

## Before the Building Practitioners Board

	BPB Complaint No. C2-01565
Licensed Building Practitioner:	Satish Chand (the Respondent)
Licence Number:	BP 113469
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	Auckland
Hearing Type:	In Person
Hearing Date:	29 August 2017
Decision Date:	15 September 2017
Board Members Present	Richard Merrifield (Presiding) Mel Orange Brian Nightingale Robin Dunlop

#### **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.

#### **Board Decision:**

The Respondent **has** committed disciplinary offences under sections 317(1)(b) and (d) of the Act.

## Contents

<b>Introduction</b> .....	2
<b>Function of Disciplinary Action</b> .....	2
<b>Background to the Complaint</b> .....	3
<b>Evidence</b> .....	3
<b>Board’s Conclusion and Reasoning</b> .....	5
Respondent’s Involvement .....	5
Negligence and/or Incompetence .....	6
Contrary to a Building Consent.....	7
<b>Penalty, Costs and Publication</b> .....	8
Penalty .....	8
Costs.....	10
Publication .....	10
<b>Section 318 Order</b> .....	11
<b>Submissions on Penalty, Costs and Publication</b> .....	12
<b>Right of Appeal</b> .....	12

## Introduction

[1] The hearing resulted from a complaint into the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations<sup>1</sup> to hold a hearing in relation to building work at [Omitted]. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:

- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act); and
- (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act).

## Function of Disciplinary Action

[2] 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*<sup>2</sup> and in New Zealand in *Dentice v Valuers Registration Board*<sup>3</sup>.

<sup>1</sup> The resolution was made following the Board’s consideration of a report prepared by the Registrar in accordance with the Complaints Regulations.

<sup>2</sup> *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

- [3] 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*<sup>4</sup> 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.”*

- [4] The Board can only inquire into “the conduct of a licensed building practitioner” with respect to the grounds for discipline set out in section 317 of the Act. It does not have any jurisdiction over contractual matters.

### **Background to the Complaint**

- [5] The Complainant alleged that building work carried out and/or supervised by the Respondent had been completed in a negligent and/or incompetent manner and that the building work did not comply with the building consent issued for it. The Complainant cited numerous failed council inspections in support of the complaint.

### **Evidence**

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

- [7] The Board heard from:

Denise Whelan	Auckland Council, for the Complainant
Glyn Robertson	Council Inspector, Auckland Council
[Omitted]	Witness, Main Contractor

- [8] The Complaint related to building work on an alteration carried out and supervised by the Respondent. The building work was consented and was described as “RECLAD – form new car parking area, form overhangs to roof, reroof, reclad exterior, refurbish bathrooms and new deck”.
- [9] The Auckland Council, as the Building Consent Authority (BCA), noted that the building work failed multiple building inspections often in relation to the same matters. Head flashings were provided as a specific example. Three inspections were required before the work was completed to an acceptable and compliant standard. The complaint included a summary of the inspections completed and the actual inspection records with the complaint.

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<sup>3</sup> [1992] 1 NZLR 720 at p 724

<sup>4</sup> [2016] HZHC 2276 at para 164

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

- [10] The Complainant noted that the consent allowed for 12 inspections but 28 were booked during the Respondent's involvement in the building work. Some of these were cancelled but an additional cost of \$2,700 was incurred by the home owner as a result of the extra inspections. A further 10 inspections were required after the Respondent's involvement to ensure the work was brought up to the required standard.
- [11] The inspection records provided showed that 10 of the inspections carried out while the Respondent was involved with this work had failed. Most had failed on numerous items and most involved serious failures that related to the weathertightness of the building.
- [12] The Respondent did not initially provide a response to the Complaint. When contacted he advised that he had already responded as part of another complaint about him in respect of the same property<sup>6</sup> and that the response to that matter was also his response to this complaint. In general his response was that as building work had been passed by the council and/or was incomplete there were no grounds for complaint. The Respondent noted he was engaged by the main contractor who provided labour for the build and that he was not on site all of the time. He stated that sometimes he would go and check the work but as it had already been done poorly he had to fix up the work a few times.
- [13] On 8 August 2017 the Respondent took part in a prehearing conference with the Presiding Member. The Respondent indicated that he would be attending the hearing. The day before the hearing Respondent emailed Counsel for the Registrar and advised:

*Re: LICENSED BUILDING PRACTITIONER BOARD COMPLAINT AGAINST SATISH CHAND (C2-01565) I would like to inform you that I am not attending the hearing as I have nothing to do with this complaint.*

