

## Before the Building Practitioners Board

	BPB Complaint No. CB26499
Licensed Building Practitioner:	Joshua Parish (the Respondent)
Licence Number:	BP 132922
Licence(s) Held:	Foundations – Concrete foundations wall and concrete slab-on-ground

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### Decision of the Board in Respect of the Conduct of a Licensed Building Practitioner Under section 315 of the Building Act 2004

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Complaint or Board Inquiry	Complaint
Hearing Location	by audiovisual link
Hearing Type:	In Person
Hearing and Decision Date:	27 September 2024
Board Members Present:	
	Mr M Orange, Chair, Barrister (Presiding)
	Mrs F Pearson-Green, Deputy Chair, LBP, Design AoP 2
	Mr P Thompson, LBP, Carpentry and Site AoP 3, Quantity Surveyor

#### 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** committed a disciplinary offence under section 317(1)(b) of the Act.

The Respondent is censured and ordered to pay costs of \$1,500. A record of the disciplinary offending will be recorded on the Public Register for a period of three years.

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## Summary

- [1] The Respondent constructed a driveway in a negligent manner. The Board found that he had been negligent because the base for the driveway had not been correctly prepared, the concrete had not been finished to an acceptable standard, and clause E1/VM1 of the Building Code had not been met with regard to the diversion of water away from the sub floor access to the subfloor of the dwelling.
- [2] The negligence was at the lower end of the scale, and there were mitigating factors. As such, the Board decided that it would censure the Respondent. A censure is a public expression of disapproval. The Board also ordered that he pay costs of \$1,500, the Board’s scale amount for an audiovisual hearing. A record of the disciplinary offending will be recorded on the public Register for a period of 3 years.

## 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], have carried out or supervised building work in a negligent or incompetent manner

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<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.

contrary to section 317(1)(b) of the Act, IN THAT, he may have constructed a driveway in a manner that would not meet quality or compliance standards and, in particular:

- (a) the finished levels may have been such that water was not diverted away from the dwelling;
- (b) the base may not have been prepared in accordance with acceptable standards;
- (c) steel reinforcing mesh (Mesh) might not have been placed in accordance with acceptable standards; and
- (d) the finish, curing, and cutting of the concrete may not have met an acceptable standard.

### Evidence

- [5] 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.
- [6] The Respondent was contracted to construct a concrete driveway that replaced an existing driveway. The driveway was on a slope and it needed to manage water run-off. The following photograph shows a general view of the driveway.



- [7] The Respondent prepared the driveway, installed mesh and poured the concrete. When preparing the driveway, the Respondent did not install any new sub-base material. He stated that some of the base was metal and some was clay. A witness who has extensive experience in driveway construction and who viewed the base

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

after the Respondent's work had been removed confirmed that the base was inconsistent.

[8] On the day of the concrete pour, the Respondent had expected two additional persons to be assisting him, one of whom had more experience with driveways than the Respondent had. Those persons let him down, and he had to manage the pour with just one other person assisting. The weather conditions were hot when the pour took place, and the Respondent accepted that given the conditions and the fact that he did not have the persons on-site to assist him that he had expected, he should not have proceeded with the pour.

[9] When pouring the concrete, the Respondent did not use a concrete pump as he could not afford one. He stated that he lifted the mesh as the concrete was placed so that it was embedded in the centre of the concrete. The concrete was finished with a smooth finish. The Respondent had recommended a brushed finish, which the owner did not want. Because of the weather conditions and the lack of additional assistance, the concrete started to cure between pours, leaving visible evidence of this. The following photographs depict the issues with the quality of the finished work.



[10] There were also issues with how the concrete was finished in the area of the sub floor access. The concrete was not formed in a way that would ensure that water was diverted away from the sub floor access



[11] The Respondent accepted that the driveway was not completed to an acceptable standard. He did offer to rectify the issues. The owner did not allow that. The Respondent did the lift the driveway that he had poured.

