

Before the Building Practitioners Board

	BPB Complaint No. CB26027
Licensed Building Practitioner:	Tony Songhurst (the Respondent)
Licence Number:	BP 129264
Licence(s) Held:	Carpentry and Site AoP 1

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:	13 October 2022
Final Decision Date:	22 November 2022

Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)
Mr D Fabish, LBP, Carpentry and Site AoP 2
Mrs F Pearson-Green, LBP, Design AoP 2
Ms 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 a disciplinary offence under section 317(1)(da)(ii) of the Act.

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Summary of the Board’s Final Decision

[1] The Respondent failed to provide a record of work on completion of restricted building work. He is fined \$500 and ordered to pay costs of \$500. The disciplinary finding will be recorded on the public Register for a period of three years.

The Board

[2] The Board is a statutory body established under the Building Act.¹ 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.

The Charges

- [3] On 13 October 2022, the Board received a Registrar’s Report in respect of a complaint about the conduct of the Respondent.
- [4] 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.
- [5] Having received the report, the Board decided that regulation 9 did not apply. Under regulation 10 the Board is required to hold a hearing.

¹ Section 341 of the Act.

- [6] The Board's jurisdiction is that of an inquiry. Complainants 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 procedures². 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 legislation³. 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.
- [7] In this instance, the Board decided that a formal hearing was not necessary. The Board considered that there was sufficient evidence before it to allow it to make a decision on the papers.
- [8] The Board did, 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, it issued a draft Board decision. The Respondent and/or Complainant were 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 directed, or the Respondent requested an in-person hearing, then the Board advised that one would be scheduled.

Disciplinary Offence Under Consideration

- [9] 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).

Function of Disciplinary Action

- [10] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*⁴ and in New Zealand in *Dentice v Valuers Registration Board*⁵.

² Clause 27 of Schedule 3

³ *Castles v Standards Committee No.* [2013] NZHC 2289, *Orlov v National Standards Committee 1* [2013] NZHC 1955

⁴ *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

⁵ [1992] 1 NZLR 720 at p 724

- [11] Disciplinary action under the Act is not designed to redress issues or disputes between a complainant and a respondent. In *McLanahan and Tan v The New Zealand Registered Architects Board*,⁶ Collins J. noted that:

“... the disciplinary process does not exist to appease those who are dissatisfied The disciplinary process ... exists to ensure professional standards are maintained in order to protect clients, the profession and the broader community.”

Evidence

- [12] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁷. 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.
- [13] The Respondent was engaged to carry out building work on a relocatable dwelling at the manufacturer’s premises. The building work was carried out under a building consent. The building work included restricted building work for which a record of work must be provided on completion. The Respondent’s building work started on or about 29 September 2020 and came to an end on or about 25 November 2020.
- [14] The Complainant stated that the Respondent had failed to provide a record of work on completion of restricted building work despite numerous requests for him to provide one.
- [15] The Respondent provided a reply in which he stated that he had provided a record of work in or about November 2020. It was provided to [OMITTED] who, as the manufacturer, was the owner. The Respondent stated:

The ROW was supplied originally on or about November 2020. The person at [OMITTED], [OMITTED] has since left and it was misplaced. I was contacted earlier this year and managed to locate this and resend to [OMITTED].

- [16] A copy of the Territorial Authority file for the dwelling was obtained in August 2022. It did not contain a record of work from the Respondent.

Further Evidence and Submissions Received

- [17] Following the Board issuing a Draft Decision, it received a submission from the Respondent. It took this into account when making this Final Decision.
- [18] The Respondent did not seek an in-person hearing. He stated:

I do not wish to have a hearing as you will just lawyer up for your kangaroo court and double the penalty.

⁶ [2016] HZHC 2276 at para 164

⁷ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

- [19] The Respondent disagreed that “there has been any potential loss or protection required to the public”. He noted the record of work was provided to the client on or about 22 November 2020 and that the client misplaced it. Further, he submitted:

There was no intention to hold back, defraud or any other devious reasoning behind not providing ROW to the tertiary authority.

And

Not one LBP I spoke to including myself were aware a ROW had to be provided to both client and council.

- [20] With regard to the proposed penalty, the Respondent submitted:

Without wanting to sound cynical, it is hard to reconcile your comments with the statement that punitive measures are not the underlying reason for this. No one was affected by this. I have spoken to numerous LBP regarding this and the common comment is it is revenue driven. Everyone is laughing behind your backs at how you treat your practitioners.

And

So there is no support, little upskilling provided by LBP, only disciplinary action.

And

So in closing I consider your draft penalty unjust and out of proportion.

Conclusion and Reasoning

- [21] The further submissions made by the Respondent did not result in any changes being made to the Board’s Draft Decision. The Respondent’s submissions will, however, be addressed.
- [22] 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.
- [23] 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 work⁸.
- [24] 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

⁸ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

need only consider whether the Respondent had “good reason” for not providing a record of work on “completion” of the restricted building work.

