

Before the Electrical Workers Registration Board

CE No. 22287

In the matter of:

A disciplinary hearing before the Electrical Workers Registration Board

Between:

The Ministry of Business Innovation and Employment

And

Stephen Burton a registered and licensed electrical worker (E 251554, EW109865, Electrician) (the Respondent)

Decision of the Board in Respect of the Conduct of an Electrical Worker Under section 147G and 147M of the Electricity Act 1992 (Subject to Suppression Orders)

Hearing Location:

Nelson

Hearing Type:

In Person

Hearing Date:

18 September 2024

Decision Date:

20 September 2024

Board Members Present:

Mr R Keys, Registered Inspector (Presiding)

Mr M Orange, Barrister

Ms S Cameron, Registered Electrician

Mr T Wiseman, Registered Inspector

Mr J Hutton, Registered Inspector

Ms L Wright, Barrister

Appearances: M Millar for the Investigator

L Castle and M Sotutu for the Respondent

Procedure:

The matter was considered by the Electrical Workers Registration Board (the Board) under the provisions of Part 11 of the Electricity Act 1992 (the Act), the Electricity (Safety) Regulations 2010 (the Regulations) and the Board's Disciplinary Hearing Rules.

Board Decision:

The Respondent has committed disciplinary offences under sections 143(b)(ii) and 143(f) of the Act.

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Summary of the Board’s Decision

- [1] The Respondent carried out prescribed electrical work on an installation. He accepted that when he had completed his work, he failed to test it. The completed work was not electrically safe, and, as a result, a person received a fatal electric shock. On the basis of the Respondent’s acceptance that he had committed the alleged disciplinary offences that the Investigator was pursuing, the Board found that he had negligently created a risk of serious harm, being an offence under section 143(b)(ii) of the Act, and that he had provided false or misleading certification contrary to section 143(f) of the Act.
- [2] The disciplinary offending was serious, and the Board found that the Respondent had been grossly negligent. In terms of the appropriate actions the Board decided it should take as a result of the offending, the Board adopted a starting point of the cancellation of the Respondent’s licence. The Board considered that cancellation was appropriate on the basis that it would provide a deterrent to the Respondent and to other electrical workers to signify the importance of testing prescribed electrical work before and after connecting it to a power supply.
- [3] There were multiple mitigating factors present. The Respondent had accepted responsibility, had not previously appeared before the Board, and his license had been suspended for approximately one year during the investigation of the matter.

The Respondent had also been punished by the District Court, where he was prosecuted for the same events. The Respondent had also shown some remorse.

- [4] Taking mitigating factors into consideration, the Board decided that it would suspend the Respondent's licence until the latter of a period of two years or the completion by him of Board-ordered training. The training order was issued on the basis that the Board held reservations about the Respondent's competence, which, in turn, meant the Board had concerns that there may be an ongoing risk to the public.
- [5] The Board also ordered that the Respondent pay costs and that there would be publication orders (subject to suppression orders), including that a record of the offending will be recorded on the public register for a period of three years and that a press release be issued.
- [6] The Board acknowledges the family of the person who lost their life in this matter. The Board takes this opportunity to extend its sympathies and to thank them for their assistance at the hearing.

Introduction

- [7] The hearing resulted from a complaint about the conduct of the Respondent and a report under section 147G(1) of the Act from the Investigator that the complaint should be considered by the Board.
- [8] The complaint was made by WorkSafe in March 2020. When a complaint is made, it is received by the Board but is investigated independently of the Board by an investigator appointed by the Chief Executive of the Ministry of Business Innovation and Employment. The Board cannot take any steps, other than whether it should impose an interim suspension order pending the complaints investigation, until such time as the appointed Investigator reports with his or her findings and a recommendation as to whether or not the matter should or should not proceed to a hearing.
- [9] In April 2020, the Board decided that it would impose an interim suspension. The Electricity Act provides that if the Board imposes an interim suspension order, the affected person can seek a hearing to consider whether the order should be revoked. The Respondent sought a revocation of the interim suspension order. The application was heard in February 2021. The Board issued a decision stipulating that the suspension would be revoked once satisfactory evidence was received that the Respondent had completed a refresher course on testing administered by a suitably qualified approved person and had been assessed by the person administering the course that the Respondent was competent to carry out or supervise testing. In March 2021, the Respondent satisfied those conditions, and his license was reinstated. He has retained his license since.
- [10] The Investigator completed his investigation and submitted a report to the Board recommending that a disciplinary hearing be held in May 2024. The completion of the investigation followed the conclusion of a prosecution of the Respondent in the District Court by WorkSafe under section 163C(2) of the Electricity Act in February

