

## Before the Building Practitioners Board

	BPB Complaint No. CB26126
Licensed Building Practitioner:	Apakuki Soro (the Respondent)
Licence Number:	BP133013
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	by Audio Visual Link
Hearing Type:	In person
Hearing and Decision Date:	27 September 2023

#### Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)  
Mr D Fabish, LBP, Carpentry and Site 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.

#### 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 \$1,500. 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 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 \$1,500. 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.<sup>1</sup>

[3] In this matter, the disciplinary charges the Board resolved to further investigate<sup>2</sup> were that the Respondent may, in relation to building work at [OMITTED], Lower Hutt, have failed, without good reason, in respect of a building consent that relates to restricted building work that he 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.

<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.

- [4] The Board<sup>3</sup> 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 committed<sup>4</sup>. Under section 322 of the Act, the Board has relaxed rules of evidence that allow it to receive evidence that may not be admissible in a court of law.
- [6] The Respondent was engaged to carry out building work on an alternation and addition to a residential dwelling under a building consent. The building work included restricted building work for which a record of work must be provided on completion.
- [7] The Respondent's building work started on or about 23 July 2021. In an email response to the complaint dated 23 January 2023, the Respondent stated his work came to an end on or about 12 September 2021. The last council inspection prior to a final inspection was undertaken on 8 October 2021. At the hearing, the Respondent accepted that his work would have come to an end, at the latest, in October 2021.
- [8] The Respondent made reference to an outstanding defects list that had to attend to, but accepted that it did not include any restricted building work.
- [9] The Complainant stated that a record of work was sought from 13 June 2022. A complaint was made in September 2022. The Complainant stated that the record of work was being withheld as a result of a payment dispute. A copy of a message sent by the Respondent was provided. It stated:
- Also need one of the invoices outstanding paid, lbp memorandum form has been done so when the final payment goes through I'll email to you for Your code of compliance. Just remember that your final is a fail because the cladding hasn't been painted.*
- [10] In a response to the complaint, the Respondent stated:
- I have not send the record of work to the council as yet as it the owners responsibility this job to apply for COC. I have supplied me record of work to the owners as of 23/8/22.*
- [11] A final inspection was not undertaken until June 2022. The Complainant gave evidence that the delay was because she was painting weatherboards and had to get

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<sup>3</sup> The Board is a statutory body established under section 341 of the Act.<sup>3</sup> 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.

<sup>4</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

the compliance of a wood burner sorted. A Code Compliance Certificate was not issued until August 2023 because of those outstanding items.

- [12] A record of work dated 23 August 2022 was provided to the owner on 21 September 2022 and to the Territorial Authority on 30 September 2022. The Complainant claimed it did not contain any detail, which may have been the result of a computer software issue.
- [13] At the hearing, it was put to the Respondent that the record of work was not provided when completion occurred in October 2021 because he had not been paid. He accepted this was a reason why he had not provided it and noted that he had still not been paid.

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

- [14] A Licensed Building Practitioner must provide a record of work for any restricted building work that they have carried out or supervised to the owner and the Territorial Authority on completion of their restricted building work.<sup>5</sup>
- [15] There is a statutory requirement under section 88(1) of the Building Act 2004 for a licensed building practitioner to provide a record of work to the owner and the territorial authority on completion of restricted building work<sup>6</sup> unless there is a good reason for it not to be provided.<sup>7</sup>

#### Did the Respondent carry out or supervise restricted building work?

- [16] The Respondent carried out restricted building work.

#### Was the restricted building work complete?

- [17] The restricted building work was completed in October 2021. That was when a record of work was due.

#### Has the Respondent provided a record of work on completion?

- [18] The Respondent provided a record of work in September 2022, almost a year after completion. On that basis, he did not provide it on completion or soon thereafter.

#### Was there a good reason?

- [19] The reasons put forward related to the obtaining of a Code Compliance Certificate and to payment issues. There was no restricted building work relating to the Respondent that had to be carried out to obtain a Code Compliance Certificate. As such, those matters do not equate to a good reason.
- [20] With respect to payment issues, 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

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<sup>5</sup> Section 88(1) of the Act.

<sup>6</sup> Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

<sup>7</sup> Section 317(1)(da)(ii) of the Act

disputes. Licensed building practitioners should now be aware of their obligations to provide them, and their provision should be a matter of routine. Non payment is not a good reason.

- [21] The Respondent should also 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.

### **Board's Decision**

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

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

- [23] 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.

