

Before the Building Practitioners Board

	BPB Complaint No. CB26026
Licensed Building Practitioner:	Scott Nicholson (the Respondent)
Licence Number:	BP130078
Licence(s) Held:	Roofing – Profiled Metal Roof and/or Wall Cladding

Penalty Decision of the Board under section 318 of the Building Act 2004

Complaint or Board Inquiry	Complaint
Hearing Location	Auckland
Hearing Type:	In Person
Hearing Date:	8 February 2023
Substantive Decision Date:	13 March 2023
Penalty Decision Date:	26 April 2023

Board Members Present

Ms J Clark, Barrister and Solicitor, Legal Member (Presiding)
Mrs F Pearson-Green, Deputy Chair, LBP, Design AoP 2
Mr D Fabish, LBP, Carpentry and Site AoP 2
Mrs 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 disciplinary offences under sections 317(1)(b), (c), (d) and (db) of the Act.

The Respondent **has not** committed a disciplinary offence under section 317(1)(da)(ii) of the Act.

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Summary of the Board’s Penalty Decision

- [1] The Respondent is fined \$2,500 and ordered to pay costs of \$3,500. The decision will be recorded in the Register of Licensed Building Practitioners for a period of three years, and the matter will be published in Code Words. The Respondent and the Respondent’s company will not be named in the publication.

The Charges

- [2] This penalty decision arises out of the Board’s substantive decision in which it found that the Respondent had committed the following disciplinary offences:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act);
 - (b) carried out (other than as an owner-builder) or supervised restricted building work or building inspection work of a type that he or she is not licensed to carry out or supervise (s 317(c) of the Act);
 - (c) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act); and
 - (d) has held himself or herself out as being licensed to carry out or supervise building work or building inspection work of a type that, at that time, he or she was not licensed to carry out or supervise (s 317(1)(db) of the Act).
- [3] 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.
- [4] In its substantive decision, the Board set out its indicative position as regards penalty, costs and publication and invited the Respondent to make written submissions on those matters.
- [5] On 23 March 2023, the Board received the Respondent’s submissions. It has considered them and made the following decisions.

Penalty

- [6] The Board's initial view was that a fine of \$2,500 was the appropriate penalty for the disciplinary offence.
- [7] Having considered the submissions received, the Board has decided to uphold its initial view.
- [8] The Respondent's submission largely, repeated factual matters which were already canvassed at the hearing and considered in reaching the Board's substantive decision. These factual matters are not relevant to the issue of penalty.
- [9] The Board has the discretion to impose a range of penalties. 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.¹
- [10] In this case, the Board took into account mitigating and aggravating factors in reaching its indicative penalty decision, and no new factors have been raised by the Respondent. The Board does not consider any further adjustment is, on the facts of the case, warranted. The Board is also mindful that the penalty needs to reflect the seriousness of the matter and to create a deterrent to other practitioners.

Costs

- [11] The Board's initial view was that \$3,500 in costs was appropriate. Having considered the submissions received, the Board has decided to uphold its initial view.
- [12] The Respondent objected to being charged for a full day of hearing for what was in his view less than half a day. The Board considers that the hearing was a half day and the costs order is the usual tariff for a half day hearing. A cost order for a full day's hearing of this type would have been approximately \$7,000. The Board notes that the costs order relates not just to the time spent at the hearing but also the costs incurred by the Registrar in investigating the complaint.

Publication of Name

- [13] The Board's initial view was that there were good reasons to further publish the matter.
- [14] Having considered the submissions received, the Board has decided to uphold its initial view.
- [15] The Respondent stated that he did not agree or give permission for any information to be published in codewords or on the website. He maintains that it is a breach of privacy and that there are inaccurate, defamatory comments recorded in the decision.
- [16] It is clear that the Board has no discretion as regards information on disciplinary action being retained on the Register. It is a statutory requirement². The Board does

¹ 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]

² Section 301(1)(l)(iii) of the Act

however have discretion to publicly notify the disciplinary action taken.³ The Board does not require the Respondent's permission to do so.

- [17] In deciding to publish the decision in Codewords the Board is guided by the need for the public and/or the profession to know of the findings. Regard is paid to the stated purposes of the Act which include promoting *"the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code."*⁴
- [18] The Board considers that the concerns expressed by the Respondent are adequately addressed by the order that the publication does not include the Respondent's or the Respondent's company name.

Section 318 Order

- [19] 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 \$2,500.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$3,500 (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, there will be action taken to publicly notify the Board's action, in addition to the note in the Register and the Respondent being named in this decision. This decision will be published in Codewords, but the Respondent and the Respondent's company are not to be named in the publication.

- [20] 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

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

Signed and dated this 5th day of May 2023



Mrs J Clark
Presiding Member

³ Section 318(5) of the Act.

⁴ Section 3 (b) of the Act.

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.*