

Before the Building Practitioners Board

	BPB Complaint No. CB25671
Licensed Building Practitioner:	Alex Smith (the Respondent)
Licence Number:	BP 125503
Licence(s) Held:	Carpentry

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 Type:	On the Papers
Hearing and Draft Decision Date:	26 October 2021
Final Decision Date:	21 December 2021
Board Members:	
	Mr C Preston, Chair (Presiding)
	Mr M Orange, Deputy Chair, Barrister
	Mr B Monteith, LBP, Carpentry and Site AOP 2
	Mr R Shao, LBP, Carpentry and Site AOP 1

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.

Contents

Summary of the Board’s Decision	2
The Charges	2
Regulation 9 Decisions	2
Disciplinary Offence to be Investigated	4
Draft Decision Process	5
Evidence	5
Further Evidence and Submissions Received	6
Conclusion and Reasoning	6
Penalty, Costs and Publication	8
Penalty	9
Costs.....	10
Publication	11
Section 318 Order	12
Right of Appeal	12

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 \$1,500 and ordered to pay costs of \$500.

The Charges

[2] On 26 October 2021, the Board received a Registrar’s Report in respect of a complaint about the conduct of the Respondent.

[3] Under regulation 10 of the Complaints Regulations, the Board must, on receipt of the Registrar’s Report, decide whether to proceed no further with the complaint because regulation 9 of the Complaints Regulations applies.

[4] Having received the report, the Board decided that regulation 9 applied to aspects of the complaint but not to all of the allegations.

Regulation 9 Decisions

[5] The complaint to the Board also contained allegations that the Respondent had:

- (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);

[6] With regard to the allegations that the Respondent had breached section 317(1)(b) and 317(1)(d) of the Act, the Board decided that regulation 9(f)(ii) of the Complaints Regulations applied. It provides:

Complaint not warranting further investigation

A complaint does not warrant further investigation if—

- (a) the investigation of it is—*
- (ii) unnecessary;*

[7] In considering whether the investigation of a complaint is necessary, the Board is required to consider the directions of the courts as regards the threshold for matters to be dealt with as a disciplinary matter. In *Collie v Nursing Council of New Zealand*¹, Justice Gendall stated, as regards the threshold for disciplinary matters:

[21] Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness.

[8] Again, in *Pillai v Messiter (No 2)*,² the Court of Appeal stated:

... the statutory test is not met by mere professional incompetence or by deficiencies in the practice of the profession. Something more is required. It includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse.

[9] The complaint contained various allegations in relation to the building work. The Board noted that many of the matters complained about related to incomplete building work or did not reach the threshold for disciplinary action to be taken. As such, on the basis of the above matters and the facts as presented in the complaint and response, the Board has decided that it will not proceed with the allegations of negligence.

[10] With regard to the allegation that the Respondent had breached section 317(1)(c) of the Act, the Complainant set out that the Respondent may not have been licensed for a period of the build as a result of a licence suspension.

¹ [2001] NZAR 74

² (1989) 16 NSWLR 197 (CA) at 200

- [11] Under section 297 of the Act, a person ceases to be a Licensed Building Practitioner when their license is suspended:

297 Effect of licensing suspension

- (1) *A person is not a licensed building practitioner, for the purposes of this Act, for the period for which his or her licensing is suspended.*
- (2) *At the end of the period of suspension, the person's licensing is immediately revived (unless there is some other ground to suspend or cancel that person's licensing under this subpart).*

- [12] In effect, the Respondent was not a Licensed Building Practitioner when his licence was suspended. He was not authorised, during those periods, to carry out or supervise restricted building work.