*The work carried out by me and supervised by me were approved by the council engineers either in the first or the second inspection, furthermore I was not always present at the site when the council engineer carried out the inspection.*

*I would also like to let you know that I have no liability on that particular job as the main contractor was [omitted]. The dispute started in regards to payment issues between the home owner and contractor.*

*Also, this was my first leaky home job therefore there may be some errors from my side. Please note that I have already provided record of building work to the owner of the property.*

*Lastly, I would like to let you know that I will accept whatever decision made by the LBP board in my absence.*

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<sup>6</sup> C2-01445

*Thank You*  
*Satish Chand*  
*(Bp 113469)*

- [14] The Board heard evidence from the Building Inspector and the main contractor that the Respondent was on site and was carrying and supervising the building work. The Building Inspector stated that whilst the Respondent may not have been noted on some of the inspection sheets he was on site and was involved in inspections. The main contractor noted that the Respondent had been engaged to be the supervising licensed building practitioner and was working full time on the job and that he has records of payments made to the Respondent to this effect.
- [15] The Building Inspector noted that it was a simple job but the Respondent seemed to be out of his depth. He found that the Respondent had difficulty interpreting the plans and, notwithstanding the Building Inspector stepping him through what had to be done and how, the building work continued to fail. He considered, and the Complainant submitted, that the Respondent lacked the competencies required of a licensed building practitioner.
- [16] The Complainant also provided evidence pertaining to another site where a similar pattern of failed inspections of consented building work carried out or supervised by the Respondent had occurred.

#### **Board's Conclusion and Reasoning**

- [17] The Board has decided that the Respondent **has**:
- (a) carried out or supervised building work or building inspection work in a negligent and incompetent manner (s 317(1)(b) of the Act); and
  - (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act)
- and should be disciplined.
- [18] The Board's reasons for the above decision are as follows.

#### **Respondent's Involvement**

- [19] The Respondent has submitted that he "has nothing to do with the complaint".
- [20] The Board notes that when the complaint was originally brought to the Respondent's attention he provided a response which was consistent with him being involved. The Board also notes that the Respondent's written submission prior to the hearing was a mixture of his acknowledging he was involved and his laying responsibility on the Main Contractor.
- [21] The Board heard evidence at the hearing which identified the Respondent as being on site and carrying out and supervising building work. As such it is satisfied that he was involved in the building work.

- [22] In terms of the relationship between the main contractor and the Respondent the former is contractually responsible to the owner but the latter is responsible for building work carried out or supervised by him as a consequence of his being, at the time the building work was carried out, a licensed building practitioner. If the main contractor been a licensed building practitioner then the Board could have also looked at his conduct.
- [23] The building work complained about included restricted building work which can only be carried out by a licensed building practitioner. The Respondent was the only licensed building practitioner on site and as such he is accountable for the quality and compliance of the work.

#### Negligence and/or Incompetence

- [24] In considering whether the Respondent has carried out or supervised building work in a negligent or incompetent manner the Board has had regard to the case of *Beattie v Far North Council*<sup>7</sup>. Judge McElrea provided guidance on the interpretation of those terms:

*[43] Section 317 of the Act uses the phrase "in a negligent or incompetent manner", so it is clear that those adjectives cannot be treated as synonymous.*

*[44] In my view a "negligent" manner of working is one that exhibits a serious lack of care judged by the standards reasonably expected of such practitioners, while an "incompetent" manner of working is one that exhibits a serious lack of competence.*

*[46] The approach I have adopted recognises that the terms "negligent" and "incompetent" have a considerable area of overlap in their meanings, but also have a different focus - negligence referring to a manner of working that shows a lack of reasonably expected care, and incompetence referring to a demonstrated lack of the reasonably expected ability or skill level.*

- [25] The Board has also considered the comments of Justice Gendall in *Collie v Nursing Council of New Zealand*<sup>8</sup> as regards the threshold for disciplinary matters:

*[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.*

- [26] The evidence provided to the Board showed clear instances of building work that had been carried out in a negligent manner and the failings were sufficiently serious enough to warrant a disciplinary outcome. The failure to deal with weathertightness in the correct manner was particularly concerning to the Board. Ensuring weathertightness in buildings was one of the reasons why the licensed building

<sup>7</sup> Judge McElrea, DC Whangarei, CIV-2011-088-313

<sup>8</sup> [2001] NZAR 74

practitioner regime was brought into being. Such work was deemed to be restricted building work and it must be carried out or supervised by a licensed building practitioner. In this instance the Respondent has failed to carry out and to supervise that work in a manner that would ensure weathertightness and it was only through the continued intervention of the BCA that building code compliance was eventually achieved. It is not for the role of the BCA to instruct and supervise the work. It is and was the responsibility of the Respondent to ensure the work was carried out in a tradesman like manner and compliant manner.