2024.¹ The investigation was delayed on the basis that the District Court prosecution took precedence, and the Respondent was defending those proceedings.

[11] Following the receipt of the Investigator's report, the Respondent was served with a notice setting out the alleged disciplinary offences the Investigator had reported should be considered by the Board. They were:

First Alleged Disciplinary Offence

1. On or around 28 February 2020 at [Omitted], Mr Stephen Burton has carried out or caused to be carried out prescribed electrical work in a negligent or incompetent manner being an offence under section 143(a)(i) of the Act, IN THAT, he failed to correctly test prescribed electrical work, namely the installation of a socket outlet, in accordance with AS/NZS 3000:2007.

Or in the Alternative

2. On or around 28 February 2020 at [Omitted], Mr Stephen Burton has negligently created a risk of serious harm to any person, or a risk of significant property damage, through having carried out or caused to be carried out prescribed electrical work being an offence under section 143(b)(ii) of the Act, IN THAT, he failed to correctly test prescribed electrical work, namely the installation of a socket outlet, in accordance with AS/NZS 3000:2007.

Second Alleged Disciplinary Offence

1. On or around 28 February 2020 at [Omitted], Mr Stephen Burton has provided a false or misleading return being an offence under section 143(f) of the Act, IN THAT, he:
 - (a) falsely certified prescribed electrical work carried out by him as being carried out lawfully and safely when it was not; and/or
 - (b) Recorded a false insulation test result on the Certificate of Compliance he provided; and/or
 - (c) Indicated on the Certificate of Compliance he provided that he had carried out a polarity test and that it had passed when he had not carried out that test.

[12] Prior to the hearing, the Respondent and the Board were provided with all of the documents the Investigator had in his/her power or possession.

¹ A reserved judgement was issued on 10 November 2023 (*Worksafe New Zealand v Stephen Graham Burton* [2023] NZDC 24770). Sentencing took place on 20 February 2024 (*Worksafe New Zealand v Stephen Graham Burton* [2024] NZDC 3910).

Function of Disciplinary Action

- [13] 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*² and in New Zealand in *Dentice v Valuers Registration Board*³.
- [14] The Board can only inquire into “the conduct of an electrical worker” with respect to the grounds for discipline set out in section 143 of the Act. Those grounds relate to carrying out or supervising prescribed electrical work (PEW).

Procedure

- [15] The matter proceeded on the basis of an Agreed Statement of Facts.
- [16] The Board was assisted by submissions from both Counsel.
- [17] The Board also received statements from family members of the deceased. The Board would like to acknowledge their loss and express its gratitude for the assistance they provided.

Evidence

- [18] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁴. The Board notes, as regards evidence in proceedings before it, that the provisions of section 147W of the Act apply. This section states:

In all proceedings under this Part, the Board may, subject to section 156, receive as evidence any statement, document, information, or matter that may in its opinion assist it to deal effectively with the matter before it, whether or not it would be admissible as evidence in a court of law.

