

Before the Building Practitioners Board

	BPB Complaint No. CB25938
Licensed Building Practitioner:	Wayne Tupaea (the Respondent)
Licence Number:	BP131732
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	Board Inquiry
Hearing Location	Wellington
Hearing Type:	In Person
Hearing Date:	9 August 2023
Decision Date:	15 September 2023
Board Members Present:	
	Mr M Orange, Chair, Barrister (Presiding)
	Mrs F Pearson-Green, Deputy Chair, LBP, Design AoP 2
	Mr D Fabish, LBP, Carpentry and Site AoP 2
	Mr G Anderson, LBP, Carpentry and Site AoP 2

Appearances:

Mr M Wolf, 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 not** committed a disciplinary offence.

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Summary

- [1] The Respondent carried out and supervised building work as an employee of another Licensed Building Practitioner. The building work was completed out of sequence in that weatherboards were installed before brickwork had been completed. The Respondent was instructed by his employer to carry out the building work in that manner. Alleged quality and compliance issues with the build arose as a result.
- [2] The matters the Board were investigating were whether the Respondent had carried out or supervised building work in a negligent or incompetent manner or in a manner that was contrary to a building consent. The Board found that whilst there were quality and compliance issues with the Respondent’s building work, he had not committed the disciplinary offences because his Licensed Building Practitioner employer had directed that the building work be carried out in the manner that it was.
- [3] The Board also investigated whether the Respondent had failed to provide a record of work on the completion of restricted building work. It found that, at the time the Board Inquiry was initiated, there was a possibility that he might have returned to carry out further restricted building work and, as such, completion for the purposes of the provision of a record of work had not occurred.

The Charges

- [4] 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
- [5] In this matter, the disciplinary charges the Board resolved to further investigate² were that the Respondent may, in relation to building work at [OMITTED], Wellington, have:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner contrary to section 317(1)(b) of the Act;
 - (b) carried out or supervised building work or building inspection work that does not comply with a building consent contrary to section 317(1)(d) of the Act; and/or
 - (c) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) of the Act contrary to section 317(1)(da)(ii) of the Act.
- [6] The Board gave notice that, in further investigating the conduct under sections 317(1)(b) and (d) of the Act, the Board would be inquiring into the quality and compliance of building work carried out or supervised by the Respondent in relation to the installation of windows, cladding and flashings (but excluding roofing flashings), as set out in the complaint documentation for matter CB25834 and Council inspections.

Consolidation

- [7] The Board may, under Regulation 13, consolidate two or more matters into one hearing, but only if the matters are, in the opinion of the Board, about substantially the same subject matter and consolidation is agreed to.
- [8] The Board sought agreement for consolidation of this matter with complaint number CB25834, a complaint about [OMITTED], Licensed Building Practitioner (BP[OMITTED], Carpentry). The consent of all those involved was forthcoming, and the two matters were consolidated.

Evidence

- [9] 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

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

of evidence which allow it to receive evidence that may not be admissible in a court of law.

- [10] The Respondent was an employee of Thor Construction Group Limited⁴, a company that was owned by Mr [OMITTED] (the respondent in the consolidated matter). Thor had been engaged by the Complainants to construct a residential dwelling. Thor contracted [OMITTED], a Licensed Building Practitioner, to carry out the building work. Mr [OMITTED] was an employee of another company. Partway through the build, Mr [OMITTED] left his employment and was not able to continue with the build. Thor then tasked the Respondent with the build. When the Respondent took over from Mr [OMITTED], the foundations, frames and trusses had been completed. The build was not completed by Thor or by the Respondent.
- [11] Mr [OMITTED], was the project manager for the build. He organised materials and subcontractors but did not carry out any of the building work. He was responsible for the administration of the contract.

Negligence or Incompetence

- [12] 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.

Has the Respondent departed from an acceptable standard of conduct?

- [13] 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 Code¹⁰ and any building consent issued.¹¹ The test is an objective one.¹²

⁴ Mr [OMITTED] is the sole shareholder and director of Thor Construction Group Limited.

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”.

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.

- [14] The building work under investigation was the installation of windows, cladding and flashings. The Respondent stated that he was on site when the work was carried out and that he had other Thor staff members who were working under his supervision on site with him.
- [15] Neither the Respondent nor Mr [OMITTED] contested that there were some issues with weatherboard cladding, windows and flashings. With regard to the windows and flashings, they gave evidence that on-site issues were either caused or contributed to by the window manufacturer. They also noted that the build had not been completed and submitted that a distinction had to be made between non-compliant work and incomplete work. The Respondent also gave evidence that he had to make do with substitute materials such as flashings and that he was, at times, constrained by a lack of the required materials on site.
- [16] The evidence received showed that Mr [OMITTED] was directing the manner in which the build was undertaken. In particular, he directed the sequence of the build. In this respect, the build was completed out of the ordinary sequence, with weatherboard cladding installed before brickwork was completed in an attempt to weatherproof the building. A decision was also made to partially install windows so as to focus on the weatherboard cladding. Those decisions resulted in issues with cladding junctions and window sealing being noted in Council inspections. The urgency to close the house in with cladding was partly the result of long delays in the build that were compromising the framing, which had been exposed for an extended period.

