

APPEAL NUMBER 12/15

**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

Mr R CPEng MIPENZ IntPE(NZ)

Appellant

And

A C

Respondent

Decision of the Chartered Professional Engineers Council dated 29 February 2016

The Appeal

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"). The appeal is of a decision of Disciplinary Committee (DC) dated 7 September 2015.
2. The DC found that (19/667):
 - a. Mr. R had performed engineering works in a negligent manner.
 - b. Mr. R had contravened Rule 45 in that he has not acted with honesty and integrity.
3. The DC found that there were grounds for discipline of Mr R under section 21 of the Act. The DC imposed the following penalties on Mr R in line with section 22 of the Act (26/667).
 - a. That the registration of Mr. R's registration be suspended for a period of 6 months.
 - b. That Mr. R pays a fine of \$1,500.
 - c. That the particulars of this case be published in Engineering Dimension and that a copy be placed on the Registration Authorities website and that Mr R not be named in any publication relating to this case.
 - d. That Mr. R pays costs of \$5,000.
4. The Council received a Notice of Appeal dated 7 October 2015. The Council acknowledged receipt of the Appeal in a letter dated 23 October 2015. The letter outlined the timing and process to be followed. This letter also proposed that following the receipt of all submissions and responses the matter be dealt with on the papers. Both parties were offered the opportunity for a hearing to be held in person if required. Both parties agreed to the matter being considered on the papers.
5. At a meeting of the Council on 11 December 2015, the Council appointed an Appeal Panel ("the Panel") comprising Mr. Jon Williams as Principal, Ms. Sue Simons and Mr. Anthony Wilson as members.
6. Mr. R provided a further submission dated 20 November 2015. A C provided their submission dated 4 December 2015. Mr. R provided his reply to the submission on 11 December 2015.

Background

7. The complaint related to documentation issued by Mr. R under his company's name E Ltd. The A C provided information with the complaint and subsequently provided

further information during the investigation process. Their complaint was that Mr. R did not display the ethics and integrity of a professional engineer. More specifically as noted in their 31 March 2015 letter (80/667):

- a. Despite being removed from the A C register of approved Producer Statement Authors Mr. R continued to perform inspections (and quite probably design work) as if he had not been removed, intending the A C to rely on these inspections.
 - b. That Mr. R submitted documentation prepared by himself but under the signature of another Chartered Professional Engineer for the purposes of obtaining a Code Compliance Certificate (CCC).
 - c. That Mr. R engaged a colleague to provide signed, blank Producer Statements for Mr. R and his staff to complete in order to obtain CCC's.
 - d. Mr. R indicated that he was happy with E Ltd employees signing documentation that implied they were Licenced Building Practitioners when they were not.
 - e. That Mr. R amended a list of the status of projects he was working on to suit his own purposes.
8. The complaint was processed by the Registration Authority through the Adjudicator, an Investigating Committee and finally to a Disciplinary Committee. The DC issued their findings and decision on penalties as highlighted in paragraphs 2 and 3 above.

Producer Statements

9. At the centre of this complaint is the issuance of Producer Statements and other documentation to a Consenting Authority. In considering this appeal the panel note the following:
10. Building Consent Authorities (BCAs) like the A C, have a two tiered approach to confirming that the design and construction of buildings complies with the relevant parts of the New Zealand Building Code and associated Standards:
 - a. Their quality control process and checklists including office based review and site inspections.
 - b. The certification provided by the designers and constructors of the buildings.
11. Producer Statement Scheme. BCAs request Producer Statements from the designers and constructors of buildings. These statements are signed by appropriately qualified people and confirm that:
 - i. PS1 Design and PS2 Design Review – That if the building is constructed in accordance with the drawings, specifications will comply with the relevant provisions of the Building Code.
 - ii. PS4 Construction review – That the building works have been completed in accordance with the relevant requirements of the Building Consent and Building Consent Amendments
12. Whilst the Producer Statements have no statutory status under the Building Act 2004, the A C has continued to promote this process as a part of their building consenting strategy.

13. IPENZ has produced Practice Note 1, Guidelines on Producer Statements. This Practice Note comments that BCAs are likely to rely on Producer Statements and that engineers should be mindful of the responsibility and potential liability that may arise from signing a Producer Statement. The Practice Note also states all work should be subject to appropriate quality assurance processes (checking and review).
14. The Practice Note (Section 5) is clear that when a design Producer Statement is issued, full detailed design documentation (drawings, calculations, details etc.) should be provided.
15. The BCA can place a requirement within the building consent documentation that a specific level of construction monitoring is required for the project. Prior to providing a construction monitoring service, the engineer should ensure that the level of service he is offering aligns with the BCA's requirements.

