Before the Building Practitioners Board
At New Plymouth

BPB Complaint No. C2-01486

Under the Building Act 2004 (the Act)

IN THE MATTER OF	A complaint to the Building Practitioners Board under section 315 of the Act
AGAINST	John Chittenden, Licensed Building Practitioner No. BP 113914

DECISION OF THE BUILDING PRACTITIONERS' BOARD

Introduction

[1] [Omitted] (the Complainant) lodged a complaint with the Building Practitioners Board (the Board) on 22 August 2016 in respect of John Chittenden, Licensed Building Practitioner (the Respondent).

[2] The complaint alleged that the Respondent has, in relation to building work at [Omitted] carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act).

[3] The Respondent is a Licensed Building Practitioner with a Roofing Profiled Metal Roof and/or Wall Cladding; Roof Membrane Licence issued 21 March 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:

Richard Merrifield	Deputy Chair (Presiding)	Licensed in Carpentry and Site Area of Practice 2
Mel Orange	Board Member	Legal Member appointed under s 345(3) of the Act
Robin Dunlop	Board Member	Retired Professional Engineer
Bob Monteith	Board Member	Licensed in Carpentry and Site Area of Practice 2

[6] The matter was considered by the Board in New Plymouth on 30 March 2017 in accordance with the Act, the Regulations and the Board's Complaints Procedures.

[7] The following other persons were also present during the course of the hearing:

Gemma Lawson	Board Secretary

John Chittenden	Respondent
[Omitted]	Complainant
[Omitted]	Witness

[8] No Board Member declared a conflict of interest in relation to the matters under consideration.

Board Procedure

[9] The "form of complaint" provided by the Complainant satisfied the requirements of the Regulations.

[10] On 13 December 2016 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 it wishes to proceed with the complaint.

[11] On 31 January 2017 the Board considered the Registrar's report and in accordance with reg 10 it resolved to proceed with the complaint that the Respondent carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act).

[12] The Respondent was appearing before the Board on another complaint made by the same Complainant and, with the agreement of the Complainant and the Respondent the two matters were consolidated.

[13] On 6 March 2017 a pre-hearing teleconference was convened by Richard Merrifield. The Respondent was present, the hearing procedures were explained and the Respondent's attendance at the substantive hearing was confirmed.

Function of Disciplinary Action

[14] 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[1].

[15] In New Zealand the High Court noted in *Dentice v Valuers Registration Board*[2]:

> *Although, in respect of different professions, the nature of the unprofessional or incompetent conduct which will attract disciplinary charges is variously described, there is a common thread of scope and purpose. Such provisions exist to enforce a high standard of propriety and professional conduct; to ensure that no person unfitted because of his or her conduct should be allowed to practise the profession in question; to protect both the public and the profession itself against persons unfit to practise; and to enable the profession or calling, as a body, to ensure that the conduct of members conforms to the standards generally expected of them.*

[16] In *McLanahan and Tan v The New Zealand Registered Architects Board*[3] Collins J. noted that:

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

[2] [1992] 1 NZLR 720 at p 724

> *" … the disciplinary process does not exist to appease those who are dissatisfied with their architect. The disciplinary process for architects exists to ensure professional standards are maintained in order to protect clients, the profession and the broader community."*

[17] The same applies as regards the disciplinary provisions in the Building Act.

[18] It must also be noted that the Board has jurisdiction only with regard to "the conduct of a licensed building practitioner" and with respect to the grounds for discipline set out in s 317 of the Act. It cannot investigate matters outside of those grounds, does not have any jurisdiction over contractual matters and cannot deal with or resolve disputes between a complainant and the person who is the subject of the complaint.

The Hearing

[19] The consolidated hearing commenced at 10.50 a.m.

[20] Persons giving evidence were sworn in, their evidence was presented and they answered questions from the Board.

Substance of the Complaint

[21] The Complainant alleged that the Respondent carried out the replacement of a roof in a negligent and incompetent manner. In particular it was alleged:

(a) roofing sheets installed were not long enough;

(b) an upstand of 30mm was tucked under existing cladding;

(c) rubbish was left in place – existing paper and purlins; and

(d) various flashing and junctions were poorly executed.

