

## Before the Building Practitioners Board

	BPB Complaint No. CB26242
Licensed Building Practitioner:	Graeme Haika (the Respondent)
Licence Number:	BP134500
Licence(s) Held:	Carpentry and Foundations

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### Decision of the Board in Respect of the Conduct of a Licensed Building Practitioner Under section 315 of the Building Act 2004

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Complaint or Board Inquiry	Complaint
Hearing Type:	By Videoconference
Hearing Date:	11 April 2024
Decision Date:	11 April 2024

#### Board Members Present:

Mrs J Clark, Barrister and Solicitor, Legal Member (Presiding)  
Ms K Reynolds, Construction Manager  
Mr P Thompson, LBP, Carpentry, Site AoP 3

#### 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 \$500. 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 failed to provide a Record of Work on completion of Restricted Building Work. He is fined \$1,500 and ordered to pay costs of \$500.

## The Charges

- [2] 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.<sup>1</sup>
- [3] In this matter, the disciplinary charges the Board resolved to further investigate<sup>2</sup> were that the Respondent may, in relation to building work at [OMITTED], have failed, without good reason, in respect of a building consent that relates to Restricted Building Work that he or she is to carry out or supervise, or has carried out 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) of the Act contrary to section 317(1)(da)(ii) of the Act.

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<sup>1</sup> 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.

<sup>2</sup> 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.

- [4] The Board<sup>3</sup> 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.

### **Evidence**

- [5] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>4</sup>. 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.
- [6] This project was the construction of a new 4 bedroom residential dwelling. The Respondent carried out and supervised the work on the project.
- [7] The work commenced in May 2021. The Respondent advised that *“I was in charge of the site, and I had two different crews working on site that I oversaw”*. On the subfloor there were three workers, two with over 8 years’ experience each and the third with 3 years’ experience. The Respondent stated that *“they went back to Christchurch to carry on with other projects once framing was up and I organised [3 other workers] to continue”* One of these was a trade qualified carpenter with 10 years’ experience and with whom the Respondent had previously worked.

### **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.<sup>5</sup>
- [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 Work<sup>6</sup> unless there is a good reason for it not to be provided.<sup>7</sup>

### Did the Respondent carry out or supervise Restricted Building Work?

- [10] The Respondent acknowledged that he was engaged to carry out foundations and carpentry work on a new residential dwelling under a building consent. The work included work on the primary structure of a residential dwelling, which is Restricted Building Work.

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<sup>3</sup> The Board is a statutory body established under section 341 of the Act.<sup>3</sup> 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.

<sup>4</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

<sup>5</sup> Section 88(1) of the Act.

<sup>6</sup> Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

<sup>7</sup> Section 317(1)(da)(ii) of the Act

Was the Restricted Building Work complete?

- [11] The Respondent started but did not finish the project. Another builder took over after the Respondent's working relationship with the homeowner broke down in November 2021. The Respondent advised that at that stage, he was doing the cladding. He did not return to the site or talk to the homeowner again from that time.
- [12] The Complainant stated that the Council was advised that the project was under a new Licensed Building Practitioner in March 2022.
- [13] In most situations' issues with the provision of a Record of Work do not arise. The work progresses, and Record of Work are provided in a timely fashion. That did not occur in this matter. Another contractor took over, and the Respondent was not able to carry out any further Restricted Building Work. That meant that his Restricted Building Work was complete. To find otherwise would mean that a Record of Work would never be required, which would defeat the purpose of the legislation, which is to create a record of all of the Licensed Building Practitioners who have carried out or supervised Restricted Building Work.

Has the Respondent provided a Record of Work?

- [14] The Complaint sent an email to the Respondent in March 2023 requesting the Record of Work. The Respondent acknowledged to the Board that he received this email but he did not reply to it because he assumed things were going through the lawyers.
- [15] As at the time of the hearing no Records of Work had been supplied by the Respondent. It is noted that the obligation on the Respondent was to provide two Records of Work, one under his carpentry licence and one under his foundations licence.

Was there a good reason?

- [16] The Respondent cited the termination of the contract as a reason. He said that he was *"always able to"* do a Record of Work but that as it was *"incomplete works"* he would not *"sign off"* what was not finished.
- [17] In addition, some of the Respondent's answers to the Board appeared to confuse the producer statement and the Record of Work. He stated that he was *"unaware of the difference."*
- [18] The Board explained that a producer statement was a detailed statement made by a manufacturer, engineer, designer or installer about the durability, installation and performance of a product or building system, and which claims all manufacturing, design and installation will be or has been carried out in accordance with specific requirements.

