

the Building Practitioners Board

	BPB Complaint No. CB26400
Licensed Building Practitioner:	Peter Alan Dalzell (the Respondent)
Licence Number:	BP131014
Licence(s) Held:	Carpentry

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 Type:	On the Papers
Draft Decision Date:	9 April 2024
Final Decision:	4 June 2024

Board Members:

Mr M Orange, Chair, Barrister (Presiding)
Ms K Reynolds, Construction Manager
Mr G Anderson, LBP, Carpentry and Site AoP 2

Procedure:

The matter was considered by the Building Practitioners Board (the Board) under the provisions of Part 4 of the Building Act 2004 (the Act), the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Complaints Regulations) and the Board's Complaints and Inquiry Procedures.

Disciplinary Finding:

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

The Respondent is censured and ordered to pay costs of \$500. A record of the disciplinary offending will be recorded on the Public Register for a period of three years.

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Summary of the Board’s Decision

- [1] A complaint was made alleging various contraventions of section 317 of the Act. The Board decided that the only allegation it would further investigate was whether the Respondent may have brought the licensing regime into disrepute under section 317(1)(i) and that it would deal with the matter on the papers.
- [2] The specific conduct the Board made a finding on related to financial matters that resulted in criminal charges, for which the Respondent was granted diversion. The Board decided that the conduct that led to those charges was disreputable and that it would censure the Respondent for it. The Board also ordered that the Respondent pay costs of \$500. A record of the disciplinary offence will be recorded on the public Register for a period of three years.

The Charges

- [3] Under regulation 10 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 9 of the Complaints Regulations applies. Having received the report, the Board decided that regulation 9 applied to some but not to all of the allegations.

Regulation 10 Decision

- [4] In this matter, the disciplinary charge the Board resolved to further investigate¹ was whether the Respondent may have 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 contrary to section 317(1)(i) of the Act.

Regulation 9 Decisions

- [5] The complaint to the Board also contained allegations that the Respondent had:
- (a) been convicted, whether before or after he or she is licensed, by any court in New Zealand or elsewhere of any offence punishable by imprisonment for a term of 6 months or more and the commission of the offence reflects adversely on the person's fitness to carry out or supervise building work or building inspection work (s 317(1)(a) of the Act);
 - (b) carried out or supervised building work in a negligent or incompetent manner (s 317(1)(b) of the Act);
 - (c) carried out or supervised building work that does not comply with a building consent (s 317(1)(d) of the Act); and
 - (d) breached the code of ethics prescribed under section 314A of the Act (s 317(1)(g) of the Act).
- [6] Dealing firstly with the allegation that the Respondent is not a fit and proper person under section 317(1)(a) of the Act, the Respondent was charged with qualifying offences but was not convicted of them as he underwent a diversion process. As such, the conduct does not come within the ground for discipline, and it will not be further investigated because regulation 9(a) of the Complaints Regulations applies:

Complaint not warranting further investigation

A complaint does not warrant further investigation if—

- (a) it does not come within the grounds for discipline;*

- [7] Regulation 9(a) also applies to the allegation that the Respondent breached the Code of Ethics. The Code of Ethics was introduced by Order in Council by way of the Building (Code of Ethics for Licensed Building Practitioners) Order 2021. The Order specified that it would come into force on 25 October 2022. As such, the disciplinary provision in section 317(1)(g) of the Act only applies to conduct that occurred after 25 October 2022. The matters complained about with respect to the Code of Ethics occurred prior to that date. It follows that they do not come within the specified ground of discipline.

¹ The resolution was made following the Board's consideration of a report prepared by the Registrar in accordance with regulation 10 of the Complaints Regulations.

- [8] Turning to the allegations under section 317(1)(b) and (d) of the Act, the Board decided that regulation 9(f)(ii) of the Complaints Regulations applied. It provides:

Complaint not warranting further investigation

A complaint does not warrant further investigation if—

- (f) *the investigation of it is—*
(ii) *unnecessary;*

- [9] In considering whether the investigation of a complaint is necessary, the Board must consider the directions of the courts regarding the threshold for matters to be dealt with as a disciplinary matter. In short, the conduct has to fall seriously short of expected standards of conduct.²

- [10] In this matter, some of the issues complained about were not directly related to building work carried out or supervised by the Respondent or were the subject of contractual disputes, which have been dealt with in other forums. In this respect, disciplinary action under the Act is not designed to redress issues or disputes. In *McLanahan and Tan v The New Zealand Registered Architects Board*,³ 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.”

