

Before the Building Practitioners Board

	BPB Complaint No. CB26185
Licensed Building Practitioner:	Brian Horisk (the Respondent)
Licence Number:	BP125125
Licence(s) Held:	External Plastering – proprietary plastering cladding system.

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 Date:	21 November 2023
Decision Date:	4 December 2023

Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)
Mrs F Pearson-Green, Deputy Chair, LBP, Design AoP 2
Mr D Fabish, LBP, Carpentry and Site AoP 2
Ms J Clark, Barrister and Solicitor, Legal Member
Ms K Reynolds, Construction Manager
Mr G Anderson, LBP, Carpentry and Site AoP 2
Mr P Thompson, LBP, Carpentry and Site AoP 3

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 disciplinary offences under sections 317(1)(g) and (i) of the Act.

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Summary

- [1] The Complainant was disputing the payment of the Respondent’s final invoice for external plastering work carried out at the Complainant’s property. The Respondent emailed and sent texts to the Complainant, demanding payment which were expressed in abusive and threatening terms. In addition, the Respondent emailed the real estate agents who were selling the property on behalf of the Complainant through the Trademe website. These communications, as well as alleging that money was owed to the Respondent, contained allegations that the Complainant was a “Paedophile”, “complete con man”, “compulsive liar”, and “child molester”.
- [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 the Complainant. The evidence showed that the Complainant was impacted and felt threatened. The Respondent had used inappropriate and offensive language and tactics.
- [4] As such, in respect of the statements made to the Complainant and others concerning non-payment of the Respondent's final invoice, the Board found that there had been breaches of the Code of Ethics.
- [5] The allegations that the Complainant was a paedophile (and similar comments) went beyond being unprofessional and unethical. When viewed objectively, the conduct would lower the reputation of the licensing regime and Licensed Building Practitioners in the eyes of the general public. As such, those statements amounted to disreputable conduct.
- [6] The Board ordered the Respondent to attend specified training within 6 months of the date of this decision. If he fails to do so, his licence will be suspended for 12 months or to the date he completes the required training, whichever is earlier. The Board also ordered that the Respondent pay costs of \$3,500 and that its decision be published by way of an article in Code Words or other Ministry of Business and Employment publication aimed at the construction industry and Licensed Building Practitioners.

The Charges

- [7] 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
- [8] In this matter, the disciplinary charges the Board resolved to further investigate² were that the Respondent may, in relation to building work at [Omitted], 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.
- [9] With respect to the allegation that the Respondent breached the Code of Ethics, the specific provisions of the Code that will be investigated at a hearing are:
- 19 You must behave professionally.

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.

20 You must act in good faith during dispute resolution; and

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

[10] The conduct that will be further investigated in respect of the above will be the 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 a payment dispute between the Complainant and the Respondent;
- (b) Threats made to the Complainant by the Respondent and intimidating conduct by him in relation to alleged inappropriate conduct by the Complainant;
- (c) The disclosure of alleged building compliance issues without the Complainants' consent to third parties; and
- (d) With respect to the Harassment Notice, the following conduct:
 - i. interfered with property in that person's possession, in that you have attempted to interfere with the business dealings of a property;
 - ii. placing material in any electronic media where it is likely that it will be seen by, or brought to the attention of that person, in that you called a person a Child Molester and Paedophile via email and the Trademe Property website; and
 - iii. making contact with that person by electronic communication in that you sent obscene messages to that person.

[11] With respect to the same matters, the Board will 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.

[12] The Board, at the commencement of the hearing, noted that there was no evidence of any disclosure of alleged building compliance issues without the Complainant's consent to third parties. As such, that allegation was not further investigated.

Preliminary Issue

[13] The Respondent did not attend the hearing. He did communicate with the Investigator on 15 February 2023 and 9 and 11 May 2023 and he provided substantive written responses to the complaint on 6 March 2023 and 10 May 2023. He did not participate in the prehearing telephone call which was offered to him. He was provided with all the required hearing notices and responded on 31 August 2023 to the Board Officer on being sent the revised notice of proceeding.

