Before the Building Practitioners Board

	BPB Complaint No. C2-01648
Licensed Building Practitioner:	White Bai (the Respondent)
Licence Number:	BP 126975
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	Auckland
Hearing Type:	In Person
Hearing Date:	19 December 2017
Decision Date:	15 January 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.

Board Decision:

The Respondent **has** committed disciplinary offences under section 317(1)(b), (c) and (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 Regulations[1] 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 (other than as an owner-builder) or supervised restricted building work or building inspection work of a type that he or she is not licensed to carry out or supervise (s 317(c) of the Act); and

(c) 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).

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 public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by

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

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.

Background to the Complaint

[5] The Complainants alleged that the Respondent carried out brickwork as part of an extension to an existing dwelling under a building consent in a negligent manner.

[6] The Board noted that the Respondent was, at the time, licensed in Carpentry and not in Brick and Blocklaying. As such it resolved to investigate whether he had carried out restricted building work that he was not licensed to carry out.

[7] The matter was originally set down for a hearing on 20 December 2017. The Respondent advised that the hearing conflicted with a Disputes Tribunal hearing with regard to the same matters and he sought an adjournment. The hearing was rescheduled to 19 December 2017.

[8] On 4 December 2017 the Respondent sent a copy of travel details for a trip to China and advised that he will not be in New Zealand for the scheduled hearing date. He stated:

> *Because I need to go to China to see a serious brother by air in 13 Dec, He have paid air ticket.so I can not attend the 19th meeting, hoping to rescheduled. sorry very much .*

[9] The Board noted that the Respondent was given notice of the original hearing date on 18 October 2017 and of the revised date on 24 November 2017. The Board also noted that no compelling reasons were been put forward for why the matter should be adjourned other than the Respondent is travelling and that the matters being considered by the Board were serious and need to be addressed. It advised the Respondent that unless verifiable evidence satisfactory to the Board was provided showing why it was imperative that he travel on the dates selected the matter would proceed as scheduled.

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[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

[10] 11 December 2017

> *My name is Cindy. Many thanks for your correspondence. Mr. Bai's English is not very good so he asks me to write to you this time.*
>
> *Mr. Bai's brother in China is Very Sick and bought him ticket for his visit. However he wrongly wrote to you previously as "his brother is serious rather than sick". So I think you did not understand him well.*
>
> *He will be back before Christmas so he can not attend the hearing on 19 Dec. Hope that his situation can be considered and the hearing needs to be rescheduled. He expresses he does need to visit his elder brother very much rather than escaping from attending the hearing. Meanwhile, the hearing in the district court regarding this dispute has been rescheduled as well due to this.*
>
> *Please look at the attached his itinerary and the rescheduled court hearing notice again.*

[11] The Board noted that whilst the Respondent's brother's illness may have been a good reason for an adjournment no evidence was produced to substantiate the illness and the need to travel urgently. As such the Board decided to proceed with the matter.

[12] In coming to its decision to proceed the Board was also mindful that it had substantial evidence before it and that the Respondent had provided a written response to the complaint.

Evidence

[13] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed[5]. 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.

[14] The Complainants entered into a contract with NZSouthpole Team Limited to lay bricks at their property as part of a consented renovation. The Respondent was the only person that the Complainants engaged with from NZSouthpole. They were emailed a contract which bore what they believed was the Respondent's signature. The work was carried out by the Respondent and his workers. The Complainants set out in their complaint that there were issues with the work in that the bricks were out of alignment both horizontally and vertically and that the Respondent did not progress the work or respond to queries after the issues were raised with him. The Complainants provided photographs of the work at the centre of the complaint. The photographs showed brickwork with a level abutted against it that was clearly out of alignment.

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

[15] The Respondent provided a written response to the complaint. He stated the complaint should be directed at the company that entered into the contract. He stated he did not sign the contract and that "the job was not performed by me self". He was of the view that as he had not contracted with the Complainants they should deal with his employer and that it was not ethical for them to complain about him. The Respondent also made allegations about health and safety and compliance issues against the Complainants.

