

Before the Building Practitioners Board

	BPB Complaint No. CB26277
Licensed Building Practitioner:	Michiel Hamish van der Wal (the Respondent)
Licence Number:	BP130353
Licence(s) Held:	Carpentry

Decision of the Board in Respect of the Conduct of a Licensed Building Practitioner

Under section 315 of the Building Act 2004

Complaint or Board Inquiry	Complaint
Hearing Type:	On the Papers
Hearing and Draft Decision Date:	8 September 2023
Final Decision date:	24 October 2023

Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)
Mr D Fabish, LBP, Carpentry and Site AoP 2
Ms K Reynolds, 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.

Draft Disciplinary Finding:

The Respondent **has** committed a disciplinary offence under section 317(b) of the Act.

The Respondent is fined \$1,500 and ordered to pay costs of \$500. A record of the disciplinary offending will be recorded on the Public Register for a period of three years.

Contents

Summary of the Board’s Draft Decision	2
The Charges	2
Regulation 10 Decision.....	3
Regulation 9 Decisions.....	3
Draft Decision Process	3
Evidence	4
Negligence or Incompetence	4
Has the Respondent departed from an acceptable standard of conduct	5
Was the conduct serious enough	7
Board’s Decision	7
Penalty, Costs and Publication	7
Penalty	8
Costs.....	9
Publication	9
Section 318 Order	10
Submissions on Draft Decision	10
Request for In-Person Hearing	10
Right of Appeal	11

Summary of the Board’s Draft Decision

[1] The Respondent built a minor dwelling and a deck. Both required building consent, but none were obtained before the building work was carried out. The building work was not compliant with the building code. The Respondent accepted that he had been negligent and stated that he had learnt from the matter. The Board reduced the fine from \$2,500 to \$1,500 on the basis that he accepted responsibility. He was also ordered to pay costs of \$500. A record of the disciplinary offending will be recorded on the public Register for a period of three years.

The Charges

[2] Under regulation 10 of the Complaints Regulations, the Board must, on receipt of the Registrar’s Report, decide whether to proceed no further with the complaint because regulation 9 of the Complaints Regulations applies. Having received the report, the Board decided that regulation 9 applied to some but not to all of the allegations.

Regulation 10 Decision

- [3] In this matter, the disciplinary charge the Board resolved to further investigate¹ was that the Respondent may, in relation to building work at [OMITTED], may have carried out or supervised building work in a negligent or incompetent manner.

Regulation 9 Decisions

- [4] The complaint to the Board also contained allegations that the Respondent had:
- (a) breached the code of ethics prescribed under section 314A of the Act contrary to section 317(1)(g) of the Act; and
 - (b) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute contrary to section 317(1)(i) of the Act.
- [5] With regard to the allegations made, the Board decided that regulation 9(f)(ii) of the Complaints Regulations applied. It provides:

Complaint not warranting further investigation

A complaint does not warrant further investigation if—

- (f) the investigation of it is—*

 - (ii) unnecessary;*

- [6] In considering whether the investigation of a complaint is necessary, the Board must consider the directions of the courts regarding the threshold for matters to be dealt with as a disciplinary matter. In short, the conduct has to fall seriously short of expected standards of conduct.²
- [7] The Board has decided that it will investigate the conduct under the negligence or incompetence ground for discipline as it considers that to be the most appropriate disciplinary charge and on the basis that the conduct may not reach the threshold for investigation in respect of a breach of the Code of Ethics or disrepute.

Draft Decision Process

- [8] The Board's jurisdiction is that of an inquiry. Complaints are not prosecuted before the Board. Rather, it is for the Board to carry out any further investigation that it considers necessary prior to it making a decision.

¹ 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.

² *Collie v Nursing Council of New Zealand* [2001] NZAR 74

- [9] Ordinarily, the Board makes a decision having held a hearing.³ The Board may, however, depart from its normal procedures if it considers doing so would achieve the purposes of the Act, and it is not contrary to the interests of natural justice to do so.⁴
- [10] In this instance, the Board has decided that a formal hearing is not necessary. The Board considers that there is sufficient evidence before it to allow it to make a decision on the papers. There may, however, be further evidence in relation to the matter that the Board was not aware of. To that end, this decision is a draft Board decision. The Respondent will be provided with an opportunity to comment on the draft findings and to present further evidence prior to the Board making a final decision. If the Respondent requests an in-person hearing, or the Board directs that one is required, this decision will be set aside a hearing will be scheduled.

Evidence

- [11] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁵. 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

- [12] To find that the Respondent was negligent, the Board needs to determine, on the balance of probabilities,⁶ 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*⁷ test of negligence.⁸ 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.⁹ 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.¹⁰ If it does not, then a disciplinary finding cannot be made.

³ Regulation 10 of the Complaints Regulations.

⁴ Under Clause 27 of Schedule 3 the Board may regulate its own procedure and it has summary jurisdiction, which allows for a degree of flexibility in how it deals with matters: *Castles v Standards Committee No.* [2013] NZHC 2289, *Orlov v National Standards Committee 1* [2013] NZHC 1955

⁵ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

⁶ *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.

