

Before the Building Practitioners Board

	BPB Complaint No. CB25339
Licensed Building Practitioner:	Roy Sharp (the Respondent)
Licence Number:	BP 121522
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
Draft Decision Date:	8 April 2020
Final Decision Date:	27 May 2020

Board Members Present:

Chris Preston, Chair (Presiding)
Mel Orange, Deputy Chair, Legal Member
Richard Merrifield, LBP, Carpentry and Site AOP 2
David Fabish, LBP, Carpentry and Site AOP 2
Robin Dunlop, Retired Professional Engineer

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.

Board Decision:

The Respondent **has** committed disciplinary offences under sections 317(1)(b) and 317(1)(da)(ii) of the Act.

The Respondent **has not** committed a disciplinary offence under sections 317(1)(i) of the Act.

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Introduction

- [1] On 5 February 2020 the Board received a Registrar’s Report in respect of a complaint about the conduct of the Respondent.
- [2] Under regulation 10 of the Complaints Regulations the Board must, on receipt of the Registrar’s Report, decide whether to proceed no further with the complaint because regulation 9 of the Complaints Regulations applies.
- [3] Having received the report the Board decided that regulation 9 did not apply. Under regulation 10 the Board is required to hold a hearing.
- [4] On the basis of the Registrar’s Report the Respondent’s conduct that the Board resolved to investigate at a hearing was that the Respondent had:
 - (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner contrary to section 317(1)(b) of the Act, IN THAT, the Respondent may have failed to provide adequate supervision of restricted building work;

- (b) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) of the Act contrary to section 317(1)(da)(ii) of the Act, IN THAT, he may have failed to provide a record of work within a reasonable period of time of completion; and
- (c) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute contrary to section 317(1)(i) of the Act, IN THAT, he may have allowed his licensed building practitioner licence to be used for the completion of restricted building work without an intention to provide the required levels of supervision.

Scheduled Hearing

- [5] The matter was set down for a hearing on 6 May 2020 in Rotorua.
- [1] As a result of the COVID-19 Alert and Level 4 lockdown the hearing was adjourned. A notice was sent to the Respondent on 31 March 2020 advising that further notices would be sent once the COVID 19 situation changed.
- [2] The Board has since reviewed the complaint file. It has decided that there is sufficient evidence before it to make an indicative decision on the basis of the documentary evidence before it.
- [3] In coming to the decision to deal with the matter on the papers the Board has taken into consideration that the Board's jurisdiction is that of an inquiry. Complaints are not prosecuted before the Board. Rather, it is for the Board to carry out any further investigation that it considers is necessary prior to it making a decision. In this respect the Act provides that the Board may regulate its own procedures¹. It has what is described as a summary jurisdiction in that the Board has a degree of flexibility in how it deals with matters; it retains an inherent jurisdiction beyond that set out in the enabling legislation². As such it may depart from its normal procedures if it considers doing so would achieve the purposes of the Act and it is not contrary to the interests of natural justice to do so.
- [4] The Board is, however, mindful of your natural justice rights to respond to the allegations and that there may be further evidence in the possession of persons involved in the matter or that the Board may not have interpreted the evidence correctly. To that end this decision is a draft Board decision. On this basis both the Respondent and the Complainant will be provided with an opportunity to make

¹ Clause 27 of Schedule 3

² *Castles v Standards Committee No.* [2013] NZHC 2289, *Orlov v National Standards Committee 1* [2013] NZHC 1955

comment on the Board's draft findings and to present further evidence prior to the Board making a final decision. If the Board directs or the Respondent requests an in-person hearing, then one will be scheduled.

Function of Disciplinary Action

[5] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*³ and in New Zealand in *Dentice v Valuers Registration Board*⁴.

[6] Disciplinary action under the Act is not designed to redress issues or disputes between a complainant and a respondent. In *McLanahan and Tan v The New Zealand Registered Architects Board*⁵ Collins J. noted that:

"... the disciplinary process does not exist to appease those who are dissatisfied The disciplinary process ... exists to ensure professional standards are maintained in order to protect clients, the profession and the broader community."

[7] In a similar vein the Board's investigation and hearing process is not designed to address every issue that is raised in a complaint or by a complainant. The disciplinary scheme under the Act and Complaint's Regulations focuses on serious conduct that warrants investigation and, if upheld, disciplinary action. Focusing on serious conduct is consistent with decisions made in the New Zealand courts in relation to the conduct of licensed persons⁶:

... 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.

