

Before the Building Practitioners Board

	BPB Complaint No. C2-01906
Licensed Building Practitioner:	Sam Spence (the Respondent)
Licence Number:	BP 125740
Licence(s) Held:	Roofing: Profiled Metal Roof and/or Wall Cladding

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	Board Inquiry
Hearing Location	Auckland
Hearing Type:	In Person
Hearing Date:	2 October 2018
Decision Date:	30 October 2018

Board Members Present:

Mel Orange, Legal Member (Presiding)
David Fabish, LBP, Carpentry Site AOP 2
Faye Pearson-Green, LBP Design 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.

Board Decision:

The Respondent **has** committed a disciplinary offence under section 317(1)(i) of the Act.

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Introduction

[1] The hearing resulted from a Board Inquiry into the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations¹ to hold a hearing. The disciplinary offence the Board resolved to investigate was that the Respondent had conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act).

Function of Disciplinary Action

[2] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*² and in New Zealand in *Dentice v Valuers Registration Board*³.

[3] Disciplinary action under the Act is not designed to redress issues or disputes between a complainant and a respondent. In *McLanahan and Tan v The New Zealand Registered Architects Board*⁴ Collins J. noted that:

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

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

³ [1992] 1 NZLR 720 at p 724

⁴ [2016] HZHC 2276 at para 164

“... the disciplinary process does not exist to appease those who are dissatisfied The disciplinary process ... exists to ensure professional standards are maintained in order to protect clients, the profession and the broader community.”

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

Background to the Complaint

- [5] The Respondent’s conduct came to the Board’s attention as a result of a segment of the television programme Fair Go. The conduct, as reported, indicated that the Respondent may have brought the regime into disrepute.

Procedure

- [6] The matter was set down for a hearing by way of a Notice of Hearing issued 27 August 2018. On 27 September 2018 the Respondent advised that, as a result of a court bail condition that had been imposed on him, he could not communicate with a witness to the investigation and that he was requesting an adjournment. The Respondent was advised that the witness would not be attending the hearing. The Board advised the Respondent, in a Board Minute dated 1 October 2018, that the hearing would proceed as scheduled and that he could provide written submissions or that he could attend by telephone.
- [7] On 1 October 2018 the Respondent advised:

I will be in breach of Bail if I respond with any thing to do with Work related issues, so by proceeding is fine, but if I write any submissions I will be in breach therefor I cannot comment until 1. My bail conditions are relaxed or 2. Charges are dropped or doubt with in court.

This matter stems from a work related issue, wherefore I cannot attend or comment on, so with this, I will make contact when my case is over and if you proceed with out my written admissions this may prejudice any decision the board may have.

- [8] The Board noted the statement from the Respondent. It also noted that the Respondent had not engaged in the investigation by the Registrar and had not provided a response to the matters under consideration. It further noted that the evidence before it was clear and compelling and that the Respondent had not provided any form of tangible proof of the claims he was making as regards his conditions of bail. Given the seriousness of the conduct under investigation the Board resolved to proceed.

Evidence

[9] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁵. Under section 322 of the Act the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.

[10] The Board received the documentary evidence which included:

- Video footage of the Fair Go article;
- Copies of text messages sent by the Respondent;
- Transcripts of voice messages left by the Respondent; and
- The Respondent's response which was that:

The particular project in which was screened on FAIR GO, was a re-roof works and had nothing to do with Restricted building works.

No further comments will be forthcoming.

[11] The Fair Go article related to a disputed invoice. Compass Roofing, for whom the Respondent worked, had been subcontracted to carry out a re-roof. In the early stages of the re-roof concerns regarding workmanship were raised and the subcontract was terminated. A progress payment invoice was sent by Compass Roofing for \$3,023.76, approximately \$400 short of the total amount quoted for the labour on the full job.

[12] One day after the payment due date, texts demanding payment and threatening consequences if payment was not made were sent by the Respondent.

[13] Following on from this the Respondent personally made a number of demands for payment. Compass Roofing also made demands for payment which would be considered to be within the normal course of business.

