

Before the Building Practitioners Board

	BPB Complaint No. CB26402
Licensed Building Practitioner:	Christopher McLean Cresswell (the Respondent)
Licence Number:	BP134251
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 Location	Audio-visual link
Hearing Type:	In Person
Hearing Date:	15 August 2024
Decision Date:	29 August 2024

Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)
Mrs F Pearson-Green, Deputy Chair, LBP, Design AoP 2
Mr P Thompson, LBP, Carpentry and Site AoP 3, Quantity Surveyor

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)(c) of the Act.

The Respondent **has not** committed disciplinary offences under sections 317(1)(g) or (i) of the Act.

The Respondent is censured. 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 Respondent, a Licensed Carpenter, assisted a homeowner who was seeking a Building Consent for a renovation by providing design details based on an Acceptable Solution (NZS3604) to answer RFIs (Requests for Information). The Building Consent application had previously been developed and lodged by a Licensed Designer. When the RFI was issued, the Designer had ceased providing services to the homeowner. The Respondent did not make it clear that the RFI response he submitted had not come from the Designer or that anyone other than the Designer had altered the plans.
- [2] Design work is restricted building work that can only be carried out or supervised by a person who holds a Design Licence. The Respondent, who holds a Carpentry Licence, was not authorised to carry out design work, which is what he did when he submitted the RFI response. As such, the Board found that the Respondent had carried out restricted building work that he was not licensed to carry out, which is an offence under section 317(1)(c) of the Act.
- [3] The Board also considered whether the Respondent had, through his conduct, breached the Code of Ethics for Licensed Building Practitioners or had brought the

regime for Licensed Building Practitioners into disrepute. When considering such conduct, the Board needs to decide whether any conduct that might have breached either reaches the threshold for disciplinary action. In this matter, the Board decided that, because there had been minimal engagement on the project, no payment had been received for the services, and there was no intention to mislead or deceive, the conduct did not reach the threshold for disciplinary action.

- [4] The Board decided it would censure the Respondent for carrying out restricted building work that he was not licensed to carry out and that he pay costs of \$500. The disciplinary findings will be recorded on the public Register for a period of three years.

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.¹
- [6] In this matter, the disciplinary charges the Board resolved to further investigate² were that the Respondent may, in relation to building work at [OMITTED], Wellington, have:
- (a) carried out or supervised restricted building work of a type that he or she is not licensed to carry out or supervise contrary to section 317(1)(c) of the Act;
 - (b) breached the code of ethics prescribed under section 314A of the Act contrary to section 317(1)(g) of the Act, IN THAT, he may have breached:
 - (i) Clause 10: You must comply with the law; and/or
 - (ii) Clause 12: You must be knowledgeable about what you are allowed to do; and/or
 - (c) conducted himself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute contrary to section 317(1)(i) of the Act.
- [7] The Board³ initially dealt with the complaint by way of a Draft Decision. The Respondent disputed the findings. The Draft Decision was set aside, and a hearing was scheduled.

¹ Under section 322 of the Act, the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law. The evidentiary standard is the balance of probabilities, *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1.

² The resolution was made following the Board's consideration of a report prepared by the Registrar in accordance with regulation 10 of the Complaints Regulations.

³ The Board is a statutory body established under section 341 of the Act.³ Its functions include receiving, investigating, and hearing complaints about, and to inquire into the conduct of, and discipline, licensed building practitioners in accordance with subpart 2 of the Act. It does not have any power to deal with or resolve disputes.

Evidence

- [8] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed.⁴ Under section 322 of the Act, the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.

