

Before the Building Practitioners Board

	BPB Complaint No. CB25360
Licensed Building Practitioner:	Vimesh Naidu (the Respondent)
Licence Number:	BP 127686
Licence(s) Held:	Design AOP 2

Draft 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 Type:	On the Papers
Draft Decision Date:	2 September 2020

Board Members Present:

Chris Preston, Chair (Presiding)
Mel Orange, Deputy Chair, Legal Member
Bob Monteith, LBP, Carpentry and Site AOP 2
Rob Shao, LBP, Carpentry and Site AOP 1

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.

Contents

Summary of the Board's Final Decision..... 2

The Charges 2

 Regulation 9 Decisions 2

 Disciplinary Offences to be Investigated 3

Draft Decision Process..... 4

Evidence..... 4

Draft Conclusion and Reasoning..... 5

Draft Decision on Penalty, Costs and Publication 11

 Penalty 12

 Costs..... 12

 Publication 13

Draft Section 318 Order 14

Submissions on Draft Decision 14

Request for In-Person Hearing..... 15

Submissions Made..... 15

Final Section 318 Order 15

Right of Appeal 16

Summary of the Board's Final Decision

[1] The Respondent has been negligent in his supervision of a non-licensed person and in relying on the building consent authority to carry out the quality assurance checks required of a licensed designer prior to filing a building consent application. The Respondent is fined \$2,000 and ordered to pay costs of \$1,000.

The Charges

- [2] On 2 September 2020, the Board received a Registrar's Report in respect of a complaint about the conduct of the Respondent.
- [3] Under regulation 10 of the Complaints Regulations the Board must, on receipt of the Registrar's Report, decide whether to proceed no further with the complaint because regulation 9 of the Complaints Regulations applies.
- [4] Having received the report, the Board decided that regulation 9 applied to aspects of the complaint but not to all of the allegations.

Regulation 9 Decisions

[5] The complaint to the Board also contained allegations that the Respondent had conducted himself or herself in a manner that brings, or is likely to bring, the regime

under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act).

- [6] With regard to those allegations, the Board decided that regulation 9(f)(ii) of the Complaints Regulations applied. It provides:

Complaint not warranting further investigation

A complaint does not warrant further investigation if—

- (a) *the investigation of it is—*
(ii) *unnecessary; or*

- [7] In considering whether the investigation of a complaint is necessary, the Board is required to consider the directions of the courts as regards the threshold for matters to be dealt with as a disciplinary matter. In *Collie v Nursing Council of New Zealand*¹ Justice Gendall stated, as regards the threshold for disciplinary matters:

[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.

- [8] Again, in *Pillai v Messiter (No 2)*² 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.

- [9] It is on the basis of the above matters, and the facts as presented in the complaint and response, that the Board has decided that it will not proceed with the allegations of disrepute.

- [10] The Complainant also made an allegation that the Respondent had misrepresented his competence and in doing so had breached section 314B of the Act (s 317(1)(h) of the Act). The Respondent has a Design Area of Practice 2 Licence and, as such, the design work undertaken came within the scope of his licence. Questions of competence have been considered in respect of the charge under section 317(1)(b) of the Act.

Disciplinary Offences to be Investigated

- [11] On the basis of the Registrar's Report the Respondent's conduct that the Board resolved to investigate was that the Respondent had carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act).

¹ [2001] NZAR 74

² (1989) 16 NSWLR 197 (CA) at 200

[12] Under regulation 10 the Board is required to hold a hearing in respect of that matter.

Draft Decision Process

[13] The Board's jurisdiction is that of an inquiry. Complaints are not prosecuted before the Board. Rather, it is for the Board to carry out any further investigation that it considers is necessary prior to it making a decision. In this respect, the Act provides that the Board may regulate its own procedures³. It has what is described as a summary jurisdiction in that the Board has a degree of flexibility in how it deals with matters; it retains an inherent jurisdiction beyond that set out in the enabling legislation⁴. As such, it may depart from its normal procedures if it considers doing so would achieve the purposes of the Act, and it is not contrary to the interests of natural justice to do so.

[14] In this instance, the Board has decided that a formal hearing is not necessary. The Board considers that there is sufficient evidence before it to allow it to make a decision on the papers.

