

Before the Building Practitioners Board

	BPB Complaint No. CB26415
Licensed Building Practitioner:	Nicholas John Elliot (the Respondent)
Licence Number:	BP130243
Licence(s) Held:	Carpentry

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
Hearing and Draft Decision Date:	22 April 2024
Final Decision Date:	10 June 2024

Board Members Present:

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

The Respondent is censured 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, who was in dispute with the Complainant, responded in an unprofessional and disrespectful manner to correspondence from the Complainant. The Board found that the conduct breached clauses 19 and 20 of the Code of Ethics for Licensed Building Practitioners.
- [2] The Board noted that the Respondent had accepted he had responded in an inappropriate manner and stated he would be changing his ways. On that basis, and because the Code is new and the Board is taking an educative approach to its enforcement, the Board decided that it would censure the Respondent and order that he pay costs of \$500. 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.¹
- [4] In this matter, the disciplinary charge the Board resolved to further investigate² was whether the Respondent may have breached the Code of Ethics prescribed under section 314A of the Act contrary to section 317(1)(g) of the Act. The specific provisions of the Code that the Board decided to investigate are:

19 You must behave professionally

In carrying out or supervising building work, you must act professionally and treat your clients and colleagues with respect.

20 You must act in good faith during dispute resolution

If there is a dispute involving you and your client about building work (including, without limitation, the price, quality, or timing of the building work or your or the client's actions), you must—

- (a) attempt to resolve the dispute with your client; and*
- (b) ensure that you make yourself available to discuss the dispute with the client so that all parties (including you) have the opportunity to express their views and be heard; and*
- (c) ensure that at all times you act in a professional and respectful manner towards your client.*

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.³ 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.⁴

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. The evidentiary standard is the balance of probabilities, *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1.

² 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.

³ Regulation 10 of the Complaints Regulations.

⁴ 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

- [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. 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

- [8] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁵. 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.

Code of Ethics

- [9] The Code of Ethics for Licensed Building Practitioners was introduced by Order in Council.⁶ It was introduced in October 2021 and came into force on 25 October 2022. The obligations are new, but there was a transition period of one year to allow practitioners to become familiar with the new obligations. Whilst the Code of Ethics is new, ethics have been a part of other regulatory regimes⁷ for some time, and the Board has taken guidance from decisions made in other regimes.
- [10] The Code also differentiates between Licensed Building Practitioners who are in business and those who are employed in that some of the ethical obligations only apply to those who are in business. In this matter, the Respondent was in business.
- [11] The disciplinary provision in the Act simply states, “has breached the Code of Ethics”. Most disciplinary regimes frame the charge as some form of malpractice or misconduct, and the Board has considered the allegations within such a framework and with reference to superior court decisions. Within this context, in *Dentice v Valuers Registration Board*,⁸ Chief Justice Eichelbaum stated the purposes of disciplinary processes are to:

Enforce a high standard of propriety and professional conduct; to ensure that no person unfitted because of his or her conduct should be allowed to practice the profession in question; to protect both the public, and the profession itself, against persons unfit to practice; and to enable the professional calling, as a body, to ensure that the conduct of members conforms to the standards generally expected of them.

⁵ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

⁶ Building (Code of Ethics for Licensed Building Practitioners) Order 2021

⁷ Lawyers, Engineers, Architects and Accountants, for example

⁸ [1992] 1 NZLR 720 at 724

- [12] The Board also notes that the courts have applied a threshold test to disciplinary matters, and it has applied those tests. In *Collie v Nursing Council of New Zealand*,⁹ the test was stated as:

[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.

- [13] Finally, when considering alleged breaches of the Code of Ethics, the Board needs to consider whether the conduct, if upheld as a breach of the Code, reaches the threshold for a disciplinary finding of disrepute, which is a more serious disciplinary finding.

The conduct under investigation

- [14] The allegation made in the complaint was that the Respondent had replied to a query from the Complainant, with whom he was in dispute, in an unprofessional manner. Specifically, he emailed the Complainant stating:

“Go fuck yourself you bitch I’ll see you in court”

- [15] The Respondent outlined the background to the statement being made

-In August 2023 [OMITTED] Contacted me asking me to contact my insurance company to make a claim for the damaged pipe she sent me an invoice for the total amount of the repairs including what she had paid me for our services to fix it, I responded to this email saying I do not accept liability for this invoice and we will not be paying for the damages and ill leave it up to insurance.

