

Before the Building Practitioners Board

BPB Complaint No. CB26256
Licensed Building Practitioner: [Omitted] (the Respondent)
Licence Number: [Omitted]
Licence(s) Held: Carpentry

Decision of the Board in Respect of the Conduct of a Licensed Building Practitioner Under section 315 of the Building Act 2004

Complaint or Board Inquiry Board Inquiry
Hearing Location Wellington
Hearing Type: In Person
Hearing Date: 14 February 2024
Decision Date: 7 March 2024
Board Members Present:
 Mrs F Pearson-Green, Deputy Chair, LBP, Design AoP 2 (Presiding)
 Ms J Clark, Barrister and Solicitor, Legal Member
 Mr G Anderson, LBP, Carpentry and Site AoP 2

Procedure:

The matter was considered by the Building Practitioners Board (the Board) under the provisions of Part 4 of the Building Act 2004 (the Act), the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Complaints Regulations) and the Board's Complaints and Inquiry Procedures.

Disciplinary Finding:

The Respondent **has** committed disciplinary offences under sections 317(1)(b),(c) and (d) of the Act.

The Respondent is fined \$2,000 and ordered to pay costs of \$3,500. A record of the disciplinary offending will be recorded on the Public Register for a period of three years.

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Summary

- [1] The Respondent was engaged by the homeowner to construct a lounge, entry, and bathroom addition to an existing dwelling under a building consent. Under Schedule 1 to the Building Act and an amendment to the building consent, two decks were constructed. The Respondent supervised the building work.
- [2] The Board needed to consider whether the Respondent had negligently or incompetently supervised the carrying out of the building work. The Board’s investigation was based on several Council site notices which culminated in a notice

to fix. These evidenced building work which was non-compliant with the building consent and not of an acceptable standard.

- [3] The Board held that the Respondent had negligently supervised the building work and had supervised building work, which did not comply with the building consent.
- [4] In addition, the Respondent had supervised his unlicensed employees installing a metal tile roof to the dwelling addition. The Respondent holds a Carpentry Licence and does not hold a Roofing Area of Practice Metal Tile Roofing Licence. It follows that he supervised Restricted Building Work which he was not licensed to carry out or supervise.
- [5] As regards the record of work, the Board decided that the Respondent had not committed the offence of failing to provide a Record of Work on completion of the Restricted Building Work. He provided a Record of Work to the homeowner and the Territorial Authority within an acceptable time after his Restricted Building Work came to an end.
- [6] The Board decided that the Respondent would be fined \$2,000 and ordered to pay costs of \$3,500. A record of the disciplinary offending will be recorded on the Public Register for a period of three years.
- [7] The Board issued permanent name and property location suppression orders, and accordingly, the Respondent will not be named in the decision published on the Board's website and cannot be named in any other publication.

The Charges

- [8] The prescribed investigation and hearing procedure is inquisitorial, not adversarial. There is no requirement for a Complainant to prove the allegations. The Board sets the charges and decides what evidence is required.¹
- [9] In this matter, the disciplinary charges the Board resolved to further investigate² were that the Respondent may, in relation to building work at [Omitted], Wellington, have:
 - (a) carried out or supervised building work in a negligent or incompetent manner contrary to section 317(1)(b) of the Act.
 - (b) carried out or supervised restricted building work of a type which he is not licensed to carry out or supervise contrary to section 317(1)(c) of the Act in that he may have carried out roofing work that he was not licensed to carry out.

¹ Under section 322 of the Act, the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law. The evidentiary standard is the balance of probabilities, *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1.

² The resolution was made following the Board's consideration of a report prepared by the Registrar in accordance with regulation 10 of the Complaints Regulations.

- (c) carried out or supervised building work that does not comply with a building consent contrary to section 2317(1)(d) of the Act.
- (d) failed, without good reason, in respect of a building consent that relates to restricted building work that he is to carry out or supervise, or has carried out or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) of the Act, contrary to section 317(1)(da)(ii) of the Act.

[10] In further investigating the Respondent's conduct under sections 317(1)(b) and (d) of the Act, the Board will be inquiring into the matters raised in Site Notices issued by the Wellington City Council as the Building Consent Authority, those set out in a report of [Omitted] dated 7 October 2022, and the quality and compliance of roofing work.

