

Before the Building Practitioners Board

	BPB Complaint No. CB24137
Licensed Building Practitioner:	Christopher Pearce (the Respondent)
Licence Number:	BP 117886
Licence(s) Held:	Carpentry and Site AOP 1

Decision of the Board in Respect of the Conduct of a Licensed Building Practitioner

Under section 315 of the Building Act 2004

Complaint or Board Inquiry	Complaint
Hearing Location	Auckland
Hearing Type:	In Person
Hearing Date:	6 December 2018
Decision Date:	21 December 2018

Board Members Present:

Richard Merrifield, LBP, Carpentry Site AOP 2 (Presiding)
Mel Orange, Legal Member
Robin Dunlop, Retired Professional Engineer
Faye Pearson-Green, LBP Design AOP 2

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 disciplinary offences under sections 317(1)(b), 317(1)(d) and 317(1)(da)(ii) of the Act.

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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); and
- (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).

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

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

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 the Respondent gave evidence at the hearing.
- [8] The Respondent was engaged by the Complainant to undertake a renovation to an existing dwelling under a building consent. The scope of the building work included internal renovations to a kitchen and three bedrooms and the construction of two new decks and a retaining wall. The envisaged building work was not completed by the Respondent as a result of a commercial dispute that arose. The Respondent did not carry out any further work after November 2017 and he wrote to the Complainant on 6 December 2017 saying he had closed his business and was trying to find another builder to complete the work.

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

- [9] The Complainant engaged another licensed building practitioner to complete the building work. The remedial builder considered that both decks and a retaining wall the Respondent's business had carried out had not been done in accordance with the consented plans or the building code and that the workmanship was extremely poor. Specifically the Complainant alleged:

In terms of the decks, these were directly affixed to a brick veneer as opposed to the block lower level (South Deck) or carport roof (North Deck) as per the plans, which is a very major structural issue. A mix of screws and nails had been used the majority of which were not stainless steel and had begun rusting within a few short months. The flashing below the bifold doors had nail gun nails shot through to affix parts of the deck creating waterproof issues. The decks were not level and the posts uneven/warped so some of the joists were not sitting on the posts. Joist hangers were very poorly installed. Both decks had to be effectively dismantled and rebuilt and revised plans drawn up to allow some of the construction to stay. In terms of the retaining wall, once again the footings materially differed from the engineering plans/specs and therefore had to be removed.

- [10] The Respondent provided a written response to the complaint. In it he expressed his remorse for how the job had turned out and outlined personal events that were impacting on him at the time. The Respondent spoke further to these circumstances at the hearing. He also noted that he had not been paid for the building work to which the complaint related and that the Complainant had retained items of his property.
- [11] At the hearing the Respondent outlined his building background and the business activities that he was undertaking at the time. He noted that his team had been on site carrying out internal work for some 22 weeks without issue. He stated he was not happy with how the decks were constructed and that the worker who carried out the building work had been dismissed as a result.
- [12] The Respondent gave evidence that at the time he had nine builders, two roofers and two painters on staff. He was the only licensed person and he had three to four jobs on the go at the time. The work to which the complaint relates was carried out under his supervision. With regard to supervision he was on site once a week when he held tool box meetings. He said he would have checked the work completed when he was on site and that he would have left his lead builder to simply carry out the simpler work. He did not know why he did not pick up on non-compliant work when on site.
- [13] The Respondent noted that at the time he had over extended his business in that he had too much on and was spread too thin. He accepted that he should have spent more time supervising. The Respondent has closed his business down and is now working for wages.

