

Before the Building Practitioners Board

	BPB Complaint No. CB25828
Licensed Building Practitioner:	Zahid Ali (the Respondent)
Licence Number:	BP 107647
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 and Decision Date:	28 April 2022

Board Members Present:

Mr M Orange, Deputy Chair, Barrister (Presiding)
Mr D Fabish, LBP, Carpentry and Site AOP 2
Mr R Shao, LBP, Carpentry and Site AOP 1
Ms J Clark, Barrister and Solicitor, Legal Member
Ms K Reynolds, Construction Manager

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.

Disciplinary Finding:

The Respondent **has not** committed a disciplinary offence.

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Summary of the Board’s Decision

- [1] The Respondent has not committed a disciplinary offence. The matters complained about were either not the Respondent’s work or, with respect to the building work he did carry out or supervise, were not serious enough to warrant a disciplinary outcome. The Respondent was cautioned as regards his record of work practices.

The Charges

- [2] The hearing resulted from a complaint about 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 contrary to section 317(1)(b) of the Act;
 - (b) carried out or supervised building work or building inspection work that does not comply with a building consent contrary to section 317(1)(d) of the Act; and
 - (c) 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) of the Act contrary to section 317(1)(da)(ii) of the Act.

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

- [3] In further investigating the Respondent’s conduct under sections 317(1)(b) and 317(1)(d) of the Act, the Board gave notice that it would be considering the quality and compliance matters noted in a report prepared by [OMITTED], Registered Building Surveyor and, in particular, the matters noted in section 3.1 of his report on page 58 and 59 of the Board’s files (documents 2.1.43 and 2.1.44).

Function of Disciplinary Action

- [4] 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.

- [5] 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.”

- [6] In a similar vein, the Board’s investigation and hearing process is not designed to address every issue that is raised in a complaint or by a complainant. The disciplinary scheme under the Act and Complaint’s Regulations focuses on serious conduct that warrants investigation and, if upheld, disciplinary action. Focusing on serious conduct is consistent with decisions made in the New Zealand courts in relation to the conduct of licensed persons⁵:

... the statutory test is not met by mere professional incompetence or by deficiencies in the practice of the profession. Something more is required. It includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse.

- [7] Finally, 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. Those grounds do not include contractual breaches other than when the conduct reaches the high threshold for consideration under section 317(1)(i) of the Act, which deals with disrepute.

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 *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200

- [8] The above commentary on the limitations of the disciplinary process is important to note as, on the basis of it, the Board's inquiries, and this decision, focus on and deal with the serious conduct complained about.

Inquiry Process

- [9] The investigation and hearing procedure under the Act and Complaints Regulations is inquisitorial, not adversarial. There is no requirement for a complainant to prove the allegations. Rather the Board sets the charges, and it decides what evidence is required at a hearing to assist it in its investigations. In this respect, the Board reviews the available evidence when considering the Registrar's Report and determines the witnesses that it believes will assist at a hearing. The hearing itself is not a review of all of the available evidence. Rather it is an opportunity for the Board to seek clarification and explore certain aspects of the charges in greater depth.
- [10] Whilst a complainant may not be required to give evidence at a hearing, they are welcome to attend and, if a complainant does attend, the Board provides them with an opportunity to participate in the proceedings.

Background to the Complaint

- [11] As part of the investigation process, the Respondent was sent the complaint and asked to provide a response. He indicated that he would respond but did not do so. The matter proceeded to a hearing on the basis that there was evidence that tended to support the complaint and no contradictory evidence before the Board.
- [12] Prior to the hearing, and after the Board had issued its Notice of Proceeding detailing the matters the Board would further investigate at the hearing, the Complainant raised further allegations about the Respondent's building work.
- [13] Section 283(b) of the Act requires the Board to comply with the principles of natural justice. The principles of natural justice require that hearings are conducted in a manner that ensures that the Respondent is given a fair opportunity to be heard and to contradict the evidence and that the decision-making process is conducted fairly, transparently and in good faith.
- [14] In terms of a fair hearing, a party should be given the opportunity to respond to an allegation which, with adequate notice, might be effectively refuted. The key elements are surprise and potential prejudice. If there is no surprise in an allegation, or if there could be no prejudice because further notice would not have assisted the person to answer the allegation, then there is no unfairness in the process.
- [15] Given the late notice of the new allegations and the nature of the allegations raised, they were not investigated at the hearing. However, the Complainant should note that this does not preclude a new complaint being made about them.

