

Before the Building Practitioners Board

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| | BPB Complaint No. C2-01869 |
| Licensed Building Practitioner: | Seath Farrell (the Respondent) |
| Licence Number: | BP 118316 |
| 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

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| Complaint or Board Inquiry | Complaint |
| Hearing Location | Auckland |
| Hearing Type: | In Person or On the Papers |
| Hearing Date: | 17 October 2018 |
| Decision Date: | 12 November 2018 |

Board Members Present:

Chris Preston (Presiding)
Richard Merrifield, LBP, Carpentry Site AOP 2
David Fabish, LBP, Carpentry Site AOP 2
Robin Dunlop, Retired Professional Engineer

Appearances:

Rajiv Rao, Legal Counsel 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.

Board Decision:

The Respondent **has** committed a disciplinary offence under section 317(1)(b), 317 (1)(d), 317 (1) (da)(ii) and a breach of section 314(B) of the Act (section 317(1) (h) of the Act).

Contents

| | |
|--|----|
| Introduction | 2 |
| Function of Disciplinary Action | 3 |
| Evidence | 3 |
| Board’s Conclusion and Reasoning | 5 |
| Negligence and/or Incompetence | 5 |
| Contrary to a Building Consent..... | 7 |
| Record of Work..... | 8 |
| Misrepresentation or Outside of Competence..... | 9 |
| Penalty, Costs and Publication | 10 |
| Penalty | 10 |
| Costs..... | 10 |
| Publication | 11 |
| Section 318 Order | 12 |
| Submissions on Penalty, Costs and Publication | 12 |
| Right of Appeal | 13 |

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);
- (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); and
- (d) breached section 314B(b) of the Act (s 317(1)(h) of the Act).

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

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*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:

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| Seath Farrell | Respondent |
| [Omitted] | Complainant |
| [Omitted] | Complainant |
| [Omitted] | Witness, remedial builder |

[8] There were five main issues for consideration by the Board:

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

- (a) the removal of a brick wall that the consented plans that this should not be removed;
- (b) the battening of the inside of the garage space;
- (c) construction of an external wall cladding;
- (d) a failure to provide a record of work; and
- (e) carrying out plumbing work.

[9] The Complaint set out in December 2017 the Complainant engaged the Respondent to undertake alteration work at [Omitted] under a building consent. The Complaint was supported by photographs of the work complained about. The issues the Complainant raised were:

Cavity Batons – cavity batons were nailed over the existing internal gib wall as opposed to constructing a new wall on which to install the batons.

External Wall – the external wall of the new bathroom was constructed incorrectly. This needed to be flush with the current wall so it would be watertight. If not flush then it would needed to be flashed”.

Internal Wall – the internal wall between the new bathroom and new laundry was constructed incorrectly. The drawings did not require removal of the existing wall. The new wall constructed was not in the correct position and had to be rebuilt and the plumbing redone.

- [10] The Complainant also alleged the Respondent had carried out plumbing work when not authorised to do so in that he set out the plumbing pipe work for fit off by a plumber. Errors were made which had to be remediated.
- [11] In addition to the written evidence the Respondent provided the Board with reasons why he undertook the work in the way that he did.
- [12] In the case of the removal of the brick wall he claimed that he did this to create more space and that he had discussed this with the Complainants. No discussion was had with the designer and no formal documentation was provided for the change.
- [13] The Complainants gave evidence that they did not have a discussion about the removal of the brick wall and that, in their view, the battening of the inside wall was to give effect to an inspection for pre-line which was arranged by the Respondent.
- [14] The Respondent stated the battening of the internal garage wall was done as a temporary measure to “keep the battens dry”. He also stated the cladding of an external wall was temporary and appropriate flashings would have been put in place had he been able to complete the work.
- [15] The Respondent made a submission that he was not holding back the record of work for payment and that as his work had been replaced a record of work was not required

- [16] The Complainants gave evidence supported by an email that the Respondent was not going to provide a record of work unless he was paid.
- [17] [Omitted], the remedial builder, gave evidence that while, in general, he did not observe a lot of fault with the Respondent's work he did reconstruct the internal garage wall and had to add additional framing to compensate for the brick wall being removed.
- [18] The Respondent accepted he undertook plumbing work he was not licensed to do.

Board's Conclusion and Reasoning

- [19] 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 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);
 - (d) breached section 314B(b) of the Act (s 317(1)(h) of the Act);
- and should be disciplined.
- [20] The reasons for the Board's decision follow.

Negligence and/or Incompetence

- [21] Negligence and incompetence are not the same. In *Beattie v Far North Council*⁶ Judge McElrea noted:
- [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.*
- [22] 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*⁷ test of negligence which has been adopted by the New Zealand Courts⁸.
- [23] Incompetence is a lack of ability, skill or knowledge to carry out or supervise building work to an acceptable standard. *Beattie* put it as "*a demonstrated lack of the*

⁶ Judge McElrea, DC Whangarei, CIV-2011-088-313

⁷ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

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

reasonably expected ability or skill level". In *Ali v Kumar and Others*⁹ it was stated as *"an inability to do the job"*.

- [24] The New Zealand Courts have stated that assessment of negligence and/or incompetence in a disciplinary context is a two-stage test¹⁰. 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.
- [25] 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 Act¹¹. 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 practitioner¹².
- [26] 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.*

- [27] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹³ and be carried out in accordance with a building

⁹ *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

¹⁰ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

¹¹ *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

¹² *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

¹³ Section 17 of the Building Act 2004

consent¹⁴. 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.

