

Before the Building Practitioners Board

	BPB Complaint No. C2-01802
Licensed Building Practitioner:	Xiang Bai (the Respondent)
Licence Number:	BP 110135
Licence(s) Held:	Carpentry and Design AOP 1

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	Compliant
Hearing Location	Auckland
Hearing Type:	In Person
Hearing Date:	26 June 2018
Decision Date:	6 July 2018

Board Members Present:

Chris Preston (Presiding)
Mel Orange, Legal Member
Bob Monteith, LBP Carpentry and 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 Complaint into the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations¹ to hold a hearing in relation to building work at [Omitted]. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:
- (a) held himself or herself out as being licensed to carry out or supervise building work or building inspection work of a type that, at that time, he or she was not licensed to carry out or supervise (s 317(1)(db) of the Act);
 - (b) breached section 314B of the Act (s 317(1)(h) of the Act); and
 - (c) 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

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

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:

“... 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.

Procedure

- [5] The matter was set down to be heard in person. The Respondent was given notice of the hearing. A prehearing was scheduled and the Respondent indicated he would attend. He then travelled overseas and was not available. A prehearing document was issued. The Respondent then indicated he would not attend the hearing but that he might send an engineer to speak on his behalf.
- [6] The Board maintained the hearing as in “in person” hearing so as to give the Respondent an opportunity to appear and be heard and/or to send a representative. The Respondent did not appear. The matter proceeded on the basis of the papers before the Board.

Evidence

- [7] 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.
- [8] The Board received the complaint documentation and the Registrar’s Report. The Respondent did not engage in the complaint investigation at the Registrar Report phase. He did provide a response once the matter was set down by way of the Board’s Response Sheet which was sent to him together with the Notice of Proceeding.
- [9] The Complaint set out that the Respondent had been engaged to design two new houses for sections at Totara Heights, Auckland. The Respondent agreed to

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

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

undertake the design work via email on 19 April 2017 and remained in communication with the Complainant until 2 November 2017.

- [10] The Complainant stated that the Respondent was paid a fifty percent deposit but did not provide the plans within the agreed timeframe of six weeks and that the Respondent repeatedly put off the expected completion date of the designs and was difficult and uncommunicative. On 2 November 2017 the Respondent emailed stating:

"When the invoice paid, I will release my design"

- [11] The Complainant further stated that he became aware that the Respondent had been suspended from the Licensing Building Practitioners scheme whilst purporting to be carrying out the design work.

- [12] The Respondent's licensing history shows that the Respondent was suspended from 17 March 2017 until 28 June 2017. The suspension was imposed by the Board as a disciplinary penalty and the operation of section 319 of the Act under which a licensed building practitioner can be suspended for failure to pay a disciplinary fine or costs. The Registrar advised that the Respondent:

- (a) was contacted on 20 December 2016 and advised he had until 10 February 2017 to make payment towards his fine;
- (b) did not meet this deadline and so his licence was suspended on 17 March 2017;
- (c) made contact on 29 May 2017 to enquire about his outstanding fine and advised that he would pay the fine on 15 June 2017;
- (d) then made further contact on 26 June 2017 asking to pay the fine via credit card as the Council was needing his number; and
- (e) paid his fine on 28 June 2017 and his licence was reinstated.

- [13] The Respondent provided submissions for the hearing. in them he stated

I really didn't know my license been suspended until council notice me, about the payment I did make calls to find out why send me statement was not include amount I have paid, so I just been busy with 2 little boys and a new baby girl at that moment, all my work and life was disorderly. I couldn't push things active.

- [14] The Respondent also submitted that he had been supervised by an engineer and that he works with another licensed person but provided no evidence to support these assertions.

- [15] The Respondent also outlined issues with the development of the design and the Complainant's instructions which he said led to delays. He provided copies of emails

where he had sent designs that he had developed for the projects to the Complainant.

- [16] Included with the submission was a series of emails from the Respondent to the Complainant. They contained emails sent during the period of the Respondent's suspension. They each contained a footer with the Respondent's name, the Licensed Building Practitioner logo and a statement that he was a Licensed Designer and Construction Manager.

