

BPB Complaint No. C1129

IN THE MATTER OF

Under the Building Act 2004 (the Act)

A complaint to the Building Practitioners' Board under section 315

AGAINST

[The Respondent], Licensed Building Practitioner No. BP [omitted]

DECISION OF THE BUILDING PRACTITIONERS' BOARD

1 Introduction

- 1.1 [The Complainant] lodged a complaint with the Building Practitioners' Board (the Board) on 16 January 2014 in respect of [the Respondent], Licensed Building Practitioner.
- 1.2 The complaint alleged the Respondent had, in relation to building work in respect of various properties in and around Christchurch had conducted himself in a manner that brings, or is likely to bring, the regime under the Building Act for licensed building practitioners into disrepute.
- 1.3 The Respondent is a Licensed Building Practitioner with a Carpentry Licence issued 9 June 2012.
- 1.4 The following Board Members were present at the hearing:
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| Chris Preston | Deputy Chairman |
| Brian Nightingale | Board Member |
| Mel Orange | Board Member |
| Dianne Johnson | Board Member |
- 1.5 No Board Members declared any conflicts of interest in relation to the matters under consideration.
- 1.6 The matter was considered by the Board in Christchurch on 26 August 2014 in accordance with Part 4 of the Act and the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Regulations) and the Board's Complaints Procedure.
- 1.7 The following other persons were also present during the course of the hearing:
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|---------------|----------------------------|
| Paul Chisnall | Registrar's Representative |
| Sarah Jones | Board Secretary |
| [Omitted] | Respondent |

Warren Nevill	Special Adviser to the Board
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[Omitted]	Witness for the Respondent
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[Omitted]	Witness for the Respondent
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[Omitted]	Witness for the Respondent
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[Omitted]	Witness for the Respondent
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Members of the public were not present.

2 Board Procedure

- 2.1 The “form of complaint” provided by the Complainant satisfied the requirements of regulations 5(a) to (d) of the Regulations.
- 2.2 On 31 March 2014 the Registrar of the Board prepared a report in accordance with regulations 7 and 8 of the Regulations. The purpose of the report is to assist the Board to decide whether or not it wishes to proceed with the complaint. The Registrar’s recommendation was that the complaint proceed on the ground of failing, without good reason, to provide a record of work on completion of restricted work.
- 2.3 On 16 April 2014 the Board considered the Registrar’s report and in accordance with Regulation 10 it resolved to proceed with the complaint that the Respondent the LBP failed, without good reason, to provide a record of work on completion of restricted work as required by s 88(1) of the Building Act.
- 2.4 The Board requested a Special Adviser be appointed to prepare a report. Warren Nevill’s report dated 16 May 2014 was received and circulated.
- 2.5 On 30 July 2014 at 10.30 a.m. a pre-hearing teleconference was convened by Chris Preston. The Respondent and his legal representative [Omitted] and the Registrar’s Representative were present. The hearing procedures were explained and the Respondent’s attendance at the substantive hearing was confirmed.

3 The Hearing

- 3.1 The hearing commenced at 10 a.m. on 26 August 2014 in Christchurch. No person raised any issues in relation to conflicts.
- 3.2 At the hearing the Board was assisted in the presentation of the case by the Registrar’s Representative.
- 3.3 The Respondent, his witnesses and the Special Adviser were sworn in, their evidence was presented and they answered questions from the Board.
- 3.4 At the completion of the evidence and submissions the Board adjourned the hearing to allow the Complainant an opportunity to respond to the Special Advisor’s report. There had been a delay in providing the report to the Complainant which meant he had not been given adequate time consider it and respond.

4 Substance of the Complaint

- 4.1 The complaint related to the refusal by the Respondent to complete records of work for various projects he was supervising for his employer.

5 Evidence

- 5.1 The complainant says that the Respondent failed to provide records of work in relation to five properties under his supervision being:
- [Omitted]
 - [Omitted]
 - [Omitted]
 - [Omitted]
 - [Omitted]
- 5.2 The Special Adviser gave evidence and his report was confirmed. The Special Adviser provided a summary of the worksites and labour involvement and his understanding of the Respondent's attendance at the worksites and the extent of his supervision. He provided his opinion that, if the Respondent's claims as to having inadequate supervisory time and lack of qualified staff were given credence, then this might be a good reason for not signing of records of work in his supervisory capacity.
- 5.3 The Respondent gave evidence as to how the various jobs were run and what his duties were. Those duties included off site tasks in relation to the jobs. He submitted that he was not afforded sufficient time to supervise all of the sites effectively, was not in a position to know what was happening on each site in any real detail and did not feel he was in a position to be able to record or certify any work as having been done properly.
- 5.4 He stated that in addition to the jobs listed above he was also running two other jobs, one in [Omitted].
- 5.5 The Respondent gave evidence as to the individuals he was supervising and their qualifications and or skill levels. He estimated that about 80% of the staff were unskilled. Included in the staff he was supervising and who were on site were other licenced building practitioners.
- 5.6 The Respondent stated that he brought his concerns to his employer's attention (the Complainant) and advised that he could not provide a record of works under the conditions he was working under. He stated his concerns were in relation to his rights and obligations as an employee and to being put in a position where he was being forced to make statements which he did not consider he was able to make.
- 5.7 The Respondent eventually resigned his position with the employer and stated his reasons for doing so were because he had been placed in an untenable position with respect to being required to supervise with an unmanageable workload.
- 5.8 The Respondent's witnesses affirmed the evidence of the Respondent with regard to the employers work practices and the level of supervision that could actually be effectively provided.
- 5.9 The Complainant made submissions post the hearing which were also taken into consideration.

