

Before the Building Practitioners Board

	BPB Complaint No. CB26168
Licensed Building Practitioner:	Chay Goodwin (the Respondent)
Licence Number:	BP116206
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:	By Videoconference
Hearing and Draft Decision Date:	25 August 2023

Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)
Mrs J Clark, Barrister and Solicitor, Legal Member
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 \$750 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 Complainant engaged a builder to construct a separate 1 bedroom dwelling on their property. That builder contracted with the Respondent (as a passive house qualified builder and Licensed Building Practitioner) to supervise his restricted building work.
- [2] The project was delayed due to the supply of materials from overseas, and as a consequence, a different Licensed Building Practitioner was engaged in February 2022. The Respondent knew in late 2021 that his involvement in the project had come to an end.
- [3] The Complainant requested a record of work from the Respondent, and as at the date of the hearing, he had not supplied it to either the Complainant (the owner) or the Territorial Authority.
- [4] The question for the Board was whether the Respondent had failed to provide a record of work on the completion of restricted building work. There were two issues that had to be determined. Firstly, was the Respondent’s restricted building work complete, and, secondly, if it was, did he have a good reason not to provide the records of work.
- [5] In this instance, completion occurred in late 2021 when the Respondent’s engagement in the building work came to an end. The Board finds that the Respondent did fail to provide a record of work on completion of restricted building work.

- [6] The Respondent stated that he never refused to provide the record of work but that he had concerns about roofing work, which had been changed after he was no longer involved in the project. The Respondent was concerned to “sign off” the work that he considered had not been done to the Building Code or to the consented plans. The Board found that these were no good reasons for his failure to provide the record of work.
- [7] At the conclusion of the hearing, the Respondent was given a week to provide a record of work to the Board Officer and to the Complainant. He did so, and this was taken into account in setting the penalty.
- [8] The Board decided that the Respondent would be fined \$750 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.

The Charges

- [9] 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 The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed². 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.
- [10] In this matter, the disciplinary charges the Board resolved to further investigate³ were that the Respondent may, in relation to building work at [OMITTED], Levin, 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.
- [11] The Board⁴ initially dealt with the complaint by way of a Draft Decision. The Respondent disputed the findings. The Draft Decision was set aside, and a hearing was scheduled.

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

³ 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.

⁴ The Board is a statutory body established under section 341 of the Act.⁴ Its functions include receiving, investigating, and hearing complaints about, and to inquire into the conduct of, and discipline, licensed building practitioners in accordance with subpart 2 of the Act. It does not have any power to deal with or resolve disputes.

Failure to Provide a Record of Work

- [12] 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.⁵
- [13] 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 work⁶ unless there is a good reason for it not to be provided.⁷

Did the Respondent carry out or supervise restricted building work?

- [14] The building work was the construction of a stand-alone 1 bedroom 2 bathroom dwelling and, as such, included restricted building work⁸. The Respondent acknowledged that his role on the project was to supervise the restricted building work of an unlicensed builder.

Was the restricted building work complete?

- [15] There were delays in the supply of some materials from overseas. The new timeframes for the build project could not be accommodated by the original builder. As a consequence, a new builder was engaged by the Complainants in February 2022. The Respondent agreed that he knew in late 2021 that he was no longer required on the project.
- [16] As far as the Respondent's involvement in the restricted building work was concerned, completion had occurred in late 2021, when his engagement on the project came to an end. The completion date applies notwithstanding that all of the intended work had not been completed as the Respondent did not return and supervise any further restricted building work, and a record of work was due then.

Has the Respondent provided a record of work?

- [17] On 31 August 2023, after the conclusion of the hearing and at the Board's invitation, the Respondent provided a record of work dated 31 August 2023 to the Board Officer. He advised that he also gave it to the Complainant. Initially, only the final signed page of the record of work was provided. Upon further request, the Respondent provided a copy of the full record of work on 4 September 2023.

Was there a good reason for the Respondent to withhold his record of work?

- [18] The Respondent, in his written submission and at the hearing, expressed concern over "signing off" work completed by others after he had ceased involvement in the project. He was particularly concerned that the roofing contractors may have made changes to the roof after the Council inspection, which were not in compliance with the Building Code or the consented plans. The Respondent requested that he be able

⁵ Section 88(1) of the Act.

