

Before the Building Practitioners Board

	BPB Complaint No. CB26401
Licensed Building Practitioner:	Karl Murray (the Respondent)
Licence Number:	BP 120445
Licence(s) Held:	Bricklaying and Block laying – Veneer and Structural Masonry

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

Complaint or Board Inquiry	Board Inquiry
Hearing Type:	On the Papers
Draft Decision Date:	31 January 2024
Final Decision Date:	11 April 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 \$1,500 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.

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Summary of the Board’s Decision

- [1] The Respondent failed to provide a Record of Work on completion of Restricted Building Work. He is fined \$1,500 and ordered to pay costs of \$500. The disciplinary finding will be recorded on the public Register for a period of three years.
- [2] The fine was reduced from a starting point of \$2,000 on the basis that the Respondent provided the Record of Work to the homeowner within the timeframe specified in the draft decision.

The Charges

- [3] 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

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.

- [4] 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 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

- [5] 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.
- [6] 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
- [7] In this instance, the Board decided that a formal hearing was not necessary. The Board considered that there was sufficient evidence before it to allow it to make a decision on the papers.
- [8] The Board did, however, note that there may be further evidence in the possession of persons involved in the matter or that the Board may not have interpreted the evidence correctly. To that end, it issued a draft decision. The Respondent was provided with an opportunity to comment on the Board's draft findings and to present further evidence prior to the Board making a final decision. If the Board had directed, or the Respondent had requested an in-person hearing, then the Board advised that one would have been scheduled. The Respondent provided an undated submission in response to the draft decision.

Evidence

- [9] 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.

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 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

Failure to Provide a Record of Work

[10] 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.⁶

[11] 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 Work⁷ unless there is a good reason for it not to be provided.⁸

Did the Respondent carry out or supervise Restricted Building Work?

[12] The Respondent was a subcontractor to another Licensed Building Practitioner. The Respondent acknowledged that he carried out and supervised the laying and filling of blocks in respect of a new 2-storey garage and lounge addition.

[13] The block laying work he carried out and/or supervised related to the primary structure of a house and was done pursuant to a Building Consent. As such, it meets the definitional requirements under the Regulations⁹ and is therefore Restricted Building Work.

Was the Restricted Building Work complete?

[14] The Respondent advised that the work was carried out on 18, 19 and 21 February 2020. The Respondent's Restricted Building Work was, therefore, complete at the end of February 2020.

Has the Respondent provided a Record of Work?

[15] The Respondent has not provided a Record of Work, and the Council file, which was obtained on 3 July 2023, did not contain one.

Was there a good reason?

[16] The Respondent stated that he *"was never asked to provide a ROW or given the relative information to fill one out"*. He further stated: *"...I thought it was Morgan,s [sic] job his LBP number was on the inspection notes, it was his client and he was the one being paid...I have subcontracted to other block layers and never been asked to provide a ROW on their jobs. This is the first time that I have been told I should provide a ROW on another block layers job. If I had been asked & given the relative [sic] information I would have provided one."*

[17] The Board considers it concerning that the Respondent appears unaware of his obligations to provide a Record of Work. This statutory obligation falls on the Licensed Building Practitioner who carries out and/or supervises the Restricted

⁶ Section 88(1) of the Act.

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

⁸ Section 317(1)(da)(ii) of the Act

⁹ Building (Definition of Restricted building Work) Order 2011

Building Work regardless of the contractual chain and the Respondent's position as a subcontractor or whether he is subcontracting to another Licensed Building Practitioner of the same licensing class.

- [18] The Respondent should also 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.
- [19] Accordingly, the Board finds that there was no good reason for failing to provide the Record of Work.

Did the Respondent fail to provide a Record of Work

- [20] The Respondent's Restricted Building Work was complete by the end of February 2020, and as of November 2023, he had not provided a Record of Work to the homeowner or the Territorial Authority. As such, he has failed to meet his statutory obligation to provide a Record of Work.

