

## Before the Building Practitioners Board

	BPB Complaint No. CB26097
Licensed Building Practitioner:	Jayden Sawford (the Respondent)
Licence Number:	BP138320
Licence(s) Held:	Carpentry

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

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Complaint or Board Inquiry	Complaint
Hearing Location	Hamilton
Hearing Type:	In Person
Hearing Date:	23 May 2023
Decision Date:	21 June 2023

#### Board Members Present:

Mrs J Clark, Barrister and Solicitor, Legal Member, (Presiding)  
Ms K Reynolds, Construction Manager  
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 a disciplinary offence under section 317(1)(da)(ii) of the Act.

The Respondent is fined \$500 and ordered to pay costs of \$1,000. A record of the disciplinary offending will be recorded on the Public Register for a period of three years.

The Respondent **has not** committed disciplinary offences under sections 317(1)(b) and (d) of the Act.

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**Summary**

- [1] The Complainant engaged Norman Tradie Services to undertake exterior re-cladding of an existing commercial building. The Respondent was employed by Norman Tradie Services to carry out some of the work and was the only Licensed Building Practitioner on site.
- [2] The re-cladding work was undertaken under Schedule 1 of the Act as an exemption to the requirement to have a building consent and attached on one side of a commercial building was a storage room that was to be turned into accommodation.

That building work was consented, and the Respondent became aware that it was part way through the re-clad.

- [3] The Board needed to ascertain what work was done by the Respondent and what was undertaken by his employer Mr Norman, whether any of the building work carried out or supervised by the Respondent was negligent or incompetent, and whether any restricted building work requiring a Record of Work had been carried out or supervised by the Respondent.
- [4] As regards the provision of a Record of Work, the Board had to consider whether the building work on the consented part of the build, was restricted building work. It determined that whilst the building contained non-residential and residential parts, the building as a whole was one contiguous unit, and as such, the consented building work fell within the definition of restricted building work. The work, therefore, had to be carried out or supervised by a Licensed Building Practitioner. The Respondent was the only Licensed Building Practitioner involved and was the supervisor. He was therefore required to provide a Record of Work but failed to do so.
- [5] The Board then considered the workmanship concerns identified in Mr [OMITTED]'s report and found that those relating to the work the Respondent completed did not reach the threshold for disciplinary action (the seriousness threshold). The Board, therefore, decided that the Respondent had not, in relation to his work, undertaken building work in a negligent or incompetent manner or contrary to a building consent.
- [6] Elements of the work were completed by Mr Norman, who was not a Licensed Building Practitioner. Some of that work was not completed to an acceptable standard. That work was not, however, restricted building work and, as such, there was no legal requirement for the Respondent to supervise it. The Board noted the employer/employee relationship and a power disparity between them and decided that the Respondent had not supervised Mr Norman's building work and had not, therefore, been negligent or incompetent.

### **The Charges**

- [7] The prescribed investigation and hearing procedure is inquisitorial, not adversarial. There is no requirement for a complainant to prove the allegations. The Board sets the charges and decides what evidence is required.<sup>1</sup>
- [8] In this matter, the disciplinary charges the Board resolved to further investigate<sup>2</sup> were that the Respondent may, in relation to building work at [OMITTED], have:

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<sup>1</sup> Under section 322 of the Act, the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law. The evidentiary standard is the balance of probabilities, *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1.

<sup>2</sup> The resolution was made following the Board's consideration of a report prepared by the Registrar in accordance with regulation 10 of the Complaints Regulations.

- (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 is to carry out or supervise, or has carried out or supervised, (as the case may be), to provide to 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.

[9] In further investigating the complaint, the Board resolved to inquire into the matters raised in the Roof report completed by [OMITTED] and, in particular, the observations made therein on pages 75 to 77 of the Board's file. As part of its investigations, the Board also inquired into what work was carried out by Mr Steve Norman, plumber, the Respondent's employer.