- [19] The Agreed Statement of Facts provided the background to the complaint. It stated:

27 February 2020 rangehood installation

6. *On 27 February 2020 Mr Burton attended the property to undertake the replacement of the existing rangehood with a Robin Hood inbuilt rangehood.*
7. *There was a wall mounted double isolator switch (“the switch”) in the kitchen which had been installed over 10 years prior. It is likely this switch had never been taken off the wall since it was installed.*
8. *The switch had three TPS cables connected, being a supply feed in, a supply feed out to the next fitting on the circuit, and a wire to the socket in the bulkhead cavity above the rangehood. This wire had a*

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

red phase conductor connected to the top switch and a green wire with red tape connected to the bottom switch. A black conductor was connected to the neutrals of the two supply wires.

9. *The existing rangehood had a separate light and fan and used the red conductor as a phase supply for the fan. The green conductor was used as the phase supply for the light and had been sleeved with red insulation tape to clearly identify it was being used as a phase conductor.*
10. *Taping the green conductor red was compliant with the previous Electricity Regulations 1997 applicable at the time the existing rangehood was likely installed.*
11. *The red tape on the green conductor was not seen by Mr Burton as the wiring was cut off where it entered the older fitting.*
12. *Mr Burton removed the existing rangehood and cut the existing conductor cable coming from the wall isolation switch. He then connected a new PDL surface socket to the end of the existing cable observing the colour codes of the fitting and matching them to the colours of the existing cable. The socket was located in the bulkhead cavity where the rangehood was housed.*
13. *Mr Burton failed to inspect the isolating wall switch.*
14. *Had Mr Burton removed the switch from the wall he would have seen the red tape wrapped around the earth wire and would have been alerted to the fact that:*
 - a. *The green earth wire was acting as an active phase wire; and*
 - b. *The fitting would become energised when the isolating wall switch was turned to ON, and therefore the exposed metalwork on the fixed appliance would become energised.*
15. *Mr Burton then terminated the green (phase) conductor into the earth pin of the rangehood socket after failing to identify that the green conductor was being used as an active phase conductor.*
16. *Upon turning on the power supply the earth connection became energised and the exposed metalwork on the rangehood became live with 240 volts.*

Certificate of Compliance and testing

17. *On 28 February 2020 Mr Burton completed a combined electrical safety certificate (ESC) and certificate of compliance (CoC) for the work and provided it to the owner. The combined ESC/CoC certified that the PEW carried out had been done lawfully and safely, and that the installation is connected to a power supply and is safe to use. Mr*

Burton ticked the box which states “Satisfactorily tested in accordance with the Electrical (Safety) Regulations (2010)”.

18. *The mandatory testing is described in Clause 8.3 of AS/NZS 3000:2007.*
19. *In its investigation report dated 6 April 2021, Worksafe stated (at 10.60): “Had Mr. Burton tested correctly in accordance with the Electricity (Safety) Regulations 2010, he would have identified that the protective earth conductor was missing”. Worksafe concluded (at 11.6) that Mr Burton:*
 - *Failed to adequately test the installation to confirm that the work was electrically safe to use as intended; and*
 - *Issued a false and misleading Certificate of Compliance and Electrical Safety Certificate.*

19 March 2020

20. *Following the installation of the new rangehood, the owner engaged [Omitted], a handyman who owned and operated a [Omitted], to install a ‘surround’ sheet of material around the rangehood for aesthetic purposes.*
21. *On 19 March 2020 at around 9.30am [Omitted] attended the property to install the surround. The owner left the property leaving [Omitted] alone to do the work.*
22. *When the owner returned to the property that afternoon they found [Omitted] deceased and lying on the kitchen floor. The rangehood was hanging partially from the bulkhead.*
23. *Police and Emergency Services attended the Property and Worksafe commenced an investigation.*
24. *On 5 June 2020 a post-mortem examination was conducted and found the cause of [Omitted] death was electrocution resulting in cardiac arrhythmia.*
25. *Worksafe concluded that Mr Burton did not carry out required testing and that the fatal electric shock that the victim received would have been prevented if the installation of the socket-outlet to supply the range-hood was installed and verified as required by the Electricity (Safety) Regulations 2010.*

[20] The Respondent accepted the facts as outlined above and accepted that he had negligently created a risk of serious harm to any person through having carried out PEW being an offence under section 143(b)(ii) of the Act. He also accepted that he had provided a false and misleading combined ESC/COC being an offence under section 143(f) of the Act.

