

## Before the Building Practitioners Board

	BPB Complaint No. CB26425
Licensed Building Practitioner:	Aihua Wu (the Respondent)
Licence Number:	BP114313
Licence(s) Held:	Bricklaying and Blocklaying – Veneer

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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	Board Inquiry
Hearing Type:	On the Papers
Hearing and Draft Decision Date:	8 March 2024
Finalised Draft Decision Date:	8 March 2024
Board Members Present:	29 April 2024

Mr M Orange, Chair, Barrister (Presiding)  
Mrs F Pearson-Green, Deputy Chair, LBP, Design AoP 2  
Ms K Reynolds, Construction Manager

#### 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 \$1,000 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 failed to provide a Record of Work on completion of Restricted Building Work. He is fined \$1,000 and ordered to pay costs of \$500.

## The Charges

[2] Under regulation 22 of the Complaints Regulations, the Board must, on receipt of the Registrar’s Report, decide whether to proceed no further with an inquiry because regulation 21 of the Complaints Regulations applies. Having received the report, the Board decided that regulation 21 applied to some but not to all of the allegations.

### Regulation 10 Decision

- [3] In this matter, the disciplinary charges the Board resolved to further investigate<sup>1</sup> were that the Respondent may, in relation to building work at [Omitted] Auckland, 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) 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.

### Regulation 9 Decisions

- [4] The Board was also investigating whether the Respondent had:
- (a) carried out or supervised building work in a negligent or incompetent manner (s 317(1)(b) of the Act); and
  - (b) carried out or supervised building work that does not comply with a Building Consent (s 317(1)(d) of the Act);
- [5] With regard to those matters, the Board decided that regulations 21(c) and (d)(ii) of the Complaints Regulations applied. The provide:

***Matter not warranting continuation of inquiry***

*A matter does not warrant the Board continuing an inquiry into it if—*

- (c) *there is insufficient evidence to continue the inquiry; and*
- (d) *continuing the inquiry is—*
  - (ii) *unnecessary;*

- [6] The regulation 21(c) finding relates to the contrary to a Building Consent matter (section 317(1)(d)). To test sufficiency, the Board needs to inquire whether there is evidence which, if un-contradicted, would, having regard to the degree of proof demanded<sup>2</sup>, justify consideration of the matter. In this instance, the Board considered there was insufficient evidence.
- [7] In terms of the negligence or incompetence matter (section 317(1)(b)), in considering whether the investigation of a matter is necessary, the Board must consider the directions of the courts regarding the threshold for matters to be dealt with as a disciplinary matter. In short, the conduct has to fall seriously short of expected standards of conduct.<sup>3</sup>

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<sup>1</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>2</sup> The burden in complaints is on the balance of probabilities per *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

<sup>3</sup> *Collie v Nursing Council of New Zealand* [2001] NZAR 74

- [8] On this basis, the Board has decided that whilst there was some evidence of building work that may not have been completed to an acceptable standard, the matters raised did not reach the seriousness threshold as outlined in the above court decisions.
- [9] With regard to the allegation that the Respondent may have brought the licensing regime into disrepute, conduct which brings or is likely to bring the regime into disrepute is that which would be held in low esteem by the public. The courts have consistently applied an objective test when considering such conduct and have found the following conduct to have been disreputable:
- criminal convictions<sup>4</sup>;
  - honest mistakes without deliberate wrongdoing<sup>5</sup>;
  - provision of false undertakings<sup>6</sup>; and
  - conduct resulting in an unethical financial gain<sup>7</sup>.
- [10] The Courts have also stated that the threshold for disciplinary complaints of disrepute is high.
- [11] The Complainant and Respondent should note that if new compellable evidence that was not available at the time the decision not to proceed was made, a further complaint may be made, or the Board may decide to initiate a Board Inquiry into the matter.
- [12] It is on the basis of the above matters and the facts as presented in the complaint and response that the Board has decided that it will not proceed with the allegations of negligence or incompetence or disrepute.

### **Draft Decision Process**

- [13] The Board's jurisdiction is that of an inquiry. It is for the Board to carry out any further investigation that it considers necessary prior to making a decision.
- [14] Ordinarily, the Board makes a decision having held a hearing.<sup>8</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>9</sup>
- [15] In this instance, the Board has decided that a formal hearing is not necessary. The Board considers that there is sufficient evidence before it to allow it to make a decision on the papers. There may, however, be further evidence in relation to the

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<sup>4</sup> *Davidson v Auckland Standards Committee* No 3 [2013] NZAR 1519

<sup>5</sup> *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

<sup>6</sup> *Slack, Re* [2012] NZLCDT 40

<sup>7</sup> *Colliev Nursing Council of New Zealand* [2000] NZAR 7

<sup>8</sup> Regulation 10 of the Complaints Regulations.

