

Before the Building Practitioners Board

	BPB Complaint No. CB 24485
Licensed Building Practitioner:	Gary Healy (the Respondent)
Licence Number:	BP 122928
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 Location	Christchurch
Hearing Type:	On the Papers
Hearing Date:	28 February 2019
Decision Date:	26 March 2019

Board Members Present:

Richard Merrifield, LBP, Carpentry Site AOP 2 (Presiding)
Mel Orange, Legal Member
Bob Monteith, LBP Carpentry and Site AOP 2
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.

Board Decision:

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

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Introduction

[1] The hearing resulted from a complaint into the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations¹ to hold a hearing in relation to building work at [Omitted]. The alleged disciplinary offence the Board resolved to investigate was that the Respondent failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) 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) (s 317(1)(da)(ii) of the Act).

Function of Disciplinary Action

[2] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*² and in New Zealand in *Dentice v Valuers Registration Board*³.

[3] Disciplinary action under the Act is not designed to redress issues or disputes between a complainant and a respondent. In *McLanahan and Tan v The New Zealand Registered Architects Board*⁴ Collins J. noted that:

¹ The resolution was made following the Board’s consideration of a report prepared by the Registrar in accordance with the Complaints Regulations.

² *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

³ [1992] 1 NZLR 720 at p 724

⁴ [2016] HZHC 2276 at para 164

“... the disciplinary process does not exist to appease those who are dissatisfied The disciplinary process ... exists to ensure professional standards are maintained in order to protect clients, the profession and the broader community.”

- [4] The Board can only inquire into “the conduct of a licensed building practitioner” with respect to the grounds for discipline set out in section 317 of the Act. It does not have any jurisdiction over contractual matters.

Evidence

- [5] 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.
- [6] The procedure the Board uses is inquisitorial, not adversarial. The Board examines the documentary evidence available to it prior to the hearing. The hearing is an opportunity for the Board, as the inquirer and decision maker, to call and question witnesses to further investigate aspects of the evidence and to take further evidence from key witnesses.
- [7] In this case the Board decided that no further evidence was required. If a Respondent provides further evidence or submissions the Board takes them into account. If they request an in-person hearing this is given consideration.
- [8] The Respondent was engaged to carry out building work including restricted building work on an alteration to an existing dwelling that was carried out under a building consent. The Respondent carried out the work between November 2014 and November 2015.
- [9] The Complainant set out that on 11 January 2018 a record of work was requested from the Respondent. A further request was made on 28 May 2018. A record of work was not provided.
- [10] The Building Consent Authority that issued the building consent for the alteration advised the Complainant that, notwithstanding the lack of a record of work from the Respondent, they would commence the code compliance certificate process on the basis that the Complainant would lodge a complaint about the Respondent with the Board. The Rotorua Lakes Council, the Building Consent Authority also lodged a complaint about the Respondent’s failure to provide a record of work.
- [11] The Council also provided further evidence including that:
- (a) the Respondent and his lawyer had visited the Council on 25 February 2016 to advise that he was no longer the Licensed Building Practitioner for the job as there was a payment dispute; and

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

- (b) the Respondent was spoken to at a building site on 12 March 2018 by a Building Inspector who told the Respondent that he needed to provide a record of work. The Respondent reportedly stated he did not want to provide one to the owner.
- [12] The Respondent provided a response by way of a phone call to the investigator who completed the Registrar's Report. He noted he had been out of the country, the email address being used was incorrect and that he believed all work had been signed off and that there was nothing more required of him. He stated he had been given advice to this effect by a building inspector involved with the job. He further stated a full response would be sent but none was received.
- [13] Prior to the hearing the Respondent filed submissions by way of Legal Counsel. Counsel stated that the Respondent had not received the emails sent to him by the Complainant or the Territorial Authority as they were sent to an email address that was not his. The first time he became aware of the matter was on 6 September 2018 when he was contacted to have the complaint documentation served on him.
- [14] As regards the evidence that on 12 March 2018 the Council Inspector saw Mr Healy on another project and requested the record of building work Counsel stated, on behalf of the Respondent, that the Respondent did not advise the Council Inspector that he simply did not want to provide this to the owner. The explanation he put forward was that the Respondent had explained to the Council Inspector that the parties had entered into a full and final settlement in relation to the property (the full and final settlement), that another LBP was taking over and completing the work, and as he understood he therefore did not need to, or wanted to, provide a record of work. The submissions did confirm that the Respondent advised the Council on 25 February 2016 that he was no longer working on the project. Counsel submitted that all work had been signed off to that stage.
- [15] Counsel submitted that whilst the Respondent did carry out restricted building work he did not have to provide a record of work as there was a dispute which was settled on a full final basis which provided the Respondent was to carry out no further work on the project and that another licensed building practitioner completed the work and provided a record of work to the owner and the local authority for all restricted work carried out, including the Respondent's restricted building work. Counsel further submitted that as a code compliance certificate had been issued and as the Respondent was operating under the understanding from the settlement that he was not required to provide a record of work for the work he carried out the matter was outside of the Board's jurisdiction as it was a contractual dispute.
- [16] Counsel noted previous Board decisions which outline licensed building practitioner obligations as regards records of work and accepted that there was an obligation to provide a record of work even though all of the intended restricted building work had not been completed. He submitted that both parties to the contract (who were legally represented) were labouring under a misunderstanding that the Respondent

was not required to provide a record of work, and that the new practitioner could, and would, do so, relieving him of that obligation.

