

Before the Building Practitioners Board

	BPB Complaint No. C2-01788
Licensed Building Practitioner:	Bradley Jefferson (the Respondent)
Licence Number:	BP 127225
Licence(s) Held:	Carpentry and Site AOP 2

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	Complaint
Hearing Location	Hamilton
Hearing Type:	In Person
Hearing Date:	2 May 2018
Decision Date:	21 May 2018

Board Members Present:

Chris Preston (Presiding)
Mel Orange, Legal Member
Robin Dunlop, Retired Professional Engineer
Bob Monteith, LBP Carpentry and Site AOP 2

Appearances:

Noel Jellyman, Industry Representative for the Respondent

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.

Board Decision:

The Respondent **has** committed a disciplinary offences under sections 317(1)(b) and section 317(1)(h) of the Act.

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Introduction

[1] The hearing resulted from a Complaint into the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations¹ to hold a hearing in relation to building work at [Omitted]. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:

- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act); and
- (b) breached section 314B of the Act (s 317(1)(h) of the Act).

Function of Disciplinary Action

[2] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*² and in New Zealand in *Dentice v Valuers Registration Board*³.

¹ The resolution was made following the Board’s consideration of a report prepared by the Registrar in accordance with the Complaints Regulations.

² *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

³ [1992] 1 NZLR 720 at p 724

- [3] Disciplinary action under the Act is not designed to redress issues or disputes between a complainant and a respondent. In *McLanahan and Tan v The New Zealand Registered Architects Board*⁴ Collins J. noted that:

“... the disciplinary process does not exist to appease those who are dissatisfied The disciplinary process ... exists to ensure professional standards are maintained in order to protect clients, the profession and the broader community.”

- [4] The Board can only inquire into “the conduct of a licensed building practitioner” with respect to the grounds for discipline set out in section 317 of the Act. It does not have any jurisdiction over contractual matters.

Evidence

- [5] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁵. 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.

- [6] In addition to the documentary evidence before the Board heard evidence at the hearing from:

Bradley Jefferson	Respondent
[Omitted]	Complainant
William Hursthouse	Technical Assessor

- [7] The Respondent was engaged by the Complainant to carry out renovations to a residential dwelling. The building work involved the removal of walls around an existing back porch and filling it in by making the outside wall of the house continuous, the installation of second hand wooden French doors at the northeast end of the house, and the removal of an internal wall, approximately 4.9 meters long, and the design and installation of an alternative means of supporting the adjoining ceiling structure.

- [8] The building work was carried out without a building consent as the Respondent had advised the Complainant that a building consent would not be required. When an enquiry was made with the Hamilton City Council as to whether a building consent was required during the completion of the building work, the Council advised that a building consent was required for some, if not all, of the work and that a certificate of acceptance would be required.

- [9] The Board appointed a Technical Assessor to review the building work and provide an opinion as to whether or not any of the building work would have required a building consent and to confirm that with the Territorial Authority.

⁴ [2016] HZHC 2276 at para 164

⁵ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

- [10] The Technical Assessor's opinion was that the internal wall that was removed was load bearing and that a building consent was required. The Technical Assessor also noted that the methodology used to carry out the building work did not accord with an acceptable standard, such as NZS 3604:2011, and that, as such, further verification would be required to ascertain whether the building work complied with the Building Code.
- [11] The Technical Assessor did not consider that the filling in of the back porch or the installation of the French doors required a building consent.
- [12] The Principal Building Advisor at the Hamilton City Council was provided with a copy of the Technical Assessor's report. He responded stating:

The installation of the French doors and the filling in of the porch are clearly exempt work in terms of the schedule and do not require building consent. That aside as you observe the work still needs to comply with the building code.

The removal of the load-bearing wall is not exempt work in terms of the schedule and required a building consent application. As the work was carried out without a building consent the owner will need to make application for a certificate of acceptance

- [13] The Technical Assessor also raised issues with the quality of building work relating to weatherboards. He noted the original installation did not use physical plastic jointers and that lengths of weatherboard were merely butted together with sealant smeared in the area of the join, and then painted over. The Respondent had employed the same method. The Technical Assessor noted that, apart from looking untidy, these particular sealant joints are also unsatisfactory due to the inadequate width of the sealant and that the joins will require intensive maintenance if they are to meet the mandatory requirements of E2 of the Building Code for the period specified in B2.
- [14] At the hearing the Respondent, by way of his Representative, accepted the matters as set out in the Technical Assessor's report including that a building consent was required. It was submitted that the Respondent had made an error in assuming the wall that was removed was not load bearing. The Respondent expressed remorse and apologised to the Complainant.
- [15] The Respondent's Representative provided submissions on changes in business practice and noted that he will be mentoring the Respondent with his business.
- [16] The Respondent and Complainant used the opportunity afforded by an adjournment in the hearing to discuss arrangements for the Respondent to rectify the issues raised. Both the Respondent and the Complainant confirmed that a satisfactory arrangement had been reached.