Private hearing and suppression applications

- [11] Prior to the hearing a request was made for media to attend the hearing by way of videoconference. The Respondent was advised of this, and as a consequence, he requested the hearing be conducted in private, without media attendance.
- [12] This request was addressed by the Board at the commencement of the hearing, and the Respondent was invited to make any further submissions on the matter. The Respondent did not want to submit further than the written reasons already given.
- [13] When an application is made for a hearing to be in private, the onus is on the applicant to satisfy the Board that, on the balance of probabilities, the hearing should be held in private.
- [14] The Board, when considering an application, applies the principles set out in section 197(2) of the Criminal Procedure Act.³
- [15] The Board declined to hold the hearing in private on the basis that the reasons given did not, on the balance of probabilities, satisfy the grounds set out in the Criminal Procedure Act. The Respondent was invited by the Board to make an application for suppression instead and he did so orally at the hearing.

³ (2) *The court may make an order under subsection (1) only if the court is satisfied that—*

- (a) *the order is necessary to avoid—*
 - (i) *undue disruption to the conduct of the proceedings; or*
 - (ii) *prejudicing the security or defence of New Zealand; or*
 - (iii) *a real risk of prejudice to a fair trial; or*
 - (iv) *endangering the safety of any person; or*
 - (v) *prejudicing the maintenance of the law, including the prevention, investigation, and detection of offences; and*
- (b) *a suppression order is not sufficient to avoid that risk.*

- [16] The Board ordered interim suppression of the Respondent's name and address of the property, which is the subject matter of the complaint, pending the outcome of the hearing.
- [17] At the conclusion of the hearing and after advising the Respondent of the Board's substantive decision orally the Board considered the issue of suppression.
- [18] The Board, when considering an application for suppression, applies the principles set out in sections 200 and 202 of the Criminal Procedure Act, which include, in the context of a disciplinary hearing, that publication would be likely to:
- (a) *cause extreme hardship to the person charged, a witness or a person connected to those persons or the matters; or*
 - (b) *cast suspicion on another person that may cause undue hardship to those persons; or*
 - (c) *cause undue hardship to any victim of the offence; or*
 - (d) *create a real risk of prejudice to a fair trial; or*
 - (e) *endanger the safety of any person; or*
 - (f) *lead to the identification of another person whose name is suppressed by order or by law.*
- [19] "Extreme hardship" requires a very high level of hardship, and it falls outside of the ordinary consequences usually associated with proceedings or publication. It is something more than hardship. It requires hardship that is disproportionate or is greater than the circumstances warrant.
- [20] The Board, when an application is made, weighs the competing interests of the applicant and the public, taking into account such matters as whether the complaint has been upheld, the seriousness of the offending, the views of the Complainant and the public interest in knowing the outcome. The Board also considered the factors⁴ set out by the High Court in *N v Professional Conduct Committee of Medical Council*.⁵
- [21] On the basis of the written and further oral submissions given by the Respondent the Board determined that permanent name and property location suppression was necessary to avoid extreme hardship to the Respondent.

⁴ *The tribunal must be satisfied that suppression is desirable having regard to the public and private interests and consideration can be given to factors such as:*

issues around the identity of other persons such as family and employers

identity of persons involved and their privacy and the impact of publication on them; and

the risk of unfairly impugning the name of other practitioners if the responsible person is not named.

⁵ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

Evidence

[22] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed.⁶ Under section 322 of the Act, the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.

Negligence or Incompetence

[23] To find that the Respondent was negligent, the Board needs to determine, on the balance of probabilities,⁷ that the Respondent departed from an accepted standard of conduct when carrying out or supervising building work as judged against those of the same class of licence. This is described as the *Bolam*⁸ test of negligence.⁹ To make a finding of incompetence, the Board has to determine that the Respondent has demonstrated a lack of ability, skill, or knowledge to carry out or supervise building work to an acceptable standard.¹⁰ A threshold test applies to both. Even if the Respondent has been negligent or incompetent, the Board must also decide if the conduct fell seriously short of expected standards.¹¹ If it does not, then a disciplinary finding cannot be made.

[24] This project consisted of a lounge, entry, and bathroom addition to the dwelling under a building consent. This consent was later amended to add a high-level timber deck and balustrade. A low-level timber deck was also added to the project under Schedule 1 of the Building Act and, as such, was not Restricted Building Work.

