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

Appeal 02/10

AND

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

Between

A
Appellant

And

H
Complainant

Decision of the Chartered Professional Engineers Council dated 14 December 2010

The Legislation

1. This is an appeal to the Chartered Professional Engineers Council under the Chartered Professional Engineers of New Zealand Act 2002 ("the Act") from a decision of a Disciplinary Committee dated 26 July 2010 in which complaints by the complainant against the appellant were upheld. The Disciplinary Committee found specifically:

   (a) There were grounds for disciplining the appellant under s21(1)(b) of the Act (paragraph 6.1 of the decision); and

(b) That the appellant had performed engineering services in a negligent or incompetent manner under s21(1)(c) of the Act; and

(c) That the appellant had breached s21(1)(b) of the Act in undertaking fire engineering activities where the level of competence was less than could be expected of a Chartered Professional Engineer – a breach of the Code of Ethical conduct rule 46(b) of the Chartered Professional Engineers Rules (no2) 2002.

2. The Disciplinary Committee imposed a penalty of $1000 on the appellant and ordered a suspension from the register until such time as the appellant undertakes a reassessment of competence. The appellant was also required to pay a contribution of $4,600 plus GST to the costs of the complaint inquiry. The Disciplinary Committee also ordered that the decision be published in *Engineering Dimension*.

3. The appellant appeals against the findings and the penalty. The appeal was filed in time and was dated 31 August 2010.

4. On 3 September 2010 the parties (that is the appellant, complainant and the Registration Authority) were informed by letter of the appointment of an Appeal Panel to hear the appeals consisting of Andrew Hazelton as Principal, Mr Graham Shaw, Mr Andrew Read, Mr Jon Williams and Ms Sharyn Westlake as members. The letter went on to state:

(a) That the appeal as filed did not comply precisely with the practice note in that it did not provide an address for service, but more importantly did not set out the relief sought. Leave was granted to file an amended appeal notice correcting these omissions.

(b) That copies of the Registration Authorities complete file would be made available to both appellant and complainant (these were mailed);

(c) That in accordance with the legislation the appeal would be a rehearing. That required a consideration of the record of evidence

but this was incomplete due to a malfunction. The Registration Authority was asked to confirm the position.

(d) The Complainant was asked if he wished to attend the hearing.

(e) The Registration Authority was notified that the Council considered it would be helpful in this case to hear from the Registration Authority and that it should provide a written report of any considerations it had in coming to its decision on penalty as recorded in paragraphs 6.5 to 6.7 of the determination.

(f) The parties were informed of a hearing date of 14 October 2010.

5. An amended notice of appeal was filed setting out the relief sought was the vacation of a finding of a breach of rule 46 and a vacating of the penalties imposed. At the actual hearing, the appellant's counsel submitted that the relief sought was actually the vacating of all findings that there were grounds for disciplining the appellant. The Council considered that the findings were interwoven and that amending of the relief sought even at that late stage was not prejudicial. It was clear that the appellant wished to set aside the entire findings of the Disciplinary Committee from an early stage.

6. The complainant wrote on 13 September 2010 as follows:

> *I am satisfied with the evidence that was presented at the Enquiry, the manner in which it was conducted, and the conclusion that was reached.*
> *However, when I compare the emotional and financial loss my wife and I experienced with the effects of the penalty imposed on [the appellant], effectively, if temporarily, curtailing [the appellant's] career, I consider the penalty to be greater than I would have expected.*
> *Speaking as a layman in these matters, I notice that some professional bodies impose a penalty along the lines of a guilty party having to work under the supervision of a designated person for a suitable period of time.*
> *It is my personal opinion that such a penalty, together with the financial ones imposed, would serve the matter.*
> *I will not be attending the Appeal Hearing, but I would be happy to have the above presented if the Appeal process allows.*

7. On 20 September 2010 the Registration Authority confirmed that there was a fault with the digital recording of the Disciplinary Committee hearing. The Council was informed that notes were kept by the Investigating Officer and these were obtained, transcribed and provided to the parties by letter of 27 September 2010.

8. The Registration Authorities letter of 20 September 2010 also stated that it could not provide further information on the considerations as to penalty in paragraphs 6.5 to 6.7 of the decision because, in summary, it was a decision of the Disciplinary Committee and not the Registration Authority.

9. While we did not pursue the matter at the time we note here that the Disciplinary Committee is the representative of the Registration Authority whose function it is under s39(d) of the Act is to *hear complaints about, inquire into the conduct of, and discipline, chartered professional engineers….*

10. Further, the Chartered Professional Engineers of New Zealand (Appeals) Regulations 2002 state at paragraph 6(1)(b) that the Registration Authority must, if the Council requests it, send *a written report setting out any considerations that the Registration Authority had regard to in coming to its decision that are not set out in its reasons for the decision.* That was precisely what our request for information on the reasons for penalty was directed at.

