

Before the Building Practitioners Board

	BPB Complaint No. CB25333
Licensed Building Practitioner:	Richard Robinson (the Respondent)
Licence Number:	BP 113862
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	Board Inquiry
Hearing Location	Wellington
Hearing Type:	On the Papers
Hearing Date:	11 February 2020
Draft Decision Date:	09 March 2020
Final Decision Date:	25 June 2020

Board Members Present:

Chris Preston (Presiding)
Mel Orange, Legal Member
Richard Merrifield, LBP, Carpentry and Site AOP 2
David Fabish, LBP, Carpentry Site AOP 2
Robin Dunlop, Retired Professional Engineer
Bob Monteith, LBP, Carpentry and Site AOP 2
Faye Pearson-Green, LBP Design AOP 2
Rob Shao, LBP, Carpentry and Site AOP 1

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)(a) of the Act.

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Introduction

- [1] On 11 February 2020 the Board received a Registrar’s Report in respect of a Board Inquiry into the conduct of the Respondent.
- [2] 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.
- [3] Having received the report the Board decided that regulation 21 did not apply. Under regulation 22 the Board is required to hold a hearing.
- [4] 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 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.

¹ Clause 27 of Schedule 3

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

- [5] 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.
- [6] The Board does, however, note that there may be further evidence in the possession of persons involved in the matter or that the Board may not have interpreted the evidence correctly. To that end this decision is a draft Board decision. The Respondent will be provided with an opportunity to make 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

- [7] On the basis of the Registrar's Report the Respondent's conduct that the Board resolved to investigate was that the Respondent had 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.

Function of Disciplinary Action

- [8] 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.
- [9] 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*⁵ 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."

- [10] In a similar vein the Board's investigation and hearing process is not designed to address every issue that is raised in a complaint or by a complainant. The disciplinary scheme under the Act and Complaint's Regulations focuses on serious conduct that warrants investigation and, if upheld, disciplinary action. Focusing on serious

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 [2016] HZHC 2276 at para 164

conduct is consistent with decisions made in the New Zealand courts in relation to the conduct of licensed persons⁶:

... the statutory test is not met by mere professional incompetence or by deficiencies in the practice of the profession. Something more is required. It includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse.

- [11] Finally, 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. Those grounds do not include contractual breaches other than when the conduct reaches the high threshold for consideration under section 317(1)(i) of the Act which deals with disrepute.
- [12] The above commentary on the limitations of the disciplinary process are important to note as, on the basis of it, the Board Board’s inquiries, and this decision, focus on and deal with the serious conduct complained about.

Evidence

- [13] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁷. 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.
- [14] The Respondent was tried and convicted of sexual assault in the District Court at Queenstown. The conduct occurred in April 2017. The Judge, who noted the victim experienced “severe trauma” from the attack and that she felt dehumanised sentenced the Respondent to 5 years imprisonment concurrent with an 18 month term of imprisonment for a weapons charge on 26 July 2019.
- [15] The Respondent was served with the Inquiry documentation. He did not respond.

Draft Conclusion and Reasoning

- [16] The Board has decided that the Respondent **has** 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 and **should** be disciplined
- [17] The disciplinary provision in section 317(1)(a) of the Act requires two matters to be satisfied. The first is whether the Respondent 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.
- [18] Sexual offending carries significant periods of imprisonment. The first element has been satisfied.

⁶ *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200

⁷ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

- [19] The second element of the disciplinary charge is whether the commission of that offence reflects adversely on the person's fitness to carry out or supervise building work or building inspection work.
- [20] This element requires consideration by the Board of the interrelationship between the conviction and the Respondent's fitness to be a licensed person.
- [21] Unlike other licensing regimes the licensed building practitioner regime does not contain any provisions which require an assessment of an applicant's character or fitness to hold a licence at the time they apply⁸. Rather, in the Building Act, there is an ability to assess this subsequent to a person being licensed by way of section 317(1)(a) and it does not matter that the criminal offending predated the person being licensed.
- [22] Other licensing regimes have similar post licensing provisions as regards fitness to be a licensee. For example the misconduct provisions in section 73(d) of the Real Estate Agents Act under which a ground of misconduct is where conduct "*constitutes an offence for which the licensee has been convicted, being an offence that reflects adversely on the licensee's fitness to be a licensee*" and section 100(1)(c) of the Health Practitioners Competence Assurance Act 2003 where "*the practitioner has been convicted of an offence that reflects adversely on his or her fitness to practise*".
- [23] Decisions from within those jurisdictions are of assistance in determining the matter before the Board. In *Professional Conduct Committee v Martin*⁹ the court stated:
- "Fitness' often may well be something different to competence. Aspects of general deterrence as well as specific deterrence remain relevant. So too, is the broader consideration of the public or community's confidence and the upholding the standards of the nursing profession*
- [24] In *Hart v Auckland Standards Committee 1 of The New Zealand Law Society*¹⁰ the High Court stated:
- [185] As the Court noted in Dorbu, the ultimate issue in this context is whether the practitioner is not a fit and proper person to practise as a lawyer. Determination of that issue will always be a matter of assessment having regard to several factors.*
- [186] The nature and gravity of those charges that have been found proved will generally be important. They are likely to inform the decision to a significant degree because they may point to the fitness of the practitioner to remain in practice. In some cases these factors are determinative, because they will demonstrate conclusively that the practitioner is unfit to continue to*

⁸ Compare with the licensing provisions in section 91(d) of the Electricity Act 1992 and section 36(d) of the Plumbers, Gasfitters, and Drainlayers Act 2006 both of which have a requirement to be a fit and proper person for registration

⁹ High Court WN 2007

¹⁰ [2013] 3 NZLR 103

practice as a lawyer. Charges involving proven or admitted dishonesty will generally fall within this category.

