

Before the Building Practitioners Board

	BPB Complaint No. CB26438
Licensed Building Practitioner:	James Patrick Smith (the Respondent)
Licence Number:	BP117817
Licence(s) Held:	Bricklaying and Blocklaying – Structural Masonry

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	Board Inquiry
Hearing Type:	On the Papers
Hearing and Draft Decision Date:	22 May 2024
Finalised Decision Date:	30 September 2024
Board Members Present:	
	Mr M Orange, Chair, Barrister (Presiding)
	Ms K Reynolds, Construction Manager
	Mr G Anderson, LBP, Carpentry and Site AoP 2

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 disciplinary offences under sections 317(1)(b) and (d) of the Act.

The Respondent's licence is cancelled, and he may not reapply to be licensed for a period of three months. He is ordered to pay costs of \$875. A record of the disciplinary offending will be recorded on the Public Register for a period of three years.

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This decision and the order herein were made final on 30 September 2024 on the basis that no further submissions were received. 16

Summary of the Board’s Decision

[1] The Respondent has either carried out or supervised building work in a negligent and incompetent manner and in a manner that is contrary to a building consent. The departures from acceptable standards of conduct were serious, and the Respondent has previously been disciplined by the Board for similar conduct. In those circumstances, the Board decided that the cancellation of the Respondent’s licence was warranted, and the Board has ordered that he not be able to reapply to be licenced for a period of three months. The Respondent is also ordered to pay costs of \$875. The Board’s decision will be published.

The Charges

- [2] The Board's Inquiry arose as a result of a complaint about building work at [OMITTED] Auckland (matter [OMITTED]). When reviewing the Registrar's Report for [OMITTED], the Board noted that the Respondent in this matter may have carried out building work in a negligent or incompetent manner or in a manner contrary to a building consent. It resolved to initiate a Board Inquiry.
- [3] The prescribed investigation and hearing procedure is inquisitorial, not adversarial. The Board sets the charges and decides what evidence is required.¹
- [4] In this matter, the disciplinary charges the Board resolved to further investigate² were that the Respondent may, in relation to building work at [OMITTED], Auckland, have carried out or supervised building work in a negligent or incompetent manner or in a manner that was contrary to a building consent (sections 317(1)(b) and (d) of the Act).
- [5] The Board, when initiating the Inquiry, directed that the evidence from [OMITTED] was to be taken into consideration, specifically, the photographs of blockwork on pages 658, 661 and 623, and the failed inspection dated 7 December 2021 on pages 783 to 787 of that file.

Draft Decision Process

- [6] The Board's jurisdiction is that of an inquiry. It is for the Board to carry out any further investigation that it considers necessary prior to it making a decision.
- [7] Ordinarily, the Board makes a decision having held a hearing.³ The Board may, however, 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.⁴
- [8] In this instance, the Board has decided that a formal hearing is not necessary. Firstly, the Respondent has not engaged in the investigation process. Secondly, the Board considers that there is sufficient evidence before it to allow it to make a decision on the papers. There may, however, be further evidence in relation to the matter that the Board was not aware of, or the Respondent may, once he receives the Draft Decision, decide to engage in the process. To that end, this decision is a draft Board decision. The Respondent will be provided with an opportunity to comment on the draft findings and to present further evidence prior to the Board making a final

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 Regulation 10 of the Complaints Regulations.

⁴ Under Clause 27 of Schedule 3 the Board may regulate its own procedure and it has summary jurisdiction, which allows for a degree of flexibility in how it deals with matters: *Castles v Standards Committee No.* [2013] NZHC 2289, *Orlov v National Standards Committee 1* [2013] NZHC 1955

decision. If the Respondent requests an in-person hearing, or the Board directs that one is required, this decision will be set aside, and a hearing will be scheduled.

Evidence

- [9] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed.⁵ 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.

