

Before the Building Practitioners Board

	BPB Complaint No. CB25787
Licensed Building Practitioner:	Joshua Laurenson (the Respondent)
Licence Number:	BP 129349
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:	13 January 2022
Final Decision Date:	28 February 2022

Board Members Present:

Mr C Preston, Chair (Presiding)
Mr M Orange, Deputy Chair, Barrister
Mr D Fabish, LBP, Carpentry and Site AOP 2
Mrs F 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.

Disciplinary Finding:

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

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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 finding will be recorded on the public register for a period of three years.

The Charges

- [2] On 13 January 2022, the Board received a Registrar’s Report in respect of a complaint about the conduct of the Respondent.
- [3] 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.
- [4] Having received the report, the Board decided that regulation 9 applied to aspects of the complaint but not to all of the allegations.

Regulation 9 Decisions

- [5] 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); and

(b) held himself or herself out as being licensed to carry out or supervise building work or building inspection work of a type that, at that time, he or she was not licensed to carry out or supervise (s 317(1)(db) of the Act).

[6] With regard to those allegations, the Board decided that regulations 9(e) and 9(f)(ii) of the Complaints Regulations applied. They provide:

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; or*

(f) *the investigation of it is—*

(ii) unnecessary;

[7] In considering whether the further investigation of a complaint is required, the Board needs to consider the sufficiency of the evidence provided and whether the matters complaint about are serious enough to warrant a disciplinary hearing.

[8] With regard to the sufficiency of the evidence, the Board needs to inquire whether there is evidence which, if un-contradicted, would, having regard to the degree of proof demanded¹, justify consideration of the complaint. In making this assessment, questions of veracity need to be put aside as the evidence has not, at the Registrar Report phase, been tested and, in this respect, the Board notes the Court of Appeal's comments in *McLanahan v New Zealand Registered Architects Board*:²

[75] Similarly, we do not agree with the Judge's view at [127] that the purpose of r 62 includes enabling the investigating committee to reach a judgment on whether or not material before it justifies recommending an architect be referred to a disciplinary committee if that involves an evidential assessment on some basis other than provided for in r 62(b), (c) and (d).

[9] In reviewing the evidence provided, the Board decided that there was limited evidence to support the allegations under section 317(1)(b) of the Act and no evidence to support the allegation under section 317(1)(db) of the Act.

[10] With respect to the threshold for disciplinary matters, the Board is required to consider the directions of the courts. In *Collie v Nursing Council of New Zealand*³, 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

¹ The burden in complaints is on the balance of probabilities per *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

² [2017] NZCA 458 at [75]

³ [2001] NZAR 74

which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness.

[11] Again, in *Pillai v Messiter (No 2)*,⁴ 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.

[12] The Board noted that the work was not completed due to a commercial dispute and the Respondent being ordered off the site. Given that and the nature of the matters complained about, the Board decided that it would not proceed with the allegations of negligence or incompetence or of holding out to be licensed.

[13] The Board does, however, caution the Respondent as regards the removal of swarf. Further steps should have been taken when he was ordered off-site to ensure its removal or instructions issued to the owner to ensure it was removed. By itself, the matter does not, on the basis of the above, warrant a hearing

Disciplinary Offence to be Investigated

[14] 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) at [Omitted], 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).

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

Draft Decision Process

[16] 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 procedures⁵. 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 legislation⁶. As such, it may depart from its normal procedures if it considers doing

⁴ (1989) 16 NSWLR 197 (CA) at 200

⁵ Clause 27 of Schedule 3

⁶ *Castles v Standards Committee No.* [2013] NZHC 2289, *Orlov v National Standards Committee 1* [2013] NZHC 1955

so would achieve the purposes of the Act, and it is not contrary to the interests of natural justice to do so.

- [17] 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.
- [18] The Board does, however, note that there may be further evidence in the possession of persons involved in the matter or that the Board may not have interpreted the evidence correctly. To that end, this decision is a draft Board decision. The Complainant and 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

- [19] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁷. 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.
- [20] The Respondent was engaged to carry out building work on an extension to a residential dwelling under a building consent. The building work included restricted building work for which a record of work must be provided on completion. The Respondent's building work started in or about August 2017 and came to an end in or about March 2018 when the contract for services was brought to an end by the Complainant.
- [21] A record of work dated 18 August 2020 was, according to the Respondent, provided to [Omitted] on the same date. He provided a copy of it to the Board with his response to the complaint. The Complainant (the owner) disputed the provision. On 25 June 2021, the Board obtained a copy of the Territorial Authority file. It did not contain a copy of a record of work from the Respondent.
- [22] The Respondent stated, in his response to the complaint:
- I have provided an ROW for the cladding work that was completed. I have advised PBC I cannot provide a ROW for the roof works saying the work is complete because I did not complete this work.*
- [23] The Respondent referred to correspondence with the Complainant with regard to the engagement of a new builder to complete the building work and threats of a complaint to the Board if he did not provide a record of work. He noted:
- While the Complainant does not specifically state it, this builder likely completed the roofing work as this was building work that was outstanding.*

⁷ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

And

As above I could not issue a ROW for work not undertaken, witnessed, or inspected by me.

