

Before the Building Practitioners Board

	BPB Complaint No. CB26098
Licensed Building Practitioner:	Michael Broadhead (the Respondent)
Licence Number:	BP116590
Licence(s) Held:	Design AoP 2

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 Type:	On the Papers
Hearing and Draft Decision Date:	18 January 2023
Final Decision Date:	7 March 2023

Board Members Present:

Mrs F Pearson-Green, LBP, Design AoP 2
Ms J Clark, Barrister and Solicitor, Legal Member (Presiding)
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.

Draft Disciplinary Finding:

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

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Summary of the Board’s Decision

[1] The Respondent conducted himself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute. He is censured and ordered to pay costs of \$500. The decision will be recorded in the Register of Licensed Building Practitioners for a period of three years.

The Charges

- [2] On 18 January 2023, the Board received a Registrar’s Report in respect of a Board Inquiry about the conduct of the Respondent.
- [3] Under Regulation 22 of the Complaints Regulations, the Board must, on receipt of the Registrar’s Report, decide whether to proceed no further with the complaint because Regulation 21 of the Complaints Regulations applies.
- [4] Having received the report, the Board decided that Regulation 21 did not apply. Under Regulation 22, the Board is required to hold a hearing.
- [5] The Board’s jurisdiction is that of an inquiry. Board Inquiries are not prosecuted before the Board. Rather, it is for the Board to carry out any further investigation that it considers is necessary prior to it making a decision. In this respect, the Act provides that the Board may regulate its own procedures¹. It has what is described

¹ Clause 27 of Schedule 3

as a summary jurisdiction in that the Board has a degree of flexibility in how it deals with matters; it retains an inherent jurisdiction beyond that set out in the enabling legislation². As such, it may depart from its normal procedures if it considers doing so would achieve the purposes of the Act, and it is not contrary to the interests of natural justice to do so.

- [6] In this instance, the Board has decided that a formal hearing is not necessary. The Board considers that there is sufficient evidence before it to allow it to make a decision on the papers.
- [7] The Board does, however, note that there may be further evidence in the possession of persons involved in the matter. To that end, this decision is a draft Board decision. The Respondent will be provided with an opportunity to comment on the Board's draft findings and to present further evidence prior to the Board making a final decision. If the Board directs or the Respondent requests an in-person hearing, then one will be scheduled.

Disciplinary Offences Under Consideration

- [8] On the basis of the Registrar's Report, the Respondent's conduct that the Board resolved to investigate was whether the Respondent had conducted himself 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

- [9] 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*³ and in New Zealand in *Dentice v Valuers Registration Board*⁴.

Evidence

- [10] 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 that allow it to receive evidence that may not be admissible in a court of law.
- [11] On 2 August 2022 the Board held a hearing into the conduct of a Licensed Building Practitioner. On 22 August 2022, it made a decision in respect of that matter.⁶

² *Castles v Standards Committee No.* [2013] NZHC 2289, *Orlov v National Standards Committee 1* [2013] NZHC 1955

³ *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

⁴ [1992] 1 NZLR 720 at p 724

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

⁶ *William Adams* [2022] BPB 25810

- [12] The Respondent was issued with a lawful summons dated 27 June 2022, to appear at that hearing and give evidence. The summons stated the details of the date, time, and location of the hearing.
- [13] On 5 July 2022, prior to the hearing, the Respondent, in response to the summons, requested information about the case. He was sent the complaint documentation on 6 July 2022.
- [14] The Respondent did not attend the hearing on 2 August 2022. At the start time for the hearing, 10am, he was contacted by telephone, text and email by a Board Officer to ascertain his whereabouts. At 10.48 am on 2 August 2022, after the scheduled start time for the hearing, the Respondent called to say he “*hadn’t heard from us*” since he asked to be excused from the hearing. The Respondent was informed that no request to be excused had been received and that no further correspondence had been received from him since he was emailed with the documents on 6 July 2022.
- [15] The Respondent informed the Board Officer that he did not recall the email that was sent to him. It was immediately resent. The Respondent then stated to the Board Officer that he had decided after reading that document that it was not relevant to him.
- [16] The Respondent was asked a number of times to forward the email he stated he had sent asking to be excused from the hearing. He then stated that he did not email but that, upon reading the documents, he said he had nothing to do with the project and would not be coming to the hearing. The Board Officer explained to the Respondent that a summons is a statutory requirement and, if he wanted to be excused from the hearing, he should have provided that in writing. He stated that he was in no position to come to the hearing that day as he was pouring concrete.
- [17] In response to the Board Inquiry, the Respondent by email dated 6 October 2022, stated –

“Firstly, I didn’t have anything to do with the mentioned building work or specific projects outlined by Waitaki DC, I had spoken with Josh Dooley regarding this.

