Before the Building Practitioners Board

	BPB Complaint No. CB25778
Licensed Building Practitioner:	Vladimir Tikota (the Respondent)
Licence Number:	BP 135736
Licence(s) Held:	Carpentry

Final 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
Draft Decision Date:	29 September 2021
Final Decision Date:	16 November 2021

Board Members Present:

Mr C Preston, Chair (Presiding)
Mr M Orange, Deputy Chair, Barrister
Mr B Monteith, LBP, Carpentry and Site AOP 2
Mr R Shao, LBP, Carpentry and Site AOP 1
Ms J Clark, Barrister and Solicitor, Legal Member

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.

Contents

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 $500.

The Charges

[2] On 29 September 2021, the Board received a Registrar's Report in respect of a Complaint about the conduct of the Respondent.

[3] Under regulation 10 of the Complaints Regulations, the Board must, on receipt of the Registrar's Report, decide whether to proceed no further with the complaint because regulation 9 of the Complaints Regulations applies.

[4] Having received the report, the Board decided that regulation 9 did not apply. Under regulation 10 the Board is required to hold a hearing.

[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 is necessary prior to it making a decision. In this respect, the Act provides that the Board may regulate its own procedures[1]. It has what is described as a summary jurisdiction in that the Board has a degree of flexibility in how it deals with matters; it retains an inherent jurisdiction beyond that set out in the enabling legislation[2]. As such, it may 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.

[1] Clause 27 of Schedule 3
[2] *Castles v Standards Committee No.* [2013] NZHC 2289, *Orlov v National Standards Committee 1* [2013] NZHC 1955

[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.

[7] The Board does, however, note that there may be further evidence in the possession of persons involved in the matter. To that end, this decision is a draft Board decision. The Respondent will be provided with an opportunity to comment on the Board's draft findings and to present further evidence prior to the Board making a final decision. If the Board directs or the Respondent requests an in-person hearing, then this draft decision will be set aside, and a hearing will be scheduled.

Disciplinary Offences Under Consideration

[8] On the basis of the Registrar's Report, the Respondent's conduct that the Board resolved to investigate was that the Respondent had failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) 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) (s 317(1)(da)(ii) of the Act).

Function of Disciplinary Action

[9] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*[3] and in New Zealand in *Dentice v Valuers Registration Board*[4].

[10] Disciplinary action under the Act is not designed to redress issues or disputes between a complainant and a respondent. In *McLanahan and Tan v The New Zealand Registered Architects Board,*[5] Collins J. noted that:

> *"… the disciplinary process does not exist to appease those who are dissatisfied …. The disciplinary process … exists to ensure professional standards are maintained in order to protect clients, the profession and the broader community."*

[3] *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.
[4] [1992] 1 NZLR 720 at p 724
[5] [2016] HZHC 2276 at para 164

Evidence

[11] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed[6]. 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.

[12] The Respondent was engaged by [Omitted] to carry out building work on new dwellings at [Omitted], under building consents. The building work included restricted building work for which a Record of Work must be provided on completion. The Respondent stated in an email to the Investigator on 27 July 2021 – *"The job started at 26 October 2020 and I have left the job on January 2021."*

[13] The Complainant requested the records of work from the Respondent by email on 11 April 2021 and by text on 18 and 23 May 2021 but did not receive any response. By telephone, the Respondent first advised the Complainant that he would not provide records of work as the work he had done was not fully completed and then agreed to provide one by 24 May 2021. He did not do so.

[14] The Respondent emailed the Investigator on 27 July 2021 and stated that he was employed as a carpenter by [Omitted] on a labour-only basis. His reason for not providing records of work was that – *"[Omitted] as subcontractor to generation homes is responsible to sign the restricted building work to my understanding."*

[15] The Territorial Authority's file was obtained on 20 August 2021. It did not contain a Record of Work for the Respondent.

Further Evidence and Submissions Received

[16] Following the Board issuing a Draft Decision, it received a submission from the Respondent. He stated he felt the combined fine and costs were "hard to accept". He stated he had leant his lesson and asked that he be warned rather than fined. The Respondent also referred to the difficulties he experienced supervising on-site workers.

[17] The Board took the further evidence and submissions into account when making this Final Decision.

Board's Conclusion and Reasoning

[18] The Board has decided that the Respondent **has** failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) 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) (s 317(1)(da)(ii) of the Act) and **should** be disciplined

[19] 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[7].

