

Before the Building Practitioners Board

	BPB Complaint No. C2-01702
Licensed Building Practitioner:	Jason Harford (the Respondent)
Licence Number:	BP 112087
Licence(s) Held:	Carpentry and Site 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	Complaint
Hearing Location	Auckland
Hearing Type:	In Person
Hearing Date:	27 February 2018
Decision Date:	20 March 2018

Board Members Present:

Chris Preston (Presiding)
Mel Orange, Legal Member
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 disciplinary offences under section 317(1)(da)(ii) and 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) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act); and
- (b) 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.

Evidence

- [5] 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.

- [6] The Board heard evidence from:

Jason Harford	Respondent
[Omitted]	Complainant

- [7] The Respondent was engaged on a labour only basis to carry out building work on a new build by [Omitted]. In or about December 2015 he started the building work. He did not complete the build as a result of payment issues with [Omitted] who were, on 26 May 2017, placed into liquidation.

- [8] The Respondent’s involvement in the build came to an end on 20 June 2016. This was evidenced by an email from the Respondent to the Auckland Council dated 28 November 2016 wherein he stated that as of 20 June 2016 he was no longer working on the project. In the email he noted:

Please note this Job Sat for over 9 months during the winter with no covers protecting the frame or mid flooring. On my Inspection I see [Omitted] have had the lower level roof laid. This job will need the upper and mid floor areas look at in My view the flooring and upper frames need to be replaced or as I requested for a independent durability inspector do a closer look of the upper frames before close in stages.

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

- [9] On 23 February 2017 the Complainant wrote to the Respondent requesting a record of work. She received a response on 27 February 2017 that he would provide a record of work if she settled outstanding accounts owed to him by [Omitted]. The Complainant had paid [Omitted] for work completed but they had not, in turn, paid the Respondent.
- [10] The Complainant then advised the Respondent by text message that he had an obligation to provide a record of work and that she was not responsible for the debts of [Omitted]. The Respondent replied on the same day stating that he knew what his “legal commitments” were and he noted the issues he had with [Omitted]. He went on to state that “Given you are the owner of the property my bill now lays with you”.
- [11] The Respondent also raised the issues he had advised the Auckland Council of in his email to them of 28 November 2016 with the Complainant and threatened to bring the matters to the Council’s attention unless an arrangement was made to pay him for his time. He stated:
- Have a think about which way you like to go send me your details and consent number email me with these details and I will reply with my invoice once we can agree on a very small sum o would be happy to forget report plus forward you RoW for the foundation work.*
- [12] The Respondent made a written response to the Complaint. In it he stated he had dropped the record of work off to [Omitted]. He attached a copy of an initial record of work he provided which was annotated and a subsequent record of work without the annotations.
- [13] The Respondent stated it was never his intention to hold back his record of work in March 2017 and that, once he was in contact with the Complainant, he did provide a record of work to her. He claimed [Omitted] was the Complainant’s agent.
- [14] The Respondent also set out the history of the build, his relationship with [Omitted] and the effect the liquidation had on his business and his family. He denied any threatening behaviour and apologised for the lateness of his record of work.
- [15] At the hearing the Respondent provided further details on the build and the financial issues he experienced with [Omitted]. He noted that he was building five other homes for [Omitted] at the time and was owed significant amounts of money by them.
- [16] Under questioning the Respondent accepted that his first record of work that he handed [Omitted] was provided to them on 26 March 2017.
- [17] The Respondent also gave evidence that, at the time the Complainant was requesting the record of work, he was under emotional and financial stress. He also noted that his business now has better systems in place for the provision of records of work.

Board's Conclusion and Reasoning

[18] The Board has decided that the Respondent **has**:

- (a) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act); and
- (a) 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.

Record of Work

- [19] There is a statutory requirement under section 88(1) of the Building Act 2004 for a licensed building practitioner to provide a record of work to the owner and the territorial authority on completion of restricted building work⁶.
- [20] Failing to provide a record of work is a ground for discipline under section 317(1)(da)(ii) of the Act. In order to find that ground for discipline proven, the Board need only consider whether the Respondent had "good reason" for not providing a record of work on "completion" of the restricted building work.
- [21] The Board discussed issues with regard to records of work in its decision C2-01170⁷ and gave guidelines to the profession as to who must provide a record of work, what a record of work is for, when it is to be provided, the level of detail that must be provided, who a record of work must be provided to and what might constitute a good reason for not providing a record of work.
- [22] The starting point with a record of work is that it is a mandatory statutory requirement whenever restricted building work under a building consent is carried out or supervised by a licensed building practitioner (other than as an owner-builder). Each and every licensed building practitioner who carries out restricted building work must provide a record of work.
- [23] The statutory provisions do not stipulate a timeframe for the licenced person to provide a record of work. The provisions in section 88(1) simply states "on completion of the restricted building work ...".
- [24] In most situations issues with the provision of a record of work do not arise. The work progresses and records of work are provided in a timely fashion. This did not occur in the present case. The Respondent's involvement came to an end in June 2016 and he advised the territorial authority of this in November 2016. Completion

⁶ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

⁷ *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

of the Respondent's restricted building work therefore occurred in June 2016. A record of work was not provided until March 2017, some nine months later, and then it was to [Omitted], not to the owner and the territorial authority.

