

**IN THE DISTRICT COURT
AT WELLINGTON**

**I TE KŌTI-Ā-ROHE
KI TE WHANGANUI-A-TARA**

**CIV 2023-085-582
[2024] NZDC 22169**

UNDER the Chartered Professional Engineers of New
Zealand Act 2002

IN THE MATTER of an appeal against a decision of the
Chartered Professional Engineers Council

BETWEEN NIMISH NEEL DEO
Appellant

AND THE CHARTERED PROFESSIONAL
ENGINEERS COUNCIL
Respondent

Hearing: 4 September 2024

Appearances: BAJ Taylor for the appellant
AR van Echten and Ms GL Ronald for the respondent

Judgment: 13 September 2024

RESERVED JUDGMENT OF JUDGE K D KELLY

Introduction

[1] Mr Nimish Neel Deo appeals against a decision of the Chartered Professional Engineers Council (the ‘Council’)¹ which, in turn, dismissed his appeal against a decision of Institution of Professional Engineers of New Zealand Incorporated, the Registration Authority (‘RA’)² under the Chartered Professional Engineers of New Zealand Act 2002 (the ‘Act’).

¹ established by section 44 of the Act

² section 4 of the Act

Background

[2] In May 2022 Mr Deo applied for registration as a chartered professional engineer. His practice area is fire engineering.

[3] Mr Deo was interviewed by a Competency Assessment Board panel (CAB) of the RA which panel comprised two chartered professional engineers, one of whom was a specialist fire engineer practice assessor³ (the Original Assessment Panel). As part of its processes, an interactive interview was conducted with Mr Deo.⁴

[4] By way of a report dated 11 November 2022 the Original Assessment Panel concluded that for a number of reasons Mr Deo:⁵

“... has been unable to demonstrate that he is able to practice at the level of a reasonably competent professional engineer in his practice field and recommend that registration as a CPEng should be declined.”

[5] The panel recommended that Mr Deo would benefit from a period of mentoring in his practice area for a period of two years before being likely to be ready to reapply for registration.

[6] Submissions were sought from Mr Deo about this recommendation before it was finalised.

[7] Mr Deo filed submissions and supplemented these with further evidence which was referred by the CAB to the Original Assessment Panel for reconsideration. In addition, a second practice assessor specialising in fire engineering was appointed to the panel.

[8] This review was completed in February 2023 with no change being made to the original recommendation to decline.

[9] The decision to decline was made final at the RA's meeting on 9 March 2023 and confirmed by email to Mr Deo a few days later on 14 March 2023.

³ Council decision dated 9 August 2023 at [14]

⁴ Council decision dated 9 August 2023 at [19]

⁵ report dated 11 November 2022 at page 3

[10] On 28 March 2023, Mr Deo appealed the decision of the RA to the Council.⁶ Mr Deo filed submissions to the Council, as well as a reply to the RA's submissions.

[11] After considering submissions and further evidence from Mr Deo, and submissions for the RA, on 9 August 2023 the Council dismissed Mr Deo's appeal on the papers.⁷

[12] Mr Deo now appeals the Council's decision to this court.⁸

The original assessment panel's recommendation

[13] The Original Assessment Panel's proposed recommendations were that Mr Deo's application be declined for the following reasons:⁹

- (a) insufficient evidence to conclude that the candidate can practice competently to the level expected of a reasonably competent professional engineer working in New Zealand;
- (b) insufficient evidence to conclude that the candidate can exercise sound professional engineering judgement;
- (c) insufficient evidence to conclude that the candidate conducts their professional engineering activities to an ethical standard at least equivalent to the code of ethical conduct;
- (d) insufficient evidence to conclude that the candidate understands their responsibilities with regard social, cultural, and environmental effects of their engineering activities;

⁶ Section 35(1)

⁷ On 11 July 2023 the Council proposed to make its decision on the papers after reviewing the submissions received and the bundle of documents. Mr Deo advised on 13 July 2023 that this was acceptable to him and RA followed suit on 17 July 2023.

⁸ Section 35(2) of the Act

⁹ Email dated 11 November 2022 to Mr Deo

- (e) insufficient evidence to conclude that the candidate demonstrates the professional acumen across all expected areas commensurate with that expected of a reasonably competent professional engineer; and
- (f) insufficient evidence to conclude that the candidate demonstrates ability to develop technical solutions to complex engineering problems to the standard of a reasonably competent professional engineer working in their practice area.

[14] Following reconsideration, the panel was considered by the CAB on 14 March 2023. The panel stated that it found the original decisions were correct and the additional evidence provided did not overcome the fact that Mr Deo had not been able to demonstrate that he is undertaking complex engineering activities in the fire engineering field to the level of a reasonably competent fire engineer.¹⁰

[15] This RA advised Mr Deo the same day of the CAB's final decision advising that Mr Deo's application was declined because of:¹¹

Insufficient evidence to conclude that [Mr Deo] demonstrates ability to develop technical solutions to complex engineering problems to the standard of a reasonably competent professional engineer working in the practice area.

Grounds of appeal to Council of RA's decision

[16] Mr Deo appealed the RA's decision to the Council on four grounds, namely that the CAB:

- (a) did not acknowledge in its assessment reports that the design work Mr Deo submitted as evidence complied with the fire safety clauses of the Building Code;
- (b) did not acknowledge in its assessment reports that the design work Mr Deo submitted as evidence was limited by Zone models that had been design checked in a Computational Fluid Dynamics (CFD) model;

¹⁰ Assessment Report dated 14 March 2023 at page 3

¹¹ Email from Registrar dated 14 March 2023

- (c) did not acknowledge that his designs were cross-checked using CFD models which Mr Deo says proved his competency and knowledge about the limitations of some software; and
- (d) continued to reference non-compliance with complex engineering problems contrary to how Engineering New Zealand defines complex engineering problems in their guide *Let's Get You Chartered*.¹²

[17] In essence, Mr Deo does not consider that the assessment process was carried out fairly and he considers that he did demonstrate competence with the requirements for being registered as a chartered professional engineer.