- [14] With respect to the specific allegations he stated that the manner of fixing through the brick and the screws that were used were only temporary and to allow other work to continue. He had instructed a friend who was an engineer to design a bracket to allow the deck to be raised whilst being affixed below the bricks. The deck was also made larger than was consented. Both were done without any reference to the building consent authority, the designer who developed the consented plans or the engineer to the project. The Respondent's engagement came to an end prior to the changes being made.
- [15] The Respondent gave evidence that there were issues with the retaining wall in that existing fill contained site rubbish from earlier building work. He noted the footing had to be made wider. He did not note that the foundations that had been boxed for pouring were not as per the design in the consented plans. The Respondent accepted that the retaining wall foundations were not as per the engineers design in the consented documentation.
- [16] An allegation was also made that an inspection had been missed. The Respondent gave evidence that he did not consider the inspection, a framing inspection, was required as there was no structural work and his process for the particular inspection was to take photographs and provide a producer statement and get the work signed off at the post line inspection. He said he often used that process.
- [17] In answering questions the Board noted that the Respondent's general process with minor variations and amendments to building consents was to proceed on the basis of his knowledge and experience as to what would be acceptable and to then have it accepted as part of a building consent authority process.
- [18] The Complainant also alleged that the Respondent had failed to provide a record of work. The Respondent stated that he was holding onto documents due to a large amount of money owing. He stated that once he found out that he was not legally allowed to hold the record of work he sent it through and that he did this prior to the complaint being made. A record of work dated 9 April 2018 was provided to the Board on 11 September 2018. The Respondent and he stated in his response that the record of work would have been received by the Complainant on 12 June 2018.
- [19] The Respondent gave a closing statement in which he stated that he was embarrassed by what had occurred, that he accepted his wrongdoing and that he valued his licence.

Board's Conclusion and Reasoning

- [20] The Board has decided that the Respondent **has**:
- (a) carried out or supervised building work or building inspection work in a negligent 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) 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.

- [21] The reasons for the Board's decisions follow.

Negligence and/or Incompetence

- [22] The finding of negligence relates to the Respondent's supervision of non-licensed persons.
- [23] 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*⁶ test of negligence which has been adopted by the New Zealand Courts⁷.
- [24] The New Zealand Courts have stated that assessment of negligence in a disciplinary context is a two-stage test⁸. 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 Act⁹. 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 practitioner¹⁰.
- [26] The Board notes that the purposes of the Act are:

3 Purposes

This Act has the following purposes:

⁶ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁷ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

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

⁹ *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

¹⁰ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

- (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 Code¹¹ and be carried out in accordance with a building consent¹². 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] There was clear evidence of non-compliance with acceptable standards. As the finding relates to supervision the Board needs to also consider whether the conduct has fallen below the acceptable standards as regards supervision.

[29] Supervise is defined in section 7¹³ of the Act. The definition states:

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.*

[30] 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;

¹¹ Section 17 of the Building Act 2004

¹² Section 40(1) of the Building Act 2004

¹³ 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.*

- (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.

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

[32] Supervision in the context of the Building Act has not yet been considered by the courts. It has, however, been considered in relation to Electricity Act 1992¹⁴. The definition of supervision in that Act is consistent with the definition in the Building Act and as such the comments of the court are instructive. In the case Judge Tompkins stated at paragraph 24:

“As is made apparent by the definition of "supervision" in the Act, that requires control and direction by the supervisor so as to ensure that the electrical work is performed competently, that appropriate safety measures are adopted, and that when completed the work complies with the requisite regulations. At the very least supervision in that context requires knowledge that work is being conducted, visual and other actual inspection of the work during its completion, assessment of safety measures undertaken by the person doing the work on the site itself, and, after completion of the work, a decision as to compliance of the work with the requisite regulations.”

[33] The Respondent accepted that the work was not to the required standard. The Board noted that the Respondent stated he was over extended in his business. He was stretched thin and did not fulfil his role as the supervisor of the building work. His processes were lacking. He should have spent more time on site and more time checking the work that was completed under his supervision. Had he done so the issues may not have arisen. Given these factors the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent 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.

[34] The Board also considered the Respondent's process as regards inspections was negligent. The required inspections under a building consent are not to be ignored. Even if a building consent authority allows it the process of providing a producer statement and photos instead of obtaining an inspection runs the risk that the work will have to be undone if the evidence provided does not satisfy the inspector.

¹⁴ *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

Contrary to a Building Consent

[35] The process of issuing a building consent and the subsequent inspections under it ensure independent verification that the Code has been complied with and the works will meet any required performance criteria. In doing so the building consent process provides protection for owners of works and the public at large. Any departure from the consent which is not minor (as defined in s 45A of the Act) must be submitted as an amendment to the consent before any further work can be undertaken. It is also an offence under s 40 of the Act to carry out building work other than in accordance with a building consent when one is issued.

