

Before the Building Practitioners Board

	BPB Complaint No. CB25517
Licensed Building Practitioner:	Shaun Hall (the Respondent)
Licence Number:	BP 125055
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 Date:	4 May 2022
Decision Date:	1 June 2022

Board Members Present:

Mr M Orange, Deputy Chair, Barrister (Presiding)
Mr C Preston, Chair
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 Hearing

[2] The Board, on receiving a Registrar’s Report in respect of the matter, reviewed the file and decided to deal with it by way of a Draft Decision.

[3] The Respondent disputed the findings in the Draft Decision and sought a hearing. The Draft Decision was set aside, and a hearing was scheduled.

The Charges

[4] 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 offence the Board resolved to investigate was that the Respondent may have 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

[5] 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

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

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.

- [6] 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.”

Inquiry Process

- [7] 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.
- [8] 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.

Evidence

- [9] 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.
- [10] 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.
- [11] In addition to the documentary evidence before the Board heard evidence at the hearing from the Complainant and the Respondent.
- [12] The Respondent was engaged to carry out building work on an alteration and extension to an existing dwelling under a building consent. The building work

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

included restricted building work for which a record of work must be provided on completion. The Respondent's building work started on or about 15 January 2018 and came to an end on or about 25 July 2018 when the Respondent was removed from the building site.

[13] The Complainant noted that requests had been made for the record of work and expressed an opinion that it was being withheld to prevent an application for a Code Compliance Certificate from being successful. A complaint was made to the Board on 14 May 2020.

[14] The Respondent provided a copy of correspondence to the Complainant dated 16 August 2018. The correspondence stated:

5/I will provide record of works for foundations slab, ...

9/Records of works from builder, this is something you may have to discuss with your new LBP as I have been advised my name should not be on any works I have not done myself of fully supervised. Your new LBP will either have to sign off on my work or will have to supervise his.

[15] Central to the Board's investigations at the hearing was clarification of the Respondent's statement noted as number 9 above.

[16] At the hearing, the Complainant noted that a complaint had been made to assist in him obtaining a Code Compliance Certificate.

[17] The Respondent set out that he was owed a lot of money from the job and that the building work was not complete when he left the site. He maintained that he provided a record of work for what he had done and that his comment related to any further work that was to be completed. In essence, he was putting forward that if he was to provide a record of work for any future work, he would either have to carry out that work or supervise it. He was not refusing to provide a record of work for restricted building work that had been completed, and his record of work dated 14 August 2018 did cover what had been done. The record of work included a notation under "other" that stated:

Connections to front upper level deck posts need to be placed.

Upper/roof framing around chimney need to be finished.

[18] At the hearing, the Respondent confirmed that the above was the work that remained to be completed.

[19] With regard to the timing of the record of work, the Respondent state that he provided it when he became aware that other builders were completing the project. He also stated that he advised Professional Building Consultants that he was no longer involved in the building work.

[20] The Board, at the end of the in-person hearing, issued a Minute allowing the Respondent to file further evidence.

- [21] On 5 May 2021, the Respondent provided a further copy of his email dated 16 August 2018 to the owner. The email included attachments, one of which was the Respondent's record of work dated 14 August 2018.

Board's Conclusion and Reasoning

- [22] 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 not** be disciplined.
- [23] 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.
- [24] 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.
- [25] 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.
- [26] 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-builder). Each and every licensed building practitioner who carries out restricted building work must provide a record of work.
- [27] 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 ...". As was noted by Justice Muir in *Ministry of Business Innovation and Employment v Bell*⁸ "... the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work".
- [28] As to when completion will have occurred is a question of fact in each case.

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

⁸ [2018] NZHC 1662 at para 50

- [29] 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. Completion occurred on or about 25 July 2018, when the Respondent's involvement in the building work came to an end as, after that date, he would not be carrying out or supervising any further restricted building work.
- [30] The evidence shows that the Respondent provided a record of work to the owner on 16 August 2018 and to the Territorial Authority on 18 June 2019. A complaint was made on 14 May 2020, after a record of work had been provided. It appears the complaint was made, and a record of work was requested, to cover restricted building work that the Respondent had not carried out or supervised. As the Respondent did not carry out or supervise that work, he did not have a responsibility to provide one for it.
- [31] Whilst it could be said that the record of work was not provided to the Territorial Authority in a timely manner, the Board notes that the complaint was made after the required record of work had been provided and has decided that, in such circumstances, it would be an abuse of process to uphold a complaint. An abuse of process in that it would offend a court's sense of justice and propriety to try a matter in the particular circumstances of the case⁹. The Board makes that decision on the basis that its jurisdiction is a summary jurisdiction. That means that the Board has a degree of flexibility in how it deals with matters and wherein it retains inherent jurisdiction beyond that set out in the enabling legislation¹⁰.

Signed and dated this 1st day of June 2022



Mr M Orange
Presiding Member

⁹ Refer *Fox v Attorney-General* [2002] 3 NZLR 62(CA) and *Beckham v R* [2012] NZCA 603, *Moevao v Department of Labour* [1980] 1 NZLR 464

¹⁰ *Castles v Standards Committee No.* [2013] NZHC 2289, *Orlov v National Standards Committee* [2013] NZHC 1955