

## Before the Building Practitioners Board

	BPB Complaint No. 26396
Licensed Building Practitioner:	Daniel Scott Johnson (the Respondent)
Licence Number:	BP132344
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	by audio-visual link
Hearing Type:	In Person
Hearing and Decision Date:	28 August 2024

#### Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)  
Mrs F Pearson-Green, Deputy Chair, LBP, Design AoP 2  
Mr G Anderson, LBP, Carpentry and Site AoP 2

#### Appearances:

N Graham for Mr Johnson  
M Parker for Mr [OMITTED]

#### 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.

**Contents**

**Summary**..... 2

**The Charges** ..... 3

**Consolidation**..... 3

**Evidence**..... 3

**Negligence or Incompetence** ..... 5

    Has the Respondent departed from an acceptable standard of conduct? ..... 6

    Has the Respondent been negligent or incompetent? ..... 7

**Contrary to a Building Consent**..... 7

    Has the Respondent breached section 317(1)(d) of the Act?..... 8

**Failure to Provide a Record of Work** ..... 8

    Did the Respondent carry out or supervise restricted building work?..... 8

    Was the restricted building work complete?..... 9

    Did the Respondent fail to provide a record of work? ..... 9

**Board Decisions** ..... 10

**Summary**

- [1] The Respondent supervised restricted building work in relation to a new residential dwelling as a subcontractor to the main contractor. The work was mostly complete when a dispute arose between the owner and the main contractor, which prevented full completion. The Respondent’s work, which had been inspected and passed by the Building Consent Authority (BCA) during the build, was re-inspected some twelve months after the Respondent’s involvement in it. The BCA, on the basis of that re-inspection, issued a notice to fix (NTF). The NTF stipulated that the roofing was to be removed and replaced because of compliance issues. The NTF also identified issues with the installation of flashings and windows that the Respondent had supervised. By the time the hearing took place, the NTF had been withdrawn and replaced. The replacement NTF did not require the removal of all the cladding. Some compliance issues with the cladding did, however, remain. The Board’s decision, as regards the remaining compliance issues, was that those issues did not reach the threshold for the Board to take disciplinary action under either section 317(1)(b) or (d) of the Act.
- [2] The Board also investigated whether the Respondent had failed to provide a record of work on completion of restricted building work. The Board decided that because the restricted building work was ongoing, completion had not occurred. Accordingly, it did not make a finding under section 317(1)(da)(ii) of the Act that the Respondent had breached section 88(1) of the Act.

### The Charges

- [3] 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.<sup>1</sup>
- [4] In this matter, the disciplinary charges the Board resolved to further investigate<sup>2</sup> were that the Respondent may, in relation to building work at [OMITTED], Dunedin, have:
- (a) carried out or supervised building work in a negligent or incompetent manner contrary to section 317(1)(b) of the Act;
  - (b) carried out or supervised building 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 or supervise, or has carried out 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.
- [5] The Board gave notice that, in further investigating the Respondent's conduct under section 317(1)(b) and (d) of the Act, it would be inquiring into framing, roofing, flashings and window installation issues identified in a Notice to Fix dated 7 July 2023 and the associated failed inspection dated 7 July 2023.

### Consolidation

- [6] The Board may, under Regulation 13, consolidate two or more complaints into one hearing but only if the complaints are, in the opinion of the Board, about substantially the same subject matter and the complainant and the licensed building practitioner in respect of each complaint agree to the consolidation.
- [7] This matter was consolidated with a related complaint about Mr [OMITTED], [OMITTED], complaint number [OMITTED].

### Evidence

- [8] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>3</sup>. 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.

---

<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

- [9] The Respondent's company was subcontracted to complete carpentry work on a new residential build. As a result of a contractual dispute, the full scope of the intended building work was not completed. When the Respondent's involvement in the build came to an end, the build had been wrapped and windows and hit flashings had been installed. Mr [OMITTED] and his team took over at that point and installed cladding.
- [10] The Respondent supervised the restricted building work that his company had subcontracted to complete. He had a team of builders, including qualified carpenters, on site carrying out the building work. He stated that he attended the site two to three times a week, that he would spend between half an hour to an hour on the site each time, and that he would check the work. The Respondent called for the BCA inspections associated with the work that he had supervised.
- [11] During construction, inspections were carried out by the Building Consent Authority (BCA) and were passed. That allowed the build to continue through its various stages. Of note in this respect is that the compliance issues noted in the 7 July 2023 inspection and the first NTF were not identified at the earlier inspections.
- [12] A Final Inspection was undertaken on 8 December 2022. Only minor issues were noted. A Building Control Officer (BCO) from the BCA gave evidence at the hearing that, when the 8 December Inspection was completed, scaffolding had been removed and, as such, it was not possible to complete a close-up inspection. A further check of the building work, when scaffolding had been reinstated, allowed for a closer inspection of the building work. This resulted in the failed 7 July 2023 inspection and the first NTF.
- [13] At the hearing, the Board was provided with a letter from the Dunedin City Council (the BCA) dated 26 August 2024. The letter noted that the 7 July 2023 NTF had been cancelled, and a new NTF had been issued. The letter stated:
- The new notice requires the roof flashings and all cladding systems to be installed as per the approved building consent a BA-[OMITTED] and the manufacturer's specifications.*
- [14] This contrasted with the original NTF, which stated:
- Remove roof and cladding systems to the reinstalled as per the approved building consent a BA-[OMITTED] and manufacturers specifications.*
- [15] The BCO gave evidence that the replacement NTF resulted from further inquiries with the Respondent and others involved in the build, the receipt of further evidence that indicated there were reasonable grounds to be satisfied that the building work was compliant and discussions about a pathway to compliance.
- [16] The Board was also provided with email correspondence from the Dunedin City Council dated 26 August 2024. It contained an itemised list of issues to be addressed under the replacement NTF to comply with the Building Code (the pathway to