[10] The Board also investigated, in relation to section 317(1)(da)(ii) of the Act, whether the building work was restricted building work under the provisions of the Building (Definition of Restricted Building Work) Order 2011 and, in particular, whether the building was a house or residential unit based on the definitions in the Order:

*house means a free-standing, fully detached building consisting of a single residential unit (or a single residential unit and 1 or more residential facilities)*

*residential unit means a building, or part of a building, that is so designed that it is more suitable for being lived in by a single household or family than for any other use."*

### **Evidence**

[11] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>3</sup>. Under section 322 of the Act, the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.

### **Preliminary matter – the Respondent's work**

[12] The first issue the Board had to determine was the extent of the building work carried out by the Respondent on this project.

[13] The Respondent was an employee of Norman Tradie Services. He gave evidence that he worked across a number of sites at the same time, and the time he spent on this site depended on materials and weather. The Respondent thought that Mr Norman

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

was a Licensed Building Practitioner and that Mr Norman was responsible for his own work. Mr Norman is not, and was not, a Licensed Building Practitioner.

- [14] In his written response to the Investigator, the Respondent advised –
- (a) Roofing – *“I was on the ground passing sheets up to Steve to screw off, I had no further involvement with the roofing part of this job”.*
  - (b) Re-cladding- *“I was in charge of removing the existing cladding whilst Steve prepared the replacement cladding.”*
  - (c) Extension – *“I built the extension...”*
  - (d) Flashings – *“I was only involved with one (item A4) to which the flashing has not been screwed off properly.”*
- [15] At the hearing, contrary to his written statement, the Respondent accepted that he had done some of the re-cladding. Mr Norman said both he and the Respondent did the re-cladding and the flashings.
- [16] The Board found it difficult to obtain a clear picture of who did what work on-site from the evidence received at the hearing. This was in part due to Mr Norman answering most of the questions and the Respondent appearing reluctant to engage.
- [17] Weighing the evidence before it, the Board finds on the balance of probabilities that the building work relevant to the complaint and undertaken by the Respondent to be limited to the office block extension – walls, rafters, and purlins; removal of existing cladding and installation of some re-cladding, and the plastic tappit fixings. The Board accepts the Respondent’s written evidence that he did not undertake any roofing work or flashings work.

### **Negligence or Incompetence**

- [18] To find that the Respondent was negligent, the Board needs to determine, on the balance of probabilities,<sup>4</sup> that the Respondent departed from an accepted standard of conduct when carrying out or supervising building work as judged against those of the same class of licence. This is described as the *Bolam*<sup>5</sup> test of negligence.<sup>6</sup>
- [19] To make a finding of incompetence, the Board has to determine that the Respondent has demonstrated a lack of ability, skill, or knowledge to carry out or supervise building work to an acceptable standard.<sup>7</sup> A threshold test applies to both. Even if the Respondent has been negligent or incompetent, the Board must also decide if

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<sup>4</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1. Under section 322 of the Act, the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.

<sup>5</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

<sup>6</sup> Adopted in New Zealand in various matters including: *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

<sup>7</sup> In *Beattie v Far North Council* Judge McElrea, DC Whangarei, CIV-2011-088-313 it was described as “a demonstrated lack of the reasonably expected ability or skill level”. In *Ali v Kumar and Others*, [2017] NZDC 23582 at [30] as “an inability to do the job”

the conduct fell seriously short of expected standards.<sup>8</sup> If it does not, then a disciplinary finding cannot be made.

Has the Respondent departed from an acceptable standard of conduct?

[20] When considering what an acceptable standard is, the Board must consider the purpose of the Building Act<sup>1</sup> as well as the requirement that all building work must comply with the Building Code<sup>9</sup> and any building consent issued.<sup>10</sup> The test is an objective one.<sup>11</sup>

[21] There are two aspects of the Respondent's conduct to consider – the building work he carried out and his supervision of Mr Norman's and others' work.

*Workmanship issues*

[22] Mr [OMITTED]'s report, which he confirmed at the hearing, formed the basis of the Board's inquiries on workmanship issues. The Board canvassed the following matters at the hearing.