[8] Finally, the Board can only inquire into "the conduct of a licensed building practitioner" with respect to the grounds for discipline set out in section 317 of the Act. Those grounds do not include contractual breaches other than when the conduct reaches the high threshold for consideration under section 317(1)(i) of the Act which deals with disrepute.

[9] The above commentary on the limitations of the disciplinary process are important to note as, on the basis of it, the Board Board's inquiries, and this decision, focus on and deal with the serious conduct complained about.

³ *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

⁴ [1992] 1 NZLR 720 at p 724

⁵ [2016] HZHC 2276 at para 164

⁶ *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200

Evidence

- [10] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁷. 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.
- [11] The complaint made related to a failure to provide a record of work. The Respondent was engaged as the supervising licensed building practitioner at the commencement of the build by the main contractor [Omitted], an unlicensed builder. [Omitted] noted in a letter to the Board received on 7 October 2019:

Roy Sharp was hired as the project manager on the 7th January 2019 and produced his LBP on the 18th January 2019. Roy supervised all the building work, organized brackets and trusses and showed the onsite builders how touchwood homes were put together. Roy checked all the building work as to the plans and was happy with the work the builders were doing. Roy measured all the window openings for the new windows where were 20mm too short in height. Roy also followed up on materials from the suppliers for the build.

The start date for the job was on the 7/11/2018. The Foundations passed inspection on the 14/11/2018.

Roy was to attend the first inspection of the prewrap. He didn't show up, the date being 12/02/2019. Roy had not ceased work at that time. Roy ceased work via text message on the 3/3/2019.

My role: I own the business and hired all the contractors for the build.

- [12] Included with the response from [Omitted] was an invoice from Roy Sharp Builders dated 12 February 2019 for 7 hours of labour at [Omitted], the address to which the complaint related and a copy of the Respondent's licence card.
- [13] The documentation provided to the Board included evidence that the foundations, referred to above, were carried out or supervised by [Omitted].
- [14] The Respondent provided a short response to the complaint.

[Omitted] contacted me on the 13th of January about using my LPB number on a Touchwood house he was building as I used to run the touchwood factory in Rotorua.

We arranged to meet at [Omitted] where we discussed the job, I told him as I worked out of town Monday to Thursday, I can only be available on Fridays and I would expect to view the job every week on Friday and any inspections would have to be made on Fridays as well.

⁷ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

We talked about a minimal fee per visit, he said we would talk about once I had been out to site.

On the first visit the walls where all up and they had not fixed the internal walls to the concrete floor, which I gave them alternative information to fix them down as the bottom board should have been fixed down first, they had already most off the trusses in place but were struggling with reading the truss plans and the trusses over the garage were a meter short which I sorted out with [Omitted] over the phone as for the truss fixing and truss layouts they were supplied by [Omitted] truss and pre-nail.

When [Omitted] turned up, we talked about payment and he said we would catch up next week as he had to go to an appointment. We never caught up to discuss payment or sign a contract. He rang me and said he needed me to be on site to meet with the Aluminium Joiner on Tuesday I had told him from the start I could only do Fridays, but I left my other job to be there.

The joiner measured the doors and windows not me. So any wrong measurement were not my responsibility.

I visited the site six times every time I was out there, I was not happy with some of the workmanship And felt the carpenters and labours on site needed more supervision than one day a week.

I told [Omitted] my concerns and let him know that I will not be carrying on with being the LPB carpenter as I would be libel for the job for ten years.

As there had been no agreement on payment or contract sign I invoiced him for the seven hours I had been on site at my normal rate which he paid.

Then he wanted me to attend an inspection on Tuesday which I told him again I was not doing it. He also had told me he had approached someone else as the LPB be for me.

I have attached my emails with the Rotorua Lakes Council as well

- [15] He included email correspondence in response to a request for a record of work. The email correspondence included the following:

22 March 2019 Re: [Omitted]

Good morning [Omitted] as per our discussion I was approached by [Omitted] to over see [Omitted] which I said I would look at doing it. I did six visits and was concerned about some issues hence I have decided not to carry on as it leave's me open to being sued in the future. I had text [Omitted] on the 3/3/19 to tell him I am not continuing with the project, I believe there was another LBP before me.

