

Before the Building Practitioners Board

	BPB Complaint No. CB25831
Licensed Building Practitioner:	Aaron Hooker (the Respondent)
Licence Number:	BP 126798
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
Hearing Date:	6 September 2022
Decision Date:	12 September 2022

Board Members Present:

M Orange, Deputy Chair, Barrister (Presiding)
C Preston, Chair
D Fabish, LBP, Carpentry and Site AoP 2
K Reynolds, Construction Manager

Appearances

D MacRae for the Respondent

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 Board found that the Respondent's conduct did not reach the threshold for it to make a finding that he had committed a disciplinary offence.

The Board

- [2] The Board is a statutory body established under the Building Act.¹ Its functions include receiving, investigating, and hearing complaints about, and to inquire into the conduct of, and discipline, licensed building practitioners in accordance with subpart 2 of the Act. It does not have any power to deal with or resolve disputes.

The Charges

- [3] The hearing resulted from a complaint about the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations² to hold a hearing in relation to building work at [OMITTED], Tauranga.
- [4] The Board gave notice that it would further investigate whether the Respondent may have carried out or supervised building work or building inspection work in a negligent or incompetent manner contrary to section 317(1)(b) of the Act, as detailed in the list of issues from the Complainant and the photographs annexed (Document 2.1, Pages 35 -73 of the Board's file) and the Tauranga City Building Consent Failed inspections - Framing / Pre-Wrap & Post Wrap / Cavity & Preline Building dated 22 May, 8 June, 9 June, 16 June & 17 June 2020.

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 Section 341 of the Act.

² 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*³ and in New Zealand in *Dentice v Valuers Registration Board*⁴.

- [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*,⁵ 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.”

- [7] In a similar vein, the Board’s investigation and hearing process is not designed to address every issue that is raised in a complaint or by a complainant. The disciplinary scheme under the Act and Complaint’s Regulations focuses on serious conduct that warrants investigation and, if upheld, disciplinary action. Focusing on serious conduct is consistent with decisions made in the New Zealand courts in relation to the conduct of licensed persons⁶:

... the statutory test is not met by mere professional incompetence or by deficiencies in the practice of the profession. Something more is required. It includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse.

- [8] Finally, 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. Those grounds do not include contractual breaches other than when the conduct reaches the high threshold for consideration under section 317(1)(i) of the Act, which deals with disrepute.
- [9] The above commentary on the limitations of the disciplinary process is important to note as, on the basis of it, the Board’s inquiries, and this decision, focus on and deal with the serious conduct complained about.

Inquiry Process

- [10] 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.

³ *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

⁴ [1992] 1 NZLR 720 at p 724

⁵ [2016] HZHC 2276 at para 164

⁶ *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200

- [11] 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

- [12] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed.⁷ Under section 322 of the Act, the Board has relaxed rules of evidence that allow it to receive evidence that may not be admissible in a court of law.
- [13] 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.
- [14] In addition to the documentary evidence before the Board heard evidence at the hearing from:
- | | |
|--------------|---------------------------|
| Aaron Hooker | Respondent |
| [OMITTED] | Complainant |
| [OMITTED] | Father of the Complainant |
| [OMITTED] | Builder |
- [15] The Board summoned further witnesses who did not attend. [OMITTED], [OMITTED] and [OMITTED] were contacted. They did not respond. The Board was informed, after the hearing, that [OMITTED], a Building Control Officer from the Tauranga City Council, had passed away the weekend prior to the hearing. The Board's sympathies are extended to him and his family.
- [16] The Board decided, given the nature of the matters before it and the additional written evidence that had been filed in advance of the hearing, that the hearing could proceed without the attendance of all of the summoned witnesses.
- [17] The matters the Board gave notice that it would further investigate were those in a list of items provided by the Complainant and in a series of Council Inspections. The list of issues identified by the Complainant was extensive and it included items that related to other trades or were contractual in nature and which the Board could not further investigate. In the lead-up to the hearing, the Board received evidence from both the Complainant and the Respondent which provide further clarification of the matters that were before it. The Board's investigations focused on the issues that may have come within the definition of negligence.
- [18] The building work related to an alteration and addition to an existing residential dwelling. The Respondent, at the time, had three or four jobs on the go and had four

⁷ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

workers on-site who were a mix of qualified builders and apprentices, most of whom had worked for him for a reasonable period of time. The Respondent was the supervising Licensed Building Practitioner. One of the qualified carpenters was appointed as the one site foreman.

[19] The Respondent outlined his supervision process. He noted that he would attend site once or twice a week and that he would do a walk-through of the build with the builders and would discuss the project with them but that he mainly dealt with his foreman. He would carry out on-site checks of the building work prior to inspections.

