

Appeal Number: 02/11

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

F
Appellant

And

G
Complainant

Decision of the Chartered Professional Engineers Council dated 24 August 2011

Chartered Professional Engineers Council

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 15 February 2011 in which complaints by the complainant, F, against a chartered professional engineer, G, were dismissed without being referred to a full Investigating Committee, as permitted by Rule 57(a) of the Chartered Professional Engineers of New Zealand Rules (No 2) 2002 (“the Rules”), on the basis that there was no applicable ground of discipline under S21(1)(a) - (d) of the Act.
2. F’s letter of appeal dated 12 March 2011 was received by the Registration Authority on 16 March 2011. On that same day the Registration Authority wrote to F advising that the letter of appeal should be sent to the Council. The Council received an electronic copy from Registration Authority on 21 March 2011 and a hard copy from the Appellant on 24 March 2011. The actual date on which the Appellant received the decision is unclear but clearly the earliest it could have been was 16 February 2011. As the letter of appeal was received by the Registration Authority within the 28 days prescribed in section 35(3) of the Act and given the uncertainty as to when the Appellant received the decision, the Appeal Panel has determined that the appeal can not be dismissed for being received out of time.
3. The parties were informed by letter dated 25 March 2011 of the receipt of the letter of appeal and subsequently of the appointment of an appeal panel consisting of Graham Shaw as Principal, Mr Andrew Read and Mr Roly Frost as members.
4. During June 2011 both parties were given the opportunity to make submissions. The appeal panel met on 8 July. Both parties were present at the appeal hearing, spoke to their submissions, were given

the opportunity to reply to the other party's submissions and answered questions from the appeal panel members.

5. F's original complaint to the Registration Authority was in respect of a Transportation Assessment Report prepared by G for a proposed storage unit facility accessed directly from SH1.
6. In their notice of appeal F specifically alleges G of the following:
 - (a) Breaches of Rule 21(b) and (c) of the Act, namely breaches of the code of ethics and performance of engineering services in a negligent or incompetent manner.
 - (b) Breach of Rule 45 which requires that a chartered professional engineer must act honestly and with objectivity and integrity in the course of his or her engineering activities
 - (c) Breach of Rule 46(b) which relates to misrepresenting competence and in particular undertaking engineering activities only within his or her competence
 - (d) Breach of Rule 52 which requires that a chartered professional engineer must disclose to a client any financial or other interest that is likely to affect his or her judgement on any engineering activities he or she is to carry out for that client.
7. We also note that the Appellant has been critical of the performance both the Complaints Research Officer and the Chair of Investigating Committees.
8. Rule 56 of the Rules requires the Registration Authority to carry out an initial investigation of the complaint in accordance with Rule 58 and either refer it to an investigating committee or dismiss on a ground in Rule 57. That initial investigation was carried out in a manner consistent with the requirements of Rule 58. Accordingly we find no basis for F's criticism of the initial investigation process or of

the performance of either the Complaints Research Officer or the Chair of Investigating Committees.

9. There are four grounds for disciplining a chartered professional engineer in section 21(1) :
 - (a) Conviction by any court of any offence punishable by imprisonment for a term of 6 months or more; or
 - (b) Breach of the code of ethics; or
 - (c) Performance of engineering services in a negligent or incompetent manner; or
 - (d) Made or provided false or misleading documentation or representations for the purpose of obtaining registration.
10. Clearly (a) and (d) are not relevant in this case.
11. However, there has been a complaint under paragraphs (b) and (c). That complaint, at its simplest, is that there has been negligent or incompetent work undertaken, along with a breach of the code of ethics. There are clearly applicable grounds of discipline under which such a complaint can heard. Note that at this stage it is only necessary to show that the alleged conduct would be an applicable ground of discipline; it does not mean that the allegations are proven.
12. Once we have reached that conclusion we do not think we need to take the matter further under Rule 57(a).
13. Accordingly the Appeal Panel finds that the Chair of Investigating Committees was wrong to dismiss the complaint for lack of applicable grounds.
14. In February 2009 G prepared a draft Transportation Assessment Report for F in support of a proposed storage unit facility. The report described the location of the site in the transport network and the

history of the site. The report then went on to consider traffic flow data and road safety records in the context of both New Zealand Transport Agency's and the local District Council's expectations. It concluded with the statement that " On this basis , and given that the overall levels of traffic generation are likely to be close to the permitted baseline, it is concluded that the proposal makes good use of the site, and will have no more than minor effects on the adjoining road network."

15. G is a senior transportation engineer working for a company which specialises in transport engineering. As such we find G to be working within his identified area of engineering expertise.
16. To cut to the chase, the Appellant F believed that having employed G to prepare the Transportation Assessment Report that G should do so to F's expectation. Despite the Reports conclusion noted above, F took exception to section 7 of the Report and specifically Table 2 : Trip Generation Records and G's estimation of the vehicles per day ("vpd").
17. G's position was that having regard to industry available data together with that provided by F he was not prepared to change his estimate of vpd without further supporting data. G proposed a way to obtain additional data but this was qualified with settlement of the outstanding fees for the work done to date.
18. F refused to pay anything for G's services to date let alone for any further work and so a standoff quickly (apparently within the space of a week) developed between the parties leading to a dispute, a complaint to IPENZ and ultimately to this appeal.
19. We note there has been civil action taken by the parties in respect of this dispute but stress that the Council's role is only in addressing the applicable behaviour of an individual Chartered Professional Engineer in accordance with the Act and not as a mediator or judge in resolving

commercial disputes between parties. Those are ultimately issues for the courts to resolve and have no bearing on the Council's or this appeal panel's deliberations.