Negligence or Incompetence

- [10] To find that the Respondent was negligent, the Board needs to determine, on the balance of probabilities,⁶ that the Respondent departed from an accepted standard of conduct when carrying out or supervising building work as judged against those of the same class of licence. This is described as the *Bolam*⁷ test of negligence.⁸ To make a finding of incompetence, the Board has to determine that the Respondent has demonstrated a lack of ability, skill, or knowledge to carry out or supervise building work to an acceptable standard.⁹ A threshold test applies to both. Even if the Respondent has been negligent or incompetent, the Board must also decide if the conduct fell seriously short of expected standards.¹⁰ If it does not, then a disciplinary finding cannot be made.

Has the Respondent departed from an acceptable standard of conduct?

- [11] When considering what an acceptable standard is, the Board must consider the purpose of the Building Act¹¹ as well as the requirement that all building work must comply with the Building Code¹¹ and any building consent issued.¹² The test is an objective one.¹³
- [12] A failed inspection carried out by the Building Consent Authority (BCA) noted as “concrete block / nib / insitu” carried out on 7 December 2021, noted the Respondent as the LBP on record. The Respondent was not noted as being present

⁵ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

⁶ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 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.

⁷ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁸ Adopted in New Zealand in various matters including: *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

⁹ In *Beattie v Far North Council* Judge McElrea, DC Whangarei, CIV-2011-088-313 it was described as “a demonstrated lack of the reasonably expected ability or skill level”. In *Ali v Kumar and Others*, [2017] NZDC 23582 at [30] as “an inability to do the job”

¹⁰ *Collie v Nursing Council of New Zealand* [2001] NZAR 74 - [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”.

¹¹ Section 17 of the Building Act 2004

¹² Section 40(1) of the Building Act 2004

¹³ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71 noted that the tribunal does not have to take into account the Respondent’s subjective considerations.

when the inspection was carried out. The 7 December inspection report contained the following notes:

Fail Comments:

- 1. Concrete blockwork size, layout and wash outs (Fail) NO WASH OUTS , LOOSE BLOCKS , UNLEVEL NLOCKS ,*
- 2. Masonry blockwork layout as per plan laid level and plumb. (Fail)*
- 3. Masonry blockwork: Mortar joint sizes ok (min 7mm max 13mm) and tooled to match proposed finish. No gaps (Fail)*
- 4. Masonry blockwork: Washouts cut out where wall over 1.2m high. Footing clean of mortar build up (Fail) no washouts.*
- 5. Concrete blockwork reinforcing size, centres, laps as per plan (Fail)*
- 6. Masonry blockwork: Reinforcing steel lapped correctly and tied (Fail) horizontal some not tied.*
- 7. Concrete blockwork reinforcing grout cover (Fail)*

[13] The inspection report was supported by photographs that showed the non-compliant work. The photographs included the following:





- [14] The inspection reports did note that there were issues with the foundation set out and levels, which would have impacted the blockwork. That aside, the inspection notes outlined above and the photographs show work that there were serious compliance issues and that there was building work that fell below an acceptable standard.
- [15] It is somewhat inevitable that a BCA will identify compliance issues that require remediation. It will not necessarily follow that an LBP will be negligent when they are identified. In this matter, however, the extent and seriousness of the non-compliance was such that it went beyond what can be expected of a reasonable practitioner. In this respect, the Board considers that the Respondent should have been aiming to get building work right the first time and not rely on the BCA to identify compliance failings. Those failings, on a reasonable review of the building work, as shown in the above photographs, should have been obvious, and an inspection of the work should not have been called as the work was clearly not ready to be inspected.
- [16] The introduction of the LBP regime was aimed at improving the skills and knowledge of those involved in residential construction. The following was stated as the intention of the enabling legislation¹⁴:

The Government's goal is a more efficient and productive sector that stands behind the quality of its work; a sector with the necessary skills and capability to build it right first time and that takes prides in its work; a sector that delivers good-quality, affordable homes and buildings and contributes to a prosperous economy; a well-informed sector that shares information and quickly identifies and corrects problems; and a sector where everyone involved in building work knows what they are accountable for and what they rely on others for.

We cannot make regulation more efficient without first getting accountability clear, and both depend on people having the necessary skills and knowledge. The Building Act 2004 will be amended to make it clearer that the buck stops with the people doing the work. Builders and designers must make sure their work will meet building code requirements; building owners must make sure they get the necessary approvals and are accountable for any decisions they make, such as substituting specified products; and building consent authorities are accountable for checking that plans will meet building code requirements and inspecting to make sure plans are followed.

