Plumbers,
Gasfitters and
Drainlayers Board

# PIDGEON v BROWNE

## Plumbers, Gasfitters & Drainlayers Board Disciplinary Decision (2023/14)

### Summary

Mitchell Jason Browne, Certifying Plumber, Tradesman Gasfitter, was charged with negligent or incompetent gasfitting and improper conduct in performing gasfitting work. The charges related to gasfitting work carried out at a property in Christchurch.

Mr Browne pleaded guilty to the charges.

The Board considered Mr Browne's conduct was highly serious. The Board accepted there were no aggravating factors in the case and that Mr Browne was entitled to credit for pleading guilty, being cooperative throughout the process, having no previous disciplinary history, remediating the work and refunding the homeowner, undertaking further training, and being remorseful.

The Board ordered the suspension of Mr Browne's Tradesman Gasfitter registration for a period of six months, ordered him to pay a fine of $4,000, and pay $3,650 towards costs.

**IN THE MATTER OF** a disciplinary hearing pursuant to section 101 of the Plumbers, Gasfitters, and Drainlayers Act 2006

**BETWEEN** **MICHAEL PIDGEON**

**Investigator**

**AND** **MITCHELL JASON BROWNE**
Certifying Plumber, Tradesman Gasfitter, of Christchurch

**Registered Person**

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# DECISION OF THE BOARD
# 4 DECEMBER 2023

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| Hearing: | Held in Wellington on 6 September and 2 October 2023 |
| Members sitting: | Diana Kuhtz-Covich (Chair), Barry Willcox, James Smith, Selwyn Hikuroa, Sue Simons |
| Counsel: | Helen Brown and Sam McMullan for the investigator<br>Jessica Manson for Mr Browne |
| Legal advisor: | Tim Bain |

## Disciplinary hearing

1. On 6 September 2023 and 2 October 2023, the Plumbers, Gasfitters and Drainlayers Board (**Board**) held a disciplinary hearing on the papers to consider a complaint by Glyn Gerrand against Mitchell Jason Browne, Certifying Plumber, Tradesman Gasfitter. The complaint related to the installation of a gas water heater at 2 Barrs Road, Sheffield, Christchurch (**property**).

## Guilty plea

2. On 26 July 2023, Mr Browne pleaded guilty to charges of negligent or incompetent gasfitting and improper conduct in performing gasfitting work and signed an agreed summary of facts, the material parts of which were:

    a. On 23 March 2020, Mr Browne installed a non-room-sealed instantaneous gas water heater at the property. Bathrooms are a prohibited area for instantaneous gas water heaters that are not room-sealed.

    b. On the same day, Mr Browne issued a combined Gasfitting Certificate of Compliance and Gas Safety Certificate (**certificate**) for the installation. At the time, Mr Browne was a tradesman gasfitter and could not issue gas certificates. Mr Browne used his supervisor's details on the certificate. His supervisor did not know about the work or know that his details had been used on the certificate.

    c. On 11 July 2022, another gasfitter attended the property to fix the water heater. Upon inspecting it, he realised that the installation posed an immediate danger because it was not room-sealed and had been installed in a bathroom. He disconnected the heater from the gas supply, capped the supply at the valve, and notified the property owner.

    d. The installation was assessed by the Board's Senior Technical Advisor, Sam Wood. Mr Wood stated that because the heater was not a room-sealed heater there was a risk that air for combustion would be drawn from inside the bathroom. This could result in excess carbon monoxide in the space which would create a risk to occupants of the property. Mr Wood accepted that the risk had been lowered by ventilation openings Mr Browne had added later.

    e. The certificate issued by Mr Browne contained a number of errors, including that it:
        i. did not provide a link to where the manufacturer's instructions could be accessed
        ii. did not state whether other standards were required for compliance
        iii. incorrectly stated that the installation was safe to connect to the gas supply
        iv. incorrectly stated that the installation was installed in accordance with AS/NZS 5601.1, sections 3 to 6

v. incorrectly stated that the work was done lawfully and safely.

