

Before the Building Practitioners Board

	BPB Complaint No. C2-01936
Licensed Building Practitioner:	Robert Chadwick (the Respondent)
Licence Number:	BP 120010
Licence(s) Held:	Carpentry and Site AOP 1

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	Tauranga
Hearing Type:	In Person
Hearing Date:	5 December 2018
Decision Date:	20 December 2018
Board Members Present:	
	Chris Preston (Presiding)
	Mel Orange, Legal Member
	Robin Dunlop, Retired Professional Engineer
	Faye Pearson-Green, LBP Design 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.

Board Decision:

The Respondent **has** committed disciplinary offences under sections 317(1)(b) and 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(b) 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.

Procedure

- [5] The Respondent was given notice of the hearing. He was invited to attend a pre-hearing conference but did not respond to the invitations or avail himself of the opportunity. The Respondent returned his response sheet along with a submission on 2 November 2018 indicating he would be attending the hearing.
- [6] On 3 December 2018 the Respondent contacted the Board officer by email stating that he had a family emergency in Australia and that he would not be able to attend the hearing. No supporting or corroborating information was provided. The Board Officer immediately attempted to contact the Respondent to obtain further details so that the Board could consider whether an adjournment should be granted. The Respondent could not be contacted and did not respond to voice messages left or emails sent.
- [7] The Board noted that the Respondent had not sought an adjournment. It also noted that he had not engaged in the Registrar phase of the investigation and that the Board had strong evidence of alleged disciplinary offending before it in the documentation provided with the complaint. The Board also noted that the Respondent had not contradicted the evidence put forward in the response that he did provide. In those circumstances the Board decided that it would proceed with the hearing.

Evidence

- [8] 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.
- [9] The procedure the Board uses is inquisitorial, not adversarial. The Board examines the documentary evidence available to it prior to the hearing. The hearing is an opportunity for the Board, as the inquirer and decision maker, to call and question

⁴ [2016] HZHC 2276 at para 164

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

witnesses to further investigate aspects of the evidence and to take further evidence from key witnesses. The hearing is not a review of all of the available evidence.

- [10] In addition to the documentary evidence before the Board heard evidence at the hearing from a licensed building practitioner who looked at and quoted for remedial work.
- [11] The Respondent was engaged by the Complainant to carry out a renovation of a bathroom and ensuite. The building work was carried out without a building consent on the basis that it fell within Schedule 1 of the Building Act.
- [12] The Respondent started but did not finish the building work. Post his involvement the Complainant engaged other practitioners to review the building work and provide estimates of what was required to remediate the Respondent's work and to complete the project. Issues raised included poor quality and/or incomplete workmanship. It was also noted by the witness that appeared before the board that the acrylic showers and trays were not installed correctly and that they leaked as did plumbing fittings the Respondent installed. He also noted that the vanities had been moved from their original locations with channels chased in across the floor for plumbing. One contractor noted in his quote:

We cannot tidy this job or finish it in anyway. To fix this job, everything needs to be stripped out completely and redone. Including plumbing and electrical.

The only thing salvageable would be vanities, tapware, shower trays, and shower glass (door and return). Shower wall linings will need to be replaced as these cannot be reinstalled.

- [13] The complaint documentation also alleged that the Respondent had carried out all of the plumbing and electrical work. The electrician who carried out remedial work advised her that it was substandard and that she should complain about it.
- [14] The Respondent did not provide a response to the complaint as part of the Registrar's Report phase of the investigation. He did provide a written response for the hearing. He outlined the background to the job. As regards plumbing work he stated he did run pipes but that he got a plumber in to check his work. He also stated that he put wiring for a new LED point and new lights so that an electrician could fit everything off at a later date. The Respondent also noted that he did not consider a consent was required as he was just replacing fittings.
- [15] No electrical or plumbing certificates from authorised persons were provided.
- [16] The Respondent addressed issues in relation to commercial matters and water pressure and that the Complainant considered remedial work was required was as a result of a lack of water pressure. He did not address the quality or compliance issues raised.