[20] The issues the Board further investigated were:

- (a) Installation of a metal corner bracket in a shower – the Respondent stated that it was missed but that the plasterboard fixings were removed and the metal corner was slid in. The Complainant gave evidence that she believed that the plasterboard had been removed and replaced.
- (b) Plasterboard joints over windows – the Respondent accepted that the joints were not correct in that they should not have been in line with the edges of the windows.
- (c) Dip in the ceiling – the Respondent was not able to assist. He stated he had missed it and was not sure why it had occurred.
- (d) Door jambs were poorly cut at floor level – the evidence was that it was most likely work that had been completed by the flooring installers.
- (e) Cavity slider – existing reused jambs were oversized and had to be cut down to match.
- (f) Missing louvre – a gable end louvre provisioned for in the plans has not been installed. The Respondent stated it had not been provided by the Complainants. Evidence was received that one of the Respondent's workers offered to provide one but that the Respondent would not allow him to install it as he had concerns over future liability. The Respondent stated that the louvre could still be installed by cutting out a hole for it in the weatherboards.
- (g) Internal weatherboard flashings not cut to length – the Respondent accepted that they should have been cut to length before the weatherboards were installed but noted that they could still be ground or cut to the correct length.
- (h) Failed inspection item – timber post – the Respondent stated that the engineer had provided instructions but that the minor variation had not been submitted.

- (i) Failed inspections – general – the Respondent gave evidence that some of the inspections were booked up to four weeks in advance, and, on occasions, the related building work was not ready for an inspection.
 - (j) Internal steps – the steps were not installed in a compliant manner in that the framing for them was not glued or affixed to structural elements behind the plasterboard and was not level. The evidence heard was that the work was carried out after the Respondent’s involvement in the building work had come to an end. He had sent an employee back to carry out two remedial items of work but had not instructed him to do the stairs.
- [21] It was submitted that the Respondent was not given notice of remedial issues and that he would have returned and attended to them if he had been. Further, he submitted that the work was not complete when his engagement finished and that some of the items complained about would have been attended to if the engagement had continued.

Board’s Conclusion and Reasoning

- [22] The Board has decided that the Respondent **has not** carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act) and **should not** be disciplined.
- [23] Negligence and incompetence are not the same. In *Beattie v Far North Council*⁸ 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.*
- [24] 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*⁹ test of negligence which has been adopted by the New Zealand Courts.¹⁰
- [25] 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*,¹¹ it was stated as “*an inability to do the job*”.
- [26] The New Zealand Courts have stated that an assessment of negligence and/or incompetence in a disciplinary context is a two-stage test¹². The first is for the Board

⁸ Judge McElrea, DC Whangarei, CIV-2011-088-313

⁹ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

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

¹¹ *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

¹² *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

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.

[27] 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 Act¹³. 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 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 practitioner¹⁴.

[28] The Board notes that the purposes of the Act. The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹⁵ and be carried out in accordance with a building consent¹⁶. 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.

[29] Turning to seriousness in *Collie v Nursing Council of New Zealand*,¹⁷ 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.

[30] In *Pillai v Messiter (No 2)*¹⁸ the Court of Appeal stated:

... the statutory test is not met by mere professional incompetence or by deficiencies in the practice of the profession. Something more is required. It includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse.

[31] The Respondent did not carry out the building work. He did supervise it. As such, the Board's considerations need to relate to the adequacy of that supervision.

¹³ *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

¹⁴ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

¹⁵ Section 17 of the Building Act 2004

¹⁶ Section 40(1) of the Building Act 2004

¹⁷ [2001] NZAR 74

¹⁸ (1989) 16 NSWLR 197 (CA) at 200

[32] Supervise is defined in section 7¹⁹ 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.

[33] In C2-01143, the Board also discussed the levels of supervision it considers would be necessary to fulfil a licensed building practitioner's obligations noting that the level of supervision required will depend on a number of circumstances, including:

(a) the type and complexity of the building work to be supervised;

(b) the experience of the person being supervised;

(c) the supervisor's experience in working with the person being supervised and their confidence in their abilities;

(d) the number of persons or projects being supervised; and

(e) the geographic spread of the work being supervised.

[34] The Board also needs to consider whether the work met the requirements of the building code and, if not, the level of non-compliance.

[35] Supervision in the context of the Building Act has not yet been considered by the courts. It has, however, been considered in relation to Electricity Act 1992²⁰. The definition of supervision in that Act is consistent with the definition in the Building Act, and as such, the comments of the court are instructive. 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."

¹⁹ 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.

²⁰ *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

- [36] In this matter, the Board considered that the Respondent's supervision fell below the standards expected of a Licensed Building Practitioner but that the failings were not serious enough to warrant a disciplinary finding. In making that finding, the Board noted that there were areas of non-compliance or where the quality of the building work was not what would be expected of a Licensed Building Practitioner. However, when looking at the degree of non-compliance or the quality failings, the Board considered that they were not the level where the Respondent should be disciplined.
- [37] The Respondent is, however, cautioned as regards his future conduct. Supervision is a critical component of the building process. It requires engagement in the building process and an awareness of what is occurring on site and when. Non-compliance and quality issues should be identified in a timely manner and dealt with as and when they occur. In this respect, the Board noted that there were items, such as the non-compliant installation of plasterboard, that should have been identified and dealt with as the build progressed.

Signed and dated this 22nd day of September 2022

A handwritten signature in black ink, appearing to be 'M Orange', with a stylized, flowing script.

Mr M Orange
Presiding Member