Board's Conclusion and Reasoning

- [17] The Board has decided that the Respondent **has**:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act);
 - (b) breached section 314B of the Act (s 317(1)(h) of the Act);
- and should be disciplined.

[18] The reasons for the Board's decisions follow.

Negligence and/or Incompetence

- [19] The Board's considerations in relation to negligence and/or incompetence relate to the failure to obtain a building consent. It did not consider that the matters relating to the weatherboards were serious enough to warrant a disciplinary outcome.
- [20] Section 40 of the Act states that building work must not be carried out except in accordance with a building consent. Section 41 of Act provides for limited exceptions from the requirement for a building consent and in particular it states a building consent is not required for any building work described in Schedule 1 of the Act.
- [21] The onus is on the person carrying out the building work to show that one of the exemptions applies.
- [22] The Board has found in previous decisions⁶ that a licenced person who commences or undertakes building work without a building consent, when one was required, can be found to have been negligent under section 317(1)(b) of the Act. Full reasoning was provided by the Board in decision C2-01068⁷.
- [23] The fundamental question for the Board to consider is whether, at the time the building work was undertaken by the Respondent, he knew or ought to have known that a building consent was required for what was being undertaken and if so whether the Respondent has, as a result of the failing being negligent or incompetent.
- [24] Negligence and incompetence are not the same. In *Beattie v Far North Council*⁸ Judge McElrea noted:
- [43] Section 317 of the Act uses the phrase "in a negligent or incompetent manner", so it is clear that those adjectives cannot be treated as synonymous.*
- [25] Negligence is the departure by a licensed building practitioner, whilst carrying out or supervising building work, from an accepted standard of conduct. It is judged against those of the same class of licence as the person whose conduct is being inquired

⁶ Refer for example to Board Decision C1030 dated 21 July 2014

⁷ Board Decision C2-01068 dated 31 August 2015

⁸ Judge McElrea, DC Whangarei, CIV-2011-088-313

into. This is described as the *Bolam*⁹ test of negligence which has been adopted by the New Zealand Courts¹⁰.

- [26] Incompetence is a lack of ability, skill or knowledge to carry out or supervise building work to an acceptable standard. *Beattie* put it as “*a demonstrated lack of the reasonably expected ability or skill level*”. In *Ali v Kumar and Others*¹¹ it was stated as “*an inability to do the job*”.
- [27] The New Zealand Courts have stated that assessment of negligence and/or incompetence in a disciplinary context is a two-stage test¹². The first is for the Board to consider whether the practitioner has departed from the acceptable standard of conduct of a professional. The second is to consider whether the departure is significant enough to warrant a disciplinary sanction.
- [28] When considering what an acceptable standard is the Board must have reference to the conduct of other competent and responsible practitioners and the Board’s own assessment of what is appropriate conduct, bearing in mind the purpose of the Act¹³. The test is an objective one and in this respect it has been noted that the purpose of discipline is the protection of the public by the maintenance of professional standards and that this could not be met if, in every case, the Board was required to take into account subjective considerations relating to the practitioner¹⁴.
- [29] The Board notes that the purposes of the Act are:

3 Purposes

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:*

⁹ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

¹⁰ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

¹¹ *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

¹² *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

¹³ *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

¹⁴ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

(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.*

[30] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹⁵ and be carried out in accordance with a building consent¹⁶. As such, when considering what is and is not an acceptable standard, the Building Code and any building consent issued must be taken into account.

[31] Turning to seriousness in *Collie v Nursing Council of New Zealand*¹⁷ the Court's noted, as regards the threshold for disciplinary matters, that:

[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.

[32] The Respondent has accepted that he should have obtained a building consent and has accepted the findings in the Technical Assessors report. His assessment of the work that had to be undertaken and whether or not it would come within the exemptions in Schedule 1 of the Act fell below what is expected of a licensed building practitioner. Enquiries should have been made of the territorial authority and/or with a designer or other suitably qualified person with regard to the removed wall given its length and location within the home. It should also be borne in mind that, for a home owner, there is a degree of assurance provided by obtaining a building consent and that for extensive building work, consideration should be given to obtaining one even if the building work could be undertaken under Schedule 1 of the Act.

[33] Given the above factors the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent has been negligent in that he has departed from what the Board considers to be an accepted standard of conduct and that the conduct was sufficiently serious enough to warrant a disciplinary outcome.

Misrepresentation or Outside of Competence

[34] As regards working outside of one's competence 314B(b) of the Act provides:

A licensed building practitioner must—

(b) carry out or supervise building work only within his or her competence.

¹⁵ Section 17 of the Building Act 2004

¹⁶ Section 40(1) of the Building Act 2004

¹⁷ [2001] NZAR 74

- [35] If a licensed building practitioner undertakes work outside of their licence class¹⁸ then they can be found to have worked outside of their competence if they do not have the requisite skill set, knowledge base or experience. This is especially the case if the building work is noncompliant or is, in some way, deficient.
- [36] In this instance the Respondent undertook design work when determining the methodology that would be used in installing a new ceiling runner above the wall he removed. The finding that he carried out design work is based on the Technical Assessor's opinion that, in the absence of any documentation demonstrating that someone else took responsibility for the decision to use a methodology that was outside of NZS 3604:2011 or any other acceptable solution, it was the Respondent's design methodology that was used. No verification of the compliance of the solution used was obtained or provided. It may or may not meet the requirements of the Building Code.
- [37] In such circumstances the Board has decided that the Respondent has carried out building work outside of his competence and that he should be disciplined.

