

## Before the Building Practitioners Board

	BPB Complaint No. CB26342
Licensed Building Practitioner:	Lee McKinstry (the Respondent)
Licence Number:	BP132746
Licence(s) Held:	Roofing – Profiled Metal Roof and/or Wall Cladding; Metal Tile Roof

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### Decision of the Board in Respect of the Conduct of a Licensed Building Practitioner Under section 315 of the Building Act 2004

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Complaint or Board Inquiry	Complaint
Hearing Type:	On the Papers
Hearing and Draft Decision Date:	13 December 2023
Final Decision Date:	27 February 2024
Board Members Present:	
	Mrs F Pearson-Green, Deputy Chair, LBP, Design AoP 2 (Presiding)
	Mr D Fabish, LBP, Carpentry and Site AoP 2
	Mrs J Clark, Barrister and Solicitor, Legal Member

#### 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 \$1,000 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.

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## Summary of the Board’s Draft Decision

- [1] The Respondent failed to provide a record of work on completion of restricted building work. He is fined \$1,000 and ordered to pay costs of \$500. The disciplinary finding will be recorded on the public Register for a period of three years.

## The Charges

- [2] 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.<sup>1</sup>

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<sup>1</sup> 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.

- [3] In this matter, the disciplinary charges the Board resolved to further investigate<sup>2</sup> were that the Respondent may, in relation to building work at Omitted have 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.

### **Draft Decision Process**

- [4] 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.
- [5] Ordinarily, the Board makes a decision having held a hearing.<sup>3</sup> 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.<sup>4</sup>
- [6] 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, and a hearing will be scheduled.

### **Evidence**

- [7] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>5</sup>. 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.

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<sup>2</sup> 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.

<sup>3</sup> Regulation 10 of the Complaints Regulations.

<sup>4</sup> 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

<sup>5</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

### **Failure to Provide a Record of Work**

- [8] 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.<sup>6</sup>
- [9] 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 work<sup>7</sup> unless there is a good reason for it not to be provided.<sup>8</sup>

### Did the Respondent carry out or supervise restricted building work

- [10] The Respondent was engaged by the main contractor to carry out and supervise the installation of a new colorsteel roof, which is restricted building work (external moisture management system).

### Was the restricted building work complete

- [11] The work was carried out between 28 March 2022 and 4 October 2022. The main contractor and the Respondent were then involved in a dispute over payment. The Respondent advised that he ceased work in October 2022, but in December 2022, it was *“yet to be determined if [the Respondent] would be returning to finish the work”*.
- [12] In an email dated 15 December 2022, the main contractor refers to the Respondent advising them that he *“would no longer be returning to complete the...job”*. In that same email the main contractor states that a new contractor will complete the work and requested the *“paperwork”* from the Respondent.
- [13] In this instance, completion occurred in December 2022 when the Respondent’s engagement in the building work came to an end, and it was clear to the Respondent that another contractor was being engaged. The completion date applies notwithstanding that all of the intended work had not been completed as the Respondent did not return and carry out any further restricted building work.

### Has the Respondent provided a record of work

- [14] The Respondent provided a record of work dated 16 August 2023 to the investigator and main contractor on 18 August 2023. The Council file was rechecked on 22 November 2023, and it did not contain a record of work from the Respondent.
- [15] The record of work was only supplied after the Respondent was aware of the complaint against him.
- [16] The obligation under section 88(1) of the Act is to provide the record of work on completion, which in this case the Board has found was in December 2022. Provision of the record of work 8 months later does not satisfy this obligation.

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<sup>6</sup> Section 88(1) of the Act.

<sup>7</sup> Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

<sup>8</sup> Section 317(1)(da)(ii) of the Act

- [17] Furthermore, the statutory requirement is to provide the record of work to the homeowner and the Territorial Authority. In this instance, the Respondent has not, on the evidence provided, done either of these.
- [18] The Respondent should note that whilst it may be common practice for some Licensed Building Practitioners to provide their record of work to a main or head contractor, it is a practice that comes with a degree of risk as the main or head contractor may not pass it on. As such, Licensed Building Practitioners are advised to do what section 88 of the Act states and to provide the record of work to the owner and the Territorial Authority.