- [19] By contrast a Record of Work (Form 6A) is a compulsory statutory requirement which is used to outline what Restricted Building Work was carried out or supervised on a building site and who carried out or supervised it. A copy must be given to the building owner and a copy to the local council.
- [20] The Respondent gave evidence that this project was the first house build he had done as a Licensed Building Practitioner. He had never provided a Record of Work before. He had up until this point only completed subfloor foundations and believed that for those projects, he only had to provide a producer statement and not a Record of Work.
- [21] The Respondent clearly did not understand the role of or his obligations in respect of Records of Work.
- [22] Further, the Respondent has not understood what a Record of Work is for. It is not a statement as to the quality or compliance of the Restricted Building Work. It is not any form of sign off or undertaking. It is not a statement as to any person's work other than that carried out by the Respondent himself. In this respect, it is to be noted that a Record of Work given by a Licensed Building Practitioner does not, of itself create any liability that would not otherwise exist as section 88(4) provides:
- (4) *A record of work given under subsection (1) does not, of itself, —*
- (a) *create any liability in relation to any matter to which the record of work relates; or*
- (b) *give rise to any civil liability to the owner that would not otherwise exist if the licensed building practitioner were not required to provide the record of work.*
- [23] It is also important to note that a Record of Work provides an opportunity to not only record what was carried out or supervised but also what was not done, completed, or supervised. As such, if the Respondent had concerns about future liability for work that he had not carried out or supervised, he could have used the Record of Work to capture those concerns.
- [24] The matters raised by the Respondent are not “good reasons” for failing to provide a Record of Work. The Board has repeatedly stated that a Record of Work is a statutory requirement. Licensed Building Practitioners should now be aware of their obligations to provide them, and their provision should be a matter of routine.

### **Board's Decision**

- [25] The Respondent **has** failed to provide a Record of Work on completion of Restricted Building Work.

### Penalty, Costs and Publication

- [26] 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.
- [27] Having found that one or more of the grounds in section 317 applies, the Board must, under section 318 of the Act<sup>ii</sup>, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [28] The Respondent made submissions at the hearing as regards penalty, costs, and publication. He explained that the project had “ruined” him. He had lost money, had to lay off his employees and put his company into liquidation. He had suffered from stress and had had significant health issues.

### Penalty

- [29] The Board has the discretion to impose a range of penalties.<sup>iii</sup> 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.<sup>8</sup> It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:<sup>9</sup>
- (a) protection of the public and consideration of the purposes of the Act;<sup>10</sup>
  - (b) deterring other Licensed Building Practitioners from similar offending;<sup>11</sup>
  - (c) setting and enforcing a high standard of conduct for the industry;<sup>12</sup>
  - (d) penalising wrongdoing;<sup>13</sup> and
  - (e) rehabilitation (where appropriate).<sup>14</sup>
- [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 cases<sup>15</sup> and applying the least restrictive penalty available for the particular offending.<sup>16</sup> In all, the Board should be looking to impose a fair, reasonable, and

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<sup>8</sup> *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]

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

<sup>10</sup> Section 3 Building Act

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

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

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

<sup>14</sup> *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

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

<sup>16</sup> *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

proportionate penalty<sup>17</sup> that is consistent with other penalties imposed by the Board for comparable offending.<sup>18</sup>

- [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.<sup>19</sup>
- [32] Record of Work matters are at the lower end of the disciplinary scale. The Board's normal starting point for a failure to provide a Record of Work is a fine of \$1,500, an amount which it considers will deter others from such behaviour. There were no aggravating factors. The Board acknowledges the factors the Respondent raised but does not consider these to be a reason to depart from the starting point.
- [33] The Board indicated at the hearing that it would provide the Respondent with an opportunity to provide a Record of Work before it makes a final decision on the appropriate penalty. If one was provided to both the owner and the Territorial Authority as per the requirements of section 88(1) of the Act, and evidence of such was provided to the Board, within the timeframe specified to the Respondent, the Board would take it into consideration as a mitigating factor, and the penalty would be reduced by \$500 to a fine of \$1,000.
- [34] The Respondent did not do so, and accordingly, the penalty is at a fine of \$1,500.

#### Costs

- [35] 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.<sup>20</sup>
- [36] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings<sup>21</sup>. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case<sup>22</sup>.
- [37] 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 and proceeded by way of videoconference. Adjustments are then made.
- [38] The costs order for a half-day audiovisual hearing is usually \$1,500. The Board heard submissions from the Respondent on the financial impact of this project on him and

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

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

<sup>19</sup> 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.

<sup>20</sup> *Collie v Nursing Council of New Zealand* [2001] NZAR 74

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

<sup>22</sup> *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.

has decided accordingly to reduce the costs order. 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

- [39] 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,<sup>23</sup> 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.
- [40] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.<sup>24</sup> 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.<sup>25</sup>
- [41] 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.

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<sup>23</sup> Refer sections 298, 299 and 301 of the Act

<sup>24</sup> Section 14 of the Act

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



## Section 318 Order

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

**Penalty:** Pursuant to section 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of \$1,500.

**Costs:** Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$500 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

**Publication:** The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with section 301(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, in addition to the note in the Register and the Respondent being named in this decision, which will be publicly available on the Board's website.

[43] 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

[44] The right to appeal Board decisions is provided for in section 330(2) of the Act<sup>iv</sup>.

Signed and dated this 27<sup>th</sup> day of May 2024.



**Mrs J Clark**  
Presiding Member

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### <sup>ii</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:

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- (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>iii</sup> 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.*

### **<sup>iv</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—*

- (a) *within 20 working days after notice of the decision or action is communicated to the appellants; or*

- (b) *within any further time that the appeal authority allows on application made before or after the period expires.*