

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

Appeal 03/22

AND

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

From

Mr A

Appellant

Against a decision of

The Registration Authority under the
Chartered Professional Engineers of New
Zealand Act 2002

Respondent

Decision of the Chartered Professional Engineers Council on the Appellant's application for a
stay of removal from the register

Dated 8th December 2022

Introduction

1. On 28 September 2022, Counsel for Mr A appealed the Competency Assessment Board's ("CAB") decision declining Mr A's application for continued registration as a Chartered Professional Engineer ("CPEng"), under the Chartered Professional Engineers of New Zealand Act 2002 ("the Act"), to the Chartered Professional Engineers Council.
2. Accompanying the notice of appeal was an application for an order to stay the removal of Mr A's name from the CPEng register, pending determination of the appeal.
3. The Chartered Professional Engineers Council ("CPEC") considered the application should be heard and sought submissions from Mr A and the Registration Authority ("the RA") on 30 September 2022.
4. These submissions were heard by this Appeal Panel at an online hearing on 28 October 2022.
5. Further to the hearing, supplementary submissions were provided by both parties on 31 October 2022.
6. This decision is made and given by the majority of the Appeal Panel, with one panel member dissenting. References to the Appeal Panel below are references to the majority.

Background

7. Mr A is the sole CPEng in his firm, Company B.
8. He undertakes engineering design and construction monitoring services for a range of structures.
9. Mr A applied for continued registration in June 2019. During this assessment process his registration has remained current.
10. On the 31 August 2022, Mr A received notification of the CAB's decision. His application for continued registration was declined on the basis of insufficient evidence to demonstrate his competency of good professional engineering practice and the minimum standard required by a CPEng.

Grounds for Stay Application

11. The effect of the CAB's decision (a decision by the RA for the purposes of the Act) is deregistration, i.e., the removal of Mr A's name from the CPEng Register.
12. Mr A seeks a stay of that removal.
13. The Appeal Panel summarise the grounds¹ as:
 - a. If Mr A's registration is removed and his appeal is successful, the removal will cause him significant hardship to his income, dignity and self- esteem in the interim;
 - b. The removal of Mr A's registration will impact on his business employees' livelihoods because he is the only structural Chartered Professional Engineer in his firm;
 - c. Deregistration will cause significant disruption to his clients' current projects;
 - d. Granting the stay would not prejudice the Registration Authority nor bring the profession into disrepute;
 - e. Granting the stay would be consistent with the fairness principle of natural justice;
 - f. Mr A has been registered since 2003 with "no material issues" having arisen;
 - g. Mr A's referees support his continued competence; and,
 - h. The CAB's reassessment has taken two years. The CAB did not treat the matter as urgent. A stay of removal from the register pending the resolution of the appeal in the context of the time taken to date is of little moment.

¹ BOD 355 & 356: Letter 23 September 2022

The Legislation

14. The Act requires CPEngS to meet minimum standards to remain on the register², and be assessed against these standards at least every six years³. A decision by the CAB that a CPEng fails to meet these standards results in removal or suspension from the register.
15. The Act provides applicants the right to appeal decisions of the RA regarding registration to CPEC⁴.
16. Under s36 of the Act, the appealed decision continues in effect until determination of the appeal unless CPEC orders otherwise. It provides:

36 Decisions to have effect until appeal

Subject to the order of the Council or District Court (as the case may be), every decision of the decision authority against which an appeal is lodged continues in effect according to its terms until the determination of the appeal.

17. Therefore, Mr A's name will be removed from the register unless CPEC makes an order to the contrary.
18. Section 26 of the Act provides CPEC the authority to regulate its own procedure for making decisions.

Discussion

19. Mr A as the applicant must establish the grounds for the stay, having provided those grounds, the decision for this panel is a balancing exercise.
20. Mr A's counsel submits the question for this panel is "whether Mr A's appeal rights in relation to the decision would be rendered nugatory if a stay is not granted".

² Section 11 of the Act. The minimum standard for continued registration is described in rule 20 of the Rules.

³ Rule 21 of the Rules.

⁴ Section 35 of the Act.

21. He also submits the criteria for the Courts granting a stay pending appeal under s144 of the District Court are well established (⁵ & ⁶), with the relevant factors here being whether the successful party would be injuriously affected, the balance of convenience and the status quo, and further to stay decisions (⁷ & ⁸), hardship to an applicant in the event of a stay being declined, public safety, professional competence, the length of time likely to elapse before the hearing and whether or not there is an arguable case on appeal.
22. Counsel agreed the approach of the District Court is persuasive but not binding on CPEC.

Grounds (a)-(c): hardship to an applicant in the event of the stay being declined

23. Mr A's counsel argues if Mr A's registration is removed and his appeal is successful, the removal will have, in the interim:
 - (a) caused him significant hardship to his income, his dignity and his self-esteem,
 - (b) impacted on his employees' livelihoods as he is the only structural Chartered Professional Engineer in his firm,
 - (c) caused significant disruption to his clients' projects.
24. The RA acknowledge Mr A will experience some inconvenience, and propose a stay with conditions as a gesture to reduce the potential impact on Mr A's dignity and self-esteem.
25. Further discussion on this proposed conditional stay order is in 46 to 52 below.
26. The RA also acknowledge that Mr A's removal from the register, or retention on the register with conditions, limits the scope of work he is able to do without independent review, but do not accept this would result in significant hardship to Mr A, his employees or his clients. The RA suggests these impacts need not

⁵ *Philip Morris (New Zealand) Ltd v Liggett & Myers Tobacco Co (New Zealand) Ltd* [1977] 2 NZLR 41 (CA);

⁶ *Duncan v Osborne Building Limited* (1992) 6 PRNZ 85 (CA)

⁷ *Patel v Dentist Disciplinary Tribunal* [2002] BCL 907

⁸ *Suresh v Complaints Assessment Committee* HC Auckland CIV-2007-404-001818, 27 June 2007

be significant, and consider Mr A can continue with all other aspects of his work.

