

Before the Building Practitioners Board

	BPB Complaint No. CB25112
Licensed Building Practitioner:	David Evans (the Respondent)
Licence Number:	BP 118105
Licence(s) Held:	Design AOP 2

Penalty Decision of the Board under section 318 of the Building Act 2004

Complaint or Board Inquiry	Complaint
Hearing Location	Tauranga
Hearing Type:	In Person
Hearing Date:	15 August 2019
Substantive Decision Date:	2 September 2019
Penalty Decision Date:	17 September 2019

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.

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Introduction

- [1] This penalty decision arises out of the Board’s substantive decision in which it found that the Respondent had carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act).
- [2] 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.
- [3] In its substantive decision the Board set out its indicative position as regards penalty, costs and publication and invited the Respondent to make written submissions on those matters.
- [4] On 3 September 2019, the Board received the Respondent’s submissions. It has considered them and made the following decisions.

Penalty

- [5] The Board’s initial view was that a fine of \$2,500 was the appropriate penalty for the disciplinary offence.
- [6] The Respondent’ has not, in his submissions, accepted any wrongdoing or shown any remorse. He stated:

I would like to lodge my disappointment at the decision against me.

The drawings may not have been at a standard that the board want to see but I don’t believe that it would have resulted in a building that would not at the end have been compliant with the building code.

- [7] This runs contrary to the Respondent statements at the hearing that the matter had been a wake-up call and that his practice was now focused on improving and doing a better job. It would seem that the Respondent has retreated from this position which is disappointing.

- [8] The comments noted in paragraph [6] from the Respondent do go to the heart of the matter. What the Respondent considers to be an acceptable standard is at variance to that which is expected of licensed building practitioners. The aim of licensing, as was pointed out in the substantive decision, was to increase competency and quality.
- [9] The Respondent has also submitted that he tries:
- ... to provide a low cost service for clients who don't have large amounts of finance to get their projects started and this decision has meant that I cannot afford to help people any more like this.*
- [10] Whilst the approach is laudable low cost should not equate to low quality which was the case in the matter before the Board. All too often the Board deals with complaints where poor quality designs with substandard or confusing detailing and specifications has resulted in building compliance issues. It is important that designers get it right so that others in the chain do not inherit the consequences of their negligence or incompetence.
- [11] The Respondent also submitted that the fine imposed was not proportionate to the fee charged for the design. When setting a penalty, the Board is considering the seriousness of the conduct and matters of deterrence. The fee charged has some, but not much, relevance to those considerations. The penalty imposed was in line with similar fines imposed for similar conduct.
- [12] The Respondent has noted that, as a result of the Board's decision, he will no longer be employing staff as supervising them to an acceptable standard would be too time consuming. That is not a matter that the Board can take into account in considering penalty. It is a matter for the Respondent to consider.
- [13] Finally, the Respondent critiqued the Board's decision and its role in dealing with complaints suggesting that it should focus on education. Firstly, the Respondent appears to have misunderstood the Board's findings on negligence, especially with respect to Requests for Information. He is commended to read the decision more carefully and to learn from it. Secondly, the Ministry of Business Innovation and Employment, who administers the licensing regime, does carry out extensive communications with licensed building practitioners. It is noted, however, that licensed building practitioners have an obligation to keep themselves informed and to undertake professional development.
- [14] In reviewing the submissions, the Board has not identified any mitigating circumstances that have not already been taken into account noting that the fine was reduced by \$1,000. That discount now seems generous given the tone and content of the submissions received and the apparent withdrawal of the comments that the Respondent was going to look to improve processes within his design practice. Notwithstanding the Board will not increase the penalty. Rather it will affirm that which was notified in the Substantive decision.

Costs

- [15] The Board's initial view was that \$1,750 in costs was appropriate.
- [16] The Respondent has submitted that he was advised that costs for the hearing would not be imposed and that it was on this basis that he attended. The Board has no record of such an undertaking being made and it is not a practice that has ever been undertaken by the Board. The Board does take cooperation into account in setting costs but notes that the Respondent denied all wrongdoing when the complaint was initially put to him and as such a hearing was required. The Board also notes that the costs imposed in this matter were somewhat less than it normally sets for similar matter and that, as noted in the Substantive decision it is important that the profession is not left to carry the financial burden of disciplinary proceedings.

Publication of Name

- [17] The Board's initial view was there were no good reasons to further publish the matter.
- [18] Having considered the submissions received the Board has decided to uphold its initial view.

Section 318 Order

- [19] 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 \$2,500. |
| Costs: | Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$1,750 (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.**
- [20] 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

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

Signed and dated this 17th day of September 2019



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.*