Before the Building Practitioners Board

	BPB Complaint No. CB26021
Licensed Building Practitioner:	Ajitash Kumar (the Respondent)
Licence Number:	BP 128312
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:	On the Papers
Hearing and Draft Decision Date:	6 October 2022
Final Decision Date:	2 December 2022

Board Members Present:

Mr C Preston, Chair (Presiding)
Mr D Fabish, LBP, Carpentry and Site AoP 2
Ms 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.

And

The Board **will not** proceed with the allegations under section 317(1)(b) and (d) of the Act on the basis that regulation 9 of the Complaints Regulation applies and **will not** hold a hearing in respect of those allegations.

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Summary of the Board's Decision

[1] The Respondent failed to provide a record of work on completion of restricted building work. He is fined $1,500 and ordered to pay costs of $500. The disciplinary outcome will be recorded on the Register of Licensed Building Practitioners for a period of three years.

The Board

[2] The Board is a statutory body established under the Building Act.[1] 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.

The Charges

[3] On 6 October 2022, the Board received a Registrar's Report in respect of a complaint about the conduct of the Respondent.

[4] Under regulation 10 of the Complaints Regulations, the Board must, on receipt of the Registrar's Report, decide whether to proceed no further with the complaint because regulation 9 of the Complaints Regulations applies.

[1] Section 341 of the Act.

[5] Having received the report, the Board decided that regulation 9 applied to aspects of the complaint but not to all of the allegations.

Summary of the Board's Regulation 9 Decision

[6] The Board will not proceed with the complaint in relation to the allegations under sections 317(1)(b) or(d) of the Act and will not hold a hearing in respect of them.

Regulation 9 Decisions

[7] The complaint to the Board also contained allegations that the Respondent had:

(a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act)

(b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act)

(c) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act).

[8] With regard to the allegation of carrying out or supervising building work in a negligent or incompetent manner, the Board decided that Regulation 9(f)(ii) of the Complaints Regulations applied. It provides:

> ***Complaint not warranting further investigation***
> *A complaint does not warrant further investigation if—*
>
> *(f) the investigation of it is—*
> *(ii) unnecessary;*

[9] In considering whether the investigation of a complaint is necessary, the Board is required to consider the directions of the courts as regards the threshold for matters to be dealt with as a disciplinary matter. In *Collie v Nursing Council of New Zealand*[2] , Justice Gendall stated, as regards the threshold for disciplinary matters:

> *[21] Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness.*

[10] Again, in *Pillai v Messiter (No 2),*[3] the Court of Appeal stated:

> *… the statutory test is not met by mere professional incompetence or by deficiencies in the practice of the profession. Something more is required. It includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse.*

[2] [2001] NZAR 74
[3] (1989) 16 NSWLR 197 (CA) at 200

[11] In this instance the Board notes that the building work which was the subject of the complaint was minor in nature and had passed Council inspections.

[12] It is on the basis of the above matters and the facts as presented in the complaint and response that the Board has decided that further investigation is unnecessary, and the Board will not proceed with the allegations of negligence or incompetence.

[13] With regard to the allegation of carrying out or supervising building work contrary to a building consent and of conduct which brings the Licensed Building Practitioner's regime into disrepute, the Board decided that regulation 9(e) of the Complaints Regulations applied. It provides:

> ***Complaint not warranting further investigation***
> *A complaint does not warrant further investigation if—*
>
> *(e) there is insufficient evidence to warrant the investigation of the complaint;*

[14] The Complainant stated that the Respondent did not remove existing flashings and has not installed the cladding as per the manufacturer's requirements. He further alleged that the Respondent left the property without informing them, left it in an untidy state and was rude and abusive.

[15] The Board noted that these allegations were not supported by any corroborating evidence. On this basis, the Board decided that regulation 9(e) applies, there is insufficient evidence to warrant further investigation, and, therefore, the Board will not proceed with the allegations of building work undertaken contrary to a building consent and disreputable conduct.

<u>Disciplinary Offence to be Investigated</u>

[16] On the basis of the Registrar's Report, the Respondent's conduct that the Board resolved to investigate was 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).

[17] Under regulation 10, the Board is required to hold a hearing in respect of that matter.

Draft Decision Process

[18] 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 is necessary prior to it making a decision. In this respect, the Act provides that the Board may regulate its own procedures[4]. It has what is described as a summary jurisdiction in that the Board has a degree of flexibility in how it deals with matters; it retains an inherent jurisdiction beyond that set out in the enabling legislation[5]. As such, it may 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.

[19] 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.

[20] The Board does, however, note that there may be further evidence in the possession of persons involved in the matter. To that end, this decision is a draft Board decision. The Respondent will be provided with an opportunity to comment on the Board's draft findings and to present further evidence prior to the Board making a final decision. If the Board directs or the Respondent requests an in-person hearing, then one will be scheduled.

Evidence

[21] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed[6]. Under section 322 of the Act, the Board has relaxed rules of evidence that allow it to receive evidence that may not be admissible in a court of law.

