

Appeal Number: 01 / 11

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

N
Appellant

And

B
Complainant

Decision of the Chartered Professional Engineers Council dated 11 August 2011

Chartered Professional Engineers Council

IPENZ Case 180

CPEC - 3/05/2011

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”) from a decision of a Chair of Investigating Committees of the Registration Authority dated 12 May 2011 in which a complaint by N, against B, both chartered professional engineers, was dismissed without being referred to a full Investigating Committee on the basis that the alleged misconduct was insufficiently grave to warrant further investigation, as permitted by Rule 57(ba) of the Chartered Professional Engineers of New Zealand Rules (No 2) 2002 (“the Rules”).
2. N’s emailed notice of appeal was received by the Council on 19 May 2011 well within the 28 days prescribed in section 35(3) of the Act.
3. At it’s meeting on 3 June 2011 the Council appointed an Appeal Panel consisting of Graham Shaw as Principal, Ms Hazel Armstrong and Mr Jon Williams as members.
4. N’s original complaint to the Registration Authority was in respect of the actions of B assisting a tenant to gain temporary access via a crane and balcony to the 15th floor of a Christchurch office tower which had been “red stickered” and was within the CBD cordon following the 22 February 2011 Christchurch earthquake.
5. The complainant’s appeal is essentially to challenge the dismissal of the complaint by the Registration Authority on the basis that N does not accept that B’s actions were acceptable and B had not exercised his duty of care to all and had acted unethically and irresponsibly.
6. The parties were given the opportunity to make submissions and the Appeal Panel met via telephone conference call on 8 August 2011 to consider the appeal based on the papers, as agreed to by the parties.
7. Appeals are by way of rehearing (section 37(2)). 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. We think it relevant that this was a preliminary decision made “on the papers”. Since if it is correct the substance of the matters in issue will not be tested by an Investigating Committee we consider that the threshold to be crossed by a complainant in these circumstances is set relatively low, but not so low as to render the criteria listed in Rule 57 nugatory.

8. We are mindful that Rule 57 does not contain any criteria equating to a “strike out” application - ie a ground that would allow a complaint to be dismissed on the basis that it could not possibly succeed at law. We consider that we are entitled to have regard to the evidence placed before the Chair of the Investigating Committee to see if the complaint should proceed further or be dismissed under Rule 57(ba) as happened here, or for any of the other reasons listed in Rule 57 which is a decision that would have been open to the Chair of the Investigating Committee.
9. In his notice of appeal N alleges behaviour by B which could amount to a breach, or breaches, of the code of ethics and explicitly mentions the IPENZ competency elements of risk management, ethical conduct and judgement.
10. It is clear that a number of the alleged actions complained of by N were not actually undertaken by B. This is acknowledged by N in his final submission to the Appeal Panel in which he states “It would have been really helpful if B had provided this level of information at the time of the original complaint because it would seem that his involvement in preparations to access the building was fairly limited.”
11. That brings us to the basis for dismissal of the original complaint; subparagraph (ba):

(ba) the alleged misconduct is insufficiently grave to warrant further investigation;
12. We consider that this ground requires us to consider the facts and to consider whether the low threshold that we discussed earlier in this decision

has been met so as to allow the matter to move on to an Investigating Committee.

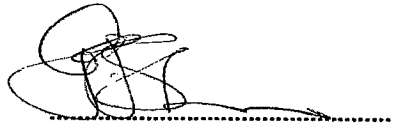
13. We have undertaken this exercise and concur with the Chair of Investigating Committees that the only possible shortcoming is that B could have made contact with the building owner. That obligation is in our view a courtesy not an ethical obligation in these circumstances. Whether making contact with the building owner would have changed anything is however supposition.
14. The papers show that the building owner was using its construction company, H, to communicate regularly with the building's tenants and not N's company. H had advised B's client that access to its floor was unlikely to be obtained until early 2012 at the earliest - a timeframe which was obviously unsatisfactory to B's client. The tenants were also advised that no attempt to access the building should be made without proper authority and spelt out the process for this. It appears that it was this process which B's client subsequently followed in arranging access.
15. Based on the above we have come to the conclusion that the complaint should be dismissed on this ground for the following reasons:
16. The ground on which the complaint can be dismissed is that the misconduct is insufficiently grave to warrant further investigation. That requires consideration of the alleged misconduct for seriousness. How grave is it? We have to say that when viewed in context we do not think it is very grave at all and does not cross the low threshold.
17. It is evident that B's client discussed with Civil Defence the question of notification to the owner and it was decided that it wasn't necessary. (We note that Civil Defence's guidelines in respect of owner notification have subsequently changed, but at the time the criteria operating were met.) It is evident that B was not part of that discussion or decision.
18. B's client was obviously aware of the plans being worked on for temporary access but the timing of these was unacceptable and so was forced to make their own arrangements and did so within the then applicable guidelines and with the necessary approvals.

Outcome

19. The decision of the Chair of Investigating Committees to dismiss the complaint is confirmed. The appeal is declined.
20. This decision which does not identify the parties may be published by the Registration Authority.

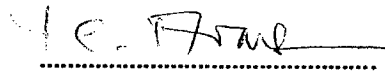
Dated this 11th day of August 2011

Graham Shaw
Principal



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Hazel Armstrong



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Jon Williams

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