[25] The two timber deck areas later changed to be a tiled deck over membrane and sheet substrate under a second amendment to the building consent. The timber balustrade was also changed to a glass balustrade under this amendment.

[26] The final aspect of the project was the roof cladding which was constructed with metal tiles.

[27] There is no requirement for a Licensed Building Practitioner to supervise non-restricted building work. This is because of the combined effect of sections 401B and 84 of the Act. Section 401B of the Act allows building work to be declared as Restricted Building Work by Order in Council.¹² It only applies to building work that is

⁶ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

⁷ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1. Under section 322 of the Act, the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.

⁸ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁹ Adopted in New Zealand in various matters including: *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

¹⁰ In *Beattie v Far North Council* Judge McElrea, DC Whangarei, CIV-2011-088-313 it was described as “a demonstrated lack of the reasonably expected ability or skill level”. In *Ali v Kumar and Others*, [2017] NZDC 23582 at [30] as “an inability to do the job”

¹¹ *Collie v Nursing Council of New Zealand* [2001] NZAR 74 - [21] “Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness”.

¹² 401B Order in Council declaring work to be restricted building work

carried out under a building consent. This work was only partially carried out under a building consent.

- [28] In previous Board decisions, it has found that the definition of supervise in section 7¹³ of the Act must be interpreted in such a way as to give effect to the purpose of the legislation, which includes the regulation and accountability of Licensed Building Practitioners and, as such, it includes work carried out without a building consent and which is not Restricted Building Work. The Board's position has been that under the disciplinary provision in section 317(1)(b) of the Act, supervision applies to all building work carried out under the supervision of a Licensed Building Practitioner.
- [29] In this matter, the evidence established that the Respondent did have a supervisory role in the building work, which was not restricted building work. On that basis, the adequacy of the Respondent's supervision of the building work was considered by the Board without differentiation between restricted and non-restricted building work.
- [30] The Respondent gave evidence that the work was carried out by his employees being a one-year qualified builder, a labourer and a two and a half year apprentice. The Respondent was doing two other new builds at the same time and estimated that he was on site for this project anywhere between 0% to 80% of his time. He said that he was working 16 hour days, was under-resourced and had underpriced the project. The Respondent advised that he was not at all of the Council inspections but that he received all of the site inspection reports.

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- (1) *The Governor-General may, by Order in Council made on the recommendation of the Minister, declare any kind of building work (other than building work for which a building consent is not required) or any kind of design work to be restricted building work.*
- (2) *An order under subsection (1) may apply to any kind of building work or design work generally, or may apply to building work or design work in relation to particular types or categories of buildings or to particular parts of buildings.*
- (3) *The Minister may recommend the making of an order under this section only if the Minister is satisfied that the kind of building work or design work in question is (or is likely to be) critical to the integrity of a building or part of a building.*
- (4) *Building work or design work is not restricted building work if it relates to an application for a building consent made before the commencement of an order under subsection (1) declaring building work or design work of the same kind to be restricted building work.*

¹³ Section 7:

supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—

- (a) *is performed competently; and*
(b) *complies with the building consent under which it is carried out.*

[31] Supervise is defined in section 7¹⁴ of the Act. The definition states:

supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—

(a) is performed competently; and

(b) complies with the building consent under which it is carried out.

[32] Supervision in the context of the Building Act has not yet been considered by the courts. It has, however, been considered in relation to the Electricity Act 1992¹⁵. The definition of supervision in that Act is consistent with the definition in the Building Act, and, as such, the comments of the court are instructive. In the case, Judge Tompkins stated, at paragraph 24:

“As is made apparent by the definition of “supervision” in the Act, that requires control and direction by the supervisor so as to ensure that the electrical work is performed competently, that appropriate safety measures are adopted, and that when completed the work complies with the requisite regulations. At the very least supervision in that context requires knowledge that work is being conducted, visual and other actual inspection of the work during its completion, assessment of safety measures undertaken by the person doing the work on the site itself, and, after completion of the work, a decision as to compliance of the work with the requisite regulations.”

[33] In C2-01143, the Board also discussed the levels of supervision it considers are necessary to fulfil a Licensed Building Practitioner’s obligations, noting that the level of supervision required will depend on a number of circumstances, including:

(a) the type and complexity of the building work to be supervised.

(b) the experience of the person being supervised.

(c) the supervisor’s experience in working with the person being supervised and their confidence in their abilities.