[14] The Respondent's demands included threats to remove materials from the roof and threats of physical violence if payment was not made.

[15] The Respondent also left voice messages, including 16 messages the day after the invoice was due, which, in addition to threats as described above, contained obscene and offensive language, and lewd sexual references and comments directed at the recipient of the messages and his wife. The comments and statements were very explicit and personal in nature.

[16] The recipients of the communications reported feeling threatened, intimidated and upset by them.

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

Board's Conclusion and Reasoning

- [17] The Board has decided that the Respondent **has** conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act) and should be disciplined.
- [18] The Respondent has implied that as the building work to which the matter relates was not restricted building work there is nothing to answer for.
- [19] Section 317 of the Act which sets out the disciplinary offences under the licensing regime contains a number of offences some of which relate solely to restricted building work and others which relate to any building work. Section 317(1)(i) which provides for disrepute has the widest application of any of the disciplinary provisions. To find that a licensed building practitioner has brought the regime into disrepute there need not be any link to building work. Rather it is the conduct of the person under investigation that is to be considered by the Board.
- [20] The actual disrepute disciplinary provision in the Act is similar to legislation in other occupations including medical professionals, teachers, lawyers and conveyancers, chartered accountants, financial advisors, veterinarians and real estate agents. The Board considered the disrepute provisions in Board Decision C2-01111⁶ and discussed the legal principles that apply.
- [21] Further to comments in paragraph [19] above it should be noted that in those other professions listed it has been held by the Courts that the conduct complained of does not have to have been conduct in the course of a practitioner's trade or profession. For example the High Court in *Davidson v Auckland Standards Committee No 3*⁷ held that a company director, who, in the course of his duties as a director where he was charged with offences under the Securities Act 1978, had brought the legal profession into disrepute. He held a lawyer's practising certificate at the time, however, he was not providing legal services. It was submitted in the case that when the acts are outside of the legal practice, only acts which exhibit a quality incompatible with the duties of the legal profession, for example dishonesty or lack of integrity, could bring the legal profession into disrepute. This was rejected by the Court. Similarly in a determination of the Disciplinary Tribunal of the New Zealand Institute of *Chartered Accountants*⁸, convictions for indecent assault and being found without reasonable cause in a building was found to bring the profession into disrepute as it was inconsistent with the required judgment, character and integrity.
- [22] Turning to the conduct which brings or is likely to bring the regime into disrepute the Act does not provide guidance as to what is "disrepute". The Oxford Dictionary defines disrepute as "the state of being held in low esteem by the public"⁹ and the

⁶ Board decision dated 2 July 2015.

⁷ [2013] NZAR 1519

⁸ 24 September 2014

⁹ Online edition, compilation of latest editions of *Oxford Dictionary of English, New Oxford American Dictionary, Oxford Thesaurus of English and Oxford American Writer's Thesaurus*, search settings UK English, accessed 12/05/15

courts have consistency applied an objective test when considering such conduct. In *W v Auckland Standards Committee 3 of the New Zealand Law Society*¹⁰ the Court of Appeal held that:

*the issue of whether conduct was of such a degree that it tended to bring the profession into disrepute must be determined objectively, taking into account the context in which the relevant conduct occurred. The subjective views of the practitioner, or other parties involved, were irrelevant.*¹¹

[23] As to what conduct will or will not be considered to bring the regime into disrepute it will be for the Board to determine on the facts of each case. The Board will, however, be guided by finding in other occupational regimes. In this respect it is noted disrepute was upheld in circumstances involving:

- criminal convictions¹²;
- honest mistakes without deliberate wrongdoing¹³;
- provision of false undertakings¹⁴; and
- conduct resulting in an unethical financial gain¹⁵.

[24] It is also noted that there are a number of cases where the conduct related to specific or important tasks a licensed building practitioner is required to complete within their occupations. Often such behaviour is measured within the context of a code of conduct or ethics. A code is yet to be established within the Building Act although provision for one is made. What is clear from the cases though is that unethical or unprofessional conduct can amount to disreputable conduct.