⁷ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁸ 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)

⁹ 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”

¹⁰ *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,

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 Act¹ as well as the requirement that all building work must comply with the Building Code¹¹ and any building consent issued.¹² The test is an objective one.¹³
- [14] The Respondent was engaged to construct a minor dwelling (cabin) measuring 10.82 square metres. It was constructed on the basis that it did not need a building consent. A neighbour complained to the Council about the building work. The Council checked the building work and issued a Notice to Fix (NTF) on the basis that a building consent was required because the building was closer to the boundary than its own height and a deck had been constructed that was higher than 1.5 metres. The NTF also required that building work that was not compliant with the Building Code be rectified. The non-compliant building work was noted as:
- (a) undersized piles;
 - (b) no subfloor bracing;
 - (c) overspanned joists
 - (d) non-compliant pile and bearer fixings; and
 - (e) deck handrail lower than 1 metre.
- [15] The Respondent accepted that he had been negligent. He stated that he believed that he could build the cabin within 1 metre of the boundary and that the original intention was for the cabin to be constructed in such a way that it could be relocated on the site. That changed when a deck was added to the cabin. He accepted that he knew the addition of the deck meant that a building consent was required and that he should have refused but did not. The Respondent attended to the required remedial work and noted that market conditions influenced his decision-making.
- [16] There are two aspects of the Respondent's conduct that the Board needs to consider. The first is in relation to a failure to ensure a building consent was in place prior to related building work being carried out. The second is in respect of the quality and compliance of the building work.

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".

¹¹ Section 17 of the Building Act 2004

¹² Section 40(1) of the Building Act 2004

¹³ *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.

Building Consent

[17] The Building Act requires that all building work be carried out under a building consent unless an exemption available under the Act applies.¹⁴ The burden is on the person carrying out the work to establish that an exemption applies. The building consent process is important as it ensures that the proposed building work is assessed by a Territorial Authority (Council) for compliance with the Building Code prior to it being undertaken¹⁵ and that the consented work is then assessed against the consent issued through scheduled inspections.¹⁶ In *Tan v Auckland Council*¹⁷ the High Court noted that if a person fails to obtain a building consent, that deprives a Council of its ability to check any proposed building work. The Court also held:

[37] ... those with oversight (of the building consent process) are in the best position to make sure that unconsented work does not occur.

[38] ... In my view making those with the closest connection to the consent process liable would reduce the amount of unconsented building work that is carried out, and in turn would ensure that more buildings achieve s 3 goals.

[18] The Respondent falls into the category of a person who was in the best position to ensure unconsented work did not occur. As such, he had a duty to assess whether a building consent was required prior to the building work being undertaken.

[19] There are limited exceptions to the requirement for a building consent. These are provided for in section 41 of the Act. The main exception is building work described in Schedule 1 of the Act, and this is further provided for in section 42A of the Act. The burden is on those that seek to rely on an exception to show that the building work comes with that exception.

[20] The exemptions that could have applied all include an exception that they do not apply to building work in connection with a building that is closer than the measure of its own height to any residential building or to any legal boundary. As the building was closer than its own height to the boundary, the exemptions did not apply. The Respondent should have researched the exemption before carrying out the work. He did not, and, as a result, he breached section 40 of the Building Act, which states:

40 Buildings not to be constructed, altered, demolished, or removed without consent

(1) *A person must not carry out any building work except in accordance with a building consent.*

(2) *A person commits an offence if the person fails to comply with this section.*

¹⁴ Refer sections 40, 41 and 42A of the Act.

¹⁵ Section 49 of the Act.

¹⁶ Section 222 of the Act.

¹⁷ [2015] NZHC 3299 [18 December 2015]

- (3) *A person who commits an offence under this section is liable on conviction to a fine not exceeding \$200,000 and, in the case of a continuing offence, to a further fine not exceeding \$10,000 for every day or part of a day during which the offence has continued.*

- [21] The Board would expect a Licensed Building Practitioner to either know that the exemption did not apply or to take steps to ensure that it did prior to carrying out the building work. As he did not, the Board finds that his conduct has fallen below an acceptable standard and that he has been negligent.
- [22] Turning to the deck, it also required a building consent as clause 24 of Schedule 1 did not apply as it was possible to fall more than 1.5 metres even if it collapsed. The Respondent knew that a building consent was required but built the deck regardless. Again, there has been a breach of section 40 of the Act and has been negligent.

Building Work

- [23] Under section 17 of the Act, all building work must comply with the building code. The building code is contained in Schedule 1 of the Building Regulations 1992 (the Building Code).
- [24] There was clear evidence that the Respondent's building work was not compliant with clause B1 of the Building Code (Structure). The Respondent's response to the complaint indicates that he knew his work was not up to the required standards but that he did it anyway. Again, the Respondent's conduct has fallen below what is expected of a Licensed Building Practitioner and he has been negligent.