- [25] On this basis the Board finds that the record of work was not provided on completion as required and the disciplinary offence has been committed.
- [26] The Respondent has argued that [Omitted] was the owner's agent and in providing the record of work to it he has satisfied the statutory requirements. Whilst evidence to substantiate this claim was not received the Board finds that even if [Omitted] was the owner's agent the record of work was not provided in a timely manner.
- [27] Section 317(1)(da)(ii) of the Act provides for a defence of the licenced building practitioner having a "good reason" for failing to provide a record of work. If they can, on the balance of probabilities, prove to the Board that one exists then it is open to the Board to find that a disciplinary offence has not been committed. Each case will be decided by the Board on its own merits but the threshold for a good reason is high.
- [28] In this instance there were payment issues with [Omitted]. Whilst this was not put forward as a good reason the Board reminds the Respondent that a Record of Work is a statutory requirement, not a negotiable term of a contract. The requirement for it is not affected by the terms of a contract, nor by contractual disputes. Licensed building practitioners should now be aware of their obligations to provide them and their provision should be a matter of routine.

Disrepute

- [29] 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 C2-01111⁸ and discussed the legal principles that apply.
- [30] 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 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*⁹ 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

⁸ Board decision dated 2 July 2015.

⁹ [2013] NZAR 1519

the legal profession, for example dishonesty or lack of integrity, could bring the legal profession into disrepute. This was rejected by the Court.

[31] Similarly in a determination of the Disciplinary Tribunal of the New Zealand Institute of Chartered Accountants¹⁰, 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.

[32] 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"¹¹ 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*¹² 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.*¹³

[33] 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 convictions¹⁴;
- honest mistakes without deliberate wrongdoing¹⁵;
- provision of false undertakings¹⁶; and
- conduct resulting in an unethical financial gain¹⁷.

[34] 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.

[35] The conduct in question in this case is the Respondent's attempts to use the record of work in order to obtain payments and threats to advise the Auckland Council of issues with the build unless a payment arrangement was entered into.

¹⁰ 24 September 2014

¹¹ 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

¹² [2012] NZCA 401

¹³ [2012] NZAR 1071 page 1072

¹⁴ *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519

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

¹⁶ *Slack, Re* [2012] NZLCDT 40

¹⁷ *Colliev Nursing Council of New Zealand* [2000] NZAR 7

- [36] Dealing with the first matter there was clear evidence that the Respondent was seeking payments from the Complainant that she was not liable for. The Complainant contracted with [Omitted] and she made the payments required under that contract. [Omitted], in turn, contracted with the Respondent. The Respondent's remedies and redress lie with [Omitted] not with the Complainant. His attempts to obtain payments from her were inappropriate and whilst the Board accepts he was under financial stress the conduct is not to be condoned.
- [37] Turning to the threats to notify the Auckland Council of issues with the build the Board notes that the Respondent had already advised the Council of them by way of his email of 28 November 2016. The Board also notes that the Respondent had an obligation under section 89 of the Act to notify the building consent authority of any breaches of the building consent. As such, in emailing his concerns to the Auckland Council, he was fulfilling his obligations. It is in concealing that he had done so and in using threats that he would notify the Council so as to obtain payments that his conduct comes into question. Again such conduct is not what the Board expects of a licensed building practitioner. The Respondent was being deceitful and the evidence shows he was attempting to use his deceit and the record of work to leverage payments that he was not entitled to.
- [38] The Board must, in order to find whether the conduct amounts to disrepute, also consider whether the conduct was sufficiently serious enough to make a disciplinary finding.
- [39] 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.*
- [40] The Board considers that had the conduct been limited to only a single instance then the conduct may not have been sufficiently serious enough. There was, however, a pattern of disreputable conduct and evidence that the Respondent knew that he had an obligation to provide a record of work but that he was prepared to use unethical measures to try and obtain payments. On this basis the Board finds that the Respondent's conduct was sufficiently serious enough to warrant a disciplinary finding of disrepute.

Penalty, Costs and Publication

- [41] 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.
- [42] The Board heard evidence during the hearing relevant to penalty, costs and publication and has decided to make indicative orders and give the Respondent an

opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

- [43] 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*¹⁸ 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.

- [44] The Board also 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.
- [45] The Respondent has committed two disciplinary offences. Dealing firstly with the section 317(1)(da)(ii) record of work matter. Record of work matters are at the lower end of the disciplinary scale. The Board's normal starting point for a failure to provide a record of work is a fine of \$1,500. In this instance there are aggravating factors but as these also relate to the finding of disrepute they will be dealt with as part of the penalty for that offence. There is also significant mitigation but again this more appropriately dealt with as part of the Board's penalty findings in relation to disrepute. The Board's penalty decision for the record of work matter is therefore that the Respondent pay a fine of \$1,500.
- [46] The disrepute matter is the far more serious offence. The penalty should reflect this. The Board does, however, note that there is significant mitigation. The Respondent was placed in a tenuous financial position by [Omitted] and his conduct was coloured by this. On this basis the Board has reduced the fine from a starting point of \$3,000 to a fine of \$1,500.

Costs

- [47] 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."

¹⁸ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

- [48] 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.
- [49] 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.

- [50] Based on the above the Board's costs order is that the Respondent is to pay the sum of \$2,000 toward the costs of and incidental to the Board's inquiry. This is significantly less than 50% of the actual costs incurred.

Publication

- [51] 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.

- [52] 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.
- [53] 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 guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*²⁶.

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

²⁶ *ibid*

[54] 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.

[55] Based on the above the Board will not order further publication.

Section 318 Order

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

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 \$2,000 (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 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.

[57] 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

[58] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **13 April 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

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

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

Signed and dated this 20th day of March 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*
 - (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.*