

Before the Building Practitioners Board

	BPB Complaint No. CB26441
Licensed Building Practitioner:	Carl Anthony Kennard (the Respondent)
Licence Number:	BP116924
Licence(s) Held:	Roofing

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	Hamilton
Hearing Type:	In Person
Hearing and Decision Date:	4 October 2024
Board Members Present:	

Mr M Orange, Chair, Barrister (Presiding)
Mrs F Pearson-Green, Deputy Chair, LBP, Design AoP 2
Mr P Thompson, LBP, Carpentry and Site AoP 3, Quantity Surveyor

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

- [1] The Respondent was contracted to replace a roof. He started but did not finish the work. The Complainant raised issues with a leak and complained about the Respondent's lack of responsiveness. The Board found that the building work issues did not reach the threshold for a distant finding to be made. Regarding the alleged failure to respond to queries, the Board investigated this under the Code of Ethics and under the provisions relating to disreputable conduct but found that, on the basis of the circumstances at the time, the conduct did not warrant a distant finding.

The Charges

- [2] The prescribed investigation and hearing procedure is inquisitorial, not adversarial. There is no requirement for a complainant to prove the allegations. The Board sets the charges and decides what evidence is required.¹
- [3] In this matter, the disciplinary charges the Board resolved to further investigate² were that the Respondent may, in relation to building work at [OMITTED], have:
- (a) carried out or supervised building work in a negligent or incompetent manner contrary to section 317(1)(b) of the Act;

¹ 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. The evidentiary standard is the balance of probabilities, *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1.

² The resolution was made following the Board's consideration of a report prepared by the Registrar in accordance with regulation 10 of the Complaints Regulations.

- (b) breached the Code of Ethics prescribed under section 314A of the Act contrary to section 317(1)(g) of the Act; and
 - (c) conducted himself in a manner that brings, or is likely to bring, the regime under the Act for licensed building practitioners into disrepute contrary to section 317(1)(i) of the Act, IN THAT the Respondent may have taken a deposit for the project with no intention of completing the project and/or contrary to a promise to apply the deposit to the purchase of materials.
- [4] In further investigating the Respondent's conduct under section 317(1)(b) of the Act, the Board gave notice that it would be inquiring into:
- (a) the incorrect installation of the change of pitch flashing;
 - (b) failure to put in additional purlins;
 - (c) incorrect screw fixings;
 - (d) the cutting of the mounting strips of the HRV system and consequential damage; and
 - (e) roof leaks in new roof areas.
- [5] With respect to the allegation that the Respondent breached the Code of Ethics, the specific provisions of the Code for further investigation were:

15. You must be accountable –*"If building work carried out by you, or someone under your supervision, is or could be defective you must-*

- (a) *Take all reasonable steps to communicate with your client about the problem in a way that-*
 - (i) *Is honest; and*
 - (ii) *Is responsive; and*
- (b) *Act with integrity in relation to the resolution of the problem."*

16. You must advise clients of any delays as soon as they become apparent –*"You must, in relation to any building work you are carrying out or supervising, take all reasonable steps to-*

- (a) *Give your client regular reports on progress: and*
- (b) *Ensure that your time frame estimates to clients are realistic; and*
- (c) *Promptly notify your client when time frames for completing work change, particularly in the event of delays; and*
- (d) *Ensure that delays in completing building work are prevented wherever possible.*

- [6] The specific conduct the Board gave notice would be further investigated with respect to the Code was the alleged lack of communication and responsiveness to the issues of the leaking roof and communications with the client in respect of delays.

Evidence

- [7] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed³. 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 Respondent was contracted to reroof a dwelling. The work was carried out under an exemption from the requirement to have a building consent and schedule one of the Act, specifically Clause 1: General repair, maintenance and replacement.
- [9] The Respondent started but did not finish the roofing work. The Complainant raised issues with the delays in finishing the work and the lack of response to queries about the work. An issue with a leak was also raised.

Negligence or Incompetence

- [10] To find that the Respondent was negligent, the Board needs to determine, on the balance of probabilities,⁴ that the Respondent departed from an accepted standard of conduct when carrying out or supervising building work as judged against those of the same class of licence. This is described as the *Bolam*⁵ test of negligence.⁶ To make a finding of incompetence, the Board has to determine that the Respondent has demonstrated a lack of ability, skill, or knowledge to carry out or supervise building work to an acceptable standard.⁷ A threshold test applies to both. Even if the Respondent has been negligent or incompetent, the Board must also decide if the conduct fell seriously short of expected standards.⁸ If it does not, then a disciplinary finding cannot be made.

Has the Respondent departed from an acceptable standard of conduct

- [11] When considering what an acceptable standard is, the Board must consider the purpose of the Building Actⁱ as well as the requirement that all building work must

³ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

⁴ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1. 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.