- [21] The general rule is that all facts in issue, or relevant to the issue in a case, must be proved by evidence. As the Investigator and Respondent agreed to the facts as outlined above, it was not necessary to call any further evidence or to test the evidence as outlined in the Statement.
- [22] In addition to the Agreed Statement of Facts, the Board was provided with various materials collected during the investigation. That included the reserved judgement of Judge D C Ruth⁵ and his sentencing notes.⁶ The general rule is that all facts in issue or relevant to the issue in a case must be proved by evidence. There is, however, the doctrine of estoppel, which can create a legal bar to asserting a particular position. Estoppel can arise from a previous determination of the matter by a court.⁷
- [23] The doctrine of issue estoppel seeks to protect the finality of litigation by precluding the re-litigation of issues that have been conclusively determined in a prior proceeding. The key principles are:
- (a) Issue estoppel precludes a party from re-litigating an identical issue (whether of fact or of law) that has previously been raised and determined with certainty between the parties.⁸
 - (b) Issue estoppel is concerned with the prior resolution of issues rather than causes of action.⁹
 - (c) Issue estoppel can only be founded on findings that are fundamental to the original decision and without which it cannot stand. Other findings cannot support an issue estoppel, however definite the language in which they are expressed.¹⁰
 - (d) The purpose of any estoppel is to work justice between the parties. It is therefore open to the courts to recognise that in special circumstances, inflexible application of estoppel may have the opposite result¹¹. The application of issue estoppel is ultimately a matter at the discretion of the judge in the subsequent proceedings: “A judicial doctrine developed to serve the ends of justice should not be applied mechanically to work an injustice”.¹²
- [24] The Board considers, in this case, that estoppel applies as regards the decisions of the District Court. Accordingly, the Board has taken those decisions and the comments made by Judge Ruth into consideration when making its decisions, more

⁵ *Worksafe New Zealand v Stephen Graham Burton* [2023] NZDC 24770).

⁶ *Worksafe New Zealand v Stephen Graham Burton* [2024] NZDC 3910.

⁷ Refer section 50 of the Evidence Act 2006 and in particular section 50(2)(b) and *Gillies v Keogh* [1989] 2 NZLR 327, 345 (CA).

⁸ *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1965] 2 All ER 4 at 8 per Lord Denning; *Thoday v Thoday* [1964] 1 All ER 341 at 352

⁹ *Joseph Lynch Land Co Ltd v Lynch* [1995] 1 NZLR 37 (CA) at 40–41

¹⁰ *Talyancich v Index Developments Ltd* [1992] 3 NZLR 28 at 38; *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 (HL) at 965, per Lord Wilberforce

¹¹ *Arnold v National Westminster Bank* [1991] 2 AC 93 (HL) per Lord Keith of Kinkel at 109, at 112, per Lord Lowry

¹² *Danyluk v Ainsworth Technologies Inc* 2001 SCC 44, [2001] 2 SCR 460 at 460

of which will be said when the Board considers appropriate penalty orders to be made by it.

- [25] For context, the offence that the Respondent was found to have committed by the District Court was:

Stephen Graham Burton failed to correctly test prescribed electrical work, namely the installation of a socket-outlet, in accordance with regulation 63 of the Electricity (Safety) Regulations 2010 and AS/NZS 3000:2007, knowing that the failure to correctly test the prescribed electrical work was reasonably likely to cause serious harm or significant property damage, and failed to prevent, so far as reasonably practicable, serious harm or significant property damage.

