

Before the Building Practitioners Board

	BPB Complaint No. CB26146
Licensed Building Practitioner:	Glenn Watson (the Respondent)
Licence Number:	BP132844
Licence(s) Held:	Roofing – Profiled Metal Roofing and/or Wall Cladding

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 and Location	By videoconference
Hearing and Decision Date:	5 July 2023

Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)
Ms J Clark, Barrister and Solicitor, Legal Member
Ms K [OMITTED], Construction Manager

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), (d) and (da)(ii) of the Act.

The Respondent's licence is cancelled, and the Board orders that he may not apply to be re-licensed for a period of three (3) months. Further, the Respondent is ordered to pay costs of \$1,500. The decision will be recorded in the Register of Licensed Building Practitioners for a period of three years, and the decision will be published in Code Words.

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Summary

- [1] The Respondent was engaged as a subcontractor to the main contractor to supply materials and construct a roof at a new dwelling under a building consent. The work was undertaken by an employee, and the Respondent, as the Licensed Building Practitioner, was required to supervise him.
- [2] The main contractor terminated its contract with the Respondent before the work was completed because of alleged delays. At that stage, the work on the roof was

inspected by Mr [OMITTED] of [OMITTED], who reported alleged defective workmanship.

- [3] The Board needed to consider the workmanship and whether the Respondent had negligently or incompetently supervised the carrying out of the building work. The Board also needed to determine whether there was a change in roofing product from that which was in the consented plans.
- [4] After exploring the workmanship issues further with Mr [OMITTED] and the Complainant, and considering the level of the Respondent's supervision, the Board found that the matters reached the seriousness threshold and that a disciplinary offence had been committed. The Board held that the Respondent had negligently and incompetently supervised the roofing work.
- [5] In respect of a possible non-consented change in roof product, the Board accepted the evidence of Mr [OMITTED] and the Complainant that the product was substantially the same as that consented and had simply been referred to by a different brand name.
- [6] As regards the record of work, the Board considered whether the Respondent's work on the roof had been totally replaced so as to render the provision of a record of work unnecessary. The Board found that some of the Respondent's roofing work remained after the remedial work was completed. As such, and as the Licenced Building Practitioner supervising the restricted building work, the Respondent was required to provide a record of work, upon completion. He failed to do so.
- [7] The Board decided to cancel the Respondent's licence and order that he may not apply to be re-licensed for a period of three (3) months.

The Charges

- [8] 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
- [9] 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, in respect of the matters noted in a report from Mr [OMITTED], Licensed Building Practitioner, (BPB 133308) at pages 33 to 41 of the Board's file (Documents 2.1.21 to 2.1.29); and
 - (b) carried out or supervised building work that does not comply with a building consent contrary to section 317(1)(d) of the Act in respect of the matters noted

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.

in a report from Mr [OMITTED], Licensed Building Practitioner, (BPB 133308) at pages 33 to 41 of the Board's file (Documents 2.1.21 to 2.1.29) and in respect of a change in roofing product from that which was consented; and/or

- (c) failed, without good reason, in respect of a building consent that relates to restricted building work that he is to carry out or supervise, or has carried out or supervised, (as the case may be), to provide the persons specified in section 88(2) of the Act 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, noting that if the Respondent's work was removed or replaced, that a record of work may not have been required.

Preliminary Issue

- [10] The Respondent did not attend the hearing. He did provide written responses to the complaint to the Investigator on 18 November 2022, 20 February 2023, 1 March 2023 and 4 March 2023. He did not participate in the prehearing telephone call which was offered to him. He was provided with all the required hearing notices.
- [11] Prior to considering the disciplinary charge the Board needs to determine whether the Respondent has been provided with notice of the complaint and with an opportunity to respond to it.
- [12] Under regulation 7(2) of the Complaints Regulations, the Registrar must, when compiling the Registrar's Report, provide a copy of the complaint to the Respondent. Similarly, under regulation 12, if the complaint is to proceed to a hearing, the Board must give notice of the hearing to the Respondent.
- [13] The Register of Licensed Building Practitioners must contain certain information, including under section 301(1)(d) an "address for communications under this Act". Under section 302 the licensed building practitioner must keep their details up to date:

