

Before the Building Practitioners Board

	BPB Complaint No. CB26329
Licensed Building Practitioner:	Roneel Kumar (the Respondent)
Licence Number:	BP130769
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	Auckland
Hearing Type:	In Person
Hearing Date:	6 August 2024
Decision Date:	19 August 2024
Board Members Present:	
	Mr M Orange, Chair, Barrister (Presiding)
	Mrs F Pearson-Green, Deputy Chair, LBP, Design AoP 2
	Mr D Fabish, 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) and (d) of the Act.

The Respondent is fined \$2,000 and ordered to pay costs of \$2,800. A record of the disciplinary offending will be recorded on the Public Register for a period of three years.

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Summary

- [1] The Respondent supervised a complex build. During construction, a preline inspection was failed, and significant non-compliance issues were noted. Additionally, post construction reports obtained by the owner, who complained about the Respondent, noted compliance issues.
- [2] The Board investigated whether the Respondent had been negligent or incompetent or had carried out building work contrary to a building consent. Negligence or incompetence requires a serious departure from acceptable standards. A finding of building contrary to a building consent does not require a finding of fault, but the conduct does have to be serious enough to warrant a disciplinary finding.

- [3] The Board found that the Respondent had negligently supervised building work and that there was building work that did not comply with a building consent. In making those decisions, the Board noted the seriousness of the non-compliant work, which was not ready for inspection. It also noted that some of the issues had been covered over, and it found that the Respondent had not checked the work for compliance prior to an inspection being called.
- [4] The Board decided it would fine the Respondent \$2,000 and order that he pay scale costs of \$2,800. A record of the disciplinary offending will be recorded on the public Register for a period of three years.

The Charges

- [5] 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
- [6] In this matter, the disciplinary charges the Board resolved to further investigate² were that the Respondent may, in relation to building work at [OMITTED], Auckland, have:
- (a) carried out or supervised building work in a negligent or incompetent manner contrary to section 317(1)(b) of the Act; and
 - (b) carried out or supervised building work that does not comply with a building consent contrary to section 317(1)(d) of the Act.
- [7] The Board gave notice that, in further investigating the Respondent's conduct under section 317(1)(b) and (d) of the Act, it would be inquiring into the items listed in:
- (a) the 17 August 2021 Council preline building inspection report relating to framing, cavity, window installation, RAB, bracing and all associated fixings (Page 553 of the Board's file);
 - (b) the Peace of Mind report dated 17 March 2022 relating to the possible lack of a vented cavity on the top-level north side above the master bedroom deck (Page 41 of the Board's file); and
 - (c) the Peace of Mind report dated 26 April 2023 relating to framing not being plumb, square, or level, inadequate falls to the tiled showers and exterior window and door joinery installation. (Page 53 of the Board's file).

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 resolution was made following the Board's consideration of a report prepared by the Registrar in accordance with regulation 10 of the Complaints Regulations.

Consolidation

- [8] The matter was heard at a consolidated hearing together with a hearing for Board Inquiry matter [OMITTED], which related to the same address. The disciplinary allegations for each were the same.

Evidence

- [9] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed³. 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.
- [10] The Respondent was one of two Licensed Building Practitioners (LBP) involved in the construction of a new residential dwelling. The other LBP, the subject of the related Board Inquiry [OMITTED], carried out building work on the footings, foundations and blockwork. On approximately two occasions, he also lent a hand with framing work but for no more than half a day. At the hearing, the Board received and accepted evidence that he was not involved in the building work that was under investigation other than a very limited involvement in framing. On that basis, the Board decided that it would not carry out any further investigation into him and that the hearing would focus on the Respondent's conduct.
- [11] The Respondent's company was the main contractor for the build, and the Respondent was the supervising LBP for his staff, which were a mix of trade-qualified carpenters, apprentices and other labourers. The Respondent stated that he had up to six staff on-site over the course of the build. The Respondent had approximately 25 other construction projects underway at the time. He stated that the majority were under the supervision of subcontracted LBPs and that he was personally supervising two other house-build projects. The Respondent stated that he spent 30 to 40% of this time on the site. The Complainant, who lived on the site during the build, disputed the amount of time that the Respondent spent on the site. He stated that over the 18 months of the build, the Respondent attended the site about 20 times and that, most of the time, there were no LPBs on site.
- [12] The Respondent's evidence was that when he attended the site, he would check the building work to ensure that it was compliant. He also called for and attended Building Consent Authority (BCA) inspections.
- [13] The Complainant provided further evidence after the hearing had been concluded. That evidence has not been taken into account by the Board on the basis that to do so would be a breach of natural justice.

³ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

Preline Inspection

[14] On 17 August 2021, the BCA completed a preline building inspection. Issues were noted regarding compliance with the building work being inspected. The following are the recorded notes:

Fail Comments

1. *Preline: framing notches and holes (Fail)*
 2. *Preline building- cladding complete and building weather proof (Fail)*
 3. *Preline: Joinery installed and air sealed (Fail)*
 4. *Preline: window/door glazing permanent markings sighted (Fail)*
 5. *Preline: Timber framing moisture content 18% maximum (Fail)*
 6. *Preline: stairs as per plan (Fail)*
 7. *Preline: barrier framing as per plan (Fail)*
 8. *Preline: wet area substrate installation (Fail)*
 9. *Preline: corner steel angles for tiles (plaster board only) (Fail)*
 10. *Insulation installation correct as per plan (Fail) Moisture levels to high for insulation and building is not weathertight. please remove insulation and keep dry until building is weathertight. check framing moisture is 18 percent or less and ensure cavity has been fully checked and completed by the LBP and then Council.*
 11. *Fire lining sheet edge back blocking (Fail)*
 12. *Fire wraps/ seals installed (record make and description) (Fail)*
- AGENT/ OWNER MUST NOT BOOK A PRELINE BUILD INSPECTION UNTIL A FULL CAVITY WRAP AND FRAMING INSPECTION HAS BEEN PASSED.*

Additional Comments

REASON FOR FAIL;

The following is a direction to the Lbp to ensure all works are completed as per the consented plans.

- Bolts through Rab require a detail from the architect for weatherproofing. currently small 40x40 tap over bolts and Rab cut out around them.*
- Holes in the Rab have been created after my colleagues last inspection and hence changing the last cavity to a fail.*
- Horizontal junctions in Rab require pvc horizontal flashing not tape.*

- *Rab board has been taken off the balcony areas since the last inspection done by my colleague hence why I am changing his inspection to a fail. See details dwg A07 for requirements.*
- *Membrane joins appear to have had nogs removed or not installed as I can see gaps through the joins. See Nuraply 3ptm specifications.*
- *Fixings for the membrane balcony ply substrate have missed mid floor framing members and must be taken out and re drilled into framing members. A recheck inspection of the ply substrate is required to check the substrate support. Do not install waterproofing to balconies.*
- *All joinery must be installed before the building is weathertight.*
- *Jambs of joinery have not been taped and exposed H1.2 under studs. Air seals not installed. Packers missing to the few windows that have been installed and fixed.*
- *Bracing hold down bolts seen coming through flooring and not into framing, full bracing recheck required. see dwg A420 rev 3 for what is required for the hold downs. Also a recheck of the ply fixing to the studs to be rechecked as can see some fixings have missed. see dwg A421 for requirements.*
- *Multiple cavity batten fixings have missed the studs and are coming through the Rab. This seen after pulling out insulation.*
- *In areas horizontal pvc flashings have been shot into Rab only. Framing is required behind all flashings.*
- *Fire collars have been installed to floor penetrations however do not comply with the install data sheets. The collar is correct for the pipe size however the hole cut in the floor for the penetration to pass through is to big. please provide a passive fire register and data sheets.*
- *A check that framing is plumb and that rooms and wardrobes are square needs to be done. Possibly use a 3,4,5 triangle method or a corner to corner measurement test to check. I ask this as walking around visually I was able to pick up a wardrobe out of parallels to the wall measured off by 40mm this was shown to the builder LBP and the owner.*
- *Nails from the inside have penetrated the Rab and can be seen from the outside. these need to be removes and holes addressed as per James hardie spec.*
- *Top floor external corners under soffits need a recheck as non compliance sighted.*
- *wet area shower framing to be checked. see sheet A414 for what is required*

FOLLOW UP INSPECTORS I HAVE ATTACHED FIRE REPORT AND ARCHITECHTURAL PLANS.

- [15] The BCA Inspector who carried out the inspection attended the hearing and gave evidence. He confirmed the above items and gave evidence to clarify their extent and seriousness. He noted that, in his opinion, the work was not ready to be inspected. The Respondent stated that he did not want all of the work to be inspected but that the BCA Inspector proceeded to check all of the building work that would normally be checked at a preline building inspection. In essence, the Respondent submitted that not all of the work was ready to be inspected.
- [16] The BCA Inspector's evidence was that multiple instances of the issues above were noted and that, in some cases, the non-compliant building work had been covered with insulation, which was only evident when the insulation was removed. Examples given were holes in the rigid air barrier and missing fixings. The Inspector stated that he carried out more checks than he normally would have because of the level of non-compliance that he found.
- [17] The Inspector also noted that it was apparent, from a visual inspection of the framing, that some of the internal frames were not plumb. His view was that they were 10-15 millimetres out, and he noted that the worst instance was a frame that was 40 millimetres out. He noted that this was outside of tolerances levels in NZS3604, an Acceptable Solution for framing Building Code compliance. The Inspector recommended that a 3-4-5 method of checking frames were square be used.
- [18] The Respondent stated that he had checked the work before the inspection was called for and stated that he was aware of the issues except for those that were covered by insulation. He also submitted that the framing was within tolerances that Master Builders allow for. In this respect, Master Builders had carried out some reviews of the work as part of a dispute process. Master Builders documentation is not a means of compliance with the Building Code.⁴
- [19] Evidence was received that the fire collar issue noted in the inspection was the work of a subcontractor. As such, on the basis that the overall build was not restricted building work that had to be carried out or supervised by an LBP, the Board did not further investigate that issue.

