

Before the Building Practitioners Board

	BPB Complaint No. CB25046
Licensed Building Practitioner:	Reece McPherson (the Respondent)
Licence Number:	BP 129265
Licence(s) Held:	Roofing – Concrete or Clay Tile Roof

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:	23 May 2019
Decision Date:	5 July 2019

Board Members Present:

Chris Preston (Presiding)
Richard Merrifield, LBP, Carpentry Site AOP 2
David Fabish, LBP, Carpentry Site AOP 2
Bob Monteith, LBP Carpentry and Site AOP 2

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 not** committed a disciplinary offence under section 317(1)(b) or 317(1)(h) of the Act.

Contents

Introduction	2
Function of Disciplinary Action	2
Evidence	3
Board’s Conclusion and Reasoning	4
Negligence and/or Incompetence	4
Misrepresentation or Outside of Competence	6
Right of Appeal	7

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) breached section 314B of the Act (s 317(1)(h) 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.

[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.”

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 [1992] 1 NZLR 720 at p 724

⁴ [2016] HZHC 2276 at para 164

- [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] In addition to the documentary evidence before the Board heard evidence at the hearing from:
- | | |
|-----------------|-------------|
| Reece McPherson | Respondent |
| [Omitted] | Complainant |
| [Omitted] | Witness |
- [8] The Complainant gave evidence that the replacement of the light weight metal roof with a similar product had taken much longer than it should have and restated in his written complaint that the work was not done to a tradesman standard and that numerous leaks had occurred during the work and eventually needed another trades person to rectify.
- [9] [Omitted] gave evidence that he was the salesperson at the time and was only responsible for the measuring of the roof and that he took no further part in the work.
- [10] The Respondent confirmed and accepted that the work did take longer than it should have, that the work was not up to standard, and that due to financial pressures he could not attend to the issues as he would have liked.
- [11] He gave evidence that he was unable to undertake or supervise the work himself and had engaged [Omitted] who was a qualified but not licenced roofer. He did visit the site on a regular basis but was unable, due to a hand injury, to get up on the roof to look at the work itself.
- [12] The Complainant did not live on site and was away so could not attend site and observe what the respondent did do on site.

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

Board's Conclusion and Reasoning

[13] The Board has decided that the Respondent **has not** :

- (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) breached section 314B of the Act (s 317(1)(h) of the Act)
- and should not be disciplined.

[14] The reasons for the board's decisions follow.

Negligence and/or Incompetence

[15] Negligence and incompetence are not the same. In *Beattie v Far North Council*⁶ Judge McElrea noted:

[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.

[16] 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*⁷ test of negligence which has been adopted by the New Zealand Courts⁸.

[17] 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*⁹ it was stated as "*an inability to do the job*".

[18] The New Zealand Courts have stated that assessment of negligence and/or incompetence in a disciplinary context is a two-stage test¹⁰. 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.

[19] 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 Act¹¹. 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

⁶ Judge McElrea, DC Whangarei, CIV-2011-088-313

⁷ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁸ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

⁹ *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

¹⁰ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

¹¹ *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

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 practitioner¹².

[20] 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*
 - (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.*

[21] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹³ and be carried out in accordance with a building consent¹⁴. 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.

[22] Turning to seriousness in *Collie v Nursing Council of New Zealand*¹⁵ 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.

[23] The Building work was a like for like replacement of a long run lite weight roof. There was no Building consent, and this was covered under Schedule One of the Building Act 2004.

¹² *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

¹³ Section 17 of the Building Act 2004

¹⁴ Section 40(1) of the Building Act 2004

¹⁵ [2001] NZAR 74

- [24] Under Schedule One of the Act the re-roof did not require a building consent. As such it was not restricted building work and a Licensed Building Practitioner did not have to undertake the work.
- [25] In this case the [Omitted] who was a qualified (but not licensed) roofer did the work.
- [26] The Respondent, due to injury to his hand, took no part in doing the work or supervising it and therefore was not responsible for the poor workmanship.
- [27] If the Respondent had done or supervised the work, even under Schedule One, then the ground for discipline may have been upheld and the Respondent needs to keep this in mind for the future. Schedule One work does not provide automatic protection from discipline if a licensed building practitioner (LBP) has performed the building work to a poor standard.

Misrepresentation or Outside of Competence

- [28] There are two types of disciplinary offence under s 314B. The first relates to representations as to competence (314(a)). The second relates to carrying out or supervising building work outside of a licensed person's competence (s 314(b)).
- [29] The matter before the Board relates to an allegation that the Respondent has worked outside of his competence. Section 314B(b) of the Act provides:

A licensed building practitioner must—

(b) carry out or supervise building work only within his or her competence.

- [30] In the context of the Act and the disciplinary charge under section 317(1)(h) and 314B(b) a licensed building practitioner must only work within their individual competence. In this respect it should be noted that if they hold a class of licence for the building work they are undertaking but are not able to successfully or efficiently complete the building work then it may be that they are working outside of their competence. Such a situation could occur, for example, where a person holding a carpentry licence who has only ever built simple single level dwellings unsuccessfully undertakes a complex multi-level build. Likewise if a licensed building practitioner undertakes work outside of their licence class¹⁶ then they can be found to have worked outside of their competence if they do not have the requisite skill set, knowledge base or experience especially if the building work is noncompliant or is in some way deficient.
- [31] The Respondent was also of the view that his licence, Roofing: Area of practice Concrete or Tile Roof, allowed him to do all types of roofing.
- [32] The Respondent's view and assumption is incorrect. There are seven areas of practice as regards roofing. A licensed building practitioner who holds a licence in an

¹⁶ Note that to carry out restricted building work outside of a licensed building practitioners licence class is a disciplinary offence under s 317(1)(c) of the Act.

area of practice can work within that area of practice but not within the others. The general rule that they must only undertake work in the area they are competent to undertake also applies. The granting of an area of practice is recognition of the licensed building practitioner's competence in that area of practice. The inverse also applies. If they do not hold the area of practice licence for other forms of roofing work then they are not deemed to be competent in it and, if it is restricted building work, they cannot carry out or supervise it.

- [33] However, as the Respondent did not undertake the work the ground for discipline was not upheld.

Right of Appeal

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

Signed and dated this 5th day of July 2019



Chris Preston
Presiding Member

ⁱ **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.