

# DISCIPLINARY COMMITTEE DECISION

REGARDING THE OWN MOTION INQUIRY BY  
ENGINEERING NEW ZEALAND ABOUT  
JOSEPH DOUGLAS MCGIRR

**In accordance with:**

Chartered Professional Engineers of New Zealand Act 2002  
Chartered Professional Engineers of New Zealand Rules (No 2) 2002  
Engineering New Zealand Rules  
Engineering New Zealand Disciplinary Regulations

**Prepared by:**

Jenny Culliford FEngNZ

**Chair of Disciplinary Committee**

Dr Cordelia Thomas, barrister and solicitor of the High Court of New Zealand

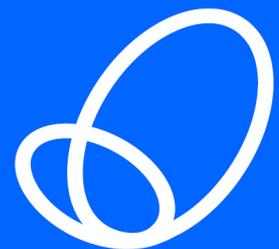
Hamish Wilson, nominated by Consumer New Zealand

Gordon Hughes FEngNZ CPEng IntPE(NZ)

Andrew Read FEngNZ CPEng IntPE(NZ)

**Members of the Disciplinary Committee**

**18 December 2019**



**engineering**  
new zealand  
Institute of Engineering Professionals



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# EXECUTIVE SUMMARY

1. On 29 August 2018, Joseph McGirr CPEng CMEngNZ was convicted in the District Court in Christchurch for driving with excess breath alcohol, contrary to the Land Transport Act 1998, for the third or subsequent time.
2. On 13 August 2019 Engineering New Zealand initiated an own motion inquiry in respect of Mr McGirr, to determine whether his conviction met the grounds for discipline in respect of section 21(1)(a) of the Chartered Professional Engineers of New Zealand Act 2002 (the Act),<sup>1</sup> and Rule 4.5 of the Engineering New Zealand Rules.<sup>2</sup>
3. A Disciplinary Committee, already formed to consider another complaint regarding Mr McGirr, met to consider this matter on 23 October 2019. The parties agreed to dispense with an in-person hearing and the matter was dealt with on the papers.
4. Section 21(1)(a) of the Act is a two-element test. The first element requires a finding that Mr McGirr had been convicted of an offence punishable by imprisonment for a term of six months or more. The second element is that the Registration Authority considers this reflects adversely on Mr McGirr's fitness to practise engineering.
5. The first element is satisfied by the court records.

## DECISION

6. Having considered the matter the Disciplinary Committee found that:
  - a. both elements of the test in section 21(1)(a) of the Act have been met; and
  - b. Mr McGirr breached rule 4.5 of the Engineering New Zealand Rules.
7. This decision sets out the background to, and reasoning for, that decision.
8. Accordingly, we find that there are grounds for disciplining Mr McGirr under Section 21 of the Act and under Rule 4.5 of the Engineering New Zealand Rules.
9. The complaint is upheld.

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<sup>1</sup>(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;

<sup>2</sup> Engineering New Zealand members must conduct themselves at all times in a manner consistent with being a fit and proper person to be a member of Engineering New Zealand (the "good character" obligation).

# BACKGROUND

## OWN MOTION INQUIRY

10. On 29 August 2018, Mr McGirr was convicted in the Christchurch District Court of driving with excess breath alcohol, for the third time.
11. On 13 August 2019, Engineering New Zealand commenced an own motion inquiry in respect of Mr McGirr.<sup>3</sup>
12. The purpose of the own motion inquiry was to determine whether there are grounds for disciplining Mr McGirr on the basis of his conviction.
13. Specifically, the own motion inquiry sought to determine whether:
  - a. both elements of the test in section 21(1)(a) of the Act had been met; and<sup>4</sup>
  - b. Mr McGirr had breached rule 4.5 of the Engineering New Zealand Rules.<sup>5,6</sup>

## DISCIPLINARY COMMITTEE

14. The members of the Disciplinary Committee are:
  - Jenny Culliford FEngNZ (Chair);
  - Hamish Wilson, nominated by Consumer New Zealand;
  - Cordelia Thomas, barrister and solicitor of the High Court of New Zealand;
  - Gordon Hughes FEngNZ CPEng IntPE(NZ)
  - Andrew Read FEngNZ CPEng IntPE(NZ)
15. Both parties agreed to the matter being heard by the Disciplinary Committee on the papers.
16. The Disciplinary Committee considered all information provided to it by the parties, including submissions. It also engaged Adam Lewis, barrister, who provided independent legal advice to the Disciplinary Committee.

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<sup>3</sup> Under rule 55(1) of the Chartered Professional Engineers of New Zealand Rules (No 2) 2002 (the Rules), Engineering New Zealand (as the Registration Authority for Chartered Professional Engineers) may inquire into any matter on its own motion if it has reason to suspect that a Chartered Professional Engineer or former Chartered Professional Engineer may come within any of the grounds for discipline in section 21 of the Act. In addition, under clause 4 of the Engineering New Zealand Disciplinary Regulations, Engineering New Zealand may also inquire into any matter on its own motion if it has reason to suspect that a member may have breached the Rules of Engineering New Zealand.

<sup>4</sup> Section 21(1)(a) of the Act provides that Engineering New Zealand 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 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 six months or more if, in the Authority's opinion, the commission of the offence reflects adversely on the person's fitness to practise engineering.

<sup>5</sup> The applicable version of the Engineering New Zealand Rules is dated October 2017.

<sup>6</sup> Rule 4.5 imposes an ethical obligation on Members, that they must conduct themselves at all times in a manner consistent with being a fit and proper person to be a Member of Engineering New Zealand (the "good character" obligation).

# INFORMATION GATHERED

## BACKGROUND

17. Mr McGirr has been a Chartered Professional Engineer (CPEng) since 5 March 2015 and a Chartered Member of Engineering New Zealand (CMEngNZ) since 11 March 2015.<sup>7</sup>
18. In 2018, while investigating Mr McGirr for an existing complaint, Engineering New Zealand became aware that Mr McGirr had been charged with breach of a supervision order and made enquiries with his solicitor as to what conviction the supervision order pertained. Through these enquiries, Engineering New Zealand was made aware that Mr McGirr had been convicted of driving with excess breath alcohol for the third time and, on 29 August 2018, had been sentenced to: community detention for three months, 12 months supervision, 100 hours of community work and disqualification from driving for 28 days.
19. Engineering New Zealand, as the Registration Authority for Chartered Professional Engineers (the Registration Authority), commenced an own motion inquiry under the Chartered Professional Engineers of New Zealand Rules (No 2) 2002 (the Rules) regarding Mr McGirr's conviction for driving with excess breath alcohol (third or subsequent)<sup>8</sup>, and Engineering New Zealand commenced an own motion inquiry pursuant to the Engineering New Zealand Disciplinary Regulations (the Disciplinary Regulations).<sup>9</sup>