[25] The conduct in question, at a base level, relates to debt collection. Pursuing a debt or recovering a debt, whether it is disputed or not is conduct that falls within the ordinary course of business. There are numerous options open to pursue and enforce a debt within the building industry. The Construction Contracts Act provides for industry specific mechanisms, the disputes tribunal can be used as can the courts.

[26] The Respondent did not resort to the above mechanisms. Rather he used intimidation and threats of violence. His conduct went well beyond what is considered to be acceptable means and methods of debt collection.

[27] The Respondent also made sexual comments and statements. The language used and the comments made by him were very personal, highly offensive and vile.

[28] The demands and statements were not a one off. They were an unrelenting and escalating barrage of inappropriate and unacceptable communications.

¹⁰ [2012] NZCA 401

¹¹ [2012] NZAR 1071 page 1072

¹² *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519

¹³ *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

¹⁴ *Slack, Re* [2012] NZLCDT 40

¹⁵ *Colliev Nursing Council of New Zealand* [2000] NZAR 7

- [29] The Courts have stated that the threshold for disciplinary complaints of disrepute is high and the Board notes that when the disciplinary provision was introduced to Parliament the accompanying Cabinet paper noted:

This power would only be exercised in the most serious of cases of poor behaviour, such as repetitive or fraudulent behaviour, rather than for minor matters.

- [30] This is one of those cases. The Board finds that the conduct displayed has lowered the reputation of the licensing regime and, as such, that the Respondent has brought the regime into disrepute by using unacceptable methods to try and collect what was a disputed sum of money.

Penalty, Costs and Publication

- [31] Having found that one or more of the grounds in section 317 applies the Board must, under section 318 of the Actⁱ, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [32] The matter was dealt with on the papers in the absence of the Respondent. Included was information relevant to penalty, costs and publication and the Board has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

- [33] The purpose of professional discipline is to uphold the integrity of the profession; the focus is not punishment, but the enforcement of a high standard of propriety and professional conduct. The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*¹⁶ commented on the role of "punishment" in giving penalty orders stating that punitive orders are, at times, necessary to provide a deterrent and to uphold professional standards. The Court noted:

[28] I therefore propose to proceed on the basis that, although the protection of the public is a very important consideration, nevertheless the issues of punishment and deterrence must also be taken into account in selecting the appropriate penalty to be imposed.

- [34] Deterrence was also noted in *Hart* and in *Dorbu v New Zealand Law Society (No 2)*¹⁷. The High Court when discussing penalty stated:

[35] The principles to be applied were not in issue before us, so we can briefly state some settled propositions. The question posed by the legislation is whether, by reason of his or her conduct, the person accused is not a fit and proper person to be a practitioner. Professional misconduct having been

¹⁶ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

¹⁷ [2012] NZAR 481

established, the overall question is whether the practitioner's conduct, viewed overall, warranted striking off. The Tribunal must consider both the risk of reoffending and the need to maintain the reputation and standards of the legal profession. It must also consider whether a lesser penalty will suffice. The Court recognises that the Tribunal is normally best placed to assess the seriousness of the practitioner's offending. Wilful and calculated dishonesty normally justifies striking off. So too does a practitioner's decision to knowingly swear a false affidavit. Finally, personal mitigating factors may play a less significant role than they do in sentencing.

