

BPB Complaint No. C2-01259

IN THE MATTER OF

Under the Building Act 2004 (the Act)

A complaint to the Building Practitioners' Board under section 315

AGAINST

[The Respondent], Licensed Building Practitioner No. [omitted]

DECISION OF THE BUILDING PRACTITIONERS' BOARD

Introduction

- [1] [The Complainant] lodged a complaint with the Building Practitioners' Board (the Board) on 10 April 2015 in respect of [the Respondent], Licensed Building Practitioner.
- [2] The complaint alleged the Respondent has, in relation to building work at [omitted] failed, without good reason, to provide a record of work, on completion of the restricted building work as required by s 88(1) of the Act (s 317(1)(da)(ii) of the Act).
- [3] The Respondent is a Licensed Building Practitioner with a Carpentry Licence issued 25 September 2012.
- [4] The Board has considered the complaint under the provisions of Part 4 of the Act and the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Regulations).
- [5] The following Board Members were present at the hearing:
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|--------------------|--------------|
| Richard Merrifield | Deputy Chair |
| Mel Orange | Board Member |
| Dianne Johnson | Board Member |
| Catherine Taylor | Board Member |
- [6] The matter was considered by the Board in Auckland on 19 January 2016 in accordance with the Act, the Regulations and the Boards' Complaints Procedures.
- [7] The following other persons were also present during the course of the hearing:
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|---------------|-----------------|
| Sarah Romanos | Board Secretary |
|---------------|-----------------|
- Members of the public were not present.
- [8] No Board Members declared any conflicts of interest in relation to the matters under consideration.

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Board Procedure

- [9] The “form of complaint” provided by the Complainant satisfied the requirements of the Regulations.
- [10] On 4 November 2015 the Registrar of the Board prepared a report in accordance with reg 7 and 8 of the Regulations. The purpose of the report is to assist the Board to decide whether or not it wishes to proceed with the complaint.
- [11] On 3 December 2015 the Board considered the Registrar’s report and in accordance with reg 10 it resolved to proceed with the complaint that the Respondent failed, without good reason, to provide a record of work on completion of restricted work as required by s 88(1) of the Building Act (s 317(1)(da)(ii) of the Act).
- [12] On 17 December 2015 at 11 am a pre-hearing teleconference was convened by Richard Merrifield. The Respondent and Registrar’s Representative were both present. The hearing procedures were explained and the Respondent’s attendance at the substantive hearing was confirmed.
- [13] The Respondent subsequently advised that he would not attend and that the Board could consider the matter on the papers presented.

The Hearing

- [14] The hearing commenced at 1pm.
- [15] The hearing was opened by the Presiding Member and then adjourned so the Board could consider the evidence.

Substance of the Complaint

- [16] The Respondent undertook restricted building work at the site from January 2015 to March 2015. On completion of the work a payment dispute arose between the parties.
- [17] The Respondent did not provide a record of work for the restricted building work undertaken, until late November, notwithstanding repeated requests from the Complainant.

Evidence

- [18] The Respondent admitted that he did not provide a record of work and the reason he did not provide it was that he had not been paid for the work he undertook on the site.
- [19] The Respondent stated that he was unaware that a record of work must be provided on completion of restricted building work. The Respondent provided the record of work as soon as he became aware of his obligations, after the complaint had been laid.

Board’s Conclusion and Reasoning

- [20] There is a statutory requirement under s 88(1) of the Building Act 2004 for a licensed building practitioner to provide a record of work to the owner and the building consent authority on completion of restricted building work.

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- [21] Failure to provide a record of work is a ground for discipline under s 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.
- [22] The legislative history of the record of work provisions show that they are designed to create a documented record of who did what in the way of restricted building work under a building consent. It ensures all those involved in the restricted building work can be identified by the owner and the building consent authority along with the restricted building work they carried out.
- [23] The Board has considered numerous complaints where a payment dispute has arisen. The Board has consistently held that the builder must provide a record of work for the work completed and that withholding a record of work because of a payment dispute is not a “good reason” to withhold.
- [24] The Registrar has publicised the Board’s decisions in relation to records of work on numerous occasions and the Board is of the view that by now, licensed building practitioners should be aware of their obligations.
- [25] The Respondent should have completed a record of work and provided it to the Complainant and the territorial authority soon after he finished work on site.

Complaint Decision

- [26] The Board has decided that the Respondent has carried out or supervised building work which is the subject of the complaint as a Licensed Building Practitioner failed, without good reason, to provide a record of work, on completion of the restricted building work as required by s 88(1) of the Act (s 317(1)(da)(ii) of the Act) and should be disciplined.

Disciplinary Penalties, Publication and Costs

- [27] The grounds upon which a Licenced Building Practitioner may be disciplined are set out in s 317 of the Act. If one or more of the grounds in s 317 applies, then the Board may apply disciplinary penalties as set out in s 318 of the Act¹. Under s 318(4) of the Act, the Board has the power to order the Respondent to pay the reasonable costs and expenses of, and incidental to, the Board’s inquiry and pursuant to s 318(5) of the Act, the Board may publicly notify any disciplinary action taken against a Licensed Building Practitioner in any way it thinks fit.
- [28] The Board’s Complaints Procedures allow the Board to either set out the Board’s decision on disciplinary penalty, publication and costs or to invite the Respondent to make written submissions on those matters.
- [29] The Board did not request any submissions on penalty, cost or publication of name, but in considering the circumstances of this complaint, as well as the Respondent recognising that he made an error and that the proposed penalty is at the lower end of offending, the Board has made a decision.
- [30] In all the circumstances of the case, the Board considers a fine of \$1,000 to be the appropriate penalty.
- [31] The Board notes that the Respondent has been cooperative in regard to the Board’s inquiry and admitted that he should have provided a record of work. The evidence was also heard on the papers, resulting in a reduction in the Board’s costs.

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- [32] Under all the circumstances, the Board has reduced the order for costs and the sum of \$500 (reduced from a starting point of \$1,000) is considered to be a reasonable amount toward the costs of and incidental to the Board's inquiry.
- [33] For the reasons set out above, the Board directs that:
- Penalty:** Pursuant to s 318(1)(d) of the Building Act 2004, the Respondent is to pay a fine of \$1,000.
- Costs:** Pursuant to s 318(4) of the Act, the Respondent is ordered to pay costs of \$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 s 301(1)(iii) of the Act.
- In terms of s 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.

Submissions on Penalty Costs and Publication

- [34] The Board invites the Respondent to make written submissions on the matters of disciplinary penalties, costs and publication up until close of business on 4 March 2016.
- [35] If no submissions are received then this decision will become final.
- [36] 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

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

Signed and dated this 19th day of February 2016



Richard Merrifield
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

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- 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.