f. Because the heater was not a room-sealed appliance, its installation in the bathroom breached clause G11.2 of the New Zealand Building Code which requires the gas supply system to be safe and adequate for its intended use in a building where gas is used as an energy source. The installation also breached clause 2.6.4 of AS/NZS 5601.1 which requires instantaneous water heaters that are not a room-sealed type to not be installed in a bedroom, bathroom, toilet, or sleeping area. Because the installation was in breach of these provisions, Mr Browne had therefore carried out gasfitting in a negligent or incompetent manner.

g. By using his supervisor's details on the certificate without his knowledge or permission and issuing the certificate when he was not a registered and licensed certifying gasfitter, Mr Browne engaged in improper conduct in carrying out gasfitting that rendered him unfit to be registered or licensed.

3. The Board was satisfied that the facts in the agreed summary of facts meant that Mr Browne had committed disciplinary offences under section 89(a)(i) and 89(i) of the Plumbers, Gasfitters, and Drainlayers Act 2006 (**Act**).

## Penalty and costs submissions

4. On behalf of the investigator, Ms Brown submitted that the principles and purposes of disciplinary proceedings were well established. They were to protect the public and to maintain proper industry standards. She submitted that the principles that were relevant to the assessment of penalty in disciplinary proceedings were the need to ensure rehabilitation, the importance of treating practitioners consistently where possible, and the need to impose the least severe penalty appropriate to ensure the principles and purposes of the disciplinary proceeding were met.

5. Recognising that consistency with other cases was a consideration when determining penalty, Ms Brown referring the Board to its previous decisions in *Radovich v Mitchell* (2021/32), *Radovich v Frogley* (2022/1), and *Radovich v Kench* (2022/6). In *Mitchell*, Mr Mitchell pleaded guilty to negligent or incompetent gasfitting for failing to install an appliance regulator on a LPG to natural gas conversion. The Board adopted a starting point of $4,500 for the fine in his case. In *Frogley*, Mr Frogley, who was Mr Mitchell's supervisor, pleaded guilty to failing to properly supervise. He was also found guilty of issuing a false or misleading return in respect of the work Mr Mitchell had done. The Board adopted a starting point of $4,000 for the fine in that case. Finally, in *Kench,* Mr Kench pleaded guilty to negligent or incompetent gasfitting and filing a false or misleading return. Mr Kench had failed to ensure there was adequate ventilation and adequate clearances between a flue and combustible materials when he replaced a gas hot water cylinder. The Board adopted a starting point of a fine of $6,000.

6. Ms Brown submitted that the cases referred to demonstrated that incompetent gasfitting and offending relating to false or misleading gas certificates was considered to be serious by the Board. She submitted that the present case was most similar to the *Kench* case although the present case was arguably more serious as it involved a degree of deception in the way the certificate was completed using the supervisor's details without his knowledge.

7. Ms Brown submitted that Mr Browne's offending was moderately serious given that some of the work was defective and had required remediation. While acknowledging that Mr Browne had installed some ventilation openings after the original work, Ms Brown submitted these were not sufficient to alleviate the risk posed by the installation. She submitted that Mr Browne was also aware that he could not certify the work he had undertaken. Having regard to the nature and gravity of Mr Browne's conduct, Ms Brown submitted that a fine was the appropriate penalty with a starting point in the vicinity of $6,000.

8. Ms Brown submitted that the investigator was not aware of any aggravating factors personal to Mr Browne and accepted that his lack of previous disciplinary history, early guilty plea, and acceptance of responsibility were mitigating factors in his favour. Ms Brown also acknowledged that Mr Browne had removed the work and refunded the complainant prior to the investigator's involvement.

9. Ms Brown submitted that under section 107 of the Act, the Board could require Mr Browne to pay a contribution towards the costs and expenses of the investigation, prosecution, and hearing. Ms Brown submitted that the starting point for an order of costs was typically half of the actual costs, but this was a matter for the Board to determine in its discretion. Ms Brown submitted that the Board could consider a reduction from the starting point in recognition of Mr Browne's guilty plea and cooperation.

