

## **Before the Building Practitioners Board**

	BPB Complaint No. C2-01537
Licensed Building Practitioner:	Joshua Martin (the Respondent)
Licence Number:	BP 129309
Licence(s) Held:	Carpentry

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

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Complaint or Board Inquiry	Complaint
Hearing Location	Auckland
Hearing Type:	In Person
Hearing Date:	27 April 2017
Decision Date:	5 May 2017
Penalty Decision Date:	11 August 2017
Board Members Present	Chris Preston (Presiding) Richard Merrifield Mel Orange Bob Monteith

#### **Procedure:**

The matter was considered by the Building Practitioners Board (the Board) under the provisions of Part 4 of the Building Act 2004 (the Act), the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Complaints Regulations) and the Board's Complaints and Inquiry Procedures.

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## Introduction

[1] This penalty decision arises out of the Board’s substantive decision in which it found that the Respondent had committed the following disciplinary offence(s):

- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act); and
- (b) 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).

[2] Having found that one or more of the grounds in section 317 applies the Board must, under section 318 of the Act<sup>i</sup>, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.

[3] In its substantive decision the Board set out its indicative position as regards penalty, costs and publication and invited the Respondent to make written submissions on those matters. Specifically it set out requirements as regards the submissions. The Respondent was advised as follows:

*[47] The Board is concerned as to the Respondent’s competence and in this respect it must consider whether the public and the confidence in the licensing regime needs to be protected by way of the cancellation of the Respondent’s licence. Such action would allow him a further period of working under supervision and further development of his competency before becoming relicensed.*

*[48] Cancellation of the Respondent’s licence would have a significant impact on him and the Board has not fully explored the Respondent’s overall competency. It may be that this job was an aberration in that it was not demonstrative of his actual competency and as such the Board seeks submissions from the Respondent as to why it should not cancel or suspend his licence.*

*[49] The Respondent should note that the Board will require tangible evidence in writing as to his competence. Such evidence could come from experienced licensed building practitioners the Respondent has worked with, or is currently working with, who can attest to his competence. Such evidence should be signed by the person giving it and disclose their contract so that the Board can, if necessary, verify it. Anecdotal evidence will not be accepted. The Board is concerned as to the Respondent's competence and in this respect it must consider whether the public and the confidence in the licensing regime needs to be protected by way of the cancellation of the Respondent's licence. Such action would allow him a further period of working under supervision and further development of his competency before becoming relicensed.*

- [4] The substantive decision directed that the submissions on penalty, costs and publication were to be provided by 16 June 2016.
- [5] On or about 27 June 2017 the Respondent provided a hand written submission which did not address the specific items noted in paragraphs [47] to [49] of the Board's substantive decision.
- [6] Following the receipt of the submission the Board issued a Minute dated 30 June 2017. In it the Registrar was asked to contact the Respondent and explain the Board's requirements to him and to give the Respondent a further opportunity to provide the information the Board required. The Respondent was given until 21 July 2017 to provide a further submission and the Registrar contacted and spoke to the Respondent as per the Board's request.
- [7] On 21 July, the due date for the further submission the Respondent emailed the Board Secretariat requesting an extension and stated:

*I'm sorry I have not got my submission into the board as I have been back into hospital with an infection from my surgery unfortunately... could I please request 1 more week, 28th July to get my references in... the date has come up on me so quick and due to being back into hospital it slipped my mind*

*Please give my apologies to the board and please ask if they will accept my submission in 1 weeks time?*

- [8] The Board granted the extension subject to the Respondent providing evidence that substantiated his hospital admission. No evidence was provided.
- [9] On 31 July 2017 the Respondent further emailed in response to an enquiry from the Board Secretariat as regards evidence of his hospital admission as follows:

*Nope I haven't received paperwork from them and I'm having trouble getting in contact with my references as one is on holiday and one is taking his time... is there another way I can do this?... my LBP is so important to me and I really need to get my end sorted, I've got another reference that I've messaged and is happy to do it,*

*I'm real sorry for my end and the muck around in this process*

- [10] On 6 August 2017 the Respondent emailed references. Notwithstanding that the Respondent failed to meet all of the directions as regards when submissions and references were to be filed and has not provided evidence to substantiate the reasons for an extension to the due date the Board has accepted what has been provided and has taken it into consideration.