- [17] Counsel further submitted that had the owner and the Council's emails been sent to the Respondent's correct mail, or he had he become aware of those requests sooner, or had he become aware sooner that he was required to provide a record of work (irrespective of the new practitioner doing so), he would have complied. He noted a record of work has now been provided.
- [18] Counsel for the Respondent also submitted that the matter should not have proceeded to a hearing under Regulation 9(c) in that the complaint was frivolous, vexatious and/or not in good faith given the settlement reached, that the owner took no proper steps to ensure the Respondent was aware of their request for a record of work, and of some importance, given the owner obtained a code compliance certificate in the absence of a record of work from the Respondent. On that basis it was that submitted the complaint cannot be genuine or in good faith.

Board's Conclusion and Reasoning

- [19] The Board has decided that the Respondent **has** failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) 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) (s 317(1)(da)(ii) of the Act) and should be disciplined.
- [20] Counsel for the Respondent made various submissions as to why the disciplinary offence should not be upheld. They were that:
- (a) the Board did not have jurisdiction as the matter was a contractual dispute that had been settled on a full and final basis;
 - (b) the matter should not have proceeded to a hearing under Regulation 9(c); and
 - (c) the Respondent was operating under a misunderstanding and had substantially complied with his obligations once he was informed that a record of work was required.
- [21] Dealing with the first submission, as noted in paragraph [4], the Board does not have any jurisdiction over contractual matters. Often, however, there is a degree of crossover between the matters that come within section 317 of the Act and contractual issues. Fundamentally, however, if a matter comes within section 317 of the Act then the Board has jurisdiction. Moreover, as regards records of work, they are not negotiable terms of a contract. They are statutorily required documents. The parties to a contract cannot contract out of their provision. To allow otherwise would defeat the purposes of the legislative provision which is to create a

comprehensive list of licensed building practitioners who carried out or supervised restricted building work and detail of the associated restricted building work. As such the Board finds that it does have jurisdiction.

- [22] Turing to the second submission, that the complaint is frivolous, vexatious or not made in good faith the board notes that frivolous complaints are those that do not have any serious purpose or value. Vexatious are those which are improperly motivated such as where they lack merit or are instituted primarily to distress, annoy or embarrass rather than to obtain the remedy sought. Complaints that are not made in good faith are those which lack honesty or sincerity.
- [23] There may, in any complaint made about a licensed building practitioner, be elements of the above or of it having those effects. Of itself that is not, however, enough to make the complaint frivolous, vexatious, or not made in good faith. The Board considers the complaint needs to have been made predominately for those purposes and to lack value or merit. This is not the case with the matters before the Board.
- [24] Finally, dealing with the record of work itself 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. Failing to provide a record of work is a ground for discipline under section 317(1)(da)(ii) of the Act. In order to find that ground for discipline proven, the Board need only consider whether the Respondent had “good reason” for not providing a record of work on “completion” of the restricted building work.
- [25] The Board discussed issues with regard to records of work in its decision C2-01170⁷ and gave guidelines to the profession as to who must provide a record of work, what a record of work is for, when it is to be provided, the level of detail that must be provided, who a record of work must be provided to and what might constitute a good reason for not providing a record of work. Counsel for the Respondent acknowledged that decision in his submissions.
- [26] As noted in C2-1170 the starting point with a record of work is that it is a mandatory statutory requirement whenever restricted building work under a building consent is carried out or supervised by a licensed building practitioner (other than as an owner-builder). Each and every licensed building practitioner who carries out restricted building work must provide a record of work.
- [27] The statutory provisions do not stipulate a timeframe for the licenced person to provide a record of work. The provisions in section 88(1) simply states “on completion of the restricted building work ...”. In most situations issues with the provision of a record of work do not arise. The work progresses and records of work are provided in a timely fashion.

