

## Before the Building Practitioners Board

	BPB Complaint No. CB26336
Licensed Building Practitioner:	Don James Draper (the Respondent)
Licence Number:	BP123362
Licence(s) Held:	Carpentry and Site AoP 2

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### Decision of the Board in Respect of the Conduct of a Licensed Building Practitioner Under section 315 of the Building Act 2004

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Complaint or Board Inquiry	Complaint
Hearing Type:	On the Papers
Draft Decision Date:	27 November 2023
Final Decision Date:	21 May 2024

#### Board Members:

Mr M Orange, Chair, Barrister (Presiding)  
Mrs F Pearson-Green, Deputy Chair, LBP, Design AoP 2  
Ms K Reynolds, Construction Manager

#### 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.

#### Disciplinary Finding:

The Respondent **has** committed a disciplinary offence under section 317(1)(da)(ii) of the Act.

The Respondent is fined \$1,500 and ordered to pay costs of \$500. A record of the disciplinary offending will be recorded on the Public Register for a period of three years.

## Contents

<b>Summary of the Board’s Decision</b> .....	2
<b>The Charges</b> .....	3
<b>Draft Decision Process</b> .....	3
<b>Evidence</b> .....	4
<b>Failure to Provide a Record of Work</b> .....	4
Did the Respondent carry out or supervise restricted building work?.....	4
Was the restricted building work complete?.....	5
Has the Respondent provided a record of work?.....	5
Was there a good reason? .....	6
<b>Board’s Decision</b> .....	6
<b>Penalty, Costs and Publication</b> .....	6
Penalty .....	6
Costs.....	8
Publication .....	8
<b>Section 318 Order</b> .....	9
<b>Addendum</b> .....	9
<b>Right of Appeal</b> .....	10

### Summary of the Board’s Decision

[1] The Respondent submitted that he was not the responsible Licensed Building Practitioner. He identified a person who was not licensed for all of the build. It followed that he was the supervising Licensed Building Practitioner. The Board, therefore, found that he had failed to provide a record of work on completion of restricted building work. He is fined \$1,500 and ordered to pay costs of \$500. The disciplinary finding will be recorded on the public Register for a period of three years.

[2] The Respondent was provided, as part of the Draft Decision process, with an opportunity to provide his work record of work if he did, the Board stated that it would take the late provision into account as a mitigating factor. He did not provide it. As such, the fine remains at \$1,500.

### The Charges

- [3] The prescribed investigation and hearing procedure is inquisitorial, not adversarial. There is no requirement for a complainant to prove the allegations. The Board sets the charges and decides what evidence is required.<sup>1</sup>
- [4] In this matter, the disciplinary charges the Board resolved to further investigate<sup>2</sup> were that the Respondent may, in relation to building work at [OMITTED], Auckland, have failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out or supervise, or has carried out 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) of the Act contrary to section 317(1)(da)(ii) of the Act.

### Draft Decision Process

- [5] The Board's jurisdiction is that of an inquiry. Complaints are not prosecuted before the Board. Rather, it is for the Board to carry out any further investigation that it considers necessary prior to it making a decision.
- [6] Ordinarily, the Board makes a decision having held a hearing.<sup>3</sup> The Board may, however, depart from its normal procedures if it considers doing so would achieve the purposes of the Act, and it is not contrary to the interests of natural justice to do so.<sup>4</sup>
- [7] In this instance, the Board decided that a formal hearing was not necessary. The Board considered that there was sufficient evidence before it to allow it to make a decision on the papers. It noted, however, that there may have been further evidence in relation to the matter that the Board was not aware of. To that end, it issued a Draft Decision. The Respondent was provided with an opportunity to comment on the draft findings and to present further evidence prior to the Board making a final decision. The Board further noted that if the Respondent requested an in-person hearing, then the Draft Decision would be set aside, and a hearing would be scheduled.
- [8] After the Draft Decision had been issued, the Respondent, who had previously engaged in the investigation process, did not respond to it. It was made final. Then, on 20 March 2024, the Respondent emailed, having received an invoice for the fine and costs, stating:

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<sup>1</sup> 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. The evidentiary standard is the balance of probabilities, *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1.

