

Before the Building Practitioners Board

	BPB Complaint No. CB26224
Licensed Building Practitioner:	[Omitted] (the Respondent)
Licence Number:	[Omitted]
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 Location	Christchurch
Hearing Type:	In Person
Hearing and Decision Date:	26 September 2023

Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)
Mr D Fabish, LBP, Carpentry and Site AoP 2
Ms J Clark, Barrister and Solicitor, Legal Member
Ms K Reynolds, Construction Manager
Mr P Thompson, LBP, Carpentry, Quantity Surveyor

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)(i) of the Act.

The Respondent's licence is suspended, and he is ordered to undertake training. The suspension will be lifted on the earlier of the training being completed or the expiry of 12 months. The Respondent is ordered to pay costs of \$3,500. A record of the disciplinary offending will be recorded on the Public Register for a period of three years.

Suppression Order:

The Respondent's name, details and any information which could identify the Respondent or his business are suppressed. The Respondent's name and details will be redacted from the published version of this decision.

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Summary

- [1] The Respondent was paid a deposit for building work that did not proceed. The Complainant obtained a Disputes Tribunal order that the deposit be repaid. The order was not complied with. The Respondent behaved inappropriately when the Complainant sought repayment, and a complaint was made. The Respondent then repaid the deposit, but only after enforcement costs had been incurred. When repayment of those costs was sought, the Respondent overreacted, resorted to retaliatory and inappropriate actions, and used inappropriate and offensive language and tactics.
- [2] The question for the Board was whether the Respondent’s conduct breached the Code of Ethics for Licensed Building Practitioners and, if so, whether the conduct was so serious that a finding of bringing the regime into disrepute should be made.

- [3] The Board found that the Respondent's actions were designed to harass and inconvenience the Complainants and to intimidate them, and the evidence showed that the Complainants were impacted, intimidated, and felt threatened. There was an element of vindictiveness in the Respondent's conduct. As such, the Board found that there had been breaches of the Code of Ethics but that the conduct went beyond unprofessional and unethical. It was conduct that, when viewed objectively, would lower the reputation of the licensing regime and of Licensed Building Practitioners in the eyes of the general public. As such, it was disreputable conduct.

The Charges

- [4] 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
- [5] In this matter, the disciplinary charges the Board resolved to further investigate² were that the Respondent may have:
- (a) breached the code of ethics prescribed under section 314A of the Act contrary to section 317(1)(g) of the Act; and
 - (b) conducted himself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute contrary to section 317(1)(i) of the Act.
- [6] With respect to the allegation that the Respondent breached the Code of Ethics, the Board gave notice that the specific provisions of the Code that would be further investigated at the hearing would be:
- 19 You must behave professionally;
 - 20 You must act in good faith during dispute resolution; and
 - 23 You must maintain confidentiality of client details unless there is good reason for sharing information.
- [7] The specific conduct that the Board stated it would further investigate in respect of the above were statements and communications allegedly made to and about the Complainants and their lawyer to others and, in particular, those in relation to:
- (a) the nature, tone and language used by the Respondent in relation to the pursuit of a bona fide debt by the Complainants;

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.

- (b) threats made to the Complainants by the Respondent and intimidating conduct by him generally and in relation to alleged immigration and building compliance issues;
- (c) the disclosure of alleged immigration and building compliance issues without the Complainants' consent;
- (d) a complaint made to the Law Society about the Complainant's lawyer; and
- (e) the licensing regime under the Act.

[8] With respect to the same matters, the Board gave notice that it would also investigate whether, if upheld, the conduct reaches the disciplinary threshold for a finding of disreputable conduct under section 317(1)(i) of the Act.

Evidence

[9] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed³. 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.