The Appeal

16. Mr. R's Appeal only relates to one item of the Disciplinary Committee findings. His cover letter dated 7 October 2015 states"

"I honour most of the decision of the Disciplinary Committee on penalty and costs under Clause 10 of the Decision of the Disciplinary Committee dated 7th September 2015 except Clause 10.2: 'The Disciplinary Committee orders that Mr. R's registration be suspended for a period of 6 months...."

17. Section 37 (6) of the Act states:

Nothing in this Part gives the Council or District Court the power to review any part of the decision other than the part to which the appeal relates.

Accordingly this Appeal Panel can only consider the matter of the suspension of Mr R's registration.

18. In considering this appeal against penalty, the Panel needs to review the nature and seriousness of the actions of Mr R. Whilst each disciplinary decision is considered on its own merits it is helpful to review penalties imposed by other Disciplinary Committees for other offences in order to ensure consistency.
19. The Registration Authority has provided the Chartered Professional Engineers Council with a summary of penalties for 17 complaints processed between 2012 and 2015. In three of these complaints the DC has ordered that the engineers be removed from the register as follows:
 - a. CPEng registration removed, with ability to reapply after one year for performing engineering services in a negligent manner.
 - b. Suspension from CPEng Register with requirement for reassessment for not acting with integrity and objectivity
 - c. Removed from Membership (engineer was Member of IPENZ not Chartered Professional Engineer) for failure to carry out Ethical Obligation to protect life and to safeguard people and failure to comply with the Competence Obligation in his professional engineering activities.

Hearing

20. The Panel considered the appeal via telephone conference on 15 February 2016.
21. The Panel considers that that the A C should be able to place reliance on information provided by engineers on Producer Statements and other documents. That no harm came of the errors and misstatements is not material. The examples provided relate to domestic residences, issues relating to building quality and completeness could have a lasting impact on the property owners.
22. The letter provided by Mr. R requesting a Code of Compliance and B2 Waiver Modification for the property at M Rd (421/667) is unambiguous. The statement:

“However from our initial professional assessment of the building work, we can concluded (sic) on reasonable grounds that the works were carried out to good standard and maintained to reasonably good standard.”

clearly implies that Mr. R has visited the property and assessed its condition. As stated in paragraph 6.72 of the DC’s findings (13/667) this is not the case.
23. The Panel considers that this is a serious breach of integrity by Mr. R. It is clear from Mr. R’s competency assessment (356 – 363/667) that he is aware of the processes and procedures associated with interacting with a Consenting Authority. His Practice Area specifically notes “...gaining appropriate consents”.
24. Secondly, the Panel does not accept the statement made by Mr. R in paragraph 6.31 of the DC’s findings (8/667) that the inclusion of his Producer Statement author number on his inspection reports was a “software error”. The B A Drive site observation report (126/667) referenced in this paragraph of the DC’s findings was issued 8 months after Mr. R was removed from the Producer Statement Author Register. Other reports had been issued before this and after he was removed from the Register (e.g. McLeod Rd (96/667)) where Mr. R has signed reports containing his Author Number.
25. This matter is further commented on by the DC in their paragraph 6.100 (17/667). The Panel agrees with the DC that given the previous complaint against Mr. R he should be highly sensitized to the need to be accurate in such matters.

Findings of the Appeal Panel

26. The Panel finds no evidence from either a review of the DC’s findings or the subsequent submissions that changes the seriousness of the breaches by Mr. R of Sections 21 (1) (b) and (c) of the Act.
27. Mr. R’s appeal is centered on the hardship that suspension will cause his business. Whilst hardship can be relevant on compassionate grounds the Panel does not consider it to be appropriate in this case. Building Consent Authorities and members of the public need to be able to rely on the statements made by Chartered Professional Engineers. Such statements must be factually correct and only signed off by persons with the authority to do so.
28. The Panel considers that the DC was correct in the decision contained in paragraph 10.2 (26/667) to suspend Mr. R’s registration for a period of 6 months in accordance with Section 22 (1) (b) of the Act.

29. The appeal is declined.
30. The Panel notes that Mr. R's status as a Chartered Professional Engineer has not changed since the DC issued their findings 7th September 2015.
31. Section 36 of the Act states that subject to the order of the Council every decision of the Decision Authority against which an appeal is lodged continues in effect according to its terms until the determination of the appeal. Rule 70 (2) requires the Registration Authority not to implement any orders under Section 21 of the Act until the expiry of a period of at least 28 days after notifying the complainant of the decisions.
32. The Panel considers that Mr. R's registration should have been suspended from 5th October 2015. This is a procedural issue that has no bearing on this appeal.
33. Mr. R's registration is suspended for a period of 6 months from the date that these findings are received by all parties.

Costs

34. Costs associated with this appeal shall fall where they lie.

Dated this 29th February 2016

Mr Jon Williams
Principal

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Mr Anthony Wilson

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Ms Sue Simmons

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