Background to the Complaint

- [9] The complaint was made by a Ministry of Business Innovation and Employment (MBIE) Investigator (the Investigator). It arose from a complaint made by [OMITTED], a Licensed Building Practitioner holding a Design AoP 1 Licence (the Designer), about the owner of a property for whom he had carried out design work and [OMITTED], a Project Manager for CMCC Limited, trading as Country and Coast Construction. The original complaint was made to the Ministry as the prosecution authority for unlicensed building work under section 85 of the Act. Further investigations established that the Respondent, a Licensed Carpenter, may have been involved in the matters originally complained about. On that basis, the Investigator made a complaint to the Board. A different MBIE investigator assisted the Board with its investigations.
- [10] The background to the original complaint was that the homeowner had engaged the Designer to carry out design work. The Designer developed a design for the homeowner to alter an existing dwelling and submitted a Building Consent application as the homeowner's agent. The Designer, as part of the Building Consent application, submitted a Certificate of Design Work (CoDW) under section 45(3) of the Act.
- [11] After the Building Consent application had been submitted, a dispute arose between the Designer and the homeowner about the amount invoiced for design services and the scope of the services the Designer was supplying. The Designer discounted his design fee proposal on the basis that he would then charge for any services provided in relation to any RFIs. The homeowner, who also gave evidence, was somewhat vague on the details of his contractual engagement and interactions with the Designer. The Board preferred the Designer's evidence.
- [12] When RFIs were issued, the Designer provided a fee proposal to respond to them. The Designer's evidence was that the homeowner then advised him that he had decided the project was too expensive and that he was not going to proceed with it. The homeowner indicated to the Designer that he would be withdrawing the Building Consent application. Subsequent to that, the Designer became aware that the homeowner had arranged for a new agent, [OMITTED] (the Agent), an employee of the Respondent, to be added to the Building Consent Authority (BCA) system (Simpli) used for submitting Building Consent documentation and that a response

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

had been submitted to the RFIs by the Agent. The Designer then made his complaint to MBIE.

- [13] The homeowner, the Respondent and the Agent gave evidence that the homeowner contacted CMCC Limited to discuss the scope of building work. Initially, access to Simpli was obtained so that the plans could be obtained so that CMCC could price the work. The homeowner then asked the Agent if CMCC could assist with the RFIs. The Agent consulted the Respondent, who decided that, because the RFIs were simple in nature and could be answered with reference to an acceptable standard (NZS3604), he would assist. It is that assistance that led to the Board’s investigation.

The conduct under investigation

- [14] In his response to the complaint, the Respondent submitted that he assisted the homeowner because he was under the impression that the Designer had refused to assist the homeowner in completing the Building Consent application.
- [15] The assistance the Respondent provided consisted of altering the plans that had been lodged by the Designer and providing further information to respond to the RFIs. The response was made in such a way that it would have appeared to the BCA that the RFI response and associated work had been carried out and submitted by the Designer. Moreover, the Respondent did not take any steps, independent of the Simpli submission, to inform the BCA that it was his work and not the work of the Licensed Designer that had provided the CoDW.
- [16] The following is an extract from Simpli showing the responses lodged. Whilst the RFI responses are noted as having been submitted by Mr [OMITTED], both he and the Respondent accepted that the responses were actually lodged by the Respondent.

RFI Number	RFI Round	Request Details	Raised By	Responded By	Submitted	Responded	Acknowledged
1	1	B1-Structure-Floor details-You are enclosing the existing porch and proposing a new cupboard. Please provide the details of the existing and propos...	OMITTED	OMITTED	Fri, 17 Feb 2023	Fri, 7 Jul 2023	Tue, 11 Jul 2023
2	1	B1-Structure-Fixing details-You have mentioned the 6 kN straps to pile and new double studs. Please provide the fixing detail of 6 kN straps to pile...	OMITTED	OMITTED	Fri, 17 Feb 2023	Fri, 7 Jul 2023	Tue, 11 Jul 2023
3	1	B1-Structure-Fixing details-You have mentioned the new double studs to support the ceiling runner. Please provide the fixing detail showing the new ...	OMITTED	OMITTED	Fri, 17 Feb 2023	Fri, 7 Jul 2023	Tue, 11 Jul 2023
4	1	B1 - Structure Blocking details-You have specified solid blocking on top of existing top plate. Please confirm what kind of blocking is proposed an...	OMITTED	OMITTED	Fri, 17 Feb 2023	Fri, 7 Jul 2023	Tue, 11 Jul 2023
5	1	H1-Insulation-The scope of work includes is to remove the existing porch door and install new 90 x 45 mm SCS-KD framing. Please confirm if there is any...	OMITTED	OMITTED	Fri, 17 Feb 2023	Fri, 7 Jul 2023	Tue, 11 Jul 2023

- [17] When the Designer became aware of what had transpired, he informed the BCA and confronted the homeowner. The end result was that the Building Consent

application was withdrawn. The homeowner stated the reason for the withdrawal was that the proposed project was unaffordable.

[18] In his response to the complaint, the Respondent accepted his involvement and set out how he came to be involved with the homeowner and to undertake the work, and stated:

To try and assist Mr [OMITTED], [OMITTED] and I read through the outstanding RFI questions and determined they answers could probably provided using readily available information from NZS3604 and manufacturers documents commonly used in residential building.