11. The hearing was held on 14 October 2010 and it was a surprise to the Council that the Registration Authority did not attend. This appeal raises some important points, and a perspective from the Registration Authority could have been useful. At the very least, the Registration Authority would have benefited from observing the arguments in order to better understand some of the points in issue which we cover in this decision.

12. Having traversed these procedural matters we turn to the background of this appeal.

Background

13. A letter of complaint against the appellant dated 17 November 2008 was received by IPENZ from the complainant. The letter alleged a lack of competence by the appellant in regard to fire engineering services provided for a new home for the complainant which was also to serve as a bed and breakfast.

14. Central to the complaint was that the appellant had incorrectly identified the type of Gibraltar (gib) board used in the construction of the property. The appellant knew that fyreline gib board was required, but failed to identify that this had been installed. The appellant also identified other issues that were considered to be deficient with respect to the buildings compliance.

15. The upshot of this error was that the Appellant wrote a report to the Council making a number of recommendations on his belief that fyreline gib board had not been installed. He made a number of recommendations in respect of the identified deficiencies and concluded this report by stating that provided his recommendations were implemented *"the structure would be deemed … to more or less comply with the fire safety provisions of the New Zealand Building Code"*.

16. As a consequence of this report the complainant could not obtain a building code compliance certificate. He was advised to apply for a determination from the Department of Building and Housing to establish if a bed and breakfast operation could be exempted from fire regulations for commercial buildings. The appellant was unaware of an apparent determination that already existed from the Department that concerned the very issue. That determination was not produced to us and neither does it appear in the bundle of documents that were before the Disciplinary Committee.

17. Eventually matters were resolved, not by a determination issued by the Department but by the territorial authority agreeing to grant a waiver under the Building Act (as the legislation allows it to do).

18. The appellant admitted to the Disciplinary Committee that an error had been made and apologised to the complainant for doing so. His position was and is now that it was an honest mistake.

Approach to this Appeal

19. Appeals are by way of rehearing (section 37(2)). We are entitled to confirm, vary or reverse a decision (section 37(5)(a)). Following *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141 we are entitled to take a different view from the Disciplinary Committee, but the appellant carries the burden of satisfying us that it should differ from the Disciplinary Committee's decision. We should have regard to the fact that the disciplinary tribunal heard the complainant and the appellant in person, but in this case the facts are largely uncontested and credibility of witnesses is not in issue. While the Disciplinary Committee is a specialist body including Chartered Professional Engineers, this Council likewise has such representation. While therefore acknowledging the expertise of the Disciplinary Committee we do not think we are required to have additional regard for its expertise.

Consideration

20. There are two findings of the Disciplinary Committee that are challenged:

    (a) That the appellant had performed engineering services in a negligent or incompetent manner in breach of section 21(1)(c) of the Act; and

    (b) That Rule 46(b) of the Code of Ethics was breached.

21. We consider each of these findings in turn.

Was the appellant negligent or incompetent?

22. The starting point is to consider what standard sets the benchmark for negligent or incompetent behaviour.

23. The full section in which this ground of discipline is recorded is as follows:

> *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.*

24. Subsections (1)(a) and (d) set out offences of illegality or dishonesty that may be subject to disciplinary orders. Subsection (1)(b) is directly

referable to a breach of the code of ethics. Subsection (1)(c) is the subsection in issue here and specifically whether the appellant has been negligent or incompetent.

25. 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.

26. We do not consider that the appellant was incompetent. The appellant appreciated the fire engineering issues and acted upon them. That to us is not the action of someone incompetent. What we really have to decide in this appeal, and it is the first time such an issue has come before the Council, is whether the appellant was negligent and precisely what that means.

27. We do not consider that the standard of negligence that a Chartered Professional Engineer is to be judged by is the civil standard as one might expect in a case where a party pursues another for damages. In *Complaints Committee of the Canterbury District Law Society v W* [2009] 1 NZLR 514 a full bench of the High Court was called upon to consider an appeal from a Law Society Disciplinary Committee. In that case the allegation against the practitioner was framed under section 106(3)(c) of the Law Practitioners Act 1982 and was that the practitioner:

> *… has been guilty of negligence or incompetence in his professional capacity, and that negligence or incompetence has been of such a degree or so frequent as to reflect upon his fitness to practise as a barrister or solicitor or as to tend to bring the profession into disrepute…*

28. We appreciate that this adds a qualifier that is not present in the Act that we have to consider but we do not consider that this makes the reasoning of the High Court any less relevant in this case, nor any less binding on us.

29. The High Court set out a number of authorities concerning what the threshold was for a disciplinary finding in negligence to be upheld.