Evidence

[22] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed. The relevant authority is *Z v Dental Complaints Assessment Committee*[4] where Justice McGrath in the Supreme Court of New Zealand stated:

> *[102] The civil standard has been flexibly applied in civil proceedings no matter how serious the conduct that is alleged. In New Zealand it has been emphasised that no intermediate standard of proof exists, between the criminal and civil standards, for application in certain types of civil case. The balance of probabilities still simply means more probable than not. Allowing the civil standard to be applied flexibly has not meant that the degree of probability required to meet the standard changes in serious cases. Rather, the civil standard is flexibly applied because it accommodates serious allegations through the natural tendency to require stronger evidence before being satisfied to the balance of probabilities standard.*
>
> *[105] The natural tendency to require stronger evidence is not a legal proposition and should not be elevated to one. It simply reflects the*

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[3] [2016] HZHC 2276 at para 164

[4] [2009] 1 NZLR 1

> *reality of what judges do when considering the nature and quality of the evidence in deciding whether an issue has been resolved to "the reasonable satisfaction of the Tribunal". A factual assessment has to be made in each case. That assessment has regard to the consequences of the facts proved. Proof of a Tribunal's reasonable satisfaction will, however, never call for that degree of certainty which is necessary to prove a matter in issue beyond reasonable doubt.*

[23] It is to be noted that under s 322 of the Act the Board has relaxed rules of evidence:

> ***322 Board may hear evidence for disciplinary matters***
>
> *(1) In relation to a disciplinary matter, the Board may—*
>
> *(a) receive as evidence any statement, document, information, or matter that in its opinion may assist it to deal effectively with the subject of the disciplinary matter, whether or not it would be admissible in a court of law.*

[24] The Respondent was engaged by Metal Craft Roofing to complete a reroof of a residential dwelling. It was carried out by the Respondent on the basis that it came within clause 1 of Schedule 1 of the Building Act in that it was purportedly a like for like replacement. The owner's intention was to carry out further renovations of the property following the reroof. Approximately one year later the Complainant was engaged to carry out the renovations and in doing so became aware of the allegedly negligent work and made the complaint which was supported by photographs of the Respondent's work.

[25] The Respondent provided a written response to the Complaint on 25 September 2016. He set out that the work was completed over a year ago and:

(a) the roofing sheets were installed 50mm past the facia board but the gutter was installed after the roof was completed by another contractor and in such a way as to shorten the overhang;

(b) the 30mm upstands were completed over a plaster cladding which was to be replaced. The builder at the time (not the Complainant) gave instructions to install it as far up as possible and that it would be replaced when the cladding was done;

(c) rubbish was left in the cavity by staff and the Respondent removed it himself when he was made aware of it;

(d) some of the ridge ends were not tidy and needed addressing; and

(e) he was not contacted and made aware of the issues by the original builder and was not given the opportunity to go back and rectify them until Metal Craft advised him and he then tried to remediate.

[26] The Respondent also acknowledged:

> *The quality of this job was not up to my standard but the issues with flashing up stand could not be avoided without the builder removing the cladding which was not planned at that time.*

[27] At the hearing the Board heard that a Decramastic tile roof was replaced with a long run iron roof. The roof was measured and ordered by Metal Craft. The positioning of the purlins were changed. Facia was not replaced. An existing vlux window was

removed and replaced in the same location. The iron was installed with apron flashings cut and taped with alu tape.

[28] As regards the sheets installed too short the Respondent stated he installed the sheets with 30mm past the facia whereas he normally allows for a 60mm overhang. He accepted the sheets were long enough to provide for a 60mm overhang if installed correctly. Metal Craft supplied replacement iron to remediate the issue. The Respondent installed some new sheets and slipped others down to gain extra length. He accepted that new iron was available to replace the sheets that were moved down and that he should have used them. The Board was shown a photograph of an apron flashing peeled back to show original unsealed fixing holes.

[29] The Respondent accepted that the flashings shown in photographs were unacceptable.

[30] The Respondent gave evidence that the work was carried out under his supervision by a foreman with three years' experience and that he did not pick up the issues complained of during his final check.

