

Before the Building Practitioners Board

	BPB Complaint No. CB26337
Licensed Building Practitioner:	Richard Alfred Johnson (the Respondent)
Licence Number:	BP124473
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	Wellington
Hearing Type:	In Person
Hearing and Decision Date:	30 August 2024

Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)
Mrs F Pearson-Green, Deputy Chair, LBP, Design AoP 2
Mr G Anderson, LBP, Carpentry and Site AoP 2

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 disciplinary offences under sections 317(1)(b), (d) and (da)(ii) of the Act.

The Respondent's licence is cancelled. He may not apply to be relicensed for a period of three months. He is ordered to pay costs of \$2,950.

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Summary

[1] The Respondent was engaged to undertake an alteration to a residential dwelling. The consented building work included weathertightness remediation and the re-cladding of the walls and roof. The respondent started but did not complete the building work. It was approximately 85% complete when he abandoned the site. Subsequent inspections of the building work by the Building Consent Authority and other practitioners identified extensive non-compliant building work, especially with regard to the manner in which wall and roof cladding and associated flashings had been carried out.

- [2] The Board found that the Respondent, who had very little experience in the type of work being undertaken, had carried out the building work in an incompetent manner as well as in a manner that was contrary to a building consent. The Board also found that the Respondent had failed to provide a record of work on completion of restricted building work.
- [3] Because the board found that the Respondent had carried out building work in an incompetent manner, it decided that the appropriate action was to cancel the Respondent's licence. Cancellation ensures that the public is protected and other Licenced Building Practitioners are deterred from similar conduct. Further, if the Respondent seeks to be re-licenced, the cancellation will ensure that his competency is reassessed. The Board also ordered that the respondent pay costs of \$2,950.

The Charges

- [4] 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.¹
- [5] The Board² initially dealt with the complaint by way of a Draft Decision. The Complainant provided fresh evidence. Previously, the Board had decided that regulation 9(f)(ii) of the Complaints Regulations applied to allegations about the quality and compliance of cladding and exterior joinery. On the basis of the fresh evidence the Board set the Draft Decision aside, issued a Notice of Proceeding and scheduled a hearing. The disciplinary charges the Board resolved to further investigate³ were that the Respondent may, in relation to building work at [OMITTED], Wellington, have:
- (a) carried out or supervised building work in a negligent or incompetent manner contrary to section 317(1)(b) of the Act;
 - (b) carried out or supervised building work that does not comply with a building consent contrary to section 317(1)(d) of the Act; and
 - (c) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out or supervise, or has carried out 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) of the Act contrary to section 317(1)(da)(ii) of the Act.

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. The evidentiary standard is the balance of probabilities, *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1.

² The Board is a statutory body established under section 341 of the Act.² 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.

³ 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.

- [6] The Board gave notice that, in further investigating the Respondent's conduct under sections 317(1)(b) and (d) of the Act, the Board would be inquiring into the matters noted in:
- (a) an inspection report dated 15 September 2023 (page 172 of the Board's file);
 - (b) an email from [OMITTED] dated 11 December 2023 (pages 163 and 164 of the Board's file); and
 - (c) an email from the Complainant dated 21 February 2024 (page 163).

Evidence

- [7] The Board must be satisfied, on the balance of probabilities, that the disciplinary offences alleged have been committed⁴. 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.

Background

- [8] The Respondent was contracted to undertake building work on an existing dwelling under a building consent. The cost of the building work exceeded the threshold for which disclosure documentation and a written contract are required under the Building (Consumer Rights and Remedies) Regulations 2014. Notwithstanding, the Respondent did not provide either.
- [9] The building consent covered alterations to the existing building as well as a re-clad and re-roof. As part of the re-clad, timber remediation to remove decaying timber was required. When the building work was carried out, the dwelling was tenanted. The Respondent submitted that the tenancy created difficulties with the completion of the work and, in particular, with access and working hours. The Complainant, who stated her intention had been to sell the property once the building work was complete, submitted that the Respondent's failure to carry out the work in a compliant and timely manner had caused her a financial loss. The loss was a combination of the costs incurred for rectification and rework and missing a favourable market.
- [10] The Respondent was assisted by an inexperienced person who was his business partner and a casual labourer. The Respondent stated that he was on site 80% of the time and was both carrying out and supervising the work. His evidence was that his supervision included checking the work that had been done by others. The Respondent called for inspections.
- [11] The Respondent had limited experience in residential building work. The majority of his building experience was in commercial and civil building work. He had been involved in approximately three to four new residential builds but had not done any

⁴ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

renovation work of this size or complexity. He stated he had not previously carried out a re-clad and was not overly familiar with cavity systems. The Respondent also stated that he had previously completed a couple of roofs, but they were mono-pitch in design and that this was the most complex roof he had done, with multiple pitches and lots of valleys and hips.