It was reasonably practicable for Stephen Graham Burton, to conduct the following tests correctly, using the appropriate test equipment:

- (a) visual inspection of the work, carried out by verifying the correct circuit connections throughout the circuit, including the switchboard and wall switch used to operate the socket-outlet;*
- (b) continuity of the earthing system, by measuring between the earth terminal of the socket-outlet and the switchboard earth bar;*
- (c) insulation resistance test;*
- (d) polarity test at the installed socket-outlet; and earth fault loop impedance test.*

- [26] Judge Ruth sentenced the Respondent to 8 months home detention. He was also ordered to pay \$150,000 towards emotional harm and consequential loss factors. It was required to pay the first fifty thousand dollars within seven days, which he did. An order was made that \$100,000 from the proceeds of the sale of a boat owned by a trust were to be paid to the victims within 28 days of the boat being sold. Pending the sale, the Respondent was ordered to pay monthly instalments of \$3,175.18. The Respondent gave evidence at the hearing that a lien had been placed over the boat, which had not been sold.

- [27] The Board also received oral statements from the victim's family. They spoke of their loss and grief and of the impact of the death on them. They expressed their concern that the Respondent was not a competent electrical worker and their belief that he posed a risk to the public.

- [28] Finally, the Board also received an affidavit from the Respondent with exhibits and an affidavit from his son, a licensed electrical worker. The Respondent's affidavit outlined his financial circumstances and his need for an income. The latter related, in part, to his ability to satisfy the Court's reparation orders. The son's affidavit suggested a process whereby he would review the Respondent's work on a periodic basis.

First Offence

- [29] The Respondent accepted, and the Board agreed that, with respect to the first alleged disciplinary offence, the Respondent had negligently created a risk of serious harm to any person through having carried out PEW when he failed to correctly test his PEW, contrary to section 143(b)(ii) of the Act.
- [30] To make a finding under section 143(b)(ii), the Board has to firstly establish that the Respondent had conducted himself in a negligent manner and secondly that he created a risk of serious harm.

Negligence

- [31] Negligence, in a disciplinary context, is the departure by an electrical worker whilst carrying out or supervising prescribed electrical work from an accepted standard of conduct. It is judged against those of the same class of licence as the person whose conduct is being inquired into. This is described as the *Bolam*¹³ test of negligence which has been adopted by the New Zealand Courts.¹⁴
- [32] The New Zealand Courts have stated that an assessment of negligence in a disciplinary context is a two-stage test¹⁵. The first is for the Board to consider whether the practitioner has departed from the acceptable standard of conduct. The second is to consider whether the departure is significant enough to warrant a disciplinary sanction.
- [33] When considering what an acceptable standard is, the Board must have reference to the conduct of other competent and responsible practitioners and the Board's own assessment of what is appropriate conduct, bearing in mind the purpose of the Act,¹⁶ which includes protecting the health and safety of members of the public in connection with the supply and use of electricity, and promoting the prevention of damage to property in connection with the supply and use of electricity. The test is an objective one and, in this respect, it has been noted that the purpose of discipline is the protection of the public by the maintenance of professional standards and that this could not be met if, in every case, the Board was required to take into account subjective considerations relating to the practitioner.¹⁷
- [34] The Board also notes, regarding acceptable standards, that all prescribed electrical work must comply with the Safety Regulations. In this matter, the PEW was carried out on a low voltage installation, and, as such, under regulation 59 of the Safety Regulations, the PEW had to comply with AS/NZS 3000:2007. It was accepted by the Respondent that he had not completed the PEW in accordance with AS/NZS 3000 and, in particular, that he had failed to test the installation prior to connecting it to a power supply in accordance with Section 8 of AS/NZS 3000.

¹³ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

¹⁴ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

¹⁵ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

¹⁶ *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

¹⁷ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

[35] Because the Respondent failed to test, the fact that a phase conductor had been used as an earth conductor had not been identified, the result of which was that a person received a fatal electric shock.