10. On behalf of Mr Browne, Ms Manson submitted that while Mr Browne had pleaded guilty to the charges, the Board should take into consideration that he had told the homeowners not to install a door on the bathroom or block the bathroom doorway in any way. She submitted that had the door not been installed, any risk would have been negligible and the installation would have been compliant. Mr Browne had also added extra ventilation which had substantially reduced any risk from the installation as the Board's Senior Technical Advisor had recognised.

11. Ms Manson submitted that the cases relied on by the investigator could be distinguished from the present case. In *Mitchell*, she submitted the failure to install an appliance regulator was more serious than the defects in the present case. The practitioner in that case had also pleaded guilty very late in the proceedings. She submitted that the *Frogley* case involved supervision failings, and the false and misleading gas certificate charge arose as a result of remote supervision. Finally, in *Kench*, the practitioner was charged with filing a false or misleading gas certificate

which she submitted was a more serious offence than the improper conduct charge against Mr Browne.

12. Ms Manson referred the Board to the cases of *Radovich v J* (2019/5) and *Thomas v C* (2020/3). In *J*, the practitioner pleaded guilty to negligent or incompetent gasfitting and filing a false or misleading return. The Board considered J's conduct was moderately serious and determined that a fine with a starting point of $4,000 to $5,000 was appropriate. The Board recognised a number of mitigating factors in the case including J's acknowledgement of the charges, early guilty plea, cooperation, remediation of the defective work, modification of his practices, lack of any previous disciplinary history, and his further training. The Board imposed a final fine of $3,000. In *C*, the practitioner pleaded guilty to negligent or incompetent gasfitting work. The Board considered his conduct was of low seriousness and recognised similar mitigating factors to those in the case of *J*. The Board also recognised the length of time that had passed since the work had been carried out and that the practitioner was not given an opportunity to remediate the work. The Board determined that the starting point for a fine was $1,500 and this was reduced to $1,000.

13. Ms Manson submitted that Mr Browne's case was comparable to the *J* case but submitted that the charges against Mr Browne were less serious than those faced by J. As in both the *J* and *C* cases, Ms Manson submitted that there were numerous mitigating factors in Mr Browne's favour. He had acknowledged his error and cooperated fully with the investigation. He had contacted the homeowner, remediated the installation, and reimbursed her. He had pleaded guilty at the earliest stage and was deeply remorseful. Mr Browne had also undertaken further training to upskill and had ensured he trained his staff on proper procedures. Finally, Mr Browne had no previous disciplinary history.

14. Ms Manson submitted that Mr Browne's offending was low in terms of seriousness given that the non-compliant aspect of the work arose from the actions of the homeowner. Ms Manson submitted that Mr Browne's actions in adding additional ventilation had also helped to minimise the risk arising from the gas water heater.

15. Ms Manson characterised Mr Browne's conduct as a temporary lapse of professional judgment. She submitted that it was due to the extremely stressful professional and personal circumstances he was experiencing at the time which Mr Browne had described as one of the most stressful periods of his life. Ms Manson submitted that Mr Browne was deeply remorseful and his conduct had not been reflective of his usual practice.

16. Ms Manson submitted that a fine with a starting point of $4,000 was appropriate in the case. Recognising the significant mitigating factors she had described, Ms Manson submitted that the fine should be reduced to $2,000. She submitted that a 40% contribution towards the costs was also appropriate.

17. Mr Browne sought suppression of his name. Ms Manson again referred to the difficult circumstances Mr Browne had been experiencing at the time and the role they had played in his conduct. She submitted that publication of his name would allow people to identify his business and Mr Browne was concerned about possible reputational damage and the impact this could have for his employees. Ms Manson submitted that publication of Mr Browne's name was not required in the interests of public safety as Mr Browne has ceased doing gasfitting work after learning of the complaint and would not resume doing gasfitting again until he had passed his certifying gasfitter exam.