- (a) The cladding profile being fixed through the crown of the roof sheet.
- (b) Opening flashings incomplete
- (c) No closure flashing at the top of the cladding sheet
- (d) Minimal flashings to the vertical, external corner flashing
- (e) Plastic tappit fixings
- (f) Internal corner flashing detail appeared reliant on clear silicon to waterproof against the adjoining blockwork.
- (g) The door head flashing sloped back toward the cladding.

[23] Mr [OMITTED] concluded in his report –

*“...it is clear that the roofing and cladding components of this project are unfinished and some of the issues noted...are due to this. However, the standard of installation of the roof and wall cladding along with the associated components falls below that required of the industry and the industry documents. Detailing does not match the consented plans and in many places has been left with little or no waterproofing and pest proofing.*

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<sup>8</sup> *Collie v Nursing Council of New Zealand* [2001] NZAR 74 - [21] “Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness”.

<sup>9</sup> Section 17 of the Building Act 2004

<sup>10</sup> Section 40(1) of the Building Act 2004

<sup>11</sup> *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71 noted that the tribunal does not have to take into account the Respondent's subjective considerations.

*The detailing shows no consistency throughout the installation which affect both the aesthetics and the durability of the building.”*

- [24] Of the workmanship issues, which the Board gave notice that it was investigating, the Respondent is responsible for only the plastic tapits on one flashing and some of the installation of the re-cladding.
- [25] The Respondent acknowledged and accepted responsibility for these workmanship issues.
- [26] In respect of the one flashing he undertook, the Respondent said, *“I understand I did not do it up to code....as I understand if I replace the tapits there will no longer be an issue with this item.”*
- [27] In relation to the re-cladding, the Respondent’s involvement appeared to be mainly in the removal of the existing cladding. To the extent that he agreed at the hearing that he did some re-clad work, the Respondent submitted that he had tried to question his employer on the way the work was being done –

*“Whilst I was removing the cladding Steve began predrilling and installing the cladding. I was unaware at the time that he was doing it incorrectly, when I noticed that he wasn’t screwing the cladding through the trough (the way I have been taught) I questioned him on the matter. He claimed ‘this is the way I have always done it’ and carried on, irrespective of me pointing out how to do it correctly. As he was my employer at the time, and had already made significant progress through the cladding I continued with what I was doing, and then what I was instructed to do.”*

- [28] The Respondent and Mr Norman acknowledged that this project was the first time either of them had used this product for wall cladding. The Respondent stated that he should have done more research on the product before using it.
- [29] Given the above, the Board, which includes persons with extensive experience and expertise in the building industry, decided that the Respondent had departed from what the Board considers to be an accepted standard of conduct. This decision is also based on the evidence in Mr [OMITTED]’s report and the Respondent’s acknowledgements.

#### *Supervision*

- [30] Having decided that aspects of the building work was restricted building work (the parts that were consented), as the Licensed Building Practitioner on site, the Respondent was required to supervise that work. This was a somewhat artificial and difficult position given Mr Norman was the Respondent’s employer.
- [31] The two workmanship matters which were raised in Mr [OMITTED]’s report, which the Board considers are issues which meet the seriousness threshold, were:

(a) Internal corner flashing detail appeared reliant on clear silicon to waterproof against the adjoining blockwork.

(b) The door head flashing sloped back toward the cladding.

[32] Mr Norman gave evidence that he did the work involved in the first issue, and an apprentice did the work in respect of the second issue. The Respondent confirmed at the hearing that he did not do these items of work.

[33] That work was, however, carried out on the non-consented part of the build. It was carried out under clause 1 of Schedule 1 of the Building Act as replacement with a comparable product in the same position. As it was not consented building work, there was no legal requirement that a Licensed Building Practitioner supervise it. This is because, under section 401B of the Act, restricted building work is limited to building work that is carried out under a building consent.