I have no knowledge of the LBP in question regarding the hearing therefore my input to attending was irrelevant which was outlined to WDC.

On the day of the email from [Omitted] on the 6th of July providing further information this had been overlooked as I had taken the day off to enjoy my birthday skiing with my wife. The email on the 2nd of August stating I hadn’t arrived for the hearing was not opened or received as I was pouring concrete on a job site and couldn’t make it. This was discussed with Lauren on the phone which she had called me.

In no way was the missing the witness summons made on purpose; it was a genuine mistake of overlooking the appearance requested.”

Draft Conclusion and Reasoning

- [18] 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.
- [19] 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 C2-01111⁷ and discussed the legal principles that apply.
- [20] The Board, in C2-01111, also considered whether the conduct complained of needs to be conduct carried out in the capacity of a licensed building practitioner. The Board 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*,⁸ 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.
- [21] Similarly, in a determination of the Disciplinary Tribunal of the New Zealand Institute of Chartered Accountants⁹, 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",¹⁰ and the courts have consistently applied an objective test when considering such conduct. In *W v Auckland Standards Committee 3 of the New Zealand Law Society*¹¹, 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.*¹²

⁷ Board decision dated 2 July 2015.

⁸ [2013] NZAR 1519

⁹ 24 September 2014

¹⁰ 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

¹¹ [2012] NZCA 401

¹² [2012] NZAR 1071 page 1072

- [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 convictions¹³;
 - honest mistakes without deliberate wrongdoing¹⁴;
 - provision of false undertakings¹⁵; and
 - conduct resulting in an unethical financial gain¹⁶.
- [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 and cases that have been considered under them make it clear that unethical or unprofessional conduct can amount to disreputable conduct.
- [25] On 26 October 2021, a Code of Ethics for Licensed Building Practitioners was established by an Order in Council (the Code). It came into force on 25 October 2022¹⁷. The conduct in this matter predated the Code. As such, it cannot be considered in light of it.
- [26] The interaction between the Code and disrepute has yet to be tested. The disciplinary provisions are not, however, mutually exclusive.
- [27] It is an offence under section 326 of the Act not to appear when summoned to do so. The offence carries a maximum penalty of a fine of \$5,000. In Board Inquiry matter James Smith [2020] BPB CB25585, the Board found that a Licensed Building Practitioner had brought the licensing regime into disrepute under section 317(1)9i) of the Act when he failed to appear at a hearing when lawfully summoned to do so. In that decision, the Board noted:
- “Licensed Building Practitioners are expected to cooperate with investigations and the courts have emphasised the same in respect of other disciplinary regimes.”¹⁸*
- [28] A licensed person’s duties go beyond those that relate to building work, as is made evident by the scope of the disciplinary charges under section 317 of the Act and the provisions of the Code of Ethics.
- [29] Failure to comply with a summons can also be viewed as a matter of contempt. The Board’s statutory powers do not include specific powers in respect of contempt. Other jurisdictions do have such powers. Contempt, in the context of disciplinary proceedings, is an act which tends to interfere with the course of a disciplinary

¹³ *Davidson v Auckland Standards Committee* No 3 [2013] NZAR 1519

¹⁴ *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

¹⁵ *Slack, Re* [2012] NZLCDT 40

¹⁶ *Colliev Nursing Council of New Zealand* [2000] NZAR 7

¹⁷ Clause 2, Building (Code of Ethics for Licensed Building Practitioners) Order 2021

¹⁸ *Orlov v National Standards Committee 1* [2013] NZHC 1955

investigation or hearing. Notwithstanding that the Act is silent as regards contempt, the Board considers that an act of contempt may come within the disrepute provisions of section 317 of the Act.

- [30] The Respondent's failure to attend and present evidence put the hearing in the matter of another Licensed Building Practitioner at risk.
- [31] Although the Respondent initially stated that he had asked by email to be excused from the hearing, no evidence of this request was provided, despite repeated requests for the Respondent to furnish it. Later the Respondent said he did not email such a request. Rather he stated he had not received the information he requested in respect of the hearing. Upon this being resent and read by him, the Respondent stated that it was not relevant to him.
- [32] Queries over whether or when the 6 July 2022 further information was received by the Respondent are not relevant to the obligation to attend the hearing on being summoned. There is no dispute that the Respondent received the summons and this is objectively evident in the Respondent replying by requesting the further information.
- [33] Later responses from the Respondent reiterated that he had no knowledge of the Licensed Building Practitioner in question or the specific projects being investigated at the hearing he was summoned to attend. It is not for the Respondent to decide the relevance of his input into the hearing. The Board had directed that he be summoned to appear at the hearing as a person who could give evidence based on its review of all of the available documentation, including information provided by the complainant and the Territorial Authority's property files. A summons is a statutory obligation and not something which the Respondent can choose to disregard.
- [34] The Board does not accept the Respondent's position that *"it was a genuine mistake of overlooking the appearance requested"*. The summons was received and responded to with a request for information, it was not overlooked. The suggestion, now, that the summons was overlooked does not sit with other statements made on 2 August 2022 to the Board Officer – that he had asked to be excused, that he had not received the 6 July 2022 email, but no mention was made of not receiving the summons itself.
- [35] The Board considers the Respondent had a cavalier attitude to the summons and that his conduct was contemptuous of his statutory obligation.
- [36] The Board does note that it could pursue a prosecution under section 326 of the Act. It considers, however, that the matter is better dealt with within the licensing regime as opposed to in the courts.
- [37] 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.