[10] The Complainants entered into a contract with the Respondent for the construction of a conservatory. The Complainants paid a deposit in September 2022, but the contract did not proceed, and they sought the repayment of the deposit in November 2022. The Complainant and the Respondent corresponded about a payment plan which the Respondent did not adhere to, and the Complainant asked the Respondent to provide a quote for possible further work. The Respondent then emailed the Complainant at 10.47 PM on 29 November 2022, stating:

*Im sending you a bill for pissing me around
i'm not paying anything until next year*

*DON'T CALL ME ANY MORE PISS OFF
and dont try coming to my home il fuck you up*

[11] The Complainants then brought proceedings in the Disputes Tribunal for the recovery of the deposit. An order for its repayment was made on 13 February 2023. The order specified that the repayment of the deposit was to be made by 27 February 2023. The Respondent did not comply with the order. As a result, the Complainants instructed a lawyer to initiate enforcement proceedings. A letter of demand was issued on 2 March 2023. Despite attending the Disputes Tribunal hearing, the Respondent denied knowledge of the Disputes Tribunal order, which was then provided to him.

³ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

[12] On 6 March 2023, enforcement proceedings were filed, and a complaint was made to the Board about the failure to repay and the Respondent's email correspondence in relation to the payment claim.

[13] On 21 March 2023, the Respondent repaid the deposit following his engagement with the Board's Investigator. The Respondent attempted to make the repayment conditional on the Complainant withdrawing the complaint, which they refused to do.

[14] Because enforcement proceedings had been filed, costs had been incurred, and, on 22 March 2023, the Complainant's lawyer sought the recovery of those costs from the Respondent. The Respondent contested those costs with the lawyer and then proceeded, over the course of the evening of 22 March 2023, to take various retaliatory actions, which resulted in the Complainants making a police complaint at 11.41 PM. The police complaint noted:

[Omitted] Is a builder that I filed a complaint to LBP and might loose his builder license. He threatened me that will do with ever he can that I loose my everything. He is dangerous person and knows my home address. I feel unsecured here.

[15] The Complainants also increased security measures at their home following the events on 22 March. In terms of those events, the specific actions the Respondent took on that night were:

6.46 PM an email to the Christchurch City Council alleging there was illegal building work at the Complainant's address. That allegation was investigated by the Council, who attended the address and inspected it. No illegal work was identified and no actions were taken.

8.18 PM a complaint to the New Zealand Law Society about the Complainant's lawyer. The Law Society did not pursue the allegations following a detailed response being provided by the lawyer.

7.58 PM to 10.37 PM various email and text messages were sent to the Complainants noting the actions the Respondent was taking as regards the Complainants and their lawyer, including messages stating:

Getting Immigration invovled ill find some thing on you watch out

Ill do whatever I can to make you loose everything

Just message my contact from Immigration. You will get a scared when she calls you tomorrow

11.16 PM an email to New Zealand Immigration, which stated:

Going forward I have strong belief [Omitted] is in illegal matters with either his family or relatives coming into New Zealand can you investigate on this matter please

[16] The Respondent, in his correspondence with the Complainant, variously implied that the complaint was not being investigated by the Board.

[17] The Respondent accepted that he had conducted himself inappropriately. He stated that he had financial difficulties at the time and that the deposit had been used to pay a debt to the Inland Revenue Department. He noted that, as part of the discussions around repayment of the deposit in November 2022, he had priced other work for the Complainants, which he intended to undertake instead of repaying the sum owed. The Complainant did not accept his price, and he stated that led to the 29 November 2022 email.

[18] The Respondent stated that he had a drinking problem and that the messages noted above (and others) were sent when he had been drinking and was drunk. He accepted that this did not excuse his behaviour, and he expressed remorse. He noted that he had given up drinking but modified that statement to having given up at the start of 2023, relapsing when the events occurred, and now having his drinking under control. The Respondent also made reference to mental health issues and stated that he intended to seek help for both but that he had not been able to as he was too busy.

[19] The Respondent also stated that he did not know about the Code of Ethics. This was notwithstanding statements that he received and read the communications that were sent to him by the Ministry of Business Innovation and Employment as a Licensed Building Practitioner. Those communications included information about the Code and when it would come into effect.