Penalty, Costs and Publication

- [38] Having found that one or more of the grounds in section 317 applies the Board must, under section 318 of the Actⁱ, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [39] Submissions was received at the hearing as regards penalty, costs and publication. These included the Representative's submissions and the arrangements made between the Respondent and the Complainant to rectify the issues to which the complaint related.

Penalty

- [40] The purpose of professional discipline is to uphold the integrity of the profession; the focus is not punishment, but the enforcement of a high standard of propriety and professional conduct. The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*¹⁹ commented on the role of "punishment" in giving penalty orders stating that punitive orders are, at times, necessary to provide a deterrent and to uphold professional standards. The Court noted:

[28] I therefore propose to proceed on the basis that, although the protection of the public is a very important consideration, nevertheless the issues of punishment and deterrence must also be taken into account in selecting the appropriate penalty to be imposed.

¹⁸ Note that to carry out restricted building work outside of a licensed building practitioners licence class is a disciplinary offence under s 317(1)(c) of the Act.

¹⁹ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

- [41] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*²⁰ the court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act they have the advantage of simplicity and transparency. The court recommended adopting a starting point for penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.
- [42] The Board notes that the Respondent has previously been disciplined by the Board. The previous matter, C2-01675, involved similar conduct which occurred at or about the same time as the current offending for which the Respondent was fined. The Board did not consider that the present matter should be considered as a second or subsequent offence as the conduct did not occur with the findings of the previous offence in mind.
- [43] The Board took into account the acceptance of responsibility and the arrangements entered into with the Complainant. It also took into account the submissions from the Respondent's Representative including that he would be mentoring the Respondent.
- [44] Based on the above the Board's penalty decision is that the Respondent be censured. The Board has made this decision as it considers the conduct in the previous disciplinary matter and the present are similar and a further pecuniary penalty is not required. The Respondent should also note that but for the approach he took to the hearing the penalty outcome would have been significantly more serious.

Costs

- [45] Under section 318(4) the Board may require the Respondent "to pay the costs and expenses of, and incidental to, the inquiry by the Board."
- [46] The Respondent should note that the High Court has held that 50% of total reasonable costs should be taken as a starting point in disciplinary proceedings and that the percentage can then be adjusted up or down having regard to the particular circumstances of each case²¹.
- [47] In *Collie v Nursing Council of New Zealand*²² where the order for costs in the tribunal was 50% of actual costs and expenses the High Court noted that:
- But for an order for costs made against a practitioner, the profession is left to carry the financial burden of the disciplinary proceedings, and as a matter of policy that is not appropriate.*
- [48] Based on the above the Board's costs order is that the Respondent is to pay the sum of \$1,000 toward the costs of and incidental to the Board's inquiry. As with the

²⁰ 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

²¹ *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.

²² [2001] NZAR 74

penalty the amount has been reduced on the basis of the Respondent's approach to the hearing and his acceptance of responsibility.

Publication

[49] 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 Act²³. The Board is also able, under section 318(5) of the Act, to order publication over and above the public register:

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.

[50] As a general principle such further public notification may be required where the Board perceives a need for the public and/or the profession to know of the findings of a disciplinary hearing. This is in addition to the Respondent being named in this decision.

[51] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990²⁴. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²⁵. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²⁶. The High Court provided guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*²⁷.

[52] The courts have also stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published in the public interest²⁸. It is, however, common practice in disciplinary proceedings to protect the names of other persons involved as naming them does not assist the public interest.

[53] Based on the above the Board will not order further publication.

Section 318 Order

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

Penalty: Pursuant to section 318(1)(d) of the Building Act 2004, the Respondent is censured.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$1,000 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

²³ Refer sections 298, 299 and 301 of the Act

²⁴ Section 14 of the Act

²⁵ Refer sections 200 and 202 of the Criminal Procedure Act

²⁶ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

²⁷ *ibid*

²⁸ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Publication: The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with section 301(1)(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 Respondent being named in this decision.

[55] 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.

Submissions on Penalty, Costs and Publication

[56] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **12 June 2018**. The submissions should focus on mitigating matters as they relate to the penalty, costs and publication orders. If no submissions are received then this decision will become final. If submissions are received then the Board will meet and consider those submissions prior to coming to a final decision on penalty, costs and publication.

Right of Appeal

[57] The right to appeal Board decisions is provided for in section 330(2) of the Actⁱⁱ.

Signed and dated this 21st day of May 2018



Chris Preston
Presiding Member

ⁱ **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:*

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- (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."*

ii 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.*