[18] Mr Deo's submissions dated 28 May 2023 largely repeated his grounds of appeal but Mr Deo also provided a self-evaluation of four projects which he said supported his ability to develop technical solutions to complex engineering problems to the requisite standard, cross referencing his comments to the relevant guide.¹³

Council's decision

[19] The Council dismissed Mr Deo's appeal. In its decision dated 9 August 2023, the Council said:

- 32. For Mr Deo's application for CPEng registration to have been successful, he needed to convince the Assessment Panel, and ultimately the CAB, that he met the requirements for registration that are set out in rule 6 of the Rules.
- 33. In his first three grounds Mr Deo states that "the [Assessment] panel have not acknowledged..." and in his fourth ground states that "the [Assessment] panel have continued to...". It is not the role of the Panel to rule on the RA's alleged actions or failures to act. Rather, the role of the Panel is to determine whether or not the RA, the CAB in this instance, made the correct decision.
- 34. Further to 33, no means other than an application for registration demonstrating that they meet the requirement for registration referred to in 32 above, can be regarded as a pathway to registration. In other words, an alleged action or failure to act on the part of the RA cannot be regarded as an indicator of an applicant's competence.

¹² dated September 2021

¹³ For complex engineering problems

35. Noting the reason cited by the CAB for declining Mr Deo's application, the task facing the Panel, is to act as if it were the CAB and to establish (i) whether or not it considers that the evidence demonstrates Mr Deo's ability to develop solutions to complex engineering problems to the standard of a reasonable competent professional engineer working in their practice area, and (ii) that he is able to practice competently in his practice area to the standard of a reasonable professional engineer.
36. While Mr Deo has stated four grounds of appeal in his Notice of Appeal, his submissions do not address those grounds directly, a point noted by the RA.

[20] After referring to the submissions of Mr Deo and for the RA, the Council accepted the RA's submission that not every piece of information need to be reproduced and noted in the recommendation document¹⁴ The Council went on to say:¹⁵

The Panel is satisfied that that none of Grounds 1 to 3 are proven and even if they were proven, the grounds could not provide a basis for the decision of the CAB to be overturned, as they relate to the actions of the RA, not to Mr Deo's competence.

[21] In relation to Mr Deo's fourth ground of appeal, the Council said:¹⁶

The Panel finds that Ground 4 on its own has no merit and even if proven would not provide a basis for overturning the CAB's decision. The issues associated with complex engineering are considered by the Panel under 'Other Considerations' below.

[22] Under the heading 'Other considerations', the Council discussed matters raised by Mr Deo which the Council said were neither central to, nor addressed under, the four cited grounds of appeal. These matters were ten points raised in Mr Deo's submissions which Mr Deo gave as reasons why the CAB decision should be overturned notwithstanding that these were not his grounds of appeal.¹⁷

[23] Ultimately, the Council concluded: "the Panel has not seen any evidence to justify overturning the CAB's decision to decline Mr Deo's application for CPEng registration."¹⁸

¹⁴ Council Decision dated 9 August 2023 at [45]

¹⁵ Council Decision dated 9 August 2023 at [46]

¹⁶ Council Decision dated 9 August 2023 at [50]

¹⁷ Council Decision dated 9 August 2023 at [51] – [112]

¹⁸ Council Decision dated 9 August 2023 at [114]

Grounds of appeal of the Council's decision

[24] The present grounds of appeal against the Council's decision are that:¹⁹

- i.) the CAB and [Council] have not referred to and omitted to consider information provided to them that addresses their concerns in relation to the matters discussed at [paragraph [12] (b), (d), and (f) above];
- ii.) the CAB and [Council] have relied on incorrect or immaterial considerations when determining that the appellant did not meet the standard in [paragraph [12] (c) above];
- iii.) the CAB and [Council] rely heavily on answers given by the appellant in interview (interactive assessment) stage of the application. The appellant contends that the conclusions drawn by the panel and [Council] do not accord with the answers given by the applicant at the interview. No transcript or video evidence of the answers given by the appellant have been provided;
- iv.) the CAB and [Council] have given insufficient consideration to the evidence that the projects they consider deficient were peer reviewed by Chartered Professional Engineers specialising in fire engineering including chartered fire engineer involvement from Fire and Emergency New Zealand and final approval by the Building Control (sic) Authority;
- v.) [the Council] acknowledges that an appeal to [the Council] is by way of re-hearing but [the Council] has not independently assessed the evidence for the purposes of the appeal. [The Council's] decision relies heavily on the comments made in the CAB decision;
- vi.) [the Council's] panel did not have any members specialising in fire engineering and therefore could not assess the evidence or alleged deficiencies in the projects to the standard required; and
- vii.) [the Council] has not undertaken its own assessment of the evidence in relation to the standard of competence. In particular, there is no evidence that CPEC has

¹⁹ Notice of Appeal dated 5 September 2023

reached its own conclusions on the alleged deficiencies in the Evan Parry House project and the Puketeraki Marae project.

Relief sought

[25] By way of relief, Mr Deo seeks that the decision of the Council be reversed and the matter referred back to the Council for reconsideration.