#### Was there a good reason

- [19] 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.
- [20] The Respondent stated that the record of work was not supplied because they were in a dispute process with the main contractor over payment. The Respondent also highlighted that there had only been one email requesting the record of work.
- [21] Non-payment is not an acceptable reason to withhold the record of work. The Board has repeatedly stated that a Record of Work is a statutory requirement, not a negotiable term of a contract. The requirement for it is not affected by the terms of a contract, nor by contractual disputes. Licensed building practitioners should now be aware of their obligations to provide them, and their provision should be a matter of routine.
- [22] Further, the Respondent should note 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. He is required to act of his own accord and not wait for others to remind him of his obligations.
- [23] The Board, therefore, finds that no “good reason” has been established for the failure to provide the record of work on completion.

#### Did the Respondent fail to provide a record of work

- [24] The Respondent failed to provide a record of work on completion of the restricted building work in breach of section 88 (1) of the Act.

#### **Board’s Decision**

- [25] The Respondent **has** committed the disciplinary offence under section 317(1)(da)(ii) of the Act of failing to provide a record of work on completion of restricted building work.

## Penalty, Costs and Publication

- [26] Having found that one or more of the grounds in section 317 applies, the Board must, under section 318 of the Act<sup>i</sup>, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [27] 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

- [28] The Board has the discretion to impose a range of penalties.<sup>ii</sup> 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.<sup>9</sup> It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:<sup>10</sup>
- (a) protection of the public and consideration of the purposes of the Act;<sup>11</sup>
  - (b) deterring other Licensed Building Practitioners from similar offending;<sup>12</sup>
  - (c) setting and enforcing a high standard of conduct for the industry;<sup>13</sup>
  - (d) penalising wrongdoing;<sup>14</sup> and
  - (e) rehabilitation (where appropriate).<sup>15</sup>
- [29] Overall, the Board should assess the conduct against the range of penalty options available in section 318 of the Act, reserving the maximum penalty for the worst cases<sup>16</sup> and applying the least restrictive penalty available for the particular offending.<sup>17</sup> In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty<sup>18</sup> that is consistent with other penalties imposed by the Board for comparable offending.<sup>19</sup>

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<sup>9</sup> *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]

<sup>10</sup> Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

<sup>11</sup> Section 3 Building Act

<sup>12</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

<sup>13</sup> *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

<sup>14</sup> *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>15</sup> *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

<sup>16</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

<sup>17</sup> *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

<sup>18</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

<sup>19</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

- [30] In general, when determining the appropriate penalty, the Board adopts a starting point based on the principles outlined above prior to it considering any aggravating and/or mitigating factors present.<sup>20</sup>
- [31] 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.
- [32] The Board decided to reduce the fine from the starting point of \$1,500 on the basis that the Respondent did provide the record of work during the investigation process. The fine is set at \$1,000.

### Costs

- [33] 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.<sup>21</sup>
- [34] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings<sup>22</sup>. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case<sup>23</sup>.
- [35] 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 and the draft decision has been made on the papers.
- [36] 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

- [37] 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,<sup>24</sup> 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.
- [38] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.<sup>25</sup> Further, as a general principle, publication may be required where the Board perceives a need for the public and/or the

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<sup>20</sup> 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.

<sup>21</sup> *Collie v Nursing Council of New Zealand* [2001] NZAR 74

<sup>22</sup> *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

<sup>23</sup> *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.

<sup>24</sup> Refer sections 298, 299 and 301 of the Act

<sup>25</sup> Section 14 of the Act

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.<sup>26</sup>

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

### Section 318 Order

[40] 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(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 publicly available on the Board's website.**

[41] 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

[42] 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.

[43] Submissions and/or further evidence must be filed with the Board by no later than the close of business on **26 February 2024**.

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

[45] 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.

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<sup>26</sup> Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055



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

### **Request for In-Person Hearing**

[47] 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.

[48] A request for an in-person hearing must be made in writing to the Board Officer no later than the close of business on **26 February 2024**.

[49] 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**

[50] The right to appeal Board decisions is provided for in section 330(2) of the Act<sup>iii</sup>.

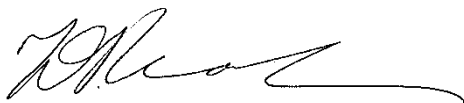
Signed and dated this 2<sup>nd</sup> day of February 2024



**Mrs F Pearson-Green**  
Presiding Member

**This decision and the order herein were made final on 27 February 2024 on the basis that no further submissions were received.**

Signed and dated this 8<sup>th</sup> day of March 2024



**Mrs F Pearson-Green**  
Presiding Member

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**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:*
  - (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 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.*

iii **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.*