<sup>2</sup> The resolution was made following the Board's consideration of a report prepared by the Registrar in accordance with regulation 10 of the Complaints Regulations.

<sup>3</sup> Regulation 10 of the Complaints Regulations.

<sup>4</sup> Under Clause 27 of Schedule 3 the Board may regulate its own procedure and it has summary jurisdiction, which allows for a degree of flexibility in how it deals with matters: *Castles v Standards Committee No.* [2013] NZHC 2289, *Orlov v National Standards Committee 1* [2013] NZHC 1955

*I did not receive ANY correspondence as per Boards Decision on 12/1/24. Or any other emails except from invoice to pay from MBIE today*

*Was a hard copy send ?*

*Ple advise what appeals channels are available for my response?*

- [9] The Board considered that there may have been a risk that natural justice requirements as regards notice of its decision had not been met. As such, it recalled its decision, reinstated it as a Draft Decision and offered the Respondent a further opportunity to make submissions or ask for a hearing. On 4 April 2024, the Respondent sought and was granted an extension until 15 May 2024 to make a submission. On 16 May 2024, his submission was received. It has been taken into account. The Respondent did not seek an in-person hearing.

### **Evidence**

- [10] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>5</sup>. 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.

### **Failure to Provide a Record of Work**

- [11] A Licensed Building Practitioner must provide a record of work for any restricted building work that they have carried out or supervised to the owner and the Territorial Authority on completion of their restricted building work.<sup>6</sup>
- [12] 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 work<sup>7</sup> unless there is a good reason for it not to be provided.<sup>8</sup>

### **Did the Respondent carry out or supervise restricted building work?**

- [13] The Respondent was involved in an addition and alteration to a residential dwelling under two building consents. The consented work on both aspects of the build included restricted building work, which must be carried out or supervised by a Licensed Building Practitioner.
- [14] The Respondent provided a response to the complaint in which he stated that [OMITTED] was the “primary LBP” and that he would arrange for him to provide his Licensed Building Practitioner number. A record of work was then provided by Mr [OMITTED]. The Respondent also outlined what he did do. The work he listed was not restricted building work.

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<sup>5</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

<sup>6</sup> Section 88(1) of the Act.

<sup>7</sup> Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

<sup>8</sup> Section 317(1)(da)(ii) of the Act

- [15] The Board obtained licensing information about Mr [OMITTED] \ from the Registrar. The information on the Register of Licensed Building Practitioners showed that Mr [OMITTED] was granted a license in 2011. His licence was suspended on 24 April 2015 and that his licence was cancelled on 22 September 2016. It has not been renewed since that date. It follows that Mr [OMITTED] could not carry out or supervise restricted building work after 24 April 2015.
- [16] The garage addition building consent was issued on 22 August 2014. If Mr [OMITTED] was involved in that aspect of the build, it may have been that he was the Licensed Building Practitioner who carried out or supervised the restricted building work.
- [17] The alteration building consent was issued on 12 April 2016. As Mr [OMITTED] was not licensed at that time, he could not have been the Licensed Building Practitioner who carried out or supervised restricted building work. On that basis, the record of work provided by Mr [OMITTED] is not valid for any of the restricted building work he may have been involved in after 24 April 2015.
- [18] The Board obtained the Council's building consent inspection records. Mr Draper was identified as being present at building inspections and as the Licensed Building Practitioner on 22 April and 3 August 2016 and at two final inspections carried out in September 2016. As such, there was evidence of the Respondent's association with the restricted building work, and, in the absence of evidence that any other Licensed Building Practitioners were involved, the presumption is that the Respondent was the Licensed Building Practitioner.
- [19] Additionally, as the contracting party and the person who engaged Mr [OMITTED], the Respondent should have been aware of his licensing status.
- [20] In response to the Draft Decision, the Respondent stated:
- I assisted [OMITTED] in providing information for her CCC visiting the site 4 times and meeting with the engineer and Architect also meeting with [OMITTED] on 3 occasions. And providing documentation and assistance.*
- [21] It is noted that the Respondent has not denied involvement in the building work. He was at building inspections, and no other Licensed Building practitioners have been identified in relation to the carpentry work. The Board is, therefore, satisfied that he was the supervising Licensed Building Practitioner.