[26] At this juncture, I note the submission of counsel for the Council, that if this court concludes that the decision ought to be remitted back, the appropriate course would be to remit it back to the RA instead of the Council.

[27] Counsel submits that Mr Deo's prayer for relief that the matter be remitted back to the Council stems in large part from Mr Deo approaching this appeal as something more aligned to an administrative law review than an appeal focusing on whether the RA's decision, as upheld by the Council, was the right one.

[28] The Council submits that under s 37 this court has jurisdiction to refer the matter back to either the Council or the RA as the term "decision authority" in s 37(5)(b) is defined in s 4 as being either the RA or the Council. The balance of s 37, it is submitted then refers to either the RA or the Council when intending only one of those.

[29] The Council submits that the decision, if remitted back, should be remitted back to the RA as the Council lacks the specialist knowledge to conduct the fresh assessment the appellant appears to be seeking. Further, it is submitted that Mr Deo's complaint rests with the underlying decision of the reconstituted assessment panel.

[30] I do not accept this interpretation of s 37(5)(b).

[31] As Mr Taylor for Mr Deo rightly submits in my view, the construction of s 35 of the Act is clear that a person may appeal a decision of the RA to the Council, and a decision of the Council may be appealed to the District Court. Section 37(5) caters for both types of appeals in relation to what relief may be provided. It is clear from the words "as the case may be" in s 37(5) that the decision authority in question is either

the Council if dealing with an appeal from the RA, or the District Court if dealing with an appeal from the Council.

[32] Further the reference is to “the decision authority” and not “a decision authority”, which when read with the words “the case may be” can only refer to the Council as the decision-maker.

[33] I do not find the Council submission relating to second appeal courts to be of assistance. As Mr Taylor points out, r 18.24 of the District Court Rule 2014 govern the power of the court on appeal. Reference to directing a rehearing is to the ‘decision-maker’ which in this case is the Council on appeal from the RA.²⁰ This is evident when one considers that the RA may also appeal to the District Court against a decision of the Council. It could make no sense if the court could remit back to the RA a decision made by the Council. Hence, the words “as the case may be” in ss 35(3) and 37(5) of the Act.

[34] I determine that there is no ability to remit a decision of the Council back to the RA on appeal to this Court under s 37(5)(b).

[35] In saying that, the issue does not arise in this case for the reasons that follow.

Approach on appeal

[36] An appeal of a decision does not act as a stay,²¹ and an appeal proceeds as a rehearing.²² On appeal this court may:²³

- (a) confirm, vary, or reverse the decision, or part of decision, to which the appeal relates;
- (b) refer the matter back to the Council for it to reconsider, either generally or in relation to specific matters, the whole or any part of the decision (together with any direction on that whole or part that this court, thinks fit);

²⁰ Section 35(2)

²¹ Section 36

²² Section 37

²³ Section 37(5)

- (c) make any decision that could have been made by the Council;
- (d) make any order as to the payment of the costs of the appeal that it thinks fit.

[37] There is no dispute that as a rehearing the approach in *Austin Nichols & Co Inc v Stichting Lodestar* applies.²⁴ Mr Deo bears an onus of satisfying this court that it should differ from the decision under appeal. It is only if this court considers that the appealed decision is wrong that it is justified in interfering with it.²⁵

[38] It is also recognised that the Council may have had a particular advantage (such as technical expertise or the opportunity to assess the credibility of witnesses, where such assessment is important).²⁶ In such a case this court may rightly hesitate to conclude that findings of fact or fact and degree are wrong. This court may take the view that it has no basis for rejecting the reasoning of the Council appealed from and that its decision should stand. But the extent of the consideration that this court, exercising a general power of appeal, gives to the Council's decision is a matter for this court's judgment. This Court is not required to pay explicit attention to the reasons of the Council if it comes to a different reasoned result. On general appeal, this court has the responsibility of arriving at its own assessment of the merits of the case.²⁷

[39] Mr Deo, in exercising his general right of appeal is entitled to judgment in accordance with the opinion of this court, even where that opinion is an assessment of fact and degree and entails a value judgment. If this court's opinion is different from the conclusion of the Council appealed from, then the decision under appeal is wrong in the only sense that matters, even if it was a conclusion on which minds might reasonably differ.²⁸

[40] Where the parties differ is in the application of *Austin, Nichols & Co Inc v Stichting Lodestar*.

²⁴ *Austin Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103

²⁵ Above n 24, at [4]

²⁶ Although submissions for the Council in this case on the issue of relief suggest that the Council does not consider it has the specialist knowledge to conduct the fresh assessment being sought.

²⁷ Above n 24, at [5]

²⁸ Above n 24, at [16]

[41] This difference goes to Mr Deo's fifth and seventh grounds of appeal, which I address now as it goes to the approach I must take to this appeal.

Ground 5: Has the Council erred by not independently assessing the evidence for the purposes of the appeal?

Ground 7: Has the Council failed to undertaken its own assessment of the evidence in relation to the standard of competence, in particular, on the alleged deficiencies in the Evan Parry House project and the Puketeraki Marae project?

Submissions

[42] Mr Taylor submits that the Council took the approach of predetermining that Mr Deo did not meet the threshold for registration and that its only role was to determine whether the RA's process was fair.

[43] It is submitted that there is very little in the Council's decision that indicates the Council reviewed the evidence and reached its own conclusions, with every reference being to the wording of the RA's decision or the submissions with no references to the actual evidence or work records submitted to the RA. It is submitted that it was incumbent on the Council given the appeal was in the nature of a rehearing, to review the projects itself and form its own conclusions.