[36] The Safety Regulations also specify that when a person carries out PEW, the installation must, upon completion, be electrically safe:

13 Doing work on works, installations, fittings, and appliances

(1) *A person who does work on any works or installation, or on any part of any works or installation, must ensure—*

(a) *that the resulting works or installation, or part of the works or installation, is electrically safe; and*

(b) *if the work is on only part of any works or installation, that the work has not adversely affected the electrical safety of the rest of the works or installation.*

[37] The terms electrically safe and unsafe are defined in regulation 5 of the Safety Regulations:

5 Meanings of electrically safe and electrically unsafe

In these regulations, unless the context otherwise requires—

electrically safe means, in relation to works, installations, fittings, appliances, and associated equipment, that there is no significant risk that a person or property will be injured or damaged by dangers arising, directly or indirectly, from the use of, or passage of electricity through, the works, installations, fittings, appliances, or associated equipment

electrically unsafe means, in relation to works, installations, fittings, appliances, and associated equipment, that there is a significant risk that a person may suffer serious harm, or that property may suffer significant damage, as a result of dangers arising, directly or indirectly, from the use of, or passage of electricity through, the works, installations, fittings, appliances, or associated equipment.

[38] Further, regulation 20 deems certain installations to be unsafe:

20 Electrically unsafe works and installations

(1) *Works and installations are deemed to be electrically unsafe if there are not measures in place that do at least 1 of the following:*

(a) *prevent accidental direct or indirect contact with exposed fittings or exposed conductive parts of the works or installations:*

(b) *provide for the automatic interruption of the power supply to the works or installations on the occurrence of a fault that would cause injury or damage to any person or property:*

- (c) *prevent an electric current passing through the body of a person on contact with any part of the works or installations, or limit that current so that the magnitude and duration of the shock current cannot exceed the IEC shock current standards.*

[39] It is clear that the PEW was not electrically safe as defined and that both regulation 13(1) and 20(1)(c) had been breached.

[40] Also, under regulation 73A(1) an electrical worker has certain obligations that must be complied with. The Respondent did not comply with the following:

73A Before connecting installations to power supply

(1) *Before connecting to a power supply a low or extra-low voltage installation or part installation on which prescribed electrical work has been done, the person doing the connection must—*

(a) *be satisfied that the installation or part installation is safe to connect; and*

(b) *be satisfied that the testing required by these regulations has been done;*

[41] The Board would expect a competent electrical worker to carry out the mandatory tests required under Section 8 of AS/NZS 3000. This is especially the case given the above provisions of the Safety Regulations. Testing is the primary means by which the electrical safety of installation is verified. A failure to test can have tragic consequences, as was the case in this matter. There is simply no excuse for failing to test, and the Respondent's conduct by failing to do so falls into the category of gross negligence.

[42] Turning to seriousness in *Collie v Nursing Council of New Zealand*,¹⁸ the Court noted, as regards the threshold for disciplinary matters, that:

[21] Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness.

[43] In this matter, there is no question that the conduct fell seriously short of what is acceptable. When it comes to testing, inadvertence, oversight, or carelessness can lead to serious harm. As testing is mandatory and a fundamental requirement under the Safety Regulations, any failure to test will be a serious departure from an acceptable standard. This is borne out by the various provisions and the Safety Regulations quoted above.

¹⁸ [2001] NZAR 74

Serious Harm

[44] Turning to a risk of serious harm, the term is defined in section 2 of the Act. It means:

death; or

injury that consists of or includes loss of consciousness; or

a notifiable injury or illness as defined in section 23 of the Health and Safety at Work Act 2015.

[45] Whilst actual serious harm need not occur for the Board to make a finding, in this matter serious harm, the death of a person, did occur, and the second element of the offence has been satisfied.

Finding

[46] The Board finds, on the basis of the Respondent's admission, in accordance with the above, that the Respondent has negligently created a risk of serious harm to any person and that he has committed a disciplinary offence under section 143(b)(ii) of the Act.

Second Offence

[47] The charge under section 143(f) of the Act related to the provision of a false or misleading return. In determining whether a return is false or misleading is a question of fact to be decided objectively and the intention of the issuer is irrelevant¹⁹.