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 Board has also decided that the Respondent **has not**:
- (a) held himself or herself out as being licensed to carry out or supervise building work or building inspection work of a type that, at that time, he or she was not licensed to carry out or supervise (s 317(1)(db) of the Act) or
 - (b) breached section 314B of the Act (s 317(1)(h) of the Act).
- [19] The reasons for the Board's decisions follow.

Held Out as Licensed

- [20] Whilst on the face of it the Respondent's conduct falls squarely within this provision the Board is prevented from making a disciplinary finding under it as a result of the operation of section 297 of the Act. That section states:

297 Effect of licensing suspension

- (1) *A person is not a licensed building practitioner, for the purposes of this Act, for the period for which his or her [licensing] is suspended.*
- (2) *At the end of the period of suspension, the person's [licensing] is immediately revived (unless there is some other ground to suspend or cancel that person's [licensing] under this subpart.*

- [21] Moreover there is a specific offence in section 314 where a person holds themselves out as licensed when they are not:

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.*

- [22] Given the wording of section 297 and the creation of a specific offence in section 314 the provisions in section 317(1)(db) can only relate to a person who is, at the time of the conduct, licensed in one or more classes and holds themselves out as being licensed to carry out or supervise restricted building work in a class that they are not licensed in. Accordingly the Respondent cannot be found to have committed a disciplinary offence under this specific provision.

Outside of Competence

- [23] As regards working outside of one's competence 314B(b) of the Act provides:

A licensed building practitioner must—

(b) carry out or supervise building work only within his or her competence.

- [24] The Board is once again constrained by the provisions of section 297 and as such can take the charge no further.

Disrepute

- [25] Unlike the previous disciplinary charges discussed when looking at conduct that may bring the regime into disrepute the Board can take a wider range of matters into account and is not constrained to behaviour that has occurred whilst the licensed building practitioner is licensed. As such it can take into the Respondent's conduct from the time he accepted instructions through to when the complaint was made, including the period when he was suspended.

- [26] Critically the Respondent was licensed at the time the Complaint was made and in this respect the Board notes the provisions of section 315 of the Act:

315 Complaints about licensed building practitioners

- (1) *Any person may complain to the Board about the conduct of a licensed building practitioner in accordance with the regulations.*
- (2) *A complaint or inquiry, and any decision on the complaint or inquiry, may relate to a person who is no longer a licensed building practitioner but who was a licensed building practitioner at the time of the relevant conduct.*

- [27] The 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.

- [28] The Board, in C2-01111 considered whether the conduct complained of needs to be conduct carried out in the capacity of a licensed building practitioner. The Board

⁶ Board decision dated 2 July 2015.

notes that in the professions listed above there is no requirement for the conduct to have been in the course of carrying out that person's trade or profession. For example in the High Court held in *Davidson v Auckland Standards Committee No 3*⁷ a company director, who, in the course of his duties as a director 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.

- [29] Similarly in a determination of the Disciplinary Tribunal of the New Zealand Institute of Chartered Accountants⁸, 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.
- [30] 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 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

- [31] 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.

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

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

- [32] 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.
- [33] The conduct in question in the present case relates to the Respondent undertaking a design business that included restricted building work whilst not licensed and his holding himself out to be licensed and able to carry out the restricted building work¹⁶.
- [34] The Respondent's submitted that he was unaware of his suspension. This is notwithstanding multiple communications being sent to him. It is also noted that the suspension came about as a result of disciplinary action, where he was found to have been negligent, and the Respondent's failure to pay the fine and costs imposed on him. Again he would have received multiple communications about it.
- [35] As regards communications section 394 of the Act stipulates that notice or other document required to be served on, or given to, any person under this Act is sufficiently served if delivered to the person at the person's usual or last known place of residence or business. The Act further provides in section 302 that a licensed building practitioner has to maintain their details. This includes their postal address. As such there is no excuse for the Respondent not being aware of his suspension. If he was not, it is as a result of his own failings.
- [36] The Board also notes, as regards the present disciplinary matter, that the Respondent ignored the Complaint when it was first brought to his attention and only engaged once the matter was set down for a hearing and then only in a limited way. There is a pattern of the Respondent ignoring or being wilfully blind to matters that relate to his licence and his licencing.
- [37] It is also apparent from the evidence before the Board that the Respondent only became concerned about his licence once he needed it for submission of a design for a building consent. Until then he appears to have been content to undertake design work without a licence and to lead his client to believe that he was authorised to carry out such design work.
- [38] What the Board needs to consider is whether it should condone a licensed building practitioner slipping in an out of the scheme when it suits. The reality of design work is that the point in time when the licensed building practitioner has to prove that they are licensed is when they seek to submit a Certificate of Work under section 45(3) of the Act. The Board does not, however, consider that the licensing regime was designed nor intended by Parliament to allow a designer to operate by only being licensed at the time that they have to submit a Certificate of Work. This is