[44] Mr Taylor submits that the Council was obliged to reach its own conclusion before being satisfied that there was no error on the part of the RA, and now on appeal, this court too must undertake its own assessment of the evidence in order for it to determine whether there has been an error on the part of the Council.

[45] Ms van Echten for the Council, on the other hand, submits that Mr Deo, in discharging the onus on him to satisfy this court that it should differ from the decision under appeal, must first identify in what respect the Council's decision is in error.

Analysis

[46] I accept the approach espoused by the Council. As Ms van Echten correctly submits, in *Green v Green* the Court of Appeal said that while an appellate court's

obligation is to form its own independent judgment on the merits of an appeal by way of rehearing:²⁹

it is still axiomatic that the appellant bears the onus of persuading the appellate court to reach a different conclusion. Of necessity, in discharging that onus the appellant must identify the respects in which the judgment under appeal is said to be in error.

[47] It is also fundamental that as expressly stated in *Austin, Nichols* that an appellate court should exercise caution in considering challenges to findings of credibility. While that does not justify inappropriate deference to the Council's findings or exempt this court from conducting its own independent analysis of the evidence, it does underscore the importance of the fact finder's function and an appellant's obligation to show material error or errors and particularise the grounds in support.³⁰

[48] In other words, where there is no error identified with appropriate particularity an appellant (in this case, Mr Deo), will not have discharged the onus on him of persuading this court that the court's conclusion ought to differ from that of the Council.

[49] I agree with Ms van Echten that the Council was not required to undertake a wholesale review of the evidence to assess whether Mr Deo met the minimum standards in the absence of Mr Deo identifying those parts of the Council's decision which he considered to be in error.

[50] In this regard too, this is not a judicial review of the Council's exercise of, or failure to exercise, a statutory power.

[51] In the absence of there being a particularised error identified, Mr Deo will not have discharged the onus on him of persuading this court that the court's conclusion ought to differ from that of the Council.

²⁹ *Green v Green* [2016] NZCA 486, [2017] 2 NZLR 321 at [30]

³⁰ Above n 29, at [32] – [33]

Conclusion

[52] I find that this ground of appeal is not made out and must therefore fail.

The scheme of the Act

[53] Having set out the approach on appeal, it is also useful to set out the scheme of the Act.

[54] The purpose of the Act in s 3 of the Act, relevantly, is to:

- ...reform the law relating to the registration of engineers and to establish the title of chartered professional engineer as a mark of quality; and, to those ends, this Act—
- (a) establishes a registration system for chartered professional engineers, under which persons who wish to be chartered professional engineers must meet minimum standards to be, and continue to be, registered;
 - (b) requires a code of ethics and a complaints and disciplinary process to apply to chartered professional engineers;
 - (c) requires a professional body to carry out the functions relating to the registration system, the code of ethics, and the complaints and disciplinary process, and establishes a statutory body to oversee aspects of those functions:

[55] As a ‘mark of quality’, s 6 of the Act provides that a person is a ‘chartered professional engineer’ if he or she is registered and holds a current registration certificate. Section 7 of the Act provides that only a chartered professional engineer, may use in connection with his or her business, trade, employment, calling, or profession, the title “chartered professional engineer”. Otherwise, it is an offence for any person to use that title.³¹

[56] Section 8 of the Act sets out the requirements for initial registration of a chartered professional engineer. The Registration Authority³² must register a person if he or she:

- (a) applies, and pays the applicable charge, in accordance with the rules; and
- (b) satisfies the Registration Authority that he or she meets the minimum standards for registration contained in the rules and

³¹ Section 7(3)

³² Defined in s 4 as the ‘Institution of Professional Engineers of New Zealand’

- (c) agrees to be bound by the rules as amended from time to time.

[57] The 'minimum standards for registration' are set out in r 6 of the Chartered Professional Engineers of New Zealand Rules (No 2) 2002 (the 'Rules'). To meet these minimum standards, a person must demonstrate that he or she is able to practise competently in his or her practice area to the standard of a reasonable professional engineer. This is referred to as the 'overall standard'.

[58] The extent to which the person is able to do each of the following things in his or her practice area must be taken into account in assessing whether or not he or she meets the overall standard:

- (a) comprehend, and apply his or her knowledge of, accepted principles underpinning:
 - (i) widely applied good practice for professional engineering; and
 - (ii) good practice for professional engineering that is specific to New Zealand;
- (b) define, investigate, and analyse complex engineering problems in accordance with good practice for professional engineering;
- (c) design or develop solutions to complex engineering problems in accordance with good practice for professional engineering;
- (d) exercise sound professional engineering judgement;
- (e) be responsible for making decisions on part or all of 1 or more complex engineering activities;
- (f) manage part or all of 1 or more complex engineering activities in accordance with good engineering management practice;
- (g) identify, assess, and manage engineering risk;
- (h) conduct his or her professional engineering activities to an ethical standard at least equivalent to the code of ethical conduct;
- (i) recognise the reasonably foreseeable social, cultural, and environmental effects of professional engineering activities generally;
- (j) communicate clearly to other engineers and others that he or she is likely to deal with in the course of his or her professional engineering activities; and

- (k) maintain the currency of his or her professional engineering knowledge and skills.