[34] Given the nature of the relationship between Mr Norman, the employer, and the Respondent, an employee and the fact that the Respondent did not carry out the work, the Board finds that he was not the supervisor of the matters complained about and, as such, has not breached section 317(1)(b) of the Act.

#### Was the conduct serious enough?

[35] The Board is required to consider whether the conduct was serious enough to warrant a disciplinary outcome. In respect of the plastic tappit, it was easily remediable, and the Board does not consider that it reaches the seriousness threshold to warrant a disciplinary outcome. The Board cautions the Respondent, however, that he has a responsibility to ensure all building work complies with the building code<sup>12</sup>.

[36] The Board does caution the Respondent that in the future, he needs to be very clear on the nature and extent of restricted building work and the responsibilities that it entails for a Licensed Building Practitioner.

#### Has the Respondent been negligent or incompetent?

[37] The Board finds the Respondent has not committed the disciplinary offence under section 317(1)(b) of the Act.

#### **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.<sup>13</sup> Once issued, there is a requirement that the building work be carried out in accordance with the building consent.<sup>14</sup> Building consents also stipulate the number and type of inspections the

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<sup>12</sup> Section 14E (2A) of the Act

<sup>13</sup> Section 49 of the Act

<sup>14</sup> Section 40 of the Act



issuing authority will carry out during the build.<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup> If it does not, then a disciplinary finding cannot be made.

Was there building work that differed from the building consent?

- [40] Both the Respondent and Mr Norman stated that they were unaware of the building consent for the accommodation portion of the building until part way through the re-cladding of the existing building. They commenced work in June 2021, and the building consent was issued on 22 June 2021. The Complainant was unable to confirm whether a copy of the building consent was given to the Respondent or Mr Norman.
- [41] Mr Norman and the Respondent said that as soon as they were aware of the building consent, they referred to it, and this necessitated some changes to work that had already been done.
- [42] The Board finds that there was work undertaken that differed from the building consent.

Was the conduct serious enough?

- [43] As with the Board's finding for the disciplinary offence under section 317(1)(b) of the Act, the departures from the building consent were not serious enough to make a finding under section 317(1)(d) of the Act.
- [44] In making this finding, the Board takes into account that the Respondent did not know of the existence of the building consent, but once he did, he undertook the work in accordance with the consent until he left the site prior to the completion of the work.

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<sup>15</sup> Section 222 of the Act

<sup>16</sup> *Blewman v Wilkinson* [1979] 2 NZLR 208

<sup>17</sup> *Collie v Nursing Council of New Zealand* [2001] NZAR 74 - [21] "Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness".

[45] The Board notes, however, that the Respondent should educate himself as to the requirements of being familiar with the need for and the following of a building consent.<sup>18</sup>

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

[46] Accordingly, the Board finds that the Respondent has not committed the disciplinary offence under section 317(1)(d) of the Act.

**Failure to Provide a Record of Work**

[47] 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.<sup>19</sup>

[48] 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 work<sup>20</sup> unless there is a good reason for it not to be provided.<sup>21</sup>

Did the Respondent carry out or supervise restricted building work?

[49] The Board considered whether the building work was restricted building work. This is due to the description of the work and the existence of a residential part and a non-residential part in the same building.

[50] Section 84 of the Act provides:

*All restricted building work must be carried out or supervised by a Licensed Building Practitioner [who is licensed] to carry out or supervise the work.*

[51] Section 401B of the Act allows building work to be declared as restricted building work by Order in Council<sup>22</sup>. It only applies to building work that is carried out under a building consent.

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<sup>18</sup> Section 14E and 40 of the Act.

<sup>19</sup> Section 88(1) of the Act.