[15] The Board does, however, note that there may be further evidence in the possession of persons involved in the matter or that the Board may not have interpreted the evidence correctly. To that end, this decision is a draft Board decision. The Complainant and the Respondent will be provided with an opportunity to comment on the Board's draft findings and to present further evidence prior to the Board making a final decision. If the Board directs or the Respondent requests an in-person hearing, then one will be scheduled.

Evidence

[16] 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.

[17] The Respondent was engaged to carry out design work for a new residential dwelling. The Respondent subsequently submitted building consent documentation, including a certificate of work signed by him. Following the filing of the building consent application, the Building Consent Authority (BCA) issued a Request for Further Information (RFI). It contained 39 items that required attention. The RFI included requests for detail on how the requirements of the building code would be met including (but not limited to) structural and weathertightness elements, requests for further documentation and updates to drawings, and a greater alignment between the drawings, specification and submitted documentation.

[18] The Complainant, a representative of [Omitted], noted, as part of the complaint:

³ Clause 27 of Schedule 3

⁴ *Castles v Standards Committee No.* [2013] NZHC 2289, *Orlov v National Standards Committee 1* [2013] NZHC 1955

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

[Omitted] provided the reasonable opportunity for Vim (the Respondent) to rectify the matter by responding to the RFI. Vim initially noted the RFI's would be responded to by the week of the 29th of July 2019. Then 2 weeks later having not responded Vim retracted this offer and would not provide any further service.

13. [Omitted] has occurred additional costs by way of a requiring a second Consent processing through council as the original one was now invalid. Additional costs are Council Consent Fees, compensation to the [Omitted] for the delays, additional Engineering, and additional Truss Designs equating to around about \$25,000 including GST.

[19] The Respondent provided a written response to the complaint. In it, he noted that he had been engaged by *[Omitted]* to do a "scheme design" and that:

4. *[Omitted]earlier had made some recommendations to me to use some contract draftees who had approached Sentinel Homes for work however when [Omitted], they had found other opportunities or the fee didn't allow that. I had an informal interview with a draftsman during this time, someone who I knew who has been working in the industry for some time and with good experience. I was to use him on a part-time basis to draft building consent drawings until a time when he could be taken on full-time. The working drawings were completed by the draftsman and I lodged them on the 10th of July.*

[20] The Respondent set out how he responded to the RFI from the BCA and went on to state:

I initially only did an overview review taking into consideration the draftees experience, however upon receiving the RFI's did a thorough review given some council RFI on another project completed by same draftee.

[21] The response went on to deal with matters pertaining to a commercial dispute and the termination of services. The Respondent noted:

14. *a) I acknowledge that I relied on a contracted draftees experience and didn't do a thorough review of the drawings and did an overview check however don't believe that demonstrates that I am incompetent or purposefully negligent.*

Draft Conclusion and Reasoning

[22] The Board has decided that the Respondent **has** carried out or supervised building work or building inspection work in a negligent manner (s 317(1)(b) of the Act) and **should** be disciplined.

[23] The Board's considerations as regards negligence and/or incompetence are in respect of the Respondents design work.

[24] Under the definitions in the Building Act design work forms part of the wider definition of building work and as such, in respect of section 317(1)(b) it comes within the Board's jurisdiction. In this respect, the definition of building work in section 7 of the Act states that it "includes design work (relating to building work) that is design work of a kind declared by the Governor-General by Order in Council to be restricted building work for the purposes of this Act". The Building (Design Work Declared to be Building Work) Order 2007 declared:

3 Design work declared to be building work

- (1) *Design work of the specified kind is building work for the purposes of Part 4 of the Building Act 2004.*
- (2) *Design work of the specified kind means design work (relating to building work) for, or in connection with, the construction or alteration of a building.*

[25] Part 4 of the Act relates to the regulation of building practitioners. The combined effect of the two declarations is that design work applies to building work in general and to restricted building work for the purposes of the licensing regime.

[26] Turning to negligence and incompetence the Board notes that they are not the same. In *Beattie v Far North Council*⁶ 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.

[27] 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, in this case a licensed building practitioner with a design license. This is described as the *Bolam*⁷ test of negligence which has been adopted by the New Zealand Courts⁸.