Was the restricted building work complete?

- [22] Final inspections were carried out in 2016. A Code Compliance Certificate application was not sought until August 2022. It is likely that the restricted building work was complete in September 2016. If not, it was complete in August 2022.

Has the Respondent provided a record of work?

- [23] The Respondent has not provided a record of work.

Was there a good reason?

- [24] The Respondent put forward that Mr [OMITTED] was the Licensed Building Practitioner. That has been dealt with. He was not licensed for all of the work and, as such, could not provide a record of work for all of it.
- [25] Also, the requirement is for each and every Licensed Building Practitioner to do a record of work. As such, the Respondent can not simply put forward that someone else was the main Licensed Building Practitioner. If he also carries out or supervises restricted building work he must also provide a record of work.
- [26] The Respondent should note that the requirement is on the licensed building practitioner to provide a record of work, not on the owner or territorial authority to demand one. He is required to act of his own accord and not wait for others to remind him of his obligations.
- [27] In response to the Draft Decision, the Respondent made submissions that are relevant to penalty costs and publication. However, medical evidence related to an eye condition and surgery was included. The Board noted that the condition post-dated the date when the record of work was due. As such, it is not a good reason.

**Board's Decision**

- [28] The Respondent **has** failed to provide a record of work on completion of restricted building work.

**Penalty, Costs and Publication**

- [29] Having found that one or more of the grounds in section 317 applies, the Board must, under section 318 of the Act<sup>i</sup>, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [30] The matter was dealt with on the papers. The Board made an indicative order in its Draft Decision. It has since received submissions and has made a final decision regarding penalty, costs, and publication.

Penalty

- [31] The Board has the discretion to impose a range of penalties.<sup>ii</sup> Exercising that discretion and determining the appropriate penalty requires that the Board balance various factors, including the seriousness of the conduct and any mitigating or aggravating factors present.<sup>9</sup> It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:<sup>10</sup>

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<sup>9</sup> *Ellis v Auckland Standards Committee 5* [2019] NZHC 1384 at [21]; cited with approval in *National Standards Committee (No1) of the New Zealand Law Society v Gardiner-Hopkins* [2022] NZHC 1709 at [48]

<sup>10</sup> Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

- (a) protection of the public and consideration of the purposes of the Act;<sup>11</sup>
- (b) deterring other Licensed Building Practitioners from similar offending;<sup>12</sup>
- (c) setting and enforcing a high standard of conduct for the industry;<sup>13</sup>
- (d) penalising wrongdoing;<sup>14</sup> and
- (e) rehabilitation (where appropriate).<sup>15</sup>

[32] Overall, the Board should assess the conduct against the range of penalty options available in section 318 of the Act, reserving the maximum penalty for the worst cases<sup>16</sup> and applying the least restrictive penalty available for the particular offending.<sup>17</sup> In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty<sup>18</sup> that is consistent with other penalties imposed by the Board for comparable offending.<sup>19</sup>

[33] In general, when determining the appropriate penalty, the Board adopts a starting point based on the principles outlined above prior to it considering any aggravating and/or mitigating factors present.<sup>20</sup>

[34] Record of work matters are at the lower end of the disciplinary scale. The Board's normal starting point for a failure to provide a record of work is a fine of \$1,500, an amount which it considers will deter others from such behaviour.

[35] The Board provided the Respondent with an opportunity to provide a record of work before it made a final decision. The Respondent, in his submission, stated:

*Sorry for the delay only received my new glasses. And heavily involved with work and family court. There is a lot of reading in the reports. Further to ur email I can provide a record of work.*

[36] The Board's requirements were clear. A record of work had to be provided to the owner and the Territorial Authority for the reduction to apply. He has not done so.

[37] Further, the Board notes that whilst the Respondent states he has not been in a position to provide a record of work or respond to the Board, he has managed to correspond with a Government Minister about building work over the same period.

[38] The Respondent also raised personal matters regarding unrelated personal events that he is enduring. He sought a warning as opposed to a formal penalty.