## CONVICTIONS

20. On 10 February 2018, Mr McGirr was discovered by Police to be driving while under the influence of alcohol. At the time, Mr McGirr had 593 micrograms of alcohol per litre of breath. The legal breath alcohol limit is 250mcg of alcohol per litre of breath.<sup>10</sup>
21. Mr McGirr was previously convicted for driving with excess blood alcohol in 2013 and 2016. As a result of his previous convictions for driving with excess blood alcohol, Mr McGirr was subject to a zero-tolerance driving licence, which was still in place on 10 February 2018.
22. On 29 August 2018, Mr McGirr was convicted in the District Court at Christchurch of driving with more than 400 micrograms of alcohol per litre of breath (third or subsequent offence).<sup>11</sup>
23. Mr McGirr was sentenced to three months' community detention, 100 hours of community work and 12 months supervision. The conditions of the supervision were to attend and complete any recommended intervention or alcohol use programme to the satisfaction of a probation officer, and not to possess or consume or use any alcohol or drugs not prescribed. In addition, for driving under the influence of alcohol while on a zero-tolerance licence, Mr McGirr was disqualified from driving for 28 days.<sup>12</sup>

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<sup>7</sup> The Institution of Professional Engineers New Zealand (IPENZ) changed its trading name to Engineering New Zealand in October 2017. At the same time, it changed its membership pathways. Mr McGirr was a Professional Member of IPENZ between 11 March 2015 and 30 September 2017. From October 2017 Mr McGirr has been a Chartered Member of Engineering New Zealand.

<sup>8</sup> Chartered Professional Engineers of New Zealand Rules (No 2) 2002, r 55(1).

<sup>9</sup> Engineering New Zealand Disciplinary Regulations, cl 4.

<sup>10</sup> Land Transport Act 1998, Section 56.

<sup>11</sup> *Ibid*, s 56(1) and 56(4).

<sup>12</sup> *Ibid*, s 57AA(1). NB: This conviction does not meet the grounds of discipline contained in the Act.

24. At sentencing, Judge Kellar stated that “the level of alcohol in [Mr McGirr’s] system was in the moderate to creeping up to higher range of 593 micrograms of alcohol per litre of breath” and warned Mr McGirr against any more drink-driving convictions, noting that “it all starts to get rather unpleasant from here on in”.

## SUBSEQUENT EVENTS

25. On 22 October 2018, Police attended Mr McGirr’s home address on an unrelated matter. The Police summary of facts stated that at about 4:37am Mr McGirr admitted to Police that he had consumed beer and rum. Mr McGirr was charged with breaching the conditions of his supervision order.<sup>13</sup>
26. On 23 October 2018, Mr McGirr appeared before Judge Holmes in the District Court in Christchurch where he pled guilty to the breach. Mr McGirr was convicted and discharged.<sup>14</sup>
27. Mr McGirr’s Probation Officer has confirmed that Mr McGirr has met the requirements of the other special condition of the sentence (by attending a “Driving Change” programme).
28. Mr McGirr provided a copy of a letter from his AOD clinician<sup>15</sup> at Odyssey House, the providers of the Driving Change programme, that stated he had been assessed and it was determined that his primary issue was impaired driving. Mr McGirr attended all 10 sessions of the programme and:

*[D]emonstrated a growing understanding of the relationship between thoughts, feelings and behaviours. He was able to recognise the use of justifications that have led to impaired driving in the past and the consequences that he would face should he choose to engage in this behaviour in the future. ... Joe has made an action plan specific to him, this includes his goals, high-risk situations to be aware of and strategies he can use to assist him in his goal of avoiding future incidents of impaired driving.*

29. Mr McGirr’s period of supervision ended on 29 August 2019.

## SECTION 21 OF THE ACT

30. Section 21(1)(a) of the Act states that the Registration Authority may make an order for discipline if it is satisfied that a CPEng:
- has been convicted by any court in New Zealand or elsewhere of any offence punishable by imprisonment for a term of six months or more; and
  - in the Authority’s opinion, the commission of the offence reflects adversely on the person’s fitness to practise engineering.

### Conviction

31. Mr McGirr submitted that he accepts his conviction for driving with excess breath alcohol (third or subsequent) means that the first aspect of section 21(1)(a) of the Act has been met.
32. The Registration Authority also accepted that the first element of the test was met.

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<sup>13</sup> Sentencing Act 2002, s 70(a).

<sup>14</sup> This conviction does not meet the grounds for discipline contained in the Act.

<sup>15</sup> Alcohol and Other Drug clinician

## Reflects adversely on fitness to practise

We have set out below the case law relevant to the question of whether Mr McGirr's convictions reflect adversely on his fitness to practise engineering, the parties' views on the question for the Disciplinary Committee and their submissions.

### Case law

33. Mr McGirr submitted that no cases could be located in respect of the words "fitness to practise"; however, there is case law on "fit and proper person". Mr McGirr referred the Disciplinary Committee to *Stanley v New Zealand Law Society*<sup>16</sup> where a candidate for admission to the bar had been convicted of four drink driving convictions from 1978 to 2014. He submitted that:

*The Court noted that counsel for the Respondent could think of only one case where a practitioner's ability to practise was affected by multiple drink driving convictions, however that case was accompanied by other convictions for resisting arrest and disorderly behaviour.*

34. Mr McGirr further submitted that it was likely that the purpose of section 21(1)(a) of the Act is to maintain the standards expected of professional engineers, and presumably to protect the public:

*The Courts have, on a number of occasions, confirmed that to attract professional discipline, the conduct would have to depart from acceptable professional standards to an extent significant enough to justify sanction for the purposes of protecting the public. See Martin v Director of Proceedings [2010] NZAR333.*

35. In response to this, the Registration Authority submitted that there was a significant body of case law addressing the issue of conduct that reflects adversely on a professional's fitness to practise. It referred the Disciplinary Committee to the Health Practitioners Competence Assurance Act 2003 (the HPCAA) that contains an identical provision to the Act.<sup>17</sup>

36. The Registration Authority referred to *Re Zauka*, where the Health Practitioners Disciplinary Tribunal stated:<sup>18</sup>

*...the conduct will need to be of a kind that is inconsistent with what might be expected from a practitioner who acts in compliance with the standards normally observed by those who are fit to practise medicine.*

37. The Registration Authority submitted that a determination of whether conduct reflects adversely on a professional's fitness to practise will involve consideration of:

- a. whether the professional's conduct was immoral or unethical;<sup>19</sup>
- b. the professional's character;<sup>20</sup> and

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<sup>16</sup> [2019] NZCA 119.

<sup>17</sup> Health Practitioners Competence Assurance Act 2003, s 100(1)(c) "the Tribunal may make [an order for discipline if it finds that] the practitioner has been convicted of an offence that reflects adversely on his or her fitness to practise."

<sup>18</sup> Medical Practitioners Disciplinary Tribunal decision, 236/03/103C.

<sup>19</sup> *Murdoch*, 6/Phys06/45P.

<sup>20</sup> *Pellowe* 137/Phar/07/74P.