[28] 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*⁹ it was stated as "*an inability to do the job*".

[29] The New Zealand Courts have stated that assessment of negligence and/or incompetence in a disciplinary context is a two-stage test¹⁰. The first is for the Board to consider whether the practitioner has departed from the acceptable standard of

⁶ Judge McElrea, DC Whangarei, CIV-2011-088-313

⁷ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁸ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

⁹ *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

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

conduct of a professional. The second is to consider whether the departure is significant enough to warrant a disciplinary sanction.

[30] 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 Act¹¹. 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 practitioner¹².

[31] The Board notes that the purposes of the Act are:

3 Purposes

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.*

[32] The Board also notes the provisions of section 14D of the Act which states:

14D Responsibilities of designer

- (1) *In subsection (2), designer means a person who prepares plans and specifications for building work or who gives advice on the compliance of building work with the building code.*
- (2) *A designer is responsible for ensuring that the plans and specifications or the advice in question are sufficient to result in the building work complying with the building code, if the building work were properly completed in accordance with those plans and specifications or that advice.*

¹¹ *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

¹² *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

- [33] Given the above, when considering what is and is not an acceptable standard, the provisions of the building code need to be taken into account. In respect of design work, the Board also needs to take into account the wider requirements of resource management and town planning matters as they pertain to a design¹³.
- [34] The Board also notes, as regards the allegations that were before the Board, that the competencies a licensed designer is expected to be able to demonstrate in order to obtain a licence are set out in Schedule 1 of the Licensed Building Practitioners Rules 2007. Those competencies for a Design AOP 2 licence include:
- 2.2.5 Use quality assurance techniques in performing design activities.*
Examples of techniques: checklists, design review and peer review.
 - 4.2.4 Co-ordinate and integrate design information provided by others.*
May include but not limited to RMA consultants, surveyors, services specialists, consulting engineers, manufacturers, the Ministry for Business, Innovation and Employment, and building consent authorities.
 - 4.2.5 Produce detailed drawings, site specific specifications and documentation suitable for building consent and construction.*
- [35] The conduct that was of concern to the Board was the reliance on the BCA to provide quality assurance and the overall lack of supervision of a contracted person.
- [36] Looking at the BCA, their role is to check that the design work has been carried out in accordance with the Building Code. It is not uncommon that a building consent authority will identify issues with designs and specifications. The question the Board will often have to answer is whether those issues should have been identified and dealt with prior to the consent being submitted. In this respect, it is noted that the building consent authority's job is to grant or refuse a building consent. It is not its role, nor responsibility, to assist a designer to develop its designs to the point where they achieve compliance with the Building Code.
- [37] A designer should be aiming to get their design and specifications right the first time and not to rely on the building consent authority to identify compliance failings and to assist them to get it right. In this respect it is also to be noted that under section 45(3) of the Act a licensed building practitioner with a design licence must submit a certificate of work with a building consent that states that the design complies with the building code:
- (3) The plans and specifications that contain the design work referred to in subsection (2) must be accompanied by a certificate of work—*

¹³ Refer to the competencies required from a licensed designer in Schedule 1 of the Licensed Building Practitioners Rules 2007

- (a) *provided by 1 or more licensed building practitioners who carried out or supervised that design work; and*
- (b) *that identifies that design work; and*
- (c) *that states—*
 - (i) *that the design work complies with the building code; or*
 - (ii) *whether waivers or modifications of the building code are required and, if so, what those waivers or modifications are.*

[38] The introduction of the licensed building practitioner regime was aimed at improving the skills and knowledge of those involved in residential construction. The following was stated as the intention to the enabling legislation¹⁴:

The Government's goal is a more efficient and productive sector that stands behind the quality of its work; a sector with the necessary skills and capability to build it right first time and that takes prides in its work; a sector that delivers good-quality, affordable homes and buildings and contributes to a prosperous economy; a well-informed sector that shares information and quickly identifies and corrects problems; and a sector where everyone involved in building work knows what they are accountable for and what they rely on others for.

We cannot make regulation more efficient without first getting accountability clear, and both depend on people having the necessary skills and knowledge. The Building Act 2004 will be amended to make it clearer that the buck stops with the people doing the work. Builders and designers must make sure their work will meet building code requirements; building owners must make sure they get the necessary approvals and are accountable for any decisions they make, such as substituting specified products; and building consent authorities are accountable for checking that plans will meet building code requirements and inspecting to make sure plans are followed.