<sup>20</sup> Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

<sup>21</sup> Section 317(1)(da)(ii) of the Act

<sup>22</sup>401B Order in Council declaring work to be restricted building work

(1) *The Governor-General may, by Order in Council made on the recommendation of the Minister, declare any kind of building work (other than building work for which a building consent is not required) or any kind of design work to be restricted building work.*

(2) *An order under subsection (1) may apply to any kind of building work or design work generally, or may apply to building work or design work in relation to particular types or categories of buildings or to particular parts of buildings.*

(3) *The Minister may recommend the making of an order under this section only if the Minister is satisfied that the kind of building work or design work in question is (or is likely to be) critical to the integrity of a building or part of a building.*

(4) *Building work or design work is not restricted building work if it relates to an application for a building consent made before the commencement of an order under subsection (1) declaring building work or design work of the same kind to be restricted building work.*

[52] The Building (Definition of Restricted Building Work) Order 2011 was passed to establish restricted building work. Clause 5 of the Order stipulates:

5 *Certain building work relating to primary structure or external moisture-management systems of residential buildings to be restricted building work*

(1) *The kinds of building work to which this clause applies are restricted building work for the purposes of the Act.*

(2) *This clause applies to building work that is—*

(a) *the construction or alteration of—*

(i) *the primary structure of a house or a small-to-medium apartment building; or*

(ii) *the external moisture-management system of a house or a small-to-medium apartment building; and*

(b) *of a kind described in subclause (3); and*

(c) *of a kind for which a licensing class to carry out or supervise the work has been designated by Order in Council under section 285 of the Act.*

(3) *The kinds of building work referred to in subclause (2)(b) are—*

(a) *bricklaying or blocklaying work;*

(b) *carpentry work;*

(c) *external plastering work;*

(d) *foundations work;*

(e) *roofing work.*

[53] On the basis of the Order, there are three requirements that need to be met for building work to be restricted building work. Dealing with each as they relate to the case before the Board:

(a) it must relate to the construction or alteration of the primary structure or the external moisture-management system of a house or a small-to-medium apartment building;

(b) be of a kind described in subclause (3) of the Order;

(c) be of a kind for which a licensing class to carry out or supervise the work has been designated by Order in Council under section 285 of the Act.

[54] The second two elements, those in paragraphs [23](b) and [23](c) above, are not in question. What is in question is whether it was building work on a “house” or “a small-to-medium apartment building”. To decide this, the definitions provided in clause 3 of the Order need to be taken into consideration. Specific definitions of relevance are:

*house means a free-standing, fully detached building consisting of a single residential unit (or a single residential unit and 1 or more residential facilities)*

**household unit—**

- (a) *means a building or group of buildings, or part of a building or group of buildings, used or intended to be used solely or principally for residential purposes and occupied or intended to be occupied exclusively as the home or residence of not more than 1 household; but*
- (b) *does not include a hostel or boardinghouse, or other specialised accommodation.*

*residential facility means a part of a building that is not a residential unit, but is a facility (for example a corridor, foyer, garage, laundry, lift, sauna, or storage unit) whose principal or only purpose is ancillary to the use of a residential unit in the building (or 2 or more residential units in the building)*

*residential unit means a building, or part of a building, that is so designed that it is more suitable for being lived in by a single household or family than for any other use*

- [55] The structure shown in the consented plans was free-standing and fully detached. It included a residential unit as defined above. It also included what could be described as a non-residential facility. The only question for the Board is whether the inclusion of the non-residential facility, resulted in part or all of the consented structure no longer being restricted building work.
- [56] In coming to a decision, the Board needs to apply the general principles of statutory interpretation as regards giving words their natural meaning and as outlined in s 5 of the Interpretation Act 1999.<sup>23</sup>
- [57] The Board finds that the building, notwithstanding the inclusion of an area that may not have been a “residential facility”, was a house as per the definition in the Order.
- [58] The Board’s reasoning is that the building as a whole is one contiguous unit. Various structural and weathertight elements such as framing, trusses and cladding of one part are integral to the other and cannot be separated or treated as distinct. Therefore, to require that certain aspects be carried out by a Licensed Building Practitioner and not others would not only be impracticable, but it would potentially

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<sup>23</sup> Section 5 of the Interpretation Act 1999:

*Ascertaining meaning of legislation*

(1) *The meaning of an enactment must be ascertained from its text and in the light of its purpose.*

(2) *The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.*

(3) *Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.*

defeat the requirement for the restricted parts of the residential unit to be completed or supervised by a Licensed Building Practitioner.