[20] Notwithstanding the statement that alcohol explained the escalating conduct on the night of 22 March 2023, the Respondent proceeded to send emails on the following days to the Complainants and their lawyer referencing the actions he was taking:

23 March 2023 at 6.37 AM: *Good morning all. Day 1. Let's get started.*

24 March 2023 at 6.45 AM: *[Omitted] saga. Day 2*

[21] The Respondent was contacted by the police. After that, the conduct ceased.

[22] On 14 May 2023, the Respondent sent the following apology:

I would like to make a formal apology for my behavior and regret my compliments txt messages and emails towards you

This type of behavior is out of character for me and not in my nature and my attention was not to cause you any harm.

I am sorry for behaving unprofessionally and I will not cause you anymore grief, wish you the best for the future.

- [23] The debt recovery costs were paid in late May 2023 after a warrant to arrest was issued because the Respondent failed to appear at a means assessment.
- [24] At the hearing, the Respondent reiterated his remorse and apologised again to the Complainants and their lawyer.

Code of Ethics

The Code within a disciplinary context

- [25] The Code of Ethics for Licensed Building Practitioners was introduced by Order in Council.⁴ It was introduced in October 2022 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 regimes⁵ for some time, and the Board has taken guidance from decisions made in other regimes.
- [26] 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.
- [27] The disciplinary provision in the Act simply states, “has breached the code of ethics”. The Board has taken guidance from other disciplinary regimes and, in particular, that the protection of the public is the central focus.⁶
- [28] 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*,⁷ 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.

⁴ Building (Code of Ethics for Licensed Building Practitioners) Order 2021

⁵ Lawyers, Engineers, Architects and Accountants, for example

⁶ *Z v Dental Complaints assessment Committee* [2009] 1 NZLR 1 at [128], McGrath J.

⁷ [1992] 1 NZLR 720 at 724

[29] The Board also notes that the courts have applied a threshold test to disciplinary matters, and the Board has applied those tests. In *Collie v Nursing Council of New Zealand*,⁸ 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.

[30] 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 Code provisions under investigation

[31] The provisions the Board stated it would investigate were:

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.

23 You must maintain confidentiality of client details unless there is good reason for sharing information

If you become aware of client information of a confidential matter (for example, details of your client's private life or finances) you must take all reasonable steps to keep that information confidential, unless you are required or authorised by law to disclose it.

[32] Two of the above provisions are premised on "building work". The Respondent did not carry out any physical building work. The Code adopts the same definition of the

⁸ [2001] NZAR 74

term as the Act, which is work that is *for, or in connection with, the construction, alteration, demolition, or removal of a building*.⁹

- [33] On a strict interpretation of the term, the Code may not apply to the matters complained about. However, the phrase “for, or in connection with” in the definition connotes a wide range of matters that could be brought into play, and, conceivably, it includes pre-contractual processes.

The meaning of “building work” within the Code

- [34] The Board, in ascertaining the meaning of the phrase “building work”, must derive it “from its text and in light of its purpose.”¹⁰ The Board, in ascertaining meaning, can use the indications provided in the enactment, including preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.¹¹
- [35] Looking at the Building Act as a whole, there has been a move toward regulating more than just the carrying out of building work. In 2015, Part 4A (Consumer Rights and Remedies in Relation to Residential Building Work) and the associated Building (Residential Consumer Rights and Remedies) Regulations 2014 were introduced. Part 4A regulates contractual relationships, and section 362D imposes a mandatory obligation on building contractors to provide certain information prior to a building contract that exceeds \$30,000 in value being entered into. The associated regulations stipulate that a building contractor must provide prescribed disclosure information about the contractor¹² and a prescribed checklist¹³ designed to inform a consumer before they enter into a contract. Those provisions point toward a wider definition of the term “building work” and the inclusion of matters that lead to building work being carried out.
- [36] As noted above, supporting papers can also be used as an aid to interpretation. In the Cabinet Paper¹⁴ that was presented as part of the approval process of the Code, the responsible Minister noted:

6 *The Code of Ethics will establish clear behavioural requirements to manage the ethical conduct of LBPs. Additionally, the Code of Ethics will set expectations to practitioners and consumers that substandard conduct and behaviour will not be tolerated, and outlines a clear standard that practitioners can be held to.*

⁹ Section 7 of the Act

¹⁰ Section 5(1) of the Interpretation Act 1999

¹¹ Section 5(2 and (3) of the Interpretation Act 1999

¹² Regulation 5(1)(a) and Schedule 1 of the Building (Residential Consumer Rights and Remedies) Regulations 2014

¹³ Regulation 5(1)(b) and Schedule 1 of the Building (Residential Consumer Rights and Remedies) Regulations 2014

¹⁴ Office of the Minister for Building and Construction 21 October 2021. Cabinet minute: LEG-21-MIN-0168

- 7 *Currently, the Board can take disciplinary action against an LBP in specific circumstances, including where an LBP has brought the LBP regime into disrepute. This threshold is high, and it is difficult for the Board to prove that it has been reached.*
- 8 *As a result, a small proportion of LBPs engage in conduct, which, despite being unethical, cannot easily be said to meet the threshold of bringing the regime into disrepute. This small group of LBPs are responsible for the majority of complaints about unethical behaviour.*
- 9 *The introduction of the Code of Ethics will allow the Building Practitioners Board (the Board) to hold these LBPs to account, by providing clear grounds for taking disciplinary action against the unethical conduct of LBPs.*
- 10 *The need for a code of ethics was identified through consistent feedback from stakeholders that said the LBP scheme can be strengthened by setting clear behavioural standards. The consultation also confirmed most LBPs are behaving appropriately, and there is strong sector and public support for the introduction of a code of ethics.*

[37] Finally, and in light of the above, when looking at the Code of Ethics as a whole, it is clear that the intent behind them is to protect the consumer throughout a build process and raise the bar on Licensed Building Practitioner conduct. With respect to pre-contractual matters, the Code includes provisions such as a duty to explain risks, including those relating to design and construction, and a duty to inform and educate. Both are designed to ensure consumers can make informed decisions before building work is undertaken. It is also noted that, in differentiating between the obligations of a person in business as opposed to those in employment, there was an intention to regulate contractual interactions.

[38] Considering the above, the Board has formed the view that the conduct complained about and under investigation comes within the meaning of “building work” and has decided that it can consider the allegations.

The conduct complained about

[39] There are three issues that the Board has to consider. They are whether the Respondent behaved professionally and treated the Complainants with respect (clause 19), acted in a professional and respectful manner during dispute resolution (clause 20), and maintained the Complainant’s confidentiality (clause 21).

[40] The conduct related to the Respondent’s reaction to enforcement costs being sought after he had failed to comply with a Disputes Tribunal order. In short, he overreacted to what were valid demands and methods to seek payment and resorted to retaliatory and inappropriate actions. He also used inappropriate and offensive language and tactics when dealing with the matter and used knowledge of the

Complainant's property and personal circumstances to lay complaints with enforcement agencies. His actions were designed to harass and inconvenience the Complainants and to intimidate them, and there was evidence before the Board that the Complainants were impacted, were intimidated and did feel threatened. There was an underlying theme of the Respondent seeking to avoid the enforcement costs and the complaint to the Board through his actions.

[41] The Respondent accepted that his conduct was not appropriate and submitted that events in his life were the root cause of his reactions. In particular, he submitted that his response and anger were driven by alcohol and that his conduct was out of character. Whilst there was certainly an element of escalating behaviour over the course of one night, the Respondent continued to send intimidating and threatening messages over the following days and only stopped once the police spoke to him.

