

## **-Before the Building Practitioners Board**

	BPB Complaint No. CB26389
Licensed Building Practitioner:	John Te Ratau Whaanga (the Respondent)
Licence Number:	BP130417
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 proceeding as a Board Inquiry
Hearing Type:	On the Papers
Draft Decision Date:	25 March 2024
Final decision Date:	26 June 2024
Board Members Present:	

Mrs F Pearson-Green, Deputy Chair, LBP, Design AoP 2 (Presiding)  
Mr D Fabish, LBP, Carpentry and Site AoP 2  
Mrs J Clark, Legal Member, Barrister and Solicitor

#### **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 \$1,000 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.

## Contents

<b>Summary of the Board’s Decision</b> .....	2
<b>The Charges</b> .....	2
<b>Complaint Withdrawal</b> .....	3
<b>Draft Decision Process</b> .....	4
<b>Evidence</b> .....	4
Did the Respondent carry out or supervise Restricted Building Work? .....	5
Was the Restricted Building Work complete? .....	5
Has the Respondent provided a Record of Work? .....	5
Was there a good reason?.....	5
<b>Board’s Decision</b> .....	6
<b>Penalty, Costs and Publication</b> .....	6
Penalty.....	7
Costs .....	8
Publication.....	8
<b>Section 318 Order</b> .....	9
<b>Right of Appeal</b> .....	9

## Summary of the Board’s Decision

[1] The Respondent failed to provide a record of work on completion of Restricted Building Work. He is fined \$1,000 and ordered to pay costs of \$500. The disciplinary finding will be recorded on the public Register for a period of three years. The fine was reduced from a starting point of \$1,500 because the Respondent has, since the complaint was made, provided his Record of Work.

## 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 on a new relocatable residential dwelling constructed at [OMITTED] have failed, without good reason,

---

<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.

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.

### **Complaint Withdrawal**

- [4] On 30 October 2023, the Complainant sought to withdraw the complaint on the basis that the Respondent had, since the complaint was made, provided the Record of Work that had been sought.
- [5] Under regulation 17(2) of the Complaints Regulations, the Board may proceed with a Complaint that has been withdrawn as a Board Inquiry. Regulation 17(2) provides:
- (2) *This Part also applies to an inquiry into a matter about the conduct of a building practitioner raised by a complaint where the Board carries on an inquiry into that matter on its own motion after the Complainant decides not to proceed with the complaint—*
    - (a) *as if every reference to a matter raised by the Board’s own inquiries included a reference to the matter raised by that complaint; and*
    - (b) *with all modifications necessary to take into account that there is no need for the Board to repeat any process already undertaken as part of the investigation of the complaint under Part 1 where a substantially equivalent process may be, or is required to be, undertaken as part of an inquiry under this Part; and*
    - (c) *with any other necessary modifications.*
- [6] Clause 3.7.4 the Board’s Complaint and Inquiry Procedures require that the Board meet and consider whether the matter should continue as a Board Inquiry:
- 3.7.4 *The Board will meet and decide whether to continue with the matter (or not) as a Board Inquiry and will advise all relevant persons of its decision as soon as practicable thereafter.*
- [7] The Board retains a discretion as to whether or not it continues with the matter as an inquiry. In coming to a decision, the Board needs to take various matters into consideration, including sufficiency of evidence, the seriousness of the alleged offending, and whether an inquiry would further the purposes of Part 4 of the Building Act.

- [8] Having considered the matter and taking the above tests into consideration, the Board has decided that the matter should proceed as a Board Inquiry.