Was the conduct serious enough

- [25] A failure to obtain a building consent is serious. The process of issuing a building consent and the subsequent inspections under it ensure independent verification that the Building Code has been complied with and that the works will meet the required performance criteria in the Building Code. In doing so, the building consent process provides protection for owners of works and the public at large.
- [26] In terms of the Respondent's conduct, he should have known that a consent was required for the cabin and did know that a consent was required for the deck. The former may have been inadvertent, but the latter certainly was not. Further, he knowingly carried out building work that was not Building Code compliant. Given those factors, the Board finds that the conduct was serious enough.

Board's Decision

- [27] The Respondent **has** carried out building work in a negligent manner.

Penalty, Costs and Publication

- [28] 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.

[29] The matter was dealt with on the papers. Included was information relevant to penalty, costs and publication, and 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

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

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

[31] Overall, the Board should assess the conduct against the range of penalty options available in section 318 of the Act, reserving the maximum penalty for the worst cases²⁵ and applying the least restrictive penalty available for the particular offending.²⁶ In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty²⁷ that is consistent with other penalties imposed by the Board for comparable offending.²⁸

[32] In general, when determining the appropriate penalty, the Board adopts a starting point based on the principles outlined above prior to it considering any aggravating and/or mitigating factors present.²⁹

[33] The Board adopted a starting point of a fine of \$2,500, a penalty that is consistent with other penalties imposed by the Board for similar offences.

¹⁸ *Ellis v Auckland Standards Committee* 5 [2019] NZHC 1384 at [21]; cited with approval in *National Standards Committee (No1) of the New Zealand Law Society v Gardiner-Hopkins* [2022] NZHC 1709 at [48]

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

²⁰ Section 3 Building Act

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

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

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

²⁴ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354; *Shousha v A Professional Conduct Committee* [2022] NZHC 1457

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

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

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

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

²⁹ In *Lochhead v Ministry of Business Innovation and Employment* 3 November [2016] NZDC 21288 the District Court recommended that the Board adopt the approach set out in the Sentencing Act 2002.

[34] The Respondent has accepted that what he did was wrong and has stated that he has learnt from the events and his failures. He also worked with those affected to assist in finding a solution to the issues. On that basis, and taking into account that this matter has been dealt with by way of a draft decision process, the Board has reduced the fine to \$1,500.

Costs

[35] Under section 318(4) of the Act, the Board may require the Respondent to pay the costs and expenses of, and incidental to, the inquiry by the Board. The rationale is that other Licensed Building Practitioners should not be left to carry the financial burden of an investigation and hearing.³⁰

[36] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings³¹. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case³².

[37] 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.

[38] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$500 toward the costs of and incidental to the Board's inquiry.

Publication

[39] 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,³³ 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.

[40] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.³⁴ Further, as a general principle, publication may be required where the Board perceives a need for the public and/or the profession to know of the findings of a disciplinary hearing, and the courts have stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published.³⁵

[41] Based on the above, the Board will not order further publication.

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

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

³² *Cooray v The Preliminary Proceedings Committee* HC, Wellington, AP23/94, 14 September 1995, *Macdonald v Professional Conduct Committee*, HC, Auckland, CIV 2009-404-1516, 10 July 2009, *Owen v Wynyard* HC, Auckland, CIV-2009-404-005245, 25 February 2010.

³³ Refer sections 298, 299 and 301 of the Act

³⁴ Section 14 of the Act

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

Section 318 Order

[42] 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 \$500 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

Publication: The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with section 301(l)(iii) of the Act.

In terms of section 318(5) of the Act, there will not be action taken to publicly notify the Board's action, except for the note in the Register and the Respondent being named in this decision, which will be available on the Board's website.

[43] 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 Draft Decision

[44] The Board invites the Respondent to:

- (a) provide further evidence for the Board to consider; and/or
- (b) make written submissions on the Board's findings. Submissions may be on the substantive findings and/or on the findings on penalty, costs and publication.

[45] Submissions and/or further evidence must be filed with the Board by no later than the close of business on **20 October 2023**.

[46] If submissions are received, then the Board will meet and consider those submissions.

[47] The Board may, on receipt of any of the material received, give notice that an in-person hearing is required prior to it making a final decision. Alternatively, the Board may proceed to make a final decision which will be issued in writing.

[48] If no submissions or further evidence is received within the time frame specified, then this decision will become final.

Request for In-Person Hearing

[49] If the Respondent, having received and considered the Board's Draft Decision, considers that an in-person hearing is required then one will be scheduled, and a notice of hearing will be issued.

[50] A request for an in-person hearing must be made in writing to the Board Officer no later than the close of business on **20 October 2023**.

[51] If a hearing is requested, this Draft Decision, including the Board's indicative position on penalty, costs and publication, will be set aside.

Right of Appeal

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

Signed and dated this 29th day of September 2023.



Mr M Orange
Presiding Member

This decision and the order herein were made final on 24 October 2023 on the basis that no further submissions were received.

Signed and dated this 7th day of November 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:*
 - (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.*