

Before the Building Practitioners Board

	BPB Complaint No. CB26352
Licensed Building Practitioner:	Matthew Ryan Middleton (the Respondent)
Licence Number:	BP129684
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 Type:	On the Papers
Draft Decision Date:	11 January 2024
Final Decision Date:	11 April 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)(da)(ii) of the Act.

The Respondent is fined \$750 and ordered to pay costs of \$250. A record of the disciplinary offending will be recorded on the Public Register for a period of three years.

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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 \$750 and ordered to pay costs of \$250.

Background to the Complaint

- [2] The Complaint was made by a main contractor who had subcontracted the Respondent to carry out building work on a residential dwelling. It was one of three separate complaints made about three separate contacts and dwellings. All three complaints were centred around an alleged abandonment of a contract and a failure to provide a Record of Work on completion of Restricted Building Work.

- [3] Under the Complaints Regulations, the Board is required to deal with each complaint separately. As such, it cannot deal with the complaints as one matter. However, it has taken the commonality of the Complainant and the similarity of the allegations into consideration.

Service

- [4] The Respondent did not respond to the complaint and did not engage in the initial investigation process. He did respond to the two other complaints that were made by the same Complainant. As such, prior to make a decision, the Board needs to determine whether the Respondent has been provided with notice of it and an opportunity to respond.
- [5] Under regulation 7(2) of the Complaints Regulations, the Registrar must, when compiling the Registrar's Report, provide a copy of the complaint to the Respondent.
- [6] The Register of Licensed Building Practitioners must contain certain information, including under section 301(1)(d) an "address for communications under this Act". Under section 302, the Licensed Building Practitioner must keep their details up to date. As the Respondent has not provided any updated details, the address to be used for communications with him is that contained in the Register.
- [7] The Act also provides for the service of notices in section 394. It provides that:

394 Service of notices

- (1) *Any notice or other document required to be served on, or given to, any person under this Act is sufficiently served if it is—*
- (a) *delivered personally to the person; or*
 - (b) *delivered to the person at the person's usual or last known place of residence or business; or*
 - (c) *sent by fax or email to the person's fax number or email address; or*
 - (d) *posted in a letter addressed to the person at the person's usual or last known place of residence or business.*
- (5) *A notice or other document sent by post to a person in accordance with subsection (1)(d) must be treated as having been received by that person at the time at which the letter would have been delivered in the ordinary course of post.*
- [8] Given the above provisions and noting that the Respondent received the other two complaints made, the Board finds that the required notices under the Regulations have been provided to the Respondent and that it can make a decision.
- [9] The Board also notes that the purposes of the disciplinary provisions in the Act would be defeated if Licensed Building Practitioners were able to avoid complaints by not maintaining up-to-date contact details as per the requirements of the Act.

The Charges

[10] Under regulation 10 of the Complaints Regulations, the Board must, on receipt of the Registrar's Report, decide whether to proceed no further with the complaint because regulation 9 of the Complaints Regulations applies. Having received the report, the Board decided that regulation 9 applied to some but not to all of the allegations.

Regulation 10 Decision

[11] In this matter, the disciplinary charges the Board resolved to further investigate¹ 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.

Regulation 9 Decisions

[12] The complaint to the Board also contained allegations that the Respondent had:

- (a) carried out or supervised building work in a negligent or incompetent manner (section 317(1)(b) of the Act); and
- (b) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for Licensed Building Practitioners into disrepute (section 317(1)(i) of the Act).

[13] With regard to the allegations made, the Board decided that regulation 9(f)(ii) of the Complaints Regulations applied. It provides:

Complaint not warranting further investigation

A complaint does not warrant further investigation if—

- (f) *the investigation of it is—*
 - (ii) *unnecessary*

[14] In considering whether the investigation of a complaint is necessary, the Board must consider the directions of the courts regarding the threshold for matters to be dealt with as a disciplinary matter. In short, the conduct has to fall seriously short of expected standards of conduct.²

[15] With respect to the allegations of negligent or incompetent building work, the Board noted that the matters complained about mostly related to incomplete building work and that whilst there was some evidence of building work that may not have

¹ 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.

² *Collie v Nursing Council of New Zealand* [2001] NZAR 74

been completed to an acceptable standard, the matters raised did not reach the seriousness threshold as outlined in the above court decisions.

[16] Turning to disrepute, conduct which brings or is likely to bring the regime into disrepute is that which would be held in low esteem by the public. The courts have consistently applied an objective test when considering such conduct and have found the following types of conduct to be disreputable:

- criminal convictions³;
- honest mistakes without deliberate wrongdoing⁴;
- provision of false undertakings⁵; and
- conduct resulting in an unethical financial gain⁶.

[17] It is on the basis of the above matters and the facts as presented in the complaint and response that the Board has decided that it will not proceed with the allegations of negligence or incompetence, or disrepute.

Draft Decision Process

[18] The Board's jurisdiction is that of an inquiry. Complaints 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.

[19] Ordinarily, the Board makes a decision having held a hearing.⁷ 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.⁸

[20] 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. It noted, however, that there may have been further evidence in relation to the matter that the Board was not aware of. To that end, it issued a Draft 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. The Board further noted that if the Respondent requested an in-person hearing, then the Draft Decision would be set aside, and a hearing would be scheduled.

[21] The Respondent did not request a hearing. He did make submissions which have been taken into account.

