

Before the Building Practitioners Board

	BPB Complaint No. CB25930
Licensed Building Practitioner:	Mingyang Ma (the Respondent)
Licence Number:	BP 127405
Licence(s) Held:	Roofing AOP Profiled Metal Roof and/or Wall Cladding; Shingle or Slate Roof

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
Draft Decision Date:	11 April 2022
Final Decision Date:	27 June 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
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.

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Summary of the Board’s Final Decision

- [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 \$500. The fine was increased from \$1,500 on the basis that the Respondent has previously been disciplined by the Board for a failure to provide a record of work. The disciplinary finding will be recorded on the public Register for a period of three years.

The Charges

- [2] On 11 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 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 carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act).
- [6] The Complainant alleged that there were defects with the manner in which guttering was installed, and that roofing was deformed and damaged during installation.

- [7] With regard to those allegations, 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;*

- [8] To test sufficiency, 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 this instance, no supporting or corroborating evidence that would satisfy the test was provided. On that basis, the Board decided that it would not proceed with the allegations of negligence or incompetence.

Disciplinary Offence to be Investigated

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

Draft Decision Process

- [11] 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 procedures². 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 legislation³. 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.
- [12] 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.

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

² Clause 27 of Schedule 3

³ *Castles v Standards Committee No.* [2013] NZHC 2289, *Orlov v National Standards Committee 1* [2013] NZHC 1955

- [13] 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

- [14] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁴. 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.
- [15] The Respondent was engaged to carry out building work on a new residential dwelling at [OMITTED] Auckland, 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 on or about 12 March 2020 and came to an end on or about 30 June 2021. A record of work has not been provided.
- [16] The Respondent provided a response to the complaint. In it, he stated that the main contractor's lawyer had instructed him to not provide any documentation. The letter noted the main contractor had terminated the contract and stated that the Respondent, as a subcontractor, had no right to provide documentation to anyone other than the main contractor. The letter did not expressly refer to records of work. It did refer to documentation "including producer statements, warranties, technical literature etc."
- [17] Enquiries were made of the Territorial Authority to establish if a record of work had been provided to it. On 23 March 2022, the Territorial Authority confirmed it did not have a record of work from the Respondent.

Further Evidence and Submissions Received

- [18] On 21 June 2022, the Respondent submitted:

I refer to the draft decision provided on 31 May 2022.

At no stage did I receive a request from the owner to provide a ROW. I was aware of issues between the owner and the Head Contractor, Ruby Construction. However, I was not formally informed of the dispute until early February 2022, after the owner's complaint had been lodged.

In these circumstances, the penalty imposed is unfair. If the decision is to be maintained, then a fine not exceeding \$1,000 would be more appropriate.

⁴ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

This is in line, and consistent with other decisions of the LBP Board imposing penalties in similar situations.

- [19] A similar submission was received from other Licensed Building Practitioners that the Board received complaints of non-provision of records of work at the same address.

Board's Conclusion and Reasoning

- [20] 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
- [21] 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 work⁵.
- [22] 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.
- [23] The Board discussed issues with regard to records of work in its decision C2-01170⁶ 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.
- [24] 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.
- [25] 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*⁷ "... the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work".
- [26] As to when completion will have occurred is a question of fact in each case.

⁵ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

⁶ *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

⁷ [2018] NZHC 1662 at para 50

- [27] 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. That did not occur in the present matter. The Respondent's work came to an end on or about 30 June 2021, and no further building work has been completed since. A commercial dispute arose, and the main contractor's contract for services was cancelled. The Complainant has sought but has not received a record of work. In those circumstances, the Board has decided that completion occurred on 30 June 2021. A record of work was due then or soon thereafter. One has not been provided. The Board, therefore, finds that the record of work was not provided on completion as required, and the disciplinary offence has been committed.
- [28] In his post Draft Decision submissions, the Respondent noted that he was not asked for a record of work. As noted in the Draft Decision, the legal requirement is for the licensed building practitioner to provide a record of work. The obligation does not arise on a request or demand being made but on completion. That had occurred and a record of work had not been provided. As such, the fact that a record of work may not have been requested is not relevant to the question of whether one was provided on completion. It is not a defence. It does not change the Board's decision.
- [29] 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.
- [30] In this instance, there was an ongoing payment dispute with the main contractor. The Respondent was instructed not to provide any documentation. That was not a valid instruction as a record of work is a statutory document that cannot be withheld for commercial purposes. The requirement for a record of work 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.

Penalty, Costs and Publication

- [31] 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.
- [32] 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

[33] 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*⁸ 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:

[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.

[34] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*,⁹ 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.

[35] 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 mitigating factors present.

[36] The Respondent has previously appeared before the Board on a record of work matter¹⁰. In March 2018, he was fined \$1,500 for failing to provide a record of work and informed of his obligations. He has not amended his ways. A more severe penalty is warranted. In its Draft Decision, the Board indicated that a fine of \$2,000 was warranted.

[37] The Respondent has submitted that a fine of \$1,000 is more appropriate and that this accords with other penalties imposed. He did not make any reference to any other Board decisions where lower fines were imposed.

[38] The Board has, in other cases, lowered the fine where it was provided to a third party but not to the owner or the Territorial Authority. There was no evidence of that. Nor is there any evidence that the record of work has been provided following the complaint. Given those factors, and the aggravating features present, the Board considers that a fine of \$2,000 is appropriate.

Costs

[39] 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.”

⁸ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

¹⁰ C2-01736

- [40] 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 case¹¹.
- [41] In *Collie v Nursing Council of New Zealand*,¹² 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.*
- [42] In *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society*,¹³ 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 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.*
- [43] 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.
- [44] 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.

¹¹ *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.

¹² [2001] NZAR 74

¹³ CIV-2011-485-000227 8 August 2011

Publication

- [45] 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 Act¹⁴. 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.*
- [46] 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.
- [47] Within New Zealand, there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990¹⁵. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction¹⁶. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive¹⁷. 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*¹⁸.
- [48] 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 interest¹⁹. 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.
- [49] Based on the above, the Board will not order further publication.

¹⁴ Refer sections 298, 299 and 301 of the Act

¹⁵ Section 14 of the Act

¹⁶ Refer sections 200 and 202 of the Criminal Procedure Act

¹⁷ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

¹⁸ *ibid*

¹⁹ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Section 318 Order

[50] 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 \$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.

[51] 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

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

Signed and dated this 27th day of July 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:*

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- (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.*