

Before the Building Practitioners Board

	BPB Complaint No. CB26095
Licensed Building Practitioner:	Nicholas Smith (the Respondent)
Licence Number:	BP131755
Licence(s) Held:	Brick and Block – Veneer

Decision of the Board in Respect of the Conduct of a Licensed Building Practitioner

Under section 315 of the Building Act 2004

Complaint or Board Inquiry	Complaint
Hearing Location	Tauranga
Hearing Type:	In Person
Hearings and Decision Date:	23 March 2023

Board Members Present:

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

Procedure:

The matter was considered by the Building Practitioners Board (the Board) under the provisions of Part 4 of the Building Act 2004 (the Act), the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Complaints Regulations) and the Board's Complaints and Inquiry Procedures.

Disciplinary Finding:

The Respondent **has not** committed a disciplinary offence.

Contents

Summary	2
The Charges	2
Evidence	3
Negligence or Incompetence	3
Has the Respondent departed from an acceptable standard of conduct	3
Was the conduct serious enough	5
Has the Respondent been negligent or incompetent.....	5
Contrary to a Building Consent	5
Has the Respondent breached section 317(1)(d) of the Act	6
Board's Decisions	6

Summary

- [1] The Respondent was the supervising Licensed Building Practitioner for brickwork that failed a half-high inspection. Control joints had not been installed, and some perp ends were not filled with mortar. The work was not re-inspected prior to it continuing to its full height. Photographic evidence was later provided to show that the issues had been rectified.
- [2] The Board found that the Respondent's supervision was, in the circumstances, adequate and that any departures from acceptable standards or from the building consent were not serious enough to warrant a disciplinary outcome.

The Charges

- [3] The prescribed investigation and hearing procedure is inquisitorial, not adversarial. There is no requirement for a complainant to prove the allegations. The Board sets the charges and decides what evidence is required.¹
- [4] In this matter, the disciplinary charges the Board resolved to further investigate² were that the Respondent may, in relation to building work at **Omitted**, have:
- (a) carried out or supervised building work in a negligent or incompetent manner contrary to section 317(1)(b) of the Act; and/or
 - (b) carried out or supervised building work that does not comply with a building consent contrary to section 317(1)(d) of the Act.

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

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

- [5] The Board gave notice that, in further investigating the above allegations, it would be inquiring into the matters noted and raised in documents 2.1.24 to 2.1.31 (pages 34 to 43 of the Board's file).

Evidence

- [6] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed³. Under section 322 of the Act, the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.

Negligence or Incompetence

- [7] To find that the Respondent was negligent, the Board needs to determine, on the balance of probabilities,⁴ 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*⁵ test of negligence.⁶ 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.⁷ A threshold test applies to both. Even if the Respondent has been negligent or incompetent, the Board must also decide if the conduct fell seriously short of expected standards.⁸ If it does not, then a disciplinary finding cannot be made.

Has the Respondent departed from an acceptable standard of conduct

- [8] When considering what an acceptable standard is, the Board must consider the purpose of the Building Actⁱ as well as the requirement that all building work must comply with the Building Code⁹ and any building consent issued¹⁰. The test is an objective one.¹¹
- [9] The complaint was made in August 2022 by the Bay of Plenty District Council. It related to an inspection carried out in January 2022. The complaint was made after a Notice to Fix was issued by the Council in relation to another property the

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

⁴ *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.

⁵ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁶ 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)

⁷ 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"

⁸ *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".

⁹ Section 17 of the Building Act 2004

¹⁰ Section 40(1) of the Building Act 2004

¹¹ *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.

Respondent had carried out brickwork on. The Council witness at the hearing, **Omitted**, the inspections team leader, noted that the predominate issue complained about was an attempt to conceal a failure to install control joints. **Omitted** did note that he had asked his colleagues about the standard of the Respondent's work on other sites that had been inspected. The impression he obtained was that the matters complained about were isolated instances.

