

## Before the Building Practitioners Board

	BPB Complaint No. CB26214
Licensed Building Practitioner:	Kiel Rangi (the Respondent)
Licence Number:	BP132493
Licence(s) Held:	Carpentry

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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 Location	Wellington and by audio-visual link
Hearing Type:	In Person
Hearing Dates:	13 September 2023 and 29 February 2024
Decision Date:	24 April 2024
Board Members Present:	
	Mr M Orange, Chair, Barrister (Presiding)
	Mr D Fabish, LBP, Carpentry and Site 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 \$1,000 and ordered to pay costs of \$1,000. 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. The Respondent is fined \$1,000 and ordered to pay costs of \$1,000. A record of the disciplinary offending will be recorded in the public Register for a period of three years.

## 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, at [OMITTED], have failed, without good reason, in respect of a building consent that relates to Restricted Building Work that he or she

<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.

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.

### **Consolidation**

- [4] The Board may, under Regulation 13, consolidate two or more complaints into one hearing. As the Board had received another complaint from the same Complainant about the Respondent, it decided to deal with the two matters at one hearing.

### **Procedure**

- [5] A hearing was held on 13 September 2023. The Respondent did not attend. Evidence was received from the Complainant, and a transcript of the evidence was produced. The Respondent was offered the opportunity to have a further hearing so as to contest the evidence. A further hearing was held on 29 February 2024. At the conclusion of that hearing, the Board issued directions regarding further evidence to be obtained and submissions to be filed by the Respondent. The Complainant then filed the requested information and additional evidence. The Respondent did not.
- [6] A further Minute was issued, reminding the Respondent of the Board's directions. A deadline for filing was imposed. The Respondent did not meet it and has not engaged any further in the process. The Board noted a pattern of the Respondent failing to engage or indicating that he would provide evidence that was then not provided. Given the pattern, the Board decided that it would make a decision.

### **Evidence**

- [7] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>3</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**

- [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>4</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>5</sup> unless there is a good reason for it not to be provided.<sup>6</sup>

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<sup>3</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

<sup>4</sup> Section 88(1) of the Act.

<sup>5</sup> Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

<sup>6</sup> Section 317(1)(da)(ii) of the Act

Did the Respondent carry out or supervise Restricted Building Work?

- [10] The Respondent was engaged to carry out and/or supervise building work on a new residential dwelling under a building consent. His work included work on the primary structure and external moisture management system of a residential dwelling,<sup>7</sup> both of which are Restricted Building Work.

Was the Restricted Building Work complete?

- [11] The Respondent worked on the dwelling up until 28 November 2022. He did not carry out any further Restricted Building Work after that date. His services were formally terminated on 16 February 2023. As such, after that date, he would not have been able to return and complete any further Restricted Building Work, and there is no evidence that he did. As such, 16 February 2023 is the completion date, and the date on which a Record of Work was due.

Has the Respondent provided a Record of Work

- [12] The Respondent did not provide a Record of Work on completion as per the section 88(1) requirements. A complaint about the non-provision was made on 20 February 2023. Notwithstanding the complaint and continued requests for a Record of Work from the Complainant, one was not provided.
- [13] The Respondent did, as part of the disciplinary hearing process, provide a Record of Work dated 4 March 2024 to the Complainant.

Was there a good reason for the Respondent to withhold his Record of Work?

- [14] The Respondent noted that, when completion occurred, he was not in a good place and that he had suffered a breakdown. He started to return to work about six weeks later and accepted that he should have provided a Record of Work when he started feeling better. He stated that he did not have a reason for not providing a Record of Work at that point in time.
- [15] The Board finds that whilst the Respondent may initially have had a good reason, the possible good reason ceased when he started feeling better.

**Board's Decisions**

- [16] The Respondent has failed to provide a Record of Work on completion of Restricted Building Work as required under section 88(1) of the Act contrary to section 317(1)(da)(ii) of the Act.

**Penalty, Costs and Publication**

- [17] 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.

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<sup>7</sup> Clause 5 of the Building (Definition of Restricted Building Work) Order 2011

[18] The Board heard evidence during the hearing relevant to penalty, costs and publication and has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

### Penalty

[19] 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>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>

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

[21] 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>

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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

<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.

- [22] 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.
- [23] The Board provided the Respondent with an opportunity to provide a Record of Work before it made a final decision. One was provided, so the fine is reduced to \$1,000.

### Costs

- [24] 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>
- [25] 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>.
- [26] 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.
- [27] The complaint was decided at a hearing. The hearing was consolidated with another complaint that had been made by the same Complainant. Two hearings have been held. The first was in person. The second was by audio-visual link. Because the Respondent did not engage in the process and did not seek an adjournment of the first hearing, additional costs have been incurred.
- [28] The Board's scale costs for an in-person hearing of a simple matter is \$2,000. As it was a consolidated hearing, the Board has decided to half that amount to \$1,000.
- [29] The Board noted that the Respondent stated he has had mental health issues. It may be that his failure to engage in the process was as a result of those issues. Because of that potential, the Board will not lift the costs order.

### Publication

- [30] 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.

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<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.

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

- [31] 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>
- [32] 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

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

**Penalty:** Pursuant to section 318(1)(d) of the Building Act 2004, the Respondent is 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 \$1,000 (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.**

- [34] The Respondent should note that the Board may, under section 319 of the Act, suspend or cancel a Licensed Building Practitioner's licence if fines or costs imposed as a result of disciplinary action are not paid.

### Submissions on Penalty, Costs and Publication

- [35] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until the close of business on **20 June 2024**. The submissions should focus on mitigating matters as they relate to the penalty, costs and publication orders. If no submissions are received, then this decision will become final. If submissions are received, then the Board will meet and consider those submissions prior to coming to a final decision on penalty, costs and publication.

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

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

## Right of Appeal

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

Signed and dated this 29<sup>th</sup> day of May 2024.



**Mr M Orange**  
Presiding Member

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### <sup>i</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:*
  - (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>ii</sup> **Section 318 Disciplinary Penalties**

- (1) *In any case to which section 317 applies, the Board may—*
  - (a) *do both of the following things:*



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- (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.*