- [12] The Respondent was involved in the build until August 2019. When he left the building site, he described it as being 85% complete. The Complainant described his departure as simply “walking off”. The Respondent stated that the situation with the tenants meant that he could not viably complete the work. The Respondent’s last invoice for services was dated 18 August 2019. Following the Respondent’s departure, his business partner continued with the building work unsupervised until the final inspection on 14 April 2021. Since the April 2021 failed inspection, another builder has been contracted. The new contractor’s work has included rectification of the Respondent’s work.

Negligence or Incompetence

- [13] To find that the Respondent was negligent, the Board needs to determine, on the balance of probabilities,⁵ 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*⁶ test of negligence.⁷ 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.⁸ 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.⁹ If it does not, then a disciplinary finding cannot be made.

Has the Respondent departed from an acceptable standard of conduct?

- [14] When considering what an acceptable standard is, the Board must consider the purpose of the Building Actⁱ as well as the requirement that all building work must

⁵ *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.

⁶ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁷ 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)

⁸ 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”

⁹ *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”.

comply with the Building Code¹⁰ and any building consent issued.¹¹ The test is an objective one.¹²

- [15] The specific issues that the Board resolved to investigate included those listed in a letter from the Building Consent Authority (BCA) that recorded the outcomes of an inspection carried out on 6 September 2023. The letter noted:

The purpose of the inspection was to enable the Council to consider whether the work carried out under this building consent meets the requirements of the building code, and if a code compliance certificate can be issued.

As a result of this inspection, the following matters will need to be addressed to the Council's satisfaction before issuing a code compliance certificate can be considered;

1. *The following items need to be completed;*

The whole exterior of the house is generally unfinished and not ready for inspection, however the following areas were noted as needing remedial work so they comply with the NZ building Code:

- *All downpipes need to be connected to storm water*
- *North west corner damaged*
- *Head flashing overhang not compliant west elevation ground level*
- *Storm water pipe in ground to be capped west elevation*
- *West elevation multiple penetrations to be sealed and finished*
- *West elevation cawling to complete*
- *West elevation level 1 no cavity closer installed*
- *West elevation dirt to be removed from against cladding*
- *Gaps under each side of head flashings, between flashing and cladding to be sealed up in all areas required.*
- *Box corners need scribes if required all areas. Noted south/east area.*
- *Beading/quad required east elevation between cladding and soffit*
- *South/east roof/wall area fascia no cover with weatherboard butting into bottom of fascia*
- *South/east above entrance apron pre-clad elements to be verified. Not sealed back to wall, and appears to be cut down where it returns behind wall cladding.*
- *Southern barge flashings not compliant with no downturn into Iron trough*
- *South raking fascia into box corner area not finished and sealed.*
- *South storm water in ground to be capped*

¹⁰ Section 17 of the Building Act 2004

¹¹ Section 40(1) of the Building Act 2004

¹² *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.

- *South Facia not finished, not fixed off correctly and needs vermin proofing.*
 - *South elevation gable end left and right corners not water tight*
 - *South Roof Iron not fixed correctly and laps not compliant. Has been laid short of spouting.*
 - *Entrance door needs head flashing, scribes.*
 - *Cladding clearances to entrance door not compliant with E2/AS1*
 - *East flat roof/wall junctions no diverters installed to north and south sides. Barge appears to have been hand bend down and is pulling away from fascia.*
 - *Barge flashings to same area supposed to be 100mm downturn and are not.*
 - *East lvl1 gable end, building paper showing at apron.*
 - *Fascia at bottom of roof not painted and too low with gap to Iron.*
 - *Same area spouting too low.*
 - *North elevation lower roof barge/apron junctions to each end of roof do not comply and are unfinished.*
 - *north barge flashings not compliant with no downturn into Iron trough*
2. *Previous pre-clad outstanding elements have not been addressed, which include:*
- *Missed inspection to all window heads to confirm head flashings taped to wrap, stop ends, cavity closer, WANZ support bars installation, Apron flashings taped to wrap. Some areas of cladding will need to be opened up so construction methodology can be verified.*
3. *There has been a land slip up against the west elevation cladding for a period of time and may have caused damage or moisture ingress to internal of walls in this area. WCC needs to be satisfied the cladding, wall cavities and framing still comply. We require the following:*
- *Some area of internal linings to be moved in these areas so inspection can be carried out to condition of framing to the west elevation ground level.*
 - *If this is not acceptable then Council requires a report from a member of the New Zealand Institute of Registered Building Surveyors; this is at your cost.*
 - *It is recommended that you advise the Council of your intended Building Surveyor prior to their engagement in order to confirm their suitability.*
 - *The report will need to confirm that the performance requirements of the relevant building code clauses are being met, as well as addressing the following issues that were identified during the inspection by Council officers*