[16] The Board heard evidence at the hearing from:

[Omitted]	Complainant
[Omitted]	Complainant
[Omitted]	Licensed Building Practitioner

[17] At the hearing the Complainants stated that the only person that they engaged with from NZSouthpole was the Respondent. A search of the Companies Office Register shows that the registered address for service is next door to the Respondent's residential address.

[18] The Complainants gave evidence that the day before work started (20 March 2017) the Respondent provided them with a "Notification of licensed building practitioner" form produced by Auckland Council. They provided the Board with the original form and a copy was admitted into evidence. They stated that the Respondent signed the form in front of them. The signature was the same as that on the contract they were provided with and which was in the evidence submitted to the Board. The form stated that the Respondent was licensed in brick and blocklaying.

[19] The records on the Licensed Building Practitioner Register for the Respondent show that he has twice applied for and twice been declined a Brick and Blocklaying Licence.

[20] The Complainants stated that on the first day of work, 21 March 2017, the Respondent showed up on site with two other persons. He showed them what to do and then left but returned later in the day and carried out bricklaying himself.

[21] [Omitted] stated that the brickwork failed a half height inspection as a result of excessive mortar on the inside of the bricks and within the cavity. He noted that the brickwork was out of alignment both vertically and horizontally and that it was visibly obvious that it was. He also noted that the bricks were not blended as they were laid.

[22] Another contractor completed the brickwork which had to be plastered on completion so as to obtain an acceptable finish.

Board's Conclusion and Reasoning

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

(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 (other than as an owner-builder) or supervised restricted building work or building inspection work of a type that he or she is not licensed to carry out or supervise (s 317(c) of the Act);

(c) 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 should be disciplined.

[24] The reasons for the Board's decision follows:

Negligence and/or Incompetence

[25] In considering whether the Respondent has carried out or supervised building work in a negligent or incompetent manner the Board has had regard to the case of *Beattie v Far North Council*[6]. Judge McElrea provided guidance on the interpretation of those terms:

> *[43] Section 317 of the Act uses the phrase "in a negligent or incompetent manner", so it is clear that those adjectives cannot be treated as synonymous.*
>
> *[44] In my view a "negligent" manner of working is one that exhibits a serious lack of care judged by the standards reasonably expected of such practitioners, while an "incompetent" manner of working is one that exhibits a serious lack of competence.*
>
> *[46] The approach I have adopted recognises that the terms "negligent" and "incompetent" have a considerable area of overlap in their meanings, but also have a different focus - negligence referring to a manner of working that shows a lack of reasonably expected care, and incompetence referring to a demonstrated lack of the reasonably expected ability or skill level.*

[26] The Board has also considered the comments of Justice Gendall in *Collie v Nursing Council of New Zealand*[7] as regards the threshold for disciplinary matters:

> *[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.*

[27] The brickwork that was both carried out and supervised by the Respondent. It was of very poor quality and it failed an inspection. It has had to be remediated by way of plastering over the work.

[28] It was clear to the Board, which includes persons with extensive experience and expertise in the building industry, that the bricklaying was carried out in a negligent

[6] Judge McElrea, DC Whangarei, CIV-2011-088-313
[7] [2001] NZAR 74

and incompetent manner. It reached this decision on the basis of the evidence before it, including the evidence that the Respondent was not and is not licensed to carry out brick laying and that he has been declined a licence for such work on two occasions.

