

**In the Matter of The Chartered
Professional Engineers Act 2002**

And in the matter of an appeal to the Chartered Professional Engineers Council

BETWEEN **NZFS**
 Complainant

AND **S**
 Respondent

**DECISION OF THE CHARTERED PROFESSIONAL ENGINEERS COUNCIL
PANEL DATED 14 DECEMBER 2015**

Background

1. This is an appeal to the Chartered Professional Engineers Council (“the Council”) by the (“NZFS”) under the Chartered Professional Engineers of New Zealand Act 2002 (“the Act”).
2. The NZFS have appealed the decision of the Investigating Committee (“IC”) dated 8 May 2013. The IC had dismissed the NZFS’s complaint against the respondent, Mr S, in accordance with Rule 57 (ba) in that they considered that the alleged misconduct was insufficiently grave to warrant further investigation
3. The NZFS, by way of letter dated 4 June 2013, sought an appeal of the IC’s decision (“notice of appeal”).
4. There were concerns over the appeal in terms of timing and submissions previously filed in opposition to the NZFS’s application for waiver, raised a number of concerns including but not limited to the fact that the notice of appeal was made out of time, it was not served on Mr S and that the notice of appeal did not comply with the Council’s Appeal Practice Notes.
5. The Council, in its letter dated 17 September 2015, advised that while the issues are now “dated” the panel considered that the appeal should be heard because of possible “public safety” implications.
6. NZFS elected not to file any further submissions in relation to its appeal.
7. The Registration Authority elected not to file any further submissions.
8. Morgan Coakle filed further submissions on behalf of Mr S dated 16th October 2015.
9. NZFS elected not to file any submissions in reply.
10. The Chartered Professional Engineers Council met on 23rd November 2015 to consider the appeal based on the papers submitted.

The grounds of appeal

11. The basis of NZFS's appeal is set out in the notice of appeal. NZFS raised three primary issues in appealing the IC's decision to dismiss the complaint:
 - (a) The IC's report concluded "*that past practices were not robust, QA process should be tightened, alternative solutions should be more robustly explained, the use of computer fire modelling and analysis needs to be undertaken by people with appropriate training*".
 - (b) The IC's report "*upholds the concerns raised by the NZFS and explicitly acknowledges that the engineer should undertake improvements to address them.*"
 - (c) It was clear to NZFS that action was needed "*to bring this engineers work to standard required of a chartered professional engineer*".
12. No specific relief was identified in the notice of appeal.

The Council's jurisdiction

13. The Council is entitled to confirm, vary or reverse a decision. It may make any decision that could have been made by the decision authority. It is entitled to take a different view from the IC but the appellant carries the burden of satisfying the Council that it should do so.
14. As set out in the Council's letter of 17 September 2015 if the decision is confirmed the appeal will be dismissed. If the decision is reversed then the only relief that can be granted is for the Council to send the matter to the disciplinary committee for the matter to be heard in full.

The Initial complaint

15. In its complaint dated 30 July 2012 Mr D alleged that Mr S had breached the code of ethical conduct, as set out in the Chartered Professional Engineers of New Zealand Rules (No 2) 2002 ("the Rules") by:
 - a. Not taking reasonable steps to safeguard health and safety of people (s3) (including firefighters);

- b. Allowing engineers under his control to carry out work beyond their competence (s46c);
 - c. Not adequately informing end users of the consequences or limitations of the advice offered (s48); and
 - d. Not disclosing a conflict of interest (s52) in that he has provided professional services to a manufacturer of the building material and has continued to support the use of this manufacturer's product as both a designer and as a peer reviewer in contravention of advice from the building regulator and a variety of other reputable sources.
16. On 17 August 2012, Mr S provided a comprehensive response to the allegations against him.
17. The IC's preliminary report dated 12 December 2012 was circulated to the parties for comment.
18. The IC considered that the matters under consideration represented differences in opinion at a very fundamental level of fire engineering in New Zealand, and that a disagreement over interpretation of paragraphs in an Acceptable Solution does not in itself support a claim of negligent or incompetent design.
19. The IC's proposed decision, as set out at paragraph 10.1 of its preliminary report, was unanimous. It was proposed that there were no grounds for reference of the complaint to the disciplinary committee and the complaint was dismissed.
20. The IC issued its final report on 8 May 2013. It confirmed the preliminary decision to dismiss the complaint against Mr S.
21. At paragraph 10.6 of the IC's final report they noted that *"the IC was particularly concerned in regard to Mr D's allegations of negligent or incompetent design reviews by Mr S and took time to review samples of documents provided to assess the general quality of Mr S's work. The IC concluded that whilst some of Mr S's reviews may not have been as thorough or as complete as Mr D would have liked, there was no evidence in Mr D's complaint of negligence or incompetence"*.
22. The Investigating Committee made recommendations on improvements to practices by Mr S and his company and concluded that some of the issues raised should be more effectively addressed by the quantifiable acceptance criteria in the 2012 Building Code.

23. Having weighed up all the evidence the Investigating Committee concluded that the complaint should be dismissed on the grounds of CPEng Rule 57 (ba), the alleged misconduct is insufficiently grave to warrant further investigation.

Council's consideration

24. The key decisions for the Council to make were:
- a. Was the decision made by the Investigating Committee correct based on the evidence presented?
 - b. Did the grounds of the appeal raise issues not considered by the Investigating Committee, or which if considered further would overturn the decision?
 - c. Did the further submissions presented by the parties give rise to the Council to confirm, vary or reverse the decision?
25. The Council did not find the grounds of appeal to be clear. The case presented by the Appellant to reverse the decision was not conclusive and the Appellant did not provide any further submissions during the appeal process, nor did the Appellant identify the relief sought as a result of the appeal.
26. The Council interpreted that the NZFS considered that the recommendations on past practices by the Investigating Committee as part of the decision, as being evidence of an Engineer demonstrating negligent or incompetent behaviour.

Discussion

27. The grounds for discipline of a Chartered Professional Engineer are set out in Section 21 (a) to (d) of the Act. Sub-sections (a) to (d) are clearly not relevant. While the original complaint did include a complaint of breach of the code of ethics, the Council took the view that there was no such breach and therefore this leaves only the matter as to whether Mr S has performed engineering services in a negligent and incompetent manner.

28. The Council has previously noted 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.
29. There were clearly different views of interpretation of Fire Engineering as at a fundamental level. Professionals are entitled to hold differing views but this does not mean that one is incompetent or negligent.
30. The Investigating Committee had considered all the evidence and concluded that there was no evidence in Mr D’s complaint of negligence or incompetence.
31. The Council formed the same view.
32. Since the complaint was first heard (in December 2012) there has been considerable development of the New Zealand Building Code Fire clauses and significant changes to the Compliance Documents, some of which address matters which were subject of the differences of opinions on the technical issues raised in the complaint.
33. There were no further submissions by the NZFS on the grounds of negligence and incompetent behaviour.
34. The submissions made on our behalf of Mr S confirmed the Council’s view that there was no evidence of negligence or incompetent behaviour.
35. Mr S has recently been re-assessed as part of his continuing professional assessment and deemed competent to practice in the field of Fire Engineering.

Decision

36. Having considered the papers presented in the original complaint, the grounds of appeal and further submissions on behalf of Mr S, the Council concluded that the appeal should be declined and the decision of the Investigating Committee to dismiss the complaint on the grounds of CP Eng Rule 57 (ba), the alleged misconduct is insufficiently grave to warrant further investigation, is confirmed.

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