27. Mr A's counsel argues the hardship caused goes beyond mere inconvenience, and provided an email from Mr A which states that swimming pools make up roughly 85% of his current projects.
28. Mr A's counsel explained at the hearing that this work is high volume, low value, carried out for a fixed fee. This work will be uneconomic, if Mr H was removed from the register or retained on the register subject to the proposed conditions, due to costs associated with review and sign off by another CPEng for every project. This would impact on his clients and himself.
29. The Appeal Panel considers these grounds have merit and weigh in favour of a stay. While it is difficult to determine the extent of the hardship without direct evidence from Mr A himself, the Appeal Panel accepts that where a large portion of Mr A's current workload becomes uneconomic to carry out or retain, one or all three grounds are likely to result in significant hardship.

Ground (d): Granting the stay would not prejudice the Registration Authority nor bring the profession into disrepute

30. The RA disputes this claim, and notes whilst this risk is low, there is still a risk which needs to be taken into account.
31. The RA strongly argues for CPEng's quality mark of competence, emphasising Building Consent Authorities and members of the public's reliance on registration as demonstrating a defined level of competence, which shows the engineer can deal with complex engineering problems requiring expert technical knowledge.
32. The RA submit Mr A should not be allowed to continue practicing unconditionally as a CPEng when he has not satisfactorily demonstrated his competence to be registered, and further referred to the risk to the RA and the profession's reputation, if Mr A is permitted to continue holding himself out as a registered Chartered Professional Engineer.
33. Mr A's counsel argued the CAB did not express any concerns about safety during the assessment or treat the matter as urgent.

34. He highlighted the duration of Mr A's current registration, which had been since 2013, without material issues.
35. He also highlighted the short duration of the appeal process and argued the right provided under s36 of the Act to seek and obtain a stay would be rendered nugatory if the panel accepts the RA's submission, given the timing of the stay application relative to the decision to deregister.
36. The Appeal Panel acknowledge retention of an engineer on the register pending an appeal decision on competence is not without some risk to the profession and the public, accept the RA's assessment of risk, acknowledge the lack of specific safety concern, and recognise Mr A's current registration duration.
37. On balance, the Appeal Panel consider this ground has merit.

Ground (e): Granting the stay would be consistent with the fairness principle of natural justice

38. Mr A's counsel makes no specific submission on this ground.

Ground (f): Mr A has been registered since 2003 with "no material issues" having arisen.

39. This ground has been acknowledged by the Appeal Panel under Ground (d), and under other matters raised below.

Ground (g): Mr A's referees support his continued competence.

40. The Appeal Panel notes Mr A's two CPEng referees supported his continued registration, whilst the four CPEng qualified engineers assessing Mr A did not.

Ground (h): The CAB's reassessment duration.

41. This ground has been considered by the Appeal Panel under Ground (d) above.

OtherMattersRaised

The length of time likely to elapse before the appeal decision

42. Mr A's counsel submits the relatively short duration between the CAB decision and the appeal decision must be put into context with the overall assessment period⁹ and Mr A's continued registration for the duration of the assessment process¹⁰.
43. The RA disagrees, arguing the Act requires prompt removal from the register following the CAB's decision to decline continued registration.
44. Whilst the Appeal Panel does not accept a stay from removal of the register automatically follows a long assessment period, the Appeal Panel acknowledge Mr A has been continually registered since 2013, apparently without incident, and is encouraged by Mr A's counsel's desire to settle on the appeal hearing date pre submissions, so as not to delay the appeal decision process.

Whether or not there is an arguable case of appeal

45. The Appeal Panel do not consider it is appropriate to speculate on whether there is an arguable case in the appeal at this stage in the appeal process, and merely notes the Act provides for decisions of the RA to be appealed. There has been no argument by the RA that the appeal is not genuine or without merit.

Stay Order with Conditions

46. The Appeal Panel has a broad discretion on the issue of whether or not to grant a stay.
47. The RA have proposed as an alternative to removal from the register, a stay order with conditions.
48. The RA submit CPEC has the ability to issue conditions under s36, and propose any risk associated with Mr A remaining on the register could be mitigated by the inclusion of conditions in the stay order, which effectively allow Mr A's name to remain on the register, whilst restricting his ability to call himself, or practise to the level of a CPEng.

⁹ 3 years (June 2019 to August 2022)

¹⁰ 2 year, 9 months (January 2020 to September 2022)

49. Mr A would be unable to use the title “Chartered Professional Engineer”, the post-nominal CPEng, or sign off producer statements requiring CPEng sign off. Any works he is involved in requiring CPEng sign off would require sign off by another current CPEng.
50. In response to a panel question on how these conditions would be published or recorded, the RA proposed inclusion of the conditions in the notes section of the register. The RA did not explain how it proposed that such conditions would (or could) be enforced.
51. Mr A has not sought, and does not accept, the proposed limitations to his registration.
52. Counsel for Mr A argued the proposed conditions remove the utility of an order for stay of deregistration entirely.
53. In consideration of the arguments above the Appeal Panel’s considered a stay order without conditions.

Decision

54. The Appeal Panel considers this matter is finely balanced. This decision was by majority which highlights the difficulty associated with reaching agreement when balancing all of the relevant factors submitted by the parties.
55. The application for a stay of deregistration is granted. Mr A shall remain registered pending the outcome of the CPEC appeal 3/22.

Dated this 8th December 2022

Signed by Appeal Panel



Sandra Hardie – Principal



Alan A Winwood



Megan Neill (minority)