6 Boards Conclusion and Reasoning

- 6.1 The grounds for the complaint were that the Respondent had failed to provide a record of work on completion of restricted building work. The complaint was laid by Respondent's employer.
- 6.2 The Employer's position was that the Respondent was employed as a licenced person to supervise licenced and non-licenced persons and it was a requirement of his employment relationship that he provide the records of work.
- 6.3 The Respondent's position was that his employer had put him in a position which resulted in him not being able to complete the records of work. He submitted that, due to a combination of the low skill level of the persons he was supposed to be supervising and the number and spread of jobs he was looking after, there was insufficient time on each to provide adequate supervision. Accordingly he was not able to complete the records of work.
- 6.4 It is to be noted that the Respondent was supervising staff which included other licenced person. In this respect, and in terms of the Act, it is a requirement that each licenced person completes their own record of work for the work they have themselves completed or supervised. Another licenced person cannot complete a record of work as having supervised them.
- 6.5 When considering the disciplinary provisions of the Act in relation to records of work the Board needs to firstly determine if the restricted building work was complete as this is when the obligation to furnish arises. If the work is complete and a record of work has not been provided then the only defence open to a practitioner is to establish that there was a good reason for not providing it. The onus is on the licenced person to prove this on the balance of probabilities.
- 6.6 In this instance it was accepted by the Respondent that the work had been completed. The question then is whether the Respondent has a good reason.
- 6.7 The reason put forward by the Respondent was that he could not provide the records of work as, in his opinion, he could not make the statement that he had actually supervised the work. The question for the Board then is whether a licenced person can be required to complete a record of work in circumstances where, through the actions of others, they cannot, in good faith, make the statements set out in the record. Or, to phrase it in the language of the Act, is this a good reason.
- 6.8 The Board is mindful, in considering this, that to find in the affirmative would be to potentially allow employed persons to avoid their responsibilities under their employment arrangements. The converse is, however, also a possibility. Finding that an employee must, irrespective of the circumstances they are placed in, complete a record of work for restricted building work they are supervising may place them in an untenable position. The Board should not be disciplining persons for refusing to make a false statement. Given this the Board considers that the circumstances under which an employee who is, as part of their employment, required to supervise restricted work may constitute a good reason not to complete a record of work but each case must be determined on its own merits.
- 6.9 In considering the Respondent's situation the Board has decided that in this instance, and on the factual matrix before it, the Respondent did have a good reason to not complete the record of work.

- 6.10 Critical to the Board's decision is the fact that the Respondent took proactive steps to bring the situation to his employer's attention and, when his concerns were not addressed, he removed himself from the situation by resigning. Had he merely decided, at the completion of the restricted building work, that he had not been able to adequately supervise and therefore could not complete a record of work then the Board's may have reached a different conclusion.
- 6.11 The Board is mindful that the scenario of a person who was ostensibly supervising refusing to complete a record of work may create difficulties for an employer. As such, and to avoid this sort of situation it is important that, if persons carrying out restricted building work are going to be doing it under supervision that there is a clear establishment of the supervisory relationship at the outset. Both the supervisor and the supervisee need to be aware of the relationship. The supervisor needs to be aware of the skill levels and experience of the supervisee and thus of the level of supervision required and of their own limitations as a supervisor.
- 6.12 In the present case the Board notes the Complainant ended up completing the records of work. Whilst the Board makes no comment on whether he was able to actually make a statement that he had supervised it does highlight that both the employer and the employed licenced person need to be mindful of the situation and to put systems and processes in place to ensure a record of work can be completed in all instances where restricted building work is undertaken.

7 Board Decision

- 7.1 The Board has decided that Respondent had a good reason for not providing a record of work on completion of restricted work and should not be disciplined.
- 7.2 As the complaint has not been upheld the complaint is now closed.

Signed and dated this day of 26 November 2014



Chris Preston
Presiding Member