

Before the Building Practitioners Board

	BPB Complaint No. CB26034
Licensed Building Practitioner:	Damian Smith (the Respondent)
Licence Number:	BP110965
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	Auckland
Hearing Type:	In Person
Hearing Date:	21 March 2023
Decision Date:	24 March 2023

Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)
Mr D Fabish, LBP, Carpentry and Site AoP 2
Mrs J Clark, Barrister and Solicitor, Legal Member

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 \$1,500 and ordered to pay costs of \$2,000. A record of the disciplinary offending will be recorded on the Public Register for a period of three years.

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Summary

- [1] The Complainant, the homeowner, contracted the Respondent to carry out building work, being alterations to an existing dwelling. The work was completed and then at the time of the final inspection, the Complainant sought records of work from the Respondent for his work and that of the three subtrades. The Respondent said he provided them to the Complainant immediately upon request and on two further occasions. He said that intermittent internet issues at his rural property meant that, unknown to him, the documents had not been sent to the Complainant.
- [2] The question for the Board was whether the Respondent had failed to provide a record of work on the completion of restricted building work. There were two issues that had to be determined. Firstly, was the Respondent’s restricted building work complete, and, secondly, if it was, did the internet issues constitute a good reason not to provide the records of work.
- [3] The Board found that the Respondent’s restricted building work was complete. The Respondent was given an opportunity to provide further evidence to substantiate his internet issues. He failed to do so. On that basis, the Board found that there was no evidence to corroborate his internet issues and, therefore, no good reason for his failure to provide the record of work.

- [4] The Board decided that the Respondent would be fined \$1,500 and ordered to pay costs of \$2,000.

The Charges

- [5] 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.
- [6] In this matter, the disciplinary charges the Board resolved to further investigate¹ 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 restricted building work 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.
- [7] The Board² 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. The Complainant was summoned to the hearing and was available via telephone. The Board and the Respondent did not require her to give any evidence so she was not called upon to participate.

Failure to Provide a Record of Work

- [8] 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.³
- [9] 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 work⁴ unless there is a good reason for it not to be provided.⁵

Did the Respondent carry out or supervise restricted building work

- [10] The Respondent acknowledged that he had undertaken restricted building work at the property.

Was the restricted building work complete

- [11] The Respondent stated that the work was undertaken from about 1 July 2019 for a period of about six weeks. He said that it was his usual practice to go back for the

¹ 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.

² The Board is a statutory body established under section 341 of the Act.² 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.

³ Section 88(1) of the Act.

⁴ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

⁵ Section 317(1)(da)(ii) of the Act

final inspection, and he was expecting to do so in this case also. The Council inspection records show that the last inspection the Respondent attended was on 26 May 2020.

- [12] The Respondent explained that he would usually provide the records of work at the final inspection as part of organising the Code Compliance Certificate for a client.
- [13] In the end, in this case, the Complainant organised the final inspection herself, and the Respondent did not know that it had occurred until the Complainant contacted him asking for the records of work for himself and the subtrades.
- [14] The Board accepts that the Respondent was expecting to return to the site for the final inspection. In essence, however, as far as the Respondent's involvement in the restricted building work was concerned, completion had occurred in August 2019, and a record of work was due then.
- [15] Whilst it was the Respondent's practice to provide the paperwork at the final inspection and as part of the Code Compliance Certificate process, he should note that the statutory obligation requires it to be provided on completion of his restricted building work and not at the completion of the project.

Has the Respondent provided a record of work

- [16] The Respondent gave evidence that he provided the records of work for himself and the subtrades, upon being asked for them by the Complainant and on two further occasions when they were requested. He provided a copy of a record of work dated 21 June 2021 at the hearing.
- [17] The Respondent said at the hearing that he could provide copies of the emails to substantiate his attempts to send the records of work to the Complainant, as claimed by him. The Board gave the Respondent time⁶ after the hearing to provide that evidence. He did not do so. No communication was received from him.
- [18] The Respondent advised that he had not provided the records of work to the Territorial Authority (Council) as he did not do the final inspection. The Respondent should note that the statutory obligation is to provide the record of work to the homeowner and the Council, regardless of the Licensed Building Practitioner's involvement at the final inspection.
- [19] On the evidence before the Board, it finds that the Respondent did not provide his record of work.

