

## Before the Building Practitioners Board

	BPB Complaint No. CB 26036
Licensed Building Practitioner:	David (Baixiang) Lee (the Respondent)
Licence Number:	BP101144
Licence(s) Held:	Carpentry

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### Decision of the Board in Respect of the Conduct of a Licensed Building Practitioner

#### Under section 315 of the Building Act 2004

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Complaint or Board Inquiry	Complaint
Hearing Location	by audio-visual conference
Hearing Type:	In Person
Hearing and Decision Date:	2 May 2023
Board Members Present:	
	Mr M Orange, Chair, Barrister (Presiding)
	Mrs F Pearson-Green, Deputy Chair, LBP, Design AoP 2
	Ms J Clark, Barrister and Solicitor, Legal Member

#### Procedure:

The matter was considered by the Building Practitioners Board (the Board) under the provisions of Part 4 of the Building Act 2004 (the Act), the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Complaints Regulations) and the Board's Complaints and Inquiry Procedures.

#### Disciplinary Finding:

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

The Respondent is fined \$2,000 and ordered to pay costs of \$750. A record of the disciplinary offending will be recorded on the Public Register for a period of three years.

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## Summary

- [1] The Respondent failed to provide a record of work on completion of restricted building work. He is fined \$2,000 and ordered to pay costs of \$750. The decision will be recorded in the Register of Licensed Building Practitioners for a period of three years.

## The Charges

- [2] The prescribed investigation and hearing procedure is inquisitorial, not adversarial. There is no requirement for a complainant to prove the allegations. The Board sets the charges and decides what evidence is required.<sup>1</sup>
- [3] In this matter, the disciplinary charges the Board resolved to further investigate<sup>2</sup> were that the Respondent may, in relation to building work at [OMITTED], Auckland, have failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out or supervise, or has carried out or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, at [OMITTED], Auckland, on completion of the restricted building work, in accordance with section 88(1) (section 317(1)(da)(ii) of the Act).

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<sup>1</sup> Under section 322 of the Act, the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law. The evidentiary standard is the balance of probabilities, *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1.

<sup>2</sup> The resolution was made following the Board’s consideration of a report prepared by the Registrar in accordance with regulation 10 of the Complaints Regulations.

- [4] The Board<sup>3</sup> initially dealt with the complaint by way of a Draft Decision. The Respondent did not engage in the investigation process until after the Draft Decision had been issued. The Respondent disputed the Board's findings in the Draft Decision. The Draft Decision was set aside, and a hearing was scheduled.
- [5] The hearing was, with the consent of the Respondent, conducted by way of an audio-visual conference.

### **Evidence**

- [6] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>4</sup>. 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.
- [7] The Respondent was engaged as a subcontractor to the main contractor ([OMITTED]) to construct the foundation of a residential dwelling under a building consent. He stated that he both carried out and supervised the construction of the foundation.
- [8] The Respondent's building work was restricted building work as it related to the primary structure of a residential dwelling. As such, there was a requirement under section 88(1) of the Act that he provide a record of work for the restricted building work that he both carried out and supervised on completion of that work.
- [9] The Respondent's building work started on or about May 2020 and came to an end, at the latest, in or about August 2021, which was the date when the main contractor left the site. The Respondent's restricted building work, most likely, came to an end prior to that date. As the Respondent's restricted building work came to an end on or about August 2021, that was when a record of work was due.
- [10] The Respondent stated that he filled out and gave a record of work toward the end of 2021 to the main contractor in person at his home. The main contractor did not pass it on. The Respondent stated that he did not keep a copy of the record of work and that the main contractor had not paid him. The Respondent did not, at that time, provide a record of work to the owner or the Territorial Authority. He did provide one to the Board as a result of the complaint. It was dated 23 January 2023. Its provision was some 16 months after completion.
- [11] The requirement is for the licensed building practitioner to provide a work record. Neither the owner nor Territorial Authority have to demand one. The Respondent should have acted of his own accord. Because he did not provide it to either the owner or the Territorial Authority in or about August 2021 (the completion date), he

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<sup>3</sup> The Board is a statutory body established under section 341 of the Act.<sup>3</sup> 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.

<sup>4</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

did not meet the requirements of section 88(1) of the Act, and the offence has been committed.

