

Before the Building Practitioners Board

	BPB Complaint No. C2-01829
Licensed Building Practitioner:	David George Cook (the Respondent)
Licence Number:	BP 127231
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	Wellington
Hearing Type:	On the Papers
Hearing Date:	9 July 2019
Decision Date:	7 August 2019

Board Members Present:

Mel Orange, Legal Member (Presiding)
David Fabish, LBP, Carpentry Site AOP 2
Robin Dunlop, Retired Professional Engineer

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.

Board Decision:

The Respondent **has** committed a disciplinary offence under section 317(1)(da)(ii) of the Act.

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Introduction

- [1] The matter originated from a complaint into the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations¹ to hold a hearing in relation to building work at [Omitted].
- [2] The alleged disciplinary offence the Board resolved to investigate was that the Respondent 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) (s 317(1)(da)(ii) of the Act).

Background

- [3] The hearing held on 9 July 2019 came about as a result of a successful appeal to the District Court² against a decision of the Board dated 1 August 2018 in respect of the same matter. In the appeal the Court noted that there had been correspondence with the Ministry of Business Innovation and Employment (MBIE) and that it was not

¹ The resolution was made following the Board’s consideration of a report prepared by the Registrar in accordance with the Complaints Regulations.

² In the matter of an Appeal by David George Cook CIV-2018-020-000318, [2019] NZDC 3009

apparent if it had been taken into consideration by the Board. The District Court Judge stated:

[21] I direct the Board to reconsider both its original decision and the penalty decision taking into account the emails and any other submissions that the Appellant may now wish to make to the Board on both the issue of culpability and/or penalty. I am making this direction because it is not clear to me whether the information contained in the emails, which the Appellant regards as crucial, was taken into account in relation to the decision of 1 August 2018 or the penalty decision of 4 September 2018.

[4] The District Court Judge also directed:

[22] If the Appellant wishes to file any further submissions he must do so within a time stipulated by the Board. Once those submissions, if any, are received then they must be sent to the Complainant, [Omitted] and he must be given time to respond.

[5] The Respondent (Appellant) was given the option of an in-person hearing. He declined. The matter proceeded as a hearing on the papers.

[6] The Respondent filed a submission in advance of the hearing. As per the above order it was provided to the Complainant.

Function of Disciplinary Action

[7] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*³ and in New Zealand in *Dentice v Valuers Registration Board*⁴.

[8] Disciplinary action under the Act is not designed to redress issues or disputes between a complainant and a respondent. In *McLanahan and Tan v The New Zealand Registered Architects Board*⁵ Collins J. noted that:

“... the disciplinary process does not exist to appease those who are dissatisfied The disciplinary process ... exists to ensure professional standards are maintained in order to protect clients, the profession and the broader community.”

[9] The Board can only inquire into “the conduct of a licensed building practitioner” with respect to the grounds for discipline set out in section 317 of the Act. It does not have any jurisdiction over contractual matters.

³ *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

⁴ [1992] 1 NZLR 720 at p 724

⁵ [2016] HZHC 2276 at para 164

Evidence

- [10] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁶. 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 procedure the Board uses is inquisitorial, not adversarial. The Board examines the documentary evidence available to it making a decision.
- [11] The Respondent was a contractor to [Omitted] at the time of the alleged conduct. The Complainant in the matter, [Omitted], is the sole director of [Omitted]. The Respondent had completed his apprenticeship with [Omitted] who is also a licensed building practitioner with Carpentry and Site AOP 1 Licenses. The Respondent obtained his Carpentry License whilst working with or for [Omitted] and it was after his licence was issued on 13 May 2014 that the matters complained about occurred.
- [12] The actual complaint was that the Respondent had failed to provide a record of work on completion of restricted building work as required under section 88(1) of the Act.
- [13] The restricted building work in question related to an alteration to a residential dwelling that was carried out under a building consent issued in 2017. The Complainant set out:

Dave Cook (the Respondent) was contracting to me at the time of the building contract. He undertook the restricted building work which comprised the digging and placing of a timber pile, installation of a 300 x 90 Hy90 lintel and supporting framing. He also undertook the bracing element. The building work was inspected and passed. The building project has been completed and we are now in the process applying for the CCC. I have asked Dave for his ROW on a number of occasions. He has conditionally agreed to give it to me on one occasion, since then he has not returned my contact. He is now failing to return my texts and I have not seen the ROW.

