

BPB Complaint No. C2-01168

IN THE MATTER OF

Under the Building Act 2004 (the Act)

A complaint to the Building Practitioners'
Board under section 315 of the Act

AGAINST

Angus Beattie, Licensed Building Practitioner
No. BP 107322

**FINAL DECISION OF THE BUILDING PRACTITIONERS' BOARD IN RESPECT OF
PENALTY, COSTS AND PUBLICATION OF NAME**

Introduction

- [1] This decision arises out of a decision by the Building Practitioners' Board ("the Board") where the Board found that the Respondent had:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act);
 - (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act); and
 - (c) has 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] The Respondent is a Licensed Building Practitioner with a Carpentry Licence issued 17 June 2011.
- [3] The Board considered the complaint under the provisions of Part 4 of the Act, the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Regulations) and the Board's Complaints Procedures.
- [4] The Board heard the complaint on 28 September 2016 in Christchurch. The Board Members present for the hearing were:
- | | |
|--------------------|--------------------------|
| Richard Merrifield | Deputy Chair (Presiding) |
| Mel Orange | Board Member |
| Bob Monteith | Board Member |
- [5] The Board's substantive decision was issued on 19 October 2016. In it the Board outlined the principles on which its decisions on penalty, costs and publication are based and gave its preliminary views in respect of the appropriate penalty. The Board invited the Respondent to make written submissions prior to confirming its position.

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- [6] On 8 November 2016 the Board received the Respondent's submissions. It has considered those and made the following final decision.

Penalty

- [7] The Board's initial view was that a two year cancellation of the Respondent's licence was warranted under s 318(1)(a) of the Act.
- [8] The Respondent provided detailed submissions. The Board notes a significant shift in the Respondent's acceptance of his actions and an acknowledgement of the seriousness of the matters that were before the Board. The Respondent has also outlined his current employment and financial situation and has submitted that a cancellation of his licence will lead to the loss of his employment as a licence is required for it. The Respondent stated:
7. *In my role, I am required to hold a current LBP license or at the minimum the foundation segment of the license. I am advised by my employer if I do not hold this aspect of my licence my employment with Placemakers is likely to end. This will place significant pressure on my family as I am the sole income earner. I attach a letter from my employer confirming the requirements for my job.*
 8. *In my role, my work is always inspected and approved by engineers. This provides a safeguard for customers and ensures there are multiple levels of protection. This approach at Placemakers has helped me to see how important it is to provide as many levels of oversight as possible. I have never had any difficulties working with the engineers or product providers that are involved in my work. I attach letters in support from [omitted] and [omitted] who are happy to discuss their views with the Board.*
- [9] The Respondent has put forward an alternative penalty for the Board to consider. He has outlined the following:
29. *I ask that the decision to cancel my licence under s318(1)(a) be substituted with an order that my licence be restricted pursuant to s318(1)(c) of the Act. I ask for the following restrictions to be implemented for a period of no less than 2 years;*
 - i. *That my license be restricted to foundation building and inspection work*
 - ii. *That any work I complete must be signed off by an engineer*
 - iii. *That I must be employed by a Company of which neither myself or any immediate family member is a shareholder or director*
 30. *I further ask that in light of the reduction from a cancellation to a restriction the following penalties be added to achieve a realistic penalty for this level of wrongdoing:*
 - i. *That I be ordered to undergo any training that the Board sees fit in this situation pursuant to s318(1)(e) of the Act*
 - ii. *That I be ordered to pay a fine of \$5,000.00 or a figure that the Board believes is appropriate in this case pursuant to s318(1)(f) of the Act*

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- [10] The matters the Board was dealing with were serious in their nature and as such a commensurate penalty was appropriate. The Board, in its substantive decision noted:

[61] The Board notes that the level of negligence and incompetence was very high and the consequences of the failings most likely put the safety of persons at risk. The Respondent has not been willing to take responsibility and appeared to the Board to have a cavalier attitude toward compliance and a desire to hide behind legal structures.

[62] The Board considers the Respondent poses a very real risk to the public and that cancellation of his licence is the only option open to it to protect the public and to uphold the integrity of the licensing regime.

- [11] In *Lochhead v Ministry of Business Innovation and Employment*¹, an appeal from a decision of the Board, the court, in respect of penalty noted:

[34] This is not a case to which the statutory principles of sentencing set out in the Sentencing Act 2002 apply. Nevertheless, the current approach adopted in criminal courts to the task of assessment of penalties to be imposed has significant advantages of simplicity and transparency compared to other approaches. Conceptual similarities between penalty assessment in this area, and the task of penalty assessment in other areas of health and safety legislation, or indeed the Building Act itself, are obvious.

[35] The modern approach to penalty assessment involves a multi stage process. Firstly, an assessment of the seriousness of the transgression is undertaken, often by reference to whether the offending conduct falls at the lower, mid-range or upper end of the scale of possible offending. That assessment will assist in the identification of an appropriate starting point on a principled basis. Secondly, aggravating features which may justify an uplift are identified and assessed. Thirdly, any mitigating features which may justify a reduction in penalty are identified and assessed. Finally, an overall assessment is made, often including the effect of the proposed penalty on the person receiving it, and such adjustments made as may be required in the particular circumstances of the case. See for example Department of Labour v Hanham & Philp Contractors Ltd & Ors (HC ChCh, CRI 2008-409-000002, 17 December 2008, Randerson and Pankhurst JJ).

