

Before the Building Practitioners Board

	BPB Complaint No. CB26043
Licensed Building Practitioner:	Scott Siffleet (the Respondent)
Licence Number:	BP109001
Licence(s) Held:	Carpentry and Site AoP 2

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 Location	by audiovisual link
Hearing Type:	In Person
Hearing and Decision Date:	1 August 2023
Board Members Present:	
	Mr M Orange, Chair, Barrister (Presiding)
	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.

The Respondent is fined \$1,000 and ordered to pay costs of \$1,000. A record of the disciplinary offending will be recorded on the Public Register for a period of three years.

Contents

Summary	2
The Charges	2
Evidence	3
Was the restricted building work complete	4
Has the Respondent provided a record of work.....	5
Was there a good reason for the Respondent to withhold his records of work	5
Did the Respondent fail to provide a record of work	5
Penalty, Costs and Publication	5
Penalty	5
Costs.....	7
Publication	7
Section 318 Order	8
Right of Appeal	8

Summary

- [1] The Respondent was engaged to carry out building work that included restricted building work. The engagement came to a premature end, and most, but not all, of the restricted building work had been completed. A record of work was not provided. At issue was whether, for the purposes of section 88(1) of the Act, completion had occurred. The Board found that, as the Respondent knew another builder had taken over and that he would not be able to return to carry out any further restricted building work, completion had occurred. It followed that he had committed a disciplinary offence under section 317(1)(da)(ii) of the Act when he failed to provide a record of work.
- [2] The Respondent was fined \$1,000 and ordered to pay costs of \$1,000. A record of the disciplinary offence will be recorded on the public Register for a period of three years.

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.¹

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.

- [4] In this matter, the disciplinary charges the Board resolved to further investigate² were that the Respondent may, in relation to building work at [OMITTED], New Plymouth, have failed, without good reason, in respect of a building consent that relates to 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.
- [5] The Board³ 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.

Evidence

- [6] 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 which allow it to receive evidence that may not be admissible in a court of law.
- [7] 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 unless there is a good reason for it not to be provided.⁶
- [8] The Respondent was engaged to carry out building work on an alteration and addition to a residential dwelling. The building work was carried out under a building consent. The consented work included work on the primary structure and the external moisture management systems of the dwelling. The Respondent accepted that he had carried out or supervised the installation of lintels, framing, cladding and one window. As the work included restricted building work, there was a requirement for the Respondent to provide a record of work on completion of his restricted work. To date, one has not been provided to either the owner or the Territorial Authority.
- [9] What was in issue at the hearing was whether the Respondent's restricted building work was complete.
- [10] The Respondent started but did not finish the contracted building work. On or about 9 June 2022, the Complainant gave notice that they required certain steps to be taken and that, if they were not taken within 10 working days, the Complainant

² 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.

³ The Board is a statutory body established under section 341 of the Act.³ 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.

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

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

⁶ Section 317(1)(da)(ii) of the Act

might cancel the contract. At that point, in terms of restricted building work, there was some internal bracing that had not been completed.

- [11] Some two weeks after notice was given, another builder was engaged to complete the project. The Respondent accepted that he knew another builder had been engaged and that he would not be returning to carry out any further restricted building work. The engagement of another builder was also acknowledged by the Respondent in his initial response to the complaint when he stated that the Complainant had not requested a record of work and that he:

... would be reluctant to supply one due to not being given the opportunity to discuss the list of complaints with (the Complainant) or to remedy if required. She also engaged a second builder very quickly and they were then to repair/remedy what she considered faults and to carry out the balance of the construction works.

Was the restricted building work complete?

