

## Before the Building Practitioners Board

|                                 |                                |
|---------------------------------|--------------------------------|
|                                 | BPB Complaint No. C2-01768     |
| Licensed Building Practitioner: | Guangyou Feng (the Respondent) |
| Licence Number:                 | BP 113617                      |
| Licence(s) Held:                | Design AOP 2                   |

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

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|----------------------------|---------------|
| Complaint or Board Inquiry | Board Inquiry |
| Hearing Location           | Auckland      |
| Hearing Type:              | In Person     |
| Hearing Date:              | 26 June 2018  |
| Decision Date:             | 4 July 2018   |

#### Board Members Present:

Chris Preston (Presiding)  
Mel Orange, Legal Member  
Bob Monteith, LBP Carpentry and Site AOP 2  
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 sections 317(1)(a) and 317(1)(i) of the Act.

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## Introduction

[1] The hearing resulted from a Board Inquiry into the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations<sup>1</sup> to hold a hearing in relation to building work at multiple addresses. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:

- (a) been convicted, whether before or after he or she is licensed, by any court in New Zealand or elsewhere of any offence punishable by imprisonment for a term of 6 months or more and the commission of the offence reflects adversely on the person's fitness to carry out or supervise building work or building inspection work; and
- (b) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) 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 the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*<sup>2</sup> and in New Zealand in *Dentice v Valuers Registration Board*<sup>3</sup>.

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

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

- [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*<sup>4</sup> 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 committed<sup>5</sup>. Under section 322 of the Act the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.
- [6] In addition to the documentary evidence before the Board heard evidence at the hearing from the Respondent.
- [7] The Board Inquiry came about as a result of the Board becoming aware that the Respondent had been sentenced in the District Court for fraud having pleaded guilty to:
- (a) two counts of forgery under section 256(2) of the Crimes Act 1961 with a maximum penalty of three years imprisonment;
  - (b) one count of forgery- section 256(1) of the Crimes Act 1961 with a maximum penalty of ten years imprisonment; and
  - (c) two counts of using forged documents - section 257(1)(a) of the Crimes Act 1961 with a maximum penalty of ten years imprisonment.
- [8] The offending took place over a period of nearly three years. The Charging Documents noted offending between October 2012 and June 2015.
- [9] The Board obtained the sentencing notes of Judge Collins in the District Court at Auckland<sup>6</sup>. The Judge noted:

*[2] I will summarise the offending briefly. You were an architectural draughtsman. You obtained or got possession of what is known as a producer statement prepared by an engineer and you have come across that legitimately for work done on a consent application for a client. You then used*

<sup>3</sup> [1992] 1 NZLR 720 at p 724

<sup>4</sup> [2016] HZHC 2276 at para 164

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

<sup>6</sup> *New Zealand Police v Guang You Feng* [2017] NZDC 14385

*that document and altered it to produce a copy, if you like, but altered it as though it was genuine. So in applying for consents to the Auckland Council planning department you represented that the altered documents were legitimate and then in subsequent offending you represented to a client that certain parts of the consenting process had already been approved. In relation to that matter you have suffered quite a significant amount of financial harm yourself.*

*[3] So your criminality rests in representing to those who are responsible for ensuring that buildings are safe in the city that certain things had been done by an engineer on projects you were working on that had not been done by an engineer. That has to be serious offending.*

[10] The Court also noted:

*... the offending is mitigated by the fact that in my view it came about not by you trying to cheat anybody or to make money but became about because of the situation that you had got yourself in with clients, you were under pressure, and as with a number of professional people over the years that have fallen from grace, Mr Feng, you made very poor errors of judgement in trying to satisfy your clients and keep them happy.*

*I am also satisfied that you are genuinely remorseful and that is evidenced by the efforts that you have made to make amends. This offending has already cost you dearly financially and I have also got no doubt cost you dearly in terms of professional reputation.*

*I am quite satisfied that you will never come back before the Courts again. You have got a job to rebuild your life, rebuild your business, rebuild your professional reputation but I suspect Mr Feng you are capable of overcoming those hurdles.*

[11] The Court's sentencing order was:

*[6] So for today on all these five charges you are convicted and sentenced to community detention for four months. The curfew will start today regardless of whether the Probation Service and the monitoring company are able to put the equipment in place, that is the bracelet that you will need to wear. The sentence still starts today.*

