

Before the Building Practitioners Board

	BPB Complaint No. CB26387
Licensed Building Practitioner:	Edward Fitzmaurice (the Respondent)
Licence Number:	BP 120923
Licence(s) Held:	Carpentry

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 Type:	On the Papers
Draft Decision Date:	11 March 2024
Final Decision Date:	26 June 2024

Board Members Present:

Mrs J Clark, Barrister and Solicitor, Legal Member (Presiding)
Ms K Reynolds, Construction Manager
Mr G Anderson, LBP, Carpentry and Site 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.

Disciplinary Finding:

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

The Respondent is fined \$1,000 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.

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Summary of the Board’s Decision

[1] The Respondent failed to provide a record of work on completion of restricted building work. He is fined \$1,000 and ordered to pay costs of \$500. The disciplinary finding will be recorded on the public Register for a period of three years.

The Charges

[2] 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.¹

[3] In this matter, the disciplinary charges the Board resolved to further investigate² were that the Respondent may, in relation to building work at [OMITTED], 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

¹ 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.

² 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.

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

- [4] 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.
- [5] Ordinarily, the Board makes a decision having held a hearing.³ 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.⁴
- [6] 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. There may, however, have been further evidence in relation to the matter that the Board was not aware of. To that end, the decision was a draft Board 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. If the Respondent had requested an in-person hearing, or the Board directed that one was required, this decision would have been set aside, and a hearing would have been scheduled.
- [7] The Respondent made written submissions on 1,6,24 and 30 May and 5 June 2024. The Respondent stated –“*we do not wish to engage in any sort of step that is beyond On the Papers and this Final submission that we believe we are afforded in the process.*”
- [8] On that basis the Board has considered the Respondent’s submissions and made a final decision on the papers.

Evidence

- [9] 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.

³ Regulation 10 of the Complaints Regulations.

⁴ 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

⁵ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

Failure to Provide a Record of Work

- [10] 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.⁶
- [11] 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 work⁷ unless there is a good reason for it not to be provided.⁸

Did the Respondent carry out or supervise restricted building work

- [12] The Respondent was engaged to carry out and supervise building work on four new residential dwelling under four separate building consents. His work included foundation work, which is restricted building work because it forms part of the primary structure of a residential dwelling.⁹
- [13] The Complainant advised that this work was undertaken between January 2021 and November 2022. The Respondent did not dispute these dates.

Was the restricted building work complete

- [14] The Council inspections for all four dwellings in respect of the foundation work evidence it being completed variously from March 2022 to September 2022. The Respondent did not raise in his response that there was any outstanding restricted building work.
- [15] Accordingly, the Board finds that the Respondent's restricted building work was complete on all four dwellings.

Has the Respondent provided a record of work

- [16] The Respondent acknowledged receipt of the complaint from the Investigator on 25 October 2023.
- [17] On 16 November 2023, the Respondent provided a record of work for each of the dwellings to the Council and to the Investigator. They were all dated 26 October 2023.

Was there a good reason

- [18] The Complainant stated that he had asked the Respondent for the records of work by email on 26 May 2023. The Respondent denies receiving this email in May, but it was later copied to him on 26 October 2023.

⁶ Section 88(1) of the Act.

⁷ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

⁸ Section 317(1)(da)(ii) of the Act

⁹ Clause 5 of the Building (Definition of Restricted Building Work) Order 2011

[19] Text exchanges between the project manager and the Respondent in May 2023 are seeking PS3s from the Respondent. In an email dated 26 May 2023, the Respondent states-

"I am thinking that [the Complainant] should be making contact as the contracting party to request whatever information he needs in relation to our contract and to make sure we are clear as to what he needs and in relation to what site. ...Once that request is made we will decide if we need to seek advice from our solicitor to reply formally given our current situation where [the Complainant] hasn't fully paid for the works we have completed for him for multiple units."

[20] The Board also notes the Council's advice to the Respondent on 28 September 2023 –*"As per section 88 of the building act 2004 an LBP must provide a record of work to the owner and territorial authority, as mentioned in the email below [the Respondent] has done the work so legally needs to supply the document."*

[21] The Respondent also stated that he was unsure which entity to put on the record of work for each house as he had been asked to invoice multiple different entities for the work.

[22] The Respondent's reasons for failing to provide a record of work can be summarised as not being sure of who the owning entities were (for the purposes of recording this on the documents) and that no requests for records of work were made.

[23] Firstly, 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.

[24] Secondly, a year passed between the completion of the work and the conversations about providing the documentation in May 2023. Further time passed until the records of work were provided in November 2023, and this was only after the Respondent was aware of the complaint against him.