At this point I have offered to help [OMITTED] answer these questions as I am the experienced builder and LBP so should be able to find the appropriate information and detailed drawings to upload for council review.

I had three options in how I thought to help;

- *do nothing*
- *draw or make notes in response to the RFI's on a blank piece of paper (or Country and Coast Construction letterhead) referencing the original multipro plans and upload them to simpli.*
- *Draw or make notes and include them with the original Multipro plans submitted to council and upload to simpli*

I chose the last approach purely because I thought it might aid the Wellington City Council in not adding any extra confusion to the job having a second set of drawings. Interestingly I had the opposite thought to what the complaint is about in that if I didn't include the added context to the existing Multipro plans then it would seem like I am trying to claim the job as my own.

I copied some information I had researched adding that with the MultiPro plans to help add context to the drawings and submitted the response to the RFI's using [OMITTED]'s Simpli login.

I believed at the time that I was not acting in breach of my license as I was adding readily available information to the consent file to add context to the drawings. I don't believed I 'designed' anything and was using my skills as a licensed builder to find the missing information required which is required on most building jobs.

After submitting the RFI responses, as evidenced, I was made aware The Designer was not happy with what we had done. On Monday July 10th I emailed Mr [OMITTED] to let him know we would prefer not to be involved until he had sorted his issues with The Designer and the Building Consent. I believe this was my last contact with either party.

We didn't take a fee for this job and we did not provide an estimate for the building work.

- [19] At the hearing, the Respondent noted the design work he did only took a few hours and reiterated that he had not been paid for any of his services. He also stated that he had followed MBIE guidelines on how to mark up changes on a plan when submitting RFI responses. He accepted that he had not considered the possible impact on the Designer, who had provided the original CoDW and was the person accountable for the design work, or how an updated CoDW capturing the changes would be provided.
- [20] The Respondent submitted that what he had done was no different to an onsite minor variation being arranged during a build and that if it was found that he had committed a disciplinary offence, it would impact how design changes were, in practice, carried out during a build. He also submitted that he had not carried out design work as his RFI responses were based on Acceptable Solutions and manufacturer's specifications, which was readily available information.
- [21] The Respondent was provided an opportunity to provide written submissions. His submissions were received on 23 August 2024 and have been taken into consideration.

Not Licensed

- [22] Restricted building work can only be carried out or supervised by a Licensed Building Practitioner who holds the required class of licence. This is because, firstly, section 84 of the Act states:

All restricted building work must be carried out or supervised by a licensed building practitioner [who is licensed] to carry out or supervise the work.

- [23] Section 85 makes it an offence to carry out restricted building unless licensed to do so

85 Offences relating to carrying out or supervising restricted building work

- (1) *A person who is not a licensed building practitioner commits an offence if he or she carries out restricted building work while not supervised by a licensed building practitioner who is licensed to carry out or supervise the carrying out of restricted building work of that kind.*
- (2) *A person who is a licensed building practitioner commits an offence if he or she—*
- (a) *carries out restricted building work and is not licensed to carry out restricted building work of that kind; or*

(b) *supervises restricted building work and is not licensed to carry out or supervise the carrying out of restricted building work of that kind.*

(3) *Subsection (1) and (2)(a) do not apply to a person to whom the owner-builder exemption applies in respect of the restricted building work in question.*

(4) *A person who commits an offence under this section is liable on conviction to a fine not exceeding \$50,000.*

[24] Technically, MBIE could have brought a prosecution against the Respondent under the above section.

[25] The Respondent brought various cases to the Board's attention. Those cases were in the criminal jurisdiction where different tests apply. The Board does not have to make a "beyond reasonable doubt" finding. The cases do not apply. Other cases referred to related to the threshold for disciplinary action, which is often referred to as "seriousness". That is a factor in findings under other provisions in section 317(1) of the Act, such as a breach of the Code of Ethics or disreputable conduct, but not to others, such as that which is under consideration. The Respondent should note that the Board has applied the seriousness test to the other grounds of conduct but not to the conduct under section 317(1)(c) of the Act.