Not Licensed to Carry Out or Supervise Restricted Building Work

[29] The building work was carried out under a building consent and as such certain elements involved restricted building work. Under section 84 of the Act:

> *All restricted building work must be carried out or supervised by a licensed building practitioner [who is licensed] to carry out or supervise the work.*

[30] Clause 5 of the Building (Definition of Restricted Building Work) Order 2011 (New Zealand) provides:

> *5 Certain building work relating to primary structure or external moisture-management systems of residential buildings to be restricted building work*
>
> *(1) The kinds of building work to which this clause applies are restricted building work for the purposes of the Act.*
>
> *(2) This clause applies to building work that is—*
>
> *(a) the construction or alteration of—*
>
> *(i) the primary structure of a house or a small-to-medium apartment building; or*
>
> *(ii) the external moisture-management system of a house or a small-to-medium apartment building; and*
>
> *(b) of a kind described in subclause (3); and*
>
> *(c) of a kind for which a licensing class to carry out or supervise the work has been designated by Order in Council under section 285 of the Act.*
>
> *(3) The kinds of building work referred to in subclause (2)(b) are—*
>
> *(a) bricklaying or blocklaying work:*
>
> *(b) carpentry work:*
>
> *(c) external plastering work:*
>
> *(d) foundations work:*
>
> *(e) roofing work.*

[31] The Respondent is a licensed building practitioner with a Carpentry Licence.

[32] The licensing classes designated under section 285 were created by Order in Council in the Building (Designation of Building Work Licensing Classes) Order 2010. It designates the types of building work that a licensed building practitioner can carry out or supervise. Under clause 4 of the Order Design the following are the types of building work each class of licence can carry out:

Licensing class	***Type of building work***

Trade licensing classes	
Carpentry	*Carpentry for any building that is—* *(a) a category 1 building; or* *(b) a category 2 building; or* *(c) a category 3 building*
Bricklaying and blocklaying	*Laying or erection of bricks or blocks for any building that is—* *(a) a category 1 building; or* *(b) a category 2 building; or* *(c) a category 3 building*

[33] The creation of multiple classes of licence the distinctions between them make it clear that the types of building work under them, to a large extent, mutually exclusive. There are some minor exceptions which are recognised by way of the competencies in Schedule 1 of the Licensed Building Practitioners Rules 2007. For example a Licensed Building Practitioner with a Carpentry Licence can do lightweight metal roofing installation notwithstanding that there are multiple roofing licence areas of practice. The competencies do not, however, contain any references to brick or block laying other than in relation to liaising with other trades.

[34] On the basis of the above a licensed building practitioner with a Carpentry Licence cannot carry out or supervise restricted building work that relates to brick or block laying work.

[35] As regards evidence that the Respondent did carry out or supervise brick laying the Board had before it an original document that was signed by the Respondent in the presence of the Complainant which stated that the Respondent was a Licensed Building Practitioner with a Brick and Blocklaying Licence. That declaration by the Respondent in addition to the Complainant's evidence that the Respondent was carrying out bricklaying is sufficient to satisfy the elements of the charge.

<u>Contrary to a Building Consent</u>

[36] 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. It an offence under section 40 of the Act to carry out building work other than in accordance with a building consent when one is issued.

[37] There was evidence before the Board that the building work carried out and supervised by the Respondent had failed an inspection. There was also evidence that the work had to be remediated by other contractors and was not rectified by the Respondent. On this basis the Board finds that the disciplinary offence has been committed.

Penalty, Costs and Publication

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

[39] The matter was dealt with at a hearing that the Respondent did not attend. The Board has decided to make the appropriate orders and to give the Respondent an opportunity to provide further evidence or submissions relevant penalty, costs and publication.

Penalty

[40] 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*[8] 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.*

[41] Deterrence was also noted in *Hart* and in *Dorbu v New Zealand Law Society (No 2)*[9]. The High Court when discussing penalty stated:

> *[35] The principles to be applied were not in issue before us, so we can briefly state some settled propositions. The question posed by the legislation is whether, by reason of his or her conduct, the person accused is not a fit and proper person to be a practitioner. Professional misconduct having been established, the overall question is whether the practitioner's conduct, viewed overall, warranted striking off. The Tribunal must consider both the risk of reoffending and the need to maintain the reputation and standards of the legal profession. It must also consider whether a lesser penalty will suffice. The Court recognises that the Tribunal is normally best placed to assess the seriousness of the practitioner's offending. Wilful and calculated dishonesty normally justifies striking off. So too does a practitioner's decision to knowingly swear a false affidavit. Finally, personal mitigating factors may play a less significant role than they do in sentencing.*

[42] Cancellation of a license is the equivalent of striking off within the licensed building practitioner regime.

