

## Before the Building Practitioners Board

	BPB Complaint No. CB26416
Licensed Building Practitioner:	Douglas Owen Taylor (the Respondent)
Licence Number:	BP116268
Licence(s) Held:	Carpentry, Foundations and Site AoP 2

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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 Type:	On the Papers
Hearing and Draft Decision Date:	29 April 2024
Finalised Draft Decision Date:	18 June 2024

#### Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)  
Mrs F Pearson-Green, Deputy Chair, LBP, Design AoP 2  
Mr G Anderson, LBP, Carpentry and Site AoP 2

#### 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)(b) of the Act.

The Respondent is fined \$2,000 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 Decision

- [1] The Respondent supervised roof and wall cladding. The work was completed, and a Code Compliance Certificate was issued. The Complainant then experienced issues with water ingress. An expert report was sought. It identified multiple Building Code compliance failings. The report and complaint were put to the Respondent, who did not engage in the complaints process. The Board made a decision based on the evidence in the expert report that the Respondent had negligently supervised building work.
- [2] The Board fined the Respondent \$2,000 and ordered that he pay costs of \$500. The fine and costs were reduced because the matter was dealt with on the papers. A record of the disciplinary offence will be recorded on the public Register for a period of three years.

## The Charges

- [3] 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>
- [4] 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], have carried out or supervised building work in a negligent or incompetent manner contrary to section 317(1)(b) of the Act. In particular, the Board decided to investigate whether the Respondent had carried out roofing in a negligent manner.

## Draft Decision Process

- [5] 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.
- [6] Ordinarily, the Board makes a decision having held a hearing.<sup>3</sup> 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.<sup>4</sup>
- [7] 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. Also, the Respondent has not engaged in the complaint process, so there is no contradicting evidence to consider or test.
- [8] 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, and a hearing will be scheduled.

## Evidence

- [9] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>5</sup>. Under section 322 of the Act, the Board has

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<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.

<sup>3</sup> Regulation 10 of the Complaints Regulations.

<sup>4</sup> 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

<sup>5</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.

### **Negligence or Incompetence**

[10] To find that the Respondent was negligent, the Board needs to determine, on the balance of probabilities,<sup>6</sup> that the Respondent departed from an accepted standard of conduct when carrying out or supervising building work as judged against those of the same class of licence. This is described as the *Bolam*<sup>7</sup> test of negligence.<sup>8</sup> To make a finding of incompetence, the Board has to determine that the Respondent has demonstrated a lack of ability, skill, or knowledge to carry out or supervise building work to an acceptable standard.<sup>9</sup> A threshold test applies to both. Even if the Respondent has been negligent or incompetent, the Board must also decide if the conduct fell seriously short of expected standards.<sup>10</sup> If it does not, then a disciplinary finding cannot be made.

#### Has the Respondent departed from an acceptable standard of conduct?

[11] When considering what an acceptable standard is, the Board must consider the purpose of the Building Act<sup>i</sup> as well as the requirement that all building work must comply with the Building Code<sup>11</sup> and any building consent issued.<sup>12</sup> The test is an objective one.<sup>13</sup>

[12] The Respondent was engaged by the Complainant to carry out building work on a building that included residential accommodation. After a Code Compliance Certificate had been issued, the Complainant experienced problems with the watertightness of the building. The Complainant tried to resolve them with the Respondent, who did not engage. The Complainant then sought the opinion of Mr [OMITTED], a roofing assessor. Mr [OMITTED] produced a report dated 18 July 2023. His report was comprehensive, and it noted, amongst other things:

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<sup>6</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 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.

<sup>7</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

<sup>8</sup> Adopted in New Zealand in various matters including: *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

<sup>9</sup> In *Beattie v Far North Council* Judge McElrea, DC Whangarei, CIV-2011-088-313 it was described as “a demonstrated lack of the reasonably expected ability or skill level”. In *Ali v Kumar and Others*, [2017] NZDC 23582 at [30] as “an inability to do the job”

<sup>10</sup> *Collie v Nursing Council of New Zealand* [2001] NZAR 74 - [21] “Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness”.

