

Before the Building Practitioners Board

	BPB Complaint No. CB26481
Licensed Building Practitioner:	Mathew Diamond (the Respondent)
Licence Number:	BP119484
Licence(s) Held:	Brick and Blocklaying – Veneer and Structural Masonry

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 proceeding as a Board Inquiry
Hearing Type:	On the Papers
Draft Decision Date:	28 May 2024
Final Decision Date:	21 August 2024
Board Members Present:	
	Mrs F Pearson-Green, Deputy Chair, LBP, Design AoP 2 (Presiding)
	Mrs J Clark, Barrister and Solicitor, Legal Member
	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.

The Respondent is fined \$1,000 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 of the Board’s Decision

- [1] The Respondent failed to provide a record of work on completion of restricted building work. He is fined \$1,000 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] 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.¹
- [3] In this matter, the disciplinary charges the Board resolved to further investigate² 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

¹ 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.

² The resolution was made following the Board’s consideration of a report prepared by the Registrar in accordance with regulation 22 of the Complaints Regulations.

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) of the Act contrary to section 317(1)(da)(ii) of the Act.

Board Inquiry

- [4] This matter began as a complaint from the homeowner. On 22 May 2024, the homeowner advised the Investigator that he wished to withdraw the complaint.
- [5] 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 Inquiry.
- [6] The Board resolved to continue with the matter as a Board Inquiry.

Draft Decision Process

- [7] The Board's jurisdiction is that of an inquiry. Matters are not prosecuted before the Board. Rather, it is for the Board to carry out any further investigation that it considers necessary prior to it making a decision.
- [8] Ordinarily, the Board makes a decision having held a hearing.³ The Board may, however, 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.⁴
- [9] 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. There might, however, have been further evidence in relation to the matter that the Board was not aware of. To that end, the decision was a draft Board decision. The Respondent was provided with an opportunity to comment on the draft findings and to present further evidence prior to the Board making a final decision. If the Respondent had requested an in-person hearing, or the Board directed that one was required, the draft decision would have been set aside, and a hearing scheduled.
- [10] The Respondent provided a written submission dated 18 July 2024 in response to the draft decision. The Board has considered this when making a final decision.

³ Regulation 22 of the Complaints Regulations.

⁴ Under Clause 27 of Schedule 3 the Board may regulate its own procedure and it has summary jurisdiction, which allows for a degree of flexibility in how it deals with matters: *Castles v Standards Committee No.* [2013] NZHC 2289, *Orlov v National Standards Committee 1* [2013] NZHC 1955

Evidence

[11] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁵. 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.

Failure to Provide a Record of Work

- [12] 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.⁶
- [13] 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 work⁷ unless there is a good reason for it not to be provided.⁸

Did the Respondent carry out or supervise restricted building work?

[14] The Respondent was engaged to carry out and/or supervise the cladding work on a new residential dwelling under a building consent. His work included the installation of brick veneer cladding, which is restricted building work because it forms part of the external moisture management system of a residential dwelling.⁹

Was the restricted building work complete?

- [15] The homeowner advised that the Respondent's building work was undertaken between 1 and 23 March 2020. A Council cladding inspection report dated 19 March 2020 supports the Respondent's work being completed around March 2020. The Respondent did not initially comment on the work dates. However, in his further submission on the draft decision his statements appeared to confirm the work was complete in March 2020.
- [16] In this instance, the Board finds that completion occurred in March 2020 when the Respondent's restricted building work was complete.

Has the Respondent provided a record of work?

- [17] The homeowner filed the original complaint on 19 February 2024 and stated that he had been unable to contact the Respondent via phone, email, Linked In and the Companies Office.
- [18] The Council confirmed by email dated 16 May 2024 that it did not have the Respondent's record of work on its file.

⁵ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

⁶ Section 88(1) of the Act.

⁷ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

⁸ Section 317(1)(da)(ii) of the Act

⁹ Clause 5 of the Building (Definition of Restricted Building Work) Order 2011

[19] After he had had notice of the original complaint, the Respondent provided a record of work dated 22 March 2024 to the homeowner on that date and the Complainant provided a copy of the record of work to the Investigator on 22 May 2024.

Was there a good reason?

[20] The Respondent did not give a written response to the original complaint. He stated on the phone to the Investigator that he did not think a response was required as he had provided his record of work to the homeowner.