[14] In addition, at the commencement of the hearing, a voicemail message was left on the Respondent's phone by the Board Officer, and a text message was then sent

advising that the hearing was going to continue in his absence if he did not respond in the next 5 minutes. He did not respond.

- [15] The Board noted that, prior to considering the disciplinary charge, it needed to determine whether the Respondent had been provided with notice of the complaint and with an opportunity to respond to it.
- [16] Under regulation 7(2) of the Complaints Regulations, the Registrar must, when compiling the Registrar's Report, provide a copy of the complaint to the Respondent. Similarly, under regulation 12, if the complaint is to proceed to a hearing, the Board must give notice of the hearing to the Respondent.
- [17] The Register of Licensed Building Practitioners must contain certain information, including, under section 301(1)(d) of the Act, an "address for communications under this Act". Under section 302, the licensed building practitioner must keep their details up to date:

302 Obligation to notify Registrar of change in circumstances

- (1) *Each [person applying to become licensed], and each licensed building practitioner, must give written notice to the Registrar of any change in circumstances within 10 working days after the change.*
- (2) *Change of circumstances—*
- (a) *means any change in the information that the person has provided to the Registrar under this subpart; and*
- (b) *includes any change that may be prescribed (if any).*

- [18] As the Respondent has not provided any updated details, the address to be used for communications with him is that contained in the Register.
- [19] Section 314 of the Act makes it an offence for a licensed building practitioner to fail to update the Register:

314 Offences relating to licensing.

- (1) *A person commits an offence if the person holds himself or herself out as a person who is licensed to carry out or supervise building work or building inspection work, or building work or building inspection work of a certain type, while not being so licensed.*
- (2) *A person who commits an offence under subsection (1) is liable on conviction to a fine not exceeding \$20,000.*
- (3) *A person commits an offence if the person—*
- (a) *fails to produce evidence of being licensed as required by section 289; or*

(b) *fails to give written notice of a change in circumstances in accordance with section 302.*

(4) *A person who commits an offence under subsection (3) is liable on conviction to a fine not exceeding \$5,000.*

[20] The Act also provides for the service of notices in section 394. It provides that:

394 Service of notices

(1) *Any notice or other document required to be served on, or given to, any person under this Act is sufficiently served if it is—*

(a) *delivered personally to the person; or*

(b) *delivered to the person at the person's usual or last known place of residence or business; or*

(c) *sent by fax or email to the person's fax number or email address; or*

(d) *posted in a letter addressed to the person at the person's usual or last known place of residence or business.*

(5) *A notice or other document sent by post to a person in accordance with subsection (1)(d) must be treated as having been received by that person at the time at which the letter would have been delivered in the ordinary course of post.*

[21] Given the above provisions, the Board finds that the required notices under the Regulations have been provided to the Respondent. This decision is reinforced by the Respondent providing responses to the Investigator and the Board Officer.

[22] The Board also notes that the purposes of the disciplinary provisions in the Act would be defeated if licensed building practitioners were able to avoid complaints by not maintaining up-to-date contact details as per the requirements of the Act.

[23] In reaching the decision to proceed in the Respondent's absence, the Board has also noted the Court's comments:³

"Absenting oneself voluntarily runs the risk that a trial may be carried on in one's absence but the discretion to do so is only exercised with caution and is subject to the absolute right to a trial that is as fair as circumstances permit and that would lead to a just outcome."

[24] The Court also stated that anyone who chose not to be present could not complain about the "inevitable consequences" of a trial being held in their absence.

[25] Based on the above, the Board found that it was appropriate that it considered the complaint.

³ *R v Chatha* [2008] NZCA 547 as cited in *Hart v Auckland Standards Committee 1 of the NZLS* [2013] 3 NZLR at [25] and [26].