Boards Conclusion and Reasoning

[31] In considering whether the Respondent has carried out or supervised building work in a negligent or incompetent manner the Board has had regard to the case of *Beattie v Far North Council*[5]. Judge McElrea provided guidance on the interpretation of those terms:

> *[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.*
>
> *[44] In my view a "negligent" manner of working is one that exhibits a serious lack of care judged by the standards reasonably expected of such practitioners, while an "incompetent" manner of working is one that exhibits a serious lack of competence.*
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> *[46] The approach I have adopted recognises that the terms "negligent" and "incompetent" have a considerable area of overlap in their meanings, but also have a different focus - negligence referring to a manner of working that shows a lack of reasonably expected care, and incompetence referring to a demonstrated lack of the reasonably expected ability or skill level.*

[32] The Board has also considered the comments of Justice Gendall in *Collie v Nursing Council of New Zealand*[6] as regards the threshold for disciplinary matters:

> *[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.*

[33] The building work was not carried out by the Respondent. It was completed under his supervision. It was not carried out under a building consent. In Board Decision C2-01143[7] the Board found that the definition of supervise in s 7[8] of the Act must be

[5] Judge McElrea, DC Whangarei, CIV-2011-088-313
[6] [2001] NZAR 74
[7] Board Decision dated 14 April 2016

interpreted in such a way as to give effect to the purpose of the legislation which includes the regulation and accountability of licensed building practitioners and, as such, it includes work carried out without a building consent. The Board's position, therefore, is that under the disciplinary provision in s 317(1)(b) supervision applies to all building work carried out under the supervision of a licensed building practitioner and that where the work is carried out under a building consent an additional requirement applies in that it must also comply with the building consent under which it is carried out. The fundamental requirement in s 7 that the supervision of the building work is *"sufficient to ensure it is performed competently"* applies to all building work carried out under the supervision of a licensed building practitioner.

[34] In C2-01143 the Board also discussed the levels of supervision it considers will be necessary to fulfil a licensed building practitioner's obligations noting that the level of supervision required will depend on a number of circumstances including:

(a) the type and complexity of the building work to be supervised;

(b) the experience of the person being supervised;

(c) the supervisor's experience in working with the person being supervised and their confidence in their abilities;

(d) the number of persons or projects being supervised; and

(e) the geographic spread of the work being supervised.

[35] The Board also needs to consider whether the work met the requirements of the building code and if not the level of non-compliance.

[36] The main areas of concern for the Board were the installation of the long run iron (and the failure to correctly remediate it) and the substandard flashings excluding those that were installed against cladding which was to be removed. The Board accepted, as regards those flashings, that the temporary solution was acceptable given that deconstruction of the cladding was to be carried out.

[37] The issues with the remainder of the work should have been identified by the Respondent as part of his supervision processes. The work was substandard and a reasonable licensed building practitioner should have picked the issues up as part of the supervision and checking process. The Board therefore finds that the Respondent has been negligent in that he has exhibited a serious lack of care as judged by the standards reasonably expected of a licensed building practitioner.

[38] The Board also notes that the building work, whilst carried out under Schedule 1, may have required a building consent given the purlin set out was different from the existing roof. As such it may not have been a like for like replacement using a comparable component in the same position as required under clause 1(2) of Schedule 1. Whilst it has not made a decision on whether the Respondent was negligent for carrying out the building work without a building consent the Respondent is cautioned about carrying out such work without fully investigating whether a consent is required or not. In such situations enquiries should be made of the building consent authority disclosing the full extent of the building work to be

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[8] Section 7:

supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—

(a) is performed competently; and

(b) complies with the building consent under which it is carried out.

undertaken and seeking advice, in writing, whether or not a building consent is required.

Board Decision

[39] The Board has decided that Respondent has carried out or supervised building work or building inspection work in a negligent manner (s 317(1)(b) of the Act) and should be disciplined.

Disciplinary Penalties

[40] The grounds upon which a Licensed 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 Act[i].

[41] 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 submissions on those matters.

[42] As part of the materials provided to the Board for the Hearing the Respondent provided submissions which were relevant to penalty, publication and costs and the Board has taken these into consideration. Included in this was his acceptance of responsibility and the attempts, albeit inadequate, at remediation.

[43] Given the nature of the disciplinary offending, the mitigation already heard and the level of penalty decided on the Board has decided to dispense with calling for further submissions. The Respondent will, however, be given an opportunity to comment on the level of penalty, costs and on publication should he consider there a further matters which the Board should take into consideration.

