

Before the Building Practitioners Board

	BPB Complaint No. C2-01866
Licensed Building Practitioner:	Dale Kay (the Respondent)
Licence Number:	BP 121585
Licence(s) Held:	Carpentry and Site AOP 1

Penalty Decision of the Board under section 318 of the Building Act 2004

Complaint or Board Inquiry	Complaint
Hearing Location	Tauranga
Hearing Type:	In Person
Hearing Date:	31 October 2018
Substantive Decision Date:	16 November 2018
Penalty Decision Date:	18 December 2018

Board Members Present

Richard Merrifield, LBP, Carpentry Site AOP 2 (Presiding)
Mel Orange, Legal Member
Robin Dunlop, Retired Professional Engineer
Faye Pearson-Green, LBP Design AOP 2

Procedure:

The matter was considered by the Building Practitioners Board (the Board) under the provisions of Part 4 of the Building Act 2004 (the Act), the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Complaints Regulations) and the Board's Complaints and Inquiry Procedures.

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Introduction

- [1] This penalty decision arises out of the Board’s substantive decision in which it found that the Respondent had carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act);
- [2] 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.
- [3] In its substantive decision the Board set out its indicative position as regards penalty, costs and publication and invited the Respondent to make written submissions on those matters.
- [4] On 9 December 2018, the Board received the Respondent’s submissions. It has considered them and made the following decisions.

Penalty

- [5] The Board’s initial view was that a fine of \$3,000 was the appropriate penalty for the disciplinary offence. In coming to that view it noted:

[55] The matters before the Board were serious. The fundamental safety objective of the Act was potentially put at risk. The Respondent had little appreciation of the seriousness of his conduct or of the requirement for a building consent.

- [6] The Respondent accepted the Board’s decision and outlined that he know understood his responsibilities as a licensed building practitioner. The Respondent also submitted:

I have been harshly penalised in this process in that I have had to pay the cost of materials used on this site, I was not paid any money by anyone for the hours spent on this site, have spent many hours at disputes tribunal and with the LBP Board and process without payment, and have had costs awarded against me by the Disputes Tribunal and now the LBP Board. In total this has cost me well over \$20,000-00 and I am 2 years away from retirement and also must bear the notification of my name which will not help me to find well paid work in the next two years. The Boards directive is not to be punitive but I am

left thinking that the fine imposed does not achieve any outcome except to add to the considerable costs I bear in this matter and does appear to be punitive.

At 63 years old and without any history of fault against this system I believe I can assure the Board that you will not see me before this board again and I will be strenuously ensuring that I act within these rules at all times that I act as a LBP on any construction sites in the future. I can assure you that the purposes of the disciplinary action have been achieved without the imposition of any monetary penalty by this Board.

- [7] Having considered the submissions received the Board has decided to reduce the fine. In doing so the Board still needs to reflect the seriousness of the matter, to impose a penalty that is consistent with other penalties ordered by the Board and to create a deterrence. The Board's final order will therefore be that the Respondent pay a fine of \$2,000.

Costs

- [8] The Board's initial view was that \$2,000 in costs was appropriate. This sum is significantly less than the costs that were actually incurred. In ordering a contribution toward the costs of the investigation and hearing the Board is ensuring that the full burden does not fall on other licensed building practitioners. As such the order will remain at \$2,000.

Publication of Name

- [9] The Board's initial view was there were good reasons to further publish the matter. The Respondent made no submissions on publication. The order is confirmed.

Section 318 Order

- [10] 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 \$2,000.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$2,000 (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.

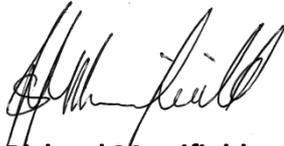
In terms of section 318(5) of the Act, there will be action taken to publicly notify the Board's action, in addition to the note in the Register and the Respondent being named in this decision.

- [11] 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

[12] The right to appeal Board decisions is provided for in s 330(2) of the Actⁱⁱ.

Signed and dated this 18th day of December 2018



Richard Merrifield
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:*
 - (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.*