

Before the Building Practitioners Board

	BPB Complaint No. 26501
Licensed Building Practitioner:	Feng Wu (the Respondent)
Licence Number:	BP 129165
Licence(s) Held:	Carpentry and Site AoP 2

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	Auckland
Hearing Type:	In Person
Hearing and Decision Date:	7 November 2024
Board Members Present:	
	Mr M Orange, Chair, Barrister (Presiding)
	Mrs F Pearson-Green, Deputy Chair, 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** committed disciplinary offences under sections 317(1)(b) and(d) of the Act.

The Respondent is fined \$1,250 and ordered to pay costs of \$2,150. A record of the disciplinary offending will be recorded on the Public Register for a period of three years.

Contents

Summary..... 2

The Charges 3

Evidence..... 3

Negligence or Incompetence 4

 Has the Respondent departed from an acceptable standard of conduct 4

 Was the conduct serious enough 5

 Has the Respondent been negligent or incompetent..... 5

Contrary to a Building Consent..... 5

 Was there building work that differed from the building consent..... 6

 Was the conduct serious enough 6

 Has the Respondent breached section 317(1)(d) of the Act 6

Board Decisions 6

Penalty, Costs and Publication..... 7

 Penalty 7

 Costs..... 8

 Publication 9

Section 318 Order..... 9

Right of Appeal..... 10

Summary

- [1] The Respondent was contracted to carry out complex additions and alterations to an existing dwelling. During the build, an incorrect grade of timber was used for enclosed balconies and open timber decks (H1.2, not H3.2 as specified in the building consent). Because the Respondent relied on his experience and knowledge and had not referred to the building consent when selecting the timber, the Board decided he had carried out and supervised building work in a negligent manner and in a manner that was contrary to a building consent.
- [2] The Board fined the Respondent \$1,250 and ordered him to pay costs of \$2,150. A record of the disciplinary offending will be recorded on the public Register for a period of three years.

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
 - (b) carried out or supervised building work that does not comply with a building consent contrary to section 317(1)(d) of the Act.
- [5] In further investigating the Respondent's conduct under section 317(1)(b) and (d) of the Act, the Board gave notice that it would be inquiring into whether the following building work was carried out to an acceptable standard and/or in a compliant manner:
- (a) the construction of a floor slab and, in particular, whether under-slab plumbing and drainage was installed prior to the concrete floor being poured; and/or
 - (b) the construction of enclosed balconies and open timber decks and, in particular, whether the correct treatment grade of timber was used and the manner in which fixings were completed.

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] The Respondent's company was engaged to carry out a complex addition and alteration to an existing dwelling. The Respondent was the supervising Licensed Building Practitioner (LBP). He had three to four employees working on the building site, some of whom were experienced. The Respondent had one other complex alteration and addition underway at the time, as well as a new multiunit development. He split his time between the building sites.

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.

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

Negligence or Incompetence

[8] To find 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

- [9] 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
- [10] There were two main issues that were complained about and which the Board had resolved to investigate. The first related to the installation of plumbing services in concrete floors. The second to whether the correct treatment grade of timber was used for enclosed balconies and open timber decks.

Plumbing Issues

- [11] The Board was provided with photographs of channels cut into concrete floors on top of which new internal framing had been constructed. The Complainant also gave evidence that plumbing services had not been provided within the new concrete floors for all of the internal fittings that required them.
- [12] The Board accepted the evidence provided by the Respondent that the channels were cut into existing concrete to provision for new plumbing and drainage services.

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.

Further, whilst the Board did not agree with the sequencing of the building work carried out thereafter (frames constructed before the channels were enclosed with concrete), it did not consider the building work had been carried out in a negligent or incompetent manner.

- [13] Turning to the failure to provide all the required plumbing and drainage services, the Board notes that installation of those services is the responsibility of the plumber. Plumbers are regulated and are accountable and responsible for their own work. It follows the Board cannot make a finding about the Respondent's conduct with respect to that allegation.

Timber Grade Issues

- [14] The Respondent used H1.2 timber for the construction of enclosed balconies and open timber decks, whereas the building consent specified H3.2. The Respondent submitted that H1.2 was adequate and that he had verbal approval from the engineer and architect to use H1.2. The Respondent was not able to provide corroborating evidence for his assertion. His evidence was also at odds with the architect requiring all of the H1.2 timber to be removed and replaced with H3.2.
- [15] The Respondent also stated he had relied on his knowledge and experience in selecting the grade of timber. He was unaware of the requirement notated in the building consent to use H3.2. At the hearing, on being shown the specific details in the consented specification, the Respondent accepted that H3.2 had been specified. He stated he would take greater care in the future.
- [16] The Board decided that the Respondent had departed from an acceptable standard of conduct when he failed to use the correct grade of timber meeting and had carried out and supervised building work in a negligent manner. In making its decision, the Board noted the building work may not have met the durability requirements in the New Zealand Building Code and that it expects LBPs to be fully conversant with the building consents issued and to build in accordance with them.