302 Obligation to notify Registrar of change in circumstances

- (1) *Each [person applying to become licensed], and each licensed building practitioner, must give written notice to the Registrar of any change in circumstances within 10 working days after the change.*
- (2) *Change of circumstances—*
 - (a) *means any change in the information that the person has provided to the Registrar under this subpart; and*
 - (b) *includes any change that may be prescribed (if any).*

- [14] As the Respondent has not provided any updated details, the address to be used for communications with him is that contained in the Register.
- [15] Section 314 of the Act makes it an offence for a licensed building practitioner to fail to update the Register:

314 Offences relating to licensing

- (1) *A person commits an offence if the person holds himself or herself out as a person who is licensed to carry out or supervise building work or building inspection work, or building work or building inspection work of a certain type, while not being so licensed.*
- (2) *A person who commits an offence under subsection (1) is liable on conviction to a fine not exceeding \$20,000.*
- (3) *A person commits an offence if the person—*
 - (a) *fails to produce evidence of being licensed as required by section 289; or*
 - (b) *fails to give written notice of a change in circumstances in accordance with section 302.*
- (4) *A person who commits an offence under subsection (3) is liable on conviction to a fine not exceeding \$5,000.*

[16] The Act also provides for the service of notices in section 394. It provides that:

394 Service of notices

- (1) *Any notice or other document required to be served on, or given to, any person under this Act is sufficiently served if it is—*
 - (a) *delivered personally to the person; or*
 - (b) *delivered to the person at the person's usual or last known place of residence or business; or*
 - (c) *sent by fax or email to the person's fax number or email address; or*
 - (d) *posted in a letter addressed to the person at the person's usual or last known place of residence or business.*
- (5) *A notice or other document sent by post to a person in accordance with subsection (1)(d) must be treated as having been received by that person at the time at which the letter would have been delivered in the ordinary course of post.*

[17] Given the above provisions, the Board finds that the required notices under the Regulations have been provided to the Respondent. This decision is reinforced by the Respondent providing responses to the Investigator from the email address to which all notices were sent.

[18] The Board also notes that the purposes of the disciplinary provisions in the Act would be defeated if licensed building practitioners were able to avoid complaints by not maintaining up-to-date contact details as per the requirements of the Act.

[19] In reaching the decision to proceed in the Respondent's absence, the Board has also noted the Court's comments:³

"Absenting oneself voluntarily runs the risk that a trial may be carried on in one's absence but the discretion to do so is only exercised with caution and is subject to the absolute right to a trial that is as fair as circumstances permit and that would lead to a just outcome."

[20] The Court also stated that anyone who chose not to be present could not complain about the "inevitable consequences" of a trial being held in their absence.

[21] Based on the above, the Board finds that it is appropriate that it considers the complaint.

Evidence

[22] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed.⁴ 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

[23] To find that the Respondent was negligent, the Board needs to determine, on the balance of probabilities,⁵ 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*⁶ test of negligence.⁷ 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.⁸ 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.⁹ If it does not, then a disciplinary finding cannot be made.

³ *R v Chatha* [2008] NZCA 547 as cited in *Hart v Auckland Standards Committee 1 of the NZLS* [2013] 3 NZLR at [25] and [26].

⁴ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

⁵ *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.

⁶ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁷ 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)

⁸ 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"

⁹ *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".

Has the Respondent departed from an acceptable standard of conduct?

- [24] When considering what an acceptable standard is, the Board must consider the purpose of the Building Act¹ as well as the requirement that all building work must comply with the Building Code¹⁰ and any building consent issued.¹¹ The test is an objective one.¹²
- [25] The Complainant said that he did not see the Respondent on the roof at all and that the Respondent did not do any of the work himself. The Complainant expressed that he felt sorry for the employee who tried hard and was heard on the phone “pleading for help”. The Respondent confirmed in his written response that it was just him and his employee on site. He did not make any comment on the delineation of the work.
- [26] In the absence of any contradictory evidence and on the balance of probabilities, the Board finds that the Respondent did not carry out the restricted building work, but he was required to and did supervise the work as the only Licensed Building Practitioner with a roofing license.
- [27] When considering the acceptable standard in relation to supervision, the Board considers the definition of supervise in section 7¹³ of the Act and the discussion in its previous decisions of the supervision levels it considers necessary to fulfil a licensed building practitioner’s obligation.¹⁴
- [28] 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 1992,¹⁵ and the Board is guided by those principles in assessing the adequacy of the Respondent’s supervision.
- [29] Ultimately, the Board also needs to consider whether the work met the requirements of the building code and, if not, the level of non-compliance.
- [30] Mr [OMITTED] is a Licensed Building Practitioner who has held a Roofing - Profiled Metal Roof and/or Wall Cladding licence since December 2017. He was asked by the Complainant to investigate the issues with the roof and then carry out the necessary remedial work.

