

Before the Building Practitioners Board

	BPB Complaint No. C2-01885
Licensed Building Practitioner:	Peter Ireland (the Respondent)
Licence Number:	BP 118910
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:	In Person
Hearing Date:	13 November 2018
Decision Date:	18 December 2018
Board Members Present:	
	Chris Preston (Presiding)
	Richard Merrifield, LBP, Carpentry Site AOP 2
	Mel Orange, Legal Member
	David Fabish, LBP, Carpentry Site 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.

Board Decision:

The Respondent **has** committed disciplinary offences under section 317(1)(b) and 317(1)(da)(ii) of the Act.

The Respondent **has not** committed a disciplinary offence under section 317(1)(d) of the Act.

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Introduction

[1] The hearing resulted 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]. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:

- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act);
- (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act); and
- (c) 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).

Function of Disciplinary Action

[2] 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

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

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*² and in New Zealand in *Dentice v Valuers Registration Board*³.

- [3] 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*⁴ 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.”

- [4] 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.

Evidence

- [5] 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.
- [6] The procedure the Board uses is inquisitorial, not adversarial. The Board examines the documentary evidence available to it prior to the hearing. The hearing is an opportunity for the Board, as the inquirer and decision maker, to call and question witnesses to further investigate aspects of the evidence and to take further evidence from key witnesses. The hearing is not a review of all of the available evidence.
- [7] In addition to the documentary evidence before the Board heard evidence at the hearing from the Respondent and the Complainants.
- [8] The Respondent was engaged by the Complainants to undertake an alteration to a residential dwelling under a building consent. The work started on or about 11 December 2017 and came to an end on or about 19 February 2018. The building work, which was restricted building work, included work on the subfloor to transfer additional load to the ground and the installation of a four-leaf bi-fold door.
- [9] The Complainants raised concerns with the building work completed on the sub-floor including:
- (a) failure to install a pile as per the plans;

² *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

³ [1992] 1 NZLR 720 at p 724

⁴ [2016] HZHC 2276 at para 164

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

- (b) the installation of a single piece of 240x45 H1 timber without any brackets or straps nailed to the existing bearer, as opposed to the specified HySpan 200x63 bearer with Bowmac B51 angle bracket and Bowmac B85 flat strap.
- [10] The Respondent gave evidence that the pile was not required as site investigations under the floor showed that there was an existing pile in the vicinity that was adequate to carry the load which obviated the need for a new pile and that this was confirmed by the Building Consent Authority in an inspection.
- [11] The Respondent also gave evidence that he had on site discussions with the designer and was given the impression that his solution of a 240x45 timber nailed to the existing bearer would be adopted but that after he had completed the work the designer issued a revision with a Hyspan being specified.
- [12] As a result of the on-site changes made by the Respondent the designer amended the detail on the plans to cater for what the Respondent had done and prescribed two 240x45 bearers and Bowmac B85 flat strap, Bowmac B84 flat strap, Bowmac B51 angle bracket and packer to pile face.
- [13] One of the bearers installed by the Respondent, which had been checked by him to fit over a pile, cracked from the check into the bearer. The Respondent stated that it was at the non-load-bearing end.
- [14] The Complainant's reported that a second bearer was installed as per the revised requirements but that the straps and brackets were not. The Respondent gave evidence at the hearing that the straps and brackets were not installed as the existing pile appeared to be in poor condition and may have been compromised if they were drilled.
- [15] A subsequent builder replaced the bearers and installed the required straps and brackets. Photographs of the remedial work were produced.
- [16] With regard to the bi-fold doors, the consented plans and specifications were for an aluminium door. A wooden door was installed. The existing window that was being replaced was aluminium. The Complainants stated their intention was always to install a wooden door as the rest of the house joinery was wood. Neither the Complainants nor the Respondent picked up that the designer had specified an aluminium door. The Building Consent Authority advised that the change was acceptable as long as revised details were on site. In essence they accepted it as a minor variation.
- [17] The Complainants arranged the supply of the wooden bi-fold. The Respondent installed the frame and the joiners installed the doors. The Complainants noted that the door frame was installed on top of the floorboards with a 65mm lip which they claimed was a tripping hazard. They gave evidence that a subsequent contractor has installed it flush to the floor. The Respondent gave evidence that it was always going to be installed with a lip as there were structural limitations to it being installed without one. He stated he had advised the Complainants that there would be a lip.

[18] The Complainant's also complained that a leak in the door was experienced within a week of it being installed. The Respondent gave evidence that his services were terminated prior to his being able to complete the install of an air seal on the doorsill.

[19] The Complainant's have not received a record of work for the restricted building work that he completed. They made at least two requests for one. The Respondent gave evidence that he was unsure as to his obligations and needed to seek advice prior to completing a record of work. He sought that advice after the complaint was made and he supplied a record of work on 26 August 2018 after his obligations had been clarified. The record of work detailed the Respondent's limited involvement in the work.