- [14] The evidence before the Board was that the Respondent's building work had been completed on or about 14 September 2017.
- [15] The Respondent submitted that he had received advice from an MBIE employee that he would not be in contradiction of the Building Act 2004 if I did not sign his name to work he had not done. He provided a copy of email correspondence with the MBIE employee in support of the submission. In the email to MBIE he noted that he did some work but that he was being pressured to provide a record of work and that:

... much of what was done I wasn't there for or didn't witness the finished work ... therefor am not prepared to provide a ROW and take responsibility for this work.

⁶ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

[16] The response from MBIE stated:

You are required to provide a record of work for all RBW (restricted building work) you carried out or supervised , if you did not carry out or supervise the work they are wanting you to provide a record of work for then you would not be in a contradiction of the Building Act 2004 if you decided not provide one.

We would suggest you fill out a record of work for what you did or did supervise and provide a copy to the owner and a copy to the council and keep a copy for yourself, we would also suggest you are very clear on the form with exactly what work you carried out.

[17] The submission made by the Respondent prior to the hearing set out the history of the Respondent's relationship with the Complainant and of peripheral issues in relation to their contractual and personal relationship. The Respondent submitted those matters were relevant as they indicated the complaint was "purely malicious".

[18] The Respondent also set out details of the building work including that it was an alteration and removal of a chimney and small wall, that there were various persons on site at various times, and that the job was not complete at the time he ceased contracting to [Omitted]. He stated:

Looking back, the only notifiable work relating to the job would have been installing a beam and subsequent supporting framing. Which [Omitted] (the Complainant) had either helped with or sited, meaning he could have and I believe DID, sign off on.

[19] The Respondent further noted:

While being off this job, brackets/strapping etc were put on and covered with gib. There is no way I would be willing to sign my name to something I would be liable for 10 years without sitting or doing myself.

[20] The Respondent reiterated in his submission that he had been advised that he would not be in breach of the Act if he did not sign off the work in question under the circumstances he had stated.

[21] The Complainant also made further submissions. He implied that he did not carry out building work himself stating:

I floated between jobs and ran the business from the office.

Mr Cook was employed as an LBP qualified builder, which negated me having to supervise his jobs. Therefore I did not have to be onsite when inspections arose.

[22] The Complainant also provided copies of job and time sheets noting:

Attached are the hour sheets for the job at [Omitted]. As can be seen, Mr Cook was the onsite LBP for a lot of the time. The areas requiring sign off

were the installation of the bearing beam and attachments, bracing elements and the installation of a bearing pile sub floor.

Also attached is Mr Cooks time sheet for the week relating to [Omitted]. In those sheets are references to Gib board – walls and ceiling.

- [23] The Complainant responded to matters raised with respect to the business and personal relationship between the Respondent and the Complainant.

Board's Conclusion and Reasoning

- [24] The Board has decided that the Respondent **has** 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) (s 317(1)(da)(ii) of the Act) and should be disciplined.
- [25] Section 88(1) of the Building Act 2004 requires that a licensed building practitioner provide a record of work to the owner and the territorial authority on completion of restricted building work⁷.