Further Evidence and Submissions Received

- [21] Following the Board issuing a Draft Decision, it received an undated submission from the Respondent. He did not request an in-person hearing. The Board took the further submission into account when making this Final Decision.
- [22] The Respondent acknowledged that he was under a mistaken impression that the contracted Licensed Building Practitioner (who did not carry out or supervise the work) was, nevertheless, the Licensed Building Practitioner who had the responsibility for providing the Record of Work. However, he then commented that he now knew that he was required to provide the Record of Work to the contractor to whom he was subcontracted and that the contractor would pass that on to the builder who would provide all of the paperwork for the project to the Council.
- [23] This response demonstrates a fundamental lack of understanding on the part of the Respondent.
- [24] 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.
- [25] Further, the Respondent noted: *"I feel in a situation like this, where a contracted LBP subcontracts the work to another LBP, the process of submitting the ROW is not clearly outlined in the Code of Ethics and this could lead to some confusion.....So, moving forward in the best interests of LBPs in general, it would be great to have some form of educational reminder as to who does what when there is a situation as ...I faced..."*

[26] The Board notes that the Respondent has held his licence since 2012. During that time, in order to maintain his licence, he has had compulsory learning requirements, including reading Codewords articles and completing the corresponding quizzes. Many of these articles and quizzes are directly on point with regard to the Record of Work requirements. In particular, the Board notes of recent times-

71. Codewords – “For the record”

81. Codewords – “Always play by the rules with Records of Work”

90. Codewords – “Your duty in labour only contracts – Records of Work”

93. Codewords – “Keeping your records straight”

[27] Licensed Building Practitioners should now be aware of their obligations to provide the Records of Work, and their provision should be a matter of routine.

Board’s Decision

[28] The Respondent **has** failed to provide a Record of Work on completion of Restricted Building Work.

[29] The further submissions made by the Respondent did not result in any changes being made to the Board’s Draft Decision on the grounds of discipline being upheld.

Penalty, Costs and Publication

[30] 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.

[31] The matter was dealt with on the papers. The Board made an indicative order in its Draft Decision and gave the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

[32] The Respondent did not make any submissions on the penalty, costs, or publication orders.

Penalty

[33] The Board has the discretion to impose a range of penalties.ⁱⁱ 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.¹⁰ It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:¹¹

¹⁰ *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]

¹¹ Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

- (a) protection of the public and consideration of the purposes of the Act;¹²
- (b) deterring other Licensed Building Practitioners from similar offending;¹³
- (c) setting and enforcing a high standard of conduct for the industry;¹⁴
- (d) penalising wrongdoing;¹⁵ and
- (e) rehabilitation (where appropriate).¹⁶

[34] 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 cases¹⁷ and applying the least restrictive penalty available for the particular offending.¹⁸ In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty¹⁹ that is consistent with other penalties imposed by the Board for comparable offending.²⁰

[35] 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.²¹

[36] 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. There are no mitigating factors present. There is an aggravating factor. The Board has noted that there is a pattern of the Respondent not providing a Record of Work when he is a subcontractor. The Record of Work provisions have been in place for over a decade, and the Respondent has been licensed for all of that time. He should know what his obligations are. Having taken the aggravating factor into account, the fine was lifted to \$2,000.

[37] The Board provided the Respondent with an opportunity to provide a Record of Work before it made a final decision on the appropriate penalty. On 3 April 2024, the Respondent provided evidence that he had done so. As such, this has been taken into consideration as a mitigating factor when setting the penalty. From the starting point of \$2,000, the fine will be reduced by \$500 to a fine of \$1500.

¹² Section 3 Building Act

¹³ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

¹⁴ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

¹⁵ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

¹⁶ *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

¹⁷ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

¹⁸ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

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

²⁰ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²¹ 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.

Costs

- [38] 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.²²
- [39] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings²³. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case²⁴.
- [40] 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.
- [41] 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

- [42] 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,²⁵ 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.
- [43] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.²⁶ 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.²⁷
- [44] Based on the above, the Board will not order any publication over and above the record on the Register, the Respondent being named in this decision, and the publication of the decision on the Board's website. The Respondent should note, however, that as the Board has not made any form of suppression order, other entities, such as the media or the Ministry of Business Innovation and Employment, may publish under the principles of open justice reporting.

²² *Collie v Nursing Council of New Zealand* [2001] NZAR 74

²³ *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

²⁴ *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.

²⁵ Refer sections 298, 299 and 301 of the Act

²⁶ Section 14 of the Act

²⁷ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Section 318 Order

[45] 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(I)(iii) of the Act.

In terms of section 318(5) of the Act, the Respondent will be named in this decision, which will be published on the Board's website.

[46] 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

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

Signed and dated this 16th day of April 2024



Mrs F Pearson-Green
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 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.