<sup>9</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

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**

[16] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>10</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.

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

[17] 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>11</sup>

[18] 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>12</sup> unless there is a good reason for it not to be provided.<sup>13</sup>

### Did the Respondent carry out or supervise Restricted Building Work?

[19] The Respondent supervised building work on a new residential dwelling under a Building Consent. The work included work on the brick veneer, which is Restricted Building Work because it forms part of the external moisture management system of a residential dwelling.<sup>14</sup>

### Was the Restricted Building Work complete?

[20] The Restricted Building Work that the Respondent supervised was carried out in March 2022. It was inspected and passed as compliant with the Building Code. March 2022 was when a Record of Work was due.

### Has the Respondent provided a Record of Work?

[21] The Respondent provided a Record of Work to the main contractor, who withheld it from the owner and the Territorial Authority. The Board obtained the Territorial Authority file for the property. It did not contain a Record of Work from the Respondent.

[22] Whilst it may be common practice in some quarters of the building industry for Records of Work to be provided to main contractors, it is a practice that carries with

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<sup>10</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

<sup>11</sup> Section 88(1) of the Act.

<sup>12</sup> Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

<sup>13</sup> Section 317(1)(da)(ii) of the Act

<sup>14</sup> Clause 5 of the Building (Definition of Restricted Building Work) Order 2011

it the risk that the Record of Work will not be passed on to the required recipients, the owner and the Territorial Authority. This can occur for a variety of reasons, including as a result of a contractual dispute. If the main contractor does not pass a Record of Work on to the final recipients, it is the author of the Record of Work that will be held accountable by the Board, not the person or entity that they entrusted to fulfil their statutory obligation. It is also to be noted whilst, at times, a Respondent may not immediately know who the owner is, there are ways and means of ascertaining such details<sup>15</sup> and that there should be no impediments to a Record of Work being provided to a Territorial Authority.

- [23] A copy of the Record of Work provided to the main contractor dated 2 May 2022 was provided to the Board as part of its investigations.

Was there a good reason?

- [24] No reasons, other than those outlined above, were put forward. As noted, providing the Record of Work to the main contractor and not knowing who the owner is are not good reasons.

**Board's Decision**

- [25] The Respondent **has** failed to provide a Record of Work on completion of Restricted Building Work.

**Penalty, Costs and Publication**

- [26] 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.
- [27] The matter was dealt with on the papers. Included was information relevant to penalty, costs and publication, and the Board has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

- [28] The Board has the discretion to impose a range of penalties.<sup>ii</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>

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<sup>15</sup> Ownership details of land are available on public registers.

<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]

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

[29] 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>

[30] 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.<sup>27</sup>

[31] 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. After the Board had initiated its inquiry, the Respondent provided a Record of Work. Because of the late provision, the Board has decided that it will reduce the fine by \$500. The fine is set at \$1,000.

### Costs

[32] 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>

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<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

<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

- [33] 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>.
- [34] The Board has adopted an approach to costs that uses a scale based on 50% of the average costs of different categories of hearings: simple, moderate and complex. The current matter was simple. Adjustments are then made.
- [35] 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

- [36] 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.
- [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>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>
- [38] 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.

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<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.

<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



### Section 318 Order

[39] 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 \$1,000.

**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(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.**

[40] The Respondent should note that the Board may, under section 319 of the Act, suspend or cancel a Licensed Building Practitioner's licence if fines or costs imposed as a result of disciplinary action are not paid.

### Submissions on Draft Decision

[41] 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.

[42] Submissions and/or further evidence must be filed with the Board by no later than the close of business on **26 April 2024**.

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

[44] 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.

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

### Request for In-Person Hearing

[46] 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.

[47] A request for an in-person hearing must be made in writing to the Board Officer no later than the close of business on **26 April 2024**.

[48] 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

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

Signed and dated this 3<sup>rd</sup> day of April 2024



**Mr M Orange**  
Presiding Member

**This decision and the order herein were made final on 29 April 2024 on the basis that no further submissions were received.**

Signed and dated this 13<sup>th</sup> day of May 2024



**Mr 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, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*
  - (c) *restrict the type of building work or building inspection work that the person may carry out or supervise under the person's licensing class or classes and direct the Registrar to record the restriction in the register:*
  - (d) *order that the person be censured:*

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

**ii Section 318 Disciplinary Penalties**

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

**iii Section 330 Right of appeal**

- (2) A person may appeal to a District Court against any decision of the Board—
  - (b) to take any action referred to in section 318.

**Section 331 Time in which appeal must be brought**

An appeal must be lodged—

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