Was the conduct serious enough?

- [17] The Board was satisfied that there were quality and compliance issues that should not have arisen during the build and that, in this respect, the build was not completed to an acceptable standard. It was also clear that the issues the Board was investigating were the result of the build sequence and, in particular, the installation of weatherboards before the brickwork had been completed.
- [18] The question for the Board was whether the Respondent's conduct, as opposed to the build issues themselves, reached the threshold for disciplinary action.
- [19] It was clear to the Board that the person making the decision and directing how the build was to be carried out was Mr [OMITTED]. The Respondent, as an employee, took direction from Mr [OMITTED], who was the overall project and contract manager. Mr [OMITTED] is a Licensed Building Practitioner, and whilst the Board would ordinarily find that a person in the Respondent's position has to take responsibility for their actions, in this matter, that has to be tempered by consideration of the interrelationship between the two Licensed Building Practitioners and the power imbalance between them.
- [20] When looking at the root cause of the serious build issues, it was the decision to depart from normal and accepted building methodology in terms of sequencing. That decision was made and directed by Mr [OMITTED]. Had the Board been aware of the extent of Mr [OMITTED]'s role at the time its decision was made to proceed to a hearing, it would have investigated his conduct with regard to those decisions as the evidence at the hearing has indicated that the matters under investigation were primarily the result of his conduct.

[21] Given the above, the Board has decided that whilst the Respondent may have carried out building work in a negligent manner, his conduct was not, within the context of his having received instructions from his employer (a Licensed Building Practitioner), serious enough to warrant a disciplinary finding. In coming to this decision, the Board has applied Court directions as regards the type of conduct that can result in a finding of negligence or incompetence. In particular, those in *Collie v Nursing Council of New Zealand*:¹³

[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] And those in *Pillai v Messiter (No 2)*,¹⁴ an Australian Court of Appeal decision that has been adopted by the Superior Courts of New Zealand:

... the statutory test is not met by mere professional incompetence or by deficiencies in the practice of the profession. Something more is required. It includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse.

[23] Whilst the Board has not upheld the ground for discipline, the Board does caution the Respondent. As a Licensed Building Practitioner, the Respondent should have taken a firmer position as regards the manner in which his employer was directing the work to be carried out. He should have raised the potential issues that could and did arise as a result of those directions and worked with his employer to establish clear mitigation strategies.

Has the Respondent been negligent or incompetent?

[24] The Respondent has not conducted himself in a negligent or incompetent manner.

Contrary to a Building Consent

[25] 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 Building consents also stipulate the number and type of inspections the issuing authority will carry out during the build.¹⁷ Inspections ensure independent verification that the building consent is being complied with.

[26] 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.¹⁸ The Board does, however, consider that the seriousness of the conduct under

¹³ [2001] NZAR 74

¹⁴ (1989) 16 NSWLR 197 (CA) at 200

¹⁵ Section 49 of the Act

¹⁶ Section 40 of the Act

¹⁷ Section 222 of the Act

¹⁸ *Blewman v Wilkinson* [1979] 2 NZLR 208

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.¹⁹ If it does not, then a disciplinary finding cannot be made.

- [27] On the same basis that the Board found that the conduct did not meet the threshold for negligence or incompetence, the Board finds that the conduct, in the particular circumstances of the inquiry, was not serious enough.

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

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

Failure to Provide a Record of Work

- [29] 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.²⁰

- [30] 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 work²¹ unless there is a good reason for it not to be provided.²²

Did the Respondent carry out or supervise restricted building work?

- [31] The Respondent accepted that he both carried out and supervised restricted building work. He has not provided a record of work for it.

Was the restricted building work complete?

- [32] The work was not complete. The Board, however, had to consider whether the work was complete from the perspective of the Respondent's record of work obligations. In this respect, even if all of the contracted or envisaged work has not been completed, the Board can find that completion for the purposes of providing a record of work has occurred if a Licensed Building Practitioner cannot or will not be returning to complete any further restricted building work.

- [33] The Board heard evidence that a protracted dispute arose after the Respondent left the site and that, at the time the Board initiated its inquiry, there was a possibility that Thor Construction may have returned to the site to carry out further restricted building work and that the Respondent may have been tasked with that work. On that basis, the Board

¹⁹ *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".

²⁰ Section 88(1) of the Act.

²¹ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

²² Section 317(1)(da)(ii) of the Act

finds that the Respondent has not committed a disciplinary offence. In short, completion had not occurred.

- [34] The Respondent should note that now that it has become clear that his involvement or possible involvement in the build has come to an end (this occurred after the Board Inquiry was initiated), a record of work is due and must be provided by him for the restricted building work that he carried out and supervised.

Has the Respondent failed to provide a record of work?

- [35] The Respondent had not, at the time of the Board Inquiry being initiated, failed to provide a record of work.

Board's Decisions

- [36] To summarise the Board's decisions, the Respondent has not committed the disciplinary offences that the Board was investigating.

[37]

Signed and dated this 11th day of October 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.*