*[7] In addition on all five charges as well you are convicted and sentenced to 150 hours' community work.*

[12] The Respondent did not respond to the Inquiry when it was served on him. Once the matter was set down for a hearing he sent the Board submissions. With them he provided a copy of his submissions to the Court for sentencing, outlined the events that led to the criminal offending and stated:

*I am regret for the thing I have done and learn from it and serve my time and community works. I have changed and would never want to go back the same routes.*

- [13] At the hearing the Respondent reiterated that he was not motivated by greed and he outlined the impact the offending has had on him. He stated he has learnt that he need to be more aware of time management.

### **Board's Conclusion and Reasoning**

- [14] The Board has decided that the Respondent **has**:

- (a) been convicted, whether before or after he or she is licensed, by any court in New Zealand or elsewhere of any offence punishable by imprisonment for a term of 6 months or more and the commission of the offence reflects adversely on the person's fitness to carry out or supervise building work or building inspection work; and
  - (b) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act)
- and should be disciplined.

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

### Criminal Offending

- [16] The disciplinary provision in s 317(1)(a) of the Act requires two matters to be satisfied. The first is whether the Respondent "*a licensed building practitioner has been convicted, whether before or after he or she is licensed, by any court in New Zealand or elsewhere of any offence punishable by imprisonment for a term of 6 months or more*".
- [17] As noted above the criminal offending exceeded the threshold. The first element of the disciplinary provision is therefore satisfied.
- [18] The second element of the disciplinary charge is "*Does the commission of that offence(s) reflect adversely on the person's fitness to carry out or supervise building work or building inspection work*".
- [19] This element requires consideration by the Board of the interrelationship between the convictions and the Respondent's fitness to be a licensed person. The criminal offending that took place arose out of the Respondent's design practice. Therefore it was directly related to his fitness to carry out or supervise building work.
- [20] It is to be noted that the courts have noted that fitness and competence are not the same. In *Professional Conduct Committee v Martin*<sup>7</sup> the court stated:

*"Fitness' often may well be something different to competence. Aspects of general deterrence as well as specific deterrence remain relevant. So too, is*

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<sup>7</sup> High Court WN 2007

*the broader consideration of the public or community's confidence and the upholding the standards of the nursing profession*

- [21] In *Hart v Auckland Standards Committee 1 of The New Zealand Law Society*<sup>8</sup> the High Court stated, as regards a similar provision that there are various matters that need to be taken into account:

*[185] As the Court noted in Dorbu, the ultimate issue in this context is whether the practitioner is not a fit and proper person to practise as a lawyer. Determination of that issue will always be a matter of assessment having regard to several factors.*

*[186] The nature and gravity of those charges that have been found proved will generally be important. They are likely to inform the decision to a significant degree because they may point to the fitness of the practitioner to remain in practice. In some cases these factors are determinative, because they will demonstrate conclusively that the practitioner is unfit to continue to practice as a lawyer. Charges involving proven or admitted dishonesty will generally fall within this category.*

*[187] In cases involving lesser forms of misconduct, the manner in which the practitioner has responded to the charges may also be a significant factor. Willingness to participate fully in the investigative process, and to acknowledge error or wrongdoing where it has been established, may demonstrate insight by the practitioner into the causes and effects of the wrongdoing. This, coupled with acceptance of responsibility for the misconduct, may indicate that a lesser penalty than striking off is sufficient to protect the public in the future.*

*[188] For the same reason, the practitioner's previous disciplinary history may also assume considerable importance. In some cases, the fact that a practitioner has not been guilty of wrongdoing in the past may suggest that the conduct giving rise to the present charges is unlikely to be repeated in the future. This, too, may indicate that a lesser penalty will be sufficient to protect the public.*

*[189] On the other hand, earlier misconduct of a similar type may demonstrate that the practitioner lacks insight into the causes and effects of such behaviour, suggesting an inability to correct it. This may indicate that striking off is the only effective means of ensuring protection of the public in the future.*

- [22] Applying the tests and factors outlined above the Board notes:
- (a) Nature of the charges:

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<sup>8</sup> [2013] 3 NZLR 103

The criminal offending related to fraud and was directly related to the Respondent's design practice and ultimately his licence and as such there is a correlation between the nature of the charges and fitness to be licensed.