- [12] The Board is required to consider whether there may have been a good reason not to provide the record of work.
- [13] In June 2022, the Complainant requested a record of work from the Respondent by email and in a telephone call. The Complainant reported that the Respondent stated that he would provide it only to the main contractor, and an email from the Respondent stated the same.
- [14] Email correspondence between the Complainant and the Respondent also recorded that the Complainant was seeking various documents to obtain a Code Compliance Certificate. The Respondent stated that he interpreted the correspondence as a request for him to provide a record of work for restricted building work carried out or supervised by other Licensed Building Practitioners, which he could not do. He stated that this was why he did not provide a record of work when one was requested.
- [15] The Board noted that in the correspondence, the Complainant stated: *Also to be clear, I am only asking you for your documentation and records for work that you or your team has done.* It was clear, therefore, that the Respondent was only being asked for his documentation and record of work.
- [16] The Respondent also stated, in response to questions as to why he did not just provide a record of work for his restricted building work, that he did not know or understand the legal requirements regarding providing a record of work. He maintained this even though the Board disciplined him for failing to provide a record of work in September 2020 and informed him of the legal requirements and obligations with regard to records of work.
- [17] The Board finds that the Respondent's reasons for not providing a record of work were not good reasons. Firstly, the reasons relate to his failure to take action in June 2022. That was well after the date on which a record of work was due (August 2021). As such, even if it was a good reason, which it was not, it came well after the date on which the disciplinary offence was committed. Secondly, the Board finds that the Respondent was only being asked for his record of work and that he should have known of his obligation to provide it.

#### **Board's Decision**

- [18] 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 or supervise, or has carried out or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act) and **should** be disciplined.

## Penalty, Costs and Publication

- [19] Having found that one or more of the grounds in section 317 applies, the Board must, under section 318 of the Act<sup>i</sup>, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [20] The Respondent made submissions at the hearing as regards penalty, costs and publication. The Board proceeded to make a decision. The Respondent elected to exit the audio-visual call prior to the Board informing him of its penalty, costs and publication decision.

## Penalty

- [21] The Board has the discretion to impose a range of penalties.<sup>ii</sup> Exercising that discretion and determining the appropriate penalty requires that the Board balance various factors, including the seriousness of the conduct and any mitigating or aggravating factors present.<sup>5</sup> It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:<sup>6</sup>
- (a) protection of the public and consideration of the purposes of the Act;<sup>7</sup>
  - (b) deterring other Licensed Building Practitioners from similar offending;<sup>8</sup>
  - (c) setting and enforcing a high standard of conduct for the industry;<sup>9</sup>
  - (d) penalising wrongdoing;<sup>10</sup> and
  - (e) rehabilitation (where appropriate).<sup>11</sup>
- [22] Overall, the Board should assess the conduct against the range of penalty options available in section 318 of the Act, reserving the maximum penalty for the worst cases<sup>12</sup> and applying the least restrictive penalty available for the particular offending.<sup>13</sup> In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty<sup>14</sup> that is consistent with other penalties imposed by the Board for comparable offending.<sup>15</sup>

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<sup>5</sup> *Ellis v Auckland Standards Committee* 5 [2019] NZHC 1384 at [21]; cited with approval in *National Standards Committee (No1) of the New Zealand Law Society v Gardiner-Hopkins* [2022] NZHC 1709 at [48]

<sup>6</sup> Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

<sup>7</sup> Section 3 Building Act

<sup>8</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

<sup>9</sup> *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

<sup>10</sup> *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>11</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354; *Shousha v A Professional Conduct Committee* [2022] NZHC 1457

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

<sup>13</sup> *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

<sup>14</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

<sup>15</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

- [23] In general, when determining the appropriate penalty, the Board adopts a starting point based on the principles outlined above prior to it considering any aggravating and/or mitigating factors present.<sup>16</sup>
- [24] 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.
- [25] The Respondent was previously disciplined by the Board in September 2020 for, (amongst other matters), a failure to provide a record of work<sup>17</sup>. The Respondent should therefore have known better and been aware of his obligations when he failed to provide it in August 2021 and then refused to provide it to the homeowner in June 2022. This is an aggravating factor. The Board has increased the fine accordingly. The fine is set at \$2,000.
- [26] The Respondent noted that he had lost some \$3,000 in relation to the work as the main contractor had not paid him. He also stated that this was the only other time he had failed to provide a record of work. The Board noted, however, that he was also disciplined in August 2022 for a failure to provide a record of work.<sup>18</sup> Taking those factors into account, the Board decided that it would not reduce the fine. It will remain at \$2,000.