(d) the number of persons or projects being supervised; and

(e) the geographic spread of the work being supervised.

[34] Ultimately, the Board also needs to consider whether the work met the requirements of the building code and, if not, the level of non-compliance.

¹⁴ Section 7:

supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—

(a) is performed competently; and

(b) complies with the building consent under which it is carried out.

¹⁵ *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

Has the Respondent departed from an acceptable standard of conduct?

[35] When considering what an acceptable standard is, the Board must consider the purpose of the Building Act¹ as well as the requirement that all building work must comply with the Building Code¹⁶ and any building consent issued.¹⁷ The test is an objective one.¹⁸

General Building Issues

[36] Various Site Notices were issued by the Wellington City Council as the Building Consent Authority. They included the following notations:

Date	Notation
7 May 2021	<p>***Builder is instructed to stop and attend to remedial issues immediately.</p> <p>***A Notice To Fix (form 13) will now be issued as prescribed by the Building Act.</p> <p>A post line was booked for today but I declined to carry this out due to unresolved fails.</p> <p>Bracing was also not as per approved plan.</p> <p>“As-built” floor plan required as additional information showing the alteration to fixture locations from the consented plans</p>
10 May 2021	<p>Site Meeting to tidy up all failed items from previous inspections once NTF conditions are complied with.</p> <p>Galv fixings to engineered deck to be replaced, deck design, PS1 to be submitted to council.</p> <p>Main entry verandah/porch has been closed in and not part of building consent.</p> <p>Inspection was booked to inspect GIB fixings, discussed with LBP what would be required and made aware of the NTF. I have marked out what needs remedying on the consented drawings and the LBP has agreed to comply.</p> <p>Piles (anchor/braced) 4 Anchor Piles to have retro fixings for both joist/bearer and pile/bearer Lumberlok Retro Plates as per Structural fixings guide 2019. 8 nails top and bottom of plates.</p>

¹⁶ Section 17 of the Building Act 2004

¹⁷ Section 40(1) of the Building Act 2004

¹⁸ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71 noted that the tribunal does not have to take into account the Respondent’s subjective considerations.

Date	Notation
	Other 3 anchor piles to have CT160s for joist/bearer connections and nail plates for pile to bearer connections.
17 May 2021	<p>(Additional items to the above)</p> <p>Deck remains unverified and not built as per plan. Owner want to change this to a tiled over membrane deck this would require an amendment.</p> <p>Nothing regarding this deck has been inspected and approved.</p> <p>Main entry verandah/porch has been closed in and not part of building consent.</p> <p>It was seen on site today that the original posts of the verandah were removed and new piles/posts added thereby altering the existing structure of the dwelling.</p> <p>This is un-consented building work which now requires a Certificate of Acceptance.</p> <p>Foam installed with out PEF rod</p> <p>Remove all foam around windows and have ready for PEF rod inspection</p> <p>Engineering site notice Engineers site notice confirming new deck approval.</p> <p>[Omitted] have undertaken a site investigation for ground bearing for the deck for the front row of piles. The report is inconclusive and does not sign off the deck structure.</p> <p>Internal Bracing It was discovered that bracing BL1 brackets along wall from bathroom to front door were compromised because builder had removed fixings from brackets, also as the bracing was not installed as per plan all of this bracing is now in question.</p> <p>Builder must remove the linings to prove the bracing brackets are installed as per plan or as per revision to be provided by the designer.</p>
4 June 2021	<p>There has been no remedial work completed that would allow for any progress.</p> <p>Builder is instructed to attend to remedial works and make ready for a remedial inspection.</p>

Date	Notation
	<p>No inspections will be undertaken for internal works until structure and weather tightness are proven</p> <p>NTF requirements have not been complied with.</p>

[37] A further Site Notice dated 12 August stated:

It is important that the homeowner understands that the Notice to Fix (NTF) that has been issued is still in effect and the time allowed to demonstrate compliance with the NTF has expired.

WCC may consider what compliance action to take going forward.

WCC is concerned that the builder does not appear to be demonstrating a concern for building in accordance with the approved consent and amendments. While on site it was observed that other work has continued, that would make remediation of the non complaint work potentially difficult and costly.

This is leaving the homeowner in a difficult position where the ability to gain a Code Compliance Certificate is in jeopardy.

