

Before the Building Practitioners Board

	BPB Complaint No. CB25556
Licensed Building Practitioner:	Jason King (the Respondent)
Licence Number:	BP 110704
Licence(s) Held:	Roofing – Liquid Membrane Roof, Torch on Roof Membrane

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

Complaint or Board Inquiry	Complaint
Hearing Location	Whangarei
Hearing Type:	In Person
Hearing Date:	30 June 2021
Substantive Decision Date:	14 July 2021
Penalty Decision Date:	8 August 2021

Board Members Present:

Mr C Preston, Chair (Presiding)
Mr D Fabish, LBP, Carpentry and Site AOP 2
Mr B Monteith, LBP, Carpentry and Site AOP 2
Mr R Shao, LBP, Carpentry and Site AOP 1

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.

Contents

Summary of the Board’s Penalty Decision	2
The Charges	2
Penalty	3
Costs	3
Publication of Name	4
Section 318 Order	5
Right of Appeal	5

Summary of the Board’s Penalty Decision

[1] The Respondent is fined \$1,500 and ordered to pay costs of \$500.

The Charges

[2] This penalty decision arises out of the Board’s substantive decision in which it found that the Respondent had 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).

[3] 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.

[4] 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.

[5] On 27 August 2021, the Board received the Respondent’s submissions. It has considered them and made the following decisions.

[6] The Respondent’s submissions did not address matters of penalty, costs and publication other than to state:

I think the punishment of \$2,000 is excessive as I was only trying to protect myself from a difficult client and my name on the bad list is uncalled for.

[7] The Respondent’s submissions, in the main, focused on the reasons why he disagreed with the Board’s decision. In this respect, the Respondent is reminded that he can appeal the Board’s decision if he disagrees with its findings. The Board also notes that, in calling for submissions on penalty, costs and publication that it was not inviting the Respondent to relitigate the matter. Notwithstanding, the Board has reviewed the submissions made and has decided that there are no reasons why it should review or change its Substantive Decision. In essence, the matter raised in the

Respondent's submissions were considered and taken into consideration when the Board decided that the Respondent had breached section 317(1)(da)(ii) of the Act.

- [8] The facts remain that the Respondent's first period of restricted building work was completed on or around 2 June 2019. His first record of work was provided on or about 14 February 2020. It was outside of the time frames required for provision. Remedial work was carried out on 9 June 2020. It required the issue of an additional record of work. one was not. As of 23 June 2020, the territorial authority did not have any records of work on file. A record of work has to be provided by the Licensed Building Practitioner to both the owner and the territorial authority, not one or the other. The record of work for remedial restricted building work was then provided on or after 28 October 2020. Again this was a long time after completion of the remedial work and not in accordance with the requirement to provide it "on completion".
- [9] One new issue the Respondent raised was the provision of the record of work to the builder, which he stated is the "usual routine". Whilst it may be common practice in some quarters of the building industry for records of work to be provided to main contractors, it is a practice that carries with it the risk that the record of work will not be passed on to the required recipients, the owner and the territorial authority. This can occur for a variety of reasons, including as a result of a contractual dispute. If the main contractor does not pass a record of work on to the final recipients, it is the author of the record of work that will be held accountable by the Board, not the person or entity that they entrusted to fulfil their statutory obligation. It is also to be noted whilst, at times, a Respondent may not immediately know who the owner is, there are ways and means of ascertaining such details¹ and that there should be no impediments to a record of work being provided to a territorial authority.

Penalty

- [10] The Board's initial view was that a \$1,500 fine was the appropriate penalty for the disciplinary offence.
- [11] The only submission made was that the penalty was excessive. The proposed fine was in line with fines the Board has imposed for similar offences. It is an amount that the Board hopes will deter others from engaging in similar conduct. There are no mitigating factors. The Board sees no reason to change the fine, which is at \$1,500.

Costs

- [12] The Board's initial view was that \$500 in costs was appropriate.
- [13] As with penalty the Respondent has not provided a submission other than the amount being, combined with the fine, excessive. On the contrary, given that a full hearing was held, the amount is modest. The Board imposed costs as if the matter was dealt with on the papers, and the amount is far less than the actual costs that have been incurred. The Board finds that it is a reasonable amount.

¹ Ownership details of land are available on public registers.

Publication of Name

- [14] The Board's initial view was there were no good reasons to further publish the matter. This remains the case.
- [15] The Respondent has indicated that he does not consider it fair for the disciplinary offending to be recorded on the Register of Licensed Building Practitioners in accordance with section 301(1)(l)(iii) of the Act. In this respect, the Board does not have any discretion. The Register is established by section 298 of the Act, and section 299 sets out its purposes which are:

The purpose of the Register is—

- (a) *to enable members of the public to—*
- (i) *determine whether a person is a licensed building practitioner and, if so, the status and relevant history of the person's [licensing]; and*
 - (ii) *choose a suitable building practitioner from a list of licensed building practitioners; and*
 - (iii) *know how to contact the building practitioner; and*
 - (iv) *know which licensed building practitioners have been disciplined within the last 3 years; and*
- (b) *to facilitate the administrative, disciplinary, and other functions of the Board and the Registrar under this Act.*

- [16] Section 301 of the Act sets out the matters to be contained in the Register. The section uses the phrasing "must", which makes the provisions mandatory, not discretionary:

- (1) *The Register must contain all of the following information, to the extent that the information is relevant, for each licensed building practitioner whose name is entered in the Register:*
- (l) *information about the status and history of the person's [licensing], particularly—*
 - (i) *the class [in which the person is licensed]; and*
 - (ii) *the date on which the person's name was entered in the Register; and*
 - (iii) *any action taken under section 318 on a disciplinary matter in respect of the person in the last 3 years:*

- [17] The final provision, action taken under section 318, is the reason why detail on the disciplinary offence must be contained in the Register.

- [18] Taking the above provisions into consideration, it is clear that one of the purposes of the Register is to allow an informed consumer to choose a licensed building practitioner. Providing information as regards disciplinary action helps to facilitate this. It is also clear that the Board has no discretion as regards information on disciplinary action being retained on the Register.

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 \$1,500.

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(l)(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 Actⁱ.

Signed and dated this 5th day of October 2021



Mr C Preston

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:

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- (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.