[22] The Respondent was engaged to carry out building work on a garage conversion into a bedroom and ensuite bathroom in New Lynn, Auckland under a building consent. The building work included restricted building work for which a record of work must be provided on completion. On the Complainant's evidence, the Respondent's building work started on or about 4 December 2021 and came to an end on or about 21 December 2021. The Respondent agreed that he was not allowed back on the property after 21 December 2021 (Document 2.2.5, Page 57 of the Board's file).

[23] The Complainant attempted to contact the Respondent by text messages, phone calls and emails dated January and April 2022. A copy of the Council Property file was obtained on 13 July 2022, and it did not contain a record of work from the Respondent.

[4] Clause 27 of Schedule 3

[5] *Castles v Standards Committee No.* [2013] NZHC 2289, *Orlov v National Standards Committee 1* [2013] NZHC 1955

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

[24] The Respondent provided a response to the complaint. With respect to the record of work allegation, he confirmed he had completed restricted building work. He stated that the work was unfinished and that this was why he did not provide a record of work.

Conclusion and Reasoning

[25] 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.

[26] 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 work[7].

[27] 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.

[28] The Board discussed issues with regard to records of work in its decision C2-01170[8] 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.

[29] 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.

[30] 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 …". As was noted by Justice Muir in *Ministry of Business Innovation and Employment v Bell*[9] "… the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work".

[7] Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011
[8] *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015
[9] [2018] NZHC 1662 at para 50

[31] As to when completion will have occurred is a question of fact in each case. 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.

[32] The Respondent's involvement with the building work ended, on the Complainant's evidence, near the end of December 2021 (and by the Respondent's own evidence he was removed from the project at that time). Completion, as regards the Respondent, occurred at that point in time as he would not be returning to carry out any further restricted building work. Completion, therefore, occurred near the end of December 2021. A record of work was still not provided to the Council as of 13 July 2022. On this basis, the Board finds that the record of work was not provided on completion as required, and the disciplinary offence has been committed.

[33] 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.

[34] In this instance, the Respondent did not put forward any reason for not providing the record of work other than to state that one *"can be issued"* in respect of framing works but that other *"works are still pending".*

[35] The Board finds that no "good reason" for failing to provide a record of work has been established.

Decision on Penalty, Costs and Publication

[36] Having found that one or more of the grounds in section 317 applies, the Board must, under section 318 of the Act[i], consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.

[37] 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.

<u>Penalty</u>

[38] 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*[10] commented on the role of "punishment" in giving penalty orders stating that punitive orders are, at times,

[10] HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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.*

[39] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment,*[11] 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 a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.

[40] 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.

[41] The Respondent has previously been disciplined by the Board in relation to record of work matters[12]. On those matters, he was fined $1,500. His subsequent offending is an aggravating factor. Notwithstanding, the Board has decided that it will not depart from the starting point. The fine is set at $1,500.

Costs

[42] 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."

[43] 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 case[13].

[44] In *Collie v Nursing Council of New Zealand,*[14] 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.*

[45] The Board notes the matter was dealt with on the papers. There has, however, been costs incurred investigating the matter, producing the Registrar's Report and in the Board making its decision. The costs have been less than those that would

[11] 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288
[12] Complaint matters C2-01557 and C2-01567 – on the papers decisions of 22 August 2017.
[13] *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.
[14] [2001] NZAR 74

have been incurred had a full hearing been held. As such, the Board will order that costs of $500 be paid by the Respondent. The Board considers that this is a reasonable sum for the Respondent to pay toward the costs and expenses of, and incidental to, the inquiry by the Board.

Publication

[46] 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[15]. 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.*

[47] 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.

[48] Within New Zealand, there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990[16]. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction[17]. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive[18]. 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*[19].

[49] 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 interest[20]. 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.

[50] Based on the above, the Board Will Not order further publication.

[15] Refer sections 298, 299 and 301 of the Act
[16] Section 14 of the Act
[17] Refer sections 200 and 202 of the Criminal Procedure Act
[18] *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350
[19] ibid
[20] Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

Section 318 Order

[51] 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.

[52] 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 Draft Decision

[53] The Board invites the Respondent to:

(a) provide further evidence for the Board to consider; and/or

(b) make written submissions on the Board's findings. Submissions may be on the substantive findings and/or on the findings on penalty, costs and publication.

[54] Submissions and/or further evidence must be filed with the Board by no later than the close of business on **1 December 2022.**

[55] If submissions are received, then the Board will meet and consider those submissions.

[56] The Board may, on receipt of any of the material received, give notice that an in-person hearing is required prior to it making a final decision. Alternatively, the Board may proceed to make a final decision which will be issued in writing.

[57] If no submissions or further evidence is received within the time frame specified, then this decision will become final.

Request for In-Person Hearing

[58] If the Respondent, having received and considered the Board's Draft Decision, considers that an in-person hearing is required, then one will be scheduled, and a notice of hearing will be issued.

[59] A request for an in-person hearing must be made in writing to the Board Officer no later than the close of business on **1 December 2022.**

[60] If a hearing is requested, this Draft Decision, including the Board's indicative position on penalty, costs and publication, will be set aside.

Right of Appeal

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

Signed and dated this 10th day of November 2022

Mr C Preston
Presiding Member

This decision and the order herein were made final on 2 December 2022 on the basis that no further submissions were received.

Signed and dated this 5th day of December 2022

Mr C Preston
Presiding Member

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[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.