[26] Turning to the conduct, clause 6 of the Building (Definition of Restricted Building Work) Order 2011 (New Zealand) defines restricted building work as it relates to design work:

6 *Certain design work relating to primary structure or external moisture-management systems of residential buildings to be restricted building work*

(1) *The kinds of design work described in subclause (2) are restricted building work for the purposes of the Act.*

(2) *The design work referred to in subclause (1) is the preparation of any drawing, specification, or other document, according to which—*

(a) *the primary structure of a house or a small-to-medium apartment building is proposed to be constructed or altered; or*

(b) *any external moisture-management system attached to or forming part of a house or a small-to-medium apartment building is proposed to be constructed or altered.*

[27] Licensing classes are designated under section 285 of the Act. The current ones were created by Order in Council in the Building (Designation of Building Work Licensing Classes) Order 2010. It designates the types of building work that a licensed building

practitioner can carry out or supervise. Under clause 4 of the Order, the following are the types of building work each class of licence can carry out:

<i>Licensing class</i>	<i>Type of building work</i>
<i>General Licence Classes</i>	
Design	Design work for any building that is— (a) a category 1 building; or (b) a category 2 building; or (c) a category 3 building
<i>Trade Licensing Classes</i>	
Carpentry	Carpentry for any building that is— (a) a category 1 building; or (b) a category 2 building; or (c) a category 3 building

- [28] The Respondent holds a Carpentry Licence. On the basis of the above, his license is limited to carpentry work, and he cannot carry out or supervise design work. Only a Licensed Building Practitioner who holds a Design Licence can do so.

Acceptable Solutions and Design Work

- [29] Under section 17 of the Act, all building work must comply with the Building Code. The building code is contained in Schedule 1 of the Building Regulations 1992 (the Building Code).
- [30] Section 19 of the Act sets out how compliance can be established. It includes compliance with an Acceptable Solution.⁵ Manufacturer's specifications are often included in design specifications to demonstrate how a product is to be installed in order to meet compliance requirements.
- [31] Often, designs and design work rely on Acceptable Solutions and manufacturer's specifications. Their reliance does not, however, exempt such designs from the definition of design work that is restricted building work. An exemption can only be granted by a legislative provision, none of which exists. Therefore, as the Respondent's RFI responses came within the definition of design work that is restricted building work, it is not a defence that he relied on an Acceptable Solution.

Design Changes During a Build

- [32] The Respondent submitted that what he did was no different from changes being made to a Building Consent form during the build process. The Board did not accept that submission.
- [33] Firstly, section 45 of the Act, which regulates how a Building Consent is to be applied for, requires, under subsections (2) and (3), the provision of a Certificate of Design Work (CoDW) must accompany the application:

⁵ Section 19(1)(b) of the Act.

45 How to apply for Building Consent

- (2) *If an application for a Building Consent is accompanied by plans and specifications that contain design work (relating to building work) that is restricted building work, that design work must be carried out or supervised by 1 or more licensed building practitioners who are licensed to carry out or supervise that work.*
- (3) *The plans and specifications that contain the design work referred to in subsection (2) must be accompanied by a certificate of work—*
- (a) *provided by 1 or more licensed building practitioners who carried out or supervised that design work; and*
 - (b) *that identifies that design work; and*
 - (c) *that states—*
 - (i) *that the design work complies with the building code; or*
 - (ii) *whether waivers or modifications of the building code are required and, if so, what those waivers or modifications are.*

[34] The above makes it clear that the design work associated with a Building Consent application must be carried out or supervised by an appropriately licensed person, which is a Licensed Designer.

[35] By contrast, minor variations are provisioned for in section 45A of the Act. It provides a flexible approach to changes to a Building Consent for Minor Variations. The process differs from that set out for amendments, which must follow the same process as originating applications for Building Consents (set out in section 45 of the Ac). Notably, section 45A states:

45A Minor variations to Building Consents

- (1) *An application for a minor variation to a Building Consent—*
- (a) *is not required to be made in the prescribed form; but*
 - (b) *must comply with all other applicable requirements of section 45.*
- (2) *Sections 48 to 50 apply, with all necessary modifications, to an application for a minor variation.*
- (3) *A Building Consent authority that grants a minor variation—*
- (a) *must record the minor variation in writing; but*
 - (b) *is not required to issue an amended Building Consent.*

[36] Minor Variation is defined in the Building (Minor Variations) Regulations 2009. Regulation 3 defines a Minor Variation as:

3 Minor variation defined

- (1) *A minor variation is a minor modification, addition, or variation to a Building Consent that does not deviate significantly from the plans and specifications to which the Building Consent relates.*
- (2) *The following are examples of minor variations and do not constitute an exhaustive list:*
 - (a) *substituting comparable products (for example, substituting one internal lining for a similar internal lining):*
 - (b) *minor wall bracing changes:*
 - (c) *a minor construction change (for example, changing the framing method used around a window):*
 - (d) *changing a room's layout (for example, changing the position of fixtures in a bathroom or kitchen).*
- (3) *The examples in subclause (2) are only illustrative of subclause (1) and do not limit it. If an example conflicts with subclause (1), subclause (1) prevails.*

[37] It is clear from section 45A of the Act that whilst the process for a Minor Variation is not as onerous as that required for an Amendment to a Building Consent, there is, nevertheless, a requirement that the legislative provisions in the Act as regards compliance with the Building Consent still applies. Most importantly, the Building Consent authority retains the discretion to refuse a Minor Variation.⁶ To aid the process of applying for a Minor Variation, most Building Consent authorities have an application form.