- *The Council requires that adequate testing (including invasive and destructive testing where necessary) is carried out by the Building Surveyor to support the conclusions in their report.*
4. *Please provide the following documentation;*
- *South elevation not as per approved plans. Amended elevation to be provided with roof and gable end.*
 - *East level 1 gable end not re-cladded as part of building consent. Amended elevation drawing required to reduce scope of work.*
 - *A completed application for code compliance certificate*
 - *Submit an amendment to modify clause B2 - durability of the building code. The modified date should be April 2021. A copy of an amendment application form is enclosed with this letter. You will need to complete and return the amendment application form along with a covering letter (also enclosed) that acknowledges the nature of the amendment application being sought*
 - *Record of work memorandum required from Richard Johnson for all restricted works carried out.*
 - *Record of work memorandum required from installer of Iron roofing.*

Please note;

- *Additional outstanding items may be identified should remedial work proceed.*
- *Progress and communication with the Council needs to be maintained. If there is no communication with the Council for a period exceeding 3 months the file will be sent back to archives and payment of any outstanding fees will be required.*
- *A site meeting is advisable to clarify the content of this letter before any remedial work commences.*

[16] Whilst a number of the items outlined above relate to incomplete work, the majority note non-compliant building work.

[17] In addition to the BCA inspection, the Board was provided with photographs and notes from [OMITTED]. They were engaged to carry out remedial work after the Respondent had left the site. The photographs provided were taken after some deconstruction of the cladding had been carried out. The photographs supported the BCA findings and comments. Mr [OMITTED] of [OMITTED] attended the hearing and gave evidence. He noted that the issues identified were not isolated in that the noncompliance issues were pervasive throughout the build.

[18] The Board was also provided with an assessment supported by photographs of roofing work that the Respondent had also carried out. The assessment, dated 11 December 2023, noted:

After inspecting the roof on Friday there were a few concerns to address. Below are a few photos.

Photo 1- Installer has lapped a sheet on top of another sheet. This will cause a reaction and will hold water and start to rust.

Photo 3 - There is a 45mm gap between fascia and roofing iron also eave flashing hasn't been installed either. This will cause water to get in, in certain winds. Roofing underlay has started to deteriorate as well.

Photo 4 - Installer hasn't overhung the fascia the minimum 50mm on a few sheets then has moved the rest of the sheets to meet the 50mm overhang.

Photo 6 - Installer hasn't removed the old iron as seen in photo. This will react with the new colorsteel and cause rusting. I couldn't see if that goes for the rest of the house or just on that barge

Photo 8 - There are no diverters on any of the flashing which will allow water to get in behind the cladding. Photo 9 - Same as photo 8 no diverter

Photo 11 - Installer has cut all of the bottom of the sheet with nibblers and exposing the steel which will cause it to rust. Also sheets do meet the required 50mm overhang

Photo 12 - Apron flashing is short with no diverter. Photo 13 - Holes in apron flashing will be letting water in.

Over all roof is in poor condition and this is from what I can see. I can only imagine how bad it is underneath the flashings and roofing iron.

- [19] Most of the noncompliance issues noted in the BCA records, the roofing assessment and the notes from [OMITTED] relate to external moisture management, which is a critical aspect of building work. The manner in which wall and roof cladding and associated flashings had been installed would most likely have resulted in water being able to penetrate the building's external envelope. It is noteworthy, in this respect, that one of the reasons why the consented building work was commissioned in the first place was to remediate external moisture ingress. The manner in which the building work was carried out, if it was not rectified, would have put that objective at risk.
- [20] The Respondent was asked if he contested the evidence in support of the disciplinary allegations regarding the quality and compliance of the building work. He stated that he accepted the evidence and submitted that it was a rush job because of the tenants.
- [21] Based on the uncontested evidence, the Board found that the Respondent carried out building work in an incompetent manner. Incompetence is a lack of ability, skill, or knowledge to carry out or supervise building work to an acceptable standard. In

Beattie v Far North Council,¹³ Judge McElrea put it as: “a demonstrated lack of the reasonably expected ability or skill level”. In *Ali v Kumar and Others*,¹⁴ it was stated as: “an inability to do the job”.