<sup>11</sup> Section 17 of the Building Act 2004

<sup>12</sup> Section 40(1) of the Building Act 2004

<sup>13</sup> *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71 noted that the tribunal does not have to take into account the Respondent’s subjective considerations.

### **Site Inspection Report**

6. *In discussions onsite with [OMITTED] it was established as follows: -*
  - a) *There has been water ingress along the Warehouse gutter line which has stained the roofing underlay.*
  - b) *This also caused mould on the plywood lining.*
  - c) *No closure pieces were installed in the Warehouse roof profiles at the time of installing the roof.*
  - d) *The roofing underlay was fitted overhanging down into the gutter.*
  - e) *As a result of water ingress, [OMITTED] taped over the ends of a number of the roofing profiles and later obtained and installed manufacturer supplied closure pieces.*
  - f) *The roofing underlay was also trimmed back. This action in particular appeared to stop water ingress further staining the roofing underlay.*

### **Summary**

1. *Even though the building has a Code of Compliance, aspects of the roof as installed are either not compliant with E2/AS1, the CoP or good industry practice.*
2. *For the longer term security and performance of the roof these should be remedied.*
3. *Further damage to the roofing underlay appears to have been largely avoided by the action of the owner fitting closure pieces to the end of the sheets on the upper roof and cutting back the excessively overhanging roofing underlay.*
4. *Not installing foam closure pieces under the cladding or flashings as detailed in the plans may also be a contributing factor to moisture ingress in more extreme conditions in this very high wind zone, as well as not providing vermin proofing.*
5. *Items noted in the Report should be remedied as part of the original contract and also covered under a five year workmanship warranty.*
6. *It is assumed that some of the variations from the plans in the as constructed situation were agreed or approved at the time of installation, such as deleting timber fascia boards and detailing of the wall cladding flashings.*

- [13] The Respondent, on completion of his restricted building work, provided a record of work. It stated that he had supervised the roof and wall cladding systems. On that basis, and in the absence of a response from the Respondent, he is the person responsible and accountable for the work that has been complained about.
- [14] Mr [OMITTED] report was sent to the Respondent as part of the complaint process. As noted, he has not engaged and so has not responded to it. In the absence of contradictory evidence, the report and findings are accepted. Those findings were that there was no compliant work, which is impacting the performance of the building.
- [15] The Respondent's record of work states that he did not carry out the work but that he did supervise it. The term supervise is defined in section 7 of the Act.<sup>14</sup> The courts have not yet considered supervision in the context of the Building Act. It has, however, been considered in relation to the Electricity Act 1992.<sup>15</sup> The definition of supervision in that Act is consistent with the definition in the Building Act, and as such, the comments of the court are instructive. In the case, Judge Tompkins stated, in paragraph 24:
- “As is made apparent by the definition of “supervision” in the Act, that requires control and direction by the supervisor so as to ensure that the electrical work is performed competently, that appropriate safety measures are adopted, and that when completed the work complies with the requisite regulations. At the very least supervision in that context requires knowledge that work is being conducted, visual and other actual inspection of the work during its completion, assessment of safety measures undertaken by the person doing the work on the site itself, and, after completion of the work, a decision as to compliance of the work with the requisite regulations.”*
- [16] When considering supervision, the Board needs to consider what type of supervision was required and how well that supervision was undertaken. The Board also needs to consider whether the work met the requirements of the building code and, if not, the level of non-compliance.
- [17] In this instance, an independent expert has reviewed the work and has noted that aspects of it do not comply with the Building Code and that the cladding is not performing as required and maintaining a watertight envelope. On that basis, the Board has decided that the Respondent has not provided adequate supervision and that he has been negligent.

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<sup>14</sup> Section 7:

*supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—*

*(a) is performed competently; and*

*(b) complies with the building consent under which it is carried out.*

<sup>15</sup> *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

Was the conduct serious enough?

- [18] The departure is not mere oversight or inadvertence. A notable lack of supervision led to the issues. Also, if the Respondent had carried out the compliance checks expected of a supervisor, then the issues should have been identified and rectified. They were not. Given those factors, the Board has decided that the conduct was serious enough to warrant a disciplinary outcome.

