

Before the Building Practitioners Board

	BPB Complaint No. CB26251
Licensed Building Practitioner:	[OMITTED] (the Respondent)
Licence Number:	BP[OMITTED]
Licence(s) Held:	External Plastering

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	by Audio-Visual Conference
Hearing Type:	In Person
Hearing and Decision Date:	1 December 2023
Board Members Present:	
	Mr M Orange, Chair, Barrister (Presiding)
	Ms K Reynolds, Construction Manager
	Mr G Anderson, LBP, Carpentry and Site AoP 2

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 not** committed a disciplinary offence.

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Summary

- [1] The Respondent was engaged to carry out external cladding and plastering work. He was paid a deposit for the work. He attended the site, carried out less than one day's work, and then failed to respond to queries from the Complainant. The Complainant cancelled the contract and sought repayment of the deposit paid. The Respondent did not repay the deposit and did not respond to queries from the Complainant. A complaint was made, and the Board decided to investigate the Respondent's conduct under the Code of Ethics for Licensed Building Practitioners.
- [2] At the hearing, the Respondent outlined the circumstances that resulted in him failing to complete the work and not engaging with the Complainant. They were a personal injury, surgery, loss of key staff, a lack of subcontractor resources and a payment issue on another job, all of which led to him suffering mental health issues. As a result, the Respondent withdrew and did not deal with issues that he should have. After the complaint had been made, the Respondent repaid the deposit.
- [3] The Board found that, because of the surrounding circumstances and the repayment of the deposit, the Respondent's conduct had not breached the Code of Ethics.

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, in relation to building work at [OMITTED], have breached the code of ethics prescribed under section 314A of the Act contrary to section 317(1)(g) of the Act in that he may have breached the following:

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.

16 You must advise clients of any delays as soon as they become apparent;

19 You must behave professionally; and

20 You must act in good faith during dispute resolution.

[6] The Board gave notice that the conduct that would be further investigated in respect of the above at the hearing would be the Respondent's failure to account for funds received in a timely and professional manner and to deal with the Complainant in a manner to be expected of a Licensed Building Practitioner.

Evidence

[7] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed.³ 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.

[8] The Respondent was engaged to carry out external cladding and plastering of a new dwelling. A quote with terms and conditions, including payment terms, was issued by the Respondent. The Complainant paid a deposit of \$14,974, and the work was scheduled.

[9] The Respondent attended the building site on 7 February 2023 and carried out a small amount of work (less than a day's worth). He then disengaged and stopped communicating with the Complainant, who cancelled the contract, appointed another contractor and sought repayment of his deposit. The Respondent ignored the requests for repayment. As a result, a complaint was made to the Board.

[10] The Respondent did not engage in the initial phases of the Board's investigations, so the Board did not know the reasons why he had not completed the work or repaid the deposit. It was on that basis that the Board proceeded with its investigations.

[11] At the hearing, the Respondent outlined the reasons why he did not complete the work and why he did not return the deposit when it was first sought. In short, the Respondent was, when the work was to be undertaken, overcommitted and hit with a key staff member leaving, subcontractors he had hoped to use not being available, an injury to his knee which required surgery and which incapacitated him, and payment issues on another job. As a result of the pressure he was under, his mental health deteriorated. He stated he "shut down", and he failed to deal with outstanding matters. Soon after the Complaint was made, the Respondent returned to work so that he could generate income to repay the deposit, which he repaid on 20 March 2023. In doing so, the Respondent compromised his recovery from surgery.

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

Code of Ethics

- [12] The Code of Ethics for Licensed Building Practitioners was introduced by Order in Council.⁴ It was introduced in October 2021 and came into force on 25 October 2022. The obligations are new, but there was a transition period of one year to allow practitioners to become familiar with the new obligations. Whilst the Code of Ethics is new, ethics have been a part of other regulatory regimes⁵ for some time, and the Board has taken guidance from decisions made in other regimes.
- [13] 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.
- [14] The disciplinary provision in the Act simply states, “has breached the code of ethics”. Most disciplinary regimes frame the charge as some form of malpractice or misconduct, and the Board has considered the allegations within such a framework and with reference to superior court decisions. Within this context, in *Dentice v Valuers Registration Board*,⁶ 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.

- [15] The Board also notes that the courts have applied a threshold test to disciplinary matters, and it has applied those tests. In *Collie v Nursing Council of New Zealand*,⁷ 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.

The conduct complained about

- [16] The Respondent entered into an agreement whereby he would provide his services in return for payment. He did not provide those services in a timely manner. The contract was validly terminated by the Complainant, who was entitled to a refund of the funds he had paid in advance (the deposit).

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

⁵ Lawyers, Engineers, Architects and Accountants, for example

⁶ [1992] 1 NZLR 720 at 724

⁷ [2001] NZAR 74

- [17] On the surface, the Respondent's conduct appeared to be taking funds with no intention of completing the associated services, and the conduct could have been a breach of the Code of Ethics. This resulted from his failure to engage with the Complainant over why he was not completing the work and then why he was not repaying funds paid in advance. The explanation given at the hearing painted a different picture. There were genuine reasons behind both matters and had those explanations been given to the Complainant in the first place and then the Board when it was deciding whether to proceed to a hearing, it is doubtful whether the complaint would have been necessary or have been made.

Was the conduct serious enough?

- [18] A failure to communicate and to deal with matters such as those complained about can be unethical. However, in this matter, the conduct needs to be looked at within the context of the surrounding circumstances. Firstly, the Respondent was experiencing personal and business difficulties. Those, of themselves, were not good reasons to disengage. They did result in mental health issues, which can, in certain circumstances, explain and excuse behaviour. Secondly, the debt which underpinned the complaint was repaid within a reasonable period of the complaint being made. Given the combination of those factors, the Board decided that the conduct was not serious enough.

Has the Respondent breached the Code of Ethics?

- [19] The Respondent has not breached the Code of Ethics. He is, however, cautioned that, in the future, he should not ignore business issues that may arise and should seek help if he finds himself facing mental health difficulties.

Signed and dated this 22nd day of December 2023

A handwritten signature in black ink, appearing to be 'M Orange', written in a cursive style.

M Orange
Presiding Member