### **Draft Decision Process**

- [9] The Board's jurisdiction is that of an inquiry. Matters are not prosecuted before the Board. Rather, it is for the Board to carry out any further investigation that it considers necessary prior to it making a decision.
- [10] Ordinarily, the Board makes a decision having held a hearing.<sup>3</sup> 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.<sup>4</sup>
- [11] In this instance, the Board decided that a formal hearing was not necessary. The Board considered that there was sufficient evidence before it to allow it to make a decision on the papers. There may, however, have been further evidence in relation to the matter that the Board was not aware of. To that end, the decision was a draft Board decision. The Respondent was provided with an opportunity to comment on the draft findings and to present further evidence prior to the Board making a final decision. If the Respondent had requested an in-person hearing, or the Board directed that one was required, the decision would have been set aside, and a hearing would have been scheduled.
- [12] In the draft decision the Respondent was given until 7 May to file any submissions or further evidence. He did not do so within that time frame. However, on 17 June 2024 the Respondent provided a written response. Although outside the time allowed the Board has accepted and considered the submission.

### **Evidence**

- [13] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>5</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.

### **Failure to Provide a Record of Work**

- [14] 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>6</sup>

---

<sup>3</sup> Regulation 10 of the Complaints Regulations.

<sup>4</sup> 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

<sup>5</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

<sup>6</sup> Section 88(1) of the Act.

- [15] 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>7</sup> unless there is a good reason for it not to be provided.<sup>8</sup>

Did the Respondent carry out or supervise Restricted Building Work?

- [16] The Respondent was the supervisor of students who were constructing a new relocatable residential dwelling under a building consent. The supervised work included work on the primary structure and external moisture management systems of a residential building, both of which are Restricted Building Work.<sup>9</sup> Under section 88(1) of the Act, the Respondent was required to provide a Record of Work for the supervised Restricted Building Work on completion.

Was the Restricted Building Work complete?

- [17] The building project was completed at the end of 2019. The Respondent left his employ at the training institution soon thereafter. Late 2019 or early 2020 was when a Record of Work was due. When a Code Compliance Certificate was sought in 2023, the Auckland Council noted a Record of Work had not been provided by the Respondent. The Council advised that if a complaint was made to the Board, a Code Compliance Certificate application would be processed.

Has the Respondent provided a Record of Work?

- [18] Since the complaint was made, the Respondent has provided a Record of Work. He did not, however, provide one on completion, which was in late 2019, as per the statutory requirement.

Was there a good reason?

- [19] The Respondent stated in his initial response that he was dealing with the Council. However, the evidence before the Board was that the owner of the dwelling provided a templated proforma unsigned Record of Work that covered the Respondent's work, which was rejected. Further, the Complainant had attempted to contact the Respondent to get a Record of Work without success. It was when a complaint was made that he cooperated.
- [20] The Respondent submitted in his further submission after the Draft Decision that his involvement in building the dwelling was as a tutor supervising students. His role within the teaching institution was then disestablished and because of this he did not respond to any emails from them. He stated that this left *"unfinished paperwork for the ACC/ROW paper work requires for logging to council I had no access to this paper work once my job was disestablished."*

---

<sup>7</sup> Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

<sup>8</sup> Section 317(1)(da)(ii) of the Act

<sup>9</sup> Clause 5 of the Building (Definition of Restricted Building Work) Order 2011

- [21] The Respondent firstly acknowledged that the final inspection was carried out while he was still employed by the teaching institution but then contradicted this saying – “...*all documentation and paper work were left up to my employee MANAGER to complete the ROW was awaiting final inspection as I was no longer working for them at that point in time.*”
- [22] Nevertheless, the Respondent’s comments make clear that the restricted building work was complete and that he was aware of this fact. The obligation to provide a record of work arose at that point.
- [23] The Respondent’s employment situation is not relevant to his statutory obligation to provide the record of work. In any event, the Respondent did not respond to email and phone requests for the record of work when he was contacted some three years after the employment related issues.
- [24] The Board notes that section 88 of the Act states, “*Each licensed building practitioner who carries out ... or supervises restricted building work ...must ...provide ...a record of work ...*”. The use of the word “each” makes it clear that every licensed building practitioner who carries out restricted building work must complete a record of work for the work they did or supervised.
- [25] The Respondent’s response suggests he may have left the responsibility to complete the record of work to his “*employee MANAGER*”. The Respondent should note that whilst it may be common practice for some Licensed Building Practitioners to provide their record of work to a main or head contractor, it is a practice that comes with a degree of risk as the main or head contractor may not pass it on. As such, Licensed Building Practitioners are advised to do what section 88 of the Act states and to provide the record of work to the owner and the Territorial Authority.
- [26] The Board does not consider that the Respondent has established a “good reason” for failing to provide the record of work on completion.