Peace of Mind Report

- [20] The author of the Peace of Mind Report attended the hearing and gave evidence. He had completed two reports. The first noted that there may not have been a vented cavity on a small portion of cladding below a fascia. It was not clear, from the evidence before the Board, including the detail on the consented plans, whether the area required a cavity or was direct-fix. On the basis that there was insufficient

⁴ Refer to section 19 of the Building Act for means of compliance with the Building Code.

evidence on which to make a finding, the Board decided that it would not further investigate the issue.

- [21] The second report noted issues with the framing, the installation of window and door joinery, and the falls on one shower. The Board accepted that the issue as regards the shower was the work of a subcontractor. Accordingly, on the basis that the overall build was not restricted building work that had to be carried out or supervised by an LBP, the Board did not further investigate that issue.
- [22] On framing issues, the report contained photographs and measurements. The report writer stated he used a 1.8-metre level to take his measurements and that it had been calibrated. He noted walls that were between 5 and 20 millimetres out of plumb of 1.8 metres, and his report outlined that the issue flowed onto window and door joinery, which was also out of plumb. The Respondent submitted that when he attended the site with the report writer, the issues noted in the report could not be readily identified. He did accept that there were some issues with internal framing, which he was prepared to remediate. The Board considered the framing issues to be the same as those noted in the BCA inspection and that the report findings were further evidence of the same issue that had, most likely, not been remediated before plasterboard linings and window and door joinery were installed.

Issues for Consideration

- [23] On the basis of the evidence received, the issues for the Board to consider in relation to the disciplinary charges are those noted in the BCA inspection report (excluding the fire collar), with the Peace of Mind report being corroborating evidence of those issues.

Negligence or Incompetence

- [24] 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

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”

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?

- [25] 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 comply with the Building Code¹⁰ and any building consent issued.¹¹ The test is an objective one.¹²
- [26] The Respondent accepted that he was the supervising the work under investigation. As such, his conduct has to be considered within that context and with reference to acceptable supervision standards.
- [27] Supervise is defined in section 7¹³ 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.*
- [28] When considering whether the Respondent's supervision has met acceptable standards, the Board needs to consider the definition of supervision, the purposes of the Act, whether the work met the requirements of the Building Code and, if not, the level of non-compliance.
- [29] Supervision in the context of the Building Act has not yet been considered by the courts. It has, however, been considered in relation to the Electricity Act 1992¹⁴. The definition of supervision in that Act is consistent with the definition in the Building Act, and as such, the comments of the court are instructive. In the case, Judge Tompkins stated at paragraph 24:

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".

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.

¹³ 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.*

¹⁴ *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

“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.”

[30] The was clear evidence before the Board that the building work inspected at the preline inspection was not compliant and that, put simply, it was not ready to be inspected. In this respect, the Board considers that the Respondent, who stated he had checked the work, should have identified the issues and dealt with them prior to his calling for the inspection.

[31] Looking at the compliance issues themselves, while it is somewhat inevitable that a BCA will identify compliance issues requiring remediation when they carry out inspections, the number and seriousness of failings in this matter takes them beyond the norm. In this respect, the Board considers an LBP should be aiming to get building work right the first time and not rely on the BCA to identify compliance failings. The Board notes that this was referred to in the first reading of changes to the Act around licensing¹⁵ by the responsible Minister:

In February this year the Minister announced measures to streamline and simplify the licensed building practitioner scheme. A robust licensing scheme with a critical mass of licensed builders means consumers can have confidence that their homes will be built right first time.

[32] The introduction of the LBP 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 legislation¹⁶:

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.

¹⁵ Hansard volume 669: Page 16053

¹⁶ Hansard volume 669: Page 16053

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.

- [33] Given the above, and looking at the level of non-compliance noted in the preline inspection, the Board finds that the Respondent has been negligent (but not incompetent) because his supervision of the building work has fallen below an acceptable standard.

Was the conduct serious enough?

- [34] As noted, the conduct under consideration has to be sufficiently serious enough to warrant a disciplinary finding. As was noted by Justice Gendall in *Collie v Nursing Council of New Zealand*¹⁷ 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.