[59] Rule 9 lists all of the supporting information that is required to be contained in or accompany an application for registration. Certain information may be excused if the applicant has previously been registered, or the applicant has an equivalent qualification.³³

[60] Upon applying for registration, it is the function of the RA to carry out the functions relating to registration including making decisions relating to registration, and issuing a registration certificate to a person if satisfied that he or she meets the minimum standards for registration.³⁴

[61] Upon making a decision relating to registration, an applicant may appeal that decision to the Council.³⁵

[62] As decision makers, the procedures and exercise of the RA's and Council's decision-making functions and powers are specified in s 25, namely to:

- (a) give written notice of, and reasons for, its decision to any person to whom the decision relates;
- (b) to observe the rules of natural justice; and
- (c) to comply with any applicable procedures under the rules or regulations made under the Act.

[63] Except as otherwise provided in the Act, the RA and Council, as 'decision authorities', may regulate their own procedures for making decisions.³⁶

[64] I now turn to the remaining grounds of appeal.

³³ Rule 9(2)

³⁴ Sections 24, 39 and 8 of the Act

³⁵ Sections 24 and 35

³⁶ Section 26

Ground 1: Has the Council failed to consider information going to whether the appellant meets the requisite standard in his practice area?

Submissions

[65] Mr Taylor says that Mr Deo's primary submission on appeal to the Council was that the CAB assessment panel had not taken into account a number of material considerations that he says addressed a number of the panel's concerns.

[66] Mr Taylor says that the panel did not acknowledge the additional information that Mr Deo provided and that some of the concerns raised by the panel prior to its reconsideration, did not change in any material way including Mr Deo's awareness of the limitations of some of the software models, and the integration between fire engineering solutions and the requirements of the Building Act 2004.

[67] It is submitted that the Council was plainly incorrect in saying that it was not its role to rule on the RA's alleged actions or failures to act but instead, to determine whether or not the RA made the correct decision.

[68] Mr Taylor submits that one of the criteria for a successful appeal is the failure to take into account a relevant consideration and that it was the Council's role to determine whether the appellant was correct in his submission that the additional information had not been given proper consideration.

[69] Mr Taylor says further that the Council adopted the wrong approach in concluding that none of Mr Deo's grounds of appeal to the Council were proved and even if they were proved, could not provide a basis for the decision to be overturned because they related to the actions of the RA, and not to Mr Deo's competence.

[70] Mr Taylor submits that the Council should have reviewed the additional material itself and assessed whether this addressed any of the RA's concerns. If the RA was found to have given inadequate weight to that information, it is submitted that could provide a basis for the decision to be overturned.

[71] To the extent that the Council said that there were deficiencies in the Evan Parry House and Puketeraki Marae projects submitted by Mr Deo for assessment, it is submitted that the Council failed to consider the evidence that was submitted to address these concerns. In relation to the Puketeraki Marae project, in particular, it is submitted that the Council failed to recognise, or completely ignored, that this project was submitted as a complex engineering activity that required consideration of social, cultural and environmental aspects, being also a conflict between cultural requirements and building code requirements.

[72] Overall, it is submitted that a primary focus of the RA's decision to decline Mr Deo's application was that Mr Deo demonstrated a number of concerning technical and engineering errors. As these were disputed by Mr Deo, it is submitted that on appeal the Council should have explicitly addressed these disputes (between the RA and Mr Deo) when determining whether the RA made a correct decision.

[73] Ms van Echten, on the other hand submits that the Council did consider Ms Deo's submissions as did the RA. The RA simply did not consider that the material provided remedied the defects identified, and the Council did not consider that they established his competence.

Analysis

[74] I accept Ms van Echten's submissions on this point.

[75] Mr Deo's first three grounds of appeal to the Council were that the RA did not acknowledge in its report that the design work Mr Deo submitted as evidence:

- (a) complied with the fire safety clauses of the Building Code;
- (b) was limited by Zone models that had been design checked in a Computational Fluid Dynamics (CFD) model; and
- (c) were cross-checked using CFD models which Mr Deo says proved his competency and knowledge about the limitations of some software.

[76] In its report the RA said:³⁷

Following the original Panel decision to decline Nimish's application he made an application for review. This was accepted by EngNZ CAB and a second PAA in fire engineering was added to the Panel to undertake a review of the decision. All evidence originally submitted and Nimish's additional evidence was reviewed again by the new three person Panel. The appeal review Panel has found that the original decisions were correct and the additional evidence provided does not overcome the fact that Nimish has not been able to demonstrate that his undertaking complex engineering activities in the fire engineering field to the level expected of a reasonably competent fire engineer.

[77] The RA said further:³⁸

The appeal review Panel considered all the evidence submitted in his original application plus additional information provided as part of his application for review. The appeal review Panel do not consider that the additional information submitted adds anything to the original work records and as such the original decision that Nimish has not fully demonstrated his ability to develop technical solutions to complex engineering problems was correct and remains valid.

[78] The report also states:³⁹

The additional [Practice Area Assessor] noted specifically "I concur with the conclusion reached by the other assessors, in which some of the evidence provided may not exemplify the level of complexity of engineering tasks, while other have a number of concerning technical and engineering errors.

[79] It would appear therefore that the material submitted by Mr Deo was considered by the RA such that the grounds of appeal as expressed, were not established before the Council.

[80] I also agree with the submissions that the Council is not required to refer to every piece of evidence adduced or every argument advanced.⁴⁰

³⁷ RA decision dated 14 March 2023 at page 3 (BOD at 374)

³⁸ RA decision dated 14 March 2023 at page 10 (BOD at 381)

³⁹ RA decision dated 14 March 2023 at page 3 (BOD at 374)

⁴⁰ *Manukau City Council v Trustees of Mangaere Lawn Cemetery* (1991) 15 NZTPA 58 (HC) at 6; cited

[81] Perhaps more importantly, as already referred to, what Mr Deo was required to do on appeal was to persuade the Council that its conclusion ought to differ from that of the RA. Insofar as the Council said that its role was to determine whether the RA made the right decision, that accords with the orthodox principle that if the Council's opinion is different from the conclusion of the RA appealed from, then the decision under appeal is wrong in the only sense that matters.