## Negligence or Incompetence

[12] 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 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

[13] 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>

[14] The Respondent accepted that his work was not up to an acceptable standard, and the Board agreed. The specific areas where the Respondent had departed from an acceptable standard were the preparation of the base, the standard of the finish of the concrete, and the failure to manage surface water. The Board notes, in regards the latter, that the Respondent's building work would not have met the requirements of clause E1/VM1 of the Building Code, which deals with surface water. With regard to the placement of mesh, the Board accepted that the Respondent lifted the mesh as the concrete was placed and that whilst the use of chairs would have been a preferable method of ensuring mesh was embedded in the concrete, the method used was acceptable.

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<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)

<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.

### Was the conduct serious enough

- [15] The conduct was at the lower of the scale. Notwithstanding, the Board decided that the conduct was sufficiently serious and that a disciplinary finding was warranted. In making a decision, the Board noted that the Respondent knew, or ought to have known, that the conditions were not suitable for pouring the concrete with the resources that he had available.

### Has the Respondent been negligent or incompetent

- [16] The Respondent carried out building work in a negligent manner.

### **Penalty, Costs and Publication**

- [17] Having found that one or more of the grounds in section 317 applies, the Board must, under section 318 of the Act<sup>ii</sup>, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.

- [18] The Respondent made submissions at the hearing as regards penalty, costs and publication.

### Penalty

- [19] The Board has the discretion to impose a range of penalties.<sup>iii</sup> Exercising that discretion and determining the appropriate penalty requires that the Board balance various factors, including the seriousness of the conduct and any mitigating or aggravating factors present.<sup>12</sup> It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:<sup>13</sup>

- (a) protection of the public and consideration of the purposes of the Act;<sup>14</sup>
- (b) deterring the Respondent and other Licensed Building Practitioners from similar offending;<sup>15</sup>
- (c) setting and enforcing a high standard of conduct for the industry;<sup>16</sup>
- (d) penalising wrongdoing;<sup>17</sup> and
- (e) rehabilitation (where appropriate).<sup>18</sup>

- [20] Overall, the Board should assess the conduct against the range of penalty options available in section 318 of the Act, reserving the maximum penalty for the worst

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<sup>12</sup> *Ellis v Auckland Standards Committee* 5 [2019] NZHC 1384 at [21]; cited with approval in *National Standards Committee (No1) of the New Zealand Law Society v Gardiner-Hopkins* [2022] NZHC 1709 at [48]

<sup>13</sup> Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

<sup>14</sup> Section 3 Building Act

<sup>15</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

<sup>16</sup> *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

<sup>17</sup> *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>18</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354; *Shousha v A Professional Conduct Committee* [2022] NZHC 1457

cases<sup>19</sup> and applying the least restrictive penalty available for the particular offending.<sup>20</sup> In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty<sup>21</sup> that is consistent with other penalties imposed by the Board for comparable offending.<sup>22</sup>

- [21] In general, when determining the appropriate penalty, the Board adopts a starting point based on the principles outlined above prior to it considering any aggravating and/or mitigating factors present.<sup>23</sup>
- [22] In this matter, the Board adopted a starting point of a modest fine based on the low level of negligence found. The Board accepted that there were mitigating factors. Those included the Respondent's acceptance that the work was not to an acceptable standard, that he had been let down by persons whom he had expected would be able to assist him, and that he did carry out some limited remedial work (the removal of concrete that he had poured). On the basis of that mitigation, the Board reduced the penalty to 1 of a censure. A censure is a public expression of disapproval of conduct. The Board also recommended that the Respondent obtain further experience in the construction of driveways.

### Costs

- [23] Under section 318(4) of the Act, the Board may require the Respondent to pay the costs and expenses of, and incidental to, the inquiry by the Board. The rationale is that other Licensed Building Practitioners should not be left to carry the financial burden of an investigation and hearing.<sup>24</sup>
- [24] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings<sup>25</sup>. The starting point can then be adjusted up or down with regard to the particular circumstances of each case<sup>26</sup>.
- [25] The Board has adopted an approach to costs that uses a scale based on 50% of the average costs of different categories of hearings: simple, moderate and complex. The current matter was simple. Adjustments are then made.
- [26] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$1,500 toward the costs of and incidental to the Board's inquiry. This is the Board's scale amount for a simple matter that has been dealt with at an in-person hearing way of an audiovisual link. It is significantly less than 50% of actual costs.