- c. whether the conviction is likely to bring discredit to the profession although this, in itself, is not determinative.<sup>21</sup>
38. The Registration Authority submitted in cases involving second (*Streat*)<sup>22</sup> and third (*Pollock*)<sup>23</sup> drink-driving offences respectively; the Health Practitioners Disciplinary Tribunal found that a repeated offence of drink driving does reflect adversely on fitness to practise.
39. Mr McGirr responded to this by stating that in both of these cases, a key consideration for the Health Practitioners Disciplinary Tribunal was that the practitioners had a serious ongoing problem with alcohol, and there had previously been conditions placed on the individuals by their employers in relation to alcohol. Mr McGirr states that there is no evidence he has a serious ongoing problem with alcohol, he was at low risk of harm from his alcohol risk, and he has taken steps to address his offending by completing a Driving Change Course.
40. Mr McGirr submitted that the cases referred to by the Registration Authority related to medical professionals, which was not necessarily relevant in order to determine the fitness to practise of an engineer. He referred to *K*<sup>24</sup> that stated:
- If there is any section of the community which should be more aware than others of the potentially catastrophic consequences of driving motor vehicles with a higher level of alcohol in the driver's system than the law permits, and of the injuries, suffering, harm and expense which can be caused by drivers who have partaken of an excess quantity of alcohol, it is the medical profession.*
41. Mr McGirr went on to say that this means there is a higher likelihood of this type of conduct adversely reflecting on a person's fitness to practise in the medical profession. He referred again to *Stanley*,<sup>25</sup> (supra) where the Court of Appeal found that this type of offending did not go directly to fitness to practise as a lawyer, in contrast to people who had honesty convictions or defects of character. Mr McGirr submit that *K* and *Stanley* highlight the importance of focussing on the relevant profession, and whether the offending reflects adversely on the person's fitness to practise in that field.

*Relevant question for the Disciplinary Committee*

42. Mr McGirr submitted that the opinion of the Disciplinary Committee must be objectively held, that is, whether reasonable members of the public, informed and with knowledge of the factual circumstances, could reasonably conclude that the offending here reflects adversely on the person's fitness to practise engineering.
43. The Registration Authority submitted that the relevant question for the Disciplinary Committee is whether the conduct in question reflects adversely on the professional's fitness to practise in their chosen field; and that fitness to practise is distinct from professional competence.<sup>26</sup> Further, that the conduct in question needs to be of the kind that was inconsistent with what might be expected from

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<sup>21</sup> *Pittwood*, 84/Ost06/42P.

<sup>22</sup> *Streat* 630/Med13/269P.

<sup>23</sup> *Pollock* 95/Nur06/38P.

<sup>24</sup> *K* MPDT 140/00/63C.

<sup>25</sup> *Stanley v New Zealand Law Society* [2019] NZCA 119. Currently under appeal in the Supreme Court.

<sup>26</sup> *Professional Conduct Committee v Martin unreported*, Gendall J High Court, Wellington, CIV-2006-485-1461, 27 February 2007.

a practitioner who acts in compliance with the standards normally observed by those who are fit to practise.

#### *Mr McGirr's submissions*

44. Mr McGirr submitted that this was a human transgression made in his private life. He said that whether the offending took place while he was working was in fact a relevant consideration. He submitted that where offending arises directly out of a professional's work, it calls their character and competence into question. He said that in this case, however, there was no link to his conduct and the profession, and that his conduct does not bring into question the reputation of the profession nor create suspicion that he would not be able to comply with the fundamental obligations of an engineer. Mr McGirr also submitted that the offending is not significant enough to attract a disciplinary sanction, and he does not have a significant alcohol problem.
45. Mr McGirr further submitted that the following factors should also be considered:
  - a. while the third drink-driving offence is regarded seriously by the Courts, it is a driving offence rather than a strictly criminal offence such as dishonesty, bribery or assault;
  - b. the offending did not relate to behaviour while Mr McGirr was carrying out engineering work, it occurred during evening hours after socialising;
  - c. the offence does not go strictly to Mr McGirr's character, nor his fitness or ability to practise as an engineer;
  - d. the offending was not so serious that the Court imposed imprisonment – he was given the lower penalty of a sentence of community detention, consistent with the view that his offending was not at the higher end; and
  - e. there were no victims or other vehicles involved.
46. Accordingly, Mr McGirr submitted that the second part of the test in section 21(1)(a) of the Act has not been met.

#### *Registration Authority's submissions*

47. The Registration Authority argued that the test in section 21(1)(a) of the Act is designed to uphold standards within the profession and protect the public. In this respect, fitness to practise involves a broader assessment of a professional's ability to live up to the public expectations of a professional, and for this test it is largely irrelevant that the offending took place in Mr McGirr's private life.
48. As noted in *Streat*, the public are entitled to have confidence that medical practitioners are able to control their alcohol intake and exercise the right judgment as to when consumption of alcohol is appropriate and when it is not. The same is true of engineers. The safety-critical nature of engineering work means the public places significant trust and confidence in engineers and expects them to be able to exercise good judgment at all times.
49. The Registration Authority stated that the public is entitled to expect engineers to exercise good judgment in all aspects of their life, both professional and private. An engineer who receives three criminal convictions for drink driving during a relatively short period of time (five years) has indicated a serious lack of responsibility and judgment in their private life, which the public will inevitably assume flows on to their professional life. Furthermore, the repeated nature of Mr McGirr's convictions for drink driving leads to a perception that Mr McGirr did not take seriously the risk he was placing the public in by driving with excess breath alcohol.

50. The Registration Authority also referred to the seriousness of the penalty imposed by Judge Kellar, noting that while the Judge did not order imprisonment, he did find the offending serious enough to restrict Mr McGirr's freedom to ensure Mr McGirr did not place the public at risk again and he ordered a restrictive curfew, community work and made a supervision order. The Judge also warned Mr McGirr not to offend again.
51. The Registration Authority submitted that Mr McGirr's argument that drink driving is not "strictly criminal" is incorrect; it is a criminal offence that places the public at risk of serious injury or death, and the seriousness of the offence is reflected in the penalty available (two years imprisonment).
52. The Registration Authority submitted that the second part of the test in section 21(1)(a) of the Act has been met.

## **FIT AND PROPER**

### **"Good character" obligation**

53. Rule 4.5 of the Engineering New Zealand Rules (the Rules) states that Engineering New Zealand members must conduct themselves at all times in a manner consistent with being a fit and proper person to be a member of Engineering New Zealand (the "good character" obligation).

### **Case law**

54. Engineering New Zealand referred the Disciplinary Committee to the Lawyers and Conveyancers Act 2006, which states that a lawyer must be "fit and proper" to be admitted to the bar and noted that this requires a holistic consideration of the person's character. Mr McGirr accepted that the "good character" obligation is similar to the test in the Lawyers and Conveyancers Act 2006.
55. Engineering New Zealand referred to *Re Owen* where the Court was prepared to find that the respondent was reformed as his offending was historic,<sup>27</sup> and *Mitchell*<sup>28</sup> where the respondent was not "fit and proper" because there was an insufficient lapse of time between his conduct and his admission. In both of those cases, the Court was considering whether the respondent was fit and proper to be admitted to the bar.