⁵ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁶ Adopted in New Zealand in various matters including: *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

⁷ In *Beattie v Far North Council* Judge McElrea, DC Whangarei, CIV-2011-088-313 it was described as “a demonstrated lack of the reasonably expected ability or skill level”. In *Ali v Kumar and Others*, [2017] NZDC 23582 at [30] as “an inability to do the job”

⁸ *Collie v Nursing Council of New Zealand* [2001] NZAR 74 - [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”.

comply with the Building Code⁹ and any building consent issued.¹⁰ The test is an objective one.¹¹

- [12] The main conduct under investigation related to the leak. The Board received evidence from the remedial roofer, who noted that the issue arose because fixings had missed a purlin in the area of a transition flashing. An additional purlin was added, and this resolved the issue. The remedial roofer noted that the leak was in a limited area, that the roofing work had been completed to a high standard, and that it is not uncommon for fixings to miss purlins.
- [13] The complaint included other allegations of building work that had not been completed to an acceptable standard. The Board did not receive sufficient evidence to make findings on those matters.

Was the conduct serious enough

- [14] The Board considered that the building work complained about did not reach the threshold for the Board to make a disciplinary finding. The overall roofing work was of a high standard, and the courts have noted that a disciplinary finding should not be made where the conduct relates to an error, inadvertence or mistake. The Board considers that the conduct complained about comes within those parameters.

Has the Respondent been negligent or incompetent

- [15] The Respondent has not carried out building work in a negligent or incompetent manner.

Code of Ethics and Disrepute

Code of Ethics

- [16] The Code of Ethics for Licensed Building Practitioners was introduced by Order in Council.¹² It was introduced in October 2021 and came into force on 25 October 2022. The obligations are new, but there was a transition period of one year to allow practitioners to become familiar with the new obligations. Whilst the Code of Ethics is new, ethics have been a part of other regulatory regimes¹³ for some time, and the Board has taken guidance from decisions made in other regimes.
- [17] The Code also differentiates between Licensed Building Practitioners who are in business and those who are employed in that some of the ethical obligations only apply to those who are in business. In this matter, the Respondent was in business.
- [18] The disciplinary provision in the Act simply states, “has breached the Code of Ethics”. Most disciplinary regimes frame the charge as some form of malpractice or

⁹ Section 17 of the Building Act 2004

¹⁰ Section 40(1) of the Building Act 2004

¹¹ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71 noted that the tribunal does not have to take into account the Respondent’s subjective considerations.

¹² Building (Code of Ethics for Licensed Building Practitioners) Order 2021

¹³ Lawyers, Engineers, Architects and Accountants, for example

misconduct, and the Board has considered the allegations within such a framework and with reference to superior court decisions. Within this context, in *Dentice v Valuers Registration Board*,¹⁴ Chief Justice Eichelbaum stated the purposes of disciplinary processes are to:

Enforce a high standard of propriety and professional conduct; to ensure that no person unfitted because of his or her conduct should be allowed to practice the profession in question; to protect both the public, and the profession itself, against persons unfit to practice; and to enable the professional calling, as a body, to ensure that the conduct of members conforms to the standards generally expected of them.

Disrepute

[19] Conduct which brings or is likely to bring the regime into disrepute is that which may result in the regime being held in low esteem by the public. Examples include:

- criminal convictions¹⁵;
- honest mistakes without deliberate wrongdoing¹⁶;
- provision of false undertakings¹⁷; and
- conduct resulting in an unethical financial gain¹⁸.

[20] The Courts have consistently applied an objective test when considering such conduct.¹⁹ The subjective views of the practitioner, or other parties involved, are irrelevant. The conduct need not have taken place in the course of carrying out or supervising building work.²⁰

Seriousness

[21] The threshold test applies to negligent or incompetent conduct also applies to Code of Ethics breaches and to disreputable conduct, in that the conduct has to be sufficiently serious enough for the Board to make a disciplinary finding.²¹

Conduct Under Investigation

[22] The specific matters under investigation related to the Respondent's failure to engage with the Complainant when issues arose.

[23] The Board noted that the conduct under investigation occurred over a period when the Code of Ethics came into force. As such, only conduct after 22 October 2022 can be taken into consideration. That limitation does not apply to disreputable conduct.

¹⁴ [1992] 1 NZLR 720 at 724

¹⁵ *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519

¹⁶ *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

¹⁷ *Slack, Re* [2012] NZLCDT 40

¹⁸ *Collie v Nursing Council of New Zealand* [2000] NZAR 7

¹⁹ *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

²⁰ *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519

²¹ *Collie v Nursing Council of New Zealand* [2001] NZAR 74

- [24] The Board questioned the Respondent as to why he failed to respond to queries from the Complainant. His evidence was that, at the time, persistent rain prevented the timely completion of roofing work. That, in turn, meant that he was not able to complete multiple jobs in a timely manner and that the pressure of running his business in those circumstances got to him and resulted in mental health issues. As a consequence of those events, he closed his business and is now working as an employee. His current employer gave evidence that the Respondent is a reliable employee and that his work is of high quality.
- [25] Given the background circumstances and the fact that the Code was new, the Board decided that the conduct did not reach the threshold for a finding under either the Code of Ethics or disrepute.

Board Decision

- [26] The Respondent has not committed a disciplinary offence.

Signed and dated this on the 30th day of October 2024.



M Orange
Presiding Member

Section 3 of the Act

This Act has the following purposes:

- (a) *to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—*
- (i) *people who use buildings can do so safely and without endangering their health; and*
 - (ii) *buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and*
 - (iii) *people who use a building can escape from the building if it is on fire; and*
 - (iv) *buildings are designed, constructed, and able to be used in ways that promote sustainable development:*
- (b) *to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code.*