[82] Having regard to Mr Deo's submission to the Council, I agree that these did not address his grounds of appeal directly.⁴¹ Given this, Mr Deo did not discharge the onus on him of persuading the Council that its conclusion ought to differ from that of the RA.

[83] Before this court, in his oral submissions Mr Taylor says that this appeal is more procedural than anything else and is about the process by which the Council reached its conclusion. Mr Taylor submits that this court is not being asked to determine whether Mr Deo met the minimum standards for registration but whether the Council made its decision correctly.

[84] That is not a sufficient basis to succeed on appeal where the focus is the conclusion reached. As already noted, this is not an administrative law review of the Council's exercise of, or failure to exercise, a statutory power. If this court's opinion is different from the conclusion of the Council appealed from, then the decision under appeal is wrong in the only sense that matters. It is for Mr Deo to persuade the court of this which he has not done.

Conclusion

[85] This ground of appeal must fail for the reasons stated.

Ground 2: Did the Council rely on incorrect or immaterial considerations in concluding that the candidate does not meet the ethical standard?

Submissions

in *Auckland Medical Officer of Health v Birthcare Auckland Limited* [2015] NZHC 2689, [2016] NZAR 287 at [106]

⁴¹ Council decision dated 9 August 2023 at [36]

[86] This ground of appeal relates to a concern the RA raised about Mr Deo stating that he had gained specialist experience in fire engineering, roading and subdivisions, water supply reticulation, stormwater management and environmental engineering.

[87] Mr Taylor submits that the RA objected to any other area other than fire engineering being promoted by Mr Deo as the RA considered that there was no evidence to support his experience in the other areas. In so far as the RA considered Mr Deo misrepresented his competence, it is submitted that the RA found this to be a breach of the EngNZ Code of Ethics.

[88] On appeal to the Council, it is submitted that Mr Deo argued that the RA had only picked out a small part of a larger statement on his website that went on to clarify that his “primary area of practice is no fire safety design”.

[89] Mr Deo’s position, it is submitted, was not evaluated by the Council in its decision and the only finding in the Council’s decision related to whether Mr Deo changed the wording on his website, failing to address the RA’s ethical finding.

[90] Ms Roland for the Council submits that the RA’s finding that Mr Deo’s self-promotional material breached the Code of Ethics is unassailable and that the Council carefully considered and rejected Mr Deo’s argument that the panel made incorrect statements about his website.

Analysis

[91] Mr Deo’s CV, filed with his application, states:⁴²

Nimish is a fire engineer with over 15 years’ experience in fire engineering, project management and construction monitoring, both in New Zealand and overseas. He has gained experience in civil and environmental projects specialising in areas of fire engineering, roading and sub-divisions, water supply reticulation, stormwater management and environmental engineering.

...

[92] On 15 September 2022 Dr Paul Wilson, the Lead Assessor emailed Mr Deo expressing concern about his qualifications. Dr Wilson said:

⁴² BOD at page 3

I have been further examining your documentation and note the following section from your supplied CV and from your company website:

Nimish is a fire engineer with over 15 years' experience in fire engineering, project management and construction monitoring, both in New Zealand and overseas. He has gained experience in civil and environmental projects specialising in the areas of fire engineering, roading and sub-divisions, water supply reticulation, stormwater management and environmental engineering.

I am concerned that you have no engineering qualifications in roading, sub-divisions, water supply reticulation, stormwater management, and environmental engineering. These areas are well outside of your identified experience and engineering knowledge and could be seen as against the current code of ethical conduct part 4b.⁴³ This matter will be addressed at the [interactive interview] – that is no response in needed at this time.

[93] Rule 4.b(i) of the Code of Ethical Conduct for engineers states: “You must not misrepresent, or permit others to misrepresent, your competence.”⁴⁴

[94] The Original Assessment Panel concluded that it was:⁴⁵

...unable to conclude that Nimish conducts his professional engineering activities to an ethical standard at least equivalent to the code of ethical conduct. When reviewing the material supplied by Nimish a concern was identified by the Panel that his brief bio and company websites stated: “*He has gained experience in civil and environmental projects specialising in the areas of fire engineering, roading and sub-divisions, water supply reticulation, stormwater management and environmental engineering.*” *Nimish has no formal qualifications or identified work experience from his CV/ Work History that support that claim and is therefore clearly in contradiction of the EngNZ Code of Ethics 4.b.1.*⁴⁶ *When advised of this concern by the Panel Nimish changed the wording on his company website to remove that wording.*

[95] As Ms Ronald points out under rule 9 of the Chartered Professional Engineers of New Zealand Rules (No 2) 2002, an applicant must provide evidence of academic and other relevant qualifications, and a chronological summary of the applicant’s work history, with his or her application. I accept therefore that the RA, and the Council in turn, are entitled to rely on the material provided by Mr Deo.