### *Mr McGirr's submissions*

56. Mr McGirr is 37 years old and a sole practitioner of his own firm, JDM Consulting. He submits that he took his conviction seriously, is aware that this must be his last such offence and provided evidence that he had completed a driving-awareness course. Further, he has vowed not to drink drive again, and has been alcohol free for seven months.
57. Mr McGirr provided character references from: his friend Mike Palmer; his property manager Hamish Woodley of Warwick Todd Limited; and Colin Maclaren, an architect and former client.
58. Mr Palmer's character reference in support of Mr McGirr details his personal and professional relationship with Mr McGirr. Mr Palmer's submission states:

*I have had the pleasure of knowing Joe McGirr for 11 years ... I have always found Joe great to deal with due to his quiet trustworthy nature, incredible loyalty to friends and family, generosity and ethical approach to various aspects of life ... For these reasons I have*

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<sup>27</sup> *Re Owen* [2005] 2 NZLR 536.

<sup>28</sup> *New Zealand Law Society v Mitchell* [2010] BCL 932.

*recommended Joe and JDM Consulting for professional advice and services on a number of projects ... I believe Joe McGirr to be an honourable individual, a valuable member of the community and dear trustworthy and dependable friend.*

59. Mr Woodley's character reference states:

*Joe McGirr has been a client of our Company since 2016 and has entrusted us with the management of 3 properties over this period of time. We have found Joe to be extremely honest and reliable with all our dealings that we have had.*

60. Mr Maclaren's character reference details his professional relationship with Mr McGirr during the construction of the Lake Tekapo Footbridge (2009 – 2015):

*Joe always conducted himself in a totally competent and professional manner at all times and I can make nothing but positive comments on his performance. He acted with decorum and respect in all aspects of his work ... he took the prime responsibilities towards completion of the project.*

#### *Engineering New Zealand's submissions*

61. Engineering New Zealand submits that in order to take advantage of the forward-looking nature of the test, the Disciplinary Committee has to be satisfied that Mr McGirr's offending is historic and that he is rehabilitated to the extent that any further incidents impacting his ability to comply with the "good character" obligation are unlikely to occur.

62. Moreover, Engineering New Zealand submits that:

*[...] Mr McGirr committed his third conviction while still under sentence (a zero-alcohol licence) for his second. These convictions occurred within a relatively short period of time and cannot be considered historic.*

*Engineering New Zealand submits that the reasons specified above as to the seriousness of Mr McGirr's conviction, combined with the recent nature of his offending and reoffending, mean that Mr McGirr has breached his obligations under rule 4 by failing to behave consistently with being a fit and proper person.*

*In the alternative, even if the Disciplinary Committee consider that Mr McGirr is a fit and proper person notwithstanding his recent conviction, the test under s 21(1)(a) is met and disciplinary action is necessary on that basis.*

## DISCUSSION

### THE DISCIPLINARY COMMITTEE'S ROLE

63. Professional disciplinary processes primarily exist to protect the public, uphold professional standards, and maintain public confidence in the profession and its regulation. They do this by ensuring that members of the profession adhere to certain universal (or accepted) professional standards.<sup>29</sup>

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<sup>29</sup> *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC).

## DISCUSSION

### Section 21 of the Act

64. The test for discipline in section 21(1)(a) of the Act has two elements, both of which must be satisfied for discipline. It requires that:
  - a. a Chartered Professional Engineer has been convicted by any court in New Zealand or elsewhere of any offence punishable by imprisonment for a term of six months or more; and
  - b. the commission of the offence reflects adversely on the person's fitness to practise engineering.
65. On 29 August 2018, Mr McGirr was convicted of driving with excess breath alcohol, third or subsequent. Convictions under this section carry a penalty of not more than two years imprisonment.
66. We have been provided with copies of the sentencing notes of Judge Kellar and a certified copy of Mr McGirr's conviction. We are satisfied that the first part of the test in section 21(1)(a) of the Act has been met.
67. The Disciplinary Committee must determine whether the second part of the test in section 21(1)(a) of the Act has been met, that is, whether the conviction for driving with excess breath alcohol (third or subsequent) reflects adversely on Mr McGirr's fitness to practise engineering.
68. Whilst no cases directly related to the fitness of an engineer to practise have been identified in the submissions or the advice provided to us by Mr Lewis, we consider case law related to other professions to be relevant, in particular case law related to the medical profession. Serious adverse consequences can result from poor judgment exercised by both medical and engineering professionals in their decision-making. For engineers, decision-making when undertaking engineering design or while on a construction site are two aspects where the exercise of sound judgment is particularly important.
69. We agree with the Registration Authority that the purpose of section 21(1)(a) of the Act is to uphold standards within the engineering profession and protect the public.
70. "Fitness to practise" is different from "competence to practise". The question we addressed was whether Mr McGirr's behaviour was consistent with what might reasonably be expected of a professional engineer acting in compliance with the standards normally accepted by the public and a body of his peers.
71. We acknowledge that people make mistakes and that one conviction for drink-driving may be considered a one-off transgression that does not indicate a fundamental lack of judgment. This could be considered a poor decision that was out of character. However, three convictions for drink-driving occurring over a relatively short period and a failure to comply with the conditions of a supervision order are a different matter. They indicate poor decision-making, disrespect for the law and a serious lack of judgment by Mr McGirr.
72. In our opinion, the cumulative pattern of Mr McGirr's behaviour is of concern and reflects on his fitness to practise, given that engineers have legal requirements to comply with. At the time of the third drink-driving offence, Mr McGirr was subject to a zero-tolerance driving licence. Subsequently, Mr McGirr breached a condition of his supervision order by consuming alcohol. Whilst the failure to comply with the zero-tolerance licence and the breach of the supervision conditions do not meet the threshold for discipline under section 21 of the Act, they indicate a lack of respect for the Court, as well as a failure to exercise good judgment and act responsibly.

73. We consider that Mr McGirr is wrong in submitting that while the third drink-driving offence is regarded seriously by the Courts, it is a driving offence rather than a strictly criminal offence such as dishonesty, bribery or assault.
74. We note Mr McGirr's assertions that there were no victims or other vehicles involved and that the offending was not so serious that the Court imposed imprisonment. However, a person driving with excess alcohol in their system does place the public at risk of harm. While the sentencing judge did not order imprisonment, he did impose significant sanctions on Mr McGirr and warned him against further drink-driving offences.
75. None of the offences occurred while Mr McGirr was undertaking engineering work; however, we agree with the Registration Authority that one cannot separate one's behaviour into convenient work-life and private-life compartments. There is an expectation that a professional will act professionally and exercise sound judgment, whatever the situation. If a person demonstrates poor judgment, disrespect for legal sanctions and bad decision-making in their private life, it is not unreasonable to assume that the reasonable public and a body of their peers will assume that this behaviour will also affect their professional activities.
76. We consider that Mr McGirr's behaviour has the potential to diminish the standing of professional engineers in the eyes of the public. The public relies on professional engineers for their advice and judgment. They have a right to expect professional behaviour including compliance with the law.
77. Professional engineers expect their peers to behave in a professional manner. We consider that Mr McGirr's conduct fell short of what a body of his peers would expect.
78. For the reasons given above we find that the second element of section 21(1)(a) of the Act has been met, that is that Mr McGirr's conduct reflects adversely on his fitness to practise engineering.