Restricted Building Work

- [26] The first question for consideration is whether the building work carried out or supervised by the Respondent was restricted building work. If it was then a record of work had to be provided for it.
- [27] Section 401B of the Act allows building work to be declared as restricted building work by Order in Council⁸. Under that provision the building work must be building work that has been carried out under a building consent. The building work in the case before the Board was carried out under a building consent.
- [28] Restricted building work was, in turn, defined in the Building (Definition of Restricted Building Work) Order 2011. Clause 5 of the Order stipulates:

⁷ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

⁸ 401B Order in Council declaring work to be restricted building work

- (1) *The Governor-General may, by Order in Council made on the recommendation of the Minister, declare any kind of building work (other than building work for which a building consent is not required) or any kind of design work to be restricted building work.*
- (2) *An order under subsection (1) may apply to any kind of building work or design work generally, or may apply to building work or design work in relation to particular types or categories of buildings or to particular parts of buildings.*
- (3) *The Minister may recommend the making of an order under this section only if the Minister is satisfied that the kind of building work or design work in question is (or is likely to be) critical to the integrity of a building or part of a building.*
- (4) *Building work or design work is not restricted building work if it relates to an application for a building consent made before the commencement of an order under subsection (1) declaring building work or design work of the same kind to be restricted building work.*

5 *Certain building work relating to primary structure or external moisture-management systems of residential buildings to be restricted building work*

- [29] The Complainant has alleged the Respondent undertook the digging and placing of a timber pile, the installation of a lintel and supporting framing and the install of a bracing element. He has provided supporting information which details the number of hours spent on the job (121.5 hours) but not the specific work undertaken. The job hours also indicate that the Respondent was the only licensed building practitioner on site on the days that he was present except for two days when the Complainant was on site for one hour on each day. The building work outlined by the Complainant was restricted building work.
- [30] The Respondent's own evidence was that he had installed a beam and subsequent supporting framing but that the Complainant assisted with the work.
- [31] On the basis of the evidence before it, the Board finds that the Respondent did carry out restricted building work. The Respondent's evidence was that he installed a beam and support framing. Both items are structural elements, it was a residential building, and there was a building consent. It was, therefore, restricted building work.
- [32] The Board considers, on the balance of probabilities, that the Respondent did more restricted building work than he has stated. It is a somewhat moot point however as all that is required for a record of work to be necessitated is that there be some restricted building work which there was.

Requirement for a Record of Work

- [33] Having established that the building work carried out was restricted building work the next consideration is whether a record of work for it was required.
- [34] As noted above if restricted building work has been carried out there is a statutory duty to provide a record of work. The Respondent has, however, alluded to the Complainant having assisted with the restricted building work that he did. He has implied that, with the involvement of another licensed building practitioner, a record of work was not required from him, i.e. that the Complainant could or should have done the record of work.
- [35] The Board notes that section 88 of the Act states "Each licensed building practitioner who carries out or supervises restricted building work ...". The use of the word "each" makes it clear that every licensed building practitioner who carries out restricted building work has to complete a record of work for the work they did or supervised. This is so that there is a complete record of all the licensed persons who have been involved in the restricted building work. As such even if there is more than one licensed building practitioner carrying out restricted building work on the same element, they must both provide a record of work. Their records of work should delineate what each did.

- [36] It must also be noted that the reference to supervision in the context of records of work is to the supervision of persons who are not authorised to carry out restricted building work, i.e. non-licensed persons. A licensed building practitioner does not require supervision by virtue of their own licence – they are authorised to carry out restricted building work. Even if one practitioner was to consider that they were in overall charge of a building site and of the work being carried out under a building consent (such as where they hold a Site Licence) the wording “each licenced person...” in section 88 cannot be ignored.
- [37] The wording of the section is clear. The obligation is for each and every licensed building practitioner to provide a record of work for the restricted building work they carried out under a building consent irrespective of whether there may have been another licensed building practitioner on site who may have been providing overall supervision.
- [38] Given the above the Respondent was still required to provide a record of work for his restricted building work even if the Complaint assisted with that work.