- [35] In *Pillai v Messiter (No 2)*,¹⁸ an Australian Court of Appeal decision that has been adopted by the Superior Courts of New Zealand, 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.

- [36] The Respondent submitted that it was a large project and that his departures were, in the context of the build, minor. The Board considers that because it was a large, complex build, it required more care and attention and closer supervision than other builds may have. That did not occur, at least with regard to the building work associated with the preline inspection. The result was non-compliant building work that was not ready for inspection. Further, some of the non-compliance issues were concealed and, taking that factor into account with the other factors present, the Board does not accept that the Respondent had checked the work for compliance prior to the inspection being called. Given those factors, the Board finds that there was a serious departure.

¹⁷ [2001] NZAR 74

¹⁸ (1989) 16 NSWLR 197 (CA) at 200

Has the Respondent been negligent or incompetent?

[37] The Respondent has supervised building work in a negligent manner.

Contrary to a Building Consent

[38] 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.¹⁹ Once issued, there is a requirement that the building work be carried out in accordance with the building consent.²⁰ Building consents also stipulate the number and type of inspections the issuing authority will carry out during the build.²¹ Inspections ensure independent verification that the building consent is being complied with.

[39] 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 conduct.²² 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.²³ If it does not, then a disciplinary finding cannot be made.

Was there building work that differed from the building consent?

[40] The failed preline inspection notes non-compliant building work. As such, this element of the offence has been satisfied.

Was the conduct serious enough?

[41] For the same reasons outlined in relation to negligence, the Board finds that the conduct was serious enough.

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

[42] The Respondent has supervised building work that was contrary to a building consent.

[43] The Board notes the commonality between the findings under sections 317(1)(b) and (d) of the Act. To that end, when determining the appropriate penalty, they will be treated as a single disciplinary offence.

¹⁹ Section 49 of the Act

²⁰ Section 40 of the Act

²¹ Section 222 of the Act

²² *Blewman v Wilkinson* [1979] 2 NZLR 208

²³ *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".

Board Decisions

[44] The Respondent has breached section 317(1)(b) and (d) of the Act.

Penalty, Costs and Publication

[45] 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.

[46] The Board heard evidence relevant to penalty, costs, and publication during the hearing and has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

[47] 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.²⁴ It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:²⁵

- (a) protection of the public and consideration of the purposes of the Act;²⁶
- (b) deterring other Licensed Building Practitioners from similar offending;²⁷
- (c) setting and enforcing a high standard of conduct for the industry;²⁸
- (d) penalising wrongdoing;²⁹ and
- (e) rehabilitation (where appropriate).³⁰

[48] 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 cases³¹ and applying the least restrictive penalty available for the particular offending.³² In all, the Board should be looking to impose a fair, reasonable, and

²⁴ *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]

²⁵ Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

²⁶ Section 3 Building Act

²⁷ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²⁸ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

²⁹ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

³⁰ *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

³¹ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

³² *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

proportionate penalty³³ that is consistent with other penalties imposed by the Board for comparable offending.³⁴

- [49] In general, when determining the appropriate penalty, the Board adopts a starting point based on the principles outlined above prior to considering any aggravating and/or mitigating factors present.³⁵
- [50] The offending was at the low to mid-level. As such, the Board adopted a starting point of a fine of \$2,000, which is consistent with penalties imposed for similar offences.
- [51] The Respondent has previously appeared before the Board. The conduct in that matter occurred at or about the same time as this matter. As such, this decision is not considered to be a second disciplinary, and the previous appearance is not an aggravating factor.
- [52] There are no mitigating factors. This includes the Respondent's partial remediation, which was merely putting what was wrong right.

Costs

- [53] 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.³⁶
- [54] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings³⁷. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case³⁸.
- [55] 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, the scale for which is \$2,800. No adjustments to that amount are necessary. As such, the Board's costs order is that the Respondent is to pay the sum of \$2,800 toward the costs of and incidental to the Board's inquiry.

Publication

- [56] 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

³³ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

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

³⁵ 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.

³⁶ *Collie v Nursing Council of New Zealand* [2001] NZAR 74

³⁷ *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

³⁸ *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,³⁹ 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.

- [57] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.⁴⁰ 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.⁴¹
- [58] 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

- [59] 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 \$2,800 (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.

- [60] 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 Penalty, Costs and Publication

- [61] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until the close of business on **30 September 2024**. The submissions should focus on mitigating matters as they relate to the penalty, costs and publication orders. If no submissions are received, then this decision will become final. If submissions are received, then the Board will meet and

³⁹ Refer sections 298, 299 and 301 of the Act

⁴⁰ Section 14 of the Act

⁴¹ Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

consider those submissions prior to coming to a final decision on penalty, costs and publication.

Right of Appeal

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

Signed and dated this 9th 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.*