[42] The events in the Respondent's life may be mitigating factors in terms of any penalty the Board may consider imposing. They are not a defence. Further, even if the Respondent had not intended the actions he took to be taken in the manner that they were, when looking at the conduct, the Board needs to assess it objectively. As was stated by the Supreme Court when looking at the tests for fit and proper persons under licensing regimes, with which there are certain parallels, the evaluation is an objective exercise which should not be influenced by sympathy for the Respondent.¹⁵

Was the conduct serious enough

[43] The conduct was serious. It was not mere inadvertence, error, oversight or carelessness. It was a deliberate departure from an acceptable standard of conduct, and it was sustained over a period of time.

Has the Respondent breached the Code of Ethics

[44] Considering the above, the Board finds that the Respondent has breached Code provisions 19, 20 and 21. He did not behave professionally or treat the Complainants with respect and has breached clause 19. He did not act in a professional and respectful manner during dispute resolution and has breached clause 20. Finally, he did not maintain the Complainant's confidentiality and has breached clause 21.

Disrepute

[45] The Board gave notice that if it found that there had been a breach of the Code of Ethics, it would consider whether the conduct reached the threshold for a finding of disrepute. Conduct which brings or is likely to bring the regime into disrepute is that which may result in the regime being held in low esteem by the public.

[46] The Courts have consistently applied an objective test when considering such conduct.¹⁶ The subjective views of the practitioner or other parties involved are

¹⁵ *New Zealand Law Society v Stanley* [2020] NZSC 83 at [39]

¹⁶ *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

irrelevant. The conduct need not have taken place in the course of carrying out or supervising building work.¹⁷

- [47] To make a finding of disreputable conduct, the Board needs to determine, on the balance of probabilities,¹⁸ that the Respondent has brought the regime into disrepute and that the conduct was sufficiently serious enough for the Board to make a disciplinary finding.¹⁹
- [48] The Board has, in past complaint decisions, found that the way in which a Licensed Building Practitioner conducts him or herself during disputes can bring the regime into disrepute. In matter C2-01167²⁰ the Board found that a practitioner who cut down a deck that he had built and removed it because a debt was in dispute and had not been paid had brought the regime into disrepute. In *Spence* [2018] BPB 1906, the Board found the practitioner's unrelenting use of highly offensive and vile sexual comments and statements in relation to a disputed debt brought the regime into disrepute. Those matters were decided prior to there being a Code of Ethics. The Board now needs to decide whether a finding of a breach of the Code suffices or whether the conduct is such that it warrants the more serious finding of disrepute. In this respect, the Board has formed the view that a finding of a breach of the Code can lead to a disciplinary finding of disrepute, but that only one disciplinary finding should be made and that there is a hierarchy to the disciplinary provisions, with disrepute being the more serious.

The conduct complained about

- [49] The conduct under consideration is that which has been summarised with respect to the Code of Ethics above. As noted, the question for the Board is whether that conduct should, because of its seriousness, be elevated to a finding of disrepute.
- [50] As previously noted, the conduct was designed to harass and inconvenience the Complainants and to intimidate them. There was an element of vindictiveness. The conduct went beyond unprofessional and unethical. It was conduct that, when viewed objectively, would lower the reputation of the licensing regime and of Licensed Building Practitioners in the eyes of the general public. As such, it was disreputable conduct.

Was the conduct serious enough for a finding of disrepute

- [51] The same findings made with respect to a breach of the Code of Ethics apply. The conduct was serious. It was not mere inadvertence, error, oversight or carelessness. It was a deliberate departure from an acceptable standard of conduct and it was sustained over a period of time. Accordingly, the Board finds that the conduct complained about meets the threshold for a finding of disrepute.

¹⁷ *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519

¹⁸ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1. Under section 322 of the Act, the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.

¹⁹ *Collie v Nursing Council of New Zealand* [2001] NZAR 74

²⁰ October 2015

Board's Disciplinary Finding

[52] The Respondent has brought the regime for Licensed Building Practitioners into disrepute contrary to section 317(1)(i) of the Act, and he should be disciplined.

Penalty, Costs and Publication

[53] 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.

[54] The Respondent made submissions at the hearing as regards penalty, costs and publication.