- [38] The Board does consider that the failure to appear when summonsed was serious. It is conduct that puts the disciplinary regime under the Act, and the purposes for which it was established (to protect the public and uphold standards) at risk. As such, it has decided to uphold the ground of discipline.

Draft Decision on Penalty, Costs and Publication

- [39] 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.
- [40] 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

- [41] 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*¹⁹ 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.

- [42] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*,²⁰ 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 a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors. In this case, there are no mitigating or aggravating factors.
- [43] Based on the above, the Board has decided that it will censure the Respondent. A censure is a formal expression of disapproval.

¹⁹ *HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27*

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

Costs

- [44] 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.”
- [45] 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 case²¹.
- [46] In *Collie v Nursing Council of New Zealand*,²² 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.*
- [47] The Board notes the matter was dealt with on the papers. There has, however, been costs incurred investigating the matter, producing the Registrar’s Report and in the Board making its decision. The costs have been less than those that would have been incurred had a full hearing been held. As such, the Board will order that costs of \$500 be paid by the Respondent. The Board considers that this is a reasonable sum for the Respondent to pay toward the costs and expenses of, and incidental to, the inquiry by the Board.

Publication

- [48] 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 Act²³. 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.*
- [49] 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.
- [50] Within New Zealand, there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990²⁴. The Criminal Procedure Act 2011 sets out

²¹ *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.

²² [2001] NZAR 74

²³ Refer sections 298, 299 and 301 of the Act

²⁴ Section 14 of the Act

grounds for suppression within the criminal jurisdiction²⁵. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²⁶. 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*²⁷.

[51] 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 interest²⁸. 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.

[52] Based on the above, the Board Will Not order further publication.

Draft Section 318 Order

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

Penalty: Pursuant to section 318(1)(d) of the Building Act 2004, the Respondent is censured.

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

In terms of section 318(5) of the Act, there will not be action taken to publicly notify the Board's action, except for the note in the Register and the Respondent being named in this decision.

[54] 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 Draft Decision

[55] The Board invites the Respondent to:

- (a) provide further evidence for the Board to consider; and/or
- (b) make written submissions on the Board's findings. Submissions may be on the substantive findings and/or on the findings on penalty, costs and publication.

[56] Submissions and/or further evidence must be filed with the Board by no later than the close of business on the 6th March 2023.

²⁵ Refer sections 200 and 202 of the Criminal Procedure Act

²⁶ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

²⁷ *ibid*

²⁸ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

- [57] If submissions are received, then the Board will meet and consider those submissions.
- [58] The Board may, on receipt of any of the material received, give notice that an in-person hearing is required prior to it making a final decision. Alternatively, the Board may proceed to make a final decision which will be issued in writing.
- [59] If no submissions or further evidence is received within the time frame specified, then this decision will become final.

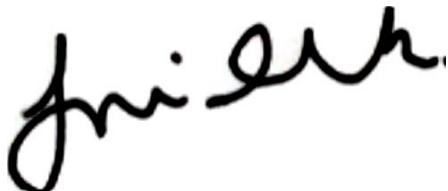
Request for In-Person Hearing

- [60] If the Respondent, having received and considered the Board’s Draft Decision, considers that an in-person hearing is required, then one will be scheduled, and a notice of hearing will be issued.
- [61] A request for an in-person hearing must be made in writing to the Board Officer no later than the close of business on 6th March 2023.
- [62] If a hearing is requested, this Draft Decision, including the Board’s indicative position on penalty, costs and publication, will be set aside.

Right of Appeal

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

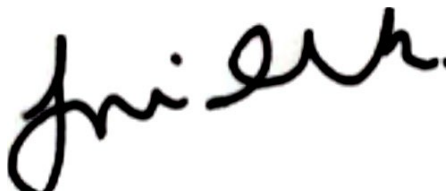
Signed and dated this 10th day of February 2023.



Mrs J Clark
Presiding Member

This decision and the order herein were made final on 7 March 2023 on the basis that no further submissions were received.

Signed and dated this 29th day of March 2023.



Mrs J Clark
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 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.*