- [12] 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. In this matter, a contractual dispute arose, and the Respondent stated that he had not previously found himself in such a position, and he was unsure what he should do when another practitioner would be finishing what he had started. He noted that, because of the Board's investigations, he had not provided a record of work because, again, he was not sure what to do.
- [13] The Board has, in previous decisions which have been the subject of continuing professional development articles for Licensed Building Practitioners, held that when the point in time when it becomes clear to a Licensed Building Practitioner that he or she will not be able to return and carry out any further restricted building work, then his or her work is considered to be complete and a record of work is due. The reason is that if the Board was to hold otherwise, then a record of work might never be provided. That would defeat the purpose of the legislation, which is to ensure there is a complete record of all of the Licensed Building Practitioners who carried out or supervised restricted building work.
- [14] It is also important to note that a record of work provides an opportunity to not only record what was carried out or supervised but also what was not done, completed or supervised. Further, if the Respondent had concerns about future liability for work that he had not carried out or supervised, he could have used the record of work to capture those concerns and exclude the bracing that he had not carried out or supervised.
- [15] The Respondent should also note that a record of work is not a statement as to the quality or compliance of the restricted building work. It is not a form of sign-off or undertaking. It is not to be confused with a producer statement. It is simply a record of who carried out or supervised what restricted building work.

- [16] On the basis of the above, the Board finds that the Respondent's restricted building work was complete when he became aware that he would not be returning to carry out any further restricted building work.

Has the Respondent provided a record of work?

- [17] The Respondent has not provided a record of work. In this respect, 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.

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

- [18] The Respondent's reasons have been dealt with in considering the question of completion. It is noted that he also claimed that he did not know what he should do when the contract was brought to a premature end. Ignorance of the Respondent's obligations as a Licensed Building Practitioner is not a good reason. It also noted that the Respondent did not take any steps to find out what he should do. If he had, then a record of work may well have been provided, and the Board would not have had to deal with the matter.

Did the Respondent fail to provide a record of work?

- [19] 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 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) (s 317(1)(da)(ii) of the Act).

Penalty, Costs and Publication

- [20] 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.
- [21] The Respondent made submissions at the hearing as regards penalty, costs and publication.
- [22] The Board advised the Respondent that if he provided a record of work within 10 working days of the hearing, that the Board would take its provision into account as a mitigating factor.

Penalty

- [23] 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.⁷ It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:⁸

- (a) protection of the public and consideration of the purposes of the Act;⁹
- (b) deterring other Licensed Building Practitioners from similar offending;¹⁰
- (c) setting and enforcing a high standard of conduct for the industry;¹¹
- (d) penalising wrongdoing;¹² and
- (e) rehabilitation (where appropriate).¹³

- [24] 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 cases¹⁴ and applying the least restrictive penalty available for the particular offending.¹⁵ In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty¹⁶ that is consistent with other penalties imposed by the Board for comparable offending.¹⁷
- [25] 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.¹⁸
- [26] 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.
- [27] The Board received evidence that the Respondent had submitted a record of work to the Territorial Authority on 6 August 2023. The Board has taken this into account and has reduced the fine to \$1,000.

⁷ *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]

⁸ Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

⁹ Section 3 Building Act

¹⁰ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

¹¹ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

¹² *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

¹³ *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

¹⁴ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

¹⁵ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

¹⁶ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

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

¹⁸ 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.

Costs

- [28] 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.¹⁹
- [29] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings²⁰. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case²¹.
- [30] 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, and it was dealt with by way of an audiovisual link. Adjustments are then made. The Board's scale for a hearing of this type is \$1,000. The Board sees no reason to depart from that amount.
- [31] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$1,000 toward the costs of and incidental to the Board's inquiry.

Publication

- [32] 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,²² 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.
- [33] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.²³ 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.²⁴
- [34] Based on the above, the Board will not order further publication.

¹⁹ *Collie v Nursing Council of New Zealand* [2001] NZAR 74

²⁰ *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

²¹ *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.

²² Refer sections 298, 299 and 301 of the Act

²³ Section 14 of the Act

²⁴ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Section 318 Order

[35] 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 \$1,000 (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 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, which will be publically available on the Board's website.

[36] 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

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

Signed and dated this 15th day of September 2023



M Orange
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.*
 - (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.*