- [11] Taking those factors into account, the Board has decided that whilst there was some evidence of building work that may not have been completed to an acceptable standard, the matters raised did not reach the seriousness threshold as outlined in court decisions.

- [12] It is on the basis of the above matters and the facts as presented in the complaint and response that the Board has decided that it will not proceed with the allegations of negligence or incompetence or disrepute.

Draft Decision Process

- [13] The Board’s jurisdiction is that of an inquiry. Complaints are not prosecuted before the Board. Rather, it is for the Board to carry out any further investigation that it considers necessary prior to it making a decision.

- [14] Ordinarily, the Board makes a decision having held a hearing.⁴ The Board may, however, depart from its normal procedures if it considers doing so would achieve

² *Collie v Nursing Council of New Zealand* [2001] NZAR 74

³ [2016] HZHC 2276 at para 164

⁴ Regulation 10 of the Complaints Regulations.

the purposes of the Act, and it is not contrary to the interests of natural justice to do so.⁵

[15] In this instance, the Board decided that a formal hearing was not necessary. The Board considered that there was sufficient evidence before it to allow it to make a decision on the papers. It noted, however, that there may have been further evidence in relation to the matter that the Board was not aware of. To that end, it issued a Draft Decision. The Respondent was provided with an opportunity to comment on the draft findings and to present further evidence prior to the Board making a final decision. The Board further noted that if the Respondent requested an in-person hearing, then the Draft Decision would be set aside, and a hearing would be scheduled.

Evidence

[16] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁶. 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.

Disrepute

[17] Conduct which brings or is likely to bring the regime into disrepute is that which may result in the regime being held in low esteem by the public. Examples include:

- criminal convictions;⁷
- honest mistakes without deliberate wrongdoing;⁸
- provision of false undertakings;⁹ and
- conduct resulting in an unethical financial gain.¹⁰

[18] The Courts have consistently applied an objective test when considering such conduct.¹¹ The subjective views of the practitioner or other parties involved are irrelevant. The conduct need not have taken place in the course of carrying out or supervising building work.¹²

[19] To make a finding of disreputable conduct, the Board needs to determine, on the balance of probabilities,¹³ that the Respondent has brought the regime into

⁵ Under Clause 27 of Schedule 3 the Board may regulate its own procedure and it has summary jurisdiction, which allows for a degree of flexibility in how it deals with matters: *Castles v Standards Committee No.* [2013] NZHC 2289, *Orlov v National Standards Committee 1* [2013] NZHC 1955

⁶ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

⁷ *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519

⁸ *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

⁹ *Slack, Re* [2012] NZLCDT 40

¹⁰ *Colliev Nursing Council of New Zealand* [2000] NZAR 7

¹¹ *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

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

¹³ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1. Under section 322 of the Act, the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.

disrepute and that the conduct was sufficiently serious enough for the Board to make a disciplinary finding.¹⁴

The conduct under investigation

[20] The conduct that the Board decided that it would investigate was the Respondent's invoicing, which led to a police complaint, charges being laid under the Crimes Act and the Respondent going through a diversion process. Counsel for the Respondent, in response to the complaint, submitted:

Regrettably, some overcharging did occur on the project and Mr Dalzell explains in his statement how this occurred. He has also explained that he this was the first significant project that he had run and he has taken steps to ensure that he does not make the same mistakes again. He has also paid reparations to the [OMITTED] totalling \$35,000, which he estimates as being more than double the total overcharged. The process has been stressful and costly for him so he is highly motivated to ensure that he is never involved in a similar situation. In these circumstances, it is submitted that if the Board does make a finding that it has grounds to discipline Mr Dalzell under section 317 of the Building Act 2004 then no further penalty is necessary or appropriate. Rather, imposing a further penalty on Mr Dalzell would be disproportionate given that he has already made a significant reparation payment and been through a stressful Police investigation. Furthermore, if his license was cancelled or suspended this would likely delay projects that he is already involved in and would inconvenience his clients.