Was the conduct serious enough

- [17] The Board decided that the conduct reached the threshold for disciplinary action. The Respondent relied on his knowledge and experience. That led to the error. It was not, however, a matter of inadvertence as a review of the building consent would have identified the requirement for the correct grade of timber.

Has the Respondent been negligent or incompetent

- [18] The Respondent has carried out and supervised building work in a negligent manner.

Contrary to a Building Consent

- [19] 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.¹² Once issued, there is a requirement that the building work be carried out in accordance with the building consent.¹³ Building consents also stipulate the number and type of inspections the issuing authority will carry out during the build.¹⁴ Inspections ensure independent verification that the building consent is being complied with.

- [20] 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.¹⁵ 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.¹⁶ If it does not, then a disciplinary finding cannot be made.

Was there building work that differed from the building consent

- [21] The use of the incorrect grade of timber was a departure from the building consent. It follows that the Respondent has carried out building work that was contrary to the building consent.

Was the conduct serious enough

- [22] For the reasons set out above in relation to negligence, the Board finds the conduct to be sufficiently serious.

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

- [23] The Respondent carried out and supervised building work in a manner that was contrary to a building consent.
- [24] The Board notes the commonality of the negligence and contrary to building consent findings. It will treat them as a single offence when determining the appropriate penalty.

Board Decisions

- [25] The Respondent has breached:
- (a) section 317(1)(b) of the Act;
 - (b) section 317(1)(d) of the Act.

¹² Section 49 of the Act

¹³ Section 40 of the Act

¹⁴ Section 222 of the Act

¹⁵ *Blewman v Wilkinson* [1979] 2 NZLR 208

¹⁶ *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".

Penalty, Costs and Publication

- [26] 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.
- [27] The Respondent made submissions at the hearing as regards penalty, costs and publication.

Penalty

- [28] 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.¹⁷ It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:¹⁸
- (a) protection of the public and consideration of the purposes of the Act;¹⁹
 - (b) deterring the Respondent and other Licensed Building Practitioners from similar offending;²⁰
 - (c) setting and enforcing a high standard of conduct for the industry;²¹
 - (d) penalising wrongdoing;²² and
 - (e) rehabilitation (where appropriate).²³
- [29] 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 cases²⁴ and applying the least restrictive penalty available for the particular offending.²⁵ In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty²⁶ that is consistent with other penalties imposed by the Board for comparable offending.²⁷

¹⁷ *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]

¹⁸ Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

¹⁹ Section 3 Building Act

²⁰ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²¹ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

²² *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

²³ *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

²⁴ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²⁵ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

²⁶ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

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

- [30] 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.²⁸
- [31] In this matter, the Board adopted a starting point of a fine of \$2,000, an amount that is consistent with similar disparate matters that come before the Board.
- [32] The Respondent has previously appeared before the Board. The Board has not, however, taken into account as an aggravating factor given the timing of the Board's previous findings.
- [33] There were mitigating factors. Principally, the Respondent accepted he had used the incorrect grade of timber, stated he had learnt from the matter and would be more careful in the future. Taking those factors into account, the Board reduced the fine to \$1,250.

Costs

- [34] 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.²⁹
- [35] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings.³⁰ The starting point can then be adjusted up or down, having regard to the particular circumstances of each case.³¹
- [36] 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.
- [37] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$2,150 toward the costs of and incidental to the Board's inquiry. The costs order has been based on the Board scale amount for an audiovisual hearing. Whilst the matter was heard in person, the Respondent attended remotely, and the person hearing was directed on the basis that one witness required an interpreter. But for that requirement, the matter would have proceeded as an audiovisual hearing. On that basis, it is fair that the Respondent pay the lower amount of costs.

²⁸ 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.

²⁹ *Collie v Nursing Council of New Zealand* [2001] NZAR 74

³⁰ *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

³¹ *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.

Publication

- [38] 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,³² and he will be named in 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.
- [39] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.³³ 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.³⁴
- [40] Based on the above, the Board will not order any publication over and above the record on the Register, the Respondent being named in this decision, and the publication of the decision on the Board's website. The Respondent should note, however, that as the Board has not made any form of suppression order, other entities, such as the media or the Ministry of Business Innovation and Employment, may publish under the principles of open justice reporting.

Section 318 Order

- [41] For the reasons set out above, the Board directs that:
- Penalty:** Pursuant to section 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of \$1,250.
- Costs:** Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$2,150 (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(I)(iii) of the Act.
- In terms of section 318(5) of the Act, the Respondent will be named in this decision, which will be published on the Board's website.**
- [42] 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.

³² Refer sections 298, 299 and 301 of the Act

³³ Section 14 of the Act

³⁴ Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

Right of Appeal

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

Signed and dated this 16TH day of November 2024.



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:*
 - (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.*