- [17] Section 3 of the Act, which sets out the Act's purposes, notes that the Act includes the purpose of promoting the accountability of builders. Section 14E of the Act encapsulates the statements in Hansard noted above. It sets out that:

¹⁴ Hansard volume 669: Page 16053

14E Responsibilities of builder

- (1) *In subsection (2), builder means any person who carries out building work, whether in trade or not.*
- (2) *A builder is responsible for—*
 - (a) *ensuring that the building work complies with the building consent and the plans and specifications to which the building consent relates:*
 - (b) *ensuring that building work not covered by a building consent complies with the building code.*
- (3) *A licensed building practitioner who carries out or supervises restricted building work is responsible for—*
 - (a) *ensuring that the restricted building work is carried out or supervised in accordance with the requirements of this Act; and*
 - (b) *ensuring that he or she is licensed in a class for carrying out or supervising that restricted building work.*

[18] It is within this context that the Board considers that the acceptable standards expected of a reasonable LBP includes taking steps to ensure building work is carried out competently and compliantly as and when it is carried out. That has not occurred, and the Board finds that the Respondent's has carried out building work in a negligent manner.

[19] A question that does arise, however, is whether the Respondent was directly responsible for the non-compliant and substandard work (carrying it out) or was responsible as the supervisor. Supervise is defined in section 7¹⁵ of the Act. The definition states:

supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—

- (a) *is performed competently; and*
- (b) *complies with the building consent under which it is carried out.*

[20] When considering whether an LBP's supervision has met acceptable standards, the Board needs to consider the definition of supervision, the purposes of the Act, whether the work met the requirements of the Building Code and, if not, the level of non-compliance.

¹⁵ Section 7:

supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—

- (a) *is performed competently; and*
- (b) *complies with the building consent under which it is carried out.*

[21] Supervision in the context of the Building Act has not yet been considered by the courts. It has, however, been considered in relation to the Electricity Act 1992¹⁶. The definition of supervision in that Act is consistent with the definition in the Building Act, and as such, the comments of the court are instructive. In the case, Judge Tompkins stated at paragraph 24:

“As is made apparent by the definition of “supervision” in the Act, that requires control and direction by the supervisor so as to ensure that the electrical work is performed competently, that appropriate safety measures are adopted, and that when completed the work complies with the requisite regulations. At the very least supervision in that context requires knowledge that work is being conducted, visual and other actual inspection of the work during its completion, assessment of safety measures undertaken by the person doing the work on the site itself, and, after completion of the work, a decision as to compliance of the work with the requisite regulations.”

[22] If the Respondent carried out the work himself, he is directly responsible for the non-compliant and substandard work, and the Board considers he has conducted himself in a negligent manner. If he supervised it, the Board considers that he should have identified the issues as and when they arose and dealt with them. Further, he should have known that the work was not compliant and was not ready to be inspected. Because he did not do either of the foregoing, if he was supervising the building work, his supervision fell below an acceptable standard, and he has been negligent.

[23] The Board has also considered whether the Respondent’s work has gone beyond negligence and whether he has been incompetent. As noted, incompetence is a lack of ability, skill, or knowledge to carry out or supervise building work to an acceptable standard. In *Beattie v Far North Council Beattie*,¹⁷ it was put as “a demonstrated lack of the reasonably expected ability or skill level”. In *Ali v Kumar and Others*,¹⁸ it was stated as “an inability to do the job”.

[24] Looking at the work and the level of non-compliance, the Board considers that the Respondent has been both negligent and incompetent in that the Respondent’s work does not display the level of knowledge, skill or ability required of an LBP with a Bricklaying and Blocklaying – Structural Masonry Licence.

¹⁶ *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

¹⁷ Judge McElrea, DC Whangarei, CIV-2011-088-313

¹⁸ *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

Was the conduct serious enough?

- [25] As noted, the conduct under consideration has to be sufficiently serious enough to warrant a disciplinary finding. As was noted by Justice Gendall in *Collie v Nursing Council of New Zealand*¹⁹ 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.