Evidence

- [16] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁶. Under section 322 of the Act, the Board has relaxed rules of evidence that allow it to receive evidence that may not be admissible in a court of law.
- [17] 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.
- [18] In addition to the documentary evidence before the Board heard evidence at the hearing from the Respondent and from [OMITTED], a Licensed Building Practitioner with a Carpentry Licence (BP [OMITTED]).
- [19] The Board had directed that [OMITTED], Registered Building Surveyor, S[OMITTED], be summoned to the hearing. Service of the summons was attempted. He could not be located. The service agent checked Mr [OMITTED]'s known address. He reported that the building manager for the address for service on the Companies Register for [OMITTED] stated that she thought Mr [OMITTED] had moved to Germany. She noted he had worked at the address for service for about a year. The hearing proceeded without Mr [OMITTED]'s appearance as a witness.
- [20] The complaint related to an alteration and addition carried out on a residential dwelling. The building work was carried out under a building consent. The consent issued by the Auckland City Council covered the alteration/addition and the construction of a minor dwelling on the same title. The Respondent was involved in the alteration/addition. A different contractor was engaged to construct the minor dwelling.
- [21] The Board obtained the building consent file as part of its investigations from the Auckland City Council. The building consent records covered both the alteration/addition and the new minor dwelling. The inspection records did not distinguish between the two different areas of construction. At the hearing, it was clarified that the inspection records that showed failed inspection items related to the minor dwelling. Those inspection records identified Licensed Building Practitioners that were not in the employ of, or contractors of, the Respondent.
- [22] Prior to the hearing, the Complainant provided the Board with a copy of the Respondent's record of work. It was dated 23 June 2021. The Respondent's building work came to an end on 18 June 2021. The Respondent stated that he left the record of work in the letterbox at the address where the building work was carried out on

⁶ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

the date of the record of work. He did not provide a copy of it to the Territorial Authority.

- [23] The record of work indicated that the Respondent had both carried out and supervised all of the aspects of the building work. He was not, however, the only Licensed Building Practitioner who carried out or supervised the building work. In particular, Mr [OMITTED] also carried out and supervised building work. He did not complete a record of work for the restricted building work that he was responsible for. He submitted that he was being supervised by the Respondent but accepted that, as a Licensed Building Practitioner, he was responsible for his own work.
- [24] The report included issues raised about the quality and compliance of external plastering work. The inspection records identified [OMITTED], a Licensed Building Practitioner, External Plastering, Areas of Practice: Proprietary Plaster Cladding Systems licence (BP [OMITTED]). The Respondent confirmed that Mr [OMITTED] was the person who was engaged to carry out the exterior plastering work on the alteration/addition. As there was satisfactory evidence that a Licensed Building Practitioner with the appropriate class of licence carried out or supervised the external plastering work, the matter was not further investigated.
- [25] The remaining building work matters under investigation were those raised in the [OMITTED] report. The Board questioned the Respondent and Mr [OMITTED] about the building work of concern that was raised in the report.
- [26] Prior to doing so, the Board inquired into the building work arrangements at the site. The Respondent stated that he had three hammer hands on the site. Both the Respondent and Mr [OMITTED] stated that they were both on-site and that they both carried out and supervised building work.
- [27] The Respondent and Mr [OMITTED] noted that the building work, as consented, changed during the build at the instruction of the owners and that the Auckland Council, as the Building Consent Authority (BCA), authorised the changes on-site during the build. One of those changes related to the window joinery. The existing windows were retained, and the owners arranged to have them retrofitted with double glazing. The window sashes and sills remained in place. New double glazing was then inserted. Mr [OMITTED]'s report contained numerous allegations about the exterior windows and doors and, in particular, the state of the window and door joinery. Both the Respondent and Mr [OMITTED] gave evidence that what was depicted was the state of the window and door joinery prior to the Respondent carrying out any work and that they were not responsible for what was observed by Mr [OMITTED]. The [OMITTED] report did not distinguish between pre-existing building work and the work undertaken by the Respondent.