compliance noted above). The BCO confirmed that not all of the issues identified at the 7 July 2023 inspection were now relevant.

- [17] The Board proceeded with its investigations on the basis that they would be limited to the replacement NTF and the 26 August 2024 list of issues. In terms of the Respondent, his involvement in those issues related to supervising the installation of windows, hit flashings, roofing and associated flashings. The noted issues in the 26 August email were:

*Cladding:*

- *Stop ends on head flashings have not been installed as per approved drawings or manufacturer specifications.*
- *WANZ bar to be installed to large window in the master bedroom (the sill of the window is sagging). Window manufacture to assess the large window frame and decide on repair or replace.*

*Roofing:*

- *Eave flashing is to be installed on the lean-to roof as it is located in a very high wind zone.*
- *New barge flashings are to be installed at the east end once the metal barges have been extended to allow the cladding to run past.*
- *Apron flashing junction at the east end of the lean-to is insufficient, the weather board is too high, and the upstand is too low.*
- *Roofing iron overhangs on the lean are to be checked (50 mm minimum required).*
- *Apron flashing junction west end of lean-to is insufficient as Linea weather board internal corner is exposed and apron flashing junction is incorrectly installed.*

- [18] Counsel for the Respondent submitted that the remaining issues were either incomplete building work or were minor in nature and did not reach the threshold for disciplinary action. Additionally, with respect to a window that was alleged to have not been installed in a compliant manner, it was submitted that the cause of the issues raised had not been established.

### **Negligence or Incompetence**

- [19] To find that the Respondent was negligent, the Board needs to determine, on the balance of probabilities,<sup>4</sup> 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*<sup>5</sup> test of negligence.<sup>6</sup> To

---

<sup>4</sup> *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.

<sup>5</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

<sup>6</sup> 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)

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.<sup>7</sup> 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.<sup>8</sup> If it does not, then a disciplinary finding cannot be made.

Has the Respondent departed from an acceptable standard of conduct?

[20] When considering what an acceptable standard is, the Board must consider the purpose of the Building Act<sup>i</sup> as well as the requirement that all building work must comply with the Building Code<sup>9</sup> and any building consent issued.<sup>10</sup> The test is an objective one.<sup>11</sup>

[21] As noted, the Respondent's role was as the supervisor of building work. Supervise is defined in section 7<sup>12</sup> of the Act. The definition states:

*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.*

[22] The Board has previously noted that the level of supervision required will depend on a number of circumstances, but that ultimately, the Board also needs to consider whether the work met the requirements of the building consent and the Building Code and, if not, the level of non-compliance.

[23] Looking at the issues raised in the replacement NTF and the associated list, the Board was satisfied that whilst there was some non-compliance in relation to the roof, the issues did not reach the threshold for disciplinary action. In coming to this decision, the Board has noted that the overall seriousness of the matters under

---

<sup>7</sup> 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”

<sup>8</sup> *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”.

<sup>9</sup> Section 17 of the Building Act 2004

<sup>10</sup> Section 40(1) of the Building Act 2004

<sup>11</sup> *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.

<sup>12</sup> 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.*

investigation had significantly decreased between the first NTF and the replacement NTF. In this respect, had the issues remained as stated in the first NTF, which required the replacement of the roof cladding that was installed under the Respondent's supervision, then the Board's decision might well have been different.

[24] Whilst the Board will not be taking any disciplinary action under section 317(1)(b) of the Act, it does caution the Respondent as regards his supervision processes. The Board noted that the Respondent's checks of the building work that had been completed under his supervision had not identified the issues that were identified by the BCA. Further, whilst the Respondent stated that the BCA had passed inspections during the build, a BCA might not always get it right when they conduct inspections, and compliance remains an open question until such time as a Code Compliance Certificate is issued.

[25] In terms of supervision obligations, the Ministry of Business Innovation and Employment has issued guidance documentation that the Respondent should consult. He should note that while the courts have not considered supervision in the context of the Building Act, they have looked at it in relation to the Electricity Act 1992,<sup>13</sup> where the definition of supervision is similar. 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."*

#### Has the Respondent been negligent or incompetent?

[26] The Respondent **has not** supervised building work in a negligent or incompetent manner.