¹⁶ In this respect design work for a residential dwelling house is restricted building work that can only be carried out or supervised by a licensed building practitioner because of Building (Design Work Declared to be Building Work) Order 2007.

essentially what the Respondent has done. He has disregarded the licensing regime until such time as it mattered to him. At the same time he has not displayed any concern for his clients and has not provided them with the assurances the licensing regime affords them while he was carrying out restricted building work.

- [39] The Board is of the firm opinion that such behaviour is not what was intended by Parliament and that it is conduct that should not be condoned. In making this finding the Board has rejected the submission that the Respondent was working under supervision. There was no evidence to corroborate this, the client was not advised of it and, even if the Respondent was being supervised, he was still holding himself out as being licensed as was shown by his email footer that he was using.
- [40] 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.

- [41] The Board has taken this into consideration. It notes that the suspension resulted from disciplinary action, that the Respondent has been wilfully ignorant of his suspension and of the consequences of it and has only decided to adhere to his licensing obligations once it impacted on him. On this basis the Board find that the Respondent has brought the regime into disrepute and that the conduct was sufficiently serious enough to warrant a disciplinary outcome.

Penalty, Costs and Publication

- [42] 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.
- [43] The matter was dealt with on the papers. 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

- [44] 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*¹⁷ 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:

¹⁷ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

[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.

- [45] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*¹⁸ 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.
- [46] This is not the first time that the Respondent has been before the Board. This and the fact that the Respondent ignored the penalty and costs order from his first disciplinary offence are considered to be aggravating factors.
- [47] The Respondent has submitted that he has a young family and that he has to look after his uncle who is unwell. The Board has taken those matters into consideration as mitigation.
- [48] The Board considered cancellation of the Respondent's licence but decided to provide him with one last chance to show that he can adhere to the requirements of the licensing regime. Based on the above the Board's penalty decision is that the Respondent will be fined the sum of \$3,000. The level of the fine is set so as to act as a deterrent to others who may consider engaging in such behaviour.

Costs

- [49] 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."
- [50] 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 case¹⁹.
- [51] In *Collie v Nursing Council of New Zealand*²⁰ 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.*
- [52] A hearing was required and the Respondent, by way of his submissions has defended the matter. The Board's normal starting point for a hearing of this nature is \$2,000

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

¹⁹ *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.

²⁰ [2001] NZAR 74

but the hearing and investigation were not complex and as a result, and based on the above, the Board's costs order is that the Respondent is to pay the sum of \$1,000 toward the costs of and incidental to the Board's inquiry.

Publication

- [53] 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 Act²¹. 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.

- [54] 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.
- [55] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990²². The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²³. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²⁴. The High Court provided guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*²⁵.
- [56] 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 interest²⁶. 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.
- [57] Based on the above the Board will order further publication. The Board considers this is necessary so that other licensed building practitioners are made aware that the board will not condone persons continuing to hold themselves out as licensed and to continue to work as if they are when their licence is suspended.

Section 318 Order

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

²¹ Refer sections 298, 299 and 301 of the Act

²² Section 14 of the Act

²³ Refer sections 200 and 202 of the Criminal Procedure Act

²⁴ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

²⁵ *ibid*

²⁶ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Penalty: Pursuant to section 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of \$3,000.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$1,000 (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.

- [59] 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

- [60] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **30 July 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.

Right of Appeal

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

Signed and dated this 6th day of July 2018



Chris Preston
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*

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- (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.