- [26] In *Pillai v Messiter (No 2)*,²⁰ 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.

- [27] In this matter, the Board finds that there was a serious deliberate departure. The work was manifestly non-compliant. The Respondent should have known that and taken appropriate steps. He did not. As such, the Board finds that the conduct was sufficiently serious.

Has the Respondent been negligent or incompetent?

- [28] That Respondent has either carried out or supervised building work in a negligent or incompetent manner.

Contrary to a Building Consent

- [29] Building consents provide detailed plans and specifications for building work. They are issued by Territorial or Building Consent Authorities on the basis that the building work will meet the provisions of the Building Code.²¹ Once issued, there is a requirement that the building work be carried out in accordance with the building consent.²² Building consents also stipulate the number and type of inspections the issuing authority will carry out during the build.²³ Inspections ensure independent verification that the building consent is being complied with.

- [30] If building work departs from the building consent issued, the Board can find that a disciplinary offence under section 317(1)(d) of the Act has been committed. The Board does not have to find that departure was deliberate or a result of negligent conduct.²⁴ The Board does, however, consider that the seriousness of the conduct

¹⁹ [2001] NZAR 74

²⁰ (1989) 16 NSWLR 197 (CA) at 200

²¹ Section 49 of the Act

²² Section 40 of the Act

²³ Section 222 of the Act

²⁴ *Blewman v Wilkinson* [1979] 2 NZLR 208

under investigation does have to be taken into account. As such, even if the Respondent's building work departed from the building consent, the Board must also decide if the conduct fell seriously short of expected standards.²⁵ If it does not, then a disciplinary finding cannot be made.

Was there building work that differed from the building consent?

[31] The issues noted in the building inspection reports outlined above make it clear that the work did not comply with the building consent that had been issued.

Was the conduct serious enough?

[32] As with the negligence and incompetence finding, the conduct was serious. It was not mere inadvertence, error, or oversight. It was a clear departure from the building consent.

Has the Respondent breached section 317(1)(d) of the Act?

[33] The Respondent has either carried out or supervised building work in a manner that was contrary to the building consent issued.

Board's Decision

[34] The Respondent **has** breached sections 317(1)(b) and (d) of the Act and should be disciplined.

Penalty, Costs and Publication

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

[36] The matter was dealt with on the papers. Included was information relevant to penalty, costs and publication, and the Board has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

[37] The Board has the discretion to impose a range of penalties.ⁱⁱⁱ 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

²⁵ *Collie v Nursing Council of New Zealand* [2001] NZAR 74 - [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".

aggravating factors present.²⁶ It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:²⁷

- (a) protection of the public and consideration of the purposes of the Act;²⁸
- (b) deterring other Licensed Building Practitioners from similar offending;²⁹
- (c) setting and enforcing a high standard of conduct for the industry;³⁰
- (d) penalising wrongdoing;³¹ and
- (e) rehabilitation (where appropriate).³²

[38] 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 cases³³ and applying the least restrictive penalty available for the particular offending.³⁴ In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty³⁵ that is consistent with other penalties imposed by the Board for comparable offending.³⁶

[39] In general, when determining the appropriate penalty, the Board adopts a starting point based on the principles outlined above prior to considering any aggravating and/or mitigating factors present.³⁷

[40] In this matter, given the seriousness of the offending, the Board adopted a starting point of a suspension or a cancellation of the Respondent's licence.

[41] This is the second time that the Respondent has been disciplined by the Board. The fact that it is a second offence is an aggravating factor. In 2020, the Board found that the Respondent had carried out building work in a negligent manner and in a manner that was contrary to a building consent. It also found that he had failed to provide a record of work on completion of restricted building work and had brought the licensing regime into disrepute.³⁸ The Respondent was fined \$2,000 in respect of the negligence, building contrary to a building consent and failure to provide a record of work findings. He was censured as regards the disrepute finding.

²⁶ *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]

²⁷ Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

²⁸ Section 3 Building Act

²⁹ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

³⁰ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

³¹ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

³² *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

³³ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

³⁴ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

³⁵ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

³⁶ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

³⁷ 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.