2 May 2019 Re: [Omitted]

Hi [Omitted]

I have never attended any building inspections on that job. I did do some site visits and was not happy with some of the workmanship and was not prepared to put my LBP number to that job, as if there was a problem in the future I would be responsible for it for ten years. I told [Omitted] on the 3/3/19 that I am not going to be the LBP on the Job and I believe I was not the first he has approached to be the LPB so no I wont do a 6A form you can contacted me on

- [16] The Board obtained a copy of the building consent file from the territorial authority. The file referred to the carpentry and foundations licensed building practitioner as at 28/8/18 as *[Omitted]*. The notation was struck through with an annotation that he was “NOT LBP ONSITE AS CONFRIED BY *[Omitted]*”. *[Omitted]* advised that a serious health complication resulted in him being unable to be the licensed building practitioner for the Project.
- [17] The file also included a Notice to Fix issued under the Building Act by the Rotorua Lakes Council. The first item on the list was a requirement to nominate a licensed building practitioner. The file also included correspondence between the Council and *[Omitted]* on 21 March 2019 as regards who the supervising licensed building practitioner was and discussing the Respondent’s role in the build. On 27 March 2019 the Council received advice of a new licensed building practitioner, *[Omitted]*.
- [18] *[Omitted]* provided a statement. He noted that the build was part way through the brick cladding when he took over as the licensed building practitioner. He was subsequently brought on to supervise the builders in how to fix the issues identified in an inspection prior to his engagement. He advised that when he started on the floor, framing, bracing, premade internal linings, and insulation had already been completed.
- [19] The Notice to Fix also identified:
2. *The insulation is to be replaced to meet compliance with the approved building consent 78238;*
 3. *The building wrap is to be installed up to the top plate as shown on the approved building consent.*
 4. *The brick veneer that has been installed is to be removed to complete the items above.*
 5. *The foundation remedial work is to be undertaken and is to be inspected by the engineer from BSK and a council inspector.*
 6. *Site instructions 25097, 25409, 24708, and 25161 are to be completed.*
- [20] Each of the site instructions listed contained some 25 individual compliance items that needed to be addressed.

- [21] The above were the items *[Omitted]* was referring to when he noted he was brought on to fix identified items. The Notice to Fix was lifted on 8 April 2019 on the basis that the non-compliance had been rectified.
- [22] The Council file did not contain any records of advice from the Respondent that he was not the licensed building practitioner or that he had withdrawn from the build.

Draft Conclusion and Reasoning

- [23] The Board has decided that the Respondent **has**:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act); and
 - (b) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act)
- and **should** be disciplined.
- [24] The Board has decided that the Respondent **has not** conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act).
- [25] The reasons for the Board's decisions follow.

Negligence and/or Incompetence

- [26] The Board has decided that the Respondent **has** carried out or supervised building work or building inspection work in a negligent manner (s 317(1)(b) of the Act) and should be disciplined.
- [27] The finding of negligence relates to the Respondent's lack of supervision of non-licensed persons during the period when the Respondent was the licensed building practitioner.
- [28] It is to be noted that as the building work was carried out under a building consent and as certain elements involved restricted building work under section 84 of the Act it had to be supervised by a licensed building practitioner:
- 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.*
- [29] The main building contractor, *[Omitted]*, was not licensed. He therefore required a licensed person to supervise him and his staff. The foundations were supervised by *[Omitted]*. *[Omitted]* claimed that the Respondent was the next supervisor.
- [30] The Respondent tried to distance himself from the build and to limit his liability. He did not, however, deny involvement and he did invoice for services.

- [31] The Board has decided, on the basis of the evidence before it, that the Respondent was the supervising licensed building practitioner for the build post the completion of foundations up until the point in time when *[Omitted]* became the notified licensed building practitioner being 27 March 2019. It is during this period that the Board finds the Respondent's supervision was negligent.
- [32] Negligence is the departure by a licensed building practitioner, whilst carrying out or supervising building work, from an accepted standard of conduct. It is judged against those of the same class of licence as the person whose conduct is being inquired into. This is described as the *Bolam*⁸ test of negligence which has been adopted by the New Zealand Courts⁹.
- [33] The New Zealand Courts have stated that assessment of negligence in a disciplinary context is a two-stage test¹⁰. The first is for the Board to consider whether the practitioner has departed from the acceptable standard of conduct of a professional. The second is to consider whether the departure is significant enough to warrant a disciplinary sanction.
- [34] When considering what an acceptable standard is the Board must have reference to the conduct of other competent and responsible practitioners and the Board's own assessment of what is appropriate conduct, bearing in mind the purpose of the Act¹¹. The test is an objective one and in this respect it has been noted that the purpose of discipline is the protection of the public by the maintenance of professional standards and that this could not be met if, in every case, the Board was required to take into account subjective considerations relating to the practitioner¹².
- [35] The Board notes that the purposes of the Act are:

3 Purposes

This Act has the following purposes:

- (a) *to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—*
- (i) *people who use buildings can do so safely and without endangering their health; and*
 - (ii) *buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and*
 - (iii) *people who use a building can escape from the building if it is on fire; and*

⁸ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁹ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

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

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

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

(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.*

[36] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹³ and be carried out in accordance with a building consent¹⁴. As such, when considering what is and is not an acceptable standard, the Building Code and any building consent issued must be taken into account.

[37] Supervise is defined in section 7¹⁵ 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.*

[38] In C2-01143 the Board also discussed the levels of supervision it considers will be necessary to fulfil a licensed building practitioner's obligations noting that the level of supervision required will depend on a number of circumstances including:

(a) the type and complexity of the building work to be supervised;

(b) the experience of the person being supervised;

(c) the supervisor's experience in working with the person being supervised and their confidence in their abilities;

(d) the number of persons or projects being supervised; and

(e) the geographic spread of the work being supervised.

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

[40] Supervision in the context of the Building Act has not yet been considered by the courts. It has, however, been considered in relation to Electricity Act 1992¹⁶. The definition of supervision in that Act is consistent with the definition in the Building

¹³ Section 17 of the Building Act 2004

¹⁴ Section 40(1) of the Building Act 2004

¹⁵ Section 7:

supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—

(a) *is performed competently; and*

(b) *complies with the building consent under which it is carried out.*

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

Act and as such the comments of the court are instructive. In the case Judge Tompkins stated at paragraph 24:

“As is made apparent by the definition of "supervision" in the Act, that requires control and direction by the supervisor so as to ensure that the electrical work is performed competently, that appropriate safety measures are adopted, and that when completed the work complies with the requisite regulations. At the very least supervision in that context requires knowledge that work is being conducted, visual and other actual inspection of the work during its completion, assessment of safety measures undertaken by the person doing the work on the site itself, and, after completion of the work, a decision as to compliance of the work with the requisite regulations.”

- [41] There was significant evidence by way of the Council records and in particular the site instructions 25097, 25409, 24708, and 25161 to show that building work had been carried out in a non-compliant manner. The instructions detailed a comprehensive list of serious noncompliance which eventually resulted in a Notice to Fix being issued. Another licensed building practitioner was engaged, and he ensures that issues were rectified.
- [42] A review of the response from the Respondent shows that he did not take his responsibility as a supervisor seriously. The original intention was to simply turn up each Friday after his own week work was complete. Doing so does not meet the requirements of supervision as outlined above. Such arrangements may be suitable when there has been a long-term association between the supervisor and supervisee where an understanding of the skill and ability of those being supervised has been established. There was no evidence in this instance, however, that this was the case. As matters transpired the lack of supervision resulted in an increasing number of noncompliance issues arising.
- [43] The supervision certainly did not accord with the guidance issued by the Ministry of Business Innovation and Employment under section 175 of the Act and which is available to all licensed building practitioners. What was being provided appeared more in line with a form of quality assurance process. It was not active engagement in the work to ensure compliance.
- [44] Moreover, once it became apparent to the Respondent that there were issues with the compliance of the build and that more supervision was required, he took no steps to formally withdraw from the project or to increase his supervision. He did advise the main contractor on 3 March 2019 by text that he was not willing to continue but did not file any notices with the building consent authority informing them that he was no longer the supervising licensed building practitioner.
- [45] Given the above factors the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent has departed from what the Board considers to be an accepted standard of conduct and that the conduct was sufficiently serious enough to warrant a disciplinary outcome.