[59] Based on the above analysis, the Board finds that the building work that came within the scope of the building consent was restricted building work.

[60] Further, and in support of this finding, the Board notes that the building consent was applied for on the basis that it included restricted building work.

[61] Having established that the consented part of the build was restricted building work, it follows that a Record of Work was required on completion as per the statutory requirement in s 88(1) of the Act and had to be provided to the owner and the territorial authority on completion of restricted building work<sup>24</sup>.

#### Was the restricted building work complete?

[62] The Respondent left the site in November or December 2021. The date varies as between the evidence of the Respondent and the Complaint, respectively, but the discrepancy is immaterial for these purposes. At this point, the restricted building work was not complete.

[63] In this instance, however, completion occurred in November or December 2021 when the Respondent's engagement in the building work came to a premature end. The completion date applies notwithstanding that all of the intended work had not been completed as the Respondent did not return and carry out any further restricted building work.

#### Has the Respondent provided a Record of Work?

[64] The Respondent confirmed that he had not provided a Record of Work, and the Council file, obtained on 16 September 2022, did not contain one.

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

[65] There was no good reason given by the Respondent in his written response and at the hearing, he said he had no reason not to provide it and that it was "*just laziness*".

[66] The Board finds that no good reason for failing to provide a Record of Work has been established by the Respondent.

#### Did the Respondent fail to provide a Record of Work?

[67] The Respondent has failed to provide a Record of Work on the completion of restricted building work, and he has committed a disciplinary offence under section 317(1)(da)(ii) of the Act.

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<sup>24</sup> Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

### Board's Decisions

- [68] The Respondent has committed a disciplinary offence under sections 317(1)(da)(ii) of the Act.
- [69] The Respondent has not committed disciplinary offences under section 317(1)(b) and (d) of the Act.

### Penalty, Costs and Publication

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

- [72] The Board has the discretion to impose a range of penalties.<sup>iii</sup> Exercising that discretion and determining the appropriate penalty requires that the Board balance various factors, including the seriousness of the conduct and any mitigating or aggravating factors present.<sup>25</sup> It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:<sup>26</sup>
- (a) protection of the public and consideration of the purposes of the Act;<sup>27</sup>
  - (b) deterring other Licensed Building Practitioners from similar offending;<sup>28</sup>
  - (c) setting and enforcing a high standard of conduct for the industry;<sup>29</sup>
  - (d) penalising wrongdoing;<sup>30</sup> and
  - (e) rehabilitation (where appropriate).<sup>31</sup>
- [73] 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 cases<sup>32</sup> and applying the least restrictive penalty available for the particular offending.<sup>33</sup> In all, the Board should be looking to impose a fair, reasonable, and

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<sup>25</sup> *Ellis v Auckland Standards Committee* 5 [2019] NZHC 1384 at [21]; cited with approval in *National Standards Committee (No1) of the New Zealand Law Society v Gardiner-Hopkins* [2022] NZHC 1709 at [48]

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

<sup>27</sup> Section 3 Building Act

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

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

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

<sup>31</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354; *Shousha v A Professional Conduct Committee* [2022] NZHC 1457

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

<sup>33</sup> *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

proportionate penalty<sup>34</sup> that is consistent with other penalties imposed by the Board for comparable offending.<sup>35</sup>

- [74] In general, when determining the appropriate penalty, the Board adopts a starting point based on the principles outlined above prior to it considering any aggravating and/or mitigating factors present.<sup>36</sup>
- [75] The Board's starting point for a failure to provide a Record of Work is a fine of \$1,500, an amount which it considers will deter others from such behaviour.
- [76] It was clear that there was a power imbalance between the Respondent and his employer and that the Respondent was not fully cognisant of his roles and responsibilities on-site. Whilst, as a Licensed Building Practitioner, the Respondent should have been aware that the consented part of the build was restricted building work and that a Record of Work was required, the Board formed the view that the employer/employee relationship impacted. The Board has taken this into account as a mitigating factor and has reduced the fine to \$500.