#### **Rule 4 of the Engineering New Zealand Rules**

79. Engineering New Zealand members must conduct themselves at all times in a manner consistent with being a fit and proper person to be a member of Engineering New Zealand (the "good character" obligation).<sup>30</sup> The Rules and the Disciplinary Regulations do not define "fit and proper".
80. The "good character" obligation is broadly expressed and gives the decision-maker a wide scope in considering and applying it to any given case. We consider the following matters to be relevant when assessing a complaint in accordance with a member's "good character" obligation, as set out in Rule 4.5:
  - Members are required to comply with the "good character" obligation at all times. The obligation is not limited to an engineer's "engineering activities".
  - The focus of the obligation is on public protection.
  - The test of whether a person is "fit and proper" for the purpose of the legal profession has been developed through case law.<sup>31</sup> The test has three key features. In particular, the test:

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<sup>30</sup> Engineering New Zealand Rules, r 4.5.

<sup>31</sup> Tests may differ slightly in different professional contexts, depending on the key elements of the professional's role vis-à-vis the public. In particular, honesty is a key attribute for a lawyer and this is evident from the cases' focus on honesty being a determinative factor. In engineering, while honesty is also a key attribute, there may be others equally as important.

- focuses on the future conduct of the person at issue, as opposed to punishing them for past conduct;<sup>32</sup>
  - takes an overall view of the person’s behaviour, as opposed to focussing on one particular event; and
  - makes allowances for immaturity, where the conduct at issue occurred when the person was young.
81. The finding that a person is not “fit and proper” for the purpose of their profession often follows a finding by a decision-maker (Court or tribunal) that the person has been in breach of a legal or professional obligation. The finding of a breach of obligation comes first; the consideration of disqualification from being “fit and proper” follows in light of the original breach.
82. A range of conduct may justify a finding that a person is not “fit and proper”, although the threshold should be considered high. It usually requires more than a lack of professionalism. However, it does not require proof of criminal conduct. The finding of a pattern of behaviour may also be relevant.
83. Case law suggests that recent evidence of a person’s good character can override historical errors. Even where there is evidence of serious past conduct, the courts have been prepared to find a person is “fit and proper” for the purpose of their profession in the light of: evidence of subsequent character reformation, evidence that the error was uncharacteristic, or where the person has been open and honest about the past conduct.
84. The question then is, has Mr McGirr breached his obligation to conduct himself as a “fit and proper” person due to being convicted for driving with excess breath alcohol (third or subsequent), failure to comply with the zero-tolerance licence and breach of supervision conditions.
85. In our discussion above, we set out our reasons that Mr McGirr’s conduct reflected adversely on his fitness to practise engineering. Similar reasoning applies to the consideration of whether Mr McGirr’s behaviour was consistent with being a “fit and proper” person to be a member of Engineering New Zealand at the time of his offending. In our opinion, Mr McGirr’s peers would consider that he did not conduct himself in a manner consistent with being a “fit and proper” person. There would be a strong expectation that a member of Engineering New Zealand would comply with the law. We find that Mr McGirr did not meet the “good character” obligation at the time of his offending.
86. However, our decision must be forward-looking. We must decide whether Mr McGirr is now “fit and proper” to be a member of Engineering New Zealand.
87. Mr McGirr has provided statements from character witnesses attesting to his good character.
88. As noted earlier, the pattern of Mr McGirr’s behaviour concerns us. The three drink-drive convictions occurred over a relatively short time. In addition, we regard the breach of the supervision order and the driving contrary to a zero-alcohol licence very seriously. These actions indicate a lack of respect for the Court.

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<sup>32</sup> It appears that this is mainly relevant in the case of persons demonstrating they are “fit and proper” for the purposes of being admitted to the Roll of Barristers and Solicitors, rather than defending a complaint as an admitted member that they have subsequently failed to meet the good character obligation.

89. We support the efforts that Mr McGirr has taken to date to turn matters around. We note the positive report signed by his clinician from Odyssey House, and the comments from the facilitators of the Driving Change programme, who stated that Mr McGirr:

*[E]ngaged well with all aspects of the programme. ... Joe was able to identify values that can help him to avoid further impaired driving, namely family and friends.*

*[D]emonstrated a growing understanding of the relationship between thoughts, feelings and behaviours. He was able to recognise the use of justifications that have led to impaired driving in the past and the consequences that he would face should he choose to engage in this behaviour in the future. ... Joe has made an action plan specific to him, this includes his goals, high-risk situations to be aware of and strategies he can use to assist him in his goal of avoiding future incidents of impaired driving.*

90. We also note that Mr McGirr has stated that he has abstained from the consumption of alcohol since he breached the supervision order.
91. It is difficult to assess future conduct. Mr McGirr's offending was relatively recent. He demonstrated a disregard for the law and the Courts by his conduct. The Driving Change programme was completed earlier this year, with the exit interview being held on 28 March 2019.
92. We have not been convinced that Mr McGirr has demonstrated adequately that he is reformed and that the risk of future offending is low. Mr McGirr had a well-established pattern of non-compliance with the law, indicating poor judgment and decision making. His was not a one-off transgression. Moreover, it is a relatively short time since his offending occurred.
93. For the reasons given above, we find Mr McGirr does not meet the "fit and proper" person requirement to be a member of Engineering New Zealand at this time.
94. In making this decision, we are cognisant of the steps Mr McGirr has taken to date to address the shortcomings in his conduct and encourage him to continue this work to turn matters around.

## DECISION

### GROUND OF DISCIPLINE

95. The grounds for discipline of a Chartered Professional Engineer are set out in section 21 of the Act. Section 21(1)(a) of the Act states:

*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;*

96. A breach of Engineering New Zealand rule 4 is a ground for discipline of a member of Engineering New Zealand. In particular, rule 4.5 requires that:

*Engineering New Zealand members must conduct themselves at all times in a manner consistent with being a fit and proper person to be a member of Engineering New Zealand (the "good character" obligation).*

## DECISION

97. Having considered all the evidence, including written submissions, we have decided to uphold the complaint about Mr McGirr. We find that:
- a. both elements of the test in section 21(1)(a) of the Act have been met; and
  - b. Mr McGirr has breached rule 4.5 of the Engineering New Zealand Rules.
98. Accordingly, we find there are grounds for disciplining Mr McGirr under section 21 of the Act and under rule 4.5 of the Engineering New Zealand Rules.
99. Having found Mr McGirr in breach of section 21(1)(a) of the Act and Rule 4.5 of the Engineering Rules, we need to determine what orders, if any, should be made against him. There are a range of disciplinary actions available to the Disciplinary Committee, as set out in section 22 of the Act and in Engineering New Zealand Disciplinary Regulation 17(3).