Evidence

- [26] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁴. 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.
- [27] The Respondent advised that work on the Complainant's project was completed around 25 October 2022. The Complainant refused to pay the Respondent's final invoice in the sum of approximately \$16,000. The Complainant said that he would pay the balance due after the Council had inspected the work, but that inspection identified some concerns, and, as at the date of the hearing, payment had not been made.
- [28] Between 17 December 2022 and 11 August 2023, the Respondent sought payment from the Complainant and, amongst other things, said in emails and texts to the Complainant:
- (a) *"I hope I bump into you around [Omitted] as I will also make sure everyone knows about you not paying your bills...Fuck you little prick. Now you will learn."*
 - (b) *"It's disappointing that you haven't paid my invoice and are trying to use any excuse not to pay the invoice. I don't give a fuck who you call or what you do. You owe me a lot of money and are refusing to pay it. Your [sic] a fucking con man..."*
 - (c) *"Tomorrow that invoice better be paid. No excuses no nothing...Fucking test me."*
 - (d) *"iv [sic] decided to...make the police and other parties aware about your unwelcome comments about underage girls..."*
 - (e) *"One way or another your [sic] going to pay me what I'm owed and all my gib. Karma is a bitch and I'll make you pay my company what I'm owed. Every time you try to sell that scam of a building I'll make sure that the people know the truth and all the lies and bullshit you tried to cover up and mislead buyers."*
 - (f) *"I'll be seeing you around ya pedo cunt..."*
 - (g) *"You honestly think by calling the police is going to defend you and cover up that fact that you are a Paedophile"*
 - (h) *"I'm making my report to the police about your inappropriate comments referring under age girls"*
 - (i) *"Hi wanker one way or another you're paying what you owe me"*

⁴ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

- (j) *"I'm on my way there now. You're taking the piss now. See you shortly."*
- (k) *"Don't give a fuck what you do. I'm on my way"*
- (l) *"I promise you this if this invoice is not paid today I'm going to make sure everybody knows how much you owe me,...Go fuck yourselfe.[sic]"*
- (m) *"You leave me no choice now but to go public with this and the amount you owe my company."*

[29] The Respondent also sent communications to other people. To the real estate agents selling the Complainant's property he sent emails through the Trademe property website which stated

- (a) *"There's over 16 thousand dollars owed from [the Respondent] to the exterior plasterers. This property will not be sold till that debt is paid in full as we will not provide paperwork for the concert [sic] due to non payment. Can you remind the little weasel of that instead of giving [sic] it large and the big I am. No paperwork no sale."*
- (b) *"we have decided to take this owner to the high court to retrieve the outstanding invoice owed to horisk plastering systems ltd...This property will not be sold until these legal proceedings are underway."*
- (c) *"just to let you know my plastering company is owed a 15700 dollars from the owner of this property. And are in the middle of putting a default on this property and owner till the balance of 15700 is paid."*
- (d) *"Are you aware that he is a Paedophile and a complete con man. Are you aware that he is a compulsive liar and a child molester...."*

[30] Then, on a website associated with the property, the Respondent posted – *"He owes the exterior plasterer over 16K. To [sic] busy buying champagne instead of paying the tradesmen who worked hard and paid for everything....Facts are 100% correct. You owe me a lot of money and debt collectors are involved."*

[31] The Board questioned the Complainant as to whether the Respondent had taken any legal steps to obtain payment. The Complainant advised that he had not, other than a telephone call he received from a debt collector. The Complainant advised the debt collector that the matter was in dispute, and he never heard anything further.

[32] As a result of the Complainant complaining to the police on 13 August 2023, a Harassment notice was issued to the Respondent. It referenced the comments made on the Trademe website and obscene messages to the Complainant and stated that these acts had caused the Complainant to *"reasonably fear for their safety"*. The Complainant confirmed that there was no further contact from the Respondent after the harassment notice was issued.