- [35] 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*¹⁸ the High Court held that it was permissible to take into account as an adverse factor when determining penalty that the practitioner had responded to the complaints and discipline process in a belligerent way.
- [36] The Respondent has not been belligerent. He has not, however, engaged in the process and the communications he has sent to the Board since the matter has been set down have contained offensive statements and references.
- [37] The Board notes that in *Lochhead v Ministry of Business Innovation and Employment*¹⁹ the court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act they have the advantage of simplicity and transparency. The court recommended adopting a starting point for penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.
- [38] Cancellation of a license is the equivalent of striking off within the licensed building practitioner regime.
- [39] The Respondent has been found to have brought the regime into disrepute. His behaviour is considered to be at the more serious end of the scale and there are aggravating factors including the sustained nature of the Respondent's conduct, the impact it has had on others, and the manner in which the Respondent has engaged with the Board. There is little in the way of mitigation.
- [40] A clear message needs to be sent to the licensed building practitioners and to the Respondent that the conduct engaged in is not acceptable and will not be tolerated.
- [41] Taking all of the above factors into account the Board considers that a cancellation of the Respondent's licence is therefore warranted. Accordingly the Board will cancel the Respondent's licence and order that he may not apply to be relicensed for a period of three years. The Board considered a longer period but it decided that three years reflected the seriousness of the matter whilst still allowing the Respondent the opportunity to once again become a licensed building practitioner.

¹⁸ [2011] 3 NZLR 850.

¹⁹ 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

Costs

- [42] Under section 318(4) the Board may require the Respondent “to pay the costs and expenses of, and incidental to, the inquiry by the Board.”
- [43] The Respondent should note that the High Court has held that 50% of total reasonable costs should be taken as a starting point in disciplinary proceedings and that the percentage can then be adjusted up or down having regard to the particular circumstances of each case²⁰.
- [44] In *Collie v Nursing Council of New Zealand*²¹ where the order for costs in the tribunal was 50% of actual costs and expenses the High Court noted that:
- But for an order for costs made against a practitioner, the profession is left to carry the financial burden of the disciplinary proceedings, and as a matter of policy that is not appropriate.*
- [45] Based on the above the Board’s costs order is that the Respondent is to pay the sum of \$2,500 toward the costs of and incidental to the Board’s inquiry.

Publication

- [46] 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 Act²². The Board is also able, under section 318(5) of the Act, to order publication over and above the public register:
- In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit.*
- [47] As a general principle such further public notification may be required where the Board perceives a need for the public and/or the profession to know of the findings of a disciplinary hearing. This is in addition to the Respondent being named in this decision.
- [48] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990²³. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²⁴. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²⁵. The High Court provided

²⁰ *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.

²¹ [2001] NZAR 74

²² Refer sections 298, 299 and 301 of the Act

²³ Section 14 of the Act

²⁴ Refer sections 200 and 202 of the Criminal Procedure Act

²⁵ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*²⁶.

- [49] The courts have also stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published in the public interest²⁷. It is, however, common practice in disciplinary proceedings to protect the names of other persons involved as naming them does not assist the public interest.
- [50] Based on the above the Board will order further publication. Publication is necessary to ensure the public are informed of the loss of licence. Publication will also assist in ensuring other licensed building practitioners learn from the matter.

Section 318 Order

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

Penalty: Pursuant to section 318(1)(a)(i) of the Building Act 2004, the Respondent's licence is cancelled and the Registrar is directed to remove the Respondent's name from the register of Licensed Building Practitioners and pursuant to s 318(1)(a)(ii) of the Act the Board orders that the Respondent may not apply to be relicensed before the expiry of three years.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$2,500 (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(1)(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.

- [52] 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

- [53] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **20 November 2018**. 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.

²⁶ *ibid*

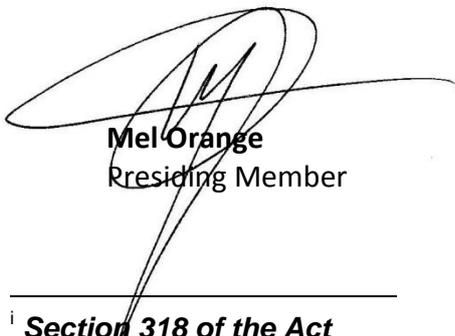
²⁷ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

[54] In calling for submissions on penalty, costs and mitigation the Board is not inviting the Respondent to offer new evidence or to express an opinion on the findings set out in this decision. If the Respondent disagrees with the Board's findings of fact and and/or its decision that the Respondent has committed a disciplinary offence the Respondent can appeal the Board's decision.

Right of Appeal

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

Signed and dated this 30th day of October 2018



Mel Orange
Residing 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 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.*