¹⁰ Section 17 of the Building Act 2004

¹¹ Section 40(1) of the Building Act 2004

¹² *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.

¹³ 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

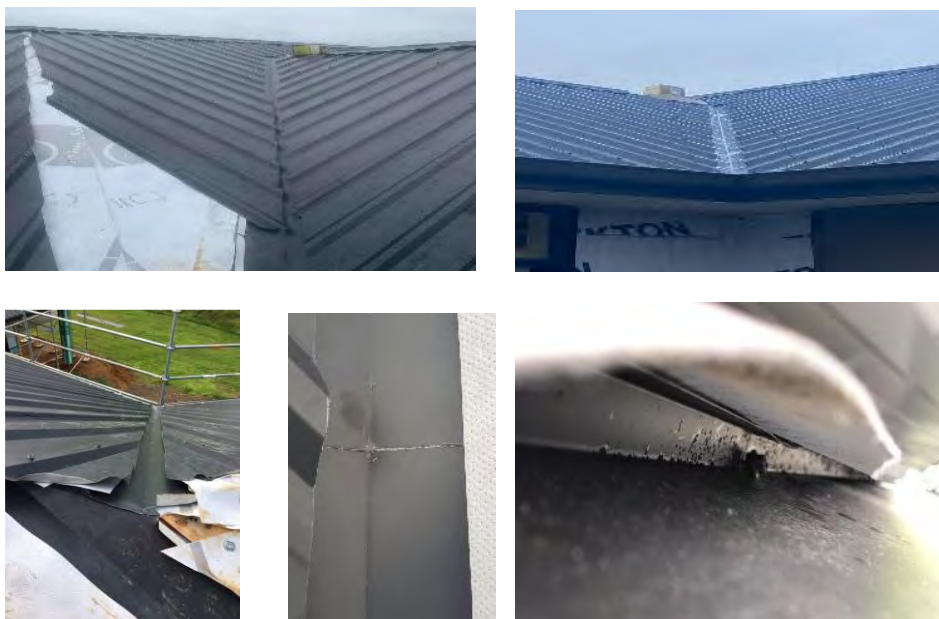
(b) complies with the building consent under which it is carried out.

¹⁴ LBP decision C2-01143

¹⁵ *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

- [31] Mr [OMITTED]'s report of June 2022, which he expanded upon in evidence, highlighted the following workmanship issues.
- (a) Underlay – the paper running from the roof sheets to the valley was running under the valley instead of running into the valley tray. Some of the underlay was also cut short. In 90 percent of the situations, the underlay was not into the valley trays, and in 50 percent it was not into the apex of the roof.
 - (b) Roof sheets – there were missing roof sheets. Mr [OMITTED] said this was incomplete rather than defective work but that it should have been finished off before moving onto other aspects of the job.
 - (c) Crooked screw line – one valley screw line was crooked, and Mr [OMITTED] explained that the screws had missed the purlin completely.
 - (d) Sheets into valleys not trimmed – Mr [OMITTED] said it was not unusual to trim the sheets on the roof but that this should only be about a 10mm trim and not the 60mm that was needed here.
 - (e) Stop ends missing – Mr [OMITTED] said only about 50-60 per cent had been done.
 - (f) Nothing sealed on the junctions – Mr [OMITTED] saw screws in the valley tray, and the junction to the ridge was laid back to front.
 - (g) Velux penetrations were 10 per cent cut in and needed stop ends on the sheets before installing the flashings. Mr [OMITTED] said this was incomplete rather than defective work.

[32] The following photographs, taken by Mr [OMITTED], show some of the issues noted above.