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

⁷ *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

- [28] In this instance the Respondent did not carry out any further restricted building work after November 2015 and he formally notified the Building Consent Authority that he was not the Licensed Building Practitioner in February 2016. At that point in time, for the purposes of his obligations to provide a record of work, the completion had occurred, and a record of work was due. One was not provided. On that basis the Board finds that the record of work was not provided on completion as required and the disciplinary offence has been committed. In making this finding the Board has not accepted the submissions as regards the Respondent not receiving the requests for a record of work. The requirement is on the licensed building practitioner to provide a record of work, not on the owner or territorial authority to demand one. They must act of their own accord and not wait for others to remind them of their obligations.
- [29] Section 317(1)(da)(ii) of the Act provides for a defence of the licenced building practitioner having a “good reason” for failing to provide a record of work. If they can, on the balance of probabilities, prove to the Board that one exists then it is open to the Board to find that a disciplinary offence has not been committed. Each case will be decided by the Board on its own merits but the threshold for a good reason is high.
- [30] The Respondent has stated he thought everything was signed off and that another licensed building practitioner would be completing a record of work which included his work. Firstly, sign off in terms of compliance with the building code and building consent and the requirement to provide a record of work are not the same. Sign off does not obviate the requirement to provide a record of work. Secondly the requirement is for each and every licensed building practitioner to complete a record of work. One licensed person cannot provide a record of work for the restricted building work carried out or supervised by another. As noted above to allow otherwise would result in an inaccurate record of who did or supervised what.
- [31] Counsel has submitted that the Respondent was operating under a misunderstanding. Whilst that may have been the case it does not excuse the conduct. It does, however, go to mitigation.
- [32] It did appear to the Board that the real reason for the non-provision was a payment dispute. This is apparent from the Council notes about why the Respondent stopped working on the project and the comments to a building inspector that the Respondent did not want to provide a record of work to the owners. The Respondent has, via Counsel, refuted this but the Board accepts the Council Inspectors evidence of the events.
- [33] The Board therefore finds that there were no good reasons and the disciplinary offence has been committed.

Penalty, Costs and Publication

- [34] 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.
- [35] 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

- [36] The purpose of professional discipline is to uphold the integrity of the profession; the focus is not punishment, but the enforcement of a high standard of propriety and professional conduct. The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*⁸ commented on the role of "punishment" in giving penalty orders stating that punitive orders are, at times, necessary to provide a deterrent and to uphold professional standards. The Court noted:

[28] I therefore propose to proceed on the basis that, although the protection of the public is a very important consideration, nevertheless the issues of punishment and deterrence must also be taken into account in selecting the appropriate penalty to be imposed.

- [37] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*⁹ the court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act they have the advantage of simplicity and transparency. The court recommended adopting a starting point for penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.
- [38] Counsel has submitted that the any penalty or sanction, if the charge is upheld, should be minimal and that the non-compliance is at the lower end of non-compliance as a result of a misunderstanding and that he had no knowledge of the owner's request.
- [39] 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. The Board does, however, note that at the time the disciplinary offending was committed the board was being more lenient with regard to record of work matters given that the requirement to provide them was relatively new. On this basis the Board has decided that it will censure the Respondent. A censure is a formal expression of disapproval and is a penalty consistent with those being imposed in 2015.

⁸ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

⁹ 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

Costs

- [40] Under section 318(4) the Board may require the Respondent “to pay the costs and expenses of, and incidental to, the inquiry by the Board.”
- [41] The Respondent should note that the High Court has held that 50% of total reasonable costs should be taken as a starting point in disciplinary proceedings and that the percentage can then be adjusted up or down having regard to the particular circumstances of each case¹⁰.
- [42] In *Collie v Nursing Council of New Zealand*¹¹ where the order for costs in the tribunal was 50% of actual costs and expenses the High Court noted that:
- But for an order for costs made against a practitioner, the profession is left to carry the financial burden of the disciplinary proceedings, and as a matter of policy that is not appropriate.*
- [43] The Board notes the matter was dealt with on the papers. Ordinarily costs for a hearing would be in the order of \$1,000 but the Board has reduced this to \$500 being an amount the Board considers is reasonable for the Respondent to pay toward the costs and expenses of, and incidental to, the inquiry by the Board.

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 Act¹². The Board is also able, under section 318(5) of the Act, to order publication over and above the public register:
- 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.*
- [45] As a general principle such further public notification 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. This is in addition to the Respondent being named in this decision.
- [46] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990¹³. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction¹⁴. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal

¹⁰ *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.

¹¹ [2001] NZAR 74

¹² Refer sections 298, 299 and 301 of the Act

¹³ Section 14 of the Act

¹⁴ Refer sections 200 and 202 of the Criminal Procedure Act

Procedure Act do not apply but can be instructive¹⁵. The High Court provided guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*¹⁶.

[47] The courts have also stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published in the public interest¹⁷. It is, however, common practice in disciplinary proceedings to protect the names of other persons involved as naming them does not assist the public interest.

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

Section 318 Order

[49] 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 censured.

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(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.

[50] 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.

Submissions on Penalty, Costs and Publication

[51] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **17 April 2019**. The submissions should focus on mitigating matters as they relate to the penalty, costs and publication orders. If no submissions are received then this decision will become final. If submissions are received then the Board will meet and consider those submissions prior to coming to a final decision on penalty, costs and publication.

[52] In calling for submissions on penalty, costs and mitigation the Board is not inviting the Respondent to offer new evidence or to express an opinion on the findings set out in this decision. If the Respondent disagrees with the Board's findings of fact and

¹⁵ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

¹⁶ *ibid*

¹⁷ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

and/or its decision that the Respondent has committed a disciplinary offence the Respondent can appeal the Board's decision.

Right of Appeal

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

Signed and dated this 26th day of March 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.*