- [12] The Board considered the conduct fell within the upper end of the scale and, at the time of making its initial decision on penalty, saw little to mitigate its starting point of a lengthy period of cancellation.
- [13] Having now received the Respondent's submissions the Board considers a review of its initial position is warranted. The alternative approach to penalty suggested by the Respondent holds some merit, especially as the Respondent has now recognised his disciplinary offending and has shown a willingness to address it. Moreover the Board accepts the penalty, as initially stated, will have a disproportionate impact on the Respondent by way of a loss of his licence.
- [14] The Board notes that its powers as regards penalty are limited to those set out in s 318 of the Act. In this respect it does not have the ability to impose conditions on a

¹ 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288, Judge Ingram

person's licence². It can, however, restrict the type of building work to be undertaken under s 318(1)(c) of the Act. The Respondent can, of his own volition, undertake to abide by the other restrictions and his willingness to do so can be taken into consideration.

- [15] The Board notes the Respondent has also submitted that training and or a fine could also be imposed to reflect the seriousness of the offending. In this respect s 318(2) of the Act applies and prevents the Board from imposing an additional penalty if one under s 318(1)(c) is imposed. Section 318(2) states:

The Board may take only 1 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).

- [16] Given the above factors the Board has decided that it will, on the basis of the Respondents undertakings that he will continue in employment and will have his work overseen by a qualified engineer, impose a restriction under s 318(c) of the Act. The Respondent's licence will be restricted to the carrying out or the supervision of foundation work. The Restriction will be imposed for a period of no less than three years. The Board considers three years is appropriate given the significant reduction in the penalty imposed from that of cancellation and to recognise the seriousness of the Respondent's conduct.
- [17] At the end of the three year period the Respondent may apply to the Registrar to have the restriction lifted. The Registrar shall, if the Respondent so applies, treat the Respondent's application as if it were a fresh application for licensing for the Carpentry class except that his competence in foundations need not be proved.

Costs

- [18] The Board's initial view was that \$3,000 were appropriate.
- [19] The Respondent has not taken issue with the level of costs and as such the Board has decided to uphold its initial view.

Publication of Name

- [20] The Board's initial view was there were good reasons to further publish the matter. In its substantive decision it stated:
- [71] *The board considers further publication is necessary to give effect to the Board's orders and to ensure the industry as a whole learns from the matter. The Board will publish the matter in Code Words and on its website and in such other publications as it thinks is necessary. The Respondent will be named in the publication.*
- [21] The Respondent has submitted that publication beyond the Register will irreparably damage his reputation and may impact on his current employer.
- [22] Whilst suppression is not being sought similar principles apply.

² Compare this with the provisions of s 147M(1)(c) of the Electricity Act 1992 as regards disciplinary powers in respect of Electrical Workers where the Electrical Workers Registration Board may restrict a licence by, amongst other things, requiring that they work for an approved employer.

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- [23] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990³. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction⁴. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive⁵. In *N v Professional Conduct Committee of Medical Council*⁶ the High Court pointed to the following factors:

The tribunal must be satisfied that suppression is desirable having regard to the public and private interests and consideration can be given to factors such as:

- *issues around the identity of other persons such as family and employers;*
- *identity of persons involved and their privacy and the impact of publication on them; and*
- *the risk of unfairly impugning the name of other practitioners if the responsible person is not named.*

- [24] 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 interest⁷. 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.

- [25] The Board has taken the above factors into consideration and has decided to uphold its decision as regards publication although its normal policy of redacting the names of other persons involved, including that of the Respondent's employer will apply. The decision is also based on the seriousness of the matter and on the fact that the Respondent is now in employ as opposed to being self-employed so the impact will be less.

- [26] As per its substantive decision the Board will publish the matter in Code Words and on its website and in such other publications as it thinks is necessary. The Respondent will be named in the publication.

Board's Decision

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

Penalty: Pursuant to s 318(1)(c) of the Building Act 2004, the Respondent's licence will be restricted to the carrying out or supervision of building work in relation to foundations for a period of three years.

Costs: Pursuant to s 318(4) of the Act, the Respondent is ordered to pay costs of \$3,000 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

³ Section 14

⁴ Refer ss 200 and 202 of the Criminal Procedure Act

⁵ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

⁶ *ibid*

⁷ *Kewene v Professional Conduct Committee of the Dental Council* - [2013] NZAR 1055

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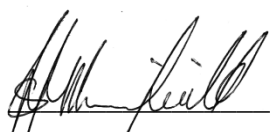
Publication: The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with s 301(1)(iii) of the Act.

In terms of section 318(5) of the Act, there will be action taken to publicly notify the Board's action, further to the note in the register and the Respondent being named in this decision.

Right of Appeal

[28] The Respondent has a right to appeal the Board decisions under s 330(2) of the Actⁱ.

Signed and dated this 23rd day of November 2016.



Richard Merrifield
Presiding Member

ⁱ 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.