(b) Gravity of the charges:

The Court noted, in sentencing, that it was serious offending. It has been compounded by the period over which it occurred.

The Board also notes that producer statements are important documents within the context of building. The offending related to PS1 documents which are relied on by persons to provide assurance that designs meet the requirements of the Building Code. They come with undertakings from the engineer who provides them and normally with a statement as to professional indemnity insurance cover. By forging such documents the Respondent is denying the recipients of those assurances and that potential cover.

(c) Acceptance of responsibility:

The Respondent has accepted responsibility. At the same time the offending did continue for an extensive period of time. It showed an ignorance of the importance of the producer statement system.

(d) Previous history:

The Respondent does not have a history with the Board or the Courts.

(e) The effect on public confidence:

The Board considers the direct connection between the criminal offending and the Respondent's design practice will have an inevitable effect on public confidence in the licensing regime.

[23] Given the above factors the Board finds that the second element of 317(1)(a) has been established in that the convictions reflect adversely on the Respondent's fitness to carry out or supervise building work or building inspection work.

### Disrepute

[24] The disrepute disciplinary provision in the Act is similar to legislation in other occupations including medical professionals, teachers, lawyers and conveyancers, chartered accountants, financial advisors, veterinarians and real estate agents. The Board considered the disrepute provisions in Board Decision C2-01111<sup>9</sup> and discussed the legal principles that apply.

[25] The Board, in C2-01111 considered whether the conduct complained of needs to be conduct carried out in the capacity of a licensed building practitioner. The Board notes that in the professions listed above there is no requirement for the conduct to have been in the course of carrying out that person's trade or profession. For

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<sup>9</sup> Board decision dated 2 July 2015.

example in the High Court held in *Davidson v Auckland Standards Committee No 3*<sup>10</sup> a company director, who, in the course of his duties as a director was charged with offences under the Securities Act 1978, had brought the legal profession into disrepute. He held a lawyer's practising certificate at the time, however, he was not providing legal services. It was submitted in the case that when the acts are outside of the legal practice, only acts which exhibit a quality incompatible with the duties of the legal profession, for example dishonesty or lack of integrity, could bring the legal profession into disrepute. This was rejected by the Court.

- [26] Similarly in a determination of the Disciplinary Tribunal of the New Zealand Institute of Chartered Accountants<sup>11</sup>, convictions for indecent assault and being found without reasonable cause in a building was found to bring the profession into disrepute as it was inconsistent with the required judgment, character and integrity.
- [27] Turning to the conduct which brings or is likely to bring the regime into disrepute the Act does not provide guidance as to what is "disrepute". The Oxford Dictionary defines disrepute as "the state of being held in low esteem by the public"<sup>12</sup> and the courts have consistency applied an objective test when considering such conduct. In *W v Auckland Standards Committee 3 of the New Zealand Law Society*<sup>13</sup> the Court of Appeal held that:

*the issue of whether conduct was of such a degree that it tended to bring the profession into disrepute must be determined objectively, taking into account the context in which the relevant conduct occurred. The subjective views of the practitioner, or other parties involved, were irrelevant.*<sup>14</sup>

- [28] As to what conduct will or will not be considered to bring the regime into disrepute it will be for the Board to determine on the facts of each case. The Board will, however, be guided by finding in other occupational regimes. In this respect it is noted disrepute was upheld in circumstances involving:
- criminal convictions<sup>15</sup>;
  - honest mistakes without deliberate wrongdoing<sup>16</sup>;
  - provision of false undertakings<sup>17</sup>; and
  - conduct resulting in an unethical financial gain<sup>18</sup>.
- [29] It is also noted that there are a number of cases where the conduct related to specific or important tasks a licensed building practitioner is required to complete

<sup>10</sup> [2013] NZAR 1519

<sup>11</sup> 24 September 2014

<sup>12</sup> Online edition, compilation of latest editions of *Oxford Dictionary of English, New Oxford American Dictionary, Oxford Thesaurus of English and Oxford American Writer's Thesaurus*, search settings UK English, accessed 12/05/15

<sup>13</sup> [2012] NZCA 401

<sup>14</sup> [2012] NZAR 1071 page 1072

<sup>15</sup> *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519

<sup>16</sup> *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

<sup>17</sup> *Slack, Re* [2012] NZLCDT 40

<sup>18</sup> *Colliev Nursing Council of New Zealand* [2000] NZAR 7



within their occupations. Often such behaviour is measured within the context of a code of conduct or ethics. A code is yet to be established within the Building Act although provision for one is made. What is clear from the cases though is that unethical or unprofessional conduct can amount to disreputable conduct.