[21] The Respondent also filed a statement in response to the complaint. The Respondent explained his conduct, the circumstances surrounding the police complaint, and the diversion process. The Respondent downplayed his conduct. However, the fact remains that overcharging did occur.

[22] As noted above, various types of conduct can be disreputable. Included and relevant to the conduct under investigation are honest mistakes without deliberate wrongdoing¹⁵ and conduct resulting in unethical financial gain.¹⁶ On that basis, the Board finds that the Respondent's conduct was, from an objective standpoint, likely to bring the regime into disrepute.

Was the conduct serious enough?

[23] The departure from an acceptable standard was serious, and it is conduct that would now come within the provisions of the Code of Ethics for Licensed Building Practitioners. The Code was introduced by Order in Council in October 2021,¹⁷ and came into in October 2022. As such, it does not apply to the matters before the Board. However, the provisions in it are illustrative of the types of conduct that are

¹⁴ *Collie v Nursing Council of New Zealand* [2001] NZAR 74

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

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

¹⁷ Building (Code of Ethics for Licensed Building Practitioners) Order 2021.

to be safeguarded against within the licensing regime. Part 5 of the Code covers the principle of behaving professionally.¹⁸ Included clause 25:

25 You must conduct your business in a methodical and responsible manner

In conducting any business that involves carrying out or supervising building work, you must take all reasonable steps to ensure that—

- (a) accurate records of money received and paid out are maintained; and*
- (b) a record of other appropriate documents is maintained.*

[24] The ethical standard shows the importance of financial management by those who are self-employed.¹⁹

[25] Moreover, the conduct was serious enough to warrant the involvement of the police, and it did lead to the Respondent being granted diversion by the District Court. In those circumstances, the Board finds that the conduct was serious enough to warrant a disciplinary outcome.

Further Evidence and Submissions Received

[26] Following the Board issuing a Draft Decision, a submission was received from the Respondent. He set out various factors that he considered should be taken into account by the Board with regard to its penalty orders. He did not contest the substantive findings or request an in-person hearing. On that basis, the Board affirms its original decision. The Respondent's penalty submissions are discussed in relation to the Board's final decision on penalty, costs and publication below.

Board's Final Decision

[27] The Respondent **has** brought the regime into disrepute.

Penalty, Costs and Publication

[28] 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.

[29] The matter was dealt with on the papers. The Board made an indicative order in its Draft Decision. It has since received submissions and has made a final decision regarding penalty, costs, and publication.

Penalty

[30] The Board has the discretion to impose a range of penalties.ⁱⁱ Exercising that discretion and determining the appropriate penalty requires that the Board balance various factors, including the seriousness of the conduct and any mitigating or

¹⁸ Clause 6 of the Code sets out four principles with the Code.

¹⁹ Clause 3 of the Code distinguishes between those who are employed and those who are self-employed.

aggravating factors present.²⁰ It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:²¹

- (a) protection of the public and consideration of the purposes of the Act;²²
- (b) deterring other Licensed Building Practitioners from similar offending;²³
- (c) setting and enforcing a high standard of conduct for the industry;²⁴
- (d) penalising wrongdoing;²⁵ and
- (e) rehabilitation (where appropriate).²⁶

- [31] Overall, the Board should assess the conduct against the range of penalty options available in section 318 of the Act, reserving the maximum penalty for the worst cases²⁷ and applying the least restrictive penalty available for the particular offending.²⁸ In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty²⁹ that is consistent with other penalties imposed by the Board for comparable offending.³⁰
- [32] In general, when determining the appropriate penalty, the Board adopts a starting point based on the principles outlined above prior to considering any aggravating and/or mitigating factors present.³¹
- [33] The Board noted in the Draft Decision that ordinarily, the Board would adopt a starting point of a fine or other punitive action for conduct of this type. The Board went on to note that the Respondent had gone through diversion and had paid reparation. In those circumstances, the Board indicated that a censure would suffice as it will ensure that the Board's condemnation of the conduct is recorded. A censure is a public expression of disapproval.