[96] In requesting his application to be reconsidered, Ms Deo said:⁴⁷

⁴³ This reference should have been to part 4(b)(i)

⁴⁴ Code of Ethical Conduct, Engineering New Zealand (1 July 2016)

⁴⁵ Assessment Report dated 11 November 2022 at page 6 (BOD at page 274)

⁴⁶ This reference again should have been to 4(b)(i)

⁴⁷ Letter dated 12 November 2022 at 1 (BOD at page 278)

This assessment panel has provided insufficient & incorrect statement in the assessment report relating to this matter. My company website notes that I have gained experience in fields other than fire engineering but my primary area of practice is fire engineering. The panel did not state the full information as per my company website. The panel also claims that I have changed the wording on my company profile but this is not true as no changes have been made to any wordings. The last time the website was updated was about 3 to 4 years ago,

The lead assessor during the interactive assessment threatened to take legal action against my previous work experience and did not give me an opportunity to provide any clarifications. I still stand by my work experience and I do not believe I have breached any Code of Ethics. The wordings have been left unchanged as evidence, but I will be prepared to update once a final decision is made by Engineering New Zealand.

[97] On reconsideration of this matter, the expanded panel accepted that it erred in referring to Mr Deo's company website instead of his LinkedIn profile. The panel revised its report to read:⁴⁸

The Panel were unable to conclude that Nimish conducts his professional engineering activities to an ethical standard at least equivalent to the code of ethical conduct. When reviewing the material supplied by Nimish a concern was identified by the Panel that his brief bio, company website, and LinkedIn profile stated: "He has gained experience in civil and environmental projects specialising in the areas of fire engineering, roading and sub-divisions, water supply reticulation, stormwater management and environmental engineering." When advised of this concern by the Panel Nimish changed the wording on his LinkedIn profile to remove that wording which is still on his company profile. Nimish has no formal qualifications or identified work experience from his CV/ Work History that support that claim of "specialisation" in those civil areas and is therefore clearly in contradiction of the EngNZ Code of Ethics 4.b.1. The appeal review Panel concludes that this aspect of the original decision was correct albeit that the original report identified changes to his company profile rather than LinkedIn profile.

[98] On appeal to the Council, Mr Deo did not raise this as one of his four grounds of appeal. Nor did he expressly refer to this in his submissions dated 28 May 2023 other than to say:

4. The assessment panel then provided incorrect statements to the Registration Authority that led the original decision by the Authority to decline the application. These were clarified in a request for reconsideration letter dated 12 November, 2022 and 17 November, 2022.

[99] The letter of 17 November 2022 makes no reference to this issue.

⁴⁸ Assessment Report dated 14 March 2023 at page 7 (BOD at page 378)

[100] Moreover, notwithstanding this, Mr Deo went on to acknowledge in his submissions:

5. The final decision received on 14 March , 2023 now pivots on a single item stated as “Insufficient evidence to conclude that the candidate demonstrates ability to develop technical solutions to complex engineering problems to the standard of a reasonably competent professional engineer working in the practice area.”

[101] Nevertheless, the Council considered the matter saying:⁴⁹

The RA has acknowledged that there were incorrect statements in the Assessment Panel’s first report and noted that the statements were corrected in the second report. The Panel has sighted both reports and is satisfied that changes have been made.

In the view of the Panel the provision of incorrect statements by the RA, which have subsequently been amended, does not provide any basis for overturning of the decision being appealed.

[102] I am not satisfied, contrary to Mr Deo’s ground of appeal, that either the RA or the Council relied on incorrect or immaterial considerations when determining that Mr Deo did not meet an ethical standard at least equivalent to the code of ethical conduct.

[103] The simple point remains, as Ms Ronald submits, that Mr Deo’s submissions to the Council failed to address the heart of the original assessment panel’s concerns that he had materially misrepresented his experience and specialities.

[104] On appeal to this Court, Mr Deo has failed to address the heart of this issue once again due to the approach taken to this appeal, to which I have already referred.

Conclusion

[105] I am not satisfied this ground of appeal has been established.

⁴⁹ Council Decision dated 9 August 2023 at paragraphs [82] and following, especially [85]–[86]

Ground 3: Did the Council put undue weight on answers given by the appellant in the interactive assessment and do the conclusions reached accord with the answers given by the applicant?

Submissions

[106] It is submitted that a significant component of the assessment was the interactive assessment, where Mr Deo was interviewed by the RA by means of a video call.

[107] It is also submitted that there is no record of this interview as it was not recorded.

[108] In its decision, Mr Taylor submitted that the Council gave an example of what it considered to be a significant concern saying:⁵⁰

Of significant concern to the Panel are the Assessment Panel's statements "...the deficiencies in the modelling identified by the Panel during the IA with respect to demonstrating means of escape from fire result in it not being acceptable." (103 above) and "...the [Assessment] Panel identified deficiencies during the review and when put to Nimish at the IA his answers were not convincing and further identified that 'he doesn't know what he doesn't know' in terms of aspects/assumptions beyond the use of the modelling software he is most comfortable with." (104 above)

[109] Mr Taylor submits that there is nothing in this statement by the Council or by Mr Deo to provide a basis on which conclusions could be reached about Mr Deo's competency. Not only are there no direct quotes from the interview set out in the RA's report but it is submitted that there is no evidence of Mr Deo's actual answers.

[110] Rather, it is submitted that the RA accepted in its report that Mr Deo's written submissions were clear and of the expected standard for registration, which is at odds with the position that he performed poorly at interview.

[111] The Council's reliance on document findings to find that Mr Deo fell short of expectations so as to lead to his application being declined, it is submitted, is not a path that was available to the Council.

⁵⁰ Council Decision dated 9 August 2023 at [106]

[112] Ms Van Echten submits that Mr Deo does not identify that what conclusions were incorrect but rather submits that the Council ought not have put weight on the unrecorded assessment.