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

- [20] The Respondent gave evidence that he attempted to provide the records of work when requested. He stated that the failure to do so was because of intermittent internet issues at his rural property. The Board was prepared to consider this explanation as potentially amounting to a good reason for his failure to provide the

⁶ The Respondent was directed to provide the emails to the Board officer by Friday 24 March 2023

records of work. It requested that he substantiate his claim by providing copies of the emails which showed his attempts to send the record of work to the Complainant. He was given time⁷ after the hearing to provide these to the Board.

- [21] There was no communication from the Respondent after the hearing and no provision of the alleged emails.
- [22] The Board finds that the Respondent did not establish a good reason for the non-provision of the record of work.

Did the Respondent fail to provide a record of work

- [23] The Respondent has failed to provide a record of work, without good reason, upon completion of his restricted building work,
- [24] The Respondent should not wait to be asked for the record of work. 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] Further, the Respondent should note that the obligation arises on completion of the Licensed Building Practitioner's restricted building work, whenever that may be and not at the end of the project.

Board's Decision

- [26] The Respondent has committed the disciplinary offence of failing to provide a record of work on completion of restricted building work.

Penalty, Costs and Publication

- [27] 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.
- [28] The Board heard evidence during the hearing relevant to penalty, costs and publication and has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

- [29] 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

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aggravating factors present.⁸ It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:⁹

- (a) protection of the public and consideration of the purposes of the Act;¹⁰
- (b) deterring other Licensed Building Practitioners from similar offending;¹¹
- (c) setting and enforcing a high standard of conduct for the industry;¹²
- (d) penalising wrongdoing;¹³ and
- (e) rehabilitation (where appropriate).¹⁴

[30] 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 cases¹⁵ and applying the least restrictive penalty available for the particular offending.¹⁶ In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty¹⁷ that is consistent with other penalties imposed by the Board for comparable offending.¹⁸

[31] 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.¹⁹

[32] The Board's 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. There were no mitigating or aggravating factors. As such, the Board sees no reason to depart from the starting point. The fine is set at \$1,500.

⁸ *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]

⁹ Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

¹⁰ Section 3 Building Act

¹¹ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

¹² *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

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

¹⁴ *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

¹⁵ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

¹⁶ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

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

¹⁸ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

¹⁹ 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

- [33] 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.²⁰
- [34] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings²¹. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case²².
- [35] 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.
- [36] Ordinarily, the costs order for a simple half day hearing, as this was, is \$2,000. In this case the Respondent requested an in person hearing in order to provide his explanation for the failure to provide the record of work. He did not take advantage of that opportunity as he did not produce the evidence, he claimed to have to explain his situation.
- [37] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$2,000 toward the costs of and incidental to the Board's inquiry.

Publication

- [38] 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 Act²³ and he will be named in this decision. The Board is also able, under section 318(5) of the Act, to order further publication.
- [39] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.²⁴ 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.²⁵
- [40] Based on the above, the Board WILL NOT order further publication.

²⁰ *Collie v Nursing Council of New Zealand* [2001] NZAR 74

²¹ *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

²² *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.

²³ Refer sections 298, 299 and 301 of the Act

²⁴ Section 14 of the Act

²⁵ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Section 318 Order

[41] 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 \$2,000 (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(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.

[42] 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.

Submissions on Penalty, Costs and Publication

[43] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until the close of business on **26 April 2023**. The submissions should focus on mitigating matters as they relate to the penalty, costs and publication orders. If no submissions are received, then this decision will become final. If submissions are received, then the Board will meet and consider those submissions prior to coming to a final decision on penalty, costs and publication.

Right of Appeal

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

Signed and dated this 3rd day of April 2023.



Mr 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:*

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- (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.*