

15 July 2015

To: Appellant:
Mr W

Respondents:

AC	SS
NR	JM
PW	SG
SJ	GB
MB	KB
JT	RL
DS	

Copy to: IPENZ as the Registration Authority

Dear Mr W

Appeal to Chartered Professional Engineers Council (CPEC) (Council) on Decisions of the Registration Authority

We are in receipt of the following notices of appeal:

- 10 November 2014 AC, CW – as CEO and Complaints Research Officer for the RA. Complaint relates to their role on behalf of the Registration Authority in instigating and initially investigating the complaint.
- 3 December 2014 - SS, PW – their roles on the RA's Investigating committee.
- 3 December 2014 JM, KB, RL, SJ, JT - their role on the Recreational Safety Engineering (RSE) Technical Interest Group from 1 April 2011
- 3 December 2014 – KB, JM, DS, SG, MB – their role on the Recreational Safety Engineering (RSE) Technical Interest Group to 31 March 2011.
- 29 April 2015 NR – preparation of a report for MBIE used as evidence in the complaint.
- 20 May 2015 – GB – his role as a witness for the investigating committee.

Correspondence has also been received relating to NC and JJ. As neither Ms C nor Mr J are CPEng, the Council has no jurisdiction.

The above has all been reviewed by the CPEC appeal panel (Panel).

We are also in receipt of your 29 May 2015 letter.

We deal firstly with your 29 May 2015 letter. Your letter has been considered by the Council. The Council does not regard itself as having jurisdiction to deal with any of the issues that you have raised and cannot comment any further.

Prior to addressing each appeal we consider it appropriate to outline the complaints and appeals process defined in the Chartered Professional Engineers Act 2002 (Act) and the Chartered Professional Engineers Rules (2002) (Rules). We also provide some specific discussion on their applicability to this matter.

Section 21 of the Act provides specific grounds for Discipline of Chartered Professional Engineers:

21 Grounds for discipline of chartered professional engineers

(1) The Registration Authority may (in relation to a matter raised by a complaint or by its own inquiries) make an order referred to in [Section 22](#) if it is satisfied that a chartered professional engineer –

(a) has been convicted, whether before or after he or she became registered, by any court in New Zealand or elsewhere of any offence punishable by imprisonment for a term of 6 months or more if, in the Authority's opinion, the commission of the offence reflects adversely on the person's fitness to practise engineering; or

(b) has breached the code of ethics contained in the rules; or

(c) has performed engineering services in a negligent or incompetent manner; or

(d) has, for the purpose of obtaining registration or a registration certificate (either for himself or herself or for any other person), –

(i) either orally or in writing, made any declaration or representation knowing it to be false or misleading in a material particular; or

(ii) produced to the Authority or made use of any document knowing it to contain a declaration or representation referred to in subparagraph (i); or

(iii) produced to the Authority or made use of any document knowing that it was not genuine.

(2) The Registration Authority may make the order whether or not the person is still a chartered professional engineer.

(3) The Registration Authority must comply with the applicable procedures under [Section 25](#) before making an order.

Clearly only S 21 (1) (b) and S21 (1)(c) have relevance in the matters you have raised. So in all matters raised the Panel has to consider, has the Chartered Professional Engineer breached the code of ethics contained in S 43 – S 53 of the Rules, or performed engineering services in a negligent or incompetent manner.

A. Ethics

The Rules provide the ethical expectations of a Chartered Professional Engineer. The areas that are relevant to these matters are

43 Take reasonable steps to safeguard health and safety

A chartered professional engineer must, in the course of his or her engineering activities, take reasonable steps to safeguard the health and safety of people.

45 Act with honesty, objectivity, and integrity

A chartered professional engineer must act honestly and with objectivity and integrity in the course of his or her engineering activities.

46 Not misrepresent competence

A chartered professional engineer must –

(a) not misrepresent his or her competence; and

(b) undertake engineering activities only within his or her competence; and

(c) not knowingly permit engineers whose work he or she is responsible for to breach paragraph (a) or paragraph (b).

The basis of this matter is health and safety. As detailed below Chartered Professional Engineers may have differing views of a specific topic. One may eventually be shown to be correct and the other incorrect. However, provided the engineer has taken “reasonable steps” there can be no breach of the S 43. In all matters relating to these complaints and subsequent appeals, the Chartered Professional Engineers in question have put considerable effort into upholding what in their professional opinion was the correct solution. The Panel finds that there has been no breach of S 43 of the Rules.

The Chartered Professional Engineers who are the subject of these complaints are either:

- Employees of IPNEZ/Registration Authority.
- Professional Engineers selected for their experience and independence to sit on or chair Investigating and Discipline Committees.
- Members of specific Technical Interest Groups that represent a particular area of engineering.

The nature and composition of Technical Interest Groups is such that they represent the knowledge of significant proportion (not all) of the profession working within this field. The Panel considers it worth noting here (with reference to other parts of this decision), that the views and findings of a Technical Interest Group will meet the test of being “reasonable” as they will be those considered acceptable by a significant proportion of the profession that practices in this field.