## ORDERS

100. On 18 December 2019, our reserved decision was sent to the parties and they were invited to make submissions on penalties. On the same day, we issued our decision in relation to a complaint by a member of the public into the conduct of Mr McGirr (“the complaint”).
101. On 16 January 2020, we received a joint memorandum from counsel for the Registration Authority/Engineering New Zealand and counsel for Mr McGirr requesting that:
- a. We deal with both complaints in one penalty decision and;
  - b. Submissions in respect of penalty to be filed by the Registration Authority/Engineering New Zealand by 22 January 2020 and by Mr McGirr by 5 February 2020.
102. We directed the parties to provide submissions on penalty in accordance with the above timeframe and agreed that one penalty decision be issued. We also agreed to receive submissions from the Registration Authority/Engineering New Zealand in respect of the complaint. Our penalty decision is reproduced in both written decisions.

## RELEVANT LAW

103. In *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand*<sup>33</sup> the High Court outlined a number of principles to be applied by the Health Practitioners Disciplinary Tribunal in determining the appropriate penalty to impose in disciplinary proceedings. The High Court determined that a disciplinary penalty must:
- a. Protect the public (including through deterrence of other practitioners from engaging in similar conduct);
  - b. Set and maintain professional standards;
  - c. Where appropriate, rehabilitate the practitioner back to the profession;
  - d. Be comparable with penalties imposed on practitioners in similar circumstances;
  - e. Reflect the seriousness of the practitioner’s conduct, in light of the range of penalties available;

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<sup>33</sup> [2012] NZHC 3354.

- f. Be the least restrictive penalty that can reasonably be imposed in the circumstances; and
- g. Be fair, reasonable, and proportionate in the circumstances.

104. The High Court also stated that while penalty may have the effect of punishing a practitioner, punishment is not a necessary focus for the Tribunal in determining penalty.
105. The principles in *Roberts* are broadly applicable to our power to make disciplinary orders under section 22 of the Act and Engineering New Zealand Disciplinary Regulation 17 and they are the principles we rely on when considering the appropriate penalty orders in this case.
106. The principles have general application to professional disciplinary proceedings in the light of the Supreme Court's decision in *Z v Dental Complaints Assessment Committee*.<sup>34</sup> In *Z*, the Supreme Court makes general statements about the purposes of professional disciplinary proceedings, noting that such proceedings are designed to:
- Ascertain whether a practitioner has met appropriate standards of conduct in the occupation concerned and what may be required to ensure that, in the public interest, such standards are met in the future. The protection of the public is the central focus.*
107. This is consistent with *Roberts*, as *Roberts* lists public protection and the maintenance of professional standards as the foremost considerations relevant to penalty.
108. The Supreme Court in *Z v Dental Complaints Assessment Committee*<sup>35</sup> also states that while professional disciplinary proceedings are not intended to punish practitioners, they may have a punitive effect in practice. This is also consistent with the principles set out in *Roberts*, in that the penalty must be the least restrictive penalty and that punishment is not a necessary focus of a disciplinary penalty.
109. The reasoning underlying *Roberts'* focus on practitioner rehabilitation is less relevant to penalties under the Act because the removal or suspension of a Chartered Professional Engineer's registration does not prevent the individual practising as an engineer but does prevent use of the Chartered Professional Engineer title.
110. It is appropriate that disciplinary penalties mark the profession's condemnation of the relevant conduct, noting that to do otherwise would not be consistent with the purpose of the Act to establish the title of Chartered Professional Engineer as a mark of quality.<sup>36</sup>

## REGISTRATION AUTHORITY'S SUBMISSIONS

111. The Registration Authority has submitted that:
- a. Mr McGirr's registration as a Chartered Professional Engineer be removed for a period of one year, after which he may reapply;
  - b. Mr McGirr be removed from membership of Engineering New Zealand;
  - c. An anonymised case note of the complaint decision be published on the Engineering New Zealand website; and

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<sup>34</sup> [2008] NZSC 55.

<sup>35</sup> *Ibid.*

<sup>36</sup> Chartered Professional Engineers of New Zealand Act 2002, s 3.

- d. This decision be published in full, Mr McGirr's name suppression lifted, and a press release issued.

## **MR MCGIRR'S SUBMISSIONS**

112. Mr McGirr submitted that:

- a. In respect of the complaint he should be:
  - i. suspended from membership with Engineering New Zealand until he completes an appropriate professional development course;
  - ii. censured by Engineering New Zealand and the Registration Authority; and
  - iii. fined no more than \$5,000.
- b. In respect of the own motion inquiry that he should be:
  - i. suspended from membership with Engineering New Zealand until he completes an appropriate professional development course;
  - ii. suspended from the register of Chartered Professional Engineers until he completes a rehabilitative course as prescribed by us, or a suspension from the register for two months; and
  - iii. censured by both Engineering New Zealand and the Registration Authority.

113. Mr McGirr also provided a letter of apology addressed to the Complainant and two character references. Mr McGirr previously provided three character references with his submissions on the substantive issue.

## **DISCUSSION**

114. The public places significant trust in engineers to self-regulate. As a professional, an engineer must take responsibility for acting ethically. The actions of an individual engineer also play an important role in the way in which the profession is viewed by the public.
115. We have found that Mr McGirr has not acted as a reasonable Chartered Professional Engineer and Chartered Member of Engineering New Zealand. That is, he has breached his professional obligation to behave appropriately by entering the Complainant's house uninvited. Additionally, he has been convicted of an offence punishable by a term of imprisonment for six months or more, and it is our opinion that the commission of the offence reflects adversely on his fitness to practice engineering.
116. In our view, Mr McGirr's actions, if condoned, would undermine the public's trust in the engineering profession and reduce the public confidence in the Chartered Professional Engineer title and membership status with Engineering New Zealand. Mr McGirr's actions showed a serious lack of judgement and insight. His behaviour represented a very significant departure from the expected and our orders need to reflect our view of the breach.

## Registration and membership

117. In respect of orders relating to registration as a Chartered Professional Engineer, the Disciplinary Committee may order that:<sup>37</sup>
- An engineer's registration be removed, and that they may not apply for re-registration before the expiry of a specified period;
  - That their registration be suspended for a period of no more than 12 months or until they meet specified conditions relating to the registration; or
  - That the engineer be censured.
118. In respect of orders relating to membership with Engineering New Zealand, the Disciplinary Committee may order that an Engineering New Zealand member be:<sup>38</sup>
- Expelled from membership;
  - Suspended from membership for any period;
  - Suspended from membership until such time as the member has fulfilled requirements for professional development as specified by the Committee; or
  - Suspended from membership for a period of time if, by a prescribed date, the member fails to fulfil requirements for professional development as specified by the Committee.
119. In *A v Professional Conduct Committee*<sup>39</sup> the High Court said, in relation to a decision to cancel or suspend a professional's registration, that four points could be expressly (and a fifth impliedly) derived from the authorities:
- First, the primary purpose of cancelling or suspending registration is to protect the public, but that 'inevitably imports some punitive element.' Secondly, to cancel is more punitive than to suspend and the choice between the two turns on what is proportionate. Thirdly, to suspend implies the conclusion that cancellation would have been disproportionate. Fourthly, suspension is most apt where there is 'some condition affecting the practitioner's fitness to practise which may or may not be amendable to cure'. Fifthly, and perhaps only implicitly, suspension ought not to be imposed simply to punish.*
120. In the recent decision of *Attorney-General v Institution of Professional Engineers New Zealand Incorporated and Reay*<sup>40</sup> the High Court set out the standard the public expects when an engineer is a member of Engineering New Zealand:

*[M]embership of a professional body, such as the Institution, can confer a status that signals trustworthiness to the public. This status reflects the value that society places upon the training and skill acquired by members and upon the Institution's ability to maintain the standards of its members through ongoing education, training and disciplinary processes.*

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<sup>37</sup> Chartered Professional Engineers of New Zealand Act 2002, s 22.