Penalty

[55] 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 aggravating factors present.²¹ It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:²²

- (a) protection of the public and consideration of the purposes of the Act;²³
- (b) deterring other Licensed Building Practitioners from similar offending;²⁴
- (c) setting and enforcing a high standard of conduct for the industry;²⁵
- (d) penalising wrongdoing;²⁶ and
- (e) rehabilitation (where appropriate).²⁷

[56] 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 cases²⁸ and applying the least restrictive penalty available for the particular offending.²⁹ In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty³⁰ that is consistent with other penalties imposed by the Board for comparable offending.³¹

²¹ *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]

²² Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

²³ Section 3 Building Act

²⁴ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²⁵ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

²⁶ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

²⁷ *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

²⁸ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²⁹ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

³⁰ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

³¹ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

- [57] 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.³²
- [58] The Respondent gave evidence about events surrounding the offending, including IRD debts, business pressures, and difficulties with alcohol and his mental health. He had not sought help with regard to the last two items but stated that he intended to do so and that he had cut back on his drinking. He accepted that he needed to work on his communication skills and develop coping mechanisms. He submitted the conduct was out of character and that it would not happen again. He apologised and accepted that he had overreacted and that he had been unprofessional. He noted that he and his staff were reliant on his licence for their livelihoods. He had the strong support of his wife.
- [59] The disciplinary finding is a serious one. Disrepute is at the upper or highest end of the disciplinary scale. A penalty that reflects that and the specific conduct is necessary.
- [60] Ordinarily, the Board would consider the cancellation of the Respondent's licence as a starting point. However, noting the remorse and mitigating factors and taking into account the principle of rehabilitation, the Board decided that it would suspend the Respondent's licence and order that he undertake a course of training. The suspension will take effect from the date on which his decision is issued, and it will remain in effect until the earlier of the Respondent successfully completing the training ordered or the expiry of 12 months. Under section 318(2) of the Act, the Board cannot impose any additional penalties.
- [61] The training the Respondent is to complete is the unit standards relating to communication in the New Zealand in Construction Related Trades (Supervisor) (Level 4) qualification. They are:
- Unit Standard 9704 – Manage interpersonal conflict;
 - Unit Standard 17516 – Write construction-related communications; and
 - Unit Standard 16614 – Apply time management concepts and methods in business situations.
- [62] The Respondent is to complete the training at his own cost and within six months of this decision being issued. Failure to do so may result in the Board initiating a Board Inquiry and considering further disciplinary action for contempt.

³² 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.

Costs

- [63] 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.³³
- [64] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings³⁴. The starting point can then be adjusted up or down having regard to the particular circumstances of each case³⁵.
- [65] 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 moderate. Adjustments are then made.
- [66] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$3,500 toward the costs of and incidental to the Board's inquiry. This is the Board's scale amount for an investigation and hearing of a matter of this nature.

Publication

- [67] 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 required³⁶ by the Act. The Board is also able, under section 318(5) of the Act, to order further publication.
- [68] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.³⁷ 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.³⁸
- [69] Ordinarily, in terms of publication, the Respondent would be named in the Board's decision, which would be available on the Board's website. The Respondent made an application for suppression. The grounds were that his business, employees, and family could be disproportionately impacted by him being identified in the Board's decision and by the matter being published, both by the Board and by the media, with his details being disclosed. The Respondent took up the opportunity to provide evidence that supported his submission that his employees, who have been

³³ *Collie v Nursing Council of New Zealand* [2001] NZAR 74

³⁴ *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

³⁵ *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.

³⁶ Refer sections 298, 299 and 301 of the Act

³⁷ Section 14 of the Act

³⁸ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

employed under an accredited employer scheme, would be adversely impacted by publication.