30. Section 106 of the Law Practitioners Act 1982 contains various types of charge that might be laid following a complaint. In relation to this the High Court stated:

> *[80] In our view each of the sub-paragraphs of s106 are intended to capture different kinds of conduct which may be more or less serious in a particular case. … There is no hierarchy of seriousness as between the sub-paragraphs. … Conduct is to be assessed in respect of the particular charge that has been brought.*

31. So in this case, we place little store on the fact that the grounds of discipline contained in other sub-paragraphs in the same section are for matters that might be said to be more grievous than an act of negligence. Indeed, that does not necessarily follow at all as an act of negligence can have very serious consequences in terms of health and safety which may well have very significant ramifications. As the High Court noted in the *Canterbury Decision "No gloss should be placed on the statutory test".*

32. That leaves us still having to consider what is the standard, which if an engineer falls below, the conduct will be considered grave enough for disciplinary action to follow.

33. In the *Canterbury Decision* the High Court said following its review of the previous authorities:

> *[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 standard 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 provision 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.*

34. 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?

35. We consider that this test aligns well with the purpose of the Act which is:

> *… to reform the law relating to the registration of engineers and to establish the title of chartered professional engineer as a mark of quality; and, to those ends, this Act—*
>
> *(a) establishes a registration system for chartered professional engineers, under which persons who wish to be chartered professional engineers must meet minimum standards to be, and continue to be, registered:* [emphasis added]

36. We also note that the Act requires Chartered Professional Engineers to be currently competent. The standards against which Chartered Professional Engineers are assessed are those set out in under Rule 6. Subsection 1 states:

> *To meet the minimum standard for registration, a person must demonstrate that he or she is able to practice competently in his or her practice area to the standard of a reasonable professional engineer.*

37. Subsection (2) of Rule 6 sets out 12 attributes that will be considered in making an overall assessment of competence. Of relevance to this appeal are the following:

(a) comprehend, and apply his or her knowledge of, accepted principles underpinning—

(i) widely applied good practice for professional engineering; and

(ii) good practice for professional engineering that is specific to New Zealand; and

…

(d) exercise sound professional engineering judgement; and

…

(g) identify, assess, and manage engineering risk; and

…

(k) maintain the currency of his or her professional engineering knowledge and skills.

38. We consider that these criteria can be read in conjunction with the test that was set out in the *Canterbury Decision* and can assist in directing us to consider what aspects of a Chartered Professional Engineer's practice we should have particular regard to in assessing whether disciplinary action should be taken or not in response to an allegation of negligence.

39. As regards the allegation of negligence it is our view that the appeal should succeed and the decision of the disciplinary tribunal should be reversed for the following reasons.

40. The appellant's errors can be summarised thus:

(a) The appellant knew that fyreline gib board had to be installed but on his inspection failed to identify this. The house was finished when he inspected. To check for fyreline gib he inspected the roof space. He was looking for pink gib, which the appellant thought was the normal colour for fyreline gib. In fact, fyreline gib can have a grey backing and it was this, not the pink face, that the appellant saw in the roof space. So the appellant failed to detect the presence of fyreline gib. The appellant did not remove a light fitting or electrical socket so that the presence of the pink face paper might have been detected, but then he had no reason to if he considered he was looking at the wrong type of gib from the outset.

(b) The Investigation Committee Report states that the appellant should have realised that a reconfiguration of the property whereby one less bedroom was built meant that a fire report was not necessary in any event. That is reflected in the Disciplinary Committee's report when it reports on the Investigating Committee's report to this effect. The Disciplinary Committee heard one of the members of the Investigating Committee and reported that:

[The appellant] accepted the Council's view that fire rating was still required, but in Mr C's view any person working in fire engineering should be expected to know that that was not correct and challenge it.

(c) The Disciplinary Committee's decision contains the following paragraphs which we comment on below:

5.2 Although the CPEng rules do not include an obligation on service quality, clause 45 says "A chartered professional engineer must act honestly and with objectivity and integrity in the course of his or her engineering activities." Failure to do so can be seen to be negligent or incompetent (s21(1)(c) of the Act.

5.3 An engineer would demonstrate integrity by providing services that complied with the obligations of the Consumer Guarantees Act which says services should be performed with reasonable care and skill, and be fit for the particular purpose they were supplied for.

5.4 A substantial number of matters relating to the fire engineering of the project were admitted by [the appellant] to be incorrect, with errors of omission as well as minor design errors. The wording of reports was also faulty and there was no indication of effective record keeping, leading to an over reliance on his memory of past events and discussions. There was an unnecessary breakdown in communication with the builder over the matters raised in the inspection.

5.5 It appears that despite former employment as a Local Body Engineer, [the appellant] accepted without question the decision of the [territorial authority] to reject his amended fire report. A second opinion or peer review from a fire engineer would have been a more appropriate course of action. This decision was subsequently shown

to be in error and if it had been discussed with the Council and challenged may have reduced the extent to which [the complainant] felt aggrieved.