- [33] In Mr [OMITTED]' opinion the work was not up to the standard required of a Licensed Building Practitioner and was both careless and lacking in knowledge and skill.
- [34] This opinion is supported by statements made by:
- (a) Mr [OMITTED], Building Inspector, Waikato District Council in an email of 29 June 2022, – *“There were several issues with the roof upon inspection and looking at the work done I found it to be non-compliant with E2/AS1. Although the roof was not finished the standard of what was done was not of the quality of a licenced [sic] person”* and
 - (b) Mr [OMITTED], CEO of the Roofing Association of New Zealand in an undated email, –*“While allowing that this roof is not finished, it would require significant remediation to enable an acceptable finish to be achieved.”*
- [35] The Complainant said he felt “disappointed” and “let down in a major way”.
- [36] Mr [OMITTED] advised that the rectification and completion of the roof took 7 days and that 90 per cent of that time was remediating the Respondent’s work, and the balance was completing unfinished work.
- [37] In his written response to the Investigator, the Respondent did not specifically address the workmanship issues in Mr [OMITTED]’s report other than to state: “we do not use screws for valleys”.
- [38] Based on the above evidence, supported by the photographs in Mr [OMITTED]’ report, the Board finds that the work was not carried out to an acceptable standard. As the work also did not comply with the Building Code (it would have failed to meet the requirements of clause E2 of the Building Code, which deals with external moisture management), it follows that it cannot have been supervised to an acceptable standard.

Was the conduct serious enough?

- [39] The Board is required to consider whether the conduct was serious enough to warrant a disciplinary outcome.
- [40] The Board notes the Complainant’s evidence that he felt he had caught the situation just in time and that if the Respondent had carried out further work on the roof, there would be more serious issues to deal with.
- [41] Based on the extent of the remedial work required, the fundamental mistakes that were made, and the potential consequences of the workmanship issues, the Board, which includes persons with extensive experience and expertise in the building industry, decided that the Respondent’s conduct was sufficiently serious enough to warrant a disciplinary outcome.

Has the Respondent been negligent or incompetent?

[42] The Board decided that the Respondent's role in the build was as the supervisor. The question for it is whether the Respondent has been negligent or incompetent as regards his supervision of the building work.

[43] The Board, in considering whether the Respondent has supervised building work in a negligent or incompetent manner also needs to have regard to the meaning of those terms. In *Beattie v Far North Council*¹⁶ Judge McElrea provided guidance on their interpretation:

[43] Section 317 of the Act uses the phrase "in a negligent or incompetent manner", so it is clear that those adjectives cannot be treated as synonymous.

[44] In my view a "negligent" manner of working is one that exhibits a serious lack of care judged by the standards reasonably expected of such practitioners, while an "incompetent" manner of working is one that exhibits a serious lack of competence.

[46] The approach I have adopted recognises that the terms "negligent" and "incompetent" have a considerable area of overlap in their meanings, but also have a different focus - negligence referring to a manner of working that shows a lack of reasonably expected care, and incompetence referring to a demonstrated lack of the reasonably expected ability or skill level.

[44] The Board finds the Respondent's supervision of the work departed from an acceptable standard and that he has been negligent and incompetent. The Board makes this finding by focusing on the extent of the remedial work required to make the roof code compliant. The Board decided that the Respondent not only exhibited a serious lack of care but that he also demonstrated a lack of expected skill level in his supervision of the roofing work.

[45] Accordingly, the Board finds that the Respondent has committed the disciplinary offence under section 317(1)(b) of the Act.

Contrary to a Building Consent

[46] 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.¹⁷ Once issued, there is a requirement that the building work be carried out in accordance with the building consent.¹⁸ Building consents also stipulate the number and type of inspections the issuing authority will carry out during the build.¹⁹ Inspections ensure independent verification that the building consent is being complied with.

¹⁶ Judge McElrea, DC Whangarei, CIV-2011-088-313

¹⁷ Section 49 of the Act

¹⁸ Section 40 of the Act

¹⁹ Section 222 of the Act

[47] 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.²⁰ 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.²¹ If it does not, then a disciplinary finding cannot be made.

Was there building work that differed from the building consent?

[48] The underlay, screws in valleys, incorrect junction to the ridge and crooked screw line are all building work which differed from the building consent.

Was the conduct serious enough?

[49] As with the Board's finding under negligence and incompetence, the departures from the building consent were serious enough to make a finding under section 317(1)(d) of the Act.

Has the Respondent supervised building work contrary to a building consent?