[70] Courts and tribunals generally have the power to suppress details relating to a hearing. Within the Building Act, however, the matter is not specifically dealt with in that the Board is not provided with an express power to suppress.³⁹

[71] The Board has found in previous decisions that it has, in certain respects, a summary jurisdiction. A summary jurisdiction is one in which the tribunal has a degree of flexibility in how it deals with matters and wherein it retains inherent jurisdiction beyond that set out in the enabling legislation. In *Castles v Standards Committee No.3*,⁴⁰ the High Court held that the disciplinary jurisdiction under the Lawyers and Conveyance Act 2006, which contains the same provisions as those in the Building Act, was a summary jurisdiction. In *Orlov v National Standards Committee 1*,⁴¹ the High Court put it as:

[29] Parliament has provided that the tribunal is free to set its own procedure. Obviously it must do so in a way that is consistent with the discharge of its statutory functions and does not cut across any express statutory or regulatory provisions. Subject to those constraints, the tribunal has been given a high degree of procedural flexibility in the exercise of its important statutory functions.

[72] Given the above, the Board considers that it does have the inherent jurisdiction to order the suppression of details relating to a hearing.

[73] Ordinarily, good grounds need to be shown as to why a matter or details should be suppressed. The Criminal Procedure Act provides details on various grounds in respect of criminal matters.⁴² Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive⁴³. In *N v Professional Conduct Committee of Medical Council*,⁴⁴ the High Court stated the tribunal must be satisfied that suppression is desirable having regard to the public and private interests, and consideration can be given to factors such as:

- (a) issues around the identity of other persons such as family and employers;
- (b) identity of persons involved and their privacy and the impact of publication on them; and

³⁹ Compare this with the provisions of section 153 of the Electricity Act, which provides the Electrical Workers Registration Board with the power to prohibit publication.

⁴⁰ [2013] NZHC 2289

⁴¹ [2013] NZHC 1955

⁴² Refer ss 200 and 202 of the Criminal Procedure Act

⁴³ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

⁴⁴ *ibid*

- (c) the risk of unfairly impugning the name of other practitioners if the responsible person is not named.

[74] Looking at the grounds that have been advanced, much of what the Respondent has raised is the natural consequence of a finding that he has committed a disciplinary offence. Something more is required. The Respondent has also put forward the potential impact on his family and employees, and, with regard to the latter, he provided evidence that substantiated his submission. Having reviewed that evidence, the Board is satisfied that there are grounds to grant a suppression order, which will, in effect, be a non-publication order. In making the order, the Board has also taken into account that this is the first matter it has heard under the new Code of Ethics disciplinary provision. It is likely there will be considerable interest in it and that the impact of publication on the Respondent, his family, and employees may be disproportionate to his conduct.

[75] Whilst a suppression order has been issued, other Licensed Building Practitioners need to learn from the complaint and the Board's finding. Therefore, the Board will order that an article be published. The Respondent is not to be named or identified in the article.

Suppression Order

[76] The Respondent's name, details and any information which could identify the Respondent are suppressed. The Board prohibits the publication of any part of its decision that could identify the Respondent or his business.

Section 318 Order

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

- Penalty:**
- Pursuant to section 318(1)(b) of the Act, the Respondent's licence is suspended for a period of no more than 12 months or until such earlier time as the Respondent competes Board-ordered training and Registrar is to record the suspension in the Register; and**
- Pursuant to section 318(1)(e) of the Building Act 2004, the Respondent is ordered to undertake and complete at his cost the following training: the unit standards relating to communication in the New Zealand in Construction Related Trades (Supervisor) (Level 4) qualification, being:**
- **Unit Standard 9704 – Manage interpersonal conflict;**
 - **Unit Standard 17516 – Write construction-related communications; and**
 - **Unit Standard 16614 – Apply time management concepts and methods in business situations.**

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$3,500 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

Publication: The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with section 301(I)(iii) of the Act.

The Respondent will not be named in this decision.

A redacted version of this decision is to be published on the Board's website.

In terms of section 318(5) of the Act, an article summarising the complaint and the Board's findings is to be published. The Respondent is not to be named or identified in that publication.

[78] 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. The Respondent may seek time to pay.

Right of Appeal

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

Signed and dated this 24th day of October 2023.



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:*
 - (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.*