[8] HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27
[9] [2012] NZAR 481

[43] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*[10] 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.

[44] The Respondent has committed three disciplinary offences. The Board, does however, note the commonality in the disciplinary offending in the negligence/incompetence finding and the finding as regards building contrary to a consent. As such it will treat those as a single offence.

[45] The most serious matter before the board though is the disciplinary offence under section 317(1)(c) of the Act that he carried out and supervised restricted building work of a type that he is not licensed to carry out or supervise. The licensing regime exists to ensure the public can have confidence in those who carry out restricted building work. Restricted building work in turn is that building work which is integral to the safe and healthy functioning of a home and the licensing regime was established so as to ensure persons with the requisite competencies, as set out in the Licensed Building Practitioners Rules 2007, carry out or supervise that work. The Respondent, by stating that he was licensed in Brick and Blocklaying and in undertaking and supervising bricklaying, has defeated the purposes of the regime.

[46] The Respondent's offending has been aggravated by his falsely claiming to be licensed. Moreover he knowingly made those claims having been twice denied a licence to carry out brick and blocklaying. Such conduct cannot be condoned.

[47] The Respondent's approach to the matters under inquiry is also an aggravating feature as the manner in which a licensed person responds to a disciplinary complaint and conducts their defence can be taken into consideration by the Board. In *Daniels v Complaints Committee*[11] the High Court held that it was permissible to take into account as an adverse factor when determining penalty that the practitioner had responded to the complaints and discipline process in a belligerent way.

[48] The Respondent has failed to understand that as a Licensed Building Practitioner he is responsible for his work as well as the work of those under his supervision. He has shown little if any understanding of the licensing regime under which he carried out restricted building work. He has also tried to avoid responsibility by stating that the company for which he works should deal with the complaint. It is not the company that is licensed and the Board doubts that the Respondent is merely an employee of the company. In all the Respondent has not taken any responsibility for his conduct.

[10] 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288
[11] [2011] 3 NZLR 850.

[49] Taking all of the above factors into account the Board considers that a cancellation of the Respondent's licence is not only warranted to punish the Respondent but also required to deter others from such conduct.

[50] Accordingly the Board will cancel the Respondent's licence and order that he may not apply to be relicensed for a period of six (6) months.

Costs

[51] 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."

[52] 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 case[12].

[53] 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.*

[54] The Board notes that additional costs have been incurred as a result of the Respondent seeking adjournments. It also notes that a hearing was required and that the Respondent has not cooperated with the Board's investigation.

[55] Based on the above the Board's costs order is that the Respondent is pay the sum of $2,500 toward the costs of and incidental to the Board's inquiry.

Publication

[56] 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[14]. 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.*

[57] 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.

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[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

[14] Refer sections 298, 299 and 301 of the Act

[58] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990[15]. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction[16]. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive[17]. 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].

[59] 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 interest[19]. 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.

[60] Based on the above the Board will order further publication. The Board considers publication of the Respondent's name is necessary to give effect to its order and to ensure the deterrence element of the penalty. Such publication will be made in the Code Words publication and on the Board's website and by way of such other means as is considered necessary to effectively inform the public.

Section 318 Order

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

Penalty:	**Pursuant to section 318(1)(a)(i) of the Building Act 2004, the Respondent's licence is cancelled and pursuant to s 318(1)(a)(ii) the Respondent may not apply to be relicensed before the expiry of 6 months from the date of this order.**
Costs:	**Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of $2,500 (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 be action taken to publicly notify the Board's action.**

[62] 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.

[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

Submissions on Penalty, Costs and Publication

[63] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **7 February 2018**. 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.

Right of Appeal

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

Signed and dated this 15th day of January 2018



Richard Merrifield
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 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.