

## Before the Building Practitioners Board

	BPB Complaint Nos. CB26002, CB26003, CB26004 and CB26005
Licensed Building Practitioner:	Damian Manahi (the Respondent)
Licence Number:	BP132078
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Complaint or Board Inquiry	Board Inquiry following a withdrawn complaint
Hearing Location	Whangarei
Hearing Type:	In Person
Hearing and Decision Date:	7 March 2023
Board Members Present:	
	Mr M Orange, Deputy Chair, Barrister (Presiding) Mr D Fabish, LBP, Carpentry and Site 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 \$500 and ordered to pay costs of \$500. 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 Complainant, a main contractor, contracted the Respondent to carry out building work on four new houses. The work started but, as a result of a contractual dispute, did not finish. The Complainant then sought records of work from the Respondent. The Respondent refused on the basis that his restricted building work was not complete and he had not been paid all that he was owed. The question for the Board was whether the Respondent had failed to provide a record of work on the completion of restricted building work. There were two issues that had to be determined. Firstly, was the Respondent's restricted building work complete, and, secondly, if it was, did the non-payment of his invoices constitute a good reason not to provide the records of work.
- [2] The Board found that the Respondent's restricted building work was complete and that non-payment was not a good reason to withhold the records of work. The Board decided that the Respondent would be fined \$500 and ordered to pay costs of \$500. The orders were reduced on the basis that there were significant mitigating factors.

## The Charges

- [3] 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>

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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.

- [4] The hearing itself is not a review of all of the available evidence. Rather it is an opportunity for the Board to call and question witnesses to further investigate aspects of the evidence.
- [5] In this matter, the disciplinary charges the Board resolved to further investigate<sup>2</sup> were that the Respondent may have failed, without good reason, in respect of a building consent that relates to restricted building work 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) of the Act. The Board's considerations related to restricted building work at the following addresses:
- (a) [OMITTED] (matter CB25602);
  - (b) [OMITTED] (matter CB25603);
  - (c) [OMITTED] (matter CB25604); and
  - (d) [OMITTED] (Matter CB25605).
- [6] The Board<sup>3</sup> initially dealt with the complaint by way of a Draft Decision. The Respondent disputed the findings. The Draft Decision was set aside, and a hearing was scheduled. The Complainant was summoned to the hearing but did not appear.

#### **Records of work**

- [7] A Licensed Building Practitioner must provide a record of work for any restricted building work that they have carried out or supervised to the owner and the Territorial Authority on completion of their restricted building work.<sup>4</sup>
- [8] There is a statutory requirement under section 88(1) of the Building Act 2004 for a licensed building practitioner to provide a record of work to the owner and the territorial authority on completion of restricted building work<sup>5</sup> unless there is a good reason for it not to be provided.<sup>6</sup>

#### **Was the restricted building work complete**

- [9] The Respondent accepted that he had carried out restricted building work on four residential dwellings. He further accepted that he had completed his restricted building work at [OMITTED] and [OMITTED].
- [10] The Respondent argued that his restricted building work on the other two dwellings, [OMITTED] and [OMITTED] was not complete because he had not carried out all of the work that he had contracted to do. He was aware that others had completed the builds and that he would not be able to return and carry out any further restricted

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<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.

<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> Section 88(1) of the Act.

<sup>5</sup> Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

<sup>6</sup> Section 317(1)(da)(ii) of the Act

building work. The question for the Board was whether the Respondent's restricted building work on those two dwellings was also complete.<sup>7</sup>

- [11] The restricted building work regime exists to ensure that there is a permanent record of all of the Licensed Building Practitioners who have carried out or supervised restricted building work. If the Board accepted the Respondent's argument, then the obligation to provide a record of work would never arise, given that others had finished what the Respondent had started.<sup>8</sup> That would defeat the purpose of the legislative provision. As such, the Board finds that completion occurred when the Respondent's engagement on the builds came to an end, and that was when a record of work was due.

#### **Has the Respondent provided records of work**

- [12] The Respondent accepted that he had not provided any records of work. He did undertake to provide all four records of work to the owner and the Territorial Authority following the completion of the hearing.

#### **Was there a good reason for the Respondent to withhold his records of work**

- [13] The Respondent outlined that a dispute arose over payments for travel to and from building sites and, as a result, he had not been paid some \$24,000 he claimed he was owed. He considered, in those circumstances, he needed to withhold the records of work to assist with obtaining payment of the outstanding amounts.
- [14] Records of work are statutory documents. They cannot be withheld as leverage to obtain payment. Again, to find otherwise would defeat the purpose of the legislation, and the Board finds that the Respondent did not have a good reason.

#### **Has the Respondent committed a disciplinary offence**

- [15] The Respondent carried out and completed restricted building on four dwellings. He did not provide any records of work and did not have a good reason for failing to do so. He has committed the disciplinary offence of failing to provide a record of work on completion of restricted building work.

#### **Penalty, Costs and Publication**

- [16] 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.

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<sup>7</sup> Justice Muir at paragraph 50 in *Ministry of Business Innovation and Employment v Bell* [2018] NZHC 1662 stated "... the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work".

<sup>8</sup> The Licensed Building Practitioner who finished off the work is also required to provide a record of work.

## Penalty

- [17] The purpose of professional discipline is to uphold the integrity of the profession. The focus is the enforcement of a high standard of propriety and professional conduct. In determining the penalty, however, the Board necessarily has to consider whether the Respondent should be punished and how it can deter other Licensed Building Practitioners.<sup>9</sup>
- [18] In *Lochhead v Ministry of Business Innovation and Employment*,<sup>10</sup> 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 do 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.
- [19] The Board's 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 were significant mitigating factors. The Respondent accepted that he had committed the disciplinary offence and acknowledged his lack of understanding of his record of work obligations. He had learned from the complaint and the hearing and undertook to further educate himself as regards his regulatory obligations. The Respondent suffered a financial loss. He also outlined personal matters which impacted how he responded to the complaint and dealt with the matter. Taking those mitigating factors into consideration, the Board decided to reduce the fine to \$500.

## Costs

- [20] 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>11</sup>
- [21] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings<sup>12</sup>. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case<sup>13</sup>.
- [22] 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 are then made.

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<sup>9</sup> *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>10</sup> 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

<sup>11</sup> *Collie v Nursing Council of New Zealand* [2001] NZAR 74

<sup>12</sup> *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

<sup>13</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.

- [23] Ordinarily, a costs order for a hearing of this type would be \$1,500. However, as the Respondent cooperated at the hearing and there were mitigating factors, the Board decided that it would reduce the order to \$500.

#### Publication

- [24] 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>14</sup> and he will be named in this decision. The Board is also able, under section 318(5) of the Act, to order further publication.
- [25] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.<sup>15</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>16</sup>
- [26] Based on the above, the Board will not order further publication.

#### **Section 318 Order**

- [27] 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 \$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.**

- [28] 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>14</sup> Refer sections 298, 299 and 301 of the Act

<sup>15</sup> Section 14 of the Act

<sup>16</sup> Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

## Right of Appeal

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

Signed and dated this 23<sup>rd</sup> day of March 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 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.*