[113] It is submitted that this was not a ground of appeal to the Council and that the Council could have stopped its analysis after considering and rejecting Mr Deo's grounds for appeal.

[114] In any event Ms van Echten submits that the passages relied on by Mr Deo show that the reconstituted panel concerns arose from written material that Mr Deo provided to the panel and about which he could not mitigate in his interview. That is, none of the passages referred to by Mr Deo have their genesis in the unrecorded assessment.

[115] Given that the Council had dismissed Mr Deo's grounds of appeal, it is submitted that its decision did not turn on this interactive assessment.

Analysis

[116] The Council states in its decision that there was no evidence before it that would indicate that the assessment panel's conduct in arriving at its conclusions relating to the interactive assessment, were prejudicial or unreasonable.

[117] Nor is there any evidence before this court. While I acknowledge that the Council could not base its conclusions on what was orally stated during in the assessment, I accept that the conclusions referred to appear to have arisen from the deficiencies in projects identified by the Panel which were not mitigated in the interview.

[118] Ultimately, however, there is no way of knowing how Mr Deo performed at interview other than from what the RA has said.

[119] In this regard, Mr Deo has not pointed to any particular inconsistency between his submissions, which is at odds with the interview. Even if he did, the lack of a

recoding or transcript would have frustrated the ability of this court to analyse those alleged inconsistencies.

[120] While I am not able to make an assessment as to whether the Council was correct on this issue, equally I am not satisfied that Mr Deo has established that the Council was wrong, the onus being on him.

[121] Putting the interactive assessment to one side for these reasons, this court is still left with this ground of appeal not being a matter raised with Council. Further, as Ms van Echten has submitted, the Council could have stopped its analysis after rejecting Mr Deo's grounds for appeal such that it would not appear that the Council relied on the interview as a grounds for dismissing his appeal of the decision of the RA.

[122] Even if I am wrong, this matter is not able to be advanced further.

Conclusion

[123] Absent any other ground of appeal being successful, this ground of appeal fails.

Ground 4: Has the Council failed to give sufficient consideration to the projects having been peer reviewed and final approval being given by the Building Control Authority?

Submissions

[124] Mr Taylor submits that Mr Deo submitted to both the RA and the Council, in response to concerns raised by the RA, that his projects had been peer reviewed by chartered professional engineers specialising in fire engineering (working for Fire and Emergency New Zealand (FENZ)) and that they also passed scrutiny of the Building Consent Authority.

[125] It is submitted that these factors do not appear to have been given any consideration by the Council and should have been referred to by the Council in reaching its conclusions because they are important to the consideration of whether

Mr Deo was designing solutions in accordance with good practice and to the level expected of a reasonably competent engineer.

Analysis

[126] I accept that this was a matter referred to in Mr Deo's submissions to the assessment panel dated 28 May 2023.⁵¹

[127] On appeal, however, while Mr Deo considers that they are important to the consideration of whether Mr Deo was designing solutions in accordance with good practice and to the level expected of a reasonably competent engineer, he did not raise this as a ground of appeal. Nor has he explained how they are important.

[128] As such, I agree with Ms van Echten that Mr Deo cannot now complain that this matter was not addressed on appeal to the Council.

[129] Further, as already noted, there is no requirement on the Council to refer to every piece of evidence adduced or every argument advanced.

Conclusion

[130] I am not persuaded that this ground of appeal has been established.

Ground 6: Is the Council required to have members specialising in fire engineering?

Submissions

[131] In tandem with grounds 5 & 7, Mr Taylor submits that the Council could not have reached its own conclusions on the evidence as no member sitting on the Council panel was qualified in fire engineering and could only rely on the RA assessors, taking their assessment at face value. This, it is submitted, resulted in an unfair hearing.

⁵¹ At point 11

Analysis

[132] I do not accept this submission. As Ms Roland for the Council rightly submits, taken to its logical conclusion, this would mean that no appellate body from a specialist tribunal, including this court, could hear an appeal unless it has members with the relevant specialist expertise.

[133] No authority has been cited for such a position.

[134] In *Austin, Nichols*, the Supreme Court expressly recognised that a tribunal may have had a particular advantage such as technical expertise or the opportunity to assess the credibility of witnesses. Where such an assessment is important, as it is here, the appellate body may rightly hesitate to conclude that findings of fact or fact and degree are wrong taking the view that it has no basis for rejecting the reasoning of the tribunal appealed from and that its decision should stand.⁵²

[135] To the extent that the Council deferred to the technical expertise of the RA, in circumstances where two of the assessors were specialists in fire engineering, it does not follow that, of itself, there is sufficient reason to find that the hearing was conducted unfairly.

[136] In any event, the focus of this appeal is the conclusion reached. Again, this is not a judicial review of the Council's exercise of, or failure to exercise, a statutory power. If this court's opinion is different from the conclusion of the Council appealed from, then the decision under appeal is wrong in the only sense that matters.

[137] In the absence of there being a particularised error identified, Mr Deo's appeal must fail where he has not discharged the onus on him of persuading this court that the court's conclusion ought to differ from that of the Council.

Conclusion

[138] This ground of appeal fails accordingly.

⁵² Above n 24, at [5]

Result

[139] For the reasons stated the appeal is dismissed.

[140] Pursuant to s 37(5)(a) the decision of the Council is confirmed.

Costs

[141] I reserve the issue of costs and invite the parties to agree costs. Should this not be possible, the Council is to file and serve a memorandum by 30 September 2024 and Mr Deo is to file and serve a memorandum in reply by 14 October 2024. A decision on costs will be made on the papers thereafter.



K D Kelly
District Court Judge