

Before the Building Practitioners Board

	BPB Complaint No. CB25035
Licensed Building Practitioner:	Shannon Tawhiti (the Respondent)
Licence Number:	BP 123986
Licence(s) Held:	Foundations – Concrete or timber pile foundations

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	Napier
Hearing Type:	In Person
Hearing and Decision Date:	29 September 2020
Board Members Present:	

Mel Orange, Deputy Chair, Legal Member
Robin Dunlop, Retired Professional Engineer
Rob Shao, LBP, Carpentry and Site AOP 1
Frank Thomas, LBP, Roofing

Appearances:

Michael Wenly, Willis Legal, for the Respondent

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 not** committed a disciplinary offence.

Contents

Introduction	2
Function of Disciplinary Action	3
Inquiry Process	3
Evidence	4
Board's Conclusion and Reasoning	6

Introduction

- [1] The hearing resulted from a complaint into the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations¹ to hold a hearing in relation to building work at [omitted]. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:
- (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).
- [2] The matter was originally heard on 30 January 2020. A decision dated 6 March 2020 was issued by the Board. It upheld the grounds of discipline. On 23 March 2020, the Respondent appealed the Board's decision on the basis that there had been a breach of natural justice in that he had not appeared and been heard. The District Court at Napier issued a minute in respect of the appeal on 28 May 2020². The Judge directed:
- 4. As a matter of material justice the appropriate course is for this to be remitted back to the Board for a rehearing and a direction is made accordingly.*
- [3] The matter was heard by Board Members who were not part of the 30 January 2020 hearing.

¹ The resolution was made following the Board's consideration of a report prepared by the Registrar in accordance with the Complaints Regulations.

² CIV-2020-041-000089

Function of Disciplinary Action

[4] 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.

[5] 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.”

[6] 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.

[7] 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.

[8] 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.

Inquiry Process

[9] The investigation and hearing procedure under the Act and Complaints Regulations is inquisitorial, not adversarial. There is no requirement for a complainant to prove the allegations. Rather the Board sets the charges, and it decides what evidence is

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

required at a hearing to assist it in its investigations. In this respect, the Board reviews the available evidence when considering the Registrar's Report and determines the witnesses that it believes will assist at a hearing. The hearing itself is not a review of all of the available evidence. Rather it is an opportunity for the Board to seek clarification and explore certain aspects of the charges in greater depth.

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 procedure the Board uses is inquisitorial, not adversarial. The Board examines the documentary evidence available to it prior to the hearing. The hearing is an opportunity for the Board, as the inquirer and decision-maker, to call and question witnesses to further investigate aspects of the evidence and to take further evidence from key witnesses. The hearing is not a review of all of the available evidence.
- [12] In addition to the documentary evidence before the Board it heard evidence at the hearing from:
- | | |
|-----------------|-----------------------------|
| Shannon Tawhiti | Respondent |
| [Omitted] | Complainant |
| [Omitted] | Homeowner |
| [Omitted] | Hastings Council, inspector |
| [Omitted] | On site builder |
- [13] The Respondent's company Relocate Homes NZ Limited⁸ was engaged to move an existing dwelling and locate it onto new foundations. It was accepted by the Respondent that the work completed on the foundations, as set out in Council building inspection records was substandard and that remedial work had to be carried out prior to a code compliance certificate being issued. The remedial work was carried out at the instruction of the Respondent's company by a contracted licensed building practitioner who had not previously been involved in the building work with the assistance and oversight of an engineer.
- [14] What was at issue at the hearing was who the supervising licensed practitioner (LBP) was. The Complainant maintained that the Respondent was the supervisor, the Respondent's position was that the Complainant was supervising the restricted building work.
- [15] The history of the building work was that the building consent for it was submitted by an architect on behalf of the Respondent's company. The Respondent was the

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

⁸ Now in liquidation

nominated LBP. The Respondent's evidence was that he is nominated as the LBP as a matter of routine when consents are applied for and that the building consent authority (BCA) is advised of the LBP who is actually carrying out or supervising the restricted building work once a subcontractor has been engaged and at the first Council inspection.