Completion

- [39] The Respondent has submitted he does not have an obligation to provide a record of work as the restricted building work was not complete when he left the project. The Board does not accept this submission.
- [40] Firstly, if the submission was accepted then, in situations where restricted building work has been started but not finished or is finished by others, an obligation to provide a record of work would never arise. That would defeat the purpose of the legislation which is to ensure there is a documented history of all of the licensed building practitioners involved in a build.
- [41] Secondly the Respondent, in his submissions, has not understood what a record of work is for. It is not a statement as to the quality or compliance of the restricted building work. It is not any form of sign off or undertaking. It is not to be confused with a producer statement. In this respect it is to be noted that a record of work given by a licensed building practitioner does not, of itself create any liability, that would not otherwise exist as section 88(4) provides:
- (4) *A record of work given under subsection (1) does not, of itself,—*
- (a) *create any liability in relation to any matter to which the record of work relates; or*
- (b) *give rise to any civil liability to the owner that would not otherwise exist if the licensed building practitioner were not required to provide the record of work.*
- [42] It is also important to note that a record of work provides an opportunity to not only record what was carried out or supervised but also what was not done, completed or supervised. As such, if the Respondent had concerns about future liability for work

that he had not carried out or supervised, he could have used the record of work to capture those concerns.

- [43] Taking the above into consideration, and looking at the facts before the Board, the Respondent had carried out restricted building work and, as a result of his involvement in the project ceasing, he was not going to be carrying out any further restricted building work. In essence, as far as the Respondent's involvement in the restricted building work was concerned, completion had occurred and a record of work was due. One has not been provided and in this respect the Respondent is reminded that the requirement is on the licensed building practitioner to provide a record of work, not on the owner or territorial authority to demand one. They must act of their own accord and not wait for others to remind them of their obligations.

Reliance on Official Advice

- [44] The Respondent has also submitted that he did not provide a record of work on the basis of advice received from MBIE.

- [45] The advice received was

You are required to provide a record of work for all RBW (restricted building work) you carried out or supervised, if you did not carry out or supervise the work they are wanting you to provide a record of work for then you would not be in a contradiction of the Building Act 2004 if you decided not provide one.

We would suggest you fill out a record of work for what you did or did supervise and provide a copy to the owner and a copy to the council and keep a copy for yourself, we would also suggest you are very clear on the form with exactly what work you carried out.

- [46] The advice was clear and consistent with the legislative requirements. The Respondent has either misinterpreted the advice or has chosen to interpret it in a way that suits his needs.
- [47] The advice was to provide a record of work for the restricted building work the Respondent had carried out or supervised and to make it clear what the Respondent had done. Rather than heeding the advice the Respondent chose not to provide a record of work at all.

Good Reason Not to Provide

- [48] Section 317(1)(da)(ii) of the Act provides for a defence of the licenced building practitioner having a "good reason" for failing to provide a record of work. If they can, on the balance of probabilities, prove to the Board that one exists then it is open to the Board to find that a disciplinary offence has not been committed. Each case will be decided by the Board on its own merits but the threshold for a good reason is high.

- [49] The Respondent has claimed the complaint was malicious. The Complaints Regulations provide a ground under which a complaint can be dismissed where a

complaint is frivolous, vexatious, or not made in good faith⁹. In the context of a disciplinary hearing frivolous complaints are those that do not have any serious purpose or value. Vexatious complaints are those which are improperly motivated such as where they lack merit or are instituted primarily to distress, annoy or embarrass and it will proceed on this basis.

[50] There will, in most complaints made about a licensed building practitioner, be elements of the above and that is the case in the matters before the Board. That is not, of itself, enough to make the complaint frivolous, vexatious, or not made in good faith. The Board considers the complaint needs to have been made predominately for those purposes and to lack value or merit.

[51] In the present case the Board notes that the Complainant sought a record of work from the Respondent so as a Code Compliance Certificate could be obtained and only made a complaint after not being able to obtain one from the Respondent. As such the Board does not find that the complaint was without merit. Nor does it find that it was made for an improper purpose.

[52] The Board therefore finds that the Respondent has failed, without good reason, to provide a record of work and that he should be disciplined.

Penalty, Costs and Publication

[53] Having found that one or more of the grounds in section 317 applies the Board must, under section 318 of the Actⁱ, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.

[54] The matter was dealt with on the papers. Included was information relevant to penalty, costs and publication and the Board has decided to make a penalty decision on the basis of that information.