[20] Failing to provide a record of work is a ground for discipline under section 317(1) (da)(ii) of the Act. In order to find that ground for discipline proven, the Board need only consider

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

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

whether the Respondent had "good reason" for not providing a record of work on "completion" of the restricted building work.

[21] The Board discussed issues with regard to records of work in its decision C2-01170[8] and gave guidelines to the profession as to who must provide a record of work, what a record of work is for, when it is to be provided, the level of detail that must be provided, who a record of work must be provided to and what might constitute a good reason for not providing a record of work.

[22] The starting point with a record of work is that it is a mandatory statutory requirement whenever restricted building work under a building consent is carried out or supervised by a licensed building practitioner (other than as an owner-builder). Each and every licensed building practitioner who carries out restricted building work must provide a record of work.

[23] The statutory provisions do not stipulate a timeframe for the licenced person to provide a record of work. The provisions in section 88(1) simply states "on completion of the restricted building work …". As was noted by Justice Muir in *Ministry of Business Innovation and Employment v Bell*[9] "… the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work".

[24] As to when completion will have occurred is a question of fact in each case.

[25] The Respondent put forward that the building work was not complete. The Respondent's involvement with the building work ended in January 2021 (as stated in his own evidence). Completion, as regards the Respondent, occurred at that point in time as he would not be returning to carry out any further restricted building work. As a record of work has still not been provided by the Respondent as of August 2021, the Board finds that the Record of Work was not provided on completion as required, and the disciplinary offence has been committed.

[26] The Respondent, when making submissions on the Draft Decision, noted the difficulty he had supervising on-site staff. The Board has not made any findings as regards the quality or compliance of the building work, so the submission is not relevant to the matter before the Board. The Respondent should, however, take steps to address supervision issues if he considers that they pose a risk to the building work that he is supervising.

[27] 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.

[28] In this instance, the Respondent suggests that it was his employer's ([Omitted]) responsibility to provide the record of work.

[29] The Board notes that 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

[8] *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015
[9] [2018] NZHC 1662 at para 50

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. Licensed building practitioners should now be aware of their obligations to provide them, and their provision should be a matter of routine.

[30] The Board, accordingly, finds that no "good reason" for the non-provision of the Record of Work has been established.

Decision on 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 Act[i], consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.

[32] 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. Further submissions were received and considered.

Penalty

[33] 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*[10] 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.*

[34] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment,*[11] 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.

[35] 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.

[36] In response to the Draft Decision, the Respondent submitted that the penalty was harsh. He asked for a warning. The disciplinary powers available to the Board do not include the ability to issue a warning. The Board also needs to ensure the penalty imposed deters others from

[10] HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27
[11] 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

failing to provide records of work. As such, the Board sees no reason to depart from the draft order. The fine is set at $1,500.

Costs

[37] 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."

[38] 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[12].

[39] In *Collie v Nursing Council of New Zealand,*[13] 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.*

[40] In *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society*,[14] 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.*

[41] 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 a simple investigation. Adjustments based on the High Court decisions above are then made.

[42] The Board notes the matter was dealt with on the papers. There has, however, been costs incurred investigating the matter, producing the Registrar's Report and in the Board making its decision. The costs have been less than those that would have been incurred had a full hearing been held. As such, the Board will order that costs of $500 be paid by the Respondent. The Board considers that this is a reasonable sum for the Respondent to pay toward the costs and expenses of, and incidental to, the inquiry by the Board. Again, the Respondent's submission that the amount is harsh is rejected.

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[12] *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.

[13] [2001] NZAR 74

[14] CIV-2011-485-000227 8 August 2011

Publication

[43] 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[15]. 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.*

[44] 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.

[45] Within New Zealand, there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990[16]. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction[17]. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive[18]. 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*[19].

[46] 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[20]. 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.

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

Section 318 Order

[48] 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(l)(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.**

[15] Refer sections 298, 299 and 301 of the Act
[16] Section 14 of the Act
[17] Refer sections 200 and 202 of the Criminal Procedure Act
[18] *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350
[19] ibid
[20] Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

[49] 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

[50] The right to appeal Board decisions is provided for in section 330(2) of the Act[ii].

Signed and dated this 20th day of December 2021.

Mr C Preston
Presiding Member

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[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 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.