Record of Work

- [46] Section 88(1) of the Building Act 2004 requires that a licensed building practitioner provide a record of work to the owner and the territorial authority on completion of restricted building work¹⁷.
- [47] Restricted building work was carried out whilst the Respondent was the supervisor. He has a statutory duty to provide a record of work for it. The Respondent informed the territorial authority that he would not be doing one.
- [48] The Respondent alludes to his not having an obligation to provide a record of work as the restricted building work was not complete when he left the project and that others were involved.
- [49] Firstly, if such a submission was accepted then, in situations where restricted building work has been started but not finished or is finished by others, an obligation to provide a record of work would never arise. That would defeat the purpose of the legislation which is to ensure there is a documented history of all the licensed building practitioners involved in a build.
- [50] Secondly each and every licensed building practitioner must provide a record of work for the restricted building work that they carry out or supervise. As such the licensed building practitioners who came before the Respondent will have to complete a record of work as will those that came after him.
- [51] The statutory provisions do not stipulate a timeframe for the licenced person to provide a record of work. The provisions in section 88(1) simply states “on completion of the restricted building work ...”. As was noted by Justice Muir in *Ministry of Business Innovation and Employment v Bell*¹⁸ “... the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work”.
- [52] As to when completion will have occurred is a question of fact in each case.
- [53] In most situations’ issues with the provision of a record of work do not arise. The work progresses and records of work are provided in a timely fashion. Completion occurred when a new licensed building practitioner took over as, from that date on, the Respondent would not be carrying out or supervising any further restricted building work. A record of work has been not provided. On this basis the Board finds that the record of work was not provided on completion as required and the disciplinary offence has been committed.
- [54] The Respondent should note that the requirement is on the licensed building practitioner to provide a record of work, not on the owner or territorial authority to demand one. He is required to act of his own accord and not wait for others to remind him of his obligations.

¹⁷ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

¹⁸ [2018] NZHC 1662 at para 50

[55] Section 317(1)(da)(ii) of the Act provides for a defence of the licenced building practitioner having a “good reason” for failing to provide a record of work. If they can, on the balance of probabilities, prove to the Board that one exists then it is open to the Board to find that a disciplinary offence has not been committed. Each case will be decided by the Board on its own merits but the threshold for a good reason is high. No good reasons have been put forward.

Draft Decision on Penalty, Costs and Publication

[56] Having found that one or more of the grounds in section 317 applies the Board must, under section 318 of the Actⁱ, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.

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

Penalty

[58] The purpose of professional discipline is to uphold the integrity of the profession; the focus is not punishment, but the enforcement of a high standard of propriety and professional conduct. The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*¹⁹ commented on the role of "punishment" in giving penalty orders stating that punitive orders are, at times, necessary to provide a deterrent and to uphold professional standards. The Court noted:

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

[59] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*²⁰ the court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act they have the advantage of simplicity and transparency. The court recommended adopting a starting point for penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.

[60] The Board considered that the level of negligence was at the mid or moderate level. There were, however, two offences that have been committed. On this basis the Board adopted a starting point of a fine of \$3,000.

[61] The Board did accept that the Respondent may have unwittingly become involved in a building project over which he had very little control. That is not a defence, he

¹⁹ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

should have turned the role down or provided proper supervision. It is a mitigating factor. On the basis of this mitigation the Board has reduced the fine to \$1,500. This is similar to a fine the Board would normally impose for a record of work offence.

Costs

- [62] Under section 318(4) the Board may require the Respondent “to pay the costs and expenses of, and incidental to, the inquiry by the Board.”
- [63] The Respondent should note that the High Court has held that 50% of total reasonable costs should be taken as a starting point in disciplinary proceedings and that the percentage can then be adjusted up or down having regard to the particular circumstances of each case²¹.
- [64] In *Collie v Nursing Council of New Zealand*²² where the order for costs in the tribunal was 50% of actual costs and expenses the High Court noted that:

But for an order for costs made against a practitioner, the profession is left to carry the financial burden of the disciplinary proceedings, and as a matter of policy that is not appropriate.

- [65] The Board notes the matter was dealt with on the papers. There has, however, been costs incurred investigating the matter, producing the Registrar’s Report and in the Board making its decision. The costs have been less than those that would have been incurred had a full hearing been held. As such the Board will order that costs of \$1,000 be paid by the Respondent. The Board considers that this is a reasonable sum for the Respondent to pay toward the costs and expenses of, and incidental to, the inquiry by the Board.

Publication

- [66] 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 Act²³. The Board is also able, under section 318(5) of the Act, to order publication over and above the public register:

In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit.

- [67] As a general principle such further public notification may be required where the Board perceives a need for the public and/or the profession to know of the findings of a disciplinary hearing. This is in addition to the Respondent being named in this decision.

²¹ *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.