⁶ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

⁷ Section 317(1)(da)(ii) of the Act

⁸ This was the construction of the primary structure of a house and met the requirements of section 5 of the Building (Definition of Restricted Building Work) Order 2011.

to inspect this work before providing a record of work. The Complainant queried this – *“The roof has been completed and I wonder what you could inspect in the structure as it is totally hidden. I could send you detailed photos to enable a speedy sign off”*.

- [19] In correspondence with the Complainant, the Respondent had also referred to an unpaid steel invoice and the need to be paid “as per our contract” for providing the record of work. At the hearing, the Respondent said that he had no involvement in the contractual arrangements between the builder and the Complainant. He had a contract with the builder to be paid for supervision of the project. The Respondent gave evidence that the reason for not providing the record of work was not related to payment issues.
- [20] The Respondent has not understood what a record of work is for. It is not a statement as to the quality or compliance of the restricted building work. It is not any form of sign-off or undertaking. It is not a statement as to any person’s work other than that carried out by the Respondent himself. In this respect, it is to be noted that a record of work given by a licensed building practitioner does not, of itself, create any liability that would not otherwise exist.⁹
- [21] It is also important to note that a record of work provides an opportunity to not only record what was carried out or supervised but also what was not done, completed, or supervised. As such, if the Respondent had concerns about future liability for work that he had not supervised, he could have used the record of work to capture those concerns.
- [22] Further, the Respondent should note that the obligation arises on completion of the Licensed Building Practitioner’s restricted building work, whenever that may be and not at the end of the project.
- [23] On the evidence before it, the Board finds that the Respondent did not establish a good reason for the failure to provide the record of work on the completion of the restricted building work.

Did the Respondent fail to provide a record of work?

- [24] The Respondent has failed to provide a record of work, without good reason, upon completion of his restricted building work.

Board’s Decision

- [25] On the basis of the above facts, the Board finds that the Respondent did not provide a record of work on completion and that there were no good reasons for that failure. As such, he has committed the disciplinary offence.

⁹ Section 88(4) provides: *A record of work given under subsection (1) does not, of itself, —(a) create any liability in relation to any matter to which the record of work relates; or (b) give rise to any civil liability to the owner that would not otherwise exist if the licensed building practitioner were not required to provide the record of work.*

Penalty, Costs and Publication

- [26] 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.
- [27] The Respondent made submissions at the hearing as regards penalty, costs, and publication. He advised that he had spoken to a number of Building Consent authorities in the region and was trying to let the relevant people (Complainant, roofer and Council) know about his concerns over the roofing changes. He was motivated by this concern and had never said he would not provide a record of work. The Respondent acknowledged that he now appreciated he had made a mistake and should have provided a record of work for the restricted building work which he had supervised and have excluded from the record of work, the building work he was concerned about.
- [28] The Respondent was given the opportunity at the hearing to provide the record of work to the Complainant and the Board Officer within 7 days of the hearing. On 31 August 2023, he provided the signed last page of a record of work dated the same day. Upon request, he then provided a full copy of the record of work to the Board Officer and the Complainant on 4 September 2023. The Respondent was advised at the hearing that if he did this, it would be taken into account as a mitigating factor in setting penalty, and the Board has done so.

Penalty

- [29] 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

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

- [30] 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
- [31] 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
- [32] 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.
- [33] The Board has taken into account that the Respondent took the opportunity offered to him by the Board and has provided the record of work after the hearing. The Board also notes, in mitigation, that the Respondent was motivated by a genuine concern over the roofing work and acknowledged that he should have provided a record of work for the restricted building work he had supervised and excluded what he had not. As such, the Board has reduced the fine to \$750.

Costs

- [34] 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
- [35] 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.
- [36] 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.
- [37] On the basis that the Respondent was partially successful in this hearing in that he has had a reduction in penalty from that imposed in the draft decision, and as the

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

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.

hearing proceeded by way of videoconference, the Board has reduced the usual tariff.

- [38] 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

- [39] 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.
- [40] 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
- [41] Based on the above, the Board will not order further publication.

Section 318 Order

- [42] 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 \$750.

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, 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.

- [43] 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.

²⁵ Refer sections 298, 299 and 301 of the Act

²⁶ Section 14 of the Act

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

Right of Appeal

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

Signed and dated this 19th day of September 2023



M Orange
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.*