[30] The Respondent has been found to have committed criminal offences. Those offences directly relate to his work as a designer. The tests for disrepute have been satisfied.

[31] The Courts have stated that the threshold for disciplinary complaints of disrepute is high and the Board notes that when the disciplinary provision was introduced to Parliament the accompanying Cabinet paper noted:

*This power would only be exercised in the most serious of cases of poor behaviour, such as repetitive or fraudulent behaviour, rather than for minor matters.*

[32] As noted previously the offending was serious and the Board finds that it exceeds the threshold for a disciplinary outcome. As such the Respondent is found to have brought the regime into disrepute.

[33] The Board acknowledges that there is an element of duplication between the two disciplinary charges that the Respondent has been found to have committed. This will be taken into consideration when looking at penalty when the conduct will be viewed as a single instance.

### **Penalty, Costs and Publication**

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

[35] The Respondent made submissions at the hearing as regards penalty, costs and publication.

### **Penalty**

[36] 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*<sup>19</sup> 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*

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<sup>19</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

*punishment and deterrence must also be taken into account in selecting the appropriate penalty to be imposed.*

- [37] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*<sup>20</sup> 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.
- [38] The matters were very serious. In similar cases of false producer statements before the Board it has ordered periods of between 6 and 18 months cancellation. The previous cases involved single instances of fabrication. In those cases the licensed building practitioner had not been convicted in a court. The Board sets a starting point of cancellation for a period of two years.
- [39] The Board has to take into account that the Respondent has been sentenced in the District Court, his contrition and the steps he has taken to right his wrongs with the effected clients. Taking those factors into account the Board decided to reduce the period of cancellation to 3 months.

#### Costs

- [40] 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.”
- [41] 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<sup>21</sup>.
- [42] In *Collie v Nursing Council of New Zealand*<sup>22</sup> 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.*
- [43] Based on the above the Board’s costs order is that the Respondent is to pay the sum of \$1,000 toward the costs of and incidental to the Board’s inquiry.

#### Publication

- [44] 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

<sup>20</sup> 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

<sup>21</sup> *Cooray v The Preliminary Proceedings Committee* HC, Wellington, AP23/94, 14 September 1995, *Macdonald v Professional Conduct Committee*, HC, Auckland, CIV 2009-404-1516, 10 July 2009, *Owen v Wynyard* HC, Auckland, CIV-2009-404-005245, 25 February 2010.

<sup>22</sup> [2001] NZAR 74

Building Practitioners' scheme as is required by the Act<sup>23</sup>. 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.*

- [45] 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.
- [46] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990<sup>24</sup>. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction<sup>25</sup>. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive<sup>26</sup>. 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*<sup>27</sup>.
- [47] 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<sup>28</sup>. 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.
- [48] The Board notes that the criminal convictions have already been published in the press.
- [49] Based on the above the Board will order further publication. It is important that other licensed building practitioners learn from the offending and in particular of the consequences of cutting corners and of falsifying documents.

### Section 318 Order

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

**Penalty:** Pursuant to s 318(1)(a)(i) of the Act, the Respondent's licence is cancelled and the Registrar is directed to remove the Respondent's name from the register of Licensed Building Practitioners and pursuant to s 318(1)(a)(ii) of the Act the Board orders that the Respondent may not apply to be relicensed before the expiry of three [3] months.

<sup>23</sup> Refer sections 298, 299 and 301 of the Act

<sup>24</sup> Section 14 of the Act

<sup>25</sup> Refer sections 200 and 202 of the Criminal Procedure Act

<sup>26</sup> *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

<sup>27</sup> *ibid*

<sup>28</sup> *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

**Costs:** Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$1,000 (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.

- [51] 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

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

Signed and dated this 4<sup>th</sup> day of July 2018



**Chris Preston**  
Presiding Member

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#### <sup>i</sup> 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).

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- (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.*