

Before the Building Practitioners Board

	BPB Complaint No. CB26384
Licensed Building Practitioner:	Scott Bogue (the Respondent)
Licence Number:	BP136820
Licence(s) Held:	Roofing – Profiled Metal Roof and/or Wall Cladding

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:	By Videoconference
Hearing Date:	29 August 2024
Decision Date:	29 August 2024
Board Members Present:	

Mrs J Clark, Barrister and Solicitor, Legal Member (Presiding)
Mr G Anderson, 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 censured 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

- [1] The Respondent failed to provide a record of work on completion of restricted building work. He is censured and ordered to pay costs of \$500. A record of the disciplinary offending will be recorded on the public Register for a period 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 supervised, (as the case may be), to provide the persons specified in section 88(2)

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.

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.

- [4] The Board³ initially dealt with the complaint by way of a Draft Decision. The Respondent disputed the findings. The Draft Decision was set aside, and a hearing was scheduled.

Evidence

- [5] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁴. 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.
- [6] The Respondent was contracted by the homeowner to supply and install the roof and the metal wall cladding to a new dwelling. The homeowner's complaint to the Board was in relation to a record of work for the roofing work only. He did not complain about a record of work for the metal wall cladding, for reasons which will be explained further.
- [7] However, the issue being investigated by the Board⁵ was the alleged failure by the Respondent to provide a record of work for all restricted building work on the project which he had carried out and/or supervised. This meant the Board canvassed with the Respondent his involvement in both the roofing and wall cladding work.
- [8] The Respondent advised the Board that he had subcontracted the installation of the roof to another company. The Respondent stated that he did not carry out or supervise any roofing work. That work was carried by and under the supervision of, another Licensed Building Practitioner, [OMITTED]. Mr [OMITTED] was present at the hearing as a witness and he confirmed that he and his employees had installed the roof.
- [9] The homeowner confirmed that the Respondent did not carry out any work himself and that he did not see the Respondent on the roof. The homeowner did, however, state that he saw the Respondent's employees carrying out work related to the eaves and flashings of the roof. On being asked how he knew the workers were the Respondent's employees and not those of Mr [OMITTED], the homeowner stated that they drove vehicles branded with the Respondent's business name. The homeowner and Mr [OMITTED] explained that two valleys – on the roof and around the fireplace - were supplied and installed by separate contractors organised by the homeowner.

³ The Board is a statutory body established under section 341 of the Act.³ Its functions include receiving, investigating, and hearing complaints about, and to inquire into the conduct of, and discipline, licensed building practitioners in accordance with subpart 2 of the Act. It does not have any power to deal with or resolve disputes.

⁴ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

⁵ Notice of Proceeding dated 2 May 2024

- [10] The homeowner's recollection of the Respondent's employee's involvement in the roofing eaves and flashings installation, on the face of it appears to conflict with the evidence of the Respondent and Mr [OMITTED]. The Board considers that the corroborated evidence of the Respondent and Mr [OMITTED] is to be preferred on this point and that it is not inconsistent that the Respondent's employees were on site but undertaking other work or work under the supervision of Mr [OMITTED].
- [11] The homeowner stated that he became aware that the Respondent had subcontracted the roofing work to Mr [OMITTED] during the course of the work.
- [12] The Board considers the provision of the record of work for the roofing work is not the responsibility of the Respondent because he neither carried out nor supervised this work. The Board notes that Mr [OMITTED] expressed a willingness at the hearing to provide a record of work for the roofing work to the homeowner.
- [13] This left the issue of the responsibility for the provision of a record of work for the wall cladding work, which the Board then investigated.

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.⁶
- [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 work⁷ unless there is a good reason for it not to be provided.⁸

Did the Respondent carry out or supervise restricted building work?

- [16] The Respondent acknowledged that he was engaged to carry out the cladding work on a new residential dwelling under a building consent. The work commenced in September 2022. The work included work on the primary structure of a residential dwelling, which is restricted building work.
- [17] The Respondent stated that he had two experienced workers on site – neither of whom were Licensed Building Practitioners. He said that he supervised the work by attending the site 3 or 4 times. Mr [OMITTED] confirmed that he did not carry out or supervise any of the cladding work.

Was the restricted building work complete?

- [18] Before the cladding work was complete, the Respondent and the homeowner had a disagreement over payment. Matters escalated, and this led to the homeowner issuing a trespass notice against the Respondent on 31 January 2023 and terminating

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

the contract with him. Another Licensed Building Practitioner completed the wall cladding work.

- [19] In this instance, completion occurred in late January 2023 when the Respondent's engagement in the building work came to an end. The completion date applies notwithstanding that all of the intended work had not been completed as the Respondent did not return and carry out any further restricted building work. His obligation to provide a record of work arose at this point.

Has the Respondent provided a record of work?

- [20] As at the date of the hearing, a record of work for the wall cladding had not been supplied by the Respondent.