-the Insurance investigation has been going on since august 2023 and they are still trying to determine an outcome.

-on the 27 october [OMITTED] phoned me and starting winding me up and saying she was going to issue a letter of demand to speed the insurance process up. this isn’t Legal according to my lawyers.

-on thursday 9th november [OMITTED] issued me with a letter of demand via emai which I responded “go fuck your self bitch ill see you in court”

I Admit that my choice of words in response to the letter of demand was not appropriate and after the issues it has caused me i will certainly not be responding/talking like that to anyone again

⁹ [2001] NZAR 74

Did the conduct breach the Code?

- [16] When considering conduct of this type, the courts have stated that it has to be viewed objectively. The subjective views of the practitioner or other parties involved are irrelevant.¹⁰
- [17] Looking at the Respondent's conduct objectively, the Board finds that it was unprofessional and a breach of the Code. Whilst the unprofessional response may have resulted from frustration or anger, that does not justify or excuse it. It was clear to the Board that the Respondent did not engage with the Complainant professionally or with respect, as required in clause 19 of the Code. Further, as is made clear by clause 20 of the Code, the requirement to treat others professionally and with respect is not set aside if there is a dispute between the parties.

Was the conduct serious?

- [18] As noted, the Code was introduced to raise standards. When it was introduced, the Ministry of Business Innovation and Employment undertook an awareness and education campaign to ensure Licensed Building Practitioners were aware of the Code and the need to act in accordance with it. The old days are gone. More is expected of Licensed Building Practitioners. As such, and given the language used and the tone of the communication, the Board finds that the conduct was serious enough to warrant disciplinary action.

Board's Decision

- [19] The Respondent **has** breached the Code of Ethics.

Penalty, Costs and Publication

- [20] Having found that one or more of the grounds in section 317 applies, the Board must, under section 318 of the Actⁱ, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [21] 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

- [22] The Board has the discretion to impose a range of penalties.ⁱⁱ 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

¹⁰ *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

aggravating factors present.¹¹ It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:¹²

- (a) protection of the public and consideration of the purposes of the Act;¹³
- (b) deterring other Licensed Building Practitioners from similar offending;¹⁴
- (c) setting and enforcing a high standard of conduct for the industry;¹⁵
- (d) penalising wrongdoing;¹⁶ and
- (e) rehabilitation (where appropriate).¹⁷

[23] 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 cases¹⁸ and applying the least restrictive penalty available for the particular offending.¹⁹ In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty²⁰ that is consistent with other penalties imposed by the Board for comparable offending.²¹

[24] 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.²²

[25] In this matter, the Board adopted a starting point of a modest fine. It has noted, however, that the Respondent has accepted his conduct was wrong and has stated he will amend his ways. In addition to that, the Code is new, and the Board is taking an educative approach to its enforcement. On that basis, the Board has decided that it will reduce the penalty to a censure, which is a public expression of disapproval.

Costs

[26] 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.²³

¹¹ *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]

¹² Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

¹³ Section 3 Building Act

¹⁴ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

¹⁵ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

¹⁶ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

¹⁷ *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

¹⁸ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

¹⁹ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

²⁰ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²¹ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²² 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.

²³ *Collie v Nursing Council of New Zealand* [2001] NZAR 74

- [27] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings²⁴. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case²⁵.
- [28] 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.
- [29] 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

- [30] 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,²⁶ 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.
- [31] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.²⁷ 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.²⁸
- [32] 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.

²⁴ *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

²⁵ *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.

²⁶ Refer sections 298, 299 and 301 of the Act

²⁷ Section 14 of the Act

²⁸ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Section 318 Order

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

Penalty: Pursuant to section 318(1)(d) of the Building Act 2004, the Respondent is censured.

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.

[34] 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

[35] 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.

[36] Submissions and/or further evidence must be filed with the Board by no later than the close of business on **7 June 2024**.

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

[38] 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.

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

Request for In-Person Hearing

[40] 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.

[41] A request for an in-person hearing must be made in writing to the Board Officer no later than the close of business on **7 June 2024**.

[42] 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

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

Signed and dated this 17th day of May 2024.



Mr M Orange
Presiding Member

This decision and the order herein were made final on 10 June 2024 on the basis that no further submissions were received.

Signed and dated this 21st day of June 2024.



Mr M Orange
Presiding Member

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:*

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- (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.*