- [33] The Complainant spoke of the abuse he had endured simply because he had wanted a job done properly. He said that he felt *“quite exposed”* and the whole process had been stressful. He stated that he did not want anyone else to be in the same situation. The Complainant denied all of the allegations made by the Respondent in the communications.
- [34] The Complainant said that the real estate agent contacted him on receiving the website message from the Respondent and that she was *“shocked “* and *“horrificed”*. He said that it was impossible to know if the Respondent’s message had an impact on the relationship with the real estate agent.
- [35] The Complainant admitted posting a review on the Respondent’s business Google listing and said he was frustrated, but it was *“probably not the right thing to do”*.
- [36] The Complainant, when dealing with the police over the harassment notice, was told by them that the Respondent had made a complaint about him to the police. No action was taken by the police.
- [37] The Respondent did not attend the hearing, but he provided two written responses to the Investigator on 6 March 2023 and 10 May 2023. He stated that he completed the exterior plaster work on the Complainant’s property after another contractor had done 60 % of the work, that the Complainant had no concerns with the quality of his work and *“the first time he complained is when it came to paying the final bill.”* He said that he had employee statements to support that the Complainant was happy with the work and that he would forward these. However, they have not been provided to the Board. The Respondent stated, *“ The bottom line is he’s trying to get out of paying his bills and as a result he’s gone to you guys to try to get me in trouble and out of paying his invoice.”*
- [38] The Respondent did not address the specific allegations of breach of the code of ethics or disrepute, nor did he make any comment on the texts, emails, and website statements the Complainant had highlighted.

Code of Ethics

The Code within a disciplinary context

- [39] The Code of Ethics for Licensed Building Practitioners was introduced by Order in Council.⁵ It was introduced in October 2022 and came into force on 25 October 2023. 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 regimes⁶ for some time, and the Board has taken guidance from decisions made in other regimes.
- [40] The Code of Ethics also differentiates between Licensed Building Practitioners who are in business and those who are employed in that some of the ethical obligations

⁵ Building (Code of Ethics for Licensed Building Practitioners) Order 2021

⁶ Lawyers, Engineers, Architects and Accountants, for example

only apply to those who are in business. In this matter, the Respondent was in business.

[41] 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.⁷

[42] 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 m’embers conforms to the standards generally expected of them.

[43] 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*,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.

[44] 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

[45] 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.

⁷ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1 at [128], McGrath J.

⁸ [1992] 1 NZLR 720 at 724

⁹ [2001] NZAR 74

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 to 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.

[46] As previously noted, the Revised Notice of Proceeding stated that the Board would be investigating an alleged breach of principle 23, in respect of *"the disclosure of alleged building compliance issues without the Complainant's consent to third parties."* The Board advised at the commencement of the hearing that this allegation was no longer being pursued.

[47] The two provisions of the Code of Ethics being considered are premised on "building work". The Code adopts the same definition of the term as the Act, which is work that is *for, or in connection with, the construction, alteration, demolition, or removal of a building.*¹⁰ The Respondent carried out exterior plastering work, which clearly falls within this definition.

[48] Clause 19 of the Code is part of the principle that Licensed Building Practitioners are expected to behave professionally.¹¹ It is drafted in a wider manner than the clauses that follow it. Those clauses all relate to specific types of behaviour. Those provisions are:

- 20 You must act in good faith during dispute resolution.
- 21 You must price work fairly and reasonably.
- 22 You must declare and manage actual or potential conflicts of interest appropriately.
- 23 You must maintain confidentiality of client details unless there is good reason for sharing information.

¹⁰ Section 7 of the Act

¹¹ Clause 6(d) of the Code of Ethics.

- 24 You must acknowledge and respect cultural norms and values of clients and colleagues; and
- 25 You must conduct your business in a methodical and responsible manner.
- [49] Clause 19 of the Code is, in effect, a catch-all provision. It stipulates that, in carrying out or supervising building work, a Licensed Building Practitioner must act professionally and treat clients and colleagues with respect.
- [50] Clause 20 includes an obligation to act in “good faith”, which has been defined as acting with propriety and honesty,¹² and as being associated with notions of fairness, honesty, and reasonableness.¹³ Clause 20 then places the same obligations as set out in Clause 19 into the context of dispute resolution. Clause 20 states that in a dispute about, for example, price, a Licensed Building Practitioner must “ensure that at all times you act in a professional and respectful manner towards your client”.
- [51] What is in question in this matter, therefore, is whether the Respondent acted unprofessionally and/or disrespectfully when he made the statements set out above to the Complainant and others.
- [52] In *Attorney-General v Institution of Professional Engineers New Zealand Incorporated*,¹⁴ Collins J stated:
- [54] *Membership of a professional body, such as the Institution, can confer a status that signals trustworthiness to the public. This status reflects the value that society places upon the training and skill acquired by members and upon the Institution’s ability to maintain the standards of its members through ongoing education, training and disciplinary processes.*
- [53] Justice Collins stated that there is a counterbalance to the trust the public places in members of professional bodies. This counterbalance is the public expectation that the admission of members will be tightly regulated to ensure that members maintain high professional standards. The public expects that if a person is afforded the status of membership, that person will maintain professional standards and that those standards will be enforced, if necessary, through disciplinary proceedings. If a professional body wishes to maintain public trust, it must act in accordance with this expectation.
- [54] Trustworthiness is a key aspect of professionalism, which, in turn, is defined as obtaining and maintaining high standards.
- [55] Further, when considering ethical conduct, the Board needs to assess it objectively, and the subjective views of the practitioner or other parties involved are irrelevant.¹⁵