Was there a good reason?

- [21] Section 317(1)(da)(ii) of the Act provides for a defence of the licenced building practitioner having a "good reason" for failing to provide a record of work. If they can, on the balance of probabilities, prove to the Board that one exists, then it is open to the Board to find that a disciplinary offence has not been committed. Each case will be decided by the Board on its own merits, but the threshold for a good reason is high.
- [22] The Respondent stated that he was unaware that he needed to provide a record of work for the wall cladding as the work had been completed by another Licensed Building Practitioner.
- [23] At the point at which the Respondent left the site, he said the cladding work was "*substantially done*", with some window flashings and finishing details to complete. The Respondent acknowledged, however, that the homeowner had a different view of the extent of work completed at that point.
- [24] The homeowner said that "*not much had been done at all*", 40 % of the flashings were still to be completed, and there was a whole wall where the cladding had to be redone. He estimated that the new contractor had to redo about 20-25% of the Respondent's cladding work.
- [25] 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. This is so that there is a complete record of all the licensed persons who have been involved in the restricted building work. As such, even if there is more than one licensed building practitioner carrying out restricted building work, they must both provide a record of work. Their records of work should delineate what each did.
- [26] The Respondent also commented that he was never asked for a record of work by the homeowner.

- [27] The homeowner explained that he had not sought a record of work for the wall cladding from the Respondent because he had obtained one from the second Licensed Building Practitioner who completed and, to some extent, redid the Respondent's cladding work.
- [28] While the homeowner did not seek a record of work for the wall cladding from the Respondent, this does not relieve him of the statutory responsibility to provide one. 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.
- [29] The matters raised by the Respondent are not "good reasons" for failing to provide a record of work.

Board's Decision

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

Penalty, Costs and Publication

- [31] 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.
- [32] Having found that one or more of the grounds in section 317 applies, the Board must, under section 318 of the Actⁱⁱ, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [33] The Respondent made submissions at the hearing as regards penalty, costs, and publication. He stated that the non-provision of the wall cladding record of work was a genuine mistake and that he thought the only issue was the roofing record of work which he did not need to provide. He was unaware of how much work had been redone by the second Licensed Building Practitioner and did not know how much work was to be covered by a record of work . The Respondent also explained that there had been Dispute Tribunal proceedings between the parties and he had incurred a financial impact as a result of the proceedings and the non-completion of the work.

Penalty

- [34] The Board has the discretion to impose a range of penalties.ⁱⁱⁱ Exercising that discretion and determining the appropriate penalty requires that the Board balance various factors, including the seriousness of the conduct and any mitigating or

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

[35] 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

[36] 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

[37] 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 instance, there were no aggravating factors.

[38] There were mitigating factors, as the Respondent outlined, and the Board notes that as it found that the Respondent did not have an obligation to provide a record of work for the roofing work, he was, on that basis, successful on one aspect of the ground for discipline.

[39] The Board also acknowledges the difficulty, given the trespass notice, that the Respondent had in verifying how much of his cladding work remained.

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

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.

[40] Taking the mitigating factors into account, the Board has decided that it will move from its starting point of a fine and censure the Respondent. A censure is a formal expression of disapproval.

Costs

[41] 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

[42] 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.

[43] 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 and proceeded by way of videoconference. Adjustments are then made.

[44] The costs order for a half-day audiovisual hearing is usually \$1,500. The Board heard submissions from the Respondent on the financial impact of this project on him and has decided accordingly to reduce the costs order. 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

[45] 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.

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

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

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

- [47] 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.
- [48] 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

- [49] 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 censured.

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.

- [50] 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

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

Signed and dated this 19th day of September 2024.



Mrs J Clark
Presiding Member

ii **Section 318 of the Act**

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

iii **Section 318 Disciplinary Penalties**

- (1) *In any case to which section 317 applies, the Board may—*
 - (a) *do both of the following things:*
 - (i) *cancel the person’s licensing and direct the Registrar to remove the person’s name from the register; and*
 - (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*
 - (b) *suspend the person’s licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*
 - (c) *restrict the type of building work or building inspection work that the person may carry out or supervise under the person’s licensing class or classes and direct the Registrar to record the restriction in the register:*
 - (d) *order that the person be censured:*
 - (e) *order that the person undertake training specified in the order:*

- (f) order that the person pay a fine not exceeding \$10,000.
- (2) The Board may take only 1 type of action in subsection (1)(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).
- (3) No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.
- (4) In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.
- (5) In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit.

iv Section 330 Right of appeal

- (2) A person may appeal to a District Court against any decision of the Board—

 - (b) to take any action referred to in section 318.

Section 331 Time in which appeal must be brought

An appeal must be lodged—

- (a) within 20 working days after notice of the decision or action is communicated to the appellant; or
- (b) within any further time that the appeal authority allows on application made before or after the period expires.