

Before the Building Practitioners Board

	BPB Complaint No. C2-01683
Licensed Building Practitioner:	Sheng Zheng (the Respondent)
Licence Number:	BP 128677
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	Auckland
Hearing Type:	In Person
Hearing Date:	1 November 2017
Decision Date:	13 November 2017
Board Members Present	Chris Preston (Presiding) Mel Orange Robin Dunlop 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 disciplinary offences under sections 317(1)(b) and 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] and 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 complaint related to the failure to provide records of work on completion of restricted building work for the two houses and an allegation that weatherboard cladding had been installed in a negligent manner.

Evidence

- [6] 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.

- [7] The Board heard evidence from:

Sheng Zheng	Respondent
[Omitted]	Complainant
[Omitted]	Licensed Building Practitioner
[Omitted]	Unlicensed Builder

- [8] The Board provided an interpreter.
- [9] The Complainant set out in his complaint that the Respondent had installed weatherboards that were not as per the manufacturer’s instructions and that the installation of associated fixtures including scribes and soakers was completed to a poor standard. The Complainant also alleged that the records of work were being held pending payment of disputed amounts.

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

[10] A list of defects supported with photographs was included with the complaint. The listed defects were:

- Wrong scribe – small uneven gap between scribe and aluminium door frame;
- Scribe not plumb
- Weatherboard on each side of wall on a different level
- Weatherboard cutting line not straight and not painted
- Weatherboard not jointed properly
- Different weatherboard exposed height
- Gaps
- Corner flashing packing board need to be replaced
- Damaged cedar boards
- Eaves mould bowing out

[11] The Respondent provided a response to the complaint in which he noted a payment dispute and his right to withhold documentation and that “Team Leader [Omitted] who has 4 years’ experience to supervise the work carried out by the labour hire staff”.

[12] In an email of 5 July 2017 the Respondent further noted:

4. when they [Omitted] complaint for they (temporary worker) doesn’t work very well as photo they show to you, I also very angry, the next day I also led my team come back amend them spent 5 days and We bear all the material by ourselves, after this the site manage [Omitted] also check and confirm everything is ok ...

[13] At the hearing the Board received further evidence in relation to the allegations. In summary the Respondent was engaged to carry out restricted building work which included the installation of weatherboard cladding. The Respondent was involved in building work on site up until the install of the cladding. He then left and moved onto another job. [Omitted] was left in charge at the site. The Respondent stated he would attend the site every two to three days and was available by phone. An additional three staff members were engaged at this time to assist with the install of the cladding. One had a similar level of experience to [Omitted] and the other two were not skilled or experienced. [Omitted] worked with one of the unskilled workers and the other more experienced person worked with the other unskilled person. It was the work of the newly hired experienced worker and his co-worker that was at issue. Those persons no longer work for the Respondent.

[14] The Respondent stated that he had worked with [Omitted] in the past and that he was familiar with his work and had confidence in his abilities. [Omitted] gave evidence that he has spent two years studying carpentry with BCITO. The Respondent also gave evidence that he was going to site every two to three days at which time he would spend one to two hours on site. [Omitted] supported that

evidence. The Respondent stated he had not picked the issues up on his site visits as they occurred between visits.

- [15] The Respondent accepted that there were issues with the way the weatherboards had been completed. He gave evidence that when they were brought to his attention he attended site and oversaw rectification of the issues which included removing some weatherboards. This was done at his own cost and he provided photographs of the finished work which he stated was to an acceptable standard.
- [16] The Complainant gave evidence that whilst attempts to repair or rectify deficiencies were made the end result was still unsatisfactory and another practitioner was engaged to tidy up the work. Some aesthetic aspects were not able to be remediated.
- [17] The Respondent made a closing statement in which he noted that there were four matters for the Board to consider. These were that:
1. the site manager provided by the main contractor did not do his job;
 2. he tried to fix the issues of his own accord;
 3. he now directly supervises his staff;
 4. he was owed a substantial sum of money which is why he has not provide the record of work.

Board's Conclusion and Reasoning

[18] 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.

[19] The reasons for the Board's decision follow.

Negligence and/or Incompetence

[20] 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.

- [21] 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.

- [22] It was accepted by the Respondent that the work was not completed to an acceptable standard. It was also noted that very little of it was carried out by him. Rather it was completed under his supervision.