[50] The Respondent has committed the disciplinary offence under section 317(1)(d) of the Act. It is noted, however, that the finding of negligence and that of building contrary to a building consent are integrally connected, and, as such, they will be treated as a single offence when the Board considers penalty.

Failure to Provide a Record of Work

[51] A Licensed Building Practitioner must provide a record of work for any restricted building work that they have carried out or supervised to the owner and the Territorial Authority on completion of their restricted building work.²²

[52] There is a statutory requirement under section 88(1) of the Building Act 2004 for a licensed building practitioner to provide a record of work to the owner and the territorial authority on completion of restricted building work²³ unless there is a good reason for it not to be provided.²⁴

²⁰ *Blewman v Wilkinson* [1979] 2 NZLR 208

²¹ *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".

²² Section 88(1) of the Act.

²³ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

²⁴ Section 317(1)(da)(ii) of the Act

Did the Respondent carry out or supervise restricted building work?

- [53] The Respondent supervised the installation of the roof on a new dwelling pursuant to a building consent. This is restricted building work.²⁵

Was the restricted building work complete?

- [54] The Complainant said the Respondent's work was carried out between 28 April 2022 and 23 June 2022. The work was not complete in June 2022, but the Complainant terminated the contract with the Respondent due to alleged delays.
- [55] The Respondent did not refute these dates in his written reply to the Investigator. He stated: *"That afternoon i met the roofer who they wanted to finish the job. 2 days later he text me to say he didn't have time to complete the job. I emailed [the Complainant] for 2 and a half months asking for a update as i needed to know how it was moving and to get paid for work done. no answer."* The context of his reply makes it clear that the knowledge that a new roofer had been approached to complete the work was in or about the end of June 2022.
- [56] The Board finds that the Respondent knew then that he was not returning to complete the restricted building work. In this instance, therefore, completion occurred in late June 2022 when the Respondent's engagement in the building work came to an end. The completion date applies notwithstanding that all of the intended work had not been completed as the Respondent did not return and carry out any further restricted building work.

Was a record of work necessary?

- [57] The Board considered whether the Respondent's restricted building work had been totally replaced in the remediation process, thus making the provision of a record of work from him unnecessary. The Board decided, based on Mr [OMITTED]' evidence, that some of the Respondent's building work remained – in particular, some of the roofing sheets.
- [58] The restricted building work regime exists to ensure that there is a permanent record of all of the Licensed Building Practitioners who have carried out or supervised restricted building work. It ensures all those involved in carrying out or supervising restricted building work can be identified by the owner (and any subsequent owner) and the territorial authority along with the restricted building work they carried out.
- [59] In this respect, it is noted that the Territorial Authority's record is one that runs with the property over its lifetime and, as it is a public record, it can be accessed by not only the owner but also by other persons interested in the property.

²⁵ Section 5 (Definition of Restricted Building Work) Order 2011

[60] Accordingly, the Board finds that although most of the Respondent's building work was replaced, given the purpose of a record of work, the Respondent's record of work was technically necessary for his remaining building work.

Has the Respondent provided a record of work?

[61] The Complaint confirmed at hearing that he had not received a record of work from the Respondent. The Council file was obtained on 23 November 2022 and it did not contain a record of work from Respondent.

[62] The Board finds that the Respondent has failed to provide a record of work.

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

[63] No explanation for not providing a record of work was put forward by the Respondent. The Complainant did explain that he had not asked the Respondent for one as Mr [OMITTED] had provided a record of work for all of the roofing restricted building work.

[64] However, 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.

[65] The Board finds that no "good reason" was established.

Did the Respondent fail to provide a record of work?

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

Board's Decisions

[67] The Respondent has committed disciplinary offences under sections 317(1)(b), 317(1)(d) and 317(1)(da)(ii) of the Act.

Penalty, Costs and Publication

[68] 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.