Penalty

[55] The purpose of professional discipline is to uphold the integrity of the profession; the focus is not punishment, but the enforcement of a high standard of propriety and professional conduct. The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*¹⁰ commented on the role of "punishment" in giving penalty orders stating that punitive orders are, at times, necessary to provide a deterrent and to uphold professional standards. The Court noted:

[28] I therefore propose to proceed on the basis that, although the protection of the public is a very important consideration, nevertheless the issues of punishment and deterrence must also be taken into account in selecting the appropriate penalty to be imposed.

⁹ Refer regulation 9(c) of the Complaints Regulations.

¹⁰ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

- [56] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*¹¹ the court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act they have the advantage of simplicity and transparency. The court recommended adopting a starting point for penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.
- [57] 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.
- [58] The Respondent has put forward certain circumstances surrounding his personal and contractual relationship with the Complainant which the Board considers are mitigating factors. Having taken those into account the Board has decided to reduce the fine to \$1,000.

Costs

- [59] Under section 318(4) the Board may require the Respondent "to pay the costs and expenses of, and incidental to, the inquiry by the Board."
- [60] The Respondent should note that the High Court has held that 50% of total reasonable costs should be taken as a starting point in disciplinary proceedings and that the percentage can then be adjusted up or down having regard to the particular circumstances of each case¹².
- [61] In *Collie v Nursing Council of New Zealand*¹³ where the order for costs in the tribunal was 50% of actual costs and expenses the High Court noted that:
- But for an order for costs made against a practitioner, the profession is left to carry the financial burden of the disciplinary proceedings, and as a matter of policy that is not appropriate.*
- [62] The Board notes the matter was dealt with on the papers. This is the second hearing of the matter. That has not been taken into account. Nor has the fact that the costs have been increased as a consequence of the Respondent not maintaining his details on the Register. The Board has treated the matter as a hearing at the first instance and has considered costs as per other matters which are heard on the papers for which it normally orders costs of \$500. The Board considers this a reasonable for the Respondent to pay toward the costs and expenses of, and incidental to, the inquiry by the Board.

¹¹ 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

¹² *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.

¹³ [2001] NZAR 74

Publication

- [63] 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 Act¹⁴. The Board is also able, under section 318(5) of the Act, to order publication over and above the public register:
- 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.*
- [64] As a general principle such further public notification 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. This is in addition to the Respondent being named in this decision.
- [65] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990¹⁵. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction¹⁶. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive¹⁷. The High Court provided guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*¹⁸.
- [66] The courts have also stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published in the public interest¹⁹. It is, however, common practice in disciplinary proceedings to protect the names of other persons involved as naming them does not assist the public interest.
- [67] Based on the above the Board will not order further publication.

¹⁴ Refer sections 298, 299 and 301 of the Act

¹⁵ Section 14 of the Act

¹⁶ Refer sections 200 and 202 of the Criminal Procedure Act

¹⁷ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

¹⁸ *ibid*

¹⁹ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Section 318 Order

[68] 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 \$1,000.

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(1)(iii) of the Act.

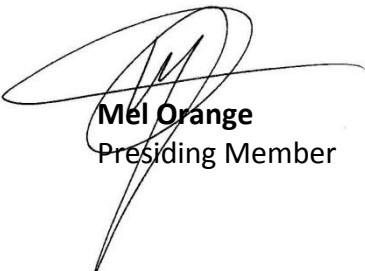
In terms of section 318(5) of the Act, there will not be action taken to publicly notify the Board's action, except for the note in the Register and the Respondent being named in this decision.

[69] 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.

Right of Appeal

[70] The right to appeal Board decisions is provided for in section 330(2) of the Actⁱ.

Signed and dated this 7th day of August 2019



Mel Orange
Presiding Member

ⁱ Section 318 of the Act

- (1) In any case to which section 317 applies, the Board may
- (a) do both of the following things:
 - (i) cancel the person's licensing, and direct the Registrar to remove the person's name from the register; and
 - (ii) order that the person may not apply to be relicensed before the expiry of a specified period:
 - (b) suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:
 - (c) restrict the type of building work or building inspection work that the person may carry out or supervise under the person's licensing class or classes and direct the Registrar to record the restriction in the register:

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

ii 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.