Before the Building Practitioners Board

	BPB Complaint No. C2-01769
Licensed Building Practitioner:	Carolus Evers (the Respondent)
Licence Number:	BP 109298
Licence(s) Held:	Carpentry and Site AOP 1

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

Complaint or Board Inquiry	Complaint
Hearing Location	Christchurch
Hearing Type:	In Person
Hearing Date:	11 April 2018
Substantive Decision Date:	8 May 2018
Penalty Decision Date:	8 June 2018

Board Members Present:

Chris Preston (Presiding)
Mel Orange, Legal Member
David Fabish, LBP, Carpentry Site AOP 2

Appearances:

Nichola Donovan for the Respondent

Procedure:

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

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Introduction

[1] This penalty decision arises out of the Board's substantive decision in which it found that the Respondent had committed the following disciplinary offence(s):

(a) has been convicted, whether before or after he or she is licensed, by any court carried out or supervised building work or building inspection work in a negligent and 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);

(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);

[2] 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.

[3] In its substantive decision the Board set out is indicative position as regards penalty, costs and publication and invited the Respondent to make written submissions on those matters.

[4] On 29 May 2018, the Board received the Respondent's submissions. It has considered them and made the following decisions.

Penalty

[5] The Board's initial view was that the Respondent should undertake and complete courses of specified training.

[6] In the submissions the Respondent accepted the penalty and undertook to complete the training within three months of this penalty decision.

[7] The penalty order is confirmed.

Costs

[8] The Board's initial view was that $2,000 in costs was appropriate.

[9] The Respondent's submissions imply that the costs order is punitive. It is not. The amount set is considerably less than 50% of actual costs.

[10] The Respondent has also submitted that mitigating factors relating to the complaint and to the penalty should be taken into account in setting the costs. The Board does not agree. Those factors have been taken into account in setting the penalty. Costs are imposed so that the full cost of the proceedings are not borne by the profession. They are not to be confused with penalty.

[11] The Respondent has also submitted that he does not have the means to pay the costs. Arrangements can be made with the Registrar to enter into a satisfactory payment arrangement.

Publication of Name

[12] The Board's initial view was there were no good reasons to further publish the matter. This remains the case.

[13] The Respondent has further submitted that he should not be named in the Register. The Board does not have a discretion to not name or to modify the period of naming.

[14] The Register is established by section 298 of the Act. Section 299 sets out its purposes which are:

> *The purpose of the register is—*
> *(a) to enable members of the public to—*
> *(i) determine whether a person is a licensed building practitioner and, if so, the status and relevant history of the person's [licensing]; and*
> *(ii) choose a suitable building practitioner from a list of licensed building practitioners; and*
> *(iii) know how to contact the building practitioner; and*
> *(iv) know which licensed building practitioners have been disciplined within the last 3 years; and*
> *(b) to facilitate the administrative, disciplinary, and other functions of the Board and the Registrar under this Act.*

[15] Section 301 sets out the matters to be contained in the Register. The section uses the phrasing "must" which makes the provisions mandatory, not discretionary:

> *(1) The register must contain all of the following information, to the extent that the information is relevant, for each licensed building practitioner whose name is entered in the register:*
> *(l) information about the status and history of the person's [licensing], particularly—*
> *(i) the class [in which the person is licensed]; and*
> *(ii) the date on which the person's name was entered in the register; and*

(iii) any action taken under section 318 on a disciplinary matter in respect of the person in the last 3 years:

[16] The final provision, action taken under section 318, is the reason why detail on the disciplinary offence must be contained in the Register.

[17] Taking the above provisions into consideration it is clear that one of the purposes of the Register is to allow informed consumer and providing information as regards disciplinary action helps to facilitate this. It is also clear that the Board has no discretion as regards information on disciplinary action being retained on the Register.

[18] It is also to be noted that the Act does not contain provisions that allow the Board to supress details of a case. The Board does consider that it has an inherent discretion to supress. Such power, however, is only to be exercised in cases where protection of the identity of persons is imperative. This is not one of the cases. The tests for suppression to be granted are high and they have not been met.

Section 318 Order

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

Penalty: **Pursuant to section 318(1)(e) of the Building Act 2004, the Respondent is ordered to undertake and complete, to the satisfaction of the Registrar, the following specified training within three months of this order:**

(a) BRANZ E-Learning Module – Introduction to the LBP Scheme;

(b) BRANZ E-Learning Module – The Building Consent Process; and

(c) BRANZ E-Learning Module – Restricted Building Work.

If the Respondent fails to successfully complete the training specified in this order then pursuant to s 318(1)(b) of the Act, the Respondent's licence will be suspended until the earlier of the Respondent competing the training to the satisfaction of the Registrar or the expiry of a period of 12 months and the Registrar will be directed to record the suspension in the register of Licensed Building Practitioners

Costs: **Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of $2,000 (GST included) towards the costs of, and incidental to, the inquiry of the Board.**

Publication: **The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with section 301(1)(iii) of the Act.**

In terms of section 318(5) of the Act, there will 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.

[20] 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

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

Signed and dated this 8th day of June 2018



Chris Preston
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.