### Costs

- [77] Under section 318(4) of the Act, the Board may require the Respondent to pay the costs and expenses of, and incidental to, the inquiry by the Board. The rationale is that other Licensed Building Practitioners should not be left to carry the financial burden of an investigation and hearing.<sup>37</sup>
- [78] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings<sup>38</sup>. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case<sup>39</sup>.
- [79] 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 moderate. Adjustments are then made.
- [80] Ordinarily, the costs order for a half-day hearing, as this was, is \$3,500. As only the Record of Work disciplinary offence was upheld against the Respondent, the Board has decided to reduce the costs award. The Board's costs order is that the Respondent is to pay the sum of \$1,000 toward the costs of and incidental to the Board's inquiry.

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

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

<sup>36</sup> In *Lochhead v Ministry of Business Innovation and Employment* 3 November [2016] NZDC 21288 the District Court recommended that the Board adopt the approach set out in the Sentencing Act 2002.

<sup>37</sup> *Collie v Nursing Council of New Zealand* [2001] NZAR 74

<sup>38</sup> *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

<sup>39</sup> *Cooray v The Preliminary Proceedings Committee* HC, Wellington, AP23/94, 14 September 1995, *Macdonald v Professional Conduct Committee*, HC, Auckland, CIV 2009-404-1516, 10 July 2009, *Owen v Wynyard* HC, Auckland, CIV-2009-404-005245, 25 February 2010.

### Publication

- [81] As a consequence of its decision, the Respondent's name and the disciplinary outcomes will be recorded in the public Register maintained as part of the Licensed Building Practitioners' scheme as is required by the Act,<sup>40</sup> and he will be named in this decision which will be available on the Board's website. The Board is also able, under section 318(5) of the Act, to order further publication.
- [82] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.<sup>41</sup> Further, as a general principle, publication may be required where the Board perceives a need for the public and/or the profession to know of the findings of a disciplinary hearing, and the courts have stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published.<sup>42</sup>
- [83] Based on the above, the Board will not order further publication.

### **Section 318 Order**

- [84] 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 \$500.

**Costs:** Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$1,000 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

**Publication:** The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with section 301(I)(iii) of the Act.

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

- [85] 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**

- [86] 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 **20 July 2023**. The submissions should focus on mitigating matters as they relate to the

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<sup>40</sup> Refer sections 298, 299 and 301 of the Act

<sup>41</sup> Section 14 of the Act

<sup>42</sup> Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

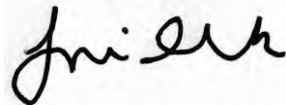


penalty, costs and publication orders. If no submissions are received, then this decision will become final. If submissions are received, then the Board will meet and consider those submissions prior to coming to a final decision on penalty, costs and publication.

### Right of Appeal

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

Signed and dated this 28<sup>th</sup> day of June 2023



**Mrs J Clark**

Presiding Member

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### <sup>i</sup> Section 3 of the Act

*This Act has the following purposes:*

- (a) *to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—*
  - (i) *people who use buildings can do so safely and without endangering their health; and*
  - (ii) *buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and*
  - (iii) *people who use a building can escape from the building if it is on fire; and*
  - (iv) *buildings are designed, constructed, and able to be used in ways that promote sustainable development:*
- (b) *to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code.*

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

- (1) *In any case to which section 317 applies, the Board may*
  - (a) *do both of the following things:*
    - (i) *cancel the person's licensing, and direct the Registrar to remove the person's name from the register; and*
    - (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*
  - (b) *suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*

- (c) *restrict the type of building work or building inspection work that the person may carry out or supervise under the person’s licensing class or classes and direct the Registrar to record the restriction in the register:*
- (d) *order that the person be censured:*
- (e) *order that the person undertake training specified in the order:*
- (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.*