

Before the Building Practitioners Board

	BPB Complaint No. CB25872
Licensed Building Practitioner:	Semisi Lui (the Respondent)
Licence Number:	BP 133644
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	Board Inquiry
Hearing Type:	On the Papers
Hearing and Draft Decision Date:	19 April 2022
Final Decision Date:	11 July 2022

Board Members Present:

Mr C Preston, Chair (Presiding)
Mr M Orange, Deputy Chair, Barrister
Mrs F Pearson-Green, LBP, Design AOP 2
Ms K Reynolds, Construction Manager

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 Decision	2
The Charges	2
Disciplinary Offences Under Consideration	3
Function of Disciplinary Action	3
Evidence	4
Further Evidence and Submissions Received	4
Board's Conclusion and Reasoning	5
Penalty, Costs and Publication	6
Penalty	6
Costs.....	8
Publication	9
Draft Section 318 Order	10
Right of Appeal	10

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 19 April 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 did not apply. Under regulation 10 the Board was required to hold a hearing.
- [5] 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 procedures¹. 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 legislation². As such, it may depart from its normal procedures if it considers doing so

¹ Clause 27 of Schedule 3

² *Castles v Standards Committee No.* [2013] NZHC 2289, *Orlov v National Standards Committee 1* [2013] NZHC 1955

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

- [6] In this instance, the Board decided that a formal hearing was not necessary. The Board considered that there was sufficient evidence before it to allow it to make a decision on the papers.
- [7] The Board did, 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, it issued a Draft Decision. The Respondent and/or Complainant were 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 directed, or the Respondent requested an in-person hearing, then the Board advised that one would be scheduled.
- [8] The Respondent did not request an in-person hearing.

Disciplinary Offences Under Consideration

- [9] 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).

Function of Disciplinary Action

- [10] 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*³ and in New Zealand in *Dentice v Valuers Registration Board*⁴.
- [11] 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*,⁵ Collins J. noted that:

"... 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."

³ *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

⁴ [1992] 1 NZLR 720 at p 724

⁵ [2016] HZHC 2276 at para 164

Evidence

- [12] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁶. 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.
- [13] The following is the evidence that was relied on in the Draft Decision.
- [14] The Respondent was engaged to carry out building work on five new residential dwellings under a single 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 on or about 19 May 2019 and came to an end on or about 2 February 2021.
- [15] The complaint set out that, following completion, a record of work was not provided despite requests being made for one. A complaint was made about the non-provision on 18 October 2021. On 19 November 2021, after the complaint had been made, a record of work was provided to the Complainant. The Complainant then sought to withdraw the complaint. The matter proceeded as a Board Inquiry.
- [16] The Respondent was provided with the complaint and was asked to provide a response to it. No response was received.
- [17] In the Draft Decision, the Board set out how it considered the complaint had been served on the Respondent. As he has now replied to the Draft Decision, the inclusion of those deemed service provisions in this decision is not required.

Further Evidence and Submissions Received

- [18] Following the Board issuing a Draft Decision, it received a submission from the Respondent.
- [19] The Respondent noted that the Complainant withdrew the complaint and that he thought the matter was now settled. It was because of that withdrawal that the matter has proceeded as a Board Inquiry and not as a complaint.
- [20] The Respondent should note that the disciplinary process and the Board's jurisdiction under the Act are inquisitorial. They do not rely on a complainant to present or prosecute a case against a respondent. This is provided for in the Regulations, which state that if a complainant does not wish to proceed with a complaint then the Board may proceed with its investigations by way of a Board Inquiry⁷.
- [21] It is also important to note that the purpose of the licensing regime is to maintain standards. In order to do that, it is important that the Board investigate conduct that has the potential to lower those standards. It is also noted that the record of work was only provided after a complaint had been made. The Board considers it can be

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

⁷ Regulation 17 of the Complaints Regulations

an abuse of the complaints process for a practitioner to conduct themselves in a manner that results in complainants and to then seek to have the complaint withdrawn as part of a settlement process. In this respect, the Board's focus is on the conduct that led to the complaint. Any subsequent conduct may be a mitigating factor.

- [22] With respect to mitigating factors, the Respondent also submitted matters for the Board to take into consideration as regards penalty costs and publication. They will be dealt with as part of the Board's section 318 orders.

Board's Conclusion and Reasoning

- [23] 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.
- [24] The Board's reasoning, which follows, does not differ from that set out in the Draft Decision.
- [25] 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.
- [26] 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.
- [27] 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.
- [28] 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.
- [29] 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

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

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”.

- [30] As to when completion will have occurred is a question of fact in each case.
- [31] 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. In this matter, the evidence before the Board was that completion occurred in February 2021 but that a record of work was not provided until November 2021, some ten months later, and then only after a complaint had been made. 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.
- [32] 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.
- [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. No response has been provided, and, as such, no good reasons advanced.

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. The Board made an indicative order in its Draft Decision. It has since received submissions and has made a final decision as regards penalty, costs and publication.

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*¹¹ commented on the role of “punishment” in giving penalty orders stating that punitive orders are, at times,

¹⁰ [2018] NZHC 1662 at para 50

¹¹ 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.

- [37] 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.
- [38] In the Draft Decision, the Board set out that 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. The complaint related to five dwellings. That is an aggravating factor. The only mitigating factor noted was the eventual provision of a record of work. Balancing the factors the Board saw no reason to depart from the starting point.
- [39] The Respondent, in his submissions on the Draft Decision, asked for a pardon. The Board does not have the discretion to pardon or take no action when an offence has been committed. In this respect, whilst section 318(1) of the Act uses the phrase "may", which suggests the possibility of discretion, the Board notes that the disciplinary provisions of other schemes expressly enable the decider to take no action, whereas the Building Act does not. Section 147M(h) of the Electricity Act 1992, for example, stipulates that the Electrical Workers Registration Board may "make no order". Section 106(1)(h) of the Plumbers, Gasfitters, and Drainlayers Act 2006 contains the same provision. Section 318 of the Building Act 2004 does not contain a similar provision. On this basis, the Board has taken the approach that Parliament did not intend that the Board have a similar discretion under the Building Act.
- [40] Rather the Board considers that the wording in 318(1) of the Act, and reference to "may", is in respect of a discretion to choose amongst the various penalty options in section 318(1)(a) to (f). Further, the Board also notes that one of the intentions of the licensing regime was to ensure the public is informed when selecting a licensed building practitioner. Disciplinary action taken under section 318 must, under section 301(1)(l)(iii) of the Act, be recorded in the Register for a period of three years. The Register is established by section 298 of the Act. Section 299 sets out its purposes which are:

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

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.*

[41] 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. Not taking any action under section 318 would defeat this purpose.

[42] Given the above, the Board has decided that it does not have the discretion to pardon or take no action. The fine is set at \$1,500.

Costs

[43] 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.”

[44] 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.

[45] 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.

[46] 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,

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

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 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.

- [47] 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.
- [48] 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

- [49] 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.

- [50] 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.
- [51] 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

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

Procedure Act do not apply but can be instructive¹⁹. 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*²⁰.

[52] 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.

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

Section 318 Order

[54] 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.

[55] 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

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

Signed and dated this 10th day of August 2022



Mr C Preston
Presiding Member

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

²⁰ *ibid*

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

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.*