- [24] The Respondent made submissions at the hearing as regards penalty, costs and publication.

### Penalty

- [25] The purpose of professional discipline is to uphold the integrity of the profession; the focus is not punishment, but the enforcement of a high standard of propriety and professional conduct. The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*<sup>8</sup> commented on the role of “punishment” in giving penalty orders stating that punitive orders are, at times, necessary to provide a deterrent and to uphold professional standards. The Court noted:

*[28] I therefore propose to proceed on the basis that, although the protection of the public is a very important consideration, nevertheless the issues of punishment and deterrence must also be taken into account in selecting the appropriate penalty to be imposed.*

- [26] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*,<sup>9</sup> the Court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act, they have the advantage of simplicity and transparency. The Court recommended adopting a starting point for a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.

- [27] 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

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<sup>8</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>9</sup> 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

aggravating nor mitigating factors present. As such, the Board sees no reason to depart from the starting point. The fine is set at \$1,500.

### Costs

- [28] Under section 318(4) the Board may require the Respondent “to pay the costs and expenses of, and incidental to, the inquiry by the Board.”
- [29] The Respondent should note that the High Court has held that 50% of total reasonable costs should be taken as a starting point in disciplinary proceedings and that the percentage can then be adjusted up or down having regard to the particular circumstances of each case<sup>10</sup>.
- [30] In *Collie v Nursing Council of New Zealand*,<sup>11</sup> where the order for costs in the tribunal was 50% of actual costs and expenses, the High Court noted that:
- But for an order for costs made against a practitioner, the profession is left to carry the financial burden of the disciplinary proceedings, and as a matter of policy that is not appropriate.*
- [31] In *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society*,<sup>12</sup> the High Court noted:
- [46] *All cases referred to in Cooray were medical cases and the Judge was careful to note that the 50 per cent was the general approach that the Medical Council took. We do not accept that if there was any such approach, it is necessarily to be taken in proceedings involving other disciplinary bodies. Much will depend upon the time involved, actual expenses incurred, attitude of the practitioner bearing in mind that whilst the cost of a disciplinary action by a professional body must be something of a burden imposed upon its members, those members should not be expected to bear too large a measure where a practitioner is shown to be guilty of serious misconduct.*
- [47] *Costs orders made in proceedings involving law practitioners are not to be determined by any mathematical approach. In some cases 50 per cent will be too high, in others insufficient.*
- [32] 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 based on the High Court decisions above are then made.
- [33] The Board adjourned the first hearing that was scheduled after it had opened the hearing at a venue in Wellington. The Respondent stated that he forgot about the hearing and that he had to care for his sick daughter. The Board granted an

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<sup>10</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>11</sup> [2001] NZAR 74

<sup>12</sup> CIV-2011-485-000227 8 August 2011

adjournment and reserved costs. Scale costs for a hearing of the type that was adjourned are \$2,000.

- [34] The hearing was rescheduled using an audio-visual link, which reduced the costs incurred. Costs were still incurred, both in investigating the matter and in hearing it. A costs order is appropriate. The Board noted, however, the Respondent's financial position and that he has not been paid for some of his work. On that basis, the Board decided that it would only impose costs for the rescheduled hearing. On a scale basis, the costs ordered are \$1,500. In essence, the costs have been reduced from \$3,500 to \$1,500.

#### 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<sup>13</sup>. The Board is also able, under section 318(5) of the Act, to order publication over and above the public Register:

*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.*

- [36] As a general principle, such further public notification 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. This is in addition to the Respondent being named in this decision.
- [37] Within New Zealand, there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990<sup>14</sup>. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction<sup>15</sup>. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive<sup>16</sup>. The High Court provided guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*<sup>17</sup>.
- [38] The courts have also stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published in the public interest<sup>18</sup>. It is, however, common practice in disciplinary proceedings to protect the names of other persons involved as naming them does not assist the public interest.
- [39] Based on the above, the Board will not order further publication.

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<sup>13</sup> Refer sections 298, 299 and 301 of the Act

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

<sup>15</sup> Refer sections 200 and 202 of the Criminal Procedure Act

<sup>16</sup> *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

<sup>17</sup> *ibid*

<sup>18</sup> *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

### Section 318 Order

[40] 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 \$1,500 (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.

[41] 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. He may apply to the Registrar to pay the fine and costs over time.

### Right of Appeal

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

Signed and dated this 31<sup>st</sup> day of October 2023



**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,

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- 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 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.*