Owner was advised a complaint to MBIE's LBP Board is an option if they are not satisfied with the work carried out.

I strongly encourage that the building work is carried out in accordance with the Building Consent and the Building Code.

[38] The 4 June 2021 Site Notice included a further list of non-compliant work. This, together with a summary email from the Council inspector, Mr Kumar dated 13 May 2021, and a report by [Omitted] of [Omitted] dated 7 October 2022, formed the basis of the Board's questioning of the Respondent.

[39] It was established from the Respondent's and the homeowner's evidence that the closing in of the veranda was done by a different contractor and therefore it was not the Respondent's responsibility that this work was done without a building consent. In addition, the lack of fall on the upper deck was not the Respondent's responsibility as the homeowner installed the membrane and tiled the deck himself and had taken on the responsibility of creating the fall. The Homeowner also noted that his contractor was also carrying out other works, such as re-cladding on the dwelling that the Respondent was not involved in or responsible for.

[40] The Respondent accepted that the following issues were the result of his inadequate supervision –

- (a) 7 anchor piles not adequately fixed off.
- (b) Missing Bowmac bracing.

- (c) At the junction of the new deck and the house the wrap and cladding were not extended to below the floor joist as required by the building consent. An alternative detail was sought from the designer and was submitted under amendment three to the building consent.
- (d) Foam installed without PEF rod.
- (e) Corner pile by entry door not built in accordance with the consented plans.

[41] The Respondent explained that he installed plywood substrate for the decks contrary to the consented building plans because the homeowner had advised him that he was changing the timber decks to tiled membrane decks. The Respondent did this work in preparation for the change but acknowledged that such work should not have been carried out before the amendment to the consent had been granted. The Respondent stated that the plywood was only temporarily installed, not glued down, and operated in any event as a safe working platform for the construction work.

[42] In the same vein, the Respondent explained that he had used galvanised fixings instead of stainless steel because of the homeowner's stated intention to close in the veranda. He acknowledged that galvanised fixings were contrary to the consented drawings.

[43] The Site Notices provide clear evidence of building work that was non-compliant and not completed to an acceptable standard. The Respondent accepted that this was because of his inadequate supervision. There was also a pattern of not attending to non-compliance issues that were raised.

Roofing

[44] The Respondent supervised the installation of the metal tile roof by his employees. The Board was provided with photographs of the cladding. They showed a roof that had been poorly installed and which would not have been compliant with clause E2 of the Building Code. The following photographs are samples of that roofing work:





[45] The Respondent gave evidence that he had intended to engage a Licensed Building Practitioner with the appropriate roofing licence to install the roof. However, time and money were tight on the project, so he decided to use his own unlicensed workers. He, at that stage, then intended to engage a Licensed Building Practitioner with the appropriate roofing licence to supervise the work. He did not do so.

[46] The photographs and other evidence provided showed a roof that would not have been watertight or secure. It had not been constructed in accordance with the Building Code. It was, in short, very poorly constructed and not the type of work that would be expected of a competent Licensed Building Practitioner.

[47] At the hearing, the Respondent accepted responsibility for the workmanship on the roof.

Was the conduct serious enough?

[48] The departures from acceptable standards and failure to adequately supervise were repeated and sustained. Moreover, the Respondent did not take action when the issues were brought to his attention. The conduct was serious, and the Respondent should be disciplined.

Has the Respondent been negligent or incompetent?

[49] The Respondent has negligently supervised the general building work and roofing work.

Not Licensed to Carry Out or Supervise Restricted Building Work

[50] The building work was carried out under a building consent and, as such, certain elements involved Restricted Building Work. Under section 84 of the Act:

All restricted building work must be carried out or supervised by a licensed building practitioner [who is licensed] to carry out or supervise the work.

[51] Clause 5 of the Building (Definition of Restricted Building Work) Order 2011 (New Zealand) provides:

- 5 *Certain building work relating to primary structure or external moisture-management systems of residential buildings to be restricted building work*
- (1) *The kinds of building work to which this clause applies are restricted building work for the purposes of the Act.*
- (2) *This clause applies to building work that is—*
- (a) *the construction or alteration of—*
- (i) *the primary structure of a house or a small-to-medium apartment building; or*
- (ii) *the external moisture-management system of a house or a small-to-medium apartment building; and*
- (b) *of a kind described in subclause (3); and*
- (c) *of a kind for which a licensing class to carry out or supervise the work has been designated by Order in Council under section 285 of the Act.*
- (3) *The kinds of building work referred to in subclause (2)(b) are—*
- (a) *bricklaying or blocklaying work;*
- (b) *carpentry work;*
- (c) *external plastering work;*
- (d) *foundations work;*
- (e) *roofing work.*

What is the Respondent licensed to carry out?

