

Before the Building Practitioners Board

	BPB Complaint No. CB26282
Licensed Building Practitioner:	Joseph Francis Schischka (the Respondent)
Licence Number:	BP127857
Licence(s) Held:	Carpentry

Draft 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
Hearing and Draft Decision Date:	21 August 2023
Final Decision date:	16 October 2023

Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)
Mrs F Pearson-Green, Deputy Chair, LBP, Design AoP 2
Mr P Thompson, LBP, Carpentry, 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.

Draft Disciplinary Finding:

The Respondent **has** committed a disciplinary offence under section 317(1)(da)(ii) of the Act.

The Respondent is fined \$1,500 and ordered to pay costs of \$500. A record of the disciplinary offending will be recorded on the Public Register for a period of three years.

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Summary of the Board’s Draft Decision

[1] The Respondent failed to provide a record of work on completion of restricted building work. He is fined \$1,500 and ordered to pay costs of \$500. The disciplinary finding will be recorded on 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.¹

[3] In this matter, the disciplinary charges the Board resolved to further investigate² 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

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.

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.

Draft Decision Process

- [4] 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.
- [5] 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
- [6] In this instance, the Board has decided that a formal hearing is not necessary. 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. 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 decision. If the Respondent requests an in-person hearing, or the Board directs that one is required, this decision will be set aside a hearing will be scheduled.

Evidence

- [7] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁵. 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.⁶
- [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 work⁷ unless there is a good reason for it not to be provided.⁸

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

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

⁶ Section 88(1) of the Act.

⁷ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

⁸ 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 building work on an extension and alteration to an existing dwelling. The work was carried out under a building consent, and it included restricted building work. The specific restricted building work that the Respondent was alleged to have carried out was foundations and wall and roof framing.

[11] The Respondent, in his response to the complaint, did not deny that he had carried out the work. He stated that he carried out the following:

Work was carried out by myself and another qualified builder [OMITTED] all under the authority of [OMITTED]; steel in floor, boxing, pitched the roof, building paper and iron on roof, wrapped building and cavity baton.

[12] He did put forward that he was being supervised by the Complainant:

[OMITTED] was in charge. [OMITTED] and I had a verbal agreement that [OMITTED] would overlook all the work under his LPB ...

And, when asked if he had provided a record of work:

No I haven't, I expected [OMITTED] to complete the ROW, as that was our agreement.

[13] The Respondent accepted that he was supervising another builder.

[14] The starting point with records of work is that each and every licensed building practitioner who carries out restricted building work must provide a record of work. This is because section 88(1) of the Act, which states:

Each licensed building practitioner who carries out (other than as an owner-builder) or supervises restricted building work under a building consent must, on completion of the restricted building work, provide the persons specified in subsection (2) with a record of work, in the prescribed form, stating what restricted building work the licensed building practitioner carried out or supervised...

[15] The use of the word “each” makes it clear that every licensed building practitioner who carries out restricted building work has to complete a record of work for the work they did.

[16] The reference to supervision in the context of records of work is to the supervision of persons who are not authorised to carry out restricted building work, i.e., non-licensed persons. A licensed building practitioner does not require supervision by virtue of their own licence – they are authorised to carry out restricted building work. Even if one practitioner were to consider that they were in overall charge of a building site and of the work being carried out under a building consent, the wording “each licenced person...” in section 88 cannot be ignored.

- [17] The wording of the section is clear. The obligation is for each and every licensed building practitioner to provide a record of work for the restricted building work they carried out under a building consent. On that basis, the Board finds that the Respondent did carry out and supervise restricted building work.

Was the restricted building work complete

- [18] The Respondent's involvement in the building work and the period during which he carried out restricted building work ran from 7 June 2021 to 18 October 2021. Again, the Respondent did not deny that he had been engaged over that period. The Respondent did not carry out any restricted building work after that date, and, as such, his restricted building work was complete as of 18 October 2021.

Has the Respondent provided a record of work

- [19] The Complainant made a complaint because of the failure to provide a record of work. On 26 May 2023, the Territorial Authority file was obtained. It did not contain a record of work from the Respondent.

Was there a good reason

- [20] In his response, the Respondent stated:

When [OMITTED] turned up to speak with me in February 2022, he never asked me for a ROW.

- [21] 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. As such, the fact that he may not have been asked for a record of work is not a good reason.

- [22] The Respondent also noted that his hesitation in providing a record of work was because of the risk of litigation. In this respect, it is to be noted that a record of work given by a licensed building practitioner does not, of itself create any liability that would not otherwise exist, as section 88(4) provides:

*(4) A record of work given under subsection (1) does not, of itself,—
create any liability in relation to any matter to which the record of work relates; or give rise to any civil liability to the owner that would not otherwise exist if the licensed building practitioner were not required to provide the record of work.*

- [23] On that basis, the risk of litigation is not a good reason.

Board's Decision

- [24] The Respondent **has** failed to provide a record of work on completion of restricted building work.

Penalty, Costs and Publication

- [25] 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.
- [26] 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

- [27] 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.⁹ It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:¹⁰
- (a) protection of the public and consideration of the purposes of the Act;¹¹
 - (b) deterring other Licensed Building Practitioners from similar offending;¹²
 - (c) setting and enforcing a high standard of conduct for the industry;¹³
 - (d) penalising wrongdoing;¹⁴ and
 - (e) rehabilitation (where appropriate).¹⁵
- [28] 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 cases¹⁶ and applying the least restrictive penalty available for the particular offending.¹⁷ In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty¹⁸ that is consistent with other penalties imposed by the Board for comparable offending.¹⁹

⁹ *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]

¹⁰ Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

¹¹ Section 3 Building Act

¹² *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

¹³ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

¹⁴ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

¹⁵ *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

¹⁶ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

¹⁷ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

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

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

- [29] 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.²⁰
- [30] Record of work matters are at the lower end of the disciplinary scale. The Board's normal starting point for a failure to provide a record of work is a fine of \$1,500, an amount which it considers will deter others from such behaviour. There are no aggravating nor mitigating factors present. As such, the Board sees no reason to depart from the starting point.

Costs

- [31] 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.²¹
- [32] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings²². The starting point can then be adjusted up or down, having regard to the particular circumstances of each case²³.
- [33] 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.
- [34] 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

- [35] 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,²⁴ 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.
- [36] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.²⁵ 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

²⁰ 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.

²¹ *Collie v Nursing Council of New Zealand* [2001] NZAR 74

²² *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

²³ *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.

²⁴ Refer sections 298, 299 and 301 of the Act

²⁵ Section 14 of the Act

stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published.²⁶

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

Section 318 Order

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

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

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

Publication: The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with section 301(I)(iii) of the Act.

In terms of section 318(5) of the Act, there will not be action taken to publicly notify the Board's action, except for the note in the Register and the Respondent being named in this decision, which will be available on the Board's website.

[39] 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

[40] 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.

[41] Submissions and/or further evidence must be filed with the Board by no later than the close of business on **13 October 2023**.

[42] If submissions are received, then the Board will meet and consider those submissions.

[43] 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.

[44] If no submissions or further evidence is received within the time frame specified, then this decision will become final.

²⁶ Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

Request for In-Person Hearing

- [45] 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.
- [46] A request for an in-person hearing must be made in writing to the Board Officer no later than the close of business on **13 October 2023**.
- [47] 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

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

Signed and dated this 22nd day of September 2023.



Mr M Orange
Presiding Member

This decision and the order herein were made final on 16 October 2023 on the basis that no further submissions were received.

Signed and dated this 7th day of November 2023



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*

- (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.