<sup>38</sup> IPENZ Disciplinary Regulations, reg 17(3)(a) – (d).

<sup>39</sup> *A v Professional Conduct Committee* [2008] NZHC 1387 at [81].

<sup>40</sup> [2018] NZHC 3211 at [52] and [55].

121. The Court also went on to set out the public expectation of Engineering New Zealand's role in maintaining the standard of the profession:<sup>41</sup>

*There is, however, a counterbalance to the public trust that is reposed in members of professional bodies such as the Institution. That counterbalance is the public expectation that the Institution will tightly regulate admission into its ranks and ensure members maintain high professional standards. The public expects that if a person is to be afforded the status of membership of the Institution, then those individuals will maintain professional standards and that those standards will be enforced by the Institution through, if necessary, disciplinary proceedings. If a professional body, such as the Institution, wishes to maintain that public trust, and the value associated with membership status, then it must act in accordance with this expectation.*

122. We consider the comments made by the Court in the *Reay* decision, as they relate to membership, are equally applicable to Chartered Professional Engineers.

123. In his submissions to us, Mr McGirr accepted that the common denominator leading to this complaint and the own motion inquiry has been the consumption of alcohol. He further submits that there have been no instances of poor behaviour since the breach of his supervision order in October 2018. We have not found that Mr McGirr has exhibited a lack of insight into his behaviour nor that his behaviour has been sustained over a long period of time. However, we agree with Mr McGirr that alcohol consumption followed by a lack of judgment is the common thread between the complaint and the own motion inquiry.

124. In terms of penalty, the Registration Authority submit that a period of suspension is not a sufficient safeguard in this case and that Mr McGirr should have his registration as a Chartered Professional Engineer removed for a period of one year because, in order to be reinstated on the register, Mr McGirr must satisfy the minimum standards of registration, including conducting his professional engineering activities to an ethical standard at least equivalent to the code of ethical conduct.<sup>42</sup> Mr McGirr submits that a short period of suspension is appropriate, with conditions, to safeguard the public.

125. We consider that the least restrictive outcome, and the outcome that would give confidence to the Registration Authority and Engineering New Zealand that Mr McGirr had indeed rehabilitated, is a period of suspension for three months with conditions. Those conditions are:

- That Mr McGirr undergoes alcohol and drug counselling as approved by the Registration Authority and Engineering New Zealand, and completed to their satisfaction; and
- That Mr McGirr undergoes professional ethics counselling with a mentor approved by the Registration Authority and Engineering New Zealand and completed to their satisfaction.
- Both courses of counselling must incorporate face to face interaction with the approved counsellor and mentor. A self-directed online course would not meet our requirements. These courses are to be organised and paid for by Mr McGirr himself.

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<sup>41</sup> Ibid at [56].

<sup>42</sup> Chartered Professional Engineers of New Zealand Rules (No 2) 2002, r 6(2)(h)

126. We acknowledge that Mr McGirr has current projects that require him to be registered as a Chartered Professional Engineer. However, we consider the 28-day appeal period following our decision to be sufficient time for Mr McGirr to organise his affairs.
127. We consider that these orders reflect our condemnation of Mr McGirr's conduct sufficiently without having to remove him from the register or expel him from membership. We have considered Mr McGirr's business as a sole trader and his personal circumstances; our orders requiring intensive counselling are intended to be rehabilitative and not punitive.
128. We wish to emphasise the rehabilitative aspect of our orders while acknowledging that Mr McGirr's actions fell very well short of what would reasonably be expected of a Chartered Member of Engineering New Zealand and as a Chartered Professional Engineer.
129. Our orders are forward looking and will allow Engineering New Zealand to monitor Mr McGirr's situation. Although Mr McGirr has advised us he is currently alcohol free, Engineering New Zealand is entitled to some assurance that he has appropriately addressed the factors that led to these breaches. By ordering that the counselling must be approved by, and completed to the satisfaction of, Engineering New Zealand, we are giving Engineering New Zealand the appropriate responsibility to ensure that our orders have the intended rehabilitative effect.
130. In terms of Mr McGirr's convictions, we note that the judge indicated if Mr McGirr incurred further drink-driving convictions he would be facing a more significant sentence than the community detention imposed – this would inevitably come to the attention of Engineering New Zealand and the Registration Authority.
131. We make these orders in relation to both the complaint and the own motion inquiry.

### **Fine**

132. The Chartered Professional Engineers of New Zealand Act 2002 and the Engineering Disciplinary Regulations state that the Disciplinary Committee may order that an engineer pay a fine up to a maximum of \$5,000. A separate fine may be imposed under both the Act and the Regulations, and in relation to both the complaint and the own motion inquiry.
133. We do not consider it necessary to impose more than one fine.
134. In respect of the complaint, we order Mr McGirr pay a single fine of \$3,500 pursuant to the Chartered Professional Engineers of New Zealand Act 2002. This reflects the seriousness with which we view Mr McGirr's behaviour. While Mr McGirr states he did not intend to upset the Complainant, the fact is that he did. This behaviour by a Chartered Member of Engineering New Zealand and Chartered Professional Engineer is completely unacceptable.
135. In respect of the own-motion inquiry, we do not consider a fine necessary, over and above the orders we have already made.

### **Costs**

136. The Disciplinary Committee can order that the engineer pay costs and expenses of, and incidental to, the inquiry by Engineering New Zealand and Registration Authority.<sup>43</sup> We note the ordering of payment of costs is not in the nature of penalty.

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<sup>43</sup> Chartered Professional Engineers of New Zealand Act 2002, s 22(4) and IPENZ Disciplinary Regulations, reg 17(3)(g) respectively.