²² [2001] NZAR 74

²³ Refer sections 298, 299 and 301 of the Act

- [68] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990²⁴. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²⁵. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²⁶. The High Court provided guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*²⁷.
- [69] The courts have also stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published in the public interest²⁸. It is, however, common practice in disciplinary proceedings to protect the names of other persons involved as naming them does not assist the public interest.
- [70] Based on the above the Board will not order further publication.

Draft Section 318 Order

- [71] 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 \$1,500.

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(1)(iii) of the Act.

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

- [72] The Respondent should note that the Board may, under section 319 of the Act, suspend or cancel a licensed building practitioner's licence if fines or costs imposed as a result of disciplinary action are not paid.

Submissions on Draft Decision

- [73] The Board invites the Respondent and the Complainant to:

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

²⁴ Section 14 of the Act

²⁵ Refer sections 200 and 202 of the Criminal Procedure Act

²⁶ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

²⁷ *ibid*

²⁸ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

- [74] Submissions and/or further evidence must be filed with the Board by no later than the close of business on **20 May 2020**.
- [75] If submissions are received, then the Board will meet and consider those submissions.
- [76] The Board may, on receipt of any of the material received, give notice that an in-person hearing is required prior to it making a final decision. Alternatively, the Board may proceed to make a final decision which will be issued in writing.
- [77] If no submissions or further evidence is received within the time frame specified, then this decision will become final.

Request for In-Person Hearing

- [78] If the Respondent, having received and considered the Board's Draft Decision, considers that an in-person hearing is required then one will be scheduled, and a notice of hearing will be issued.
- [79] A request for an in-person hearing must be made in writing to the Board Officer no later than the close of business on **20 May 2020**.

Submissions Made

- [80] The Board received submissions from both the Complainant and the Respondent.
- [81] The Complainant stated:

The facts are, Roy Sharp was hired to be the LBP for the whole job not just the first part of the build. Roy took upon himself not to turn up or be contacted toward the end of the first inspection. In doing this, Roy put the whole entire job at risk as we had to cease work. This was devastating because they are solid interior wood finish walls and we need to get the roof on to protect them.

- [82] The Complainant also noted the interactions he had with the Respondent during the build, the instructions the Respondent issued and that:

Roy (the Respondent) had turned up a few days before the inspection to check the work and was happy with it and that he would be there for the inspection.

Roy never showed up. We tried phoning Roy time and time again with no success. We had no option but to cease work.

I have lost a lot of money because of Roy and to text on the 3/3/19 saying he no longer wanted to be the LBP, we find this very serious.

- [83] The Respondent's submission focused on his interactions and difficulties with the Complainant who, he claimed, failed to provide him with the information he required. The Respondent did state:

I had continued to visit the site every Friday for six weeks in total, but it became clear that some of the workmanship was not up to scratch and I became aware that the carpenters and labourers on site would require more

involved supervision than I was able to provide. I vocalised these concerns to [Omitted] (the Complainant) and considered my position given that due to other work commitments I was only able to visit the site one day per week.

- [84] The submissions went on to note that the Respondent considered there were limitations to his supervision and that, in his opinion, the Complainant failed to meet those conditions and that the Complainant was actually responsible for supervision. The Respondent also noted that the Complainant had failed to replace him as a supervisor and that the Complainant had, thereafter, carried out unsupervised work. The Respondent did note:

I guess my failing here was becoming involved at all. I should have realised immediately that the limitations of my involvement would not result in sufficient supervision or compliance.

- [85] The Respondent maintained that the lack of supervision was because he could not supervise and that he refused to provide supervision. He stated:

I object to the finding that I did not take my supervision role seriously. In fact, I took it seriously and this is why I was not prepared to supervise the work. This is consistent with the finding that I unwittingly became involved with the project which I had little control over.

- [86] In respect of the draft finding of a failure to provide a record of work the Respondent submitted that he had a good reason in that he was “never properly engaged” and that he was “only peripherally involved in the job for a short period and there was no significant or noteworthy supervision completed in that timeframe”. He stated:

I could not reasonably provide a ROW in the circumstances. Doing so would have been misleading and dishonest. [Omitted] carried out unsupervised work which I could not in good conscience provide a ROW for. This constitutes good reason for not doing so.

