

APPEAL NUMBER 11/14

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

AND

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

Between

Mr R CPEng, MIPENZ, IntPE(NZ)

Appellant

And

Mr K CPEng ,FIPENZ, IntPE(NZ)K

Respondent

Decision of the Chartered Professional Engineers Council dated 10 November 2014

The Appeal

1. This is an appeal to the Chartered Professional Engineers Council ("the Council") under the Chartered Professional Engineers of New Zealand Act 2002 ("the Act"). The appeal is of a decision of the Investigating Committee (IC) dated 13 June 2014.
2. The IC dismissed the complaint in accordance with Rule 57(ba), that the alleged misconduct was insufficiently grave to warrant further investigation.
3. Mr R's Notice of Appeal and appeal documents dated 4 July 2014 were received by the Council. The Appeal Panel has determined that the appeal cannot be dismissed under s 35 (3) of the Act for being received out of time.
4. The parties were informed by letter dated 14 July 2014 of the receipt of the appeal and of the appointment of an appeal panel consisting of Mr Jon Williams as Principal, Mr Anthony Wilson and Ms Sharyn Westlake as members.
5. The 14 July 2014 letter outlined the timing and process to be followed. This letter also proposed that following the receipt of all submissions and responses the matter be dealt with on the papers. Both parties were offered the opportunity for a hearing to be held in person if required. Both parties agreed to the matter being considered on the papers.
6. Mr R elected to make no further submission. The Registration Authority (RA) made a submission that was forwarded to all parties on 20 August 2014, Mr K made his submission on 27 August 2014. Mr R made a Submission in Reply dated 5 September 2014.
7. The Panel met via phone conference on 4 November 2014 to consider the appeal.

Background

8. The Appeal relates to a Geotechnical Report submitted by Mr K's company dated 18 July 2013. The report was signed by Mr K. The report related to a property at 74 Petrie St, Richmond in Christchurch.
9. The report was commissioned by the owners of the property to assist with their discussions with banks, insurers and the Building Control Authority. The report assesses the feasibility and likely solutions for a foundation design to allow a house to be relocated to the site.
10. The site is classed as Technical Category (TC) 3. The Ministry of Business Innovation and Employment (MBIE) have issued a document titled "Guidance on Repairing and Rebuilding houses affected by the Canterbury Earthquakes". The document provides guidance on required investigations and testing. It also provides guidance on generic solutions for foundation design.

11. The basis of the complaint is that Mr R considers that Mr K is not “competent” to issue a geotechnical report for TC3 designated land. The basis of this assertion is section 13.1 of the MBIE Guidance document. Which states:

The scope of a deep geotechnical investigation must be determined by the geotechnical professional responsible for giving advice on the property in question. The geotechnical professional must be either:

- CPEng. geotechnical engineer
 - or for the purposes of this document, in relation to ground investigations for singular residential properties, a PEngGeol. engineering geologist with competence, suitable relevant training and experience in foundation investigations and liquefaction assessment.
12. The need or otherwise for deep geotechnical investigations is covered by the MBIE document.
13. Mr K lists Civil and Structural as his practice “fields”. His “practice area” is listed as “Seismic assessments of buildings; flood assessment for subdivisions; design of seismic strengthening of buildings being altered; design of civil works for subdivisions and reinforced concrete”.
14. Mr R notes that “geotechnical engineering” is not one of Mr K’s practice fields, or specifically noted in his practice area description. He therefore considers that Mr K has not been assessed as competent in the area of geotechnical engineering, should not practice in this area and that he has breached section 46 of the Rules by misrepresenting his competence.
15. It should be noted that Mr R has made no comment on the technical correctness or otherwise of the report produced by Mr K. The IC included a practicing geotechnical engineer. Their report does not have any adverse comment on the technical quality of the report prepared by Mr K.