[36] In *Tan v Auckland Council*¹⁵ the High Court, whilst dealing with a situation where no building consent had been obtained, stated the importance of the consenting process as follows:

[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.

[37] The same applies to the ongoing verification of building work. A failure to notify the Council of changes to the consented documents defeats the purpose of the process. Moreover undertaking building works that vary from those that have been consented can potentially put person and property at risk of harm.

[38] The Respondent accepted that the retaining wall foundation was not as per the consented plans. Other changes were made without going through a change process. In particular the deck height and size were changed. Neither the designer, the engineer nor the building consent authority were consulted prior to the change being made. Again a failure to consult prior to making changes runs the risk that the changes will not be accepted and work will have to be undone or that a certificate of acceptance for non-consented work will have to be obtained.

[39] The Board finds that the disciplinary offence has been committed.

Record of work

[40] 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 work¹⁶.

[41] 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.

¹⁵ [2015] NZHC 3299 [18 December 2015]

¹⁶ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

- [42] The Board discussed issues with regard to records of work in its decision C2-01170¹⁷ 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.
- [43] 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.
- [44] 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 ...”.
- [45] 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. Completion occurred on 6 December 2017 when the Respondent’s involvement came to an end. A record of work was not provided until mid-2018 at the earliest. 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.
- [46] 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.
- [47] 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.

Penalty, Costs and Publication

- [48] Having found that one or more of the grounds in section 317 applies the Board must, under section 318 of the Act¹, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [49] 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

¹⁷ *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

- [50] 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*¹⁸ 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.

- [51] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*¹⁹ 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.
- [52] In respect of the section 317(1)(b) negligence matter the Board considered that the Respondent's failings related to his lack of process and understanding of the role of a supervisor. Given this the Board considers that training in supervision would benefit the Respondent. The Board also considers that there is a risk that further transgressions will occur if the Respondent is able to continue to supervise restricted building work. As such the Board will order that the Respondent's licence be restricted to "carrying out" restricted building work only. The restriction will continue until such time as he successfully completes the training the Board will order.
- [53] The training to be undertaken is the BCITO Advanced Trade Supervisory Skills Package. It is to be completed to the satisfaction of the Registrar and evidence of successful completion is to be provided to the Registrar as part of satisfying this requirement. The training is to be completed at the Respondent's own cost.
- [54] With regard to the section 317(1)(d) matter the Respondent is censured. A censure is a formal expression of disapproval.
- [55] Lastly with regard to the record of work matter the Board's normal starting point for a failure to provide a record of work is a fine of \$1,500. It sees no reason to depart from that starting point.

¹⁸ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

Costs

- [56] 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.”
- [57] 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 case²⁰.
- [58] In *Collie v Nursing Council of New Zealand*²¹ 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.*
- [59] Based on the above the Board’s costs order is that the Respondent is to pay the sum of \$1,000 toward the costs of and incidental to the Board’s inquiry.

Publication

- [60] 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 Act²². 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.*
- [61] 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.
- [62] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990²³. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²⁴. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²⁵. The High Court provided

²⁰ *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.

²¹ [2001] NZAR 74

²² Refer sections 298, 299 and 301 of the Act

²³ Section 14 of the Act

²⁴ Refer sections 200 and 202 of the Criminal Procedure Act

²⁵ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*²⁶.

[63] 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 interest²⁷. 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.

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

Section 318 Order

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

- Penalty:** In respect of the disciplinary offending under section 317(1)(b) of the Act the Respondent's licence, pursuant to section 318(1)(c) of the Act, is restricted from supervising restricted building work until such time as he completes training under section 317(1)(e) of the Act is the BCITO Advanced Trade Supervisory Skills Package to the satisfaction of the Registrar; and
- In respect of the disciplinary offending under section 317(1)(d) of the Act the Respondent, pursuant to section 318(1)(d) of the Act is censured; and
- In respect of the disciplinary offending under section 317(1)(da)(ii) of the Act the Respondent, pursuant to section 318(1)(f) of the Act is to pay a fine of \$1,500.
- Costs:** Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$1,000 (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.

[66] 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

[67] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **2 February 2019**. The submissions should focus on mitigating matters as they relate to the

²⁶ *ibid*

²⁷ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

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.

- [68] 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

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

Signed and dated this 21st day of December 2018



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.*