

BPB Complaint No. C2-01502

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

Xuming Yao, Licensed Building Practitioner
No. BP 108252

DECISION OF THE BUILDING PRACTITIONERS' BOARD

Introduction

- [1] [Omitted] (the Complainant) lodged a complaint with the Building Practitioners Board (the Board) on 19 September 2016 in respect of Xuming Yao, Licensed Building Practitioner (the Respondent).
- [2] The Complainant alleged that the Respondent has, in relation to building work at [Omitted] 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).
- [3] The Respondent is a Licensed Building Practitioner with a Roofing (Concrete or Clay Tile Roof) Licence issued 21 July 2011.
- [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 | Licensed in Carpentry and Site Area of Practice 2 |
| Robin Dunlop | Board Member | Retired Professional Engineer |
| Catherine Taylor | Board Member | Layperson |
- [6] The matter was considered by the Board in Wellington on 11 April 2017 in accordance with the Act, the Regulations and the Board's Complaints Procedures.
- [7] No Board Member declared any conflict of interest in relation to the matters under consideration.

Board's Procedure

- [8] The "form of complaint" provided by the Complainant satisfied the requirements of the Regulations.
- [9] On 14 February 2017 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.
- [10] On 1 March 2017 the Board considered the Registrar's report and in accordance with reg 10 it resolved to proceed with the complaint that the Respondent 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).
- [11] On 13 March 2017 the Respondent was sent a Notice of Hearing outlining that the matter would be dealt with on the basis of the papers before it but that the Respondent could attend by phone or video conference or in person at his own cost.

Function of Disciplinary Action

- [12] 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 Kingdom¹.
- [13] 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.
- [14] In *McLanahan and Tan v The New Zealand Registered Architects Board*³ Collins J. noted that:

"... 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."
- [15] The same applies as regards the disciplinary provisions in the Building Act.

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

³ [2016] HZHC 2276 at para 164

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- [16] 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.

Substance of the Complaint

- [17] The allegation was that the Respondent failed to provide a record of work on completion of restricted building work.

Evidence

- [18] 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 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.

- [19] 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.

- [20] The Complaint set out that New Age Homes was engaged to construct a new home under a building consent. The Respondent was a subcontractor to New Age Homes.

⁴ [2009] 1 NZLR 1

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A dispute arose with New Age who would not provide required paperwork. The Complainant therefore sought to obtain items himself and to this end he requested a record of work from the Respondent in September 2016. Text messages to this effect were provided as part of the complaint. The Complainant stated that the Respondent refused to supply one as he considered he was still working for New Age Homes.

- [21] The Complainant accepted that New Age Homes was his agent for building consent purposes.
- [22] The Respondent provided a written response to the Complaint on 6 October 2016. He noted the job was over a year ago, he was working for New Age Homes to whom he provided the record of work in March or April 2016. He was not aware of who the owner was until he received calls and text messages from the Complainant asking for a record of work. He told the Complainant to contact New Age Homes.
- [23] Inquiries of the territorial authority and the Respondent also revealed a record of work had not been provided to it. The Respondent stated the project manager from New Age Homes would normally attend to this.
- [24] Enquiries were also made of Mr Singh the project manager for New Age Homes who confirmed a record of work had been provided by the Respondent soon after he completed his work and that New Age was in a payment dispute with the owner and that they were withholding paperwork as a result.

Board's Conclusion and Reasoning

- [25] There is a statutory requirement under s 88(1) of the Act for a licensed building practitioner to provide a record of work to the owner and the territorial authority on completion of restricted building work⁵.
- [26] Failing 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.
- [27] The Board discussed issues with regard to records of work in its decision C2-01170⁶ 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, whom a record of work must be provided to and what might constitute a good reason for not providing a record of work.
- [28] 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 or supervises restricted building work must provide a record of work.
- [29] The statutory provisions do not stipulate a timeframe for the licensed building practitioner to provide a record of work. The provisions in s 88(1) simply state "on completion of the restricted building work ...".
- [30] In this instance it appears a record of work was provided to the agent of the owner within a short period of time. The agent did not pass it on to the owner or to the territorial authority. As a consequence neither have received one. The Act provides

⁵ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

⁶ *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

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that a record of work must be provided to both the owner and the territorial authority⁷. Providing a record of work to one but not the other will not satisfy the requirements of the Act. Both must be provided with a correctly completed record of work.