Notice of Appeal

16. Mr R has made a number of general statements in his notice of appeal and reply to submissions relating to the interpretation of the Act and Rules by the IC and the RA. As this is an appeal relating to a specific complaint, these statements have not been considered by the panel, except as they relate directly to Mr K.
17. Mr R considers that IC has incorrectly interpreted the requirements of the Act and Rules with respect to competence assessment. He considers that only the RA can assess the competence of an engineer in a specific field.
18. Mr R specifically wants the panel to consider the issues of a Chartered Professional Engineer self-assessing their competence.
19. The outcome sought by Mr R is that Mr K is disciplined for a breach of the code of ethics relating to operating outside his area of competence.

Process

20. Appeals to the Council are by way of rehearing (section 37(2) of the Act). We are entitled to confirm, vary or reverse a decision (section 37(5)(a)). We may make any decision that could have been made by the decision authority (section 37(5)(c)). Following *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141 we are entitled to take a different view from the Chair of the Investigating Committee but the appellant carries the burden of satisfying us that we should do so.
21. In hearing the Appeal the Panel has considered whether the IC's decision to dismiss the complaint was correct.
22. As noted above the Panel is only considering the specific complaint against Mr K. The Panel is not considering the general process and procedures of the RA or IC.

Commentary

23. There have been no questions raised relating to the quality or content of the report prepared by Mr K. The issue relates to the competence of Mr K in preparing the report.
24. The Panel is only considering the specific report linked to this complaint. It is not considering the wider issues of undertaking geotechnical work in Christchurch.

Findings of the Appeal Panel.

25. The RA process for initial and continued registration assesses the competence of an engineer in one or two nominated practice "fields". It cannot be inferred from this process that the individual is not competent in other areas.
26. The MBIE guidance notes reference the requirements for the geotechnical professional giving advice to be "CPEng. geotechnical engineering". This is not a defined term within either the MBIE document or the Act or the Rules.
27. We consider that the interpretation of "CPEng. geotechnical engineering" could be either:
 - a. A CPEng who has appropriate experience to provide the geotechnical advice being sought.
 - b. A CPEng who has indicated geotechnical engineering as their practice field.

The Panel considers that this is an area of confusion. Whilst this appeal can be dealt with on its individual merits, the panel will instruct the RA to discuss this issue with MBIE and provide some clarification.
28. The grounds for discipline of a chartered professional engineer are covered by s21 of the Act. Subsections (a) and (d) clearly do not apply. This leaves:
 - (b) has breached the code of ethics contained in the rules; or
 - (c) has performed engineering services in a negligent or incompetent manner;
29. The code of ethics is detailed in sections 43 to 52 of the Rules. Sections 43, 44, 47, 48, 49, 50, 51 and 52 clearly do not apply. This leaves:

45. Act with honesty, objectivity, and integrity

A chartered professional engineer must act honestly and with objectivity and integrity in the course of his or her engineering activities.

46. Not misrepresent competence

A chartered professional engineer must—

- (a) not misrepresent his or her competence; and
- (b) undertake engineering activities only within his or her competence; and
- (c) not knowingly permit engineers whose work he or she is responsible for to breach paragraph (a) or paragraph (b).

- 30. Dealing with S(46) first. Mr K made it clear to his client that should CPT testing be required then he would not be able analyse the results. The report he has prepared appears to answer the requirements of his client. There has been no indication during the communications relating to this complaint that report contains errors or is not fit for its intended purpose.
- 31. Mr K has been a registered engineer since 1967 and has undertaken a variety of roles and projects. Many of these roles/projects required geotechnical input. Mr K has built up his knowledge of geotechnical engineering over the past 50 years as a part of being what he refers to as a “general civil engineer”.
- 32. This project is located on a flat site and relates to foundations for a relocated residential dwelling. Mr K considers that he is competent to undertake this work and the report produced aligns with this. The Panel considers that Mr K has neither misrepresented his competence nor undertaken engineering activities outside of his competence. He has therefore not breached S46 of the Rules.
- 33. Given that Mr K has not breached S46 of the Rules, the Panel can find no evidence that Mr K has acted without honesty, objectivity or integrity.
- 34. The Panel therefore finds that Mr K has not breached the code of ethics.
- 35. Has Mr K performed engineering working in a negligent or incompetent manner?
- 36. The starting point is to consider what standard sets the benchmark for negligent or incompetent behavior. We consider that incompetence is a more serious allegation than negligence. One can be negligent without being incompetent, but it is highly unlikely that someone who is incompetent is not also negligent.
- 37. We do not consider that Mr K was incompetent. The works undertaken have met the requirements of his client and no question on the appropriateness of the report has been raised during this complaint.
- 38. We do not consider that the standard of negligence that a Chartered Professional Engineer is to be judged by is the civil standard as one might expect in a case where a party pursues another for damages. In *Complaints Committee of the Canterbury District Law Society v W* [2009] 1 NZLR 514 a full bench of the High Court was called upon to consider an appeal from a Law Society Disciplinary Committee. In