¹² Dictionary of New Zealand Law <https://advance.lexis.com/api/permalink/e4b6840e-df17-4c98-8aa3-cfa13956a018/?context=1230042>

¹³ *Bobux Manufacturing Ltd v Raynor Marketing Ltd* [2002] 1 NZLR 506 at [41]

¹⁴ [2019] 2 NZLR 731 at [55]

¹⁵ *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

The conduct complained about

- [56] There are two issues that the Board has to consider. They are whether the Respondent behaved professionally and treated the Complainants with respect (clause 19) and acted in a professional and respectful manner during dispute resolution (clause 20).
- [57] The conduct related to the Respondent's reaction to the Complainant not paying his final invoice. This fell broadly into two categories. The first were statements to the Complainant and others about the amount outstanding to his company, demands for payment and an underlying threat to the Complainant that the Respondent was "coming now". The second category was personal insults to the Complainant expressed both to him and to the real estate agents.
- [58] The Board accepts that there may be frustration in not being paid, but that is not an excuse for unacceptable behaviour. Legal processes exist for the determination of disputes over payment. The Respondent, other than using a debt collection agency, did not instigate any recognised legal method to resolve the dispute and seek payment.
- [59] The Respondent used inappropriate and offensive language when dealing with the Complainant and elevated the matter by disclosing the issues to third parties. His actions were designed to harass, embarrass and inconvenience the Complainant, and there was evidence before the Board that the Complainant was impacted and did feel threatened.
- [60] The Respondent has not provided an explanation for or comment on this behaviour other than to place it within the context of his anger in not being paid his final invoice.

Was the conduct serious enough

- [61] 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

- [62] Considering the above, the Board finds that the Respondent has breached the Code of Ethics provisions 19 and 20 in respect of the first category of comments – those concerning outstanding payment. He did not behave professionally or treat the Complainants with respect and he has breached clause 19. He did not act in a professional and respectful manner during dispute resolution and he has breached clause 20.

Disrepute

- [63] 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.

- [64] The Courts have consistently applied an objective test when considering such conduct.¹⁶ The subjective views of the practitioner or other parties involved are irrelevant. The conduct need not have taken place in the course of carrying out or supervising building work.¹⁷
- [65] 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
- [66] 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. The Board now needs to decide whether a finding of a breach of the Code of Ethics 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

- [67] The conduct under consideration is that which has been identified as the second category – personal insults about the Complainant made to him and to third parties. As noted, the question for the Board is whether that conduct should be elevated to a finding of disrepute because of its seriousness.
- [68] The Respondent's behaviour escalated from comments made about payment to highly offensive and concerning allegations about the Complainant's behaviour. These statements are at a different level from those grounded in a payment dispute. The Respondent has made highly offensive statements and used language that could have an enormous impact on the Complainant. There was an element of vindictiveness, and it is noted that the behaviour only ceased once the police Harassment notice was issued.
- [69] 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.

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

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

Was the conduct serious enough

[70] 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.

Has the conduct brought the regime into disrepute

[71] 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

[72] 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.