[38] The fact that a Minor Variation has to be applied for and can either be granted or refused implies that the building work that relates to it must follow rather than precede the application. The legislative framework does not allow a Minor Variation to be carried out and then, once complete, to be retrospectively applied for, irrespective of what might be common practice on a building site.

[39] The definition of and process for Minor Variations are what distinguishes them from design work carried out for the purpose of obtaining a Building Consent. Firstly, as noted in the definition, the change is minor and will generally not require design work. Secondly, there is a requirement to consult with the BCA before the change is made. That ensures that Building Code requirements will be met or, if there are questions over compliance, that the appropriate design professionals are consulted. Finally, and most importantly for the purposes of this decision, the BCA will have knowledge of who is seeking the Minor Variation and will have the opportunity to

⁶ Sections 48, 49 and 50 of the Act provide for the processing, granting and refusal of Building Consents

require that design professionals be consulted (if needed). With respect to this matter, the BCA did not know that the RFI responses had not come from the Designer, a person they knew was a licensed design professional. In essence, the manner in which the RFI responses were submitted made them false or misleading.

Strict Liability Offence

[40] Section 317(1)(c) of the Act is a form of strict liability offence in that the Board does not need to find that there was intention, fault or negligence⁷. Nor does the Board have to consider the seriousness of the conduct, although seriousness may be a mitigating factor if a disciplinary decision is made. Rather, all that has to be established is that the Respondent has carried out or supervised restricted building work of a type that he is not licensed to carry out or supervise. That has been established, and the Board finds that the offence has been committed.

Code of Ethics and Disrepute

[41] Unlike section 317(1)(c) of the Act, to make a finding that a disciplinary offence has been committed under either section 317(1)(g) or (i) of the Act (breaches of the Code of Ethics and disreputable conduct), the Board must establish that the conduct was sufficiently serious enough.

[42] In *Collie v Nursing Council of New Zealand*,⁸ the High Court 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.

[43] In *Pillai v Messiter (No 2)*,⁹ an Australian Court of Appeal decision that has been adopted by the Superior Courts of New Zealand, 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.

[44] The tests apply to allegations of breaches of the Code of Ethics and disreputable conduct. The Board has to consider whether, from an objective standpoint,¹⁰ the conduct has not only breached the Code or brought the regime into disrepute but that the conduct was also a serious departure from an acceptable standard. In that respect, the Board has decided that, in the particular circumstances of this case, the conduct was not serious enough.

⁷ *Blewman v Wilkinson* [1979] 2 NZLR 208

⁸ [2001] NZAR 74

⁹ (1989) 16 NSWLR 197 (CA) at 200

¹⁰ *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

[45] Firstly, the conduct was not financially motivated. No payments were received, and the construction work to which the design work related did not proceed. Secondly, the Respondent's conduct was naive and misguided but was not motivated by a desire to deceive. The Respondent did not give any forethought to the possible consequences and considered he was just helping out with a simple request. On that basis, the Board has decided that the conduct was not serious enough.

Board's Decision

[46] The Respondent **has** breached sections 317(1)(c) of the Act

[47] The Respondent **has not** breached sections 317(1)(g) or (i) of the Act.

Penalty, Costs and Publication

[48] 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.