[52] The Respondent is a Licensed Building Practitioner with a Carpentry Licence. He does not hold a Roofing Licence.

[53] The licensing classes designated under section 285 were created by Order in Council in the Building (Designation of Building Work Licensing Classes) Order 2010. It designates the types of building work that a Licensed Building Practitioner can carry out or supervise. Under clause 4 of the Order, the following are the types of building work each class of licence can carry out:

Licensing class	Type of building work
<i>Carpentry</i>	<i>Carpentry for any building that is—</i> <i>(a) a category 1 building; or</i> <i>(b) a category 2 building; or</i> <i>(c) a category 3 building</i>
<i>Roofing</i>	<i>Installation of roofs, or roofing materials, for any building that is—</i> <i>(a) a category 1 building; or</i> <i>(b) a category 2 building; or</i> <i>(c) a category 3 building</i>

- [54] The competencies for a Carpentry Licence set out in the Licensed Building Practitioners Rules 2007, includes installing light weight profiled metal roofing.
- [55] Within Roofing, there are seven Areas of Practice. They include Profiled Metal Roof and, as a separate Area of Practice, Metal Tile Roof. On that basis, a Carpentry Licence incorporates profiled metal roofs but not metal tile roofs.

Has the Respondent carried out or Supervised Restricted Building work that he was not licensed to carry out?

- [56] The installation of the roof that was supervised by the Respondent was a metal tile roof. As he does not hold a Roofing Area of Practice Metal Tile Roofing Licence, it follows that he supervised Restricted Building Work that he was not licensed to carry out or supervise and that he has committed an offence under section 317(1)(c) of the Act.
- [57] The Respondent at the hearing accepted responsibility for not being licensed to supervise the roof installation.

Contrary to a Building Consent

- [58] Building consents provide detailed plans and specifications for building work. They are issued by Territorial or Building Consent Authorities on the basis that the building work will meet the provisions of the Building Code.¹⁹ Once issued, there is a requirement that the building work be carried out in accordance with the building consent.²⁰ Building consents also stipulate the number and type of inspections the issuing authority will carry out during the build.²¹ Inspections ensure independent verification that the building consent is being complied with.
- [59] If building work departs from the building consent issued, the Board can find that a disciplinary offence under section 317(1)(d) of the Act has been committed. The Board does not have to find that departure was deliberate or a result of negligent conduct.²² The Board does, however, consider that the seriousness of the conduct under investigation does have to be taken into account. As such, even if the Respondent's building work departed from the building consent, the Board must also decide if the conduct fell seriously short of expected standards.²³ If it does not, then a disciplinary finding cannot be made.

¹⁹ Section 49 of the Act

²⁰ Section 40 of the Act

²¹ Section 222 of the Act

²² *Blewman v Wilkinson* [1979] 2 NZLR 208

²³ *Collie v Nursing Council of New Zealand* [2001] NZAR 74 - [21] "Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness".

Was there building work that differed from the building consent?

- [60] The Board finds that there were multiple instances of building work that did not comply with the building consent including missing fixings to the subfloor, the use of galvanised fixings, the wrap and cladding between the deck and the dwelling not extending below the floor joists and the foam installation without PEF rods.

Was the conduct serious enough?

- [61] As with the finding of negligence the conduct was repeated and sustained and, as such, meets the threshold of being serious enough to warrant disciplinary action.

Has the Respondent breached section 317(1)(d) of the Act?

- [62] The Respondent has supervised building work that was contrary to the building consent issued and has committed a disciplinary offence under section 317(1) (d) of the Act.