[21] In his submission on the Draft Decision the Respondent stated that the burden of the Covid lockdowns affected his business and that *“Lockdown prevented [the Respondent] from then returning to site to have a final inspection of his work to satisfy himself for the record of works. It was standard practice for [the Respondent] to return to the site and photograph the works for his own records.”*

[22] The Board recognises that Covid and lockdowns created unique difficulties for businesses. However, it does not accept, given that the Respondent managed to complete the work, that lockdown in itself prevented a record of work from being completed. In addition, between the end of lockdowns and the filing of this complaint there was considerable opportunity for the Respondent to provide the record of work. He did not do so until this complaint was made.

[23] The Respondent said the homeowner never got in touch with him regarding the record of work and that the means of communication between them had been Facebook Messenger. In his further submission to the Board on 18 July 2024, the Respondent provided a screenshot of a Facebook messenger conversation with the Complainant to support this statement.

[24] It is not an acceptable excuse for the non-provision of the record of work to say that the Complainant did not get hold of the Respondent. The Respondent should 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.

[25] The Board, therefore, finds that no “good reason” has been established for the failure to provide the record of work on completion.

Did the Respondent fail to provide a record of work?

[26] The Respondent failed to provide a record of work on completion of the restricted building work in breach of section 88 (1) of the Act.

Board’s Decision

[27] The Respondent **has** failed to provide a record of work on completion of restricted building work.

Penalty, Costs and Publication

- [28] 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.
- [29] The matter was dealt with on the papers. The Board made an indicative order in its Draft Decision and gave the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.
- [30] The Respondent made a specific submission on penalty and publication. He stated – *“Given the unusual set of circumstances, and the cost of lockdown that [the Respondent] has already paid, we would respectfully request a warning, rather than a penalty and publication, on compassionate grounds.”*

Penalty

- [31] The Board has the discretion to impose a range of penalties.ⁱⁱ 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.¹⁰ It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:¹¹
- (a) protection of the public and consideration of the purposes of the Act;¹²
 - (b) deterring other Licensed Building Practitioners from similar offending;¹³
 - (c) setting and enforcing a high standard of conduct for the industry;¹⁴
 - (d) penalising wrongdoing;¹⁵ and
 - (e) rehabilitation (where appropriate).¹⁶
- [32] 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 cases¹⁷ and applying the least restrictive penalty available for the particular offending.¹⁸ In all, the Board should be looking to impose a fair, reasonable, and

¹⁰ *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]

¹¹ Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

¹² Section 3 Building Act

¹³ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

¹⁴ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

¹⁵ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

¹⁶ *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

¹⁷ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

¹⁸ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

proportionate penalty¹⁹ that is consistent with other penalties imposed by the Board for comparable offending.²⁰

- [33] 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.²¹
- [34] 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.
- [35] It is a mitigating factor that the Respondent has now, albeit belatedly, provided the record of work to the homeowner. There are no aggravating factors. As such, the Board decided to reduce the penalty by \$500 from the starting point of \$1,500 to a fine of \$1,000.
- [36] The Board considered the Respondent's further submission on penalty but has decided that to amend the penalty to a warning only would not be consistent with other penalties imposed by the Board for comparable offending.
- [37] The Respondent is to pay a fine of \$1,000.

Costs

- [38] 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.²²
- [39] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings²³. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case²⁴.
- [40] 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.
- [41] The Respondent did not make any further submissions specifically on costs. As such and based on the above, the Board's costs order is that the Respondent is to pay the sum of \$500 toward the costs of and incidental to the Board's inquiry.

¹⁹ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²⁰ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²¹ 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.

²² *Collie v Nursing Council of New Zealand* [2001] NZAR 74

²³ *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

²⁴ *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

- [42] 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,²⁵ 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.
- [43] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.²⁶ 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.²⁷
- [44] Based on the above, the Board will not order any publication over and above the record on the Register, the Respondent being named in this decision, and the publication of the decision on the Board's website.
- [45] The Respondent in his submission on the draft decision, requested that there be no publication. The Board has not ordered any publication beyond that required by statute.
- [46] The Respondent should note, however, that as the Board has not made any form of suppression order, other entities, such as the media or the Ministry of Business Innovation and Employment, may publish under the principles of open justice reporting.

Section 318 Order

- [47] 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 \$1,000.

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(I)(iii) of the Act.

In terms of section 318(5) of the Act, the Respondent will be named in this decision, which will be published on the Board's website.

²⁵ Refer sections 298, 299 and 301 of the Act

²⁶ Section 14 of the Act

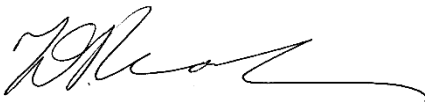
²⁷ Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

- [48] 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

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

Signed and dated this 12th day of September 2024.



Mrs F Pearson-Green
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.

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- (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 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*
 - (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.*