- [28] Turning to seriousness in *Collie v Nursing Council of New Zealand*¹⁵ 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.

- [29] The Board was not convinced that the external cladding was a temporary measure and that the correct construction methodology would have been used had the Respondent been allowed to remain on the job.
- [30] The Board has previously noted that the correct sequencing of work is an important part of the construction process as is getting it right first time. It makes little practical sense to carry out temporary work when the consented work could have been carried out. In this case the Board saw no reason why the work could not have been done correctly in the first instance.
- [31] In the case of the battening of the internal wall of the garage the Board was at a loss as to why this was done. It is the Board's view that these were not nailed in a temporary way and can only speculate that they were in place to gain a pre-line inspection pass and that it was the intention of the Respondent to then construct a dry wall. This would have resulted in the internal wall being further inside the room than was set out on the plans.
- [32] Given the above factors 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 was sufficiently serious enough to warrant a disciplinary outcome.

Contrary to a Building Consent

- [33] Under section 40 of the Act all building work must be carried out in accordance with the building consent issued. This ensures that there is independent verification that the Building Code has been complied with and the building work will meet any required performance criteria. A failure to adhere to a building consent is also an offence under section 40.
- [34] In *Tan v Auckland Council*¹⁶ the High Court, whilst dealing with a situation where no building consent had been obtained, stated the importance of the consenting process as follows:

¹⁴ Section 40(1) of the Building Act 2004

¹⁵ [2001] NZAR 74

¹⁶ [2015] NZHC 3299 [18 December 2015]

[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.

- [35] The consented drawings clearly showed that the brick wall was to remain in place. The parties dispute that there had been a discussion and agreement to make more room by removing the wall.
- [36] There was no discussion with the designer nor any formal variation raised by the Respondent which in this instance the Board would expect.
- [37] The fact remains that the building work was not in accordance with the building consent and as such the Respondent has committed the disciplinary offence.

Record of Work

- [38] 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 work¹⁷.
- [39] 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.
- [40] The Board discussed issues with regard to records of work in its decision C2-01170¹⁸ 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.
- [41] 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.
- [42] 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 ...”.
- [43] 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 Respondent’s involvement came to an end and he would not be completing any further restricted building work. His work was therefore complete

¹⁷ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

¹⁸ *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

and a record of work for it was due. One has not been provided. 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.

- [44] 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.
- [45] In this instance there was an ongoing payment dispute. The Board has repeatedly stated that a Record of Work is a statutory requirement, not a negotiable term of a contract. The requirement for it is not affected by the terms of a contract, nor by contractual disputes. Licensed building practitioners should now be aware of their obligations to provide them and their provision should be a matter of routine.
- [46] Counsel for the Respondent submitted that the respondent relied on an e mail from the complaints which stated “*We have had to redo a significant amount of the work, work which we already paid you for*” and “*...all of your work in the new area has had to be revised*”.
- [47] The Board view in this case is that the Respondent did not know that all the work he had done had been replaced and that there was a clear statement from the Respondent that “*... You will need a record of work to complete code of compliance. Am happy to sign off once payment has been made in full*”. Moreover not all of the restricted building work completed was removed. As such the Board finds that there was no good reason for not providing the record of work.

Misrepresentation or Outside of Competence

- [48] As regards working outside of one’s competence 314B(b) of the Act provides:

A licensed building practitioner must—

(b) carry out or supervise building work only within his or her competence.

- [49] In the context of the Act and the disciplinary charge under s 317(1)(h) and 314B(b) a licensed building practitioner must only work within their individual competence.
- [50] The Respondent carried out plumbing work. Under the Plumbers Gasfitters Drainlayers Act 2006 the carrying out of plumbing work requires registration and a licence.
- [51] The Respondent accepted at the hearing he had undertaken plumbing work for which he does not have a licence. As such he has worked outside of his competence.

Penalty, Costs and Publication

- [52] 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.
- [53] 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

- [54] 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*¹⁹ 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.

- [55] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*²⁰ 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.
- [56] The Respondent has committed multiple offences and the matters before the Board were serious. There was little before the Board in the way of mitigation.
- [57] Based on the above the Board's penalty decision is a fine of \$3,500.

Costs

- [58] 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."
- [59] 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

¹⁹ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

that the percentage can then be adjusted up or down having regard to the particular circumstances of each case²¹.

- [60] In *Collie v Nursing Council of New Zealand*²² 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.

- [61] 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.

Publication

- [62] 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 Act²³. 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.

- [63] 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.
- [64] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990²⁴. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²⁵. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²⁶. 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*²⁷.
- [65] 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 interest²⁸. It is,

²¹ *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.

²² [2001] NZAR 74

²³ Refer sections 298, 299 and 301 of the Act

²⁴ Section 14 of the Act

²⁵ Refer sections 200 and 202 of the Criminal Procedure Act

²⁶ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

²⁷ *ibid*

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

however, common practice in disciplinary proceedings to protect the names of other persons involved as naming them does not assist the public interest.

[66] Based on the above the Board will not order further publication.

Section 318 Order

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

Penalty: Pursuant to section 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of \$3,500.

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.

[68] 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

[69] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **4 December 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.

[70] 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

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

Signed and dated this 12th day of November 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.*