

Before the Building Practitioners Board

	BPB Complaint No. CB25903
Licensed Building Practitioner:	Donald Reid (the Respondent)
Licence Number:	BP110216
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:	25 January 2023
Decision Date:	7 February 2023

Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)
Mr D Fabish, LBP, Carpentry and Site AoP 2
Mrs J Clark, Barrister and Solicitor, Legal Member
Mrs 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 under sections 317(1)(b) or 317(1)(da)(ii) of the Act.

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Summary of the Board’s Decision

- [1] The Respondent **has not** committed the disciplinary offences of supervising building work in a negligent or incompetent manner or of failing to provide a record of work.

The Charges

- [2] 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 16 Sheppard Street, Gates Pa, Tauranga. The alleged disciplinary offences the Board resolved to investigate were that the Respondent may have:
- (a) supervised building work or building in a negligent or incompetent manner contrary to section 317(1)(b) of the Act, in that he may not have provided actual or adequate supervision to the owner who carried out restricted building work as per the details provided in the Respondent’s response dated 10 July 2022; and/or
 - (b) 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

- [3] 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.

- [4] 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.”

- [5] 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 persons⁵:

... 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.

- [6] 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.

- [7] The above commentary on the limitations of the disciplinary process are 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

- [8] 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.

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

- [9] 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

- [10] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁶. 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.
- [11] 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.
- [12] In addition to the documentary evidence before the Board, it heard evidence at the hearing from the Complainant and the Respondent.

Negligent Supervision

- [13] The Respondent agreed to undertake the construction of two single-level dwellings and to supervise the Complainant's work on the project.
- [14] The Complainant is a Project Manager who has done approximately 70-80 owner/builder projects. He stated that he was not generally on the tools, but rather acted as a project manager subcontracting out all of the work. In this case, he told the Respondent to "*treat him like an apprentice*". The Respondent agreed that the Complainant was a "*first-year apprentice at best*" and did not have basic skills.
- [15] The Respondent gave evidence that he had no other projects on at the same time and spent approximately 40 hours per week on-site. He estimated that the Complainant was working unsupervised about 5% of the time. The Complainant put this estimate at 10% of the time. Both agreed that the work done by the Complainant when the Respondent was not on site was finishing fixings and putting on hardware. The Respondent said that the next day he would verify the Complainant's work. The Complainant said that he was on site all day, every day.

Record of Work

- [16] The Respondent said that he was involved in the construction until 5 November 2021, when he left the project due to safety concerns involving the scaffolding. The Complainant denies that there were any safety issues.
- [17] The Respondent said that he took the project from ground level through to erecting the polypanels and frames. When he left the project, he said all exterior panels were

⁶ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

up, the roof was on and 80-90% of the interior framing was done. The windows and garage cladding were still to be done.

- [18] Subsequently, the Complainant requested a record of work from the Respondent. The Respondent believed he was being asked to “sign off on” work done by the Complainant after he left the site on 5 November 2021. He stated by email dated 9 November 2021 –

“...I have talked to [OMITTED] about work I need to sign off as an LBP and also that he has completed that he will document and I will check, any restricted building work from 5/11/21 will need to be signed off by another LBP.”(Document 9.1.1, Page 1207 of the Board’s file).

- [19] On 12 November 2021, the Complainant asks again (having also requested it on 11 November 2021) for the Respondent’s record of work and refers to it being for “work completed to 5 November”.

- [20] On 15 November 2021, the Respondent emails the Complainant –

“As agreed at our site meeting yesterday I need to have an on-site meeting with you where I will go through all the work that you have done to sign you off as competent. I need to do this to make sure you have completed the work to a level that is satisfactory to me and meets the requirements of the building code....”(Document 9.1.1, Page 1209 of the Board’s file).