18. Responding to Mr Browne's application for name suppression, Ms Brown submitted that the threshold for granting name suppression was high given the importance the Board placed on transparency and openness in the disciplinary process. Ms Brown submitted that Mr Browne's grounds for seeking name suppression did not meet the required threshold.

## Consideration of penalty

19. When it comes to imposing penalties in disciplinary cases, the Board's primary considerations are the need to protect the health and safety of the public and maintain industry standards. Any disciplinary penalty should aim to ensure the competency of a practitioner by holding them to account for their offending, assist with their rehabilitation, and deter them and other practitioners from disciplinary offending.

20. The Board noted that the investigator had submitted that Mr Browne's conduct in this case was moderately serious, while Mr Browne's lawyer had submitted that the level of seriousness was low. The Board disagreed with both of these submissions. The water heater that Mr Browne had installed in the bathroom in this case was the same model of water heater that had caused the carbon monoxide-related death of a 12 year old boy in Haast in 2018 when it had been installed in a bathroom. The risk in this situation was a very real and serious one and people were put at risk because of Mr Browne's actions.

21. The Board also considered that knowingly issuing a gas certificate when he knew he was not authorised to do so and using his supervisor's details without his knowledge and consent was highly improper conduct on Mr Browne's part. A gas certificate is a formal, legal declaration that is relied on by homeowners to assure them that their gas installation is compliant and safe to use. In this case, not only was the certificate not correct in stating that the installation was safe and compliant, it was dishonestly issued.

22. The Board considered that either of the offences committed by Mr Browne were serious. However, combined, the Board considered his conduct was highly serious and, in the interests of public protection, a period of suspension his gasfitting registration was warranted.

23. Noting that neither party had addressed the possibility of suspension in their submissions on penalty, the Board considered that it was appropriate to give the parties the opportunity to make any submissions they wished to make on the subject of suspension as a penalty in this case. The parties were given one week to provide their submissions.

## Summary of submissions on suspension

24. For the investigator, Mr McMullan submitted that suspension was a starting point given Mr Browne's acceptance that his improper conduct rendered him unfit to be registered or licensed under section 89(i) of the Act. Referring to the case of *Walsh v Keenan* HC Wellington CIV-2003-485-2770, 2 July 2004, Mr McMullan submitted that a serious level of impropriety was required to reach this threshold.

25. Mr McMullan submitted that a deterrent response was required in this case as Mr Browne's conduct involved negligent gasfitting work which was high risk and dishonesty in certifying it. He submitted that the dishonest issuing of a gas certificate was an aggravating feature given a certificate is required by law to provide occupants, users, and the public with an assurance of the safety of the work involved.

26. Mr McMullan referred the Board to its previous cases involving improper conduct, including *Thomas v Swaney* (2016/4), *Radovich v Tucker* (2022/13), and *Pidgeon v McDonald* (2022/21). In *Tucker* and *McDonald*, the practitioners had issued producer statements when they were not authorised to do so. In *Tucker*, Mr Tucker had used his supervisor's details to issue the statement without his supervisor's knowledge. In *McDonald*, in addition to issuing a producer statement, Mr McDonald had carried out drainlaying work without a current licence. In both cases the Board began by considering imposing a period of suspension. In *Tucker*, the mitigating factors in the case saw the penalty reduced to a fine of $5,850. In *McDonald*, Mr McDonald failed to engage in the disciplinary process and the Board therefore had no basis on which to consider reducing the penalty from the starting point. Accordingly, Mr McDonald's tradesman drainlayer registration was suspended until he completed a training course.

27. Mr McMullan submitted that Mr Browne's case was similar to both *Tucker* and *McDonald*. He had improperly certified an installation which could have created a risk to the safety of the occupants of the property and that risk was heightened because the work was incompetent. Mr McMullan submitted that, in the circumstances, it was open to the Board to reach an end point of suspension. He submitted that the period of suspension would depend on the Board's assessment of factors personal to Mr Browne including the extent to which his remorse was genuine and his extraneous personal circumstances may have contributed to his offending.

