

Before the Building Practitioners Board

	BPB Complaint No. CB26160
Licensed Building Practitioner:	Hanisi Uaisele (the Respondent)
Licence Number:	BP121473
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 Location	Auckland
Hearing Type:	In Person
Hearing and Decision Date:	6 September 2023
Board Members Present:	
	Mr M Orange, Chair, Barrister (Presiding)
	Ms J Clark, Barrister and Solicitor, Legal Member
	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 a disciplinary offence under section 317(1)(da)(ii) of the Act.

The Respondent is fined \$1,500 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 was engaged as a subcontractor to carry out renovations to a home under a building consent. A bathroom that was built leaked around the shower, and a subsequent contractor deconstructed the shower and found mould on the plasterboard linings. The Board inquired into whether the Respondent had built the shower in a negligent or incompetent manner. The cause of the leaks had not, however, been established, and there was no evidence that the Respondent’s building work had not been completed in an acceptable manner. As such, the charge was not upheld.
- [2] 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 the Respondent had carried out restricted building work, the work was complete, and that there was no good reason for the Respondent not to have provided a record of work.
- [3] Having found that the Respondent had failed to provide a record of work on the completion of restricted building work, the Board fined him \$1,500 and ordered that he pay costs of \$750. The costs were reduced because of his financial circumstances and to recognise that only one of the two charges had been upheld.

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], Auckland, have:
- (a) carried out or supervised building work in a negligent or incompetent manner contrary to section 317(1)(b) of the Act, IN THAT, bathroom renovation work may not have been completed in a quality and compliant manner; and
 - (b) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out or supervise, or has carried out 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 Board³ initially dealt with the complaint by way of a Draft Decision. The Respondent disputed the findings. The Draft Decision was set aside, and a hearing was scheduled.

Evidence

- [7] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁴. 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.
- [8] The Respondent was subcontracted by [OMITTED] to carry out alterations to a dwelling house under a building consent. A Code Compliance Certificate has not yet been issued for the building work, with water leakage issues experienced in relation to an ensuite shower yet to be resolved. The Respondent, who is no longer involved in the building work, had not, as at the date of the hearing, provided a record of work for the restricted building work that he had carried out.

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 The Board is a statutory body established under section 341 of the Act.³ Its functions include receiving, investigating, and hearing complaints about, and to inquire into the conduct of, and discipline, licensed building practitioners in accordance with subpart 2 of the Act. It does not have any power to deal with or resolve disputes.

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

Negligence or Incompetence

- [9] 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.
- [10] 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
- [11] The issue under consideration was the quality and compliance of building work on a bathroom, and in particular, an issue raised by the Complainant who stated:
- The company have sent another set of contractors who ripped out the shower area yesterday and today and as per picture below you can see the boards were getting mildew from leakage in the bathroom.*
- [12] Photographs of the bathroom were provided. They showed mould, and the Complainant gave evidence that the shower leaks when being used and that it continues to leak.
- [13] Mr [OMITTED], a registered and licensed plumber, gave evidence that he carried out the deconstruction and that he was not able to identify any issues with the quality or compliance of the building work that he deconstructed or in the plumbing work that he could observe. He thought that the cause of the issue might be plumbing issues within the foundation. The Respondent gave evidence that a registered and licensed

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.

plumber carried out the plumbing work but that he could not recall the name of the subcontractor.

- [14] As noted above, the Board must be satisfied on the balance of probabilities that the disciplinary offence has been committed. An allegation of negligence or incompetence requires evidence that the Respondent has a causal connection to the issues complained about. In this respect, whilst he was the subcontractor overseeing the building work under the consent, his own work was completed to a required standard, and it appears that the issue may be the result of the work of another trade. Within the building regulatory system, each trade is responsible for its own work. As such, if the issue does lie with the plumbing, then it is the plumber that is accountable. The simple reality is, however, that it is not clear what the cause of the leaks is, and it is not the Board's role to establish how or why the shower is leaking. Its role is simply to ascertain whether the Respondent has carried out or supervised building work that does not meet an acceptable standard on the evidence before it. As there is no evidence to establish a failure by the Respondent to build in accordance with an acceptable standard, the Board finds that the disciplinary offence under section 317(1)(b) has not been committed.

Failure to Provide a Record of Work

- [15] 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.¹³
- [16] 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 work¹⁴ unless there is a good reason for it not to be provided.¹⁵
- [17] The Respondent accepted that he had carried out restricted building work and that he had not provided a record of work for it. He considered that the work was not complete and that was why he did not provide a record of work. It was established, however, that when his involvement in the project came to an end, all of the restricted building work had been completed.
- [18] The statutory provisions do not stipulate a timeframe for the licenced person to provide a record of work. The provisions in section 88(1) simply states "on completion of the restricted building work ...". As was noted by Justice Muir in *Ministry of Business Innovation and Employment v Bell*¹⁶ "... the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work".

¹³ Section 88(1) of the Act.

¹⁴ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

¹⁵ Section 317(1)(da)(ii) of the Act

¹⁶ [2018] NZHC 1662 at para 50

- [19] As the respondent had completed his restricted building work a record of work was due. One was not provided, and a complaint about its non-provision was made. The Respondent stated that he had not been asked for a record of work. The requirement, however, 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.
- [20] As the Respondent did carry out restricted building work, which was complete and as there was no good reason for the Respondent not to provide a record of work, the Board finds that he has failed to provide a record of work on completion of restricted building work.

Board's Decisions

- [21] The Respondent has not carried out or supervised building work in a negligent or incompetent manner.
- [22] The Respondent has failed to provide a record of work on completion of restricted building work.

Penalty, Costs and Publication

- [23] 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.
- [24] The Respondent made submissions at the hearing as regards penalty, costs and publication.

Penalty

- [25] 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 other Licensed Building Practitioners from similar offending;²⁰
 - (c) setting and enforcing a high standard of conduct for the industry;²¹

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

- (d) penalising wrongdoing;²² and
- (e) rehabilitation (where appropriate).²³

- [26] 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
- [27] 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
- [28] Record of work matters are at the lower end of the disciplinary scale. The Board's normal starting point for a failure to provide a record of work is a fine of \$1,500, an amount which it considers will deter others from such behaviour.
- [29] The Board gave the Respondent the opportunity to provide a record of work following the hearing and a time frame for him to do so. The Board indicated that if he did, the provision would be considered in determining the penalty. He stated that he would but failed to do so, notwithstanding that he was reminded of the opportunity. As the Respondent has still not provided a record of work, the fine will not be reduced. The fine is \$1,500.

Costs

- [30] 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
- [31] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings³⁰. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case³¹.

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

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.

- [32] 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 simple. Adjustments are then made.
- [33] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$750 toward the costs of and incidental to the Board's inquiry. The costs have been reduced from the Board's scale amount for a simple in-person hearing of \$2,000 because of the Respondent's financial position and to recognise that not all of the charges were upheld.

Publication

- [34] 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.
- [35] 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
- [36] Based on the above, the Board will not order further publication.

Section 318 Order

- [37] 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 \$1,500.

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(I)(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, which will be available on the Board's website.

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

- [38] If the Respondent requires time to pay the fine and costs, he can apply to the Registrar.
- [39] 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

- [40] 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 **25 October 2023**. The submissions should focus on mitigating matters as they relate to the 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

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

Signed and dated this 3rd 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.*

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.*