#### **Contrary to a Building Consent**

[27] Building consents provide detailed plans and specifications for building work. They are issued by Territorial or Building Consent Authorities on the basis that the building work will meet the provisions of the Building Code.<sup>14</sup> Once issued, there is a requirement that the building work be carried out in accordance with the building consent.<sup>15</sup> Building consents also stipulate the number and type of inspections the

---

<sup>13</sup> *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

<sup>14</sup> Section 49 of the Act

<sup>15</sup> Section 40 of the Act

issuing authority will carry out during the build.<sup>16</sup> Inspections ensure independent verification that the building consent is being complied with.

- [28] If building work departs from the building consent issued, the Board can find that a disciplinary offence under section 317(1)(d) of the Act has been committed. The Board does not have to find that departure was deliberate or a result of negligent conduct.<sup>17</sup> The Board does, however, consider that the seriousness of the conduct under investigation does have to be taken into account. As such, even if the Respondent's building work departed from the building consent, the Board must also decide if the conduct fell seriously short of expected standards.<sup>18</sup> If it does not, then a disciplinary finding cannot be made.
- [29] For the same reasons that the Board has found that the Respondent has not committed a disciplinary offence under section 317(1)(b) of the Act, the Board finds that the Respondent has not committed a disciplinary offence under section 317(1)(d) of the Act. In short, whilst there were some departures from the building consent, the departures were not serious enough.

Has the Respondent breached section 317(1)(d) of the Act?

- [30] The Respondent **has not** breached section 317(1)(d) of the Act.

**Failure to Provide a Record of Work**

- [31] A Licensed Building Practitioner must provide a record of work for any restricted building work that they have carried out or supervised to the owner and the Territorial Authority on completion of their restricted building work.<sup>19</sup>
- [32] 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 work<sup>20</sup> unless there is a good reason for it not to be provided.<sup>21</sup>

Did the Respondent carry out or supervise restricted building work?

- [33] The Respondent was engaged to carry out and/or supervise building work on a new residential dwelling under a building consent. His work included building work on the primary structure and/or external moisture management system of a residential dwelling, both of which are restricted building work.<sup>22</sup> It follows that a record of work was required.

---

<sup>16</sup> Section 222 of the Act

<sup>17</sup> *Blewman v Wilkinson* [1979] 2 NZLR 208

<sup>18</sup> *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".

<sup>19</sup> Section 88(1) of the Act.

<sup>20</sup> Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

<sup>21</sup> Section 317(1)(da)(ii) of the Act

<sup>22</sup> Clause 5 of the Building (Definition of Restricted Building Work) Order 2011



Was the restricted building work complete?

- [34] The building work did not have the usual linear progression to completion. Whilst the Respondent's building work initially came to an end in or about November 2022, subsequent events called into question the compliance of that building work. The result was that further restricted building work was required. The Respondent gave evidence and supplied time sheet records that established that his workers returned to the site to complete further work in or about June 2022. A record of work was then provided to the Territory Authority on 21 July 2023.
- [35] The evidence received at the hearing, however, established that, in order to satisfy the replacement NTF requirements, further restricted building work was needed. The Respondent stated that he would be returning to carry out or supervise that work.
- [36] On the basis of the above, the sequence of events indicates that, as of the date of the hearing, the restricted building work was still not complete. On that basis, it is arguable that a further record of work is required and that the previous record of work, which was submitted within a reasonable period of the June 2023 completion date, was a partial record because the restricted building work has yet to be completed. As such, the board has decided that the respondent has not breached section 317(1)(da)(ii) of the Act.
- [37] The Board makes two comments regarding regards records of work and the Respondent's practices in relation to them. Firstly, whilst it may be arguable that the provision of a record of work to an agent satisfies the requirement of providing it to the owner, caution should be exercised over this practice. The statutory requirement to provide a record of work could be defeated if records of work were provided to an agent who then withholds them. Further, providing a record of work to the owner or their agent and not to the Territory Authority does not satisfy the requirements of section 88 of the Act. In *Hanif* [2019] BPB 25132, however, the Board decided that the provisions of section 88(1) of the Act would have been satisfied when a record of work was provided to the Territorial Authority but not the owner in a timely manner because the record of work is then in the public domain. As such, the best course of action is to provide it to the Territorial Authority as well as to the agent or owner.
- [38] Secondly, the Respondent should note that when a building contract comes to an end and it is apparent that the LBP will not be able to carry out any further restricted building work that completion, for the purposes of section 88(1) of the Act, will have occurred and a record of work will be due. Again, if a contract comes to a premature end, the best course of action is to immediately provide a record of work to the Territory Authority in accordance with *Hanif*.

Did the Respondent fail to provide a record of work?

- [39] The respondent **has not** failed to provide a record of work on completion of restricted building work.

[40] The Respondent is reminded that once all remedial work is complete, a record of work should be provided for all of the restricted building work that he has carried out or supervised.

**Board Decisions**

[41] The Respondent has not breached sections 317(1)(b), (d) or (da)(ii) of the Act.

Signed and dated this 9<sup>th</sup> day of October 2024.



**Mr M Orange**  
Presiding Member

---

**<sup>i</sup> 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.*