Failure to Provide a Record of Work

- [63] There is a statutory requirement under section 88(1) of the Building Act 2004 for a Licensed Building Practitioner to provide a Record of Work to the owner and the Territorial Authority on completion of Restricted Building Work ²⁴ unless there is a good reason for it not to be provided.²⁵
- [64] The Respondent provided a record of work dated 25 April 2023 to the Homeowner (sometime before 28 June 2023) and to the Territorial Authority on 3 May 2023.
- [65] The Homeowner advised that the Respondent's last day on site was 27 March 2023, and based on a letter from the homeowner's lawyer, the possibility of returning to do remedial work was still open in late March 2023.
- [66] The Board finds that a Record of Work was provided on completion of the Restricted Building Work in accordance with the statutory requirements.
- [67] The Respondent has not failed to provide a record of work and the disciplinary offence under section 317(1)(da)(ii) of the Act is not upheld.

Board's Decisions

- [68] The Respondent **has**:
- (a) supervised building work in a negligent manner.
 - (b) supervised Restricted Building Work that he was not licensed to supervise; and
 - (c) supervised building work that does not comply with a building consent.

²⁴ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

²⁵ Section 317(1)(da)(ii) of the Act

[69] The Respondent has, accordingly, committed offences under sections 317(1)(b),(c) and (d) of the Act.

Penalty, Costs and Publication

[70] Having found that one or more of the grounds in section 317 applies, the Board must, under section 318 of the Actⁱⁱ, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.

[71] The Respondent made submissions at the hearing as regards penalty, costs and publication. He explained the pressure he was under at the time of this project, the toll on his mental health and the steps he has taken since then to address his working practices.

Penalty

[72] The Board has the discretion to impose a range of penalties.ⁱⁱⁱ Exercising that discretion and determining the appropriate penalty requires that the Board balance various factors, including the seriousness of the conduct and any mitigating or aggravating factors present.²⁶ It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:²⁷

- (a) protection of the public and consideration of the purposes of the Act;²⁸
- (b) deterring other Licensed Building Practitioners from similar offending;²⁹
- (c) setting and enforcing a high standard of conduct for the industry;³⁰
- (d) penalising wrongdoing;³¹ and
- (e) rehabilitation (where appropriate).³²

[73] Overall, the Board should assess the conduct against the range of penalty options available in section 318 of the Act, reserving the maximum penalty for the worst cases³³ and applying the least restrictive penalty available for the particular offending.³⁴ In all, the Board should be looking to impose a fair, reasonable, and

²⁶ *Ellis v Auckland Standards Committee* 5 [2019] NZHC 1384 at [21]; cited with approval in *National Standards Committee (No1) of the New Zealand Law Society v Gardiner-Hopkins* [2022] NZHC 1709 at [48]

²⁷ Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

²⁸ Section 3 Building Act

²⁹ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

³⁰ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

³¹ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

³² *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354; *Shousha v A Professional Conduct Committee* [2022] NZHC 1457

³³ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

³⁴ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

proportionate penalty³⁵ that is consistent with other penalties imposed by the Board for comparable offending.³⁶

- [74] In general, when determining the appropriate penalty, the Board adopts a starting point based on the principles outlined above prior to it considering any aggravating and/or mitigating factors present.³⁷
- [75] It is noted that for the purposes of penalty, the offences under sections 317(1)(b) and (d) are treated as a single offence.
- [76] In this matter, the Board adopted a starting point of a fine of \$3,000 because the failures in supervision were serious and involved repeated ignoring of Council site reports, and such a penalty is consistent with penalties imposed by the Board for comparable offending.
- [77] There were no aggravating factors. The mitigating factors were that all of the issues stemmed from the same cause – lack of supervision, exacerbated by the particular set of issues the Respondent was facing at the time – and were not a reflection of the Respondent’s building capabilities. The Respondent had clearly learnt from the experience and recognised the matters which had contributed to the stressful situation he found himself in.
- [78] Taking the noted mitigating factors into account, the Board decided a reduction from the starting point was warranted and that the Respondent is to pay a fine of \$2,000.

Costs

- [79] Under section 318(4) of the Act, the Board may require the Respondent to pay the costs and expenses of, and incidental to, the inquiry by the Board. The rationale is that other Licensed Building Practitioners should not be left to carry the financial burden of an investigation and hearing.³⁸
- [80] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings³⁹. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case⁴⁰.
- [81] The Board has adopted an approach to costs that uses a scale based on 50% of the average costs of different categories of hearings, simple, moderate, and complex. The current matter was moderate and occupied a half day in person hearing. Adjustments are then made.

³⁵ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

³⁶ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

³⁷ In *Lochhead v Ministry of Business Innovation and Employment* 3 November [2016] NZDC 21288 the District Court recommended that the Board adopt the approach set out in the Sentencing Act 2002.