- [87] With regard to penalty the Respondent noted that he took his responsibilities seriously and that he should have been more forceable and diligent at the commencement but that he took action to withdraw from the project when he had concerns about the work. The Respondent submitted:

18. *Once I provided by LBP number to [Omitted], I believe I was involved and would have either been disciplined for not conducting proper supervision, or issuing a ROW when I shouldn't have.*

19. *If the BPB does find that I have unwittingly committed the offences, I believe the BPB should place greater weight on my attempts to mitigate liability and to comply with my obligations as an LBP when considering the severity of the offences.*

20. *In this case I believe the appropriate response is to direct that I carry out further professional development (which I have continued to do) to avoid such a situation occurring again.*

Final Decision

- [88] The Board accepts that the Respondent's involvement in the project was limited. The Board's findings did not relate to all of the building work but only to the periods when the Respondent was the supervising licensed building practitioner. On the Respondent's own evidence, he was, for a period, the supervising licensed building practitioner. During that period, the Respondent cannot absolve himself from responsibility. Nor can he, from a licensing and disciplinary perspective, push the blame onto the Complainant. He should note, however, that the draft penalty that the Board indicated it would impose was light as it took the relationship with the Complainant into account.
- [89] The Board does not consider that the submissions raise any new facts or matters that would lead to a different decision in respect of the negligence finding. It is upheld.
- [90] The same applies to the record of work finding. The Respondent did supervise restricted building work. As such he must provide a record of work for it. A record of work would not have been misleading or dishonest if it was restricted to only the restricted work that the Respondent supervised.
- [91] In this respect it must also be borne in mind that a record of work can capture not only what has been done but also what has not been done by the licensed building practitioner. By providing adequate detail within the record of work they can afford themselves a degree of protection against future liability by limiting the record to only that which they have completed.
- [92] In terms of penalty there is merit in the Respondent's submission as regards to training. The Board findings related to supervision and the Board considers that training in supervision may benefit the Respondent. A training order will therefore be made.
- [93] The training to be undertaken is the BCITO Advanced Trade Supervisory Skills Package. It is to be completed to the satisfaction of the Registrar and evidence of successful completion is to be provided to the Registrar as part of satisfying this requirement. The training is to be completed at the Respondent's own cost.
- [94] In respect of the record of work matter whilst the Board would normally impose a fine it considers, given the training order, that a censure will suffice. A censure is a formal expression of disapproval.

Final Section 318 Order

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

Penalty: In respect of the disciplinary offending under section 317(1)(b) of the Act the Respondent is ordered to complete a specified course of training pursuant to section 317(1)(e) of the Act which shall be the BCITO Advanced Trade Supervisory Skills Package which is to be completed to the satisfaction of the Registrar; and

In respect of the disciplinary offending under section 317(1)(da)(ii) of the Act the Respondent, pursuant to section 318(1)(d) of the Act is censured.

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(1)(iii) of the Act.

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

[96] The Respondent should note that the Board may, under section 319 of the Act, suspend or cancel a licensed building practitioner's licence if costs imposed as a result of disciplinary action are not paid.

[97] The Respondent should note that if the Respondent fails to comply with the Board's training order within the time frame indicated then it will suspend the Respondent's licence in accordance with section 318(1)(b) until the earlier of the training being satisfactorily completed or the expiry of a period of 12 months.

Right of Appeal

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

Signed and dated this 3rd day of July 2020



Chris Preston
Presiding Member

ⁱ **Section 318 of the Act**

(1) *In any case to which section 317 applies, the Board may*

(a) *do both of the following things:*

(i) *cancel the person's licensing, and direct the Registrar to remove the person's name from the register; and*

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- (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*
 - (b) *suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*
 - (c) *restrict the type of building work or building inspection work that the person may carry out or supervise under the person's licensing class or classes and direct the Registrar to record the restriction in the register:*
 - (d) *order that the person be censured:*
 - (e) *order that the person undertake training specified in the order:*
 - (f) *order that the person pay a fine not exceeding \$10,000.*
 - (2) *The Board may take only one type of action in subsection 1(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).*
 - (3) *No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.*
 - (4) *In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.*
 - (5) *In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit."*

ii Section 330 Right of appeal

- (2) *A person may appeal to a District Court against any decision of the Board—*
 - (b) *to take any action referred to in section 318.*

Section 331 Time in which appeal must be brought

An appeal must be lodged—

- (a) *within 20 working days after notice of the decision or action is communicated to the appellant; or*
- (b) *within any further time that the appeal authority allows on application made before or after the period expires.*