- [13] The Board only has jurisdiction over Licensed Building Practitioners. Given the wording of section 297, the Board does not have any jurisdiction over a person when their licence is suspended. Accordingly, regulation 9(a) of the Complaints Regulations applies. It provides:

Complaint not warranting further investigation

A complaint does not warrant further investigation if—

- (a) *it does not come within the grounds for discipline; or*

- [14] The Respondent should note it is an offence under section 85 of the Act for an unlicensed person to carry out restricted building work, with the penalty being a fine not exceeding \$50,000. The prosecuting authority for offences under section 85 is the Ministry of Business Innovation and Employment, and a copy of this decision will be provided to the Registrar for Licensed Building Practitioners. The Board cannot deal with such matters. The Respondent, if he carried out or supervised restricted building work when his licence was suspended, may have committed an offence under section 85 of the Act. Notwithstanding, as noted above, that is not a matter that the Board can proceed with.

Disciplinary Offence to be Investigated

- [15] On the basis of the Registrar's Report, the Respondent's conduct that the Board resolved to investigate was that the Respondent had failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) 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).
- [16] Under regulation 10, the Board is required to hold a hearing in respect of that matter.

Draft Decision Process

- [17] The Board's jurisdiction is that of an inquiry. Complaints are not prosecuted before the Board. Rather, it is for the Board to carry out any further investigation that it considers is necessary prior to it making a decision. In this respect, the Act provides that the Board may regulate its own procedures³. It has what is described as a summary jurisdiction in that the Board has a degree of flexibility in how it deals with matters; it retains an inherent jurisdiction beyond that set out in the enabling legislation⁴. As such, it may 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.
- [18] In this instance, the Board has decided that a formal hearing is not necessary. The Board considers that there is sufficient evidence before it to allow it to make a decision on the papers.
- [19] The Board does, however, note that there may be further evidence in the possession of persons involved in the matter or that the Board may not have interpreted the evidence correctly. To that end, this decision is a draft Board decision. The Complainant and the Respondent will be provided with an opportunity to comment on the Board's draft findings and to present further evidence prior to the Board making a final decision. If the Board directs or the Respondent requests an in-person hearing, then one will be scheduled.

Evidence

- [20] 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 that allow it to receive evidence that may not be admissible in a court of law.
- [21] The Respondent was engaged to carry out building work on an alteration to a residential dwelling under a building consent at [OMITTED]. The building work included restricted building work for which a record of work must be provided on completion. The Respondent's building work started in or about March 2020 and came to an end in or about October 2020. The Complainant alleged a record of work has not been provided. The Board obtained a copy of the Territorial Authority file. It did not contain a record of work from the Respondent. The Respondent did not provide a response to the allegation that he did not provide a record of work on completion of restricted building work.

³ Clause 27 of Schedule 3

⁴ *Castles v Standards Committee No.* [2013] NZHC 2289, *Orlov v National Standards Committee 1* [2013] NZHC 1955

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

Further Evidence and Submissions Received

- [22] Following the Board issuing a Draft Decision, it received submissions and further evidence from the Respondent. The Respondent submitted:

I am replying about the decision as I disagree with the outcome and can assure you all the ROWs were dropped off on-site on 21/11/20

On the 02/11/20 we were advised by the client that our services were no longer needed at the property.

I replied on the 03/11/20 that I was happy with the decision and would pop up and grab my remaining tools and drop off the ROW.

unfortunately myself and the clients timeframes did not line up till the 21/11/21 when I hand delivered both the ROWs to the address and I took possession of my remaining tools left on site.

We had no reason at all for withholding the ROW and as per stated in your findings we have had a similar issues before where we were unaware of the consequences of withholding the ROW.

Since then we have learnt this is not legal and learnt a very valuable lesson from this and have always delivered the ROW after every job.

- [23] The Respondent further stated:

We dropped off the ROW 19 days after finding out our service was no longer required.

- [24] The Board took the further evidence and submissions into account when making this Final Decision.

Conclusion and Reasoning

- [25] The Board has decided that 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 (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) 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) and **should** be disciplined

- [26] The further evidence received, and submissions made by the Respondent did not result in any changes being made to the Board's Draft Decision. The Respondent did raise mitigating factors which have been taken into account as regards the appropriate penalty to be imposed.