[25] There is no evidence that during that period he attempted to contact the Complainant to ascertain the correct ownership entities, and it is also noted that land ownership records are publicly available.

[26] Finally, the Respondent has also noted he was not paid. 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.

[27] In his further submission the Respondent repeated the reasons already discussed above. In addition, he stated –

a) He did not refuse to provide the record of work.

- b) The delay between completion of works and May 2023 (when the Complainant stated contact was made with the Respondent) was due to the arrangement with the Project Manager/ representative of the owner to leave paperwork to the end of the project.
- c) The further delay from May 2023 to the provision of the record of work was due to not receiving emails from the Project Manager, and not being aware that the record of work was being requested.

- [28] None of this factual matrix explains why the Respondent did not comply with his statutory obligation to provide the record of work on completion of the restricted building work, which was at the latest, September 2022. All licensed building practitioners should be well aware of their responsibility to provide the record of work on completion of their restricted building work and not when the Project Manager or property owner asks for it.
- [29] The Respondent also mentioned that he had legal advice *“to ensure [he] had the correct owner documented”*. The Board, as stated earlier, noted that there were ways to ascertain the entity such that this issue does not provide a justifiable reason for not providing the record of work.
- [30] Accordingly, the Board finds that there was no good reason for failing to provide the record of work.

Did the Respondent fail to provide a record of work

- [31] The Respondent’s restricted building work was complete by the end of September 2022, and records of work were not provided until November 2023. As such, he has failed to meet his statutory obligation to provide a record of work on completion of his restricted building work.

Board’s Decision

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

Penalty, Costs and Publication

- [33] Having found that one or more of the grounds in section 317 applies, the Board must, under section 318 of the Actⁱ, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [34] The matter was dealt with on the papers. The Board made an indicative order in its Draft Decision and gave the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.
- [35] The Respondent did not make specific submissions on penalty, costs or publication. He said that if the Board had progressed to a hearing he would have had *“no option but to resign from the LBP association. This also affects our livelihood in addition to*

the reputational damage done through the misuse of the LBP process with what we see as a vexatious complaint..."

- [36] It is not clear to the Board whether the Respondent considers the same consequences will ensue from an on the papers decision.
- [37] The Respondent further stated –“*We accordingly reiterate that we refuse to pay any fines or costs on account of time spent on this complaint...*” In this regard the Board points out to the Respondent that as a Licensed Building Practitioner the complaint and disciplinary process is one of the aspects of the regime that he has signed up to.

Penalty

- [38] The Board has the discretion to impose a range of penalties.ⁱⁱ 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.¹⁰ It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:¹¹
- (a) protection of the public and consideration of the purposes of the Act;¹²
 - (b) deterring other Licensed Building Practitioners from similar offending;¹³
 - (c) setting and enforcing a high standard of conduct for the industry;¹⁴
 - (d) penalising wrongdoing;¹⁵ and
 - (e) rehabilitation (where appropriate).¹⁶
- [39] 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 cases¹⁷ and applying the least restrictive penalty available for the particular offending.¹⁸ In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty¹⁹ that is consistent with other penalties imposed by the Board for comparable offending.²⁰

¹⁰ *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]

¹¹ Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

¹² Section 3 Building Act

¹³ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

¹⁴ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

¹⁵ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

¹⁶ *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

¹⁷ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

¹⁸ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

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

²⁰ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

- [40] 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.²¹
- [41] 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.
- [42] This complaint relates to the failure to provide four records of work. However, the Board has treated the matter as one offence, because they are in relation to the same project and all occurred within the same time frame.
- [43] There are no aggravating factors present. It is a mitigating factor that the Respondent did eventually provide the records of work to the Territorial Authority. As such, the Board reduces the penalty by \$500 to a fine of \$1,000.

Costs

- [44] 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.²²
- [45] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings²³. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case²⁴.
- [46] 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.
- [47] 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

- [48] 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,²⁵ 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.

²¹ 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.

²² *Collie v Nursing Council of New Zealand* [2001] NZAR 74

²³ *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

²⁴ *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.

²⁵ Refer sections 298, 299 and 301 of the Act

- [49] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.²⁶ 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.²⁷
- [50] 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

- [51] 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 \$1,000.

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.

- [52] 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.

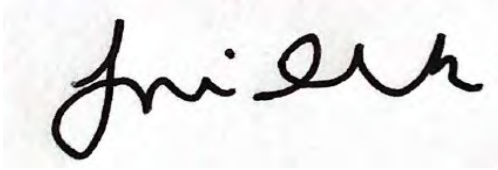
Right of Appeal

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

²⁶ Section 14 of the Act

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

Signed and dated this 11th day of July 2024.



Mrs J Clark
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 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*

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- (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.