- [28] A further issue raised with regard to window joinery was a possible failure to install stop ends. The Respondent stated that the cladding was installed over a cavity, that the stop ends were inside the cavity and that the related inspection had been passed.
- [29] The report noted that weather grooves had been planned off new door joinery. The Respondent and Mr [OMITTED] gave evidence that the joinery had been measured and ordered by the owners and that it had to be adjusted on site. The Respondent stated that the owner did not accept the method of installation and that, as a result of this issue, the contract was terminated. The Respondent gave evidence that the weather grooves would have been cut into the doors, and they would have been sealed if they had been allowed to continue with the building work.
- [30] The report also raised an issue with an excessive gap between an entry door and a sill. A photograph showed the gap. The Respondent and Mr [OMITTED] stated there was a rebate in the outside of the sill, which could not be observed in the photograph.
- [31] The [OMITTED] report noted an area on the north elevation of the dwelling where water was entering the dwelling on the left of the window jamb between it and the plaster cladding. The Respondent and Mr [OMITTED] gave evidence that the corner of the building where the window was located was hit by a vehicle involved in the construction of the rear dwelling and that the issues had nothing to do with the Respondent.
- [32] Issues were also raised with regard to the compliance of the structure of stairs leading to a deck and the compliance of the decking where one small area had a less than 12mm gap between the decking and cladding. Mr [OMITTED] gave evidence that the stairs were only temporary stairs installed to give access to the worksite. The Respondent gave evidence that the cladding was rough-cast plaster, and that was why one small area was close to the cladding.
- [33] Issues that the Respondent did accept were missing roof fixings, a failure to turn up and down new roofing iron and the amount of cover on a parapet flashing.

Board's Conclusion and Reasoning

- [34] The Board has decided that the Respondent **has not** committed a disciplinary offence and **should not** be disciplined.
- [35] The Board reached its decision on sections 317(1)(b) and (d) of the Act on the basis that firstly, there was insufficient evidence to establish that the main areas of work complained about were carried out or supervised by the Respondent and secondly, with regard to the areas where the Respondent was the responsible Licensed Building Practitioner the matters were not serious enough to warrant a disciplinary outcome. In making this decision, the Board has taken into consideration 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.

[36] Also, in *Pillai v Messiter (No 2)*,⁸ the Court of Appeal stated:

... the statutory test is not met by mere professional incompetence or by deficiencies in the practice of the profession. Something more is required. It includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse.

[37] It is on this basis, and taking into account that only a small portion of the work complained about was carried out or supervised by the Respondent, that the Board decided that a disciplinary finding was not warranted. In essence, whilst there was some evidence of building work that may not have been completed to an acceptable standard, the matters raised did not reach the seriousness threshold as outlined in the above court decisions.

[38] With regard to the record of work allegation, the Board accepted that it was provided to the owner on completion. Whilst it was not also given to the Territorial Authority, the allegation is a matter the Board pursued under its inquiry jurisdiction and, as it was not part of the complaint, the Board decided that it would not discipline the Respondent for not providing the record of work to the Territorial Authority. He is, however, reminded of his obligations under section 88(1) of the Act which requires him to provide the record of work to both the owner and the Territorial Authority.

[39] The Board also reminds both the Respondent and Mr [OMITTED] that each and every Licensed Building Practitioner who carries out restricted building work must provide a record of work. The reference to supervision in the context of records of work is to the supervision of persons who are not authorised to carry out restricted building work, i.e. non-licensed persons. A licensed building practitioner does not require supervision by virtue of their own licence – they are authorised to carry out restricted building work. Even if one practitioner was to consider that they were in overall charge of a building site and of the work being carried out under a building consent (such as where they hold a Site Licence), the wording “each licenced person...” in section 88 cannot be ignored.

⁷ [2001] NZAR 74

⁸ (1989) 16 NSWLR 197 (CA) at 200

- [40] The wording of the section is clear. The obligation is for each and every licensed building practitioner to provide a record of work for the restricted building work they carried out under a building consent irrespective of whether there may be another licensed building practitioner on-site who may be providing overall supervision.

Signed and dated this 24th day of May 2022

A handwritten signature in black ink, appearing to be 'M Orange', with a long horizontal stroke extending to the right.

Mr M Orange
Presiding