- [27] As noted in the Draft Decision, 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 work⁶.
- [28] Failing to provide a record of work is a ground for discipline under section 317(1)(da)(ii) of the Act. In order to find that ground for discipline proven, the Board need only consider whether the Respondent had “good reason” for not providing a record of work on “completion” of the restricted building work.
- [29] The Board discussed issues with regard to records of work in its decision C2-01170⁷ and gave guidelines to the profession as to who must provide a record of work, what a record of work is for, when it is to be provided, the level of detail that must be provided, who a record of work must be provided to and what might constitute a good reason for not providing a record of work.
- [30] The starting point with a record of work is that it is a mandatory statutory requirement whenever restricted building work under a building consent is carried out or supervised by a licensed building practitioner (other than as an owner-builder). Each and every licensed building practitioner who carries out restricted building work must provide a record of work.
- [31] The statutory provisions do not stipulate a timeframe for the licenced person to provide a record of work. The provisions in section 88(1) simply states “on completion of the restricted building work ...”. As was noted by Justice Muir in *Ministry of Business Innovation and Employment v Bell*⁸ “... the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work”.
- [32] As to when completion will have occurred is a question of fact in each case.
- [33] 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. Completion occurred in October 2020 when the Respondent’s involvement in the building work came to an end as, after that date, he would not have been in a position to carry out any further restricted building work.
- [34] In the Board’s Draft Decision it noted that a record of work had not been provided. On that basis, the Board found that the record of work was not provided on completion as required, and the disciplinary offence has been committed.
- [35] The Respondent has, since the Draft Decision was issued, provided a response to the allegations. The Respondent had not, until that point, engaged in the investigation process.

⁶ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

⁷ *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

⁸ [2018] NZHC 1662 at para 50

- [36] The Respondent contends that he offered to provide a record of work to the owner in November 2020, soon after completion but that due to intervening events, he was not able to actually provide it until 21 November 2021, one year later and a day after a complaint was made to the Board about its non-provision.
- [37] The Respondent further stated that he provided the record of work 19 days after he found out that his services were no longer required. The statement does not measure up with the former statement that he offered the record of work in November 2020. The Board finds that there is no evidence of a completion date later than October 2020.
- [38] The Respondent should also note that offering is not providing. A record of work is a simple document. It does not have to be hand-delivered. It can be posted or emailed. The Board does not accept that there were impediments to it being provided prior to November 2021. Moreover, there were no impediments to the Respondent providing the record of work to the Territorial Authority, and, in this respect, the Board notes that he still has not done so. Accordingly, the Board's decision remains that the Respondent has failed to provide a record of work on completion of restricted building work as per the requirements of section 88(1) of the Act.
- [39] Section 317(1)(da)(ii) of the Act provides for a defence of the licenced building practitioner having a "good reason" for failing to provide a record of work. If they can, on the balance of probabilities, prove to the Board that one exists, then it is open to the Board to find that a disciplinary offence has not been committed. Each case will be decided by the Board on its own merits, but the threshold for a good reason is high.
- [40] In this instance, there was an ongoing commercial dispute. Whilst not referred to as a reason, the Board has repeatedly stated that a Record of Work is a statutory requirement, not a negotiable term of a contract. The requirement for it is not affected by the terms of a contract, nor by contractual disputes. Licensed building practitioners should now be aware of their obligations to provide them, and their provision should be a matter of routine.
- [41] The Respondent has also referred to an inability to deliver the record of work. The Board has already dealt with that but, for the avoidance of doubt, it is not a good reason. As noted in the Draft Decision, 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 and cannot wait for a convenient time for him to provide it.

Penalty, Costs and Publication

- [42] 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.

- [43] The matter was dealt with on the papers. The Board made an indicative order in its Draft Decision. It has since received submissions and has made a final decision as regards penalty, costs and publication.

Penalty

- [44] The purpose of professional discipline is to uphold the integrity of the profession; the focus is not punishment but the enforcement of a high standard of propriety and professional conduct. The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*⁹ commented on the role of “punishment” in giving penalty orders stating that punitive orders are, at times, necessary to provide a deterrent and to uphold professional standards. The Court noted:

[28] I therefore propose to proceed on the basis that, although the protection of the public is a very important consideration, nevertheless the issues of punishment and deterrence must also be taken into account in selecting the appropriate penalty to be imposed.