- [27] The Complainant has submitted that the Respondent has not only been negligent but has also been incompetent. The Board agrees and in this respect it notes the evidence of the Building Inspector that the Respondent struggled to understand and interpret a simple design. This competency is essential to ensuring building work is carried out in a competent and compliant manner. As such the Board finds that the Respondent has shown a serious lack of the expected skill and knowledge and as such has been shown to be incompetent.

#### Contrary to a Building Consent

- [28] The process of issuing a building consent and the subsequent inspections under it ensure independent verification that the Code has been complied with and the works will meet any required performance criteria. In doing so the building consent process provides protection for owners of works and the public at large. Any departure from the consent which is not minor (as defined in s 45A of the Act) must be submitted as a variation to the consent before any further work can be undertaken. It is also an offence under s 40 of the Act to carry out building work other than in accordance with a building consent when one is issued.
- [29] In *Tan v Auckland Council*<sup>9</sup> the High Court, whilst dealing with a situation where no building consent had been obtained, stated the importance of the consenting process as follows:
- [35] The building consent application process ensures that the Council can check that any proposed building work is sufficient to meet the purposes described in s 3 (of the Act).*
- [30] The building work failed 10 inspections as a result of the building work not complying with the building consent. As such there is unequivocal evidence that the Respondent has carried out or supervised building work that does not comply with a building consent. In this respect the Board notes that not only were there multiple failures but some of them, such as the head flashing, continued to fail notwithstanding remedial work having been undertaken. The Board does not expect all building work to be carried out perfectly but in this instance the Respondent was given more than ample opportunity to get the work right and did not do so.

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<sup>9</sup> [2015] NZHC 3299 [18 December 2015]

### 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<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.
- [32] The Respondent did not appear, however, information relevant to penalty, costs and publication was included in the evidence the Board received 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

- [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*<sup>10</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.*

- [34] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*<sup>11</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 penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.
- [35] This is the third time the Respondent has appeared before the Board. In C2-01445 the Respondent was found to have failed to provide a record of work on completion of restricted building work in respect of the same property and was fined \$1,500. In C2-01468 the Respondent was found to have carried out or supervised building work in a negligent manner and to have failed to provide a record of work on completion of restricted building work and was fined \$2,000.
- [36] The Respondent has not paid the fines owed and, under section 319(b) of the Act, his licence has been suspended.
- [37] Given the Respondent has not paid previous fines imposed the Board sees little point in imposing a further penalty of the same nature. Moreover in this case the

<sup>10</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>11</sup> 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288



Respondent has been found to be incompetent and as such the Board must give serious consideration as to whether he should retain his licence.

- [38] In *Daniels v Complaints Committee 2 of the Wellington District Law Society*<sup>12</sup> the High Court, in relation to the principles relating to suspension of a legal practitioner's licence stated:

*[34] In considering sanctions to be imposed upon an errant practitioner, a Disciplinary Tribunal is required to view in total the fitness of a practitioner to practise, whether in the short or long term. Criminal proceedings of course reflect badly upon the individual offender, whereas breaches of professional standards may reflect upon the wider group of the whole profession, and will arise if the public should see a sanction as inadequate to reflect the gravity of the proven conduct. The public are entitled to scrutinise the manner in which a profession disciplines its members, because it is the profession with which the public must have confidence if it is to properly provide the necessary service. To maintain public confidence in the profession members of the public need to have a general understanding that the legal profession, and the Tribunal members that are set up to govern conduct, will not, treat lightly serious breaches of standards.*

- [39] This was affirmed in *Jefferies v National Standards Committee*<sup>13</sup> where the High Court also stated:

*[25] I accept the principle that suspension is not intended to be a punitive sanction even if it invariably has that effect.*

*[26] And I accept also that this means mitigating personal circumstances, though still relevant, are less closely connected to this purpose than would be the case in criminal sentencing. They will therefore carry less weight.*<sup>14</sup>

- [40] In the Respondent's case little if any mitigation has been heard. The Board does acknowledge that the contractual relationship with the main contractor may have contributed but at the same time the Respondent should have been aware that he was responsible, as the licensed building practitioner, for the quality and compliance of the building work. Notwithstanding this the Respondent has not taken responsibility for the failings that have occurred and continues to place the blame on the main contractor.
- [41] It may be that there are mitigating circumstances of which the Board is not aware and for this reason it is allowing the Respondent an opportunity to make further submissions on such matters.
- [42] The Board needs, in coming to its penalty decision, to consider the purposes of the regime for licensed building practitioners and the need for the public to have

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<sup>12</sup> [2011] 3 NZLR 850

<sup>13</sup> [2017] NZHC 1824

<sup>14</sup> *Bolton v Law Society* [1994] 2 All ER 486 (CA) at 492-493

confidence in those that are licensed to carry out or supervise restricted building work.

