

Before the Building Practitioners Board

	BPB Complaint No. C2-01874
Licensed Building Practitioner:	Te-Wananga-Nui-A-Maturangi Reedy (the Respondent)
Licence Number:	BP 113668
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	Complaint
Hearing Location	Wellington
Hearing Type:	On the Papers
Hearing Date:	13 November 2018
Decision Date:	18 December 2018

Board Members Present:

Chris Preston (Presiding)
Richard Merrifield, LBP, Carpentry Site AOP 2
Mel Orange, Legal Member
David Fabish, LBP, Carpentry Site AOP 2

Appearances:

Allan Knowsley Counsel 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 offence under section 317(1)(da)(ii) of the Act.

The Respondent **has not** committed a disciplinary offence under section 317(1)(b) 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) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) 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) (s 317(1)(da)(ii) 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] 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] 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 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.
- [7] The Board admitted the documentary evidence from the complainant and investigation into the record. The Respondent appeared at the hearing and gave further evidence including providing a written signed statement.
- [8] The complaint arose as a result of building work undertaken on an existing dwelling under a building consent. The work included an extension and recladding. The building work undertaken was restricted building work and came to an end in or about June or July 2017. The contract came to an end on 17 October 2017. The Complainant alleged a record of work for the restricted building work had not been provided.
- [9] The contracting entity was On Tap Construction Limited. [Omitted], the shareholder and director of On Tap, which is now in liquidation, was in a relationship with the Respondent at the time the building work was carried out. She provided project management services and carried out painting. The complaint included allegations about the painting.
- [10] In respect of painting, the Complainant engaged [Omitted] to provide a report about the workmanship of the interior and exterior painting. [Omitted] summarised:

³ [1992] 1 NZLR 720 at p 724

⁴ [2016] HZHC 2276 at para 164

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

The painting works, as viewed to the interior and exterior of the home, do not meet an acceptable trade standard and fail to meet the standard as described in AS/NZS2311:2017 guide to the painting of buildings.

The painting work to both the exterior and interior of the home is extremely poor. Most of the painted surfaces viewed, to both the interior and exterior surfaces, will require repainting to bring the work up to an acceptable standard. It is inconceivable that any competent trades' person would consider the painting work to be completed in its present state.

- [11] The Respondent gave evidence that [Omitted] has some three years' experience as a brush hand and that she volunteered to undertake the painting to assist in keeping costs down. The Respondent stated he gave her some assistance but given her greater experience with painting he considered he was doing so under her supervision.
- [12] [Omitted] provided a response to the complaint in which she stated that the painting work was not finished and that it came to a premature end due to On Tap being placed into liquidation.
- [13] The Complainant also raised issues noted as failed items in a final inspection. These included:
- (a) changes to the consented plans – the Respondent gave evidence that owner was dealing with the designer and that changes were accepted as minor variations on site;
 - (b) a failure to replace a 90mm by 90mm post with a 125mm by 125mm post – the Respondent stated the on-site investigations showed that the existing post was a prolam post which met building code requirements and, as such it did not have to be replaced;
 - (c) lack of ground clearance from cladding – photographs were provided of the areas of concern. The Respondent stated that finishing work was required including landscaping and that the clearances were adequate when he finished his work; and
 - (d) a drain that was installed was not to the required dimensions – the Respondent gave evidence that the work was completed by a drainlayer in conjunction with the designer;
 - (e) meter box sealing – a flashing was installed, the Respondent accepted that he had not applied sealant.
- [14] With regard to the record of work the Respondent apologised for not providing it, accepted that it was his responsibility and noted that he had provided it to the project manager for whom he worked. He stated he has since changed his business practices to ensure compliance.

Board's Conclusion and Reasoning

- [15] The Board has decided that the Respondent **has not** carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act).
- [16] The Board has also decided that the Respondent **has** failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) 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) (s 317(1)(da)(ii) of the Act) and should not be disciplined.
- [17] The reasons for the Board's decisions follow.

Negligence and/or Incompetence

- [18] Section 317(1)(b) relates to carrying out or supervising building work. A preliminary question for the Board to consider is whether painting is building work.
- [19] The term "building work" is defined term in section 7 of the Act as follows:
- building work*** —
- (a) *means work—*
- (i) *for, or in connection with, the construction, alteration, demolition, or removal of a building;*
- [20] The phrase "for, or in connection with" used in the definition connotes a wide range of matters that could be brought into play.
- [21] Section 17 of the Act requires that all building work must comply with the building code. The building code includes Clause E2 – External Moisture, the objective of which is to safeguard against external moisture entering a building. Painting and painting systems can be critical to external moisture management.
- [22] The Board also notes that in *GPE Holdings Limited v Tile 'N' Style Limited*⁶ the High Court found that BASF New Zealand limited, an importer and distributor of building products, made representations to GPE about the quality and suitability of a sealant which BASF supplied. These representations were work "in connection with" the construction of a building.
- [23] Given the above the Board finds building work includes painting.
- [24] Turning to whether the building work, including the painting, was carried out in a negligent or incompetent manner the Board notes that the terms are not the same. In *Beattie v Far North Council*⁷ Judge McElrea noted:

⁶ [2014] NZHC 802 at [44], [45] and [46]

⁷ Judge McElrea, DC Whangarei, CIV-2011-088-313

[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 into. This is described as the *Bolam*⁸ test of negligence which has been adopted by the New Zealand Courts⁹.
- [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*¹⁰ 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 test¹¹. 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 Act¹². 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 practitioner¹³.
- [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*

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

⁹ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

¹⁰ *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

¹¹ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

¹² *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

¹³ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

- (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.*

- [30] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹⁴ and be carried out in accordance with a building consent¹⁵. 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*¹⁶ 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 matters that the Board considered with regard to negligence and incompetence and the Board's finding on each are as follows:
- (a) changes to the consented plans – the Board accepted that the changes were being dealt with by the designer and that they were accepted as minor variations;
 - (b) a failure to replace a 90mm by 90mm post with a 125mm by 125mm post – the Respondent gave evidence that the existing post met building code requirements. There was no evidence to the contrary. Further evidence would be required to make a determination. Given this, the matter has not been proven to the required burden of proof;
 - (c) lack of ground clearance from cladding – the Board accepted the evidence that the clearances were adequate at the time the work was completed;
 - (d) a drain that was installed was not to the required dimensions – the building work relates to another practitioner working under another licensing regime. The Respondent is not responsible for that other practitioner's conduct;
 - (e) meter box sealing – the Respondent accepted this failing. The Board finds, however, that this was not sufficiently serious enough an issue to warrant a disciplinary outcome.

¹⁴ Section 17 of the Building Act 2004

¹⁵ Section 40(1) of the Building Act 2004

¹⁶ [2001] NZAR 74

[33] With regard to the painting the Board notes that the Respondent did carry out some of the painting. He was the licensed building practitioner on site and the contractual documentation notes him as the person who would be carrying out the building work. The Respondent claimed he was working under the supervision of the project manager who had painting experience. The Board does not accept this. As the licensed building practitioner he had an obligation to ensure all of the building work met building code requirements. The painting of the weatherboards did not. The Board considers, however, that the conduct does not meet the disciplinary threshold described in *Collie* above.

Record of Work

- [34] 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 work¹⁷.
- [35] Failing to provide a record of work is a ground for discipline under section 317(1)(da)(ii) of the Act. In order to find that ground for discipline proven, the Board need only consider whether the Respondent had "good reason" for not providing a record of work on "completion" of the restricted building work.
- [36] The Respondent accepted that he had not met his obligations. He provided a record of work to the project manager who was also the contracting party. It was not passed on. Proving a record of work to a third party may be practical but it does run the risk that it will not be passed on and this is what transpired.

Penalty, Costs and Publication

- [37] Having found that one or more of the grounds in section 317 applies the Board must, under section 318 of the Act¹, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [38] The Board heard evidence during the hearing relevant to penalty, costs and publication and has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

- [39] 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*¹⁸ commented on the role of "punishment" in giving penalty orders stating that punitive orders are, at times,

¹⁷ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

¹⁸ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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.

- [40] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*¹⁹ 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.
- [41] The Respondent has been found to have failed to provide a record of work. Record of work matters are at the lower end of the disciplinary scale. The Board's normal starting point for a failure to provide a record of work is a fine of \$1,500. The Board notes the Respondent's acceptance of responsibility in this regard and the changes he has made to his processes. The Board also notes that he did provide the record of work in a timely manner to the project manager.
- [42] Given the above factors the Board has decided that a censure is the appropriate penalty. A censure is a formal expression of disapproval.

Costs

- [43] 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."
- [44] 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 case²⁰.
- [45] In *Collie v Nursing Council of New Zealand*²¹ 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.*
- [46] Based on the above the Board's costs order is that the Respondent is to pay the sum of \$500 toward the costs of and incidental to the Board's inquiry. The Board notes the matter was dealt with at a hearing and that costs for a hearing would ordinarily

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

²⁰ *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.

²¹ [2001] NZAR 74

be in the order of \$1,500. It notes, however, that its normal costs order for a record of work matter when it is dealt with on the papers is \$500. Given the findings in the case it has decided that a similar level of costs is warranted.

Publication

[47] 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 Act²². 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.

[48] 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.

[49] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990²³. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²⁴. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²⁵. 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*²⁶.

[50] 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 interest²⁷. 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.

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

Section 318 Order

[52] 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.

²² Refer sections 298, 299 and 301 of the Act

²³ Section 14 of the Act

²⁴ Refer sections 200 and 202 of the Criminal Procedure Act

²⁵ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

²⁶ *ibid*

²⁷ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$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(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.

- [53] 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

- [54] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **30 January 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.

- [55] 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

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

Signed and dated this 18th 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

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- (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.*