

Before the Building Practitioners Board

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| | BPB Complaint No. C2-01640 |
| Licensed Building Practitioner: | Douglas Tuhoro (the Respondent) |
| Licence Number: | BP 121675 |
| 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

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| Complaint or Board Inquiry | Complaint |
| Hearing Location | Hamilton |
| Hearing Type: | In Person |
| Hearing Date: | 4 October 2017 |
| Decision Date: | 14 November 2017 |
| Board Members Present | Chris Preston (Presiding) Robin Dunlop Catherine Taylor Faye Pearson-Green |

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)(b) and section 317(1)(da)(ii) 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

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

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.

- [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.

Background to the Complaint

- [5] The complainant stated that “prior to the pour of the first floor concrete slab at [Omitted], the engineer noted an issue with the reinforcement in some of the ground floor walls not being central to walls and in some cases having reduced cover. The engineer required that the walls be de-constructed until the reinforcing was exposed to a level it was found to be in the correct location (central to the walls).”
- [6] The Complainant also alleged that due to a payment dispute a Record of Work was not provided.

Evidence

- [7] 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.
- [8] The Board heard evidence from:

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| Douglas Tuhoro | Respondent |
| [Omitted] | Complainant |
| [Omitted] | Witness/ attending on behalf of Complainant |
| [Omitted] | Engineer |

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

⁴ [2016] HZHC 2276 at para 164

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

- [9] Evidence was presented that the reinforcing, which had been placed, was allowed to be subjected to wind for many months prior to it being straightened and prepared for an in-situ pour of self-compacting concrete which was to form the walls.
- [10] It was agreed by both the Respondent and Complainant that there was no issue with the length of time the steel had been exposed to the weather and that it was straightened and was adequate for its intended use.
- [11] The steel was positioned between form work by chairs that were borrowed and not of the correct size and the Complainant stated that there did not appear to be enough chairs to provide adequate support and to keep the steel from moving and bowing during the pour.
- [12] The Engineer confirmed on post pour inspection that the steel was not in the centre and that in some cases the walls needed to be totally deconstructed due to this issue and the lack of coverage.
- [13] The Respondent returned to site to affect repairs but following a payment dispute did not complete the repairs nor issue a record of work.
- [14] There was no disagreement that the reinforcing was not central to the walls. There was some debate and uncertainty as to the cause of the problem.
- [15] The Respondent stated he has six years' experience in doing this type of work.

Board's Conclusion and Reasoning

- [16] The Board has decided that the Respondent **has**:
 - (a) carried out or supervised building work or building inspection work in a negligent 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);and should be disciplined.
- [17] The reasons for the Board's decision follow.

Negligence and/or Incompetence

- [18] In considering whether the Respondent has carried out or supervised building work in a negligent or incompetent manner the Board has had regard to the case of *Beattie v Far North Council*⁶. Judge McElrea provided guidance on the interpretation of those terms:

⁶ 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.

[44] In my view a "negligent" manner of working is one that exhibits a serious lack of care judged by the standards reasonably expected of such practitioners, while an "incompetent" manner of working is one that exhibits a serious lack of competence.

[46] The approach I have adopted recognises that the terms "negligent" and "incompetent" have a considerable area of overlap in their meanings, but also have a different focus - negligence referring to a manner of working that shows a lack of reasonably expected care, and incompetence referring to a demonstrated lack of the reasonably expected ability or skill level.

- [19] The Board has also considered the comments of Justice Gendall in *Collie v Nursing Council of New Zealand*⁷ as regards the threshold for disciplinary matters:

[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.

- [20] Based on the evidence and sequencing of the work, and that the placement of the reinforcing and the concrete pour were under the direct control of the Respondent, the Board is of the view the adequate care was not taken with the placement of the reinforcing, the incorrect chair sizes and number of chairs used and the method of pouring the concrete given the size and height of the form work.
- [21] The Respondent was in full control of the job and the process used and no evidence was provided to suggest any post pour issues that would have resulted in the reinforcing moving and not being central to the walls.
- [22] On this basis the Board has decided that the Respondent has been negligent in that his conduct has shown a serious lack of care in carrying out or supervising the work.

Record of Work

- [23] 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 work⁸.
- [24] 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.
- [25] The Board discussed issues with regard to records of work in its decision C2-01170⁹ and gave guidelines to the profession as to who must provide a record of work, what

⁷ [2001] NZAR 74

⁸ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

a record of work is for, when it is to be provided, the level of detail that must be provided, who a record of work must be provided to and what might constitute a good reason for not providing a record of work.

- [26] The starting point with a record of work is that it is a mandatory statutory requirement whenever restricted building work under a building consent is carried out or supervised by a licensed building practitioner (other than as an owner-builder). Each and every licensed building practitioner who carries out restricted building work must provide a record of work.
- [27] The statutory provisions do not stipulate a timeframe for the licenced person to provide a record of work. The provisions in section 88(1) simply states “on completion of the restricted building work ...”.
- [28] In most situations issues with the provision of a record of work do not arise. The work progresses and records of work are provided in a timely fashion. Completion has occurred in that the Respondent has not or will not be returning to carry out any further restricted building work. A record of work has not been provided. On this basis the Board finds that the record of work was not provided on completion as required and the disciplinary offence has been committed.
- [29] Section 317(1)(da)(ii) of the Act provides for a defence of the licenced building practitioner having a “good reason” for failing to provide a record of work. If they can, on the balance of probabilities, prove to the Board that one exists then it is open to the Board to find that a disciplinary offence has not been committed. Each case will be decided by the Board on its own merits but the threshold for a good reason is high.
- [30] In this instance there was an ongoing payment dispute. The Board has repeatedly stated that a Record of Work is a statutory requirement, not a negotiable term of a contract. The requirement for it is not affected by the terms of a contract, nor by contractual disputes. Licensed building practitioners should now be aware of their obligations to provide them and their provision should be a matter of routine.

Penalty, Costs and Publication

- [31] 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.
- [32] 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.

⁹ *Licensed Building Practitioners Board Case Decision C2-01170 15 December 2015*

Penalty

- [33] 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*¹⁰ 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.

- [34] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*¹¹ 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.
- [35] Two disciplinary offences have been committed and the matters pertaining to negligence were serious. A mid-range penalty is appropriate. Little in the way of mitigation was heard. Based on the above the Board's penalty decision is a fine of \$3,000.

Costs

- [36] Under s 318(4) the Board may require the Respondent "to pay the costs and expenses of, and incidental to, the inquiry by the Board."
- [37] 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 case¹².
- [38] In *Collie v Nursing Council of New Zealand*¹³ 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.

¹⁰ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

¹² *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.

¹³ [2001] NZAR 74

- [39] Based on the above the Board's costs order is that the Respondent is pay the sum of \$1,000 toward the costs of and incidental to the Board's inquiry.

Publication

- [40] 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 Act¹⁴. The Board is also able, under s 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.

- [41] 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.
- [42] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990¹⁵. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction¹⁶. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive¹⁷. 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*¹⁸.
- [43] 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 interest¹⁹. 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.
- [44] Based on the above the Board will not order further publication.

Section 318 Order

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

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| Penalty: | Pursuant to s 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of \$3,000. |
| Costs: | Pursuant to s 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. |

¹⁴ Refer sections 298, 299 and 301 of the Act

¹⁵ Section 14 of the Act

¹⁶ Refer sections 200 and 202 of the Criminal Procedure Act

¹⁷ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

¹⁸ *ibid*

¹⁹ *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 s 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.

- [46] 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

- [47] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **4 December 2017**. 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

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

Signed and dated this 14th day of November 2017



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.*