- [16] With respect to 11 Stanley Street, no notices of a change of LBP under section 87 of the Act were filed⁹. The BCA records continued to record the Respondent as the LBP in a Site Notice dated 30 October 2018, issued after the on-site compliance issues had arisen. The Council witness was not able to assist with respect to whether there had been any change of LBP notified on site.
- [17] The Respondent gave further evidence about his general practice as regards carrying out or supervising restricted building work. He stated that he does not get involved with on-site work. He noted that his company did a high number of dwelling relocations around the North Island and that he subcontracts the on-site work to LPBs to carry out and supervise the work.
- [18] The evidence received, in respect of the specific site, was that the initial set out and digging of pile holes was carried out by the Respondent on or about 8 or 9 July 2018. The dwelling was on site and in position waiting to be lowered onto the foundation, once constructed. The substructure of the house was used to set out where the piles would be positioned by the Respondent. The Respondent's evidence was that he dug the pile holes on this occasion because he had loaned a friend's machine and that his friend required that he be the one that operated it as he was an experienced operator.
- [19] The Respondent stated that after digging the holes, he went to Auckland and that the balance of the work was carried out by staff members of Relocate Homes under the Complainant's supervision. The homeowner confirmed that the Respondent was on site when the pile holes were dug but that she did not observe him on-site when other work was carried out.
- [20] The Respondent also gave evidence to the effect that the Complainant had been Employed by Relocate Homes to supervise all restricted building work that was being undertaken in the North Island. The Complainant was expected to supervise any restricted building work that did not have a contracted LBP. The Complainant gave evidence that his role as an employee was to supervise building work that was being carried out at the company yard. In general, this involved the refurbishment of purchased dwellings prior to them being delivered to site. He did not consider that he was the supervising LBP for [omitted] and stated that he was only brought in to deal with the job once issues arose. He referred to emails from a Relocate Homes staff member in support of his position.

⁹ Section 87 of the Act requires that the owner notify the BCA of any changes as regards the LBPs who are carrying out restricted building work.

- [21] The homeowner gave evidence that three staff members carried out the work after the pile holes had been dug and that they appeared to be unsupervised. She stated that the Complainant was not on site until after the work had been carried out. At that point in time, he stated to her that he would see that the issues were resolved.
- [22] The Board also heard from [omitted] who was on site carrying out the building work. He was not an LBP. He worked with two others and was described as the leading hand on the site. He had worked for Relocate homes for about 12-18 months at the time. His evidence was that he believed the Complainant was his supervisor. He stated that if he had problems or issues on site that he would refer them to the Complainant. [Omitted] was not clear in his recollection of who was on-site and when.
- [23] The Respondent had provided a record of work for the restricted building work. He stated that he had expected the builder who carried out the remedial work to provide a record of work but that as he had not, he decided that he would provide one to enable the completion of the code of compliance certification process.

Board's Conclusion and Reasoning

- [24] The Board has decided that the Respondent **has not**:
- (a) carried out or supervised building work or building inspection work in a negligent manner (s 317(1)(b) of the Act);
 - (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 not** be disciplined.
- [25] The Board reached its decision on the basis that there was insufficient evidence before it to establish that the Respondent was the supervising licensed building practitioner.
- [26] In this respect, the Board notes that it must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed. The relevant authority is *Z v Dental Complaints Assessment Committee*¹⁰ where Justice McGrath in the Supreme Court of New Zealand stated:

[102] The civil standard has been flexibly applied in civil proceedings no matter how serious the conduct that is alleged. In New Zealand it has been emphasised that no intermediate standard of proof exists, between the criminal and civil standards, for application in certain types of civil case. The balance of probabilities still simply means more

¹⁰ [2009] 1 NZLR 1

probable than not. Allowing the civil standard to be applied flexibly has not meant that the degree of probability required to meet the standard changes in serious cases. Rather, the civil standard is flexibly applied because it accommodates serious allegations through the natural tendency to require stronger evidence before being satisfied to the balance of probabilities standard.

[105] The natural tendency to require stronger evidence is not a legal proposition and should not be elevated to one. It simply reflects the reality of what judges do when considering the nature and quality of the evidence in deciding whether an issue has been resolved to “the reasonable satisfaction of the Tribunal”. A factual assessment has to be made in each case. That assessment has regard to the consequences of the facts proved. Proof of a Tribunal’s reasonable satisfaction will, however, never call for that degree of certainty which is necessary to prove a matter in issue beyond reasonable doubt.

- [27] The evidence before the Board was contradictory. The Respondent’s stated position was that the Complainant was the supervising LBP. The Complainant’s position was that the Respondent was the supervising LBP. There was evidence from witnesses and in the documentation before the Board which supported both positions. None of the evidence, however, met the legal burden noted in *Z v Dental Complaints Assessment Committee* above as regards the Respondent. It was on that basis that the Board decided that the allegation of negligence or incompetence would not be upheld.
- [28] With regard to the record of work, as that Board was not able to make a finding that the Respondent was the supervising LBP, it follows that it cannot make a finding as regards a failure to provide a record of work on completion of restricted building work.

Signed and dated this 20th day of October 2020



Mel Orange
Presiding Member