

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

CPEC 02/2013

AND

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

Between

**W
Appellant**

And

**Registration Authority
Respondent**

Decision of the Chartered Professional Engineers Council dated 12 April 2013

Chartered Professional Engineers Council

RA Case 205130101

CPEC - 02/2013

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 an Investigating Committee ("IC") of the Registration Authority ("RA") dated 10 January 2013, but received by W on 28 January 2013, in which a inquiry by the RA, against W, a Chartered Professional Engineer, was referred to a Disciplinary Committee ("DC") as the IC considered there to be applicable grounds for discipline under section 21(1) (a) to (d) of the Act and that under Rule 57 of the Chartered Professional Engineers of New Zealand Rules (No 2) 2002 ("the Rules") there were no grounds for dismissing the complaint.
2. When the RA itself initiates an investigation of a matter, known as an inquiry, it does so as if it were a complaint. We shall refer to it from now on as the complaint which is consistent with the parties' own use of the term.
3. W's emailed notice of appeal dated 24 February 2013 was received by the Council on the same date and within the 28 days prescribed in section 35(3) of the Act.
4. By circulation, the Council appointed an Appeal Panel consisting of Mr Graham Shaw as Principal, Ms Sharyn Westlake and Mr Andrew Hazelton as members.

Process

5. The parties were given the opportunity to make submissions and the Appeal Panel met on 12 April 2013 to consider the appeal based on the papers, as agreed to by the parties.

6. 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 that of the IC, but the appellant carries the burden of satisfying us that we should do so.

Complaint History

7. The RA's original inquiry, prompted by communication from the Department of Labour ("DoL"), was in respect of the actions of W in certifying a commercial karting activity to operate without the addition of rollover protection ("RoP") and seatbelts.
8. The disciplinary process in this case was:
 - (a) RA initiated the inquiry on its own motion under Rule 55.
 - (b) RA carried out an initial investigation of the complaint in accordance with Rule 58, in which the CRO's report was considered by the Chairperson of ICs and the Chairperson decided that the complaint should proceed to an IC rather than be dismissed on a ground in Rule 57.
 - (c) Under Rule 60 the IC may refer the complaint to a DC or dismiss it. The IC investigated the complaint and determined under Rule 60 that it should proceed to a DC. It is this decision which has been appealed.
9. W's appeal is to challenge the whole of the decision of the IC and in particular its decision to refer the complaint to a DC rather than dismiss it. W states the grounds for appeal are that there are no applicable grounds for discipline and that the complaint was vexatious and not made in good faith.

10. We also note that the relief sought by W is for the complaint to be dismissed pursuant to Rule 57, and that IPENZ management and the Recreational Safety Engineers Technical Interests Group function neutrally and transparently to the rules and principles documented.

Jurisdiction

11. The Council has no jurisdiction over the affairs of IPENZ apart from when IPENZ is acting in its statutory role as the RA under the Act. Therefore we have no ability to grant the second part of the relief sought.
12. W has chosen to appeal at the earliest possible stage in the disciplinary process - that being the IC's decision to refer the complaint to a DC. Section 35(1) of the Act provides that "a person to whom the decision relates, or if it is a disciplinary matter, the complainant may appeal to the Council against a decision of the RA under Part 2 of the Act"
13. We have considered if a decision of an IC is a decision of the RA and hence whether there is a right of appeal. An IC acts as the RA's delegate. It has no independent existence without that delegation. Practically speaking, the IC's decisions are an exercise of the RA's decision-making functions under the Act. It follows therefore that there is an appeal right in respect of an IC's decision.

Threshold

14. In order for a complaint to proceed from an IC to a DC there must be a threshold which has to be passed. We consider that threshold must be reached when a complainant produces probative evidence upon which a DC could make an adverse finding against a CPEng. We do not think that it is the role of the IC to weigh the evidence; it must merely establish that there is evidence. Once that threshold is crossed the IC then has to turn its mind to Rule 57 and consider

whether the complaint should be dismissed for any of the reasons stated therein. This is the process we intend to follow in this appeal.

Evidence

15. From the documentation we have seen and from the face of the IC's decision itself we are satisfied that there is probative evidence upon which a DC could make adverse findings against the appellant. We specifically state that we make no findings on whether that evidence should result in adverse findings against the appellant as this is the job of the DC in the first instance. Examples are:
 - (a) Report from Neil Rogers and Associates to the DoL dated 5 October 2010;
 - (b) A series of emails from Australian safety inspectors to DoL commenting on the requirement for seatbelts;
 - (c) Paragraph 4.12 of the manufacturers handbook - commenting that the addition of seatbelts and RoP improves go-kart safety;
 - (d) Paragraphs 9.5 and 9.6 of the IC's report.
16. Therefore the Council considers that there is a prima facie case that there are applicable grounds for discipline that might be relevant, since if the evidence we have outlined were to be accepted then it may result in a finding of negligence and/or a breach of the code of ethical conduct in particular regarding obligations relating to health and safety.
17. Having come to this conclusion however we still need to consider whether the complaint should be dismissed under Rule 57 (a) or (c) as sought by the appellant. These grounds are:
 - (a) there is no applicable ground of discipline under section 21(1)(a) to (d) of the Act; or

- (b) the complaint is frivolous or vexatious or is not made in good faith.
18. We have already found that there are applicable grounds of discipline therefore the complaint cannot be dismissed under Rule 57(a).
19. 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).
20. It is clear from the appeal and papers filed by the appellant that he clearly believes he is correct in the advice he has given. But that does not mean something is brought in bad faith simply because other witnesses disagree with the appellant. For something 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. There is no such evidence here.
21. While there is clearly no doubt as to the annoyance caused to W, that alone does not in itself make the complaint vexatious. Although the complaint was initiated by the RA their action in doing so was prompted by communication from DoL. The motivation of DoL in contacting the RA is irrelevant as DoL is not a party to this appeal.

Outcome

22. Based on the above we have come to the conclusion that the appeal should be dismissed.

23. The decision of the Investigating Committee of the Registration Authority to refer this complaint to a Disciplinary Committee is upheld. The appeal is declined.
24. This decision which does not identify the parties may be published by the Registration Authority.

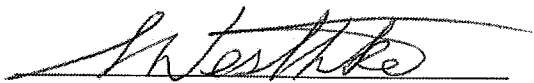
Costs

25. The Council has the ability to award costs of an appeal under Section 37(5)(d) of the Act.
26. Our tentative view is this is not a case which should be subsidised by Chartered Professional Engineers as a whole and that the appellant, having been unsuccessful, should meet the costs of this appeal. However, before making a decision on costs we invite the parties to provide and exchange their written submissions thereon within 7 working days.


Dated this 12th day of April 2013



Graham Shaw
Principal



Sharyn Westlake



Andrew Hazelton