that case the allegation against the practitioner was framed under section 106(3)(c) of the Law Practitioners Act 1982 and was that the practitioner:

... has been guilty of negligence or incompetence in his professional capacity, and that negligence or incompetence has been of such a degree or so frequent as to reflect upon his fitness to practice as a barrister or solicitor or as to tend to bring the profession into disrepute ...

39. We see nothing in the evidence that indicates that Mr K has performed in a manner that indicates that he is not fit to practice as an engineer or would tend to bring the profession into disrepute. Therefore we consider that Mr K has not been negligent.
40. We therefore conclude that Mr K has not met any of the grounds for discipline under S21 of the Act.
41. The Panel acknowledges that Section 13.1 of the MBIE guidelines requires that the geotechnical investigations must be undertaken by either: a CPEng. geotechnical engineer or a PEngGeol. Mr K is obviously aware of these guidelines as he quotes them extensively in his report. Mr K is aware that geotechnical engineering is neither one of his practice fields or referenced in his practice area.
42. Whilst Mr K has shown, and the Panel agrees, that he has not carried out this work incompetently, he should have noted this anomaly in either his commission with his client or in the report produced.
43. The Panel considers that failing to highlight this anomaly in the guidelines is a minor failing on the part of Mr K.

Outcomes

44. The Panel finds that the IC was correct in its decision that the alleged misconduct is insufficiently grave to warrant further investigation.
45. The appeal is dismissed in accordance with Rule 60 on the grounds in paragraph ba in Rule 57.
46. The Panel considers that MBIE guidelines with respect to the requirements for CPEng are unclear. The Panel will request that the RA initiate discussions with MBIE to clarify the requirements of the guidelines so that they may be aligned with the RA process for initial and continuing CPEng. assessments.
47. Subsequent to the complaint, the IC review and the appeal, MBIE have issued an update to their guidelines in July 2014. The updates to the guidelines are in the form of questions received from the community and a published response. Item number 47 states:

Question: *In section 13 of the guidelines it states that the scope of a deep geotechnical investigation in TC3 must be determined by the geotechnical professional responsible for giving advice on the property in question, and that person must be either a CPEng geotechnical engineer or a PEngGeol with competence, suitable relevant training and experience in foundation investigations and liquefaction assessment. Do the same requirements apply for professionals who are carrying out investigations for foundation*

repairs on TC3 sites, where only a shallow investigation is being carried out?

(Guidance document reference – Part C, section 13)

(Answer) It is preferable to have a specialist geotechnical professional involved in foundation work on TC3 sites. However, where remediation only involves simple repairs or relevelling, for which the MBIE guidelines do not require a deep investigation or liquefaction assessment, a shallow investigation can be carried out under the oversight of a CPEng engineer. The CPEng engineer must have relevant experience in ground investigation and the interpretation of the results of such investigations, and also enough relevant experience to be able to recognise on a site if further investigation, or a different approach is warranted.

The CPEng engineer must be familiar with the requirements of section 3.4.1 of the guidelines (which covers shallow investigations), and in particular the need to take investigations as deep as is practicable.

This update to the guidelines occurred after the complaint process concluded. It is therefore technically new evidence that should not be used in the appeal. It is included to for completeness and hasn't been considered by the panel in reaching its findings.

The Panel still considers that the RA should discuss with MBIE the use of the CPEng title in its documentation.

Costs

48. The costs associated with this appeal shall remain where they fall.

Dated this 10th November 2014

Mr Jon Williams
Principal



Mr Anthony Wilson



Ms Sharyn Westlake

