

Before the Building Practitioners Board

	BPB Complaint No. CB26148
Licensed Building Practitioner:	Clint Hannah (the Respondent)
Licence Number:	BP137906
Licence(s) Held:	Carpentry

Final 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:	31 March 2023
Final Decision Date:	6 June 2023
Board Members Present:	
	Mr M Orange, Chair, Barrister (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 Final Decision

- [1] A complaint was made about the failure to provide a record of work on completion of restricted building work. The Respondent claimed he had not been asked for one and stated he had not been paid. Records of work are statutory documents that cannot be withheld for contractual reasons, and they do not have to be demanded, they must simply be provided on completion. As that did not occur, the Board found that 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], Auckland, have failed, without good reason, in respect of a building consent that relates to restricted

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.

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

- [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 has decided that a formal hearing is not necessary. The Board considers that there is sufficient evidence before it to allow it to make a decision on the papers. There may, however, be further evidence in relation to the matter that the Board was not aware of. To that end, this decision is a draft Board decision. The Respondent will be 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 requests an in-person hearing, or the Board directs that one is required, this decision will be set aside a hearing will be scheduled.

Evidence

- [7] 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.

Failure to Provide a Record of Work

- [8] 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
- [9] 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
- [10] The Respondent was engaged to provide services for the construction of a new residential dwelling. His building work, which included restricted building work, came to

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*

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

an end in October 2021, and a Code Compliance Certificate was issued for the dwelling in November 2022. The Respondent has not provided a record of work for his restricted building work. The Complainant set out that numerous attempts had been made to obtain one but that no response had been received.

- [11] The only response to the complaint received from the Respondent about the allegation was that the Respondent had not been asked for a record of work and that there was a payment dispute.
- [12] The Territorial Authority confirmed that it did not have a record of work on file from the Respondent.

Did the Respondent fail to provide a record of work on completion?

- [13] The restricted building work was completed in October 2021. That was when a record of work was due. One has not been provided. Given those factors, the Board finds that the Respondent failed to provide a record of work on the completion of restricted building work.

Was there a good reason?

- [14] There was an ongoing 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.
- [15] The Respondent should also 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.

Further Evidence and Submissions Received

- [16] Following the Board issuing a Draft Decision, it received submissions from both the Complainant and the Respondent.
- [17] The Complainant noted that incorrect contact details may have been used when seeking a record of work from the Respondent. Whilst that may have been the case, the record of work should have been provided on completion. As noted above, a Licensed Building Practitioner must issue one on completion and not wait for a request or demand for one.
- [18] The Respondent's submission noted that the matter had been sorted. He asked if he still had to pay a fine. In this respect, it is noted that but for his failure to provide a record of work when he should have (on completion), the Board would not have had to deal with this matter. The provision has come well after the fact and only after completion. As such, it does not change the Board's decision, but the late provision can be taken into consideration as mitigation.

Board's Decision

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

Penalty, Costs and Publication

[20] 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.

[21] The matter was dealt with on the papers. Included was information relevant to penalty, costs and publication, and the Board has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

[22] 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.⁹ It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:¹⁰

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

[23] 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 cases¹⁶ and applying the least restrictive penalty available for the particular offending.¹⁷ In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty¹⁸ that is consistent with other penalties imposed by the Board for comparable offending.¹⁹

⁹ *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]

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

¹¹ Section 3 Building Act

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

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

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

¹⁵ *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

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

¹⁷ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

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

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

- [24] 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.²⁰
- [25] 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.
- [26] In the Draft Decision, the Board set the fine at \$1,500. It notes that the submissions received indicate that, if the Complainant had used a correct contact address, the matter may have been sorted without the need for a complaint. As noted, this does not constitute a defence or good reason as the requirement to provide a record of work is on completion, not on request. Nevertheless, this will be taken into account, and the fine will be reduced to \$1,000.

Costs

- [27] 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.²¹
- [28] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings²². The starting point can then be adjusted up or down, having regard to the particular circumstances of each case²³.
- [29] 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.
- [30] 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

- [31] 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 Act²⁴ and he will be named in this decision. The Board is also able, under section 318(5) of the Act, to order further publication.
- [32] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.²⁵ Further, as a general principle, publication may be required where the Board perceives a need for the public and/or the profession to

²⁰ 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.

²¹ *Collie v Nursing Council of New Zealand* [2001] NZAR 74

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

²³ *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.

²⁴ Refer sections 298, 299 and 301 of the Act

²⁵ Section 14 of the Act

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.²⁶

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

Section 318 Order

[34] 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, 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.

[35] 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

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

Signed and dated this 12th day of June 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*

²⁶ Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

- (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.