### Costs

- [27] Under section 318(4) of the Act, the Board may require the Respondent to pay the costs and expenses of, and incidental to, the inquiry by the Board. The rationale is that other Licensed Building Practitioners should not be left to carry the financial burden of an investigation and hearing.<sup>19</sup>
- [28] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings<sup>20</sup>. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case<sup>21</sup>.
- [29] The Board has adopted an approach to costs that uses a scale based on 50% of the average costs of different categories of hearings, simple, moderate and complex. The current matter was simple. The starting point is \$2,000. Adjustments have been made to reflect that the matter was dealt with by way of an audio-visual hearing.
- [30] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$750 toward the costs of and incidental to the Board's inquiry.

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<sup>16</sup> In *Lochhead v Ministry of Business Innovation and Employment* 3 November [2016] NZDC 21288 the District Court recommended that the Board adopt the approach set out in the Sentencing Act 2002.

<sup>17</sup> David Lee [2020] BPB 25370

<sup>18</sup> David Lee [2023] BPB 25968

<sup>19</sup> *Collie v Nursing Council of New Zealand* [2001] NZAR 74

<sup>20</sup> *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

<sup>21</sup> *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.

## Publication

- [31] As a consequence of its decision, the Respondent's name and the disciplinary outcomes will be recorded in the public Register maintained as part of the Licensed Building Practitioners' scheme as is required by the Act,<sup>22</sup> and he will be named in this decision which will be available on the Board's website. The Board is also able, under section 318(5) of the Act, to order further publication.
- [32] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.<sup>23</sup> Further, as a general principle, publication 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, and the courts have stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published.<sup>24</sup>
- [33] Based on the above, the Board will not order further publication.

## **Section 318 Order**

- [34] For the reasons set out above, the Board directs that:
- Penalty:** Pursuant to section 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of \$2,000.
- Costs:** Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$750 (GST included) towards the costs of, and incidental to, the inquiry of the Board.
- Publication:** The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with section 301(I)(iii) of the Act.
- In terms of section 318(5) of the Act, there will not be action taken to publicly notify the Board's action, except for the note in the Register and the Respondent being named in this decision.**
- [35] The Respondent should note that the Board may, under section 319 of the Act, suspend or cancel a licensed building practitioner's licence if fines or costs imposed as a result of disciplinary action are not paid.

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<sup>22</sup> Refer sections 298, 299 and 301 of the Act

<sup>23</sup> Section 14 of the Act

<sup>24</sup> Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

## Right of Appeal

[36] The right to appeal Board decisions is provided for in section 330(2) of the Act<sup>iii</sup>.

Signed and dated this 15<sup>th</sup> day of May 2023



**M Orange**  
Presiding Member

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### <sup>i</sup> **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."*

### <sup>ii</sup> **Section 318 Disciplinary Penalties**

- (1) *In any case to which [section 317](#) applies, the Board may—*
  - (a) *do both of the following things:*
    - (i) *cancel the person's licensing and direct the Registrar to remove the person's name from the register; and*

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- (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*
  - (b) *suspend the person’s licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*
  - (c) *restrict the type of building work or building inspection work that the person may carry out or supervise under the person’s licensing class or classes and direct the Registrar to record the restriction in the register:*
  - (d) *order that the person be censured:*
  - (e) *order that the person undertake training specified in the order:*
  - (f) *order that the person pay a fine not exceeding \$10,000.*
  - (2) *The Board may take only 1 type of action in subsection (1)(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).*
  - (3) *No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.*
  - (4) *In any case to which [section 317](#) applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.*
  - (5) *In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit.*

**iii Section 330 Right of appeal**

- (2) *A person may appeal to a District Court against any decision of the Board—*
  - (b) *to take any action referred to in section 318.*

**Section 331 Time in which appeal must be brought**

*An appeal must be lodged—*

- (a) *within 20 working days after notice of the decision or action is communicated to the appellant; or*
- (b) *within any further time that the appeal authority allows on application made before or after the period expires.*