- [10] The Respondent did not carry out the brickwork. One qualified tradesman and a fourth-year apprentice carried it out under his supervision. Both had worked for the Respondent for some time and he was confident with the capabilities and the standard of their work. The Respondent was working on another site when the brickwork was constructed. He did assist with the setout and was available if there were any issues as the brickwork progressed.
- [11] The half-high inspection was failed. The main issues were that control joints had not been installed and a lack of mortar on the back of perp ends. The Council also raised an issue with the brickwork proceeding to its full height without the non-compliant items being rechecked. Photographic evidence was subsequently supplied to the Council to establish that the issues had been satisfactorily rectified, and the brickwork was passed in early February 2022.
- [12] The Respondent accepted that the control joints had not been installed correctly, and he expressed his disappointment with the fourth-year apprentice who had failed to install them and had then tried to cover the error up. He stated that the apprentice knew what to do and could not explain the failure. The Respondent drilled out the mortar and installed the control joints himself.
- [13] With respect to the perp ends, the Respondent stated that, at times, the mortar and the back of the bricks could fall out and that he was confident that the bricks would have had 70-80% of the joint filled with mortar. The Council witnesses were not sure how many perp ends were not full. The Respondent rectified the issue.
- [14] Looking at the issues, the Board found that the failure to install control joints was a departure from acceptable standards but that there was insufficient evidence to establish that, on the balance of probabilities, the perp ends were non-compliant.
- [15] The failure to install control joints was something that was completed under the Respondent's supervision. As such, in considering whether the Respondent's conduct has failed to meet an acceptable standard, the Board needs to consider it within the context of his supervision. It is a defined term in the Act,¹² and there are various factors that the Board needs to consider when it determines whether a Licensed Building Practitioner's supervision has met an acceptable standard. The

¹² 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.

District Court has stated, albeit in the context of the Electricity Act, that at the very least, supervision 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 the compliance of the work with the requisite regulations.¹³

- [16] As the Respondent was the supervising Licensed Building Practitioner, he was responsible for the quality and compliance of the building work. The failure to install control joints was a significant and serious departure from acceptable standards. Looking at the Respondent's supervision, he was familiar with the capabilities of his staff. The work was not complex. He adopted a remote supervision methodology. In the circumstances of the case, the Board decided that remote supervision was acceptable and that the Respondent had not departed from acceptable standards as regards his supervision. The Board did recommend, however, that he obtain and study the Ministry of Business Innovation and Employment Guide, as supervision has to be adjusted according to the complexity of the building work being undertaken and the capabilities of the staff undertaking it.
- [17] With regard to the failure to call for a re-inspection at the half-height, the Respondent was asked why he did not call for it. He stated that he had never had a failed inspection and was unsure what to do when a failed inspection occurred. The failure to call for a re-inspection was a departure from acceptable standards.

Was the conduct serious enough

- [18] The only departure under consideration is the failure to obtain a re-inspection. It was noted that it was an isolated incident, and it was mitigated by the noted issues having been rectified. Given those factors, the Board decided that the conduct was not serious enough. The Respondent is, however, cautioned, and the Board recommends that he obtains and studies the Ministry's Regulatory Guidance Handbook so that he is fully conversant with his obligations as a Licensed Building Practitioner.

Has the Respondent been negligent or incompetent

- [19] The Respondent has not been negligent, nor has he been incompetent.

Contrary to a Building Consent

- [20] 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.¹⁴ Once issued, there is a requirement that the building work be carried out in accordance with the building

¹³ *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

¹⁴ Section 49 of the Act

consent.¹⁵ Building consents also stipulate the number and type of inspections the issuing authority will carry out during the build.¹⁶ Inspections ensure independent verification that the building consent is being complied with.

- [21] 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.¹⁷ 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.¹⁸ If it does not, then a disciplinary finding cannot be made.
- [22] The failure to install control joints was a departure from the building consent. As with the matters under consideration under section 317(1)(b) of the Act, in the circumstances of the case, the conduct was not serious enough to warrant a disciplinary outcome.

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

- [23] The Respondent has not committed a disciplinary offence under section 317(1)(d) of the Act.

Board's Decisions

- [24] The Respondent has not committed a disciplinary offence.

Signed and dated this 6 day of April 2023.



Mr/M Orange
Presiding Member

Section 3 of the Act

This Act has the following purposes:

¹⁵ Section 40 of the Act

¹⁶ Section 222 of the Act

¹⁷ *Blewman v Wilkinson* [1979] 2 NZLR 208

¹⁸ *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".

- (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.*