5.6 [The appellant] has apologised for his errors and indicated he owes the builder an apology. He presented arguments in mitigation and advised that he has been able to provide satisfactory fire engineering design services to past clients. It would seem however that this particular project was less straight forward than those he had experienced previously.

41. There were undoubtedly mistakes on the part of the appellant. However, we do not consider that the appellant's error in failing to identify the fyreline 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. The appellant was aware of the design requirement that would have seen the property meet an appropriate standard. The fact that he failed to identify the fyreline gib was unfortunate, but the appellant did not ignore his obligations when reporting this to the territorial authority. It might even be said he followed his obligation in that he did not attempt to hide what he perceived to be an error in construction. Indeed we are of the view that the most serious error that the appellant made was in stating that the structure would *more or less* comply with the fire safety provisions of the New Zealand Building Code. Something either complies or it does not, and this type of wording in singularly unhelpful. That wording of itself is not enough for us to conclude that the appellant was negligent to the standard we have discussed.

42. The second factor was whether the appellant should have advised the complainant differently once his report was filed with the territorial authority. Should he have appreciated that the building did not need a fire report. Here we cannot see that the response of the appellant could be said to be negligent. The territorial authority advised that the Department of Building and Housing could issue a determination and that process was started. The Council eventually granted a wavier so that the

matter was resolved. Apart from the comment from Mr C reported in the Disciplinary Committee report we have set out above, and the same conclusion made in the Investigating Committee report, we have seen no evidence of any probative value that such a comment can be made. Where does the information derive from? What form does it take? Is it readily accessible? In short what is the basis for the statement that *any person working in fire engineering should be expected to know that that was not correct*? We cannot see that this level of detail was before the Disciplinary Committee. In the absence of this material we cannot see where the conclusion comes from. We are not prepared to accept a finding of negligence on the basis of a lack of knowledge without clear evidence that this is a basic knowledge requirement to practice in this field.

43. Turning to the other findings of the Disciplinary Committee we consider that the appellant acted honestly and with objectivity and integrity at all times. We can see no room for any other finding and the reference to clause 45 in the decision was unnecessary. Similarly, we see no room for importing issues related to the Consumer Guarantees Act into the appropriate standard a CPEng is required to meet in order to meet an allegation of negligence.

44. Like the Investigating Committee we do consider that the appellant's performance was less than desirable, but we can see no evidence of conduct that falls below the standard whereby a finding of negligence would follow.

45. We therefore conclude that the allegation of negligence must be dismissed.

Was there a breach of Rule 46(b)?

46. The Disciplinary Committees decision stated at paragraph 6.3 that the appellant had:

> *… undertaken engineering activities, specifically fire engineering, where the level of competence that he displayed was less than could be expected of a*

Chartered Professional Engineer, a breach of the Code of Ethical Conduct s46(b).

47. Rule 46(b) states:

> *A chartered professional engineer must—*
> …
> *(b) undertake engineering activities only within his or her competence; …*

48. It seems to us that the finding in paragraph 6.3 is actually no more than a re-statement of the negligence allegation that we have already ruled upon.

49. In fact, Rule 46(b) is not about the standard to which activities shall be undertaken as expressed in paragraph 6.3 but rather is a statement that a Chartered Professional Engineer shall only undertake engineering that is within his or her competence.

50. It is appropriate to point out that at the time that the work which is the subject of the complaint was undertaken the appellant had been assessed as being competent.

51. Further since then the appellant has been reassessed as being competent.

52. We have seen nothing in the material before us that there was ever an allegation made or evidence led that the appellant was acting outside of his area of competence.

53. The complaint against a breach of Rule 46(b) is similarly dismissed.

Penalty

54. It is not necessary for us to go on and consider penalty, but for completeness we think we should comment.

55. Ultimately while there were some issues of performance for which the complainant had legitimate concern we are cognisant that in his letter to us he considered the penalty greater than might have been expected.

56. The Act does provide for alternative dispute resolution to be offered to parties and conciliation is an option under rule 62. The appellant has apologised and has [belatedly] repaid the fee he charged the complainant for the service he provided. We are not sure if conciliation was presented as an option to the parties, but it seems to us that this is such a situation where it could usefully have been utilised.

57. Had the appeal been declined we would have been minded to impose a fine but not to have suspended the appellant. Penalty should be related to the gravity of the offending and it seems to us as though suspension in a case such as this would be a harsh outcome.

Outcome

58. The appeal is allowed. The decision of the Disciplinary Committee is quashed.

59. This decision which does not identify the parties may be published by the Registration Authority.

Dated this day of December 2010

Andrew Hazelton Graham Shaw Andrew Read Jon Williams Sharyn Westlake
Principal