Penalty Submissions

- [34] The Respondent asked that he not be censured. He set out the reasons why.
- [35] The Board views a censure as the lowest form of penalty that it can impose. Further, it considers that when a disciplinary finding is made, it is obligated to impose a

²⁰ *Ellis v Auckland Standards Committee* 5 [2019] NZHC 1384 at [21]; cited with approval in *National Standards Committee (No1) of the New Zealand Law Society v Gardiner-Hopkins* [2022] NZHC 1709 at [48]

²¹ Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

²² Section 3 Building Act

²³ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²⁴ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

²⁵ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

²⁶ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354; *Shousha v A Professional Conduct Committee* [2022] NZHC 1457

²⁷ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²⁸ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

²⁹ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

³⁰ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

³¹ In *Lochhead v Ministry of Business Innovation and Employment* 3 November [2016] NZDC 21288 the District Court recommended that the Board adopt the approach set out in the Sentencing Act 2002.

penalty. In this respect, whilst section 318(1) uses the phrase “may” in connection with the penalty provisions, which suggests the possibility of discretion, the Board notes that the disciplinary provisions of other schemes expressly enable the decider to take no action, whereas the Building Act does not. Section 147M(h) of the Electricity Act 1992, for example, stipulates that the Electrical Workers Registration Board may “make no order”. Section 106(1)(h) of the Plumbers, Gasfitters, and Drainlayers Act 2006 contains the same provision. Section 318 of the Building Act 2004 does not contain a similar provision. On this basis, the Board has taken the approach that Parliament did not intend that the Board have a similar discretion under the Building Act. Rather, the Board considers that the wording in 318(1) of the Act, and reference to “may”, is in respect of a discretion to choose amongst the various penalty options in section 318(1)(a) to (f).

- [36] The Board also notes that one of the intentions of the licensing regime was to ensure the public is informed when selecting a licensed building practitioner. Disciplinary action taken under section 318 must, under section 301(1)(l)(iii) of the Act, be recorded in the Register for a period of three years. The Register is established by section 298 of the Act. Section 299 sets out its purposes, which are:

The purpose of the Register is—

- (a) to enable members of the public to—*
 - (i) determine whether a person is a licensed building practitioner and, if so, the status and relevant history of the person’s [licensing]; and*
 - (ii) choose a suitable building practitioner from a list of licensed building practitioners; and*
 - (iii) know how to contact the building practitioner; and*
 - (iv) know which licensed building practitioners have been disciplined within the last 3 years; and*
- (b) to facilitate the administrative, disciplinary, and other functions of the Board and the Registrar under this Act.*

- [37] Taking the above provisions into consideration, it is clear that one of the purposes of the Register is to allow an informed consumer to choose a licensed building practitioner. Providing information as regards disciplinary action helps to facilitate this. Not taking any action under section 318 would defeat this purpose.

- [38] Given the above, the Board must impose a penalty. A censure remains the appropriate penalty.

Costs

- [39] Under section 318(4) of the Act, the Board may require the Respondent to pay the costs and expenses of, and incidental to, the inquiry by the Board. The rationale is

that other Licensed Building Practitioners should not be left to carry the financial burden of an investigation and hearing.³²

- [40] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings³³. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case³⁴.
- [41] The Board has adopted an approach to costs that uses a scale based on 50% of the average costs of different categories of hearings: simple, moderate and complex. The current matter was simple. Adjustments are then made.
- [42] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$500 toward the costs of and incidental to the Board's inquiry.

Publication

- [43] 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 Act,³⁵ and he will be named in this decision which will be available on the Board's website. The Board is also able, under section 318(5) of the Act, to order further publication.
- [44] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.³⁶ Further, as a general principle, publication 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, and the courts have stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published.³⁷
- [45] Based on the above, the Board will not order any publication over and above the record on the Register, the Respondent being named in this decision, and the publication of the decision on the Board's website. The Respondent should note, however, that as the Board has not made any form of suppression order, other entities, such as the media or the Ministry of Business Innovation and Employment, may publish under the principles of open justice reporting.

³² *Collie v Nursing Council of New Zealand* [2001] NZAR 74

³³ *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

³⁴ *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.

³⁵ Refer sections 298, 299 and 301 of the Act

³⁶ Section 14 of the Act

³⁷ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Section 318 Order

[46] 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, the Respondent will be named in this decision, which will be published on the Board's website.

[47] 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.

Right of Appeal

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

Signed and dated this 5th day of July 2024



Mr M Orange
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:*

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- (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 318 Disciplinary Penalties

- (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 1 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.*

iii 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.*