³⁸ *Collie v Nursing Council of New Zealand* [2001] NZAR 74

³⁹ *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

⁴⁰ *Cooray v The Preliminary Proceedings Committee* HC, Wellington, AP23/94, 14 September 1995, *Macdonald v Professional Conduct Committee*, HC, Auckland, CIV 2009-404-1516, 10 July 2009, *Owen v Wynyard* HC, Auckland, CIV-2009-404-005245, 25 February 2010.

[82] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$3,500 toward the costs of and incidental to the Board's inquiry.

Publication

[83] As a consequence of its decision, the Respondent's name and the disciplinary outcomes will be recorded in the public Register maintained as part of the Licensed Building Practitioners' scheme as is required by the Act.

[84] The Board has ordered permanent name and property location suppression, and accordingly:

- (a) the decision which will be available on the Board's website **will not** name the Respondent in the decision.
- (b) the Board **will not** order any publication over and above the record on the Register, and the publication of the unnamed decision on the Board's website.
- (c) other entities, such as the media or the Ministry of Business Innovation and Employment, may publish under the principles of open justice reporting but the suppression order prevents them from naming the Respondent or the property location.

Section 318 Order

[85] For the reasons set out above, the Board directs that:

Penalty: Pursuant to section 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of \$2,000.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$3,500 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

Publication: The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with section 301(l)(iii) of the Act.

In terms of section 318(5) of the Act, there will not be action taken to publicly notify the Board's action, except for the note in the Register and the decision (without the Respondent or the property being named) being publicly available on the Board's website.


The Respondent and the address of the subject property have permanent suppression.

[86] The Respondent should note that the Board may, under section 319 of the Act, suspend or cancel a Licensed Building Practitioner's licence if fines or costs imposed as a result of disciplinary action are not paid.

Right of Appeal

[87] The right to appeal Board decisions is provided for in section 330(2) of the Act^{iv}.

Signed and dated this 25th day of March 2024.



Mrs F Pearson-Green
Presiding Member

ⁱ Section 3 of the Act

This Act has the following purposes:

- (a) *to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—*
 - (i) *people who use buildings can do so safely and without endangering their health; and*
 - (ii) *buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and*
 - (iii) *people who use a building can escape from the building if it is on fire; and*
 - (iv) *buildings are designed, constructed, and able to be used in ways that promote sustainable development:*
- (b) *to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code.*

ⁱⁱ Section 318 of the Act

- (1) *In any case to which section 317 applies, the Board may*
 - (a) *do both of the following things:*
 - (i) *cancel the person's licensing, and direct the Registrar to remove the person's name from the register; and*
 - (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*
 - (b) *suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*
 - (c) *restrict the type of building work or building inspection work that the person may carry out or supervise under the person's licensing class or classes and direct the Registrar to record the restriction in the register:*
 - (d) *order that the person be censured:*
 - (e) *order that the person undertake training specified in the order:*

-
- (f) order that the person pay a fine not exceeding \$10,000.
 - (2) The Board may take only one type of action in subsection 1(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).
 - (3) No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.
 - (4) In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.
 - (5) In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit.”

iii Section 318 Disciplinary Penalties

- (1) In any case to which section 317 applies, the Board may—
 - (a) do both of the following things:
 - (i) cancel the person’s licensing and direct the Registrar to remove the person’s name from the register; and
 - (ii) order that the person may not apply to be relicensed before the expiry of a specified period:
 - (b) suspend the person’s licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:
 - (c) restrict the type of building work or building inspection work that the person may carry out or supervise under the person’s licensing class or classes and direct the Registrar to record the restriction in the register:
 - (d) order that the person be censured:
 - (e) order that the person undertake training specified in the order:
 - (f) order that the person pay a fine not exceeding \$10,000.
- (2) The Board may take only 1 type of action in subsection (1)(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).
- (3) No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.
- (4) In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.
- (5) In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit.

iv Section 330 Right of appeal

- (2) A person may appeal to a District Court against any decision of the Board—
 - (b) to take any action referred to in section 318.

Section 331 Time in which appeal must be brought

An appeal must be lodged—

- (a) within 20 working days after notice of the decision or action is communicated to the appellant; or
- (b) within any further time that the appeal authority allows on application made before or after the period expires.