The actions of the individuals and groups involved in this matter have been reviewed by a number of independent individuals and panels:

- Complaints Research Officer x2
- Chair of Investigating Committee x2
- Investigating Committee
- CPEC Appeal Panel
- Disciplinary Committee

Those involved have been selected by their professional bodies or peers to represent them. These selections have been made with full knowledge of the individual's background and specific experience. None of the findings of these individuals/committees/panels have indicated that those involved have acted without honesty or objectivity. There is also no indication that any of the individuals have misrepresented their competence. The Panel can find no evidence to suggest that it should take a differing view to that of these groups. The Panel finds that there has been no breach of S 45 or S 46 of the Rules.

B. Negligence and Incompetence

In previous findings of the Council, standards for judging negligence and incompetence have been given. It is found that negligence is the lower of the two bars. An individual may be found negligent but not incompetent, whereas it is unlikely that a person who is incompetent is not also negligent.

In previous decisions of this Council we have derived assistance from *v W* ([2009] 1 NZLR 514). In that case a lawyer appealed disciplinary findings made against him which alleged he had been negligent so as to tend to bring the legal profession into disrepute. In that case a full bench of the High Court stated:

[82] ... We do think it is relevant to consider whether the conduct falls below what is to be expected of the legal profession and whether the public would think less of the profession if the particular conduct was viewed as acceptable.

[91] In our view it was negligence of a degree that tends to affect the good reputation and standing of the legal profession generally in the eyes of reasonable and responsible members

of the public. Members of the public would regard the actions as below the standards required of a law practitioner, and to be accepted as such by responsible members of the profession. It is behaviour or actions which, if known by the public generally, would lead them to think or conclude that the law profession should not condone it, or find it to be acceptable. Acceptance by the profession that such negligence is acceptable would tend to lower the standing and reputation of the profession in the eyes of the general public.

In Appeal No.2 of 2010 the Council stated:

So here, we consider that we have to assess whether the Disciplinary Committee was correct in making a finding that the appellant's conduct was such that it would tend to affect the good reputation and standing of Chartered Professional Engineers generally in the eyes of reasonable and responsible members of the public. Put slightly differently, would the acts complained of if acceptable tend to lower the standing and reputation of Chartered Professional Engineers in the eyes of reasonable and responsible members of the general public?

It is not uncommon for two engineers to have differing views on a specific technical subject. In the fullness of time one of these views may be found to be correct and the other incorrect. This does not necessarily mean that the "incorrect" engineer has been negligent. We must judge the actions and decisions of this engineer against the expectations detailed above.

C. Liability

Section 33 of the Act states:

33 Protection for members of decision authorities and others for disciplinary matters

(1) Neither a decision authority nor any committee, member, or employee of a decision authority is liable for any act or omission done, in good faith, in the pursuance or intended pursuance of their functions or duties or exercise of their powers under this Act or the rules in relation to disciplinary matters.

(2) Every person who does the following things has the same privileges as witnesses have in a court:

(a) provides documents, things, or information to a decision authority in relation to a disciplinary matter; or

(b) gives evidence or answers questions at a hearing of a decision authority in relation to a disciplinary matter.

(3) Every counsel appearing before a decision authority in relation to a disciplinary matter has the same privileges and immunities as counsel in a court.

In its decision on 10 July 2014 the Council found that staff of the Registration Authority were covered by Section 33 of the Act. This Panel finds that this Section includes all members of Investigating and Disciplinary committees. As noted above the actions of these committees have been independently reviewed by other committees and panels. There has been no findings to date or any further evidence provided to indicate that any member of these committees has not acted in good faith.

D. The Appeals

We now address each of your appeals.

1. AC, CW

In their roles as CEO and Complaints Research Officer for the Registration Authority Mr C and Mr W are afforded the protection of Section 33(1) of the Act. This appeal is dismissed based on Section C above.

2. SS, PW

Mr J is not a Chartered Professional Engineer. The Council has no jurisdiction in this complaint. Mr S and Mr W are afforded the protection of Section 33(1) of the Act. This appeal is dismissed based on Section C above.

3. JM, KB, RL, SJ, JT

Their role on the Recreational Safety Engineering (RSE) Technical Interest Group from 1 April 2011. Appeal dismissed under Rule 57 (a). There being no grounds for discipline based on Section A and Section B above.

4. KB, JM, DS, SG, MB

Their role on the Recreational Safety Engineering (RSE) Technical Interest Group from 1 April 2011. Appeal dismissed under Rule 57 (a). There being no grounds for discipline based on Section A and Section B above.

5. NR

For preparing a report for MBIE used as evidence in the complaint. Appeal dismissed under Rule 57 (a). There being no grounds for discipline based on Section A and Section B above.

6. GB

His role as a witness for the investigating committee. This appeal is dismissed based on Section C above.

E. Conclusion

The Panel finds that all appeals should be dismissed and upholds the decisions of the Chair of the Investigating Committees.

F. Costs

The Panel finds that costs should fall where they lie.

G. Appeal

You have a right of appeal to the District Court under Section 35 of the Act. Should you proceed with an appeal then the respondent will be the Registration Authority.

H. Publication

The Council proposes to publish this decision redacted on its website. Parties may make

submissions on this matter within 14 days of receiving this finding.

Yours faithfully,



Jon Williams BE, CPEng, FIPENZ
Appeal Panel Chair



Andrew Hazleton
Member



Anthony Wilson
Member