³⁸ *Smith* [2020] BPB 25585

Notwithstanding those penalty orders, the Respondent does not appear to have amended his ways.

- [42] The Respondent did not engage in the investigation of the previous matter and has not engaged in this investigation. In *Daniels v Complaints Committee*,³⁹ the High Court held that it was permissible to take into account as an adverse factor when determining penalty that the practitioner had responded to the complaints and discipline process in a belligerent way. Whilst the Respondent has not been belligerent, the Board does consider his repeated failure to respond to allegations is an aggravating factor.
- [43] Taking those factors into account, and noting that the licensing regime exists to ensure the public can have confidence in those who carry out restricted building work, which is integral to the safe and healthy functioning of a home, the Board has decided that the appropriate penalty is the cancellation of the Respondent's licence. Cancellation will also ensure that the Respondent's competence is re-evaluated under the Licensed Building Practitioners Rules 2007 if and when he seeks to obtain a new licence.
- [44] The Board must, when cancelling a licence, give consideration to the period of time before which an LBP can reapply for a licence. The Board has decided that the appropriate time frame is three (3) months, which is consistent with other penalties imposed by the Board for similar conduct.

Costs

- [45] 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.⁴⁰
- [46] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings⁴¹. The starting point can then be adjusted up or down, depending on the particular circumstances of each case⁴².
- [47] 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 moderately complex. Adjustments are then made.
- [48] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$875 toward the costs of and incidental to the Board's inquiry. This is the Board's

³⁹ [2011] 3 NZLR 850.

⁴⁰ *Collie v Nursing Council of New Zealand* [2001] NZAR 74

⁴¹ *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

⁴² *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.

scale amount for a moderately complex matter that has been dealt with by way of a Draft Decision. It is significantly less than 50% of actual costs.

Publication

- [49] 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,⁴³ 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.
- [50] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.⁴⁴ 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.⁴⁵
- [51] 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

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

Penalty: Pursuant to section 318(1)(a)(i) of the Act, 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 section 318(1)(a)(ii) of the Act the Board orders that the Respondent may not apply to be relicensed before the expiry of three [3] months.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$875 (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.

⁴³ Refer sections 298, 299 and 301 of the Act

⁴⁴ Section 14 of the Act

⁴⁵ Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

- [53] 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 Draft Decision

- [54] The Board invites the Respondent to:
- (a) provide further evidence for the Board to consider; and/or
 - (b) make written submissions on the Board's findings. Submissions may be on the substantive findings and/or on the findings on penalty, costs and publication.
- [55] Submissions and/or further evidence must be filed with the Board by no later than the close of business on **27 September 2024**.
- [56] If submissions are received, then the Board will meet and consider those submissions.
- [57] The Board may, on receipt of any of the material received, give notice that an in-person hearing is required prior to it making a final decision. Alternatively, the Board may proceed to make a final decision which will be issued in writing.
- [58] If no submissions or further evidence is received within the time frame specified, then this decision will become final.

Request for In-Person Hearing

- [59] If the Respondent, having received and considered the Board's Draft Decision, considers that an in-person hearing is required then one will be scheduled, and a notice of hearing will be issued.
- [60] A request for an in-person hearing must be made in writing to the Board Officer no later than the close of business on **27 September 2024**.
- [61] If a hearing is requested, this Draft Decision, including the Board's indicative position on penalty, costs and publication, will be set aside.

Right of Appeal

- [62] The right to appeal Board decisions is provided for in section 330(2) of the Act^{iv}.

Signed and dated this 6th day of September 2024.



Mr M Orange
Presiding Member

This decision and the order herein were made final on 30 September 2024 on the basis that no further submissions were received.

Signed and dated this 2nd day of October 2024.



Mr M Orange
Presiding Member

ⁱ Section 3 of the Act

This Act has the following purposes:

- (a) *to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—*
 - (i) *people who use buildings can do so safely and without endangering their health; and*
 - (ii) *buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and*
 - (iii) *people who use a building can escape from the building if it is on fire; and*
 - (iv) *buildings are designed, constructed, and able to be used in ways that promote sustainable development:*
- (b) *to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code.*

ⁱⁱ 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:*

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- (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."

iii **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.

iv **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.*