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<sup>19</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

<sup>20</sup> *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

<sup>21</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

<sup>22</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

<sup>23</sup> In *Lochhead v Ministry of Business Innovation and Employment* 3 November [2016] NZDC 21288 the District Court recommended that the Board adopt the approach set out in the Sentencing Act 2002.

<sup>24</sup> *Collie v Nursing Council of New Zealand* [2001] NZAR 74

<sup>25</sup> *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

<sup>26</sup> *Cooray v The Preliminary Proceedings Committee* HC, Wellington, AP23/94, 14 September 1995, *Macdonald v Professional Conduct Committee*, HC, Auckland, CIV 2009-404-1516, 10 July 2009, *Owen v Wynyard* HC, Auckland, CIV-2009-404-005245, 25 February 2010.

## Publication

- [27] As a consequence of its decision, the Respondent's name and the disciplinary outcomes will be recorded in the public Register maintained as part of the Licensed Building Practitioners' scheme as is required by the Act,<sup>27</sup> and he will be named in this decision, which will be available on the Board's website. The Board is also able, under section 318(5) of the Act, to order further publication.
- [28] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.<sup>28</sup> Further, as a general principle, publication may be required where the Board perceives a need for the public and/or the profession to know of the findings of a disciplinary hearing, and the courts have stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published.<sup>29</sup>
- [29] Based on the above, the Board will not order any publication over and above the record on the Register, the Respondent being named in this decision, and the publication of the decision on the Board's website. The Respondent should note, however, that as the Board has not made any form of suppression order, other entities, such as the media or the Ministry of Business Innovation and Employment, may publish under the principles of open justice reporting.

## **Section 318 Order**

- [30] For the reasons set out above, the Board directs that:
- Penalty:** Pursuant to section 318(1)(d) of the Building Act 2004, the Respondent is censured.
- Costs:** Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$1,500 (GST included) towards the costs of, and incidental to, the inquiry of the Board.
- Publication:** The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with section 301(I)(iii) of the Act.
- In terms of section 318(5) of the Act, the Respondent will be named in this decision, which will be published on the Board's website.**
- [31] The Respondent should note that the Board may, under section 319 of the Act, suspend or cancel a licensed building practitioner's licence if fines or costs imposed as a result of disciplinary action are not paid.

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<sup>27</sup> Refer sections 298, 299 and 301 of the Act

<sup>28</sup> Section 14 of the Act

<sup>29</sup> Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055



## Right of Appeal

[32] The right to appeal Board decisions is provided for in section 330(2) of the Act<sup>iv</sup>.

Signed and dated this 16<sup>th</sup> day of October 2024



**M Orange**  
Presiding Member

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### **<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.*

### **<sup>ii</sup> Section 318 of the Act**

- (1) *In any case to which section 317 applies, the Board may*
  - (a) *do both of the following things:*
    - (i) *cancel the person’s licensing, and direct the Registrar to remove the person’s name from the register; and*
    - (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*
  - (b) *suspend the person’s licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*
  - (c) *restrict the type of building work or building inspection work that the person may carry out or supervise under the person’s licensing class or classes and direct the Registrar to record the restriction in the register:*
  - (d) *order that the person be censured:*
  - (e) *order that the person undertake training specified in the order:*

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- (f) order that the person pay a fine not exceeding \$10,000.
  - (2) The Board may take only one type of action in subsection 1(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).
  - (3) No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.
  - (4) In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.
  - (5) In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit.”

**iii Section 318 Disciplinary Penalties**

- (1) In any case to which section 317 applies, the Board may—
  - (a) do both of the following things:
    - (i) cancel the person’s licensing and direct the Registrar to remove the person’s name from the register; and
    - (ii) order that the person may not apply to be relicensed before the expiry of a specified period:
  - (b) suspend the person’s licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:
  - (c) restrict the type of building work or building inspection work that the person may carry out or supervise under the person’s licensing class or classes and direct the Registrar to record the restriction in the register:
  - (d) order that the person be censured:
  - (e) order that the person undertake training specified in the order:
  - (f) order that the person pay a fine not exceeding \$10,000.
- (2) The Board may take only 1 type of action in subsection (1)(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).
- (3) No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.
- (4) In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.
- (5) In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit.

**iv 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.*