- [22] As noted above, the Respondent had limited experience in residential building work, even less experience in alterations, which are generally more complex than new builds, no experience with re-clads, and was not overly familiar with cavity systems. The evidence shows that he did not follow the consented plans, and the Board formed the view from questioning the Respondent that he did not understand some of the consented details that he was required to follow and that he was not familiar with standard Acceptable Solutions¹⁵ used to achieve Building Code compliance, such as E2/AS1. In short, the Respondent took on a building project that he did not have the knowledge and skills to complete in a compliant manner, and the BCA inspection record, the roofing assessment, and the notes from [OMITTED] attest to this.

Was the conduct serious enough?

- [23] The conduct was serious. The departures from an acceptable standard were significant and substantial. It was not a case of inadvertence, error or oversight. Rather, the Respondent did not know how certain critical aspects of the building work relating to moisture ingress should be carried out so as to meet compliance standards.

Has the Respondent been negligent or incompetent?

- [24] The Respondent has carried out building work in an incompetent manner.

Contrary to a Building Consent

- [25] Building consents provide detailed plans and specifications for building work. They are issued by Territorial or Building Consent Authorities on the basis that the building work will meet the provisions of the Building Code.¹⁶ Once issued, there is a requirement that the building work be carried out in accordance with the building consent.¹⁷ Building consents also stipulate the number and type of inspections the issuing authority will carry out during the build.¹⁸ Inspections ensure independent verification that the building consent is being complied with.
- [26] If building work departs from the building consent issued, the Board can find that a disciplinary offence under section 317(1)(d) of the Act has been committed. The Board does not have to find that departure was deliberate or a result of negligent

¹³ Judge McElrea, DC Whangarei, CIV-2011-088-313

¹⁴ *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

¹⁵ Under section 19(1)(b) of the Act, Building Code compliance can be achieved through compliance with an Acceptable Solution.

¹⁶ Section 49 of the Act

¹⁷ Section 40 of the Act

¹⁸ Section 222 of the Act

conduct.¹⁹ The Board does, however, consider that the seriousness of the conduct under investigation does have to be taken into account. As such, even if the Respondent's building work departed from the building consent, the Board must also decide if the conduct fell seriously short of expected standards.²⁰ If it does not, then a disciplinary finding cannot be made.

Was there building work that differed from the building consent?

[27] As set out above in relation to section 317(1)(b) of the Act, there were significant departures from the building consent, especially regarding how the external cladding and roofing work was completed.

Was the conduct serious enough?

[28] As with the finding of incompetence, the conduct was serious, and it meets the threshold for a disciplinary finding.

Has the Respondent breached section 317(1)(d) of the Act?

[29] The Respondent has carried out building work that was contrary to a building consent.

Failure to Provide a Record of Work

[30] A Licensed Building Practitioner must provide a record of work for any restricted building work that they have carried out or supervised to the owner and the Territorial Authority on completion of their restricted building work.²¹

[31] 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 work²² unless there is a good reason for it not to be provided.²³

Did the Respondent carry out or supervise restricted building work?

[32] The Respondent's building work included work on the primary structure and external moisture management systems of a residential dwelling. When carried out under a building consent, those types of building work are deemed to be restricted building work under the provisions of the Building (Definition of Restricted Building Work) Order 2011.²⁴

¹⁹ *Blewman v Wilkinson* [1979] 2 NZLR 208

²⁰ *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".

²¹ Section 88(1) of the Act.

²² Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

²³ Section 317(1)(da)(ii) of the Act

²⁴ Clause 5 of the Building (Definition of Restricted Building Work) Order 2011

Was the restricted building work complete?

- [33] As noted, the Respondent's involvement in the building work came to an end in August 2019. His position regarding a record of work was that it was still an open job, and because completion had not occurred, he did not have to provide a record of work. The Respondent made this submission notwithstanding that he has not returned to the property since August 2019, has not taken any steps to try and return, and was aware that others were continuing with the work. The Respondent also submitted that he had not provided a record of work because a complaint had been made to the Board. In this respect, the complaint to the Board was lodged on 4 August 2023, some four years after the Respondent's last time on site.
- [34] The Board finds that completion occurred in August 2019 when the Respondent left the site. Since August 2019, he has not carried out any further restricted building work, nor has he taken any steps to return and carry out any further work.