### **Penalty**

- [11] The Board's initial view was that a period of suspension of the Respondent's licence was appropriate. In its substantive decision it noted:

*[44] The matters before the Board were serious. The Respondent has been found to have been both negligent and incompetent and to have failed to provide a record of work. A commensurate penalty is warranted.*

*[45] The Board is concerned as to the Respondent's competence and in this respect it must consider whether the public and the confidence in the licensing regime needs to be protected by way of the cancellation of the Respondent's licence. Such action would allow him a further period of working under supervision and further development of his competency before becoming relicensed.*

- [12] The Respondent's initial submission was that it was "far-fetched" to suspend or cancel after only one complaint and that he had shown a willingness to rectify on site failings. He also disagreed with the findings and noted that the building could not have been out of square/plum as the RAB Board on external corners "gains both ways". In this respect the Respondent is still showing a lack of knowledge and expertise. The manner in which he squared and plumed the building was not the correct way and it was out of plum and out of square. The Respondent failed to use recognised and accepted trade practices and still seems to be failing to do so.
- [13] The Respondent noted a clean history and inspections being passed on other houses but provided no evidence to substantiate this. He also detailed the personal impact the complaint has had on him.
- [14] The further submissions received on 6 August 2017 amounted to two references. One was from a friend and co-worker and the other from a client. Neither were signed and there was no evidence to substantiate their authenticity. In such circumstances very little weight can be placed on them. Moreover neither provided the detail or assurances the Board was seeking when it issued the directions in its substantive decision.
- [15] Given the above the Board, having considered the submissions, has decided to uphold its initial view for the reasons set out in its substantive decision. The Respondent's licence will be cancelled and the Board will order that he will not be able to apply for a new licence for a period of 12 months. The Board see this as necessary to ensure he obtains further knowledge and experience prior to being able to carry out and/or supervise restricted building work in his own right.

- [16] Cancellation also means that the Respondent will, on applying to become relicensed, have his competency objectively assessed in accordance with the Licensed Building Practitioners Rules 2007.

### **Costs**

- [17] The Board's initial view was that \$2,000 were appropriate. Again the Board has not received any submissions that persuaded it to change this amount and as such it is confirmed.

### **Publication of Name**

- [18] The Board's initial view was there were good reasons to further publish the matter. In its substantive decision it stated:

*[56] 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 interest. 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.*

*[57] Based on the above the Board will order further publication. The Respondent will not be named in that publication which will focus on the imperative to get building work right the first time and not to rely on the ability to fix mistakes after they have occurred. The publication will be in Code Words and/or on the Board's website.*

- [19] Having considered the submissions received the Board has decided to uphold its initial view for the reasons outlined above.

### **Section 318 Order**

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

**Penalty:** Pursuant to s 318(1)(a) of the Building Act 2004, the Respondent's licence is cancelled and the Registrar is directed to remove the Respondent's name from the register of Licensed Building Practitioners and pursuant to s 318(1)(a)(ii) of the Act the Board orders that the Respondent may not apply to be relicensed before the expiry of 12 months.

**Costs:** Pursuant to s 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, if the Respondent is relicensed, record the Board's action in the Register of Licensed Building Practitioners in accordance with s 301(1)(iii) of the Act.

In terms of section 318(5) of the Act, there will be action taken to publicly notify the Board's action in addition to the note in the register and his being named in this decision.

- [21] 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**

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

Signed and dated this 11<sup>th</sup> day of August 2017



**Chris Preston**  
Presiding Member

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#### <sup>i</sup> **Section 318 of the Act**

- (1) *In any case to which section 317 applies, the Board may*
- (a) *do both of the following things:*
    - (i) *cancel the person's licensing, and direct the Registrar to remove the person's name from the register; and*
    - (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*
  - (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."*

#### <sup>ii</sup> **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—*

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- (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.*