Board's Conclusion and Reasoning

[20] The Board has decided that the Respondent **has**:

- (a) carried out or supervised building work or building inspection work in a negligent manner (s 317(1)(b) of the Act); and
- (b) 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.

[21] The Board has decided that the Respondent **has not** carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act).

[22] The reasons for the Board's decisions follow.

Negligence and/or Incompetence

[23] The Board's finding that the Respondent has been negligent relates to the manner in which he carried out building work on the sub-floor. The Board did not consider the matters relating to the door installation reached the threshold for disciplinary action.

[24] Negligence is the departure by a licensed building practitioner, whilst carrying out or supervising building work, from an accepted standard of conduct. It is judged against those of the same class of licence as the person whose conduct is being inquired into. This is described as the *Bolam*⁶ test of negligence which has been adopted by the New Zealand Courts⁷.

⁶ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁷ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

- [25] The New Zealand Courts have stated that assessment of negligence in a disciplinary context is a two-stage test⁸. The first is for the Board to consider whether the practitioner has departed from the acceptable standard of conduct of a professional. The second is to consider whether the departure is significant enough to warrant a disciplinary sanction.
- [26] When considering what an acceptable standard is the Board must have reference to the conduct of other competent and responsible practitioners and the Board's own assessment of what is appropriate conduct, bearing in mind the purpose of the Act⁹. The test is an objective one and in this respect it has been noted that the purpose of discipline is the protection of the public by the maintenance of professional standards and that this could not be met if, in every case, the Board was required to take into account subjective considerations relating to the practitioner¹⁰.
- [27] The Board notes that the purposes of the Act are:

3 Purposes

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.*

- [28] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹¹ and be carried out in accordance with a building consent¹². As such, when considering what is and is not an acceptable standard, the Building Code and any building consent issued must be taken into account.

⁸ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

⁹ *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

¹⁰ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

¹¹ Section 17 of the Building Act 2004

¹² Section 40(1) of the Building Act 2004

- [29] Turning to seriousness in *Collie v Nursing Council of New Zealand*¹³ the Court's noted, as regards the threshold for disciplinary matters, that:

[21] Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, 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.

- [30] Looking at the facts the Respondent departed from what was specified on the consented plans. The Board accepted that a new pile was not required and this was dealt with appropriately by engaging with the designer.
- [31] The installation of a single bearer instead of what was specified is another matter. Not only was it not what was specified in the consented plans it was installed in a manner that did not accord with acceptable standards and it would not have met the requirements of NZS3604 which is an acceptable solution for light weight timber framed buildings.
- [32] Had the Respondent proceeded to rectify the building work once it was ascertained that it was not compliant then the Board may have considered that the conduct did not reach the threshold for disciplinary action. What transpired, however, was that the Respondent completed a remedial solution prior to obtaining written minor variation details and in doing so he again failed to build as per the designed solution. A further minor variation was required. The Respondent then failed to build in accordance with it by not installing the required fixings and whilst he claimed the piles were not able to sustain those fixings a subsequent builder was able to affix them.
- [33] The combined effect of the Respondent's conduct is that the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent has departed from what the Board considers to be an accepted standard of conduct and that the conduct in relation to the sub floor was sufficiently serious enough to warrant a disciplinary outcome.

Contrary to a Building Consent

- [34] The process of issuing a building consent and the subsequent inspections under it ensure independent verification that the Code has been complied with and the works will meet any required performance criteria. In doing so the building consent process provides protection for owners of works and the public at large. Any departure from the consent which is not minor (as defined in s 45A of the Act) must be submitted as an amendment to the consent before any further work can be undertaken. It is also an offence under s 40 of the Act to carry out building work other than in accordance with a building consent when one is issued.

¹³ [2001] NZAR 74

- [35] In *Tan v Auckland Council*¹⁴ the High Court, whilst dealing with a situation where no building consent had been obtained, stated the importance of the consenting process as follows:
- [35] The building consent application process ensures that the Council can check that any proposed building work is sufficient to meet the purposes described in s 3 (of the Act). If a person fails to obtain a building consent that deprives the Council of its ability to check any proposed building work.*
- [36] The same applies to the ongoing verification of building work. A failure to notify the Council of changes to the consented documents defeats the purpose of the process. Moreover undertaking building works that vary from those that have been consented can potentially put person and property at risk of harm.
- [37] The Respondent did engage with the designer over changes to the building consent and whilst he failed to adhere to those changes and had built in advance of them being finalised he did, at least, have a process in place.
- [38] The Board also notes that it has made a negligence finding as regards the related conduct. As such it does not consider a further finding under section 317(1)(d) of the Act is necessary.