- [24] The Respondent stressed that he did not withhold his record of work because of non-payment.

Draft 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 work⁸.
- [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 C2-01170⁹ 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*¹⁰ “... the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work”.

⁸ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

⁹ *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

¹⁰ [2018] NZHC 1662 at para 50

- [31] As to when completion will have occurred is a question of fact in each case.
- [32] 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. Completion occurred in March 2018 when the Complainant informed the Respondent that his services were no longer required. He did not carry out any further restricted building work after that date and outstanding work was completed by another contractor.
- [33] The Respondent's evidence was that he provided a record of work dated 18 August 2020 to [Omitted], an agent for the Territorial Authority. The record of work covered those aspects of the restricted building work that the Respondent considered had been completed by him. There was no evidence to support his claim that he provided it on that date.
- [34] If 18 August 2020 is taken as the date of provision and if it is accepted that it covered what the Respondent considered was the completed restricted building work, it was provided over two years after that work was completed. That means it was not provided on or soon after completion, which is the requirement contained in section 88(1) of the Act. 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.
- [35] Turning to the question of the provision of a record of work for restricted building work relating to the roof, the Respondent should note that he was obliged to provide a record of work for the restricted building work that he had carried out or supervised on the roof even if the full scope of work had not been completed. In this respect, as the Respondent would not be returning to carry out any further restricted building work on the roof, completion, in terms of the provision of a record of work, had occurred and the provisions of section 88(1) of the Act were breached when a record of work was not provided.
- [36] The above accords with the purposes of the record of work provisions in the Act. The provisions are designed to create a record of all the Licensed Building Practitioners that have had involvement in consented building work. As such, there may be more than one record of work for each element. In this instance, the Board would expect a record of work from the Respondent and another from the Licensed Building Practitioner who took over and finished off the work.
- [37] The Respondent referred to not being able to inspect the work. Providing a record of work is not signing off on quality or compliance. It is not to be confused with a producer statement in that it is not a statement as to the quality or compliance of restricted building work. It is, put simply, a statement of who did or supervised what in the way of restricted building work. 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 as section 88(4) provides:

(4) *A record of work given under subsection (1) does not, of itself,—*

create any liability in relation to any matter to which the record of work relates; or 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.

- [38] 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.
- [39] In this instance, there was an ongoing payment dispute. The Respondent has stated that non-payment was not a reason for non-provision. Irrespective, the Respondent should note that 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.
- [40] 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.

Draft Decision on Penalty, Costs and Publication

- [41] 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.
- [42] 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

- [43] 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*¹¹ 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:

¹¹ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

[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.

- [44] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*,¹² 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.
- [45] 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. There are no aggravating nor mitigating factors present. As such, the Board sees no reason to depart from the starting point. The fine is set at \$1,500.

Costs

- [46] 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."
- [47] 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 case¹³.
- [48] 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.*
- [49] In *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society*,¹⁵ the High Court noted:

[46] All cases referred to in Cooray were medical cases and the Judge was careful to note that the 50 per cent was the general approach that the Medical Council took. We do not accept that if there was any such approach, it is necessarily to be taken in proceedings involving other disciplinary bodies. Much will depend upon the time involved, actual expenses incurred, attitude of the practitioner bearing in mind that whilst the cost of a disciplinary action

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

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

¹⁵ CIV-2011-485-000227 8 August 2011

by a professional body must be something of a burden imposed upon its members, those members should not be expected to bear too large a measure where a practitioner is shown to be guilty of serious misconduct.

[47] Costs orders made in proceedings involving law practitioners are not to be determined by any mathematical approach. In some cases 50 per cent will be too high, in others insufficient.

- [50] 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 based on the High Court decisions above are then made.
- [51] 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 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

- [52] 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 Act¹⁶. 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.

- [53] 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.
- [54] Within New Zealand, there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990¹⁷. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction¹⁸. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive¹⁹. The High Court provided

¹⁶ Refer sections 298, 299 and 301 of the Act

¹⁷ Section 14 of the Act

¹⁸ Refer sections 200 and 202 of the Criminal Procedure Act

¹⁹ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*²⁰.

[55] 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 interest²¹. 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.

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

Draft Section 318 Order

[57] 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(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.

[58] 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

[59] 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.

[60] Submissions and/or further evidence must be filed with the Board by no later than the close of business on 25 February 2022.

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

²⁰ *ibid*

²¹ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

- [62] 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.
- [63] If no submissions or further evidence is received within the time frame specified, then this decision will become final.

Request for In-Person Hearing

- [64] 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.
- [65] A request for an in-person hearing must be made in writing to the Board Officer no later than the close of business on 25 February 2022.
- [66] 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

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

Signed and dated this third day of February 2022.



Mr C Preston
Presiding Member

This decision and the order herein were made final on 28 February 2022 on the basis that no further submissions were received.

Signed and dated this first day of March 2022.



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:*
 - (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.*