[49] The Board heard evidence relevant to penalty, costs, and publication during the hearing 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

[50] The Board has the discretion to impose a range of penalties.ⁱⁱ Exercising that discretion and determining the appropriate penalty requires that the Board balance various factors, including the seriousness of the conduct and any mitigating or aggravating factors present.¹¹ It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:¹²

- (a) protection of the public and consideration of the purposes of the Act;¹³
- (b) deterring other Licensed Building Practitioners from similar offending;¹⁴
- (c) setting and enforcing a high standard of conduct for the industry;¹⁵
- (d) penalising wrongdoing;¹⁶ and
- (e) rehabilitation (where appropriate).¹⁷

¹¹ *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]

¹² Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

¹³ Section 3 Building Act

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

¹⁵ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

¹⁶ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

¹⁷ *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

- [51] 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 cases¹⁸ and applying the least restrictive penalty available for the particular offending.¹⁹ In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty²⁰ that is consistent with other penalties imposed by the Board for comparable offending.²¹
- [52] 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.²²
- [53] The Board has made two disciplinary findings. Looking at the licensing offence under section 317(1)(c) of the Act first, the Respondent, as a licensed person, should have known the limits of his licence and that he could not undertake design work. The Board adopted a starting point of a fine. The circumstances surrounding the matter, the Respondent's acceptance that he did what was alleged, and the manner in which the matter has been dealt with have been taken into account as mitigating factors. In those circumstances, the Board decided that a censure would be a sufficient penalty. A censure is a public expression of disapproval.
- [54] The Respondent submitted that the Boards should not impose a penalty. Section 318 of the Act, however, requires that the Board impose a penalty. In this respect, whilst section 318(1) uses the phrase "may", which suggests the possibility of discretion, the Board notes that the disciplinary provisions of other schemes expressly enable the decider to take no action, whereas the Building Act does not. Section 147M(h) of the Electricity Act 1992, for example, stipulates that the Electrical Workers Registration Board may "make no order". Section 106(1)(h) of the Plumbers, Gasfitters, and Drainlayers Act 2006 contains the same provision. Section 318 of the Building Act 2004 does not contain a similar provision. On this basis, the Board has taken the approach that Parliament did not intend that the Board have a similar discretion under the Building Act. Rather the Board considers that the wording in 318(1) of the Act, and reference to "may", is in respect of a discretion to choose amongst the various penalty options in section 318(1)(a) to (f).
- [55] The Board also notes that one of the intentions of the licensing regime was to ensure the public are informed when selecting a licensed building practitioner. Disciplinary action taken under section 318 must, under section 301(1)(l)(iii) of the Act, be recorded in the Register for a period of three years. The Register is established by section 298 of the Act. Section 299 sets out its purposes which are:

The purpose of the Register is—

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

¹⁹ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

²⁰ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²¹ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²² 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.

- (a) *to enable members of the public to—*
 - (i) *determine whether a person is a licensed building practitioner and, if so, the status and relevant history of the person’s [licensing]; and*
 - (ii) *choose a suitable building practitioner from a list of licensed building practitioners; and*
 - (iii) *know how to contact the building practitioner; and*
 - (iv) *know which licensed building practitioners have been disciplined within the last 3 years; and*
- (b) *to facilitate the administrative, disciplinary, and other functions of the Board and the Registrar under this Act.*

[56] Taking the above provisions into consideration, it is clear that one of the purposes of the Register is to allow an informed consumer to choose a licensed building practitioner. Providing information as regards disciplinary action helps to facilitate this. Not taking any action under section 318 would defeat this purpose.

Costs

- [57] 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.²³
- [58] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings²⁴. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case²⁵.
- [59] 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.
- [60] Based on the above, the Board’s costs order is that the Respondent is to pay the sum of \$500 toward the costs of and incidental to the Board’s inquiry.

Publication

- [61] As a consequence of its decision, the Respondent’s name and the disciplinary outcomes will be recorded in the public Register maintained as part of the Licensed Building Practitioners’ scheme as is required by the Act,²⁶ and he will be named in this decision, which will be available on the Board’s website. The Board is also able, under section 318(5) of the Act, to order further publication.

²³ *Collie v Nursing Council of New Zealand* [2001] NZAR 74

²⁴ *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

²⁵ *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.

²⁶ Refer sections 298, 299 and 301 of the Act

- [62] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.²⁷ 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.²⁸
- [63] Based on the above, the Board will not order any publication over and above the record on the Register, the Respondent being named in this decision, and the publication of the decision on the Board's website. The Respondent should note, however, that as the Board has not made any form of suppression order, other entities, such as the media or the Ministry of Business Innovation and Employment, may publish under the principles of open justice reporting.

Section 318 Order

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

Penalty: Pursuant to section 318(1)(d) of the Building Act 2004, the Respondent is censured.

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, the Respondent will be named in this decision, which will be published on the Board's website.

- [65] 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

- [66] 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 **14 October 2024**. 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.

²⁷ Section 14 of the Act

²⁸ Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

Right of Appeal

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

Signed and dated this 23rd day of September 2024.



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:*
 - (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.*