[48] The returns referred to are issued under the Regulations. There is a requirement that an Electrical Safety Certificate be issued for all prescribed electrical work. It must contain a statement to the effect that the installation or part installation is connected to a power supply and is safe to use. There is also a requirement that a Certificate of Compliance is issued for high and general risk prescribed electrical work. A Certificate of Compliance must state that the prescribed electrical work has been done lawfully and safely and that the information in the certificate is correct.

[49] The specific allegations were that the Respondent had falsely certified prescribed electrical work carried out by him as being carried out lawfully and safely when it was not, that he had recorded a false insulation resistance test result on the Certificate of Compliance he provided, and that he indicated on the Certificate of Compliance he provided that he had carried out a polarity test and that it had passed when he had not carried out that test.

[50] The Respondent accepted the allegations. Accordingly, and in accordance with the legal requirements in the Safety Regulations for certification, the offence has been committed.

¹⁹ *Taylor Bros Ltd v Taylor Group Ltd* [1988] 2 NZLR 1

Board's Decision

- [51] On the basis of the Respondent's acceptance that he had committed disciplinary offences, as outlined in the agreed Statement of facts, the Board has decided that the Respondent **has** negligently created a risk of serious harm to any person, or a risk of significant property damage, through having carried out or caused to be carried out prescribed electrical work being an offence under section 143(b)(ii) of the Act, IN THAT, he failed to correctly test prescribed electrical work, namely the installation of a socket outlet, in accordance with AS/NZS 3000:2007.
- [52] The Board has also decided that the Respondent **has** provided a false or misleading return being an offence under section 143(f) of the Act, in that he:
- (a) falsely certified prescribed electrical work carried out by him as being carried out lawfully and safely when it was not;
 - (b) Recorded a false insulation test result on the Certificate of Compliance he provided; and
 - (c) Indicated on the Certificate of Compliance he provided that he had carried out a polarity test and that it had passed when he had not carried out that test.

Penalty, Costs and Publication

- [53] Having found that one or more of the grounds in section 143 applies, the Board must, under section 147M 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.
- [54] The Board received submissions at the hearing regarding penalty, costs, and publication. It has taken those submissions into account and made the following decisions.

Penalty

- [55] The Board has the discretion to impose a range of penalties, which are set out in section 147M of the Act. 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 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 Respondent and other Electrical Workers from similar offending;²³

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

- (c) setting and enforcing a high standard of conduct for the industry;²⁴
- (d) penalising wrongdoing;²⁵ and
- (e) rehabilitation (where appropriate).²⁶

- [56] Overall, the Board should assess the conduct against the range of penalty options available in section 147M 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
- [57] In general, when determining the appropriate penalty, the Board adopts a starting point based on the principles outlined above prior to it considering any aggravating and/or mitigating factors present.³¹
- [58] Determining the appropriate penalty matter is not a straightforward matter.
- [59] Firstly, the Board is constrained by the provisions of section 147M(4) of the Act, which state:
- No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an—*
- (a) *offence for which the person has been convicted by a court*
- [60] The remaining penalties set out in section 147M remain open to the Board.

The Investigator's submissions

- [61] The Investigator noted the Respondent's cooperation, including that he had accepted responsibility for the disciplinary offending and that he had not previously appeared before the Board for a disciplinary matter. Counsel for the Investigator did not take a position on the appropriate orders that the Board should make.

The Respondent's submissions

- [62] Counsel for the Respondent noted that he had taken responsibility for the disparate offending and submitted that the matter before the Board was unique and that the Board should return to first principles. Counsel, whilst accepting the seriousness of the offending, submitted that it was a one-off and that this was substantiated by audits carried out by WorkSafe of the Respondent's PEW. With reference to the Respondent's financial position, Counsel noted that the Respondent was in a precarious position and that his focus should rightly be on satisfying the reparation

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.

orders. The Board was provided with financial statements to substantiate the Respondent's financial position.