- [25] The Board discussed issues with regard to records of work in its decision C2-01170⁹ 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.
- [26] 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.
- [27] 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*¹⁰ “... the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work”.
- [28] As to when completion will have occurred is a question of fact in each case.
- [29] 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 November 2020, and the Respondent stated that he provided a record of work to the owner in November 2020. A record of work was not provided to the Territorial Authority. As noted above, the requirement is for a record of work to be provided to both the owner and the Territorial Authority, not one or the other. As the record of work was not provided to the Territorial Authority, the disciplinary offence has been committed.
- [30] In the Draft Decision, the Board stated that the Respondent should note that the requirement is on the licensed building practitioner to provide a record of work to both the owner and the Territorial Authority. He was required to act of his own accord and not wait for others to remind him of his obligations. The Respondent submitted:

Not one LBP I spoke to including myself were aware a ROW had to be provided to both client and council.

- [31] The requirement in section 88(1) of the Act is clear. The Board does not have the discretion to ignore it. Moreover, there are good reasons why a record of work must

⁹ *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

¹⁰ [2018] NZHC 1662 at para 50

be provided to the Territorial Authority. The Board discussed these in *Hanif* [2019] BPB CB25132. It noted:

[25] *The legislative history of the record of work provisions show that they are designed to create a documented record of who did what in the way of restricted building work under a building consent. It ensures all those involved in carrying out or supervising restricted building work can be identified by the owner (and any subsequent owner) and the territorial authority along with the restricted building work they carried out.*

[26] *In this respect it is noted that the territorial authority's record is one that runs with the property over its lifetime and, as it is a public record, it can be accessed by not only the owner but also by other persons interested in the property.*

[27] *Given these factors the Board considers that that the provision of a record of work to the territorial authority promotes the purposes for which a record of work is provided.*

[32] The Board also notes that the Ministry of Business Innovation and Employment has published multiple articles in Code Words designed to educate Licensed Building Practitioners on their obligations and that as a Licensed Building Practitioner, the Respondent was assessed as having met the competency requirements for a Carpentry Licence, which includes regulatory knowledge.

[33] Finally, as regards the provision of a record of work to the Territorial Authority, ignorance of the law is not a defence. It may be a mitigating factor. It is, however, offset by the conduct that led to the complaint. Had the Respondent engaged with the Complainant in the first instance, the Board would not have had to deal with this matter.

[34] The Respondent also submitted:

There was no intention to hold back, defraud or any other devious reasoning behind not providing ROW to the tertiary authority.

[35] Failure to provide a record of work is a form of strict liability offence. All that needs to be proven is that a record of work was not provided in accordance with section 88(1) of the Act. No fault, intention or negligence has to be established.¹¹

[36] 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

¹¹ *Blewman v Wilkinson* [1979] 2 NZLR 208

case will be decided by the Board on its own merits, but the threshold for a good reason is high. The reasons advanced have been dealt with above.

Penalty, Costs and Publication

- [37] Having found that one or more of the grounds in section 317 applies, the Board must, under section 318 of the Act¹, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [38] 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

- [39] 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*¹² 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.

- [40] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*,¹³ 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.
- [41] In its Draft Decision, the Board noted that record of work matters are at the lower end of the disciplinary scale and that 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. The Board also noted that the Respondent had previously appeared before the Board in relation to a record of work matter but that it was not considered to be an aggravating factor and that the Respondent did provide a record of work to the owner. It reduced the fine from \$1,500 to \$500.

¹² HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

- [42] The Respondent submitted that the Board's indicative penalty was punitive and revenue driven, that no one was affected, and that it was unjust and out of proportion.
- [43] The courts have recognised whilst penalties are not intended to be punitive, they do have that effect. For example, in *Jefferies v National Standards Committee*,¹⁴ the High Court stated:
- [25] *I accept the principle that suspension is not intended to be a punitive sanction even if it invariably has that effect.*
- [44] The Board does not agree that no one has been impacted by the Respondent's disciplinary offending. A complaint has been made, and the Board has had to deal with it.
- [45] Finally, with regard to proportionality, the fine is consistent with those imposed by the Board for matters of a similar nature that have come before it.
- [46] Taking the above factors into account, and in particular the significant reduction in the fine already granted, the Board sees no reason to further reduce the penalty.

Costs

- [47] 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."
- [48] 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 case¹⁵.
- [49] In *Collie v Nursing Council of New Zealand*,¹⁶ 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.*
- [50] In *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society*,¹⁷ 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.*

¹⁴ [2017] NZHC 1824

¹⁵ *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.

¹⁶ [2001] NZAR 74

¹⁷ CIV-2011-485-000227 8 August 2011

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.

- [51] 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.
- [52] The matter was dealt with on the papers. In the Draft Decision the Board noted that costs have, however, been incurred in 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. The Board indicated that costs of \$500 were appropriate.
- [53] Again, the Respondent has submitted that they are disproportionate. They are not. The amount is minimal by comparison to the actual costs incurred. The sum of \$500 is reasonable, and it is ordered as the amount to be paid by the Respondent.

Publication

- [54] 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 Act¹⁸. 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.

- [55] 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.
- [56] Within New Zealand, there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990¹⁹. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²⁰. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal

¹⁸ Refer sections 298, 299 and 301 of the Act

¹⁹ Section 14 of the Act

²⁰ Refer sections 200 and 202 of the Criminal Procedure Act

Procedure Act do not apply but can be instructive²¹. 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*²².

- [57] 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 interest²³. 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.
- [58] The Respondent did not make any submissions as regards publication. As such, and based on the above, the Board will not order further publication.

Section 318 Order

- [59] 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 \$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(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.

- [60] 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

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

Signed and dated this 7th day of December 2022



Mr M Orange
Presiding Member

²¹ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

²² *ibid*

²³ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

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.*