137. When ordering costs, it is generally accepted that the normal approach is to start with a 50% contribution.<sup>44</sup> That, however, is a starting point and other factors may be considered to reduce or mitigate that portion. Those factors include whether the hearing was able to proceed on an agreed statement of facts, any co-operation from or attendance at the hearing by the engineer, and consistency with the level of costs in previous decisions. The balance of costs after the orders must be met by the profession itself.<sup>45</sup>

138. In respect of the medical profession, the Court in *Vatsyayann v PCC* said:<sup>46</sup>

*[P]rofessional groups should not be expected to bear all the costs of a disciplinary regime and that members of the profession who appeared on disciplinary charges should make a proper contribution towards the costs of the inquiry and a hearing; that costs are not punitive; that the practitioner's means, if known, are to be considered; that a practitioner has a right to defend [themselves] and should not be deterred by the risk of a costs order; and that in a general way 50% of reasonable costs is a guide to an appropriate costs order subject to a discretion to adjust upwards or downwards.*

139. Further, in *O'Connor v Preliminary Proceedings Committee* the High Court stated:<sup>47</sup>

*It is a notorious fact that prosecutions in the hands of professional bodies, usually pursuant to statutory powers, are very costly and time consuming to those bodies and such knowledge is widespread within the professions so controlled. So as to alleviate the burden of the costs on the professional members as a whole the legislature had empowered the different bodies to impose orders for costs. They are nearly always substantial when the charges brought are successful and misconduct admitted, or found.*

140. We have considered other Disciplinary Committee orders of costs, such as those ordered in *Borlase CPEng MIPENZ, Joyce CPEng CMEngNZ (2018)*, *Csiba MEngNZ*, a respondent engineer *CPEng CMEngNZ* and *Joyce CMEngNZ (2019)*,<sup>48</sup> along with other decisions yet to be published.

141. We have considered Mr McGirr's submissions and the factors as they relate to his level of co-operation with the investigation of the complaint and participation in the disciplinary process.

142. In terms of mitigating factors, we are cognisant of the length of time that it has taken for Engineering New Zealand to hear this matter. We are also cognisant of Mr McGirr's cooperation with the investigation to date.

143. Taking all factors into account, we do not consider there to be any compelling reason to depart from the normal practice of ordering 50% of costs. We order Mr McGirr to pay 50% of costs incurred by Engineering New Zealand and the Registration Authority for both the complaint and the own motion inquiry being approximately \$23,000.00 and \$10,500.00 respectively.

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<sup>44</sup> Including *Cooray v Preliminary Proceedings Committee HC Wellington AP 23/94*, 14 September 1995 per Doogue J.

<sup>45</sup> *PCC v Van Der Meer* 1019/Nur18/422P.

<sup>46</sup> [2012] NZHC 1138 at [34].

<sup>47</sup> *O'Connor v Preliminary Proceedings Committee HC Wellington AP 280/89*, 23 August 1990 at [13] per Jeffries J.

<sup>48</sup> Mr Borlase was ordered to pay 50% of costs, Mr Joyce (2018) was ordered to pay 50% of costs, Mr Csiba was ordered to pay 40% of costs, Engineer A was ordered to pay 50% of costs, Mr Joyce (2019) was ordered to pay 60% of costs. Available at: <https://www.engineeringnz.org/our-work/working-engineer/engineering-concerns/upheld-complaints/>

## Naming

144. In addition to notifying any orders made against an engineer on the register of Chartered Professional Engineers, the Registration Authority must notify the Registrar of Licensed Building Practitioners appointed under the Building Act 2004 of the order and the reasons for it and may publicly notify the order in any other way that it thinks fit.<sup>49</sup>
145. In respect of membership with Engineering New Zealand, the Disciplinary Committee may order that the member be named, the order against the member be stated and the nature of the breach described in the official journal of the Institution or publicised in any other manner as may be prescribed by the Committee.<sup>50</sup>
146. The Act does not prescribe factors the Disciplinary Committee should consider when deciding whether to name an engineer. While we are mindful of the specific legislative test of “desirability” set out in the Health Practitioners Competence Assurance Act 2003, we are guided by the public interest factors considered by the medical profession when deciding whether to name a practitioner.<sup>51</sup> These include openness and transparency in disciplinary proceedings; accountability of the disciplinary process; public interest in knowing the identity of the practitioner; the importance of freedom of speech; unfairly impugning other practitioners; and that where an adverse disciplinary finding has been made, it is necessary for more weighty private interest factors (matters that may affect a family and their wellbeing, and rehabilitation of the practitioner) to be advanced to overcome the public interest factors for publication.<sup>52</sup>
147. Naming is the starting point and will only be inappropriate in a limited number of circumstances where the engineer’s privacy outweighs the public interest. In *Y v Attorney-General*<sup>53</sup> the Court of Appeal explored the principles that should guide the suppression of the names of parties, witnesses, or particulars in the civil context. The starting point is the principle of open justice.<sup>54</sup>
148. The question is then, do the circumstances justify an exception to the principle of open justice. In a professional disciplinary context, a practitioner is “likely to find it difficult to advance anything that displaces the presumption in favour of disclosure”.<sup>55</sup> This is because the practitioner’s existing and prospective clients have an interest in knowing details of the conduct, as this allows them to make an informed decision about the practitioner’s services.<sup>56</sup>
149. Consistent with these precedents, the starting point is that naming of engineers subject to a disciplinary order is the normal expectation. This is because public protection is at the heart of disciplinary processes, and naming supports openness, transparency, and accountability.
150. We note that Mr McGirr has already been named publicly in respect of his convictions, by virtue of the fact that records of the court are public.

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<sup>49</sup> Chartered Professional Engineers of New Zealand Act 2002, s 22(5).

<sup>50</sup> IPENZ Disciplinary Regulations, reg 17(5)(h).

<sup>51</sup> The presumption in the Health Practitioners Competence Assurance Act 2003 is that hearing shall be in public, but gives the Tribunal discretion to grant name suppression. The test is whether it is “desirable” to prohibit publication of the name or any particulars of the affairs of the person in question and the Tribunal must consider both the interests of any person and the public interest.

<sup>52</sup> *Professional Conduct Committee of the Pharmacy Council of New Zealand v El-Fadil Kardaman* 100/Phar18/424P at [113] – [114].

<sup>53</sup> [2016] NZCA 474.

<sup>54</sup> *Ibid* at [25].

<sup>55</sup> *Ibid* at [32].

<sup>56</sup> *Ibid*.

151. After considering the above factors, we consider there are no reasons to justify the departure from the fundamental principle of naming.

## **SUMMARY OF ORDERS**

152. In exercising our delegated powers, we order that:

- a. In respect of both the complaint and the own-motion inquiry, Mr McGirr is suspended from the register of Chartered Professional Engineers and membership with Engineering New Zealand for a period of three months, and will be reinstated on the register and into the membership subject to the conditions we have set out above;
- b. In respect of the complaint, Mr McGirr is fined \$3,500; and
- c. In respect of both the complaint and the own motion inquiry, Mr McGirr is to pay 50% of Engineering New Zealand and the Registration Authority's costs in investigating and deciding these matters.

153. In addition, the Registration Authority will:

- a. Notify the Registrar of Licensed Building Practitioners appointed under the Building Act 2004 of the order and the reasons for it; and
- b. In respect of the complaint, publish a case note, anonymised to protect the Complainant, on its website, in a public press release and any other communication it considers appropriate; and
- c. In respect of the own-motion inquiry, publish our decision in full on its website, in a public press release and in any other communication it considers appropriate.

154. Mr McGirr's name suppression is lifted.



Jenny Culliford FEngNZ  
**Chair of Disciplinary Committee**