### **Board’s Decision**

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

### **Penalty, Costs and Publication**

- [28] Having found that one or more of the grounds in section 317 applies, the Board must, under section 318 of the Act<sup>1</sup>, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [29] The matter was dealt with on the papers. The Board made an indicative order in its Draft Decision and gave the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

[30] The Respondent did not make specific submissions on penalty, cost or publication. He did state “*I find this an unfair judgment when the complainant has withdrawn their complaint and received ROW ...*”

### Penalty

[31] The Board has the discretion to impose a range of penalties.<sup>ii</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>10</sup> It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:<sup>11</sup>

- (a) protection of the public and consideration of the purposes of the Act;<sup>12</sup>
- (b) deterring other Licensed Building Practitioners from similar offending;<sup>13</sup>
- (c) setting and enforcing a high standard of conduct for the industry;<sup>14</sup>
- (d) penalising wrongdoing;<sup>15</sup> and
- (e) rehabilitation (where appropriate).<sup>16</sup>

[32] 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>17</sup> and applying the least restrictive penalty available for the particular offending.<sup>18</sup> In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty<sup>19</sup> that is consistent with other penalties imposed by the Board for comparable offending.<sup>20</sup>

[33] 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>21</sup>

---

<sup>10</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>11</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>12</sup> Section 3 Building Act

<sup>13</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

<sup>14</sup> *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

<sup>15</sup> *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>16</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>17</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

<sup>18</sup> *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

<sup>19</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

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

<sup>21</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.

- [34] 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.
- [35] Since the complaint was made, the Respondent has provided a Record of Work. The Board has taken that into account and has reduced by \$500 to a fine of \$1,000.
- [36] The Respondent made this point again in his further submission. As the Board has already given a discount for that factor no further adjustment was made.

#### Costs

- [37] 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>22</sup>
- [38] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings<sup>23</sup>. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case<sup>24</sup>.
- [39] 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.
- [40] 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

- [41] 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>25</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.
- [42] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.<sup>26</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

---

<sup>22</sup> *Collie v Nursing Council of New Zealand* [2001] NZAR 74

<sup>23</sup> *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

<sup>24</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.

<sup>25</sup> Refer sections 298, 299 and 301 of the Act

<sup>26</sup> Section 14 of the Act



courts have stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published.<sup>27</sup>

- [43] 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**

- [44] 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 \$1,000.

**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(l)(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.**

- [45] 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**

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

Signed and dated this 11<sup>th</sup> day of July 2024.



**Mrs F Pearson-Green**  
Presiding Member

---

<sup>27</sup> Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

---

**i Section 318 of the Act**

- (1) *In any case to which section 317 applies, the Board may*
  - (a) *do both of the following things:*
    - (i) *cancel the person’s licensing, and direct the Registrar to remove the person’s name from the register; and*
    - (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*
  - (b) *suspend the person’s licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*
  - (c) *restrict the type of building work or building inspection work that the person may carry out or supervise under the person’s licensing class or classes and direct the Registrar to record the restriction in the register:*
  - (d) *order that the person be censured:*
  - (e) *order that the person undertake training specified in the order:*
  - (f) *order that the person pay a fine not exceeding \$10,000.*
- (2) *The Board may take only one type of action in subsection 1(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).*
- (3) *No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.*
- (4) *In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.*
- (5) *In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit.”*

**ii Section 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.*