³ *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519

⁴ *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

⁵ *Slack, Re* [2012] NZLCDT 40

⁶ *Colliev Nursing Council of New Zealand* [2000] NZAR 7

⁷ Regulation 10 of the Complaints Regulations.

⁸ 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

Evidence

[22] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁹. 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

[23] 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.¹⁰

[24] 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 Work¹¹ unless there is a good reason for it not to be provided.¹²

Did the Respondent carry out or supervise Restricted Building Work?

[25] The Respondent was engaged as a sub-contractor to carry out and/or supervise building work on a new residential dwelling under a building consent. His work included foundations and framing, both of which are Restricted Building Work because they form part of the primary structure of a residential dwelling.¹³

Was the Restricted Building Work complete?

[26] The Respondent carried out or supervised the Restricted Building Work between October 2022 and 26 February 2023, when he stopped working on the project. Another contractor was engaged in March, and that contractor finished the Restricted Building Work.

[27] The Respondent has not carried out any further Restricted Building Work since he abandoned the project, and because another carpenter has finished what the Respondent started, he will not be able to return to carry out any further Restricted Building Work. On that basis, the Respondent's Restricted Building Work is complete.

Has the Respondent provided a Record of Work?

[28] The Respondent has not provided a Record of Work.

⁹ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

¹⁰ Section 88(1) of the Act.

¹¹ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

¹² Section 317(1)(da)(ii) of the Act

¹³ Clause 5 of the Building (Definition of Restricted Building Work) Order 2011

Was there a good reason?

- [29] The Respondent did not provide a response to the complaint. As such, there are no known good reasons other than non-completion of all of the intended Restricted Building Work, which is not a good reason. This is because if a Record of Work was only provided when all of the intended work was complete in circumstances where that work cannot or will not be completed, it would defeat the purpose of the Record of Work provisions in the Act, which are designed to create a documented record of who did or supervised what in the way of Restricted Building Work under a building consent. The Respondent should also note that a Record of Work can capture not only what has been done but also what has not been done by the Licensed Building Practitioner. By providing adequate detail within the Record of Work, they can afford themselves a degree of protection against future liability by limiting the record to only that which they have completed.
- [30] Additionally, the Respondent should note that the requirement is on the Licensed Building Practitioner to provide a Record of Work, not on the owner or Territorial Authority to demand one. He is required to act of his own accord and not wait for others to remind him of his obligations.

Further Evidence and Submissions Received

- [31] The Respondent did not engage in the complaint process. Following the Board issuing a Draft Decision, it received a submission from the Respondent, which outlined the circumstances that led to the Record of Work being withheld and the financial losses incurred. The Respondent also sent a Record of Work for his Restricted Building Work.
- [32] The submissions noted an ongoing payment dispute. The Board has repeatedly stated that a Record of Work is a statutory requirement, not a negotiable term of a contract. The requirement for it is not affected by the terms of a contract, nor by contractual disputes. Licensed Building Practitioners should now be aware of their obligations to provide them, and their provision should be a matter of routine.
- [33] Given the above, the submissions do not change the Board's decision but they will be taken into account when considering the appropriate penalty to be imposed.

Board's Decision

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

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 Actⁱ, 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 matter was dealt with on the papers. The Board made an indicative order in its Draft Decision. It has since received submissions and has made a final decision regarding penalty, costs, and publication.

[38] 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.¹⁴ It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:¹⁵

- (a) protection of the public and consideration of the purposes of the Act;¹⁶
- (b) deterring other Licensed Building Practitioners from similar offending;¹⁷
- (c) setting and enforcing a high standard of conduct for the industry;¹⁸
- (d) penalising wrongdoing;¹⁹ and
- (e) rehabilitation (where appropriate).²⁰

[39] 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 cases²¹ and applying the least restrictive penalty available for the particular offending.²² In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty²³ that is consistent with other penalties imposed by the Board for comparable offending.²⁴

[40] 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.²⁵

¹⁴ *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]

¹⁵ Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

¹⁶ Section 3 Building Act

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

¹⁸ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

¹⁹ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

²⁰ *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

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

²² *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

²³ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²⁴ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²⁵ 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.

- [41] 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. In this matter, the same Complainant made three complaints. In setting the starting point, the Board took the other two complaints into consideration and set it at \$1,000.
- [42] The Board provided the Respondent with an opportunity to provide a Record of Work before it made a final decision. He provided one, and on that basis, the penalty is reduced by \$250. The final fine is \$750.

Costs

- [43] 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.²⁶
- [44] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings²⁷. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case²⁸.
- [45] 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.
- [46] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$250 toward the costs of and incidental to the Board's inquiry. This is a reduced amount. The Board's scale amount for a Record of Work matter that is dealt with by way of a Draft Decision is \$500, but again, the Board has taken into account the fact that the same Complainant has made three complaints. The amount of costs was reduced to take this into account.

Publication

- [47] 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,²⁹ 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.
- [48] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.³⁰ Further, as a general principle, publication may be required where the Board perceives a need for the public and/or the

²⁶ *Collie v Nursing Council of New Zealand* [2001] NZAR 74

²⁷ *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

²⁸ *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.

²⁹ Refer sections 298, 299 and 301 of the Act

³⁰ Section 14 of the Act

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.³¹

[49] Based on the above, the Board will not order further publication.

Section 318 Order

[50] 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 \$750.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$250 (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, there will not be action taken to publicly notify the Board's action, except for the note in the Register and the Respondent being named in this decision, which will be publicly available on the Board's website.

[51] 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

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

Signed and dated this 30th day of April 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

³¹ Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

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- (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—*
 - 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.*