[73] The Board heard evidence during the hearing relevant to penalty, costs and publication and has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

[74] 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.²⁰ It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:²¹

- (a) protection of the public and consideration of the purposes of the Act;²²
- (b) deterring other Licensed Building Practitioners from similar offending;²³
- (c) setting and enforcing a high standard of conduct for the industry;²⁴
- (d) penalising wrongdoing;²⁵ and
- (e) rehabilitation (where appropriate).²⁶

²⁰ *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]

²¹ Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

²² Section 3 Building Act

²³ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²⁴ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

²⁵ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

²⁶ *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

- [75] 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 cases²⁷ and applying the least restrictive penalty available for the particular offending.²⁸ In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty²⁹ that is consistent with other penalties imposed by the Board for comparable offending.³⁰
- [76] 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.³¹
- [77] It is noted, however, that the findings of breach of the Code of Ethics and disreputable conduct are integrally connected, and, as such, they will be treated as a single offence in considering penalty.
- [78] In previous disrepute decisions, the Board has given a censure for behaviour which included threatening language, which was highly personal in nature.³² Cancellation of licence was ordered for conduct including payment demands which threatened physical violence and included lewd sexual references³³, and a fine of \$3,500 was ordered for offensive language with racist implications.³⁴
- [79] In this instance, the Board considered the behaviour warranted more than a censure and that a fine was not appropriate because of the financial position the Respondent was already in as a consequence of this project and his actions.
- [80] In terms of aggravation, the manner in which a licensed person responds to a disciplinary complaint and conducts their defence can also be taken into consideration by the Board. In *Daniels v Complaints Committee*,³⁵ the High Court held that it was permissible to take into account as an adverse factor when determining the penalty that the practitioner had responded to the complaints and discipline process in a belligerent way. The Board finds that the Respondent's failure to attend the hearing or communicate with the Board Officer explaining his non-attendance is an aggravating factor.
- [81] Further aggravating factors were that the behaviour was protracted and involved a third party, not just the Complainant. There are no mitigating factors.
- [82] Taking the above factors into account, the Board considered that the Respondent would benefit from further training that addressed communication skills and that

²⁷ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²⁸ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

²⁹ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

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

³¹ 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.

³² Davies [2018] BPB 1883

³³ Spence [2018] BPB 1906

³⁴ Dawson [2022] 25842

³⁵ [2011] 3 NZLR 850.

this would also meet the objective of protecting the public. Accordingly, the Board orders the Respondent to undertake specified training.

[83] 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.

[84] The Respondent is to complete the training at his own cost and within six months of this decision being issued. If he fails to do so, his licence will be suspended from the end of the six-month period allowed for completion of training. The suspension will continue until the training is completed or the expiry of 12 months, whichever is earlier.

Costs

[85] 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.³⁶

[86] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings.³⁷ The starting point can then be adjusted up or down, having regard to the particular circumstances of each case³⁸.

[87] 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.

[88] 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

[89] 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,³⁹ 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.

³⁶ *Collie v Nursing Council of New Zealand* [2001] NZAR 74

³⁷ *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

³⁸ *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.

³⁹ Refer sections 298, 299 and 301 of the Act

[90] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.⁴⁰ 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.⁴¹

[91] Based on the above, the Board will order further publication of this decision for the education of the profession. The publication will be by way of an article in Code Words or other Ministry of Business and Employment publications aimed at the construction industry and Licensed Building Practitioners. The Respondent will be named in the publication.

Section 318 Order

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

Penalty: 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

Pursuant to section 318 (1) (b) of the Act, if the Respondent does not complete the above ordered training within six months of the date of this decision, then the Respondent's licence is suspended for a period of no more than 12 months or until such earlier time as the Respondent completes the Board – ordered training and the Registrar is to record the suspension in the Register.

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.

In terms of section 318(5) of the Act, there will be action taken to publicly notify the Board's action, in addition to the note in the Register and the Respondent being named in this decision, which will be publicly available on the Board's website.

⁴⁰ Section 14 of the Act

⁴¹ Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

- [93] 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

- [94] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until the close of business on **12 January 2024**. 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

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

Signed and dated this 14th day of December 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.*