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(b) 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] There are two aspects that the Board considered with regard to negligence. The first was whether or not the Respondent should have obtained a building consent prior to carrying out the building work. The second was with regard to the quality and compliance of the building work that he completed.

[20] The Board decided, in respect of both, that the Respondent had been negligent.

[21] Negligence and incompetence are not the same. In *Beattie v Far North Council*⁶ 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.

[22] 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 into. This is described as the *Bolam*⁷ test of negligence which has been adopted by the New Zealand Courts⁸.

[23] 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*⁹ it was stated as "*an inability to do the job*".

[24] The New Zealand Courts have stated that assessment of negligence and/or incompetence in a disciplinary context is a two-stage test¹⁰. 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.

⁶ Judge McElrea, DC Whangarei, CIV-2011-088-313

⁷ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁸ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

⁹ *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

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

[25] 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 Act¹¹. 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 practitioner¹².

[26] 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:*
- (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.*

[27] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹³ and be carried out in accordance with a building consent¹⁴. 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.

[28] Turning to seriousness in *Collie v Nursing Council of New Zealand*¹⁵ 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.

¹¹ *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

¹² *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

¹³ Section 17 of the Building Act 2004

¹⁴ Section 40(1) of the Building Act 2004

¹⁵ [2001] NZAR 74

- [29] Looking at the conduct in question 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.
- [30] The onus is on the person carrying out the building work to show that one of the exemptions applies.
- [31] The Board has found in previous decisions¹⁶ 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 C2-01068¹⁷.
- [32] More recently the High Court in *Tan v Auckland Council*¹⁸ the Justice Brewer in the High Court stated, in relation to a prosecution under s 40 of the Act:

[35] The building consent application process ensures that the Council can check that any proposed building work is sufficient to meet the purposes described in s 3 (of the Act). If a person fails to obtain a building consent that deprives the Council of its ability to check any proposed building work.

[37] ... those with oversight (of the building consent process) are in the best position to make sure that unconsented work does not occur.

[38] ... In my view making those with the closest connection to the consent process liable would reduce the amount of unconsented building work that is carried out, and in turn would ensure that more buildings achieve s 3 goals.

- [33] The Board considers the Court was envisaging that those who are in an integral position as regards the building work, such as a licensed building practitioner, have a duty to ensure a building consent is obtained (if required). It follows that failing to do so can fall below the standards of care expected of a licensed building practitioner.
- [34] The 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.
- [35] Part 2 of Schedule 1 of the Act covers Sanitary plumbing and drainlaying carried out by person authorised under Plumbers, Gasfitters, and Drainlayers Act 2006. Clause 32 allows for repair, maintenance and replacement. Sub clause 2, however, provides:
- (2) *Replacement of sanitary plumbing and drainage in or associated with a building, provided that—*

¹⁶ Refer for example to Board Decision C1030 dated 21 July 2014

¹⁷ Board Decision C2-01068 dated 31 August 2015

¹⁸ [2015] NZHC 3299 [18 December 2015]

(a) *a comparable component or assembly is used; and*

(b) *the replacement is in the same position.*

- [36] There was evidence before the Board that the vanities had been moved. As such the above exemption does not apply and a building consent was required.
- [37] Turning to the building work itself there was evidence before the Board that the shower and plumbing fittings installed by the Respondent leaked. Water tightness is essential and is required under clause E3 of the building code. This had not been achieved.
- [38] Given the above factors the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent 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

- [39] There are two types of disciplinary offence under s 314B. The first relates to representations as to competence (314(a)). The second relates to carrying out or supervising building work outside of a licensed person's competence (s 314(b)).
- [40] The matter the Board was investigating was whether the Respondent had worked outside of his competence. In this respect section 314B(b) of the Act provides:

A licensed building practitioner must—

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

- [41] In the context of the Act and the disciplinary charge under s 317(1)(h) and 314B(b) a licensed building practitioner must only work within their individual competence. If a licensed building practitioner undertakes work outside of their licence class¹⁹ 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 especially if the building work is noncompliant or is in some way deficient.
- [42] In this instance the building work that has been undertaken which was outside of the Respondent's competence was the electrical and plumbing work. Both fall within the definition in the Act of building work:

building work

means work—

(i) for, or in connection with, the construction, alteration, demolition, or removal of a building; and

¹⁹ 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.