[69] The Respondent elected not to attend the hearing and the matter was dealt with in his absence. The Board heard information relevant to penalty, costs and publication, but 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

- [70] 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 aggravating factors present.²⁶ It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:²⁷
- (a) protection of the public and consideration of the purposes of the Act;²⁸
 - (b) deterring other Licensed Building Practitioners from similar offending;²⁹
 - (c) setting and enforcing a high standard of conduct for the industry;³⁰
 - (d) penalising wrongdoing;³¹ and
 - (e) rehabilitation (where appropriate).³²
- [71] 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 cases³³ and applying the least restrictive penalty available for the particular offending.³⁴ In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty³⁵ that is consistent with other penalties imposed by the Board for comparable offending.³⁶
- [72] 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.³⁷
- [73] In this matter, the Board adopted a starting point of ordering the Respondent to undertake supervision training because this was the area in which the Respondent has shown a lack of reasonable care. There were no mitigating factors. However, it was an aggravating factor that the finding was not just negligence but also incompetence. The Board considered that a penalty which required the Respondent to address his lack of skill was required.

²⁶ *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]

²⁷ Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

²⁸ Section 3 Building Act

²⁹ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

³⁰ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

³¹ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

³² *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

³³ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

³⁴ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

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

³⁶ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

³⁷ 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.

- [74] The Board decided this was best served by a cancellation of licence, which then requires the Respondent to prove his competency in order to regain his licence. The Board also took into account in setting this penalty that it met the purposes of the Act by protecting the public.
- [75] The Board notes that in any re-licensing application by the Respondent, the Board would expect the Registrar to assess the Respondent's competency in respect of supervision.
- [76] Cancellation of the Respondent's license does not preclude the Respondent from carrying out unconsented roofing work or consented roofing work under the supervision of a Licensed Building Practitioner.

Costs

- [77] Under section 318(4) of the Act, the Board may require the Respondent to pay the costs and expenses of, and incidental to, the inquiry by the Board. The rationale is that other Licensed Building Practitioners should not be left to carry the financial burden of an investigation and hearing.³⁸
- [78] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings³⁹. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case⁴⁰.
- [79] The Board has adopted an approach to costs that uses a scale based on 50% of the average costs of different categories of hearings, simple, moderate, and complex. The current matter was moderate. Adjustments are then made. This matter was rated as moderate.
- [80] This hearing proceeded by way of video conference, and therefore the costs incurred were less than those for an in-person hearing. However, the Respondent's lack of engagement in the hearing process is a factor which can be taken into account when determining costs.⁴¹
- [81] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$1500 toward the costs of and incidental to the Board's inquiry.

Publication

- [82] As a consequence of its decision, the Respondent's name and the disciplinary outcomes will be recorded in the public Register maintained as part of the Licensed Building Practitioners' scheme as is required by the Act,⁴² and he will be named in

³⁸ *Collie v Nursing Council of New Zealand* [2001] NZAR 74

³⁹ *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

⁴⁰ *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.

⁴¹ *Daniels v Complaints Committee* [2011] 3 NZLR 850.

⁴² Refer sections 298, 299 and 301 of the Act

this decision which will be available on the Board's website. The Board is also able, under section 318(5) of the Act, to order further publication.

[83] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.⁴³ 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.⁴⁴

[84] Based on the above, the Board **will** order further publication of this decision in Codewords for the education of the profession and the protection of the public. The publication will be in Code Words or similar publication.

Section 318 Order

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

Penalty: Pursuant to section 318(1)(a)(i) of the Act, the Respondent's licence is cancelled, and the Registrar is directed to remove the Respondent's name from the Register of Licensed Building Practitioners and pursuant to section 318(1)(a)(ii) of the Act the Board orders that the Respondent may not apply to be re-licensed before the expiry of three [3] months.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$1500 (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 be action taken to publicly notify the Board's action, in addition to the note in the Register, the Respondent being named in this decision and the publication of the decision on the Licensed Building Practitioners website.

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

Submissions on Penalty, Costs and Publication

[87] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until the close of business on **3 August 2023**. The submissions should focus on mitigating matters as they relate to the

⁴³ Section 14 of the Act

⁴⁴ Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

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

Right of Appeal

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

Signed and dated this 12th day of July 2023



Mr 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:*

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- (d) order that the person be censured:
 - (e) order that the person undertake training specified in the order:
 - (f) order that the person pay a fine not exceeding \$10,000.
- (2) The Board may take only one type of action in subsection 1(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).
 - (3) No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.
 - (4) In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.
 - (5) In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit.”

iii **Section 318 Disciplinary Penalties**

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

iv **Section 330 Right of appeal**

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

Section 331 Time in which appeal must be brought

An appeal must be lodged—

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