

Before the Building Practitioners Board

	BPB Complaint No. CB25082
Licensed Building Practitioner:	Adam Shepherd (the Respondent)
Licence Number:	BP 114742
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	Tauranga
Hearing Type:	In Person by Teleconference
Hearing Date:	31 July 2019
Decision Date:	15 August 2019

Board Members Present:

Richard Merrifield, LBP, Carpentry Site AOP 2 (Presiding)
Mel Orange, Legal Member
Bob Monteith, LBP Carpentry and Site AOP 2
Faye Pearson-Green, LBP Design 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.

Contents

Introduction.....	2
Function of Disciplinary Action.....	2
Evidence.....	3
Board’s Conclusion and Reasoning.....	4

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 offence the Board resolved to investigate was that the Respondent 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 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.

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

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.
- [7] In this case the Board decided that no further evidence was required. If a Respondent provides further evidence or submissions the Board takes them into account. If they request an in-person hearing this is given consideration.
- [8] The Respondent asked to be heard. A telephone conference was arranged.
- [9] The Respondent was engaged to complete the foundations on three new residential dwellings that were being built under building consents. The Respondent's building work was completed in or about September 2018. The work included restricted building work for which a record of work is required. One was provided following a complainant being made on 9 March 2019.
- [10] The main contractor complained that the Respondent had failed to provide records of work. Demands had been made and the Complainant alleged the records of work were withheld as a result of payment issues over extras.
- [11] The Respondent provided a written response noting that the records of work had, since the complaint was made, been submitted to the Whanganui Council. He also noted that he had been asked to complete records of work for work that he had not carried out or supervised.
- [12] Prior to the hearing the Respondent provided the Board with medical records relating to a condition he was suffering with at the time the restricted building work was completed.
- [13] At the hearing the Respondent submitted that there were good reasons for his not providing a record of work on completion. He noted that, firstly, he did not supervise any restricted building work. He noted that other licensed building practitioners were on site and that they were also carrying out or supervising restricted building work. It was not clear what the restricted building work was that the Respondent carried out as his evidence as to the extent of his work changed during questioning. He did, however, accept that he did carry out a limited amount of restricted building work.

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

- [14] The Respondent also claimed that he was being instructed in a new system and that he was therefore himself under supervision.
- [15] The Respondent noted it was unclear to him, when the work came to an end in or about September or October, whether he would be returning to carry out further restricted building. He submitted that his involvement did not come to an end until 26 November 2018 when he received an email stating he was no longer required.
- [16] Finally, the Respondent gave evidence that as a result of a medical condition he was suffering at the time and medication that he was taking he was not able to provide a record of work. The Respondent called evidence from an employee who corroborated his submission.

Board's Conclusion and Reasoning

- [17] The Board has decided that the Respondent **has not** 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.
- [18] The Board has reached this decision on the basis that it has accepted that the Respondent did have good reason for not providing. That good reason related to his medical condition at the time.
- [19] 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 work⁶.
- [20] 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.
- [21] The Board discussed issues with regard to records of work in its decision C2-01170⁷ 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.
- [22] 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-

⁶ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

⁷ *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

builder). Each and every licensed building practitioner who carries out restricted building work must provide a record of work.

- [23] The use of the word “each” makes it clear that every licensed building practitioner who carries out restricted building work has to complete a record of work for the work they did.
- [24] It must also be noted that 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.
- [25] 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 oversight of the work.
- [26] Given the above the Board does not accept the Respondent’s submission that he was being supervised.
- [27] Turing to completion 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. In this instance the Board accepts that completion occurred when the Respondent was advised he would not be returning to the site which was in late November 2018. That was when the record of work was due. One was not provided.
- [29] The Respondent stated that he did not provide a record of work at that point in time because what was being requested was a record for more than he had carried out.
- [30] The Board does not see this as an impediment. The Respondent knew what he had completed. There was, therefore, no reason why the Respondent could not have simply provided a record of work for what he had done. This is what the Respondent eventually did but he only did it once a complaint had been made. On this basis the basic elements of the offence have been made out in that the Respondent did not provide a record a record of work on completion.
- [31] 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.

- [32] The Respondent submitted that he had a good reason being his medical condition at the time. The Respondent's medical practitioner described his condition at the time as a "brain fog". The condition was noted as continuing for a period beyond the time of completion.
- [33] The Board has, on this occasion, decided that the Respondent's medical condition was affecting his mental health and that on this basis he had a good reason.
- [34] The Respondent is, however, cautioned to be more vigilant in his provision of records of work in the future. It was noted from his correspondence with the Board that he did not have a good grasp of his obligations. He is commended to obtain and read the Ministry of Business Innovations and Employments' s (MBIE) Regulatory Handbook which is available for download at <https://www.building.govt.nz/about-building-performance/news-and-updates/codewords/codewords-issue-85/the-lbp-handbook/>
- [35] The Board would also strongly recommend that the Respondent obtain and read the Board's Supervision Practice Note which is available at <https://www.lbp.govt.nz/for-lbps/lbp-practice-notes/>

Signed and dated this 15th day of August 2019



Richard Merrifield
Presiding Member