Has the Respondent been negligent or incompetent?

- [19] The Respondent has been negligent in that his conduct has fallen below the standard expected of a Licensed Building Practitioner.

**Board's Decision**

- [20] The Respondent **has** conducted himself in a negligent manner.

**Penalty, Costs and Publication**

- [21] Having found that one or more of the grounds in section 317 applies, the Board must, under section 318 of the Act<sup>ii</sup>, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [22] The matter was dealt with on the papers. Included was information relevant to penalty, costs, and publication. 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

- [23] The Board has the discretion to impose a range of penalties.<sup>iii</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>16</sup> It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:<sup>17</sup>
- (a) protection of the public and consideration of the purposes of the Act;<sup>18</sup>
  - (b) deterring other Licensed Building Practitioners from similar offending;<sup>19</sup>
  - (c) setting and enforcing a high standard of conduct for the industry;<sup>20</sup>
  - (d) penalising wrongdoing;<sup>21</sup> and

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<sup>16</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>17</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>18</sup> Section 3 Building Act

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

<sup>20</sup> *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

<sup>21</sup> *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

(e) rehabilitation (where appropriate).<sup>22</sup>

- [24] 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>23</sup> and applying the least restrictive penalty available for the particular offending.<sup>24</sup> In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty<sup>25</sup> that is consistent with other penalties imposed by the Board for comparable offending.<sup>26</sup>
- [25] In general, when determining the appropriate penalty, the Board adopts a starting point based on the principles outlined above prior to considering any aggravating and/or mitigating factors present.<sup>27</sup>
- [26] The Board adopted a starting point of a fine of \$3,000, which reflects the seriousness of the offence and is consistent with other penalties imposed by the Board. The only known mitigating factor is the manner in which the Board has dealt with the matter. Because it has made an “on the papers” decision, it has decided that it will reduce the fine by one-third to \$2,000.

### Costs

- [27] 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>28</sup>
- [28] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings<sup>29</sup>. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case<sup>30</sup>.
- [29] 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 moderately complex. Adjustments are then made.
- [30] 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. That is the Board’s scale amount for a moderately complex matter dealt with on the papers.

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<sup>22</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>23</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

<sup>24</sup> *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

<sup>25</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

<sup>26</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

<sup>27</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.

<sup>28</sup> *Collie v Nursing Council of New Zealand* [2001] NZAR 74

<sup>29</sup> *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

<sup>30</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.



## Publication

- [31] 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>31</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.
- [32] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.<sup>32</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>33</sup>
- [33] 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**

- [34] 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 \$2,000.
- 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, the Respondent will be named in this decision, which will be published on the Board's website.**
- [35] 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.

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<sup>31</sup> Refer sections 298, 299 and 301 of the Act

<sup>32</sup> Section 14 of the Act

<sup>33</sup> Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

### **Submissions on Draft Decision**

- [36] 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.
- [37] Submissions and/or further evidence must be filed with the Board by no later than the close of business on 17 June 2024.
- [38] If submissions are received, then the Board will meet and consider those submissions.
- [39] 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.
- [40] If no submissions or further evidence is received within the time frame specified, then this decision will become final.

### **Request for In-Person Hearing**

- [41] 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.
- [42] A request for an in-person hearing must be made in writing to the Board Officer no later than the close of business on 17 June 2024.
- [43] 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**

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

Signed and dated this 27<sup>th</sup> day of May 2024.



**Mr M Orange**  
Presiding Member

**This decision and the order herein were made final on 18 June 2024 on the basis that no further submissions were received.**

Signed and dated this 16<sup>th</sup> day of July 2024.



**Mr M Orange**  
Presiding Member

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***i Section 3 of the Act***

*This Act has the following purposes:*

- (a) *to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—*
  - (i) *people who use buildings can do so safely and without endangering their health; and*
  - (ii) *buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and*
  - (iii) *people who use a building can escape from the building if it is on fire; and*
  - (iv) *buildings are designed, constructed, and able to be used in ways that promote sustainable development:*
- (b) *to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the Building Code.*

***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.*

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- (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.*