- [43] In this instance the Board considers the Respondent's conduct to have been sufficiently serious enough to warrant either a suspension or a cancellation of his licence. As the Respondent has been found to have been incompetent it is minded toward cancellation as this means that the Respondent will, if he reappplies for a licence, be reassessed as to his competency. This in turn creates an element of public protection.
- [44] Additionally the Respondent's licence is already suspended. As such the Board considers that cancellation is appropriate. The Board will also order that he may not reapply to be licenced for a period of six months.

### Costs

- [45] Under s 318(4) the Board may require the Respondent "to pay the costs and expenses of, and incidental to, the inquiry by the Board."
- [46] 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>15</sup>.
- [47] In *Collie v Nursing Council of New Zealand*<sup>16</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.*
- [48] The Respondent did not appear and did not accept any responsibility. His attitude and manner toward the investigation and hearing is a matter the Board can take into account in determining costs. In this respect the Board notes that in *Daniels v Complaints Committee*<sup>17</sup> the High Court held that it was permissible to take into account as an adverse factor when determining penalty that the practitioner had responded to the complaints and discipline process in a belligerent way.
- [49] Based on the above the Board's costs order is that the Respondent is pay the sum of \$2,000 toward the costs of and incidental to the Board's inquiry.

### Publication

- [50] 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

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<sup>15</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>16</sup> [2001] NZAR 74

<sup>17</sup> [2011] 3 NZLR 850.

Building Practitioners' scheme as is required by the Act<sup>18</sup>. The Board is also able, under s 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.*

- [51] 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.
- [52] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990<sup>19</sup>. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction<sup>20</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>21</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>22</sup>.
- [53] 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>23</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.
- [54] The Respondent's licence is to be cancelled. It is, in the Board's view, in the public interest to further publish. The Board also considers this is necessary to give effect to its order as publication will ensure that the wider public and profession are aware of the Board's action and of the learnings from it. The Board therefore also orders that there will be further publication by way of the matter being published in Code Words and on the Board's website.

### Section 318 Order

- [55] For the reasons set out above, the Board directs that:

**Penalty:** Pursuant to s 318(1)(a)(i) of the Act, the Respondent's licence is cancelled and the Registrar is directed to remove the Respondent's name from the register of Licensed Building Practitioners and pursuant to s 318(1)(a)(ii) of the Act the Board orders that the Respondent may not apply to be relicensed before the expiry of six months.

<sup>18</sup> Refer sections 298, 299 and 301 of the Act

<sup>19</sup> Section 14 of the Act

<sup>20</sup> Refer sections 200 and 202 of the Criminal Procedure Act

<sup>21</sup> *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

<sup>22</sup> *ibid*

<sup>23</sup> *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

**Costs:** Pursuant to s 318(4) of the Act, the Respondent is ordered to pay costs of \$2,000 (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 s 301(1)(iii) of the Act should the Respondent be relicensed .

In terms of section 318(5) of the Act, there will be action taken to publicly notify of the Board's action by way of an article in Code Words and on the Board's website and the Respondent being named in this decision. This will be in addition to the note on the Register (if the Respondent is relicensed).

[56] 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.

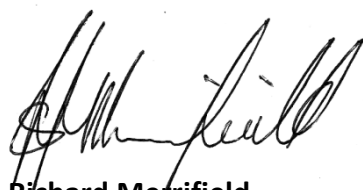
### **Submissions on Penalty, Costs and Publication**

[57] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **9 October 2017**. The submissions should focus on mitigating matters as they relate to the penalty, costs and publication orders. If no submissions are received then this decision will become final. If submissions are received then the Board will meet and consider those submissions prior to coming to a final decision on penalty, costs and publication.

### **Right of Appeal**

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

Signed and dated this 15<sup>th</sup> day of September 2017



**Richard Merrifield**  
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:*

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- (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.*