Has the Respondent provided a record of work?

- [35] The Respondent has not provided a record of work on completion of restricted building work as required by section 88(1) of the Act.

Was there a good reason for the Respondent to withhold his records of work?

- [36] The Respondent submitted that a reason why he had not provided a record of work was because a complaint had been made to the Board. That is not a good reason because the complaint was made some four years after completion occurred. If the complaint had been made at or about the time when a record of work was due, then that may have been a good reason. That is not, however, the case.

Did the Respondent fail to provide a record of work?

- [37] The Respondent has failed to provide a record work on the completion of restricted building work.

Board Decisions

- [38] The Respondent has breached sections 317(1)(b), 317(1)(d) and 317(1)(da)(ii) of the Act.

Penalty, Costs and Publication

- [39] Having found that one or more of the grounds in section 317 applies, the Board must, under section 318 of the Actⁱⁱ, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [40] The Respondent made submissions at the hearing regarding penalty, costs, and publication.

Penalty

- [41] The Board has the discretion to impose a range of penalties.ⁱⁱⁱ 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.²⁵ It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:²⁶
- (a) protection of the public and consideration of the purposes of the Act;²⁷
 - (b) deterring other Licensed Building Practitioners from similar offending;²⁸
 - (c) setting and enforcing a high standard of conduct for the industry;²⁹
 - (d) penalising wrongdoing;³⁰ and
 - (e) rehabilitation (where appropriate).³¹
- [42] 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 cases³² and applying the least restrictive penalty available for the particular offending.³³ In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty³⁴ that is consistent with other penalties imposed by the Board for comparable offending.³⁵
- [43] 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.³⁶
- [44] The Board put its concerns about the Respondent's competence to carry out restricted building work to him. The Respondent accepted that he was out of his depth with the job. He noted that he had returned to commercial work and that he did not have any intention of carrying out further restricted building work. The Respondent has chosen not to renew his licence as a Licenced Building Practitioner. As such, his licence is currently suspended.

²⁵ *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]

²⁶ Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

²⁷ Section 3 Building Act

²⁸ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²⁹ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

³⁰ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

³¹ *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

³² *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

³³ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

³⁴ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

³⁵ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

³⁶ 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.

- [45] The licensing regime exists to ensure the public can have confidence in those who carry out restricted building work, which is integral to the safe and healthy functioning of a home. A practitioner who fails to display the required competencies puts those objects at risk.
- [46] Taking the above factors into account, and given that the Respondent's licence is already suspended, the Board considers that a cancellation of the Respondent's licence is warranted. A cancellation will not only punish the Respondent but also deter others from such conduct and protect the public and the integrity of the licensing regime. Cancellation will also ensure that the Respondent's competence is re-evaluated under the Licensed Building Practitioners Rules 2007 if and when he seeks to obtain a new licence.
- [47] Accordingly, the Board will cancel the Respondent's licence and order that he may not apply to be relicensed for a period of three (3) months. Because the Board has cancelled the Respondent's licence, it cannot impose any other form of penalty in addition to the cancellation.³⁷

Costs

- [48] 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.³⁸
- [49] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings³⁹. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case⁴⁰.
- [50] 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 moderately complex. Adjustments are then made.
- [51] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$2,950 toward the costs of and incidental to the Board's inquiry. This is the Board's current scale costs for a half-day in-person hearing. The Respondent may apply to the Registrar for time to pay the costs order.

Publication

- [52] 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

³⁷ Section 318(2) of the Act.

³⁸ *Collie v Nursing Council of New Zealand* [2001] NZAR 74

³⁹ *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

⁴⁰ *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.

Building Practitioners' scheme as is required by the Act,⁴¹ 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.

- [53] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.⁴² 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.⁴³
- [54] 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

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

Penalty: Pursuant to section 318(1)(a)(i) of the Act, the Respondent's licence is cancelled and the Registrar is directed to remove the Respondent's name from the Register of Licensed Building Practitioners and pursuant to section 318(1)(a)(ii) of the Act the Board orders that the Respondent may not apply to be relicensed before the expiry of three [3] months.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$2,950 (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.

⁴¹ Refer sections 298, 299 and 301 of the Act

⁴² Section 14 of the Act

⁴³ Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

Right of Appeal

[56] The right to appeal Board decisions is provided for in section 330(2) of the Act^{iv}.

Signed and dated this 26th day of September 2024.



Mr M Orange
Presiding Member

ⁱ **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.*

ⁱⁱ **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:*

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- (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."*

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.*