not reliant on recollection. (RA 8.50, 8.51)
90. Having considered the matters addressed in 83 to 89 above the panel does not consider that the threshold to overturn the decision under rule 57(f) of the Rules has been met and therefore considers the ground to be without merit.

Ground 6 – *"The Appealed Decision leads to a negative precedent..."*

91. The appellant submitted (53) *"The decision sets a highly restrictive precedent on engineers that they can never misunderstand a question posed to them over the phone, when giving a response."* and (54) *"It imposes such a high standard that engineers would rarely respond to a question without substantial clarification as to what exactly they are being asked. This would make the process unduly cumbersome and time consuming and would require every such communication to be dealt with in a formal manner, as opposed to over the phone where there is a degree of likelihood that misunderstandings and/or*

*misinterpretations can occur.”*

92. In summary (55) the appellant suggested there is real potential for the “floodgates” to open to complaints about engineers.
93. The RA submitted (8.28) *“the Registration Authority’s concerns and complaints process is confidential to the parties involved. Accordingly, the Registration Authority will only share information relating to the complaint, including decisions, in accordance with our Rules and Disciplinary Regulations and applicable legislation including the Privacy Act 2020, the CPEng Act, and the CPEng Rules.”*
94. Because every complaint must be assessed on its merits, the panel rejects the appellant’s suggestion that this case represents a “floodgate” situation whereby it would be the basis for a number of future complaints about professional engineers.
95. Members of the public have a reasonable expectation that anything they are told by a professional engineer is to be trusted. While such an expectation causes engineers to think carefully about what they say, it does not equate to dealing with matters *“in a formal manner, as opposed to over the phone”* as submitted by the appellant (91 above).
96. The panel considers that Ground 6 has not been proven.

Ground 7 – *“The Upheld Complaint concerns communication and professionalism and ENZ has stated that such matters can be resolved by way of ADR”*

97. The appellant submitted (56) that the RA *“could not have reasonably concluded that the matter was not appropriately referable to ADR where there has clearly been a miscommunication and professionalism has come into question. Further where the parties have a differing recollection as to the Events and the least restrictive (and most appropriate) outcome that it could have imposed would be referral to ADR.”*
98. Further the appellant submits (57) *“... The risk and/or harm was negligible in*

*consideration of the fact that any indeliberate nondisclosure was swiftly rectified and was, in any event, irrelevant to the Complainant's assessment of the Applicant for Company E's purposes."*

99. The claim that *"any indeliberate nondisclosure was swiftly rectified"* has been addressed by the panel in paragraphs 39 to 55 but the assertion that *"the risk and/or harm was negligible"* is considered by the panel to be a matter for a disciplinary committee to take into account in first determining whether or not a breach has occurred and if so what penalty order(s) would be applicable.
100. As submitted by the RA (8.31) the panel agrees that there is no requirement to refer every complaint regarding communication and professionalism to ADR. The RA implies (8.32) that its reasons for not referring this complaint to ADR are set out in paragraph 50 of the Investigating Committee's decision.
101. Based on its conclusion in 52 above the panel considers the matter more appropriately handled by referral to a Disciplinary Committee and therefore sees no merit in considering ADR, which would be dependent on first gaining Mr B's agreement.
102. The panel considers that Ground 7 has not been proven.

Ground 8 – "Mr A has offered an apology to the Complainant for any misunderstanding"

103. The panel commented on the offer of an apology in 54 above.
104. This ground has no bearing on the panel's decision as to whether or not the Investigating Committee's decision should be overturned.

### **Conclusions and Outcome**

105. The panel has addressed all grounds cited by the appellant.
106. Alleged procedural shortcomings on the part of the RA are beyond the jurisdiction of the Council to consider and therefore while in some cases contributing context they do not influence the decision of the panel relating to

the substance of the appeal, in this case.

107. The conclusion of the panel is based principally on the matters addressed in paragraphs 38 to 55 above.
108. The options available to the panel under rule 60 of the Rules are to refer the matter to a disciplinary committee or to dismiss the matter on a ground in paragraphs (a) to (f) of rule 57 of the Rules.
109. The panel has concluded that none of the grounds under rule 57 of the Rules is applicable, based on its assessment of the evidence.
110. Therefore, the decision of the panel is to dismiss the appeal by Mr A and uphold the Investigating Committee's decision to refer the complaint to a disciplinary committee.
111. In accordance with s35 of the Act either party may appeal this decision to the District Court within 28 days.

### **Costs**

112. As the decision does not finalise the resolution of the complaint the panel considers that any application for award of costs is inappropriate and indicates a preference for the costs of the parties to lie where they fall.

**Dated 29 June 2022**

Signed by the Appeal Panel



Chris J Harrison (Principal)



Sue Simons



Sarah Sinclair

## **Schedule 1 - Key correspondence and submissions**

- (a) Documentation pack provided (130 pages) provided by RA, containing.
- (b) Notice of Appeal dated 17 November 2021
- (c) Email from CPEC Chair to the parties and RA confirming receipt of Notice of Appeal (22 November 2021)
- (d) Letter from CPEC Chair and panel principal confirming panel membership, confirming provision of link to bundle of documents by RA, and outlining the appeal process (14 December 2021)
- (e) Email from counsel for Mr A seeking extension of submission deadline (15 December 2021)
- (f) Email from panel principal seeking engagement to resolve submission schedule (17 December 2021)
- (g) Email from panel principal outlining telephone call with Mr B regarding extension of the submission schedule (17 December 2021)
- (h) Email from panel principal proposing revised submission schedule (20 December 2021)
- (i) Appellant's submissions (11 February 2022)
- (j) RA's submissions (25 February 2022)
- (k) Email from Mr B seeking addressing clarification of response required and time required to review appellant's submission documentation (25 February 2022)
- (l) Email from panel principal responding to Mr B amending deadline for his submission (26 February 2022)
- (m) Complainant's submissions (2 March 2022)
- (n) Appellant's submissions in response (11 March 2022)

- (o) Email from panel principal to counsel for Mr A asking if additional time is needed to revise submission re bundle of authorities requested from RA by counsel for appellant. (28 March 2022)
- (p) Email from counsel for Mr A confirming no further submission intended (29 March 2022)
- (q) Email from panel proposing that the appeal be heard on the papers and seeking any objections. (27 April 2022)
- (r) Email from RA agreeing to the appeal being heard on the papers (4 May 2022)
- (s) Email from Mr B agreeing the appeal being heard on the papers (5 May 2022)
- (t) Email from counsel for Mr A stating no objection to the appeal being heard on the papers. (31 May 2022)