20. Appeals to the Council 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".

21. When considering the dismissal of an appeal we are bound by Rule 57 which as a whole provides:

The Registration Authority may dismiss a complaint without referring it to an investigating committee if the chairperson of investigating committees decides under rule 58 that—

- (a) *there is no applicable ground of discipline under section 21(1)(a) to (d) of the Act; or*
- (b) *the subject matter of the complaint is trivial; or*
- (ba) *the alleged misconduct is insufficiently grave to warrant further investigation; or*
- (c) *the complaint is frivolous or vexatious or is not made in good faith; or*
- (d) *the person alleged to be aggrieved does not wish action to be taken or continued; or*
- (e) *the complainant does not have a sufficient personal interest in the subject matter of the complaint; or*
- (f) *an investigation of the complaint is no longer practicable or desirable given the time elapsed since the matter giving rise to the complaint.*

22. We do consider that Rule 57(a) has a purpose and two examples illustrate this. If a complaint was made that a Chartered Professional Engineer had libelled a complainant we cannot see that there would be an applicable ground of discipline under which such a complaint

could proceed. Similarly, if there was an employment dispute between a staff member and a Chartered Professional Engineer there would most likely not be an applicable ground of discipline. (Though we stress that each complaint must obviously be assessed on its own facts). In this case however we have determined that it was not appropriate to dismiss the complaint under Rule 57(a) as there were clearly applicable grounds for discipline.

23. Having come to this conclusion we are bound to consider whether the complaint should be dismissed for any other reasons set out in Rule 57.
24. We immediately dismiss subparagraphs (d) and (f) as not being relevant in this case.
25. We dismiss subparagraph (b). We do not consider that the subject matter of the complaint is trivial. That implies something of very little importance or value, something insignificant. We do not think that the complaint falls into that category. The subject matter was clearly of some moment to F and of relevance [though in itself not necessarily decisive] to the development application.
26. We dismiss subparagraph (c). We do not consider that the complaint is frivolous or vexatious. Frivolous is a reference to a proceeding that is not a serious and proper use of the complaint process (see for example *Fitzherbert v Acheson* [1921] NZLR 265). Vexatious is a reference to impropriety such as a second attempt to complain about a matter already dealt with (see for example *Registered Securities Ltd (in liq) v Yates* (1991) 5 PRNZ 68). It is clear from the papers filed by F that there is strong feeling that G was incorrect in the report provided. But that does not mean something is brought in bad faith. For something not to be brought in bad faith we would expect to see material, perhaps from a respondent to a complaint that the complainant was motivated by an element of ulterior motive that was somehow malicious. For example if one Chartered Professional

Engineer complained against another purely to obtain a business advantage. There is no such evidence here.

27. As to subparagraph (e) we consider that F had an obvious interest in the subject matter of the report.

28. That brings us to subparagraph (ba):

(ba) the alleged misconduct is insufficiently grave to warrant further investigation;

29. 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.

30. We have undertaken this exercise and have come to the conclusion that the appeal should be dismissed on this ground for the following reasons:

31. The ground on which the complaint should 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.

32. There is clearly a difference of opinion between the parties. F did not get the report it wanted. While supportive of F's intentions, F determined that the report was overall not supportive enough.

33. Engineering judgment must be exercised where necessary in order for an engineer to responsibly fulfil his or her duties. Standards are not always absolute. While G owed obligations to his client F, those needed to be balanced by his own ethical obligations as to his opinion of the facts before him.

34. In any event we do not think that the monetary outcome in this case is as a result of the misconduct alleged, but rather is caused by F

determining not to proceed with the application and to test the expert evidence of G in a hearing forum. That is what normally happens in such situations.

35. With respect to the specific allegations of negligence and incompetence we note:

(a) 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.

(b) We do not consider that G was incompetent. He fully appreciated the significance to F of his report and also well understood the information that NZTA and the District Council would expect to see in such a traffic assessment report and endeavoured to present it accordingly. That to us is not the action of someone incompetent.

(c) That leaves us still having to consider whether G was negligent. What is the standard which, if a chartered professional engineer falls below, the conduct will be considered grave enough for disciplinary action to follow? We believe that standard is conduct that would lower the standing and reputation of Chartered Professional Engineers in the eyes of reasonable and responsible members of the general public when viewed in context.

(d) We can see no evidence of conduct that falls below the standard whereby a finding of negligence would follow.

36. In respect of the specific allegations of breaches of ethics we note:

(a) Rule 46 - We see no evidence of G having acted without honesty or without objectivity and integrity in the course of his engineering activities.

- (b) Rule 46(b) - G is an experienced senior traffic engineer. The production of traffic assessment reports, similar to that prepared for F, is within his competence.
- (c) Rule 52 - We have been unable to identify any circumstances that would give rise to there being any validity in the allegation of failure to disclose a conflict of interest.


37. In summary we do not agree that this complaint should have been dismissed under Rule 57(a). However, we are entitled to come to a different conclusion to the Chair of Investigating Committees so long as it was a decision that was available to the Registration Authority. We decide in this case that the complaint should be dismissed under Rule 57(ba) and so order.

Outcome

- 38. The appeal is declined. The complaint is dismissed under Rule 57(ba).
- 39. This decision which does not identify the parties may be published by the Registration Authority.

Dated this 24th day of August 2011

Graham Shaw
Principal



Roly Frost



Andrew Read