(ii) *on an allotment that is likely to affect the extent to which an existing building on that allotment complies with the building code; and*

- [43] The Respondent has admitted that he carried out electrical work ready for an electrician to fit off.
- [44] The Respondent has also admitted that carried out the plumbing work. There was evidence that the plumbing work he did was leaking.
- [45] As set out above the building work in question had to be carried out by persons authorised under the Electricity Act 1992 and the Plumbers, Gasfitters, and Drainlayers Act 2006. Searches of the registers for both the Electrical Workers Registration Board and the Plumbers, Gasfitters and Drainlayers Board show that he is not an authorised person under either Act.
- [46] It follows that as the Respondent is not an authorised person under either Act he is not competent to carry out work that falls within the gambit of those Acts and that he has accordingly worked outside of this competence.

Penalty, Costs and Publication

- [47] 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.
- [48] The matter was dealt with at a hearing. The Respondent did not appear. The Board had before it information relevant to penalty, costs and publication and the Board has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

- [49] 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*²⁰ 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.

²⁰ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

- [50] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*²¹ 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.
- [51] The matters are serious and the Board needs to send a message to other practitioners that such conduct is not acceptable.
- [52] In *Daniels v Complaints Committee 2 of the Wellington District Law Society*²² the High Court,

[34] In considering sanctions to be imposed upon an errant practitioner, a Disciplinary Tribunal is required to view in total the fitness of a practitioner to practise, whether in the short or long term. Criminal proceedings of course reflect badly upon the individual offender, whereas breaches of professional standards may reflect upon the wider group of the whole profession, and will arise if the public should see a sanction as inadequate to reflect the gravity of the proven conduct. The public are entitled to scrutinise the manner in which a profession disciplines its members, because it is the profession with which the public must have confidence if it is to properly provide the necessary service. To maintain public confidence in the profession members of the public need to have a general understanding that the legal profession, and the Tribunal members that are set up to govern conduct, will not, treat lightly serious breaches of standards.

- [53] Taking the above and the Respondent's conduct into consideration the Board has decided that a suspension of the Respondent's licence is appropriate. His licence will be suspended for a period of six months. In addition to the suspension the Respondent is to pay a fine of \$1,500.

Costs

- [54] 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."
- [55] 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 case²³.

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

²² [2011] 3 NZLR 850

²³ *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.

[56] In *Collie v Nursing Council of New Zealand*²⁴ 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.

[57] 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.

Publication

[58] 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 Act²⁵. 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.

[59] 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.

[60] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990²⁶. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²⁷. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²⁸. 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*²⁹.

[61] 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 interest³⁰. 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.

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

²⁴ [2001] NZAR 74

²⁵ Refer sections 298, 299 and 301 of the Act

²⁶ Section 14 of the Act

²⁷ Refer sections 200 and 202 of the Criminal Procedure Act

²⁸ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

²⁹ *ibid*

³⁰ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Section 318 Order

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

Penalty: Pursuant to section 318(1)(b) of the Building Act 2004, the Respondent's licence is suspended for a period of six months and the Registrar is directed to record the suspension in the of Licensed Building Practitioners;

Additionally pursuant to section 318(1)(f) of the Act, the Respondent is ordered to pay a fine of \$1,500.

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.

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.

[64] 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

[65] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **1 February 2019**. 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.

[66] In calling for submissions on penalty, costs and mitigation the Board is not inviting the Respondent to offer new evidence or to express an opinion on the findings set out in this decision. If the Respondent disagrees with the Board's findings of fact and and/or its decision that the Respondent has committed a disciplinary offence the Respondent can appeal the Board's decision.

Right of Appeal

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

Signed and dated this 20th day of December 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:*
 - (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.*