Record of Work

- [39] 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 work¹⁵.
- [40] Failing to provide a record of work is a ground for discipline under section 317(1)(da)(ii) of the Act. In order to find that ground for discipline proven, the Board need only consider whether the Respondent had “good reason” for not providing a record of work on “completion” of the restricted building work.
- [41] The Board discussed issues with regard to records of work in its decision C2-01170¹⁶ and gave guidelines to the profession as to who must provide a record of work, what a record of work is for, when it is to be provided, the level of detail that must be provided, who a record of work must be provided to and what might constitute a good reason for not providing a record of work.
- [42] The starting point with a record of work is that it is a mandatory statutory requirement whenever restricted building work under a building consent is carried out or supervised by a licensed building practitioner (other than as an owner-builder). Each and every licensed building practitioner who carries out restricted building work must provide a record of work.

¹⁴ [2015] NZHC 3299 [18 December 2015]

¹⁵ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

¹⁶ *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

- [43] The statutory provisions do not stipulate a timeframe for the licenced person to provide a record of work. The provisions in section 88(1) simply states “on completion of the restricted building work ...”.
- [44] In most situations issues with the provision of a record of work do not arise. The work progresses and records of work are provided in a timely fashion. In this instance the building work, including the restricted building work, came to an end on 19 February 2018. A record of work was provided on 26 August 2018 some six months after completion and after repeated requests had been made and a complaint laid.
- [45] On this basis the Board finds that the record of work was not provided on completion as required and the disciplinary offence has been committed.
- [46] 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.
- [47] The Respondent has submitted that he delayed providing a record of work as he wanted to seek advice as to his obligations. Ordinarily this could amount to a good reason. In the present case, however, the Respondent took no steps to clarify his obligations until a complaint had been made. If he had been uncertain then there was ample opportunity to seek clarification when requests were made of him for a record of work. As such the Board finds that no good reason existed.
- [48] 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. They must act of their own accord and not wait for others to remind them of their obligations.

Penalty, Costs and Publication

- [49] 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.
- [50] The Respondent made submissions at the hearing as regards penalty, costs and
- [51] The Board heard evidence during the hearing relevant to penalty, costs and publication and has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

[52] 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*¹⁷ 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.

[53] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*¹⁸ 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.

[54] Whilst negligence is a serious matter the Board does find that the matter was at the lower end of the scale. It considers a censure is appropriate. A censure is a formal expression of disapproval.

[55] In respect of the failure to provide a record of work the Board's normal starting point for a failure to provide a record of work is a fine of \$1,500. It accepts that in this case there were mitigating circumstances and in this respect it has taken the Respondent's belated desire to seek clarification into account. The Board has reduced the fine to \$500.

Costs

[56] 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."

[57] 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 case¹⁹.

[58] In *Collie v Nursing Council of New Zealand*²⁰ where the order for costs in the tribunal was 50% of actual costs and expenses the High Court noted that:

¹⁷ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

¹⁹ *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.

²⁰ [2001] NZAR 74

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.

- [59] Based on the above the Board's costs order is that the Respondent is to pay the sum of \$1,500 toward the costs of and incidental to the Board's inquiry. This is significantly less than 50% of actual costs.

Publication

- [60] 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 Act²¹. 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.

- [61] 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.
- [62] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990²². The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²³. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²⁴. 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*²⁵.
- [63] 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 interest²⁶. 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.
- [64] Based on the above the Board will not order further publication.

Section 318 Order

- [65] For the reasons set out above, the Board directs that:

²¹ Refer sections 298, 299 and 301 of the Act

²² Section 14 of the Act

²³ Refer sections 200 and 202 of the Criminal Procedure Act

²⁴ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

²⁵ *ibid*

²⁶ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Penalty: Pursuant to section 318(1)(d) of the Building Act 2004, the Respondent is censured in respect of the finding under section 317(1)(b) and pursuant to section 318(1)(f) of the Act the Respondent is ordered to pay a fine of \$500 in respect of the finding under section 317(1)(da)(ii).

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$1,500 (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.

[66] 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 Penalty, Costs and Publication

[67] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **30 January 2019**. The submissions should focus on mitigating matters as they relate to the penalty, costs and publication orders. If no submissions are received then this decision will become final. If submissions are received then the Board will meet and consider those submissions prior to coming to a final decision on penalty, costs and publication.

[68] In calling for submissions on penalty, costs and mitigation the Board is not inviting the Respondent to offer new evidence or to express an opinion on the findings set out in this decision. If the Respondent disagrees with the Board's findings of fact and and/or its decision that the Respondent has committed a disciplinary offence the Respondent can appeal the Board's decision.

Right of Appeal

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

Signed and dated this 18th day of December 2018



Chris Preston
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.*