[63] With respect to potential penalties that the Board could impose, Counsel for the Respondent highlighted that the Respondent had undertaken training, submitted that it was a one-off incident of failing to test, and there was no evidence of PEW that did not meet an acceptable standard since. On that basis, and with reference to the need to be able to earn an income to meet financial obligations, including court-ordered payments, Counsel submitted that the Board needed to balance the outcomes of a tragic event with the Respondent's current circumstances. In her written submissions, Counsel stated:

16. *Cancellation would create incredible financial difficulty for Mr Burton and his wife, [Omitted]. Mr Burton's affidavit explains they rely on an ongoing income to meet their basic needs and pay off their existing debts. It will be difficult to secure alternative employment at this late stage of his working life (61) with the added burden of a criminal conviction. Mr Burton's business employs his wife. She is [Omitted] and has no formal qualifications herself.*
17. *Cancellation of Mr Burton's licence and / or registration would also likely jeopardise his ability to meet the significant reparation order to the victim's family. He has paid the first \$50,000 of the reparation order by virtue of a loan advanced to him by family and friends.*

Previous Board decisions

[64] This is not the first time that the Board has had to deal with a fatality resulting from a failure to test. In 2012, the Board found that two electrical workers, [Omitted], a Registered Electrician, and [Omitted], an Electrical Inspector (I832), had committed offences under section 143(b)(ii) of the Act when the former transposed the power supply at a point of entry, and the latter failed to identify the transposition when testing. The transposition resulted in the death of the homeowner. Those practitioners, who had been the subject of suspensions pending the hearing of the matter, were fined. [Omitted] fine was \$7,000. [Omitted] was fined \$6,000. The maximum fine that can be imposed is \$10,000. The Board took into account the impact the interim suspensions, which were for a longer period than the Respondent's, had had on them. Those practitioners were not prosecuted. The only action taken against them was by the Board.

[65] In the present matter, a fine is not an option for the reasons set out above. The period of interim suspension imposed on the Respondent is, however, a factor that the Board can and should take into consideration. The Board can also take into account the penalty and orders imposed by the District Court.

[66] Counsel for the Respondent, with respect to action taken by the Board in previous matters, submitted that cancellation was not appropriate and that in the past five years, the only times the Board had imposed a cancellation was in relation to recidivist offenders.

The District Court Decision

[67] The Respondent submitted that he was competent and that he did not pose a risk to the public. The Board questioned the Respondent about his testing methodologies. It was concerned that his answers lacked clarity and that they were somewhat at odds with the provisions in Part 8 of AS/NZS3000. In this respect, the Board also notes the comments of Judge Ruth in the District Court, where his honour stated:

[91] I have watched all of the evidence unfold and I have been particularly careful to observe the defendant in giving his evidence and reacting to questions put to him. Regrettably, from his point of view, I found the defendant was a most unimpressive witness. He seemed to me to express confusion in relation to questions put to him by the prosecution, questions which I was able to understand as a layperson in terms of matters electrical, whereas the defendant is acknowledged as being competent and experienced in this area.

Competence

[68] The Board does, notwithstanding the reinstatement of his license after a period of suspension during which he undertook remedial training, retain reservations about the Respondent's competence and the level of risk that he poses to the public. Those reservations arise as a result of the District Court decision and, in particular, the passage above.

[69] The Board's reservations also arose as a result of the Respondent's answers to questions that were put to him about testing during the hearing. The Respondent was asked to outline the procedures he would use to test an installation to ensure electrical safety and to inform the Board of the results he would expect to obtain from his tests. Whilst the Respondent answered the question correctly, he lacked confidence in his answers and seemed to struggle with the correct procedure. This may have been due to the circumstances within which he was providing answers (a disciplinary hearing). However, answering this sort of question should be straightforward for a competent electrical worker.

[70] The Board noted that the Respondent still could not reconcile the events that resulted in the death, even after the District Court had found he had failed to test and his admission of the same before the Board.

[71] The