[39] The above reflects what is stated in section 14D of the Act.

[40] Looking at the conduct in question the Board noted that the Respondent stated when responding to the complaint, that:

I initially only did an overview review taking into consideration the draftees experience, however upon receiving the RFI's did a thorough review given some council RFI on another project completed by same draftee.

[41] The response implies that the Respondent did not undertake a thorough check of the work that was to be submitted under his licence prior to it being filed. It also

¹⁴ Hansard volume 669: Page 16053

brings into question the undertaking the Respondent has made when providing his certificate of work that the design work complies with the building code. The design work clearly did not.

[42] Moreover, when looking at the number and more importantly, at the content of the RFI's, it was clear to the Board that there were fundamental issues with the building consent documentation that was submitted. It was substandard and a thorough review of it at the time of submission by the Respondent should have identified and rectified those issues. The Board's finding is that the Respondent, rather than doing those checks himself relied on the BCA to do them for him.

[43] The process used by the Respondent also raises issues as regards his supervision practices.

[44] Supervise is a defined term in the Act. Section 7¹⁵ of the Act defines it as:

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.

[45] In C2-01143 the Board also discussed the levels of supervision it considers will 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; and

(d) the number of persons or projects being supervised.

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

[47] 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 1992¹⁶. The definition of supervision in that Act is consistent with the definition in the Building

¹⁵ 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.

¹⁶ *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

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."

- [48] The Board has noted that the contractor was reasonably new to the Respondent. The statement from the Respondent noted in paragraph [19] herein attests to the fact that he was not personally familiar with the contractor's work. In such circumstances, the Board would expect a greater, not a lesser, degree of supervision. What transpired, however, was a wait and see approach relying largely on the BCA to carry out the supervisory role of ensuring the design work met quality and compliance requirements.
- [49] 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.

- [50] The Board considers the Respondent's failings were serious. His conduct was deliberate. It was not inadvertent or oversight. He chose to use a person whose work he was not familiar with and to submit it for a building consent without having carried out a thorough check.
- [51] Given the above factors the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent has been negligent (but not incompetent) in that he has departed from what the Board considers to be an accepted standard of conduct and that the conduct was sufficiently serious enough to warrant a disciplinary outcome.

Draft Decision on Penalty, Costs and Publication

- [52] Having found that one or more of the grounds in section 317 applies the Board must, under section 318 of the Actⁱ, consider the appropriate disciplinary penalty, whether

¹⁷ [2001] NZAR 74

the Respondent should be ordered to pay any costs and whether the decision should be published.

- [53] The matter was dealt with on the papers. Included was information relevant to penalty, costs and publication, and the Board has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

- [54] The purpose of professional discipline is to uphold the integrity of the profession; the focus is not punishment, but the enforcement of a high standard of propriety and professional conduct. The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*¹⁸ commented on the role of "punishment" in giving penalty orders stating that punitive orders are, at times, necessary to provide a deterrent and to uphold professional standards. The Court noted:

[28] I therefore propose to proceed on the basis that, although the protection of the public is a very important consideration, nevertheless the issues of punishment and deterrence must also be taken into account in selecting the appropriate penalty to be imposed.

- [55] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*¹⁹ the Court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act they have the advantage of simplicity and transparency. The Court recommended adopting a starting point for a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.
- [56] The level of negligence found is, in the Board's opinion, at the mid-range. The Board hopes that the Respondent will learn from the complaint and the Board's findings and that he will, in the future, take his responsibilities as a supervisor more seriously. It considers that a fine is the appropriate form of penalty.
- [57] The Board notes that there is an ongoing commercial dispute and that there were, in the Respondent's submissions, evidence as regards difficulties with the design brief. Those factors have been taken into account as mitigation. The Board has also taken into account that the complaint and hearing have been dealt with on the papers.
- [58] Based on the above, the Board's penalty decision is that the Respondent pays a fine of \$2,000. The fine has been reduced from a starting point of \$3,000 on the basis of the mitigation outlined above.

Costs

- [59] Under section 318(4) the Board may require the Respondent "to pay the costs and expenses of, and incidental to, the inquiry by the Board."

¹⁸ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

¹⁹ 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

- [60] The Respondent should note that the High Court has held that 50% of total reasonable costs should be taken as a starting point in disciplinary proceedings and that the percentage can then be adjusted up or down having regard to the particular circumstances of each case²⁰.
- [61] In *Collie v Nursing Council of New Zealand*²¹ where the order for costs in the tribunal was 50% of actual costs and expenses the High Court noted that:
- But for an order for costs made against a practitioner, the profession is left to carry the financial burden of the disciplinary proceedings, and as a matter of policy that is not appropriate.*
- [62] The Board notes the matter was dealt with on the papers. There has, however, been costs incurred investigating the matter, producing the Registrar's Report and in the Board making its decision. The costs have been less than those that would have been incurred had a full hearing been held. As such the Board will order that costs of \$1,000 be paid by the Respondent. The Board considers that this is a reasonable sum for the Respondent to pay toward the costs and expenses of, and incidental to, the inquiry by the Board.

Publication

- [63] 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 Act²². The Board is also able, under section 318(5) of the Act, to order publication over and above the public register:
- 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.*
- [64] As a general principle, such further public notification 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. This is in addition to the Respondent being named in this decision.
- [65] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990²³. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²⁴. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²⁵. The High Court provided

²⁰ *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.

²¹ [2001] NZAR 74

²² Refer sections 298, 299 and 301 of the Act

²³ Section 14 of the Act

²⁴ Refer sections 200 and 202 of the Criminal Procedure Act

²⁵ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*²⁶.

[66] The courts have also stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published in the public interest²⁷. It is, however, common practice in disciplinary proceedings to protect the names of other persons involved as naming them does not assist the public interest.

[67] Based on the above, the Board will not order further publication.

Draft Section 318 Order

[68] For the reasons set out above, the Board directs that:

Penalty: Pursuant to section 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of \$2,000.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$1,000 (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(l)(iii) of the Act.

In terms of section 318(5) of the Act, there will not be action taken to publicly notify the Board's action, except for the note in the Register and the Respondent being named in this decision.

[69] 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.

Submissions on Draft Decision

[70] The Board invites the Respondent and the Complainant to:

- (a) provide further evidence for the Board to consider; and/or
- (b) make written submissions on the Board's findings. Submissions may be on the substantive findings and/or on the findings on penalty, costs and publication.

[71] Submissions and/or further evidence must be filed with the Board by no later than the close of business on **02 October 2020**.

[72] If submissions are received, then the Board will meet and consider those submissions.

²⁶ *ibid*

²⁷ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

- [73] The Board may, on receipt of any of the material received, give notice that an in-person hearing is required prior to it making a final decision. Alternatively, the Board may proceed to make a final decision which will be issued in writing.
- [74] If no submissions or further evidence is received within the time frame specified, then this decision will become final.

Request for In-Person Hearing

- [75] If the Respondent, having received and considered the Board's Draft Decision, considers that an in-person hearing is required then one will be scheduled, and a notice of hearing will be issued.
- [76] A request for an in-person hearing must be made in writing to the Board Officer no later than the close of business on **02 October 2020**.
- [77] If a hearing is requested this Draft Decision, including the Board's indicative position on penalty, costs and publication, will be set aside.

Submissions Made

- [78] The Board received a submission from the Complainant which consisted of a Disputes Tribunal Order. The Disputes Tribunal Decision was not material to the Board's decision.
- [79] No submissions were received from the Respondent. The Respondent did not request a hearing.
- [80] Given the above, the Board affirms its draft decision and penalty.

Final Section 318 Order

- [81] For the reasons set out above, the Board directs that:

Penalty: Pursuant to section 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of \$2,000.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$1,000 (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(l)(iii) of the Act.

In terms of section 318(5) of the Act, there will not be action taken to publicly notify the Board's action, except for the note in the Register and the Respondent being named in this decision.

Right of Appeal

[82] The right to appeal Board decisions is provided for in section 330(2) of the Actⁱⁱ.

Signed and dated this 30th day of October 2020



Chris Preston
Presiding Member

ⁱ **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:*
 - (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."*

ⁱⁱ **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.*