

## Before the Building Practitioners Board

	BPB Complaint No. CB25174
Licensed Building Practitioner:	Henry Rogo (the Respondent)
Licence Number:	BP 101184
Licence(s) Held:	Carpentry and Site AOP 1

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

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Complaint or Board Inquiry	Complaint
Hearing Location	Wellington
Hearing Type:	In Person
Hearing Date:	19 November 2019
Substantive Decision Date:	18 December 2019
Penalty Decision Date:	20 March 2020
Board Members Present:	
	Richard Merrifield, LBP, Carpentry and Site AOP 2 (Presiding)
	Mel Orange, Legal Member
	Bob Monteith, LBP Carpentry and Site AOP 2
	Faye Pearson-Green, LBP Design AOP 2
	Robin Dunlop, Retired Professional Engineer

#### 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.

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## Introduction

- [1] This penalty decision arises out of the Board’s substantive decision in which it found that the Respondent had committed the following disciplinary offence(s):
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act); and
  - (b) 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).
- [2] 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.
- [3] 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.
- [4] On 24 January 2020, the Board received submissions from Legal Counsel acting for the Respondent. It has considered them and made the following decisions.

## Submissions

- [5] The Board’s initial view was that the Respondent’s licence should be cancelled and that he should not be able to reapply to be licensed for a period of six months.
- [6] Counsel for the Respondent submitted that a lesser penalty should be imposed. Reference was made to *Daniels v Complaints Committee 2 of the Wellington District Law Society*<sup>1</sup>. It was submitted that either a restriction on the type of building work that the Respondent could carry out or supervise and to have the Respondent’s work supervised by another licensed building practitioner or that the Respondent’s licence be suspended and that training be undertaken during the period of suspension.

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<sup>1</sup> CIV 2011-485-000227

- [7] Counsel also provided a letter from the Respondent which accepted that he had been wrong to blame the building consent authority inspector for the matters relating to the complaint. A number of supporting references were provided.

### Consideration of Penalty Submissions

- [8] The Board sees little, if any, difference between the Respondent being restricted and supervised to the Respondent's licence being cancelled. A restriction can be imposed under section 318(1)(c) of the Act. The restriction envisaged would be that the Respondent is restricted from carry out or supervising restricted building work. The Respondent would then have to be supervised. That is the same effect as cancellation. The Respondent, if his licence is cancelled, will no longer be able to carry out or supervise restricted building work. He would be able to carry out restricted building work under the supervision of a licensed person.
- [9] The key difference between cancellation and a restriction is that, at the end of a period of cancellation, the Respondent would, under the Licensed Building Practitioner Rules 2007, be required to prove his competence to hold a licence, on reapplication, prior to one being issued. That process would give the public confidence that he is able to work in accordance with the requirements of the licensing regime.
- [10] Turning to suspension and training the Board can, under section 318(1)(b) suspend a person's licence and impose a specified condition in relation to licensing. A condition could include a requirement to carry out training.
- [11] The Board gave consideration to the submission. It noted that the Respondent did not indicate what in the way of training might be appropriate. The Board did consider whether a training course in supervision might be appropriate.
- [12] Whilst training of this type might have merit and might assist the Respondent in the long term the Board does note that the Respondent could, of his own volition during the period when his licence has been cancelled and that successful completion could be used to support his application to be relicensed.
- [13] The Board noted that *Daniels v Complaints Committee 2 of the Wellington District Law Society*<sup>2</sup> indicated, in respect of disciplinary penalties, that:
- The predominant purposes are to advance the public interest (which include "protection of the public"), to maintain professional standards, to impose sanctions on a practitioner for breach of his/her duties, and to provide scope for rehabilitation in appropriate cases.*
- [14] The Board is not convinced that the Respondent will amend his ways if he retains his licence. Whilst those that have provided references have spoken well of him and of his skills, the Board does note his approach to the hearing and his refusal at it to take responsibility for his actions during it. It also notes that the conduct was over a prolonged period and it is only now that the Board has made a finding that the Respondent is willing to take a limited amount of accountability for it.

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<sup>2</sup> CIV 2011-485-000227

[15] Given the above factors, and the need to protect the public, the Board has decided to uphold its original decision.

### **Costs**

[16] The Board's initial view was that the sum of \$5,500 in costs was appropriate. The submissions suggested that the costs of remedial work that are and will be incurred by the Respondent should be taken into account as should the stress the Respondent was experiencing.

[17] The Board considers that those costs, which involve the Respondent doing no more than he was contractually obliged to do, cannot be taken into account in setting the costs of the investigation and hearing.

[18] As regards the Respondent himself the Board comes back to the manner in which the Respondent approached the hearing and the additional costs that were incurred as a result of it.

[19] As noted in the substantial hearing the costs of the investigation and the hearing should not fall to others to pay. It is appropriate that the Respondent bear the burden of at least some of those costs. The amount of costs ordered is still significantly less than the costs that were actually incurred.

[20] Therefore, having considered the submissions received the Board has decided to uphold its initial view.

### **Publication of Name**

[21] The Board's initial view was there were good reasons to further publish the matter. Counsel for the Respondent submitted:

*It is submitted that publication of the decision be limited to appearing in the register, but not to publicly notify the decision, taking into account the matters set out in Mrs Rogo's letter, about the impact on the family, contractors and other workers of penalties facing Mr Rogo. Publicly publishing the decision will likely affect the business and cause great hardship to the others.*

[22] The starting point with disciplinary matters is for there to be publication. There need to be good reasons not to publish. The Board acknowledges the impact that the publication may have on the Respondent, his business and family. Such impacts are inevitable from publication.

[23] The Board has considered the submission within the context of the principles in the Criminal Procedure Act<sup>3</sup> for suppression. Whilst not directly applicable and noting that suppression is not being sought the principles do provide guidance. It noted that nonpublication under the Criminal Procedure Act requires a high level of consequence such as extreme or undue hardship. The Board does not consider that such a threshold has been reached. As such it will order publication.

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<sup>3</sup> Refer ss 200 and 202 of the Criminal Procedure Act

[24] In coming to this decision, the Board has also taken into the account the need to ensure others are aware of and learn from the Board's decision.

### Section 318 Order

[25] For the reasons set out above, the Board directs that:

**Penalty:** Pursuant to section 318(1)(a)(i) of the Act, the Respondent's licence is cancelled and the Registrar is directed to remove the Respondent's name from the register of Licensed Building Practitioners and pursuant to section 318(1)(a)(ii) of the Act the Board orders that the Respondent may not apply to be relicensed before the expiry of six [6] months.

**Costs:** Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$5,500 (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(1)(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.

[26] 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

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

Signed and dated this 20<sup>th</sup> day of March 2020



**Richard Merrifield**  
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:

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- (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.*