[187] In cases involving lesser forms of misconduct, the manner in which the practitioner has responded to the charges may also be a significant factor. Willingness to participate fully in the investigative process, and to acknowledge error or wrongdoing where it has been established, may demonstrate insight by the practitioner into the causes and effects of the wrongdoing. This, coupled with acceptance of responsibility for the misconduct, may indicate that a lesser penalty than striking off is sufficient to protect the public in the future.

[188] For the same reason, the practitioner's previous disciplinary history may also assume considerable importance. In some cases, the fact that a practitioner has not been guilty of wrongdoing in the past may suggest that the conduct giving rise to the present charges is unlikely to be repeated in the future. This, too, may indicate that a lesser penalty will be sufficient to protect the public.

[189] On the other hand, earlier misconduct of a similar type may demonstrate that the practitioner lacks insight into the causes and effects of such behaviour, suggesting an inability to correct it. This may indicate that striking off is the only effective means of ensuring protection of the public in the future.

[25] Applying the tests and factors outlined above the Board notes:

(a) Nature of the charges:

The Respondent was convicted of serious sexual offending and of a weapons offence. Carrying out or supervising building work is an undertaking which involves interactions with client's, many of whom are vulnerable. As such there is a correlation between the nature of the charges and fitness to be licensed.

(b) Gravity of the charges:

The convictions were serious offending. The penalty imposed reflects this.

(c) Acceptance of responsibility:

The Respondent has not participated in the disciplinary process. It is noted that the Respondent defended the charges so his acceptance of wrongdoing may be limited.

(d) Previous history:

The Respondent does not have a history with the Board. The Board is not aware of any other criminal offending. The Respondent does have a chequered licensing history with a number of administrative suspensions noted.

(e) The effect on public confidence:

The Board considers a person convicted of serious sexual offending is the most significant factor. It has no doubt that the Respondent's conduct would have an effect on public confidence in the licensing regime.

[26] Given the above factors the Board finds that the second element of section 317(1)(a) has been established in that the convictions reflect adversely on the Respondent's fitness to carry out or supervise building work or building inspection work.

Draft Decision on Penalty, Costs and Publication

[27] 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.

[28] 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

[29] 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*¹¹ 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.

[30] Deterrence was also noted in *Hart* and in *Dorbu v New Zealand Law Society (No 2)*¹². The High Court when discussing penalty stated:

[35] The principles to be applied were not in issue before us, so we can briefly state some settled propositions. The question posed by the legislation is whether, by reason of his or her conduct, the person accused is not a fit and proper person to be a practitioner. Professional misconduct having been established, the overall question is whether the practitioner's conduct, viewed overall, warranted striking off. The Tribunal must consider both the risk of reoffending and the need to maintain the reputation and standards of the legal profession. It must also consider whether a lesser penalty will suffice.

¹¹ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

¹² [2012] NZAR 481

The Court recognises that the Tribunal is normally best placed to assess the seriousness of the practitioner's offending. Wilful and calculated dishonesty normally justifies striking off. So too does a practitioner's decision to knowingly swear a false affidavit. Finally, personal mitigating factors may play a less significant role than they do in sentencing.

- [31] Cancellation of a license is the equivalent of striking off within the licensed building practitioner regime.
- [32] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*¹³ 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.
- [33] The Respondent has committed a serious disciplinary offence which relates to serious criminal offending.
- [34] The Respondent's approach to the matters under inquiry is also an aggravating feature as the manner in which a licensed person responds to a disciplinary complaint and conducts their defence can be taken into consideration by the Board. In *Daniels v Complaints Committee*¹⁴ the High Court held that it was permissible to take into account as an adverse factor when determining penalty that the practitioner had responded to the complaints and discipline process in a belligerent way. Whilst he has not been belligerent the Respondent has not engaged in the disciplinary process.
- [35] Taking all of the above factors into account the Board considers that a cancellation of the Respondent's licence is the only viable penalty option open to it.
- [36] Accordingly, the Board will cancel the Respondent's licence and order that he may not apply to be relicensed for a period of five years.

Costs

- [37] 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."
- [38] 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 case¹⁵.

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

¹⁴ [2011] 3 NZLR 850.

¹⁵ *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.

[39] In *Collie v Nursing Council of New Zealand*¹⁶ 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.

[40] 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

[41] 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 Act¹⁷. 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.

[42] 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.

[43] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990¹⁸. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction¹⁹. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²⁰. 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*²¹.

[44] 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 interest²². It is,

¹⁶ [2001] NZAR 74

¹⁷ Refer sections 298, 299 and 301 of the Act

¹⁸ Section 14 of the Act

¹⁹ Refer sections 200 and 202 of the Criminal Procedure Act

²⁰ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

²¹ *ibid*

²² *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

however, common practice in disciplinary proceedings to protect the names of other persons involved as naming them does not assist the public interest.

[45] Based on the above the Board will order further publication.

Draft Section 318 Order

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

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

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(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.

[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.*

Submissions on Draft Decision

[48] 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.

[49] Submissions and/or further evidence must be filed with the Board by no later than the close of business on **24 June 2020**.

[50] If submissions are received, then the Board will meet and consider those submissions.

[51] 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.

[52] If no submissions or further evidence is received within the time frame specified, then this decision will become final.

Request for In-Person Hearing

- [53] 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.
- [54] A request for an in-person hearing must be made in writing to the Board Officer no later than the close of business on **24 June 2020**.

Right of Appeal

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

Signed and dated this 3rd day of June 2020



Chris Preston
Presiding Member

This decision and the order herein were made final on 25 June 2020 on the basis that no further submissions were received.

Signed and dated this 25th day of June 2020



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:*

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- (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.