- [45] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*,¹⁰ 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 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.
- [46] 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.
- [47] In the Draft Decision, the Board noted that the Respondent had previously appeared before the Board on a record of work matter¹¹ and that he was fined \$1,000. It noted that the current matter is a second offence and that the Respondent has previously been penalised for similar offending is an aggravating factor in that it appears the Respondent has not learnt from the first matter. The Board stated there are no known mitigating factors. As such, the Board indicated that a fine of \$2,000 was appropriate.
- [48] The Respondent has since stated that he did learn from the Board’s earlier decision. He stated:

We truly have learnt from past experiences where we did withhold this and have indeed learnt from this mistake.

⁹ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

¹⁰ 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

¹¹ *Smith* [2019] BPB 25253

- [49] That is doubted as the record of work was not provided in a timely manner. Notwithstanding, he did provide a record of work to the owner, albeit a long time after completion. On that basis, the Board has decided that a small reduction in the fine will be afforded. The fine is set at \$1,500.

Costs

- [50] Under section 318(4) the Board may require the Respondent “to pay the costs and expenses of, and incidental to, the inquiry by the Board.”
- [51] The Respondent should note that the High Court has held that 50% of total reasonable costs should be taken as a starting point in disciplinary proceedings and that the percentage can then be adjusted up or down having regard to the particular circumstances of each case¹².
- [52] In *Collie v Nursing Council of New Zealand*,¹³ where the order for costs in the tribunal was 50% of actual costs and expenses, the High Court noted that:

But for an order for costs made against a practitioner, the profession is left to carry the financial burden of the disciplinary proceedings, and as a matter of policy that is not appropriate.

- [53] In *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society*,¹⁴ the High Court noted:

[46] All cases referred to in Cooray were medical cases and the Judge was careful to note that the 50 per cent was the general approach that the Medical Council took. We do not accept that if there was any such approach, it is necessarily to be taken in proceedings involving other disciplinary bodies. Much will depend upon the time involved, actual expenses incurred, attitude of the practitioner bearing in mind that whilst the cost of a disciplinary action by a professional body must be something of a burden imposed upon its members, those members should not be expected to bear too large a measure where a practitioner is shown to be guilty of serious misconduct.

[47] Costs orders made in proceedings involving law practitioners are not to be determined by any mathematical approach. In some cases 50 per cent will be too high, in others insufficient.

- [54] 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 based on the High Court decisions above are then made.

¹² *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.

¹³ [2001] NZAR 74

¹⁴ CIV-2011-485-000227 8 August 2011

[55] The Board notes the matter was dealt with on the papers. There has, however, been costs incurred investigating the matter, producing the Registrar's Report and in the Board making its decision. The costs have been less than those that would have been incurred had a full hearing been held. As such, the Board will order that costs of \$500 be paid by the Respondent. The Board considers that this is a reasonable sum for the Respondent to pay toward the costs and expenses of, and incidental to, the inquiry by the Board.

Publication

[56] 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 Act¹⁵. The Board is also able, under section 318(5) of the Act, to order publication over and above the public register:

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.

[57] As a general principle, such further public notification 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. This is in addition to the Respondent being named in this decision.

[58] Within New Zealand, there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990¹⁶. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction¹⁷. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive¹⁸. The High Court provided guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*¹⁹.

[59] The courts have also stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published in the public interest²⁰. It is, however, common practice in disciplinary proceedings to protect the names of other persons involved as naming them does not assist the public interest.

[60] Based on the above, the Board will not order further publication.

¹⁵ Refer sections 298, 299 and 301 of the Act

¹⁶ Section 14 of the Act

¹⁷ Refer sections 200 and 202 of the Criminal Procedure Act

¹⁸ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

¹⁹ *ibid*

²⁰ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Section 318 Order

[61] 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 \$1,500.

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.

[62] 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

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

Signed and dated this first day of February 2022.



Mr C Preston
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 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.*