[44] The Board is aware that the common understanding of 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. Those purposes were recently reiterated by the Supreme Court of the United Kingdom:

> *The primary purpose of professional disciplinary proceedings is not to punish, but to protect the public, to maintain the public confidence in the integrity of the profession and to uphold proper standards of behaviour.*[9]

[45] In New Zealand the High Court noted in *Dentice v Valuers Registration Board*[10]:

> *Although, in respect of different professions, the nature of the unprofessional or incompetent conduct which will attract disciplinary charges is variously described, there is a common thread of scope and purpose. Such provisions exist to enforce a high standard of propriety and professional conduct; to ensure that no person unfitted because of his or her conduct should be allowed to practise the profession in question; to protect both the public and the profession itself against persons unfit to practise; and to enable the profession or calling, as a body, to ensure that the conduct of members conforms to the standards generally expected of them.*

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[9] *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

[10] [1992] 1 NZLR 720 at p 724

[46] The High Court in *Patel v Complaints Assessment Committee*[11] has commented on the role of "punishment" in giving penalty orders stating that punitive orders are, at times, necessary to uphold professional standards:

> *[27] Such penalties may be appropriate because disciplinary proceedings inevitably involve issues of deterrence. They are designed in part to deter both the offender and others in the profession from offending in a like manner in the future.*
>
> *[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.*

[47] In *Lochhead v Ministry of Business Innovation and Employment*[12], 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.*
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> *[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).*

[48] The level of negligence is at the lower end of the scale and it relates to the Respondent's supervision. The Board considers, in such circumstances, that a fine is the proper penalty. Given the mitigation heard the Board considers $1,000 to be appropriate.

Costs

[49] Under s 318(4) the Board may require the Respondent "to pay the costs and expenses of, and incidental to, the inquiry by the Board."

[50] 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

[11] HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

[12] 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288, Judge Ingram

circumstances of each case. The judgment in *Cooray v The Preliminary Proceedings Committee* [13] included the following:

> *"It would appear from the cases before the Court that the Council in other decisions made by it has in a general way taken 50% of total reasonable costs as a guide to a reasonable order for costs and has in individual cases where it has considered it is justified gone beyond that figure. In other cases, where it has considered that such an order is not justified because of the circumstances of the case, and counsel has referred me to at least two cases where the practitioner pleaded guilty and lesser orders were made, the Council has made a downward adjustment."*

[51] The judgment in *Macdonald v Professional Conduct Committee*[14] confirmed the approach taken in *Cooray*. This was further confirmed in a complaint to the Plumbers, Gasfitters and Drainlayers' Board, *Owen v Wynyard*[15] where the judgment referred with approval to the passages from *Cooray* and *Macdonald* in upholding a 24% costs order made by the Board.

[52] In *Collie v Nursing Council of New Zealand*[16] 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. It is not hard to see that the award of costs may have imposed some real burden upon the appellant but it is not fixed at a level which disturbs the Court's conscience as being excessive. Accordingly it is confirmed.*

[53] The Board notes that the Respondent agreed to the matter being consolidated. This has reduced the costs incurred and as such the Board has reduced the costs from $1,000 to $500. This is significantly less that the 50% of actual costs considered by the Courts as reasonable.

Publication of Name

[54] 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 Act.

[55] The Board is also able, under s 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.*

[56] 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.

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[13] HC, Wellington, AP23/94, 14 September 1995
[14] HC, Auckland, CIV 2009-404-1516, 10 July 2009
[15] High Court, Auckland, CIV-2009-404-005245, 25 February 2010
[16] [2001] NZAR 74

[57] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990[17]. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction[18]. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive[19]. In *N v Professional Conduct Committee of Medical Council*[20] 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:*
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> - *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.*

[58] 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[21]. 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.

[59] The Board does not consider that any further publication is required.

Penalty, Costs and Publication Decision

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

Penalty:	**Pursuant to s 318(1)(f) of the Building Act 2004, the Respondent is ordered 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 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.**

Submissions on Penalty Costs and Publication

[61] The Board invites the Respondent to make written submissions on the matters of disciplinary penalties, costs and publication up until close of business on **29th May 2017.**

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[17] Section 14

[18] Refer ss 200 and 202 of the Criminal Procedure Act

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

[20] ibid

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

[62] If no submissions are received then this decision will become final.

[63] 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.

Non Payment of Fines or Costs

[64] The Respondent should take note that the Board may, under s 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. Section 319 provides:

> ***319 Non-payment of fines or costs***
>
> *If money payable by a person under section 318(1)(f) or (4) remains unpaid for 60 days or more after the date of the order, the Board may—*
>
> *(a) cancel the person's [licensing] and direct the Registrar to remove the person's name from the register; or*
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> *(b) suspend the person's [licensing] until the person pays the money and, if he or she does not do so within 12 months, cancel his or her [licensing] and direct the Registrar to remove his or her name from the register.*

Right of Appeal

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

Signed and dated this 5th day of May 2017.

Richard Merrifield
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.