

Before the Building Practitioners Board

	BPB Complaint No. CB26062
Licensed Building Practitioner:	John Taylor (the Respondent)
Licence Number:	BP101643
Licence(s) Held:	Carpentry

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

Complaint or Board Inquiry	Complaint
Hearing Type:	On the papers
Hearing and Decision Date:	5 April 2023
Board Members Present:	

Mr M Orange, Chair, Barrister (Presiding)
Mrs F Pearson-Green, LBP, Design AoP 2
Ms K Reynolds, Construction Manager

Appearances:

D Luoni 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.

Disciplinary Finding:

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

The Respondent is fined \$500 and ordered to pay costs of \$750. A record of the disciplinary offending will be recorded on the Public Register for a period of three years.

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Summary

- [1] The Respondent supervised the installation of a fire that was not completed in a compliant manner. The Respondent accepted that his supervision had been negligent and that he had supervised building work that was contrary to a building consent. As the Respondent accepted responsibility and because the matter was dealt with on the papers the penalty and costs orders were reduced. The Respondent is fined \$500 and ordered to pay costs of \$750. A record of the disciplinary offending will be recorded on the Public Register for a period of three years.

The Charges

- [2] 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
- [3] 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

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.

- (b) carried out or supervised building work that does not comply with a building consent contrary to section 317(1)(d) of the Act.

[4] The Board gave notice that, in considering the allegations under sections 317(1) (b) and (d) of the Act, it would be investigating the installation of the fire and associated flue, including the roof penetration, cavity ventilation and installation clearances.

Hearing Procedure

[5] The Board set the matter down to be heard at a hearing. Following a prehearing conference, Counsel for the Respondent filed a written submission, and on the basis of it, the Board decided that it would consider the matter on the papers. A decision will be issued in due course.

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.
- [7] As noted above, the Respondent filed submissions. In them, he accepted responsibility for the matters under investigation.
- [8] The general rule is that all facts in issue, or relevant to the issue in a case, must be proved by evidence. However, as the Respondent has accepted the allegations, the Board decided that it was not necessary to call any further evidence or to test the evidence.

Summary of the Evidence

- [9] The Respondent's company was engaged to build a new dwelling. The building work included the installation of a wood burner. The installation was carried out by an employee (an apprentice) under the Respondent's supervision. The Respondent submitted the employee was competent to undertake the work under his supervision.
- [10] The Respondent attended the site and provided directions on set-out and instructions for the installation of the fire and the flue. The employee did not follow the Respondent's instructions, and unbeknown to the Respondent, the work was left uncompleted. The non-compliance was identified by another contractor, and the Respondent contributed to the remediation. The manner in which the flue had been installed created a risk of fire occurring in the ceiling cavity.

Negligence or Incompetence

- [11] 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

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.

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.

- [12] 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 issued.¹⁰ The test is an objective one.¹¹
- [13] The Respondent accepted that he had supervised building work in a negligent manner.
- [14] Supervision is a defined term in the Act.¹² 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 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
- [15] There are varying types of supervision. The Ministry of Business Innovation and Employment has issued a supervision guidance document.¹⁴ It notes the different

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.

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.

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

¹⁴ Practice Note: Supervision, August 2017, issued under section 175 of the Act.

types of supervision: direct, general and remote. It also provides a matrix to assist in determining the appropriate form of supervision to be used. Generally, the greater the complexity of the work, the higher the need for direct supervision. Considerations as to the skill level of the person being supervised also need to be taken into consideration.

- [16] In this matter, the person being supervised was an apprentice. The Respondent assessed him as being competent to carry out the work. The work was high risk in that non-compliance carried with it the risk of a fire occurring. Instructions were provided, but the completed work was not checked. In that respect, the supervision went from direct to remote. The Board considers, given the nature of the work and the fact that the employee was still in his apprenticeship, that direct supervision was required throughout and that a physical compliance check was required.

Contrary to a Building Consent

- [17] 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.¹⁵ Once issued, there is a requirement that the building work be carried out in accordance with the building consent.¹⁶ 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
- [18] Again, the Respondent accepted that he had committed the disciplinary offence. The consent required that the fire be installed in a specific manner. It was not. As such, the offence has been committed.

Penalty, Costs and Publication

- [19] Having found that one or more of the grounds in section 317 applies, the Board must, under section 318 of the Actⁱⁱ, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [20] The Respondent has filed submissions as regards penalty, costs and publication. The Board has made decisions based on them.

Penalty

- [21] The Board has the discretion to impose a range of penalties.ⁱⁱⁱ Exercising that discretion and determining the appropriate penalty requires that the Board balance various factors, including the seriousness of the conduct and any mitigating or

¹⁵ Section 49 of the Act

¹⁶ Section 40 of the Act

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

aggravating factors present.¹⁸ It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:¹⁹

- (a) protection of the public and consideration of the purposes of the Act;²⁰
- (b) deterring other Licensed Building Practitioners from similar offending;²¹
- (c) setting and enforcing a high standard of conduct for the industry;²²
- (d) penalising wrongdoing;²³ and
- (e) rehabilitation (where appropriate).²⁴

- [22] 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 cases²⁵ and applying the least restrictive penalty available for the particular offending.²⁶ In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty²⁷ that is consistent with other penalties imposed by the Board for comparable offending.²⁸
- [23] 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.²⁹
- [24] Counsel for the Respondent submitted that a censure would be appropriate. The Board did not agree. The matter is more serious. A deterrence penalty which enforces standards is required. As such, the Board adopted a starting point of a \$1,500 fine, an amount that is consistent with other penalties imposed by the Board for similar offending.
- [25] There are various mitigating factors that must be taken into consideration. Firstly, the Respondent has accepted responsibility. The Board has applied a one-third reduction because of it. Secondly, the Respondent has adjusted his business practices as a result, and he did attend to remedial work. A further one-third reduction is appropriate. The finishing point is a fine of \$500.

¹⁸ *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]

¹⁹ Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

²⁰ Section 3 Building Act

²¹ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²² *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

²³ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

²⁴ *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

²⁵ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²⁶ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

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

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

²⁹ 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.

Costs

- [26] 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.³⁰
- [27] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings³¹. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case³².
- [28] The Board has adopted an approach to costs that uses a scale based on 50% of the average costs of different categories of hearings, simple, moderate and complex. The current matter was moderately complex. Adjustments are then made.
- [29] The Board's normal costs order for a half-day hearing is \$3,500. A hearing was avoided as a result of the responsible manner in which the Respondent approached the matter. A reduction in the costs order is appropriate. The Board orders that the Respondent is to pay the sum of \$750 toward the costs of and incidental to the Board's inquiry.

Publication

- [30] 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 Act³³, and he will be named in this decision. The Board is also able, under section 318(5) of the Act, to order further publication.
- [31] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.³⁴ 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.³⁵
- [32] Based on the above, the Board will not order further publication.

Section 318 Order

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

³⁰ *Collie v Nursing Council of New Zealand* [2001] NZAR 74

³¹ *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

³² *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.

³³ Refer sections 298, 299 and 301 of the Act

³⁴ Section 14 of the Act

³⁵ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

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 \$750 (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(l)(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.

- [34] 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.

Right of Appeal

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

Signed and dated this 19th day of April 2023



M Orange
Presiding Member

ⁱ Section 3 of the Act

This Act has the following purposes:

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

- (b) *to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code.*

ii Section 318 of the Act

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

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- (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.