- [23] Supervision is defined in section 7 of the Act⁸. The fundamental requirements with regard to supervision is that it is *"sufficient to ensure it is performed competently"* and *"in accordance with the building consent"*.

- [24] In C2-01143 the Board also discussed the levels of supervision it considers will be necessary to fulfil a licensed building practitioner's obligations noting that the level of supervision required will depend on a number of circumstances including:

- (a) the type and complexity of the building work to be supervised;
- (b) the experience of the person or persons being supervised;
- (c) the supervisor's experience in working with the person being supervised and their confidence in their abilities;
- (d) the number of persons or projects being supervised; and
- (e) the geographic spread of the work being supervised.

⁷ [2001] NZAR 74

⁸ Section 7:

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

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

- [25] The Board also needs to consider whether the work met the requirements of the building code and if not the level of non-compliance.
- [26] Supervision in the context of the Building Act has not yet been considered by the courts. It has, however, been considered in relation to Electricity Act 1992⁹. The definition of supervision in that Act is consistent with the definition in the Building Act and as such the comments of the court are instructive. In the case Judge Tompkins stated at paragraph 24:

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

- [27] In the present case the Respondent had three new staff members whose work he was not familiar with on site. They were notionally under the onsite control of [Omitted] who was described as the “team leader”. All four were working under the Respondent’s supervision as he was the only licensed person and as such the only one authorised to carry out cladding which is restricted building work. Of the three new persons one of them was ostensibly overseeing the work of one other and it is their work that has fallen below the required standards.
- [28] In such circumstances, where there were new and untested staff on site, a higher and closer level of supervision was required. Had this occurred then it is more than likely the issues would not have arisen or that they would have been identified early enough to not impact on the build in the way they did. As such the Board finds that the Respondent has been negligent in that a reasonable building practitioner would have provided the required level of supervision.
- [29] The Board also finds that it is not enough that the Respondent was prepared to make good at his own cost. Such action may go to mitigation but the essential point is that the workmanship issues should not have occurred in the first place or, if they did, that they should have been picked up immediately, not when the work was almost finished.

⁹ *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

Record of Work

- [30] 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 work¹⁰.
- [31] 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.
- [32] The Board discussed issues with regard to records of work in its decision C2-01170¹¹ and gave guidelines to the profession as to who must provide a record of work, what 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.
- [33] 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.
- [34] 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 ...”.
- [35] 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 and a record of work has still 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.
- [36] 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.
- [37] 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.

¹⁰ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

¹¹ *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

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] 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.
- [40] The Board has taken the attempted remediation and the payment dispute into account as mitigation. The Board has also taken into consideration the Respondent's change in supervision practices.

Penalty

- [41] 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*¹² 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.

- [42] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*¹³ 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.
- [43] The Respondent has been found to have committed two disciplinary offences and whilst record or work matters are at the lower end of the scale the negligence matter was somewhat more serious although the negligence found was at the lower end of negligence. Based on these factors, the mitigation heard and the above principles, the Board's penalty decision is that the Respondent pay a fine of \$3,000.

Costs

- [44] 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."

¹² HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

- [45] 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 case¹⁴.
- [46] In *Collie v Nursing Council of New Zealand*¹⁵ 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.*
- [47] A hearing was required and costs were incurred. It is appropriate that the Respondent contribute to these so that the full burden does not fall on other licensed persons. Based on this and the above principles the Board's costs order is that the Respondent is pay the sum of \$1,500 toward the costs of and incidental to the Board's inquiry. This is significantly less than the 50% of actual costs outlined above as being the starting point.

Publication

- [48] 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 Act¹⁶. 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.*
- [49] 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.
- [50] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990¹⁷. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction¹⁸. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive¹⁹. The High Court provided

¹⁴ *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.

¹⁵ [2001] NZAR 74

¹⁶ Refer sections 298, 299 and 301 of the Act

¹⁷ Section 14 of the Act

¹⁸ Refer sections 200 and 202 of the Criminal Procedure Act

¹⁹ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*²⁰.

- [51] 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 interest²¹. 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.
- [52] Based on the above the Board will not order further publication.

Section 318 Order

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

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

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$1,500 (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.

- [54] 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

- [55] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **5 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

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

²⁰ *ibid*

²¹ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Signed and dated this 13TH 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:*
 - (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.*