- [31] It is common in the building industry for an owner to appoint an agent to act on their behalf. Usually this is an express provision in their contractual relationship or, at times, it may be implied by the nature of the relationship between the owner and the agent and the conduct of the agent.
- [32] The Board accepts that New Age Homes was the Complainant's agent. As such provision to the agent satisfied one of the requirements of the Act but not the other, that of providing it to the territorial authority. The Board also notes that the agency relationship was brought to an end by the owners when a dispute arose and at that point in time when a record of work was requested directly of the Respondent should have provided one.
- [33] The Respondent has relied on the New Age project manager to pass the record of work on to the territorial authority. New Age was not the agent of the territorial authority and as such providing it to New Age has not satisfied the statutory requirements. It may be that providing it to a project manager was a practical process but the risk for the Respondent is that it will not be passed on as has occurred. Moreover once the Respondent became aware of the dispute and that his record of work had not been passed on he should have taken steps to provide it to the territorial authority.
- [34] Given that a record of work has not been provided to the territorial authority the disciplinary offence is found to have been committed.
- [35] Section 317(1)(da)(ii) of the Act provides for a defence of the licensed building practitioner having a "good reason" for failing to provide a record of work. The reasons put forward are matters that can be taken into consideration as mitigation but do not satisfy the requirements of a good reason.

Board's Decision

- [36] The Board's preliminary view, based on the evidence received thus far, is that the Respondent 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) and should be disciplined.

Disciplinary Penalties

- [37] 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 Act¹.
- [38] The Board's Complaints Procedures allow the Board either to set out the Board's decision on disciplinary penalty, publication and costs or to invite the Respondent to make submissions on those matters.

⁷ s 88(2)

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- [39] 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 the payment dispute between New Age and the Complainant, which the Respondent has been caught up in, and the fact that a record of work was provided in a timely manner to the owner's agent but not to the territorial authority.
- [40] 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 be given an opportunity, however, 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.
- [41] As stated earlier 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.
- [42] The High Court in *Patel v Complaints Assessment Committee*⁸ 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.

- [43] In *Lochhead v Ministry of Business Innovation and Employment*⁹, 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

⁸ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

v Hanham & Philp Contractors Ltd & Ors (HC ChCh, CRI 2008-409-000002, 17 December 2008, Randerson and Pankhurst JJ).

- [44] The Board's view is that there is substantial mitigation and a censure is the appropriate penalty. A censure is the lowest form of disciplinary penalty the Board can impose.

Costs

- [45] 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."
- [46] 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 circumstances of each case. The judgment in *Cooray v The Preliminary Proceedings Committee*¹⁰ 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."

- [47] The judgment in *Macdonald v Professional Conduct Committee*¹¹ confirmed the approach taken in *Cooray*. This was further confirmed in a complaint to the Plumbers, Gasfitters and Drainlayers' Board, *Owen v Wynyard*¹² where the judgment referred with approval to the passages from *Cooray* and *Macdonald* in upholding a 24% costs order made by the Board.
- [48] In *Collie v Nursing Council of New Zealand*¹³ 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.

- [49] The matter was dealt with on the papers which has reduced the amount of costs incurred. Given this, costs of \$500 is considered to be appropriate. This is significantly less than the 50% of actual costs the courts have stated is an appropriate starting point.

¹⁰ HC, Wellington, AP23/94, 14 September 1995

¹¹ HC, Auckland, CIV 2009-404-1516, 10 July 2009

¹² High Court, Auckland, CIV-2009-404-005245, 25 February 2010

¹³ [2001] NZAR 74

Publication of Name

- [50] 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 Licenced Building Practitioners' scheme as is required by the Act.
- [51] 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.*
- [52] 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.
- [53] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990¹⁴. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction¹⁵. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive¹⁶. In *N v Professional Conduct Committee of Medical Council*¹⁷ 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.*
- [54] 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 interest¹⁸. 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.
- [55] The Board does not consider that any publication is required.

Penalty, Costs and Publication Decision

- [56] 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 censured.

¹⁴ Section 14

¹⁵ Refer ss 200 and 202 of the Criminal Procedure Act

¹⁶ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

¹⁷ *ibid*

¹⁸ *Kewene v Professional Conduct Committee of the Dental Council* - [2013] NZAR 1055

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 his being named in this decision.

Submissions on Penalty Costs and Publication

[57] 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**.

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

[59] 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

[60] 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

(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

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

Signed and dated this 5th day of May 2017.



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 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.*