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<sup>11</sup> Section 3 Building Act

<sup>12</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

<sup>13</sup> *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

<sup>14</sup> *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>15</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354; *Shousha v A Professional Conduct Committee* [2022] NZHC 1457

<sup>16</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

<sup>17</sup> *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

<sup>18</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

<sup>19</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

<sup>20</sup> In *Lochhead v Ministry of Business Innovation and Employment* 3 November [2016] NZDC 21288 the District Court recommended that the Board adopt the approach set out in the Sentencing Act 2002.

[39] Whilst the Board is not unsympathetic to his situation, the Respondent has not provided a record of work despite being given multiple opportunities to do so. He has inconvenienced the Complainant and continues to do so. A formal penalty is warranted, and it needs to be one that not only punishes but deters future occurrences by the Respondent and others. As such, the fine will remain at \$1,500.

#### Costs

[40] Under section 318(4) of the Act, the Board may require the Respondent to pay the costs and expenses of, and incidental to, the inquiry by the Board. The rationale is that other Licensed Building Practitioners should not be left to carry the financial burden of an investigation and hearing.<sup>21</sup>

[41] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings<sup>22</sup>. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case<sup>23</sup>.

[42] The Board has adopted an approach to costs that uses a scale based on 50% of the average costs of different categories of hearings, simple, moderate and complex. The current matter was simple. Adjustments are then made.

[43] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$500 toward the costs of and incidental to the Board's inquiry.

#### Publication

[44] 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,<sup>24</sup> and he will be named in this decision which will be available on the Board's website. The Board is also able, under section 318(5) of the Act, to order further publication.

[45] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.<sup>25</sup> Further, as a general principle, publication 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, and the courts have stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published.<sup>26</sup>

[46] The Respondent made a submission regarding protecting his reputation. The Board does not have a discretion over publication. One reason that the purposes of the

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<sup>21</sup> *Collie v Nursing Council of New Zealand* [2001] NZAR 74

<sup>22</sup> *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

<sup>23</sup> *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.

<sup>24</sup> Refer sections 298, 299 and 301 of the Act

<sup>25</sup> Section 14 of the Act

<sup>26</sup> *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055



Register include allowing an informed consumer to choose a licensed building practitioner. Providing information as regards disciplinary action helps to facilitate this.

- [47] Based on the above, the Board will not order any publication over and above the record on the Register, the Respondent being named in this decision, and the publication of the decision on the Board's website. The Respondent should note, however, that as the Board has not made any form of suppression order, other entities, such as the media or the Ministry of Business Innovation and Employment, may publish under the principles of open justice reporting.

### **Section 318 Order**

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

**Penalty:** Pursuant to section 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of \$1,500.

**Costs:** Pursuant to section 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 section 301(I)(iii) of the Act.

**In terms of section 318(5) of the Act, the Respondent will be named in this decision, which will be published on the Board's website.**

- [49] 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.

- [50] The Respondent apply to the Registrar for time to pay the fine and costs.

### **Addendum**

- [51] The Respondent sought and was granted an extension till 15 May 2024 to make submissions. He made a submission on 16 May 2024, and the Board proceeded to make a Final Decision.

- [52] On 27 May 2024, after the Final Decision had been made, the Respondent made a further submission. He again made reference to correspondence with a government minister, his marriage breakdown, his good character, and the impact that a penalty may have on him. He submitted:

*So ple withdraw the penalty.A warning is sufficient*

- [53] Whilst the submission was made after the closing date, the Board has reviewed it and has decided that no new mitigating factors have been raised and that the decision made should stand.

[54] It should also be noted that, notwithstanding the further time that has elapsed, the Respondent has still not provided a record of work.

### **Right of Appeal**

[55] The right to appeal Board decisions is provided for in section 330(2) of the Act<sup>iii</sup>.

Signed and dated this 4<sup>th</sup> day of July 2024



**M M Orange**  
Presiding Member

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#### <sup>i</sup> **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 318 Disciplinary Penalties**

- (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 1 type of action in subsection (1)(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).*
- (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.*

**iii 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.*