28. No further submissions were received from Mr Browne on the subject of suspension.

## Decision on penalty

29. Having considered the further submissions provided by the investigator, the Board remained of the view that a period of suspension of Mr Browne's Tradesman Gasfitter registration was the appropriate starting point in the interests of public protection.

30. The Board accepted that there were no aggravating factors in the case and there were a number of mitigating factors in Mr Browne's favour. They included his early guilty plea, cooperation, and lack of previous disciplinary offending. The Board also accepted that Mr Browne was remorseful, had remediated the work and refunded the homeowner, had since done further training, and had temporarily stopped carrying out gasfitting work. While acknowledging Mr Browne's professional and personal circumstances at the time of the offending, the Board determined that they did not constitute a mitigating factor in this case.

31. The Board considered that the appropriate starting point for a period of suspension was 12 months. Recognising the numerous mitigating factors in this case, the Board reduced this to nine months. However, given that Mr Browne had said that he had stopped doing any gasfitting work as a result of the investigation, the Board was concerned that a period of suspension alone would have limited practical effect. To ensure that the purposes of the Act were met by the penalty in this case, the Board therefore determined that, under section 106(3) of the Act, it would also impose a fine on Mr Browne. To avoid a disproportionate penalty, the Board decided to reduce the period of suspension to account for the addition of the fine. The Board determined that a period of suspension of six months combined with a fine of $4,000 was the appropriate penalty.

## Costs

32. Section 107 of the Act provides that, in addition to any penalty imposed, the Board may order a registered person to pay a reasonable sum towards the costs and expenses incidental to the investigation of the complaint, prosecution, and hearing. The Board was provided with a schedule of estimated costs for the investigations, prosecution and hearing amounting to $9,125.37.

33. The Board accepted that Mr Browne's guilty plea and cooperation had avoided the costs of a full hearing and determined that he should pay $3,650 towards costs which was around 40% of the total costs.

## Name suppression

34. The Board accepted that under section 113(3)(d)(i) of the Act, it had the power to prohibit the publication of the name of any person who is the subject of proceedings before it. The circumstances in which the Board could do this was where it considered it proper having regard to the interests of any person and the public.

35. Given the importance of disciplinary proceedings in protecting the public and maintaining industry standards, the Board's view is that openness and transparency in the disciplinary process is of high importance. Accordingly, prohibition orders should be made only when the circumstances required them.

36. The Board recognised Mr Browne's concerns that publication of his name could cause damage to his professional reputation. However, the Board considered that this was a normal consequence of disciplinary offending and Mr Browne's circumstances in this regard were no different to those of other practitioners found guilty of disciplinary offences.

37. The Board declined to order the suppression of Mr Browne's name in this case.

## Publication

38. In accordance with section 74(1)(c)(viii) of the Act, the Board ordered that details of the action taken against Mr Browne be recorded on the register of plumbers, gasfitters, and drainlayers in the usual way. Any other publication of the Board's orders would be at the discretion of the Registrar of Plumbers, Gasfitters and Drainlayers.

## Board orders

39. Being satisfied that Mr Browne was guilty of disciplinary offences under section 89(a)(i) and 89(i) of the Act, the Board made the following orders:

    i. Pursuant to section 106(1)(b)(i) of the Act, Mr Browne's Tradesman Gasfitter registration be suspended for a period of six months commencing on 18 December 2023.

    ii. Pursuant to section 106(1)(f) and 106(3) of the Act, Mr Browne pays a fine of $4,000.

    iii. Pursuant to section 107 of the Act, Mr Browne pays $3,650 towards the costs of the investigation, prosecution, and hearing.

## Appeal

40. If Mr Browne is dissatisfied with the whole or any part of this decision or these orders, he may appeal to the District Court under section 162(1)(f) of the Act. Any appeal must be brought within 20 working days from the date on which this formal written decision is received, or within any other timeframe the District Court may allow.

**Dated** 4 December 2023

**Signed**



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Diana Kuhtz-Covich
Chair
Plumbers, Gasfitters and Drainlayers Board