- [21] The Complainant then replied on 22 November 2021 that he would document and photograph work done by others, he would confirm to the Respondent when he had done the re-check of the cps 80 screws and nail plates, and he confirmed that the windows and weatherboard cladding to the garage walls had been contracted to another subcontractor. The Complainant stated –*“Your obligations ended on 5/11/2021”.*

- [22] The Respondent then advised the Complainant that the photographs were not sufficient for him to use as a basis for his record of work. The Complainant refused to let the Respondent on site, and the Respondent said on that basis he had *“no ability to go to site and check if the remedial work had been done”.*

- [23] At the hearing, the Complainant was very clear that he had drawn a line at 5 November 2021 and was not asking the Respondent to take responsibility for or provide a record of work for any work done after that date. He stated that he wanted a record of work for the work carried out by the Respondent and under his supervision up to 5 November only. After 5 November, the Complainant had another Licensed Building Practitioner complete the work and the Complainant advised that that the other Licensed Building Practitioner had provided a record of work for his work.

- [24] The Respondent said that he had a meeting with Council and came up with a way to provide his record of work. He provided two extra pages setting out what he did not

do on the project. This record of work dated 15 February 2022 was provided to the Complainant on 15 February 2022 and subsequently by the Complainant to the Board's investigator on 18 February 2022 (Document 2.5, Pages 126 – 131 of the Board's file). The Respondent said it was also provided to the Council.

- [25] The Respondent was asked by the Board why he did not provide the record of work document as he created it on 15 February at an earlier stage. He stated that, in hindsight, he probably could have, but he had never done such a document before.

Board's Conclusion and Reasoning

- [26] The Board has decided that the Respondent **has not**:

- (a) supervised building work in a negligent or incompetent manner (s 317(1)(b) of the Act); or
- (b) 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.

Negligent Supervision

- [27] The Respondent both carried out and supervised building work and restricted building work. The question for the Board is whether the Respondent has been negligent or incompetent as regards his supervision of any restricted or other building work done by the Complainant.
- [28] In Board Decision C2-01143,⁷ the Board found that the definition of supervise in section 7⁸ of the Act must be interpreted in such a way as to give effect to the purpose of the legislation, which includes the regulation and accountability of licensed building practitioners and, as such, it includes work carried out without a building consent. The Board's position, therefore, is that under the disciplinary provision in section 317(1)(b) of the Act, supervision applies to all building work carried out under the supervision of a licensed building practitioner and that where the work is carried out under a building consent an additional requirement applies in that it must also comply with the building consent under which it is carried out. The fundamental requirement in section 7 that the supervision of the building work is

⁷ Board Decision dated 14 April 2016

⁸ 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.

“sufficient to ensure it is performed competently” applies to all building work carried out under the supervision of a licensed building practitioner.

[29] Supervise is defined in section 7⁹ 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.

[30] In C2-01143, the Board also discussed the levels of supervision it considers are 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.

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

[32] The Board, in considering whether the Respondent has supervised building work in a negligent or incompetent manner also needs to have regard to the meaning of those terms. In *Beattie v Far North Council*,¹⁰ Judge McElrea provided guidance on their interpretation:

[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.

[44] In my view a “negligent” manner of working is one that exhibits a serious lack of care judged by the standards reasonably expected of such practitioners, while an “incompetent” manner of working is one that exhibits a serious lack of competence.

[46] The approach I have adopted recognises that the terms “negligent” and “incompetent” have a considerable area of overlap in their meanings, but also have a different focus - negligence referring to a manner of working that

⁹ 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.

¹⁰ Judge McElrea, DC Whangarei, CIV-2011-088-313

shows a lack of reasonably expected care, and incompetence referring to a demonstrated lack of the reasonably expected ability or skill level.

- [33] The Board has also considered the comments of Justice Gendall in *Collie v Nursing Council of New Zealand*¹¹ 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.

- [34] Based on the information the Board had before the hearing, it was initially concerned that the Complainant may have been undertaking restricted building work without adequate supervision from the Respondent. However, it is clear to the Board, from the evidence given at the hearing, that this was not the situation. The Board accepts that the Respondent adequately and appropriately supervised the building work done by the Complainant and does not uphold the ground of discipline under section 317(1)(b) of the Act.

Record of work

- [35] 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 work¹².
- [36] 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.
- [37] The Board discussed issues with regard to records of work in its decision C2-01170¹³ 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.
- [38] 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.
- [39] 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

¹¹ [2001] NZAR 74

¹² Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

¹³ *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

completion of the restricted building work ...”. As was noted by Justice Muir in *Ministry of Business Innovation and Employment v Bell*¹⁴ “... the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work”.

- [40] As to when completion will have occurred is a question of fact in each case.
- [41] Work came to an end for the Respondent when he finished on site on 5 November 2021. The Board ordinarily says that completion occurs when the contract comes to an end because, at that point, there is no ability for the Respondent to do any more restricted building work. At that point, the Respondent is statutorily obliged to provide a record of work. In this case, a record of work was not provided until 15 February 2022.
- [42] The Complainant made the complaint to the Board on 9 December 2021, only shortly after completion. After contract termination, if there is a genuine dispute, time can be put on hold if there is some possibility that the Licensed Building Practitioner may return to do further restricted building work.
- [43] Based on the evidence given at the hearing, the Board accepts that in the period between completion and the provision of the record of work there was genuine misunderstanding and cross-communication. The Respondent believed he was being asked to provide a record of work for work which he wanted and needed to check before he was comfortable providing a record of work for it.
- [44] At this point, the Respondent engaged with Council and got advice, and then provided the tagged record of work on 15 February 2022. There is no reason that the tagged document could not have been provided in November other than the misunderstanding between the Respondent and the Complainant.
- [45] Section 317(1)(da)(ii) of the Act provides for a defence of the licenced building practitioner having a “good reason” for failing to provide a record of work. If they can, on the balance of probabilities, prove to the Board that one exists, then it is open to the Board to find that a disciplinary offence has not been committed. Each case will be decided by the Board on its own merits, but the threshold for a good reason is high.
- [46] The Board considers that the miscommunication about what was being asked of the Respondent provides a “good reason” for the record of work not being provided until 15 February 2022. As soon as the Respondent gained advice on how to provide a record of work he was comfortable with, he did so. The threshold for a “good reason” to be established is high, and the Board notes that the Respondent’s situation has only just reached that threshold.

¹⁴ [2018] NZHC 1662 at para 50

- [47] However, on balance, the Board does not uphold the disciplinary offence under section 317(1)(da)(ii) of the Act.
- [48] The Respondent should note that the requirement is on the licensed building practitioner to provide a record of work, not on the owner or territorial authority to demand one. He is required to act of his own accord and not wait for others to remind him of his obligations.
- [49] The Respondent has referred to not being able to “sign off” the work. Providing a record of work is not “signing off”. It is not to be confused with a producer statement. It is not a statement as to the quality or compliance of restricted building work. It is, put simply, a statement of who did or supervised what in the way of restricted building work. In this respect, it is to be noted that a record of work given by a licensed building practitioner does not, of itself create any liability that would not otherwise exist as section 88(4) provides:
- (4) A record of work given under subsection (1) does not, of itself,—
create any liability in relation to any matter to which the record of work
relates; or give rise to any civil liability to the owner that would not otherwise
exist if the licensed building practitioner were not required to provide the
record of work.*
- [50] It is also important to note that a record of work provides an opportunity to not only record what was carried out or supervised but also what was not done, completed or supervised. As such, if the Respondent has concerns about future liability for work that he has not carried out or supervised, he can use the record of work to capture those concerns.
- [51] The Board recommends that the Respondent looks at the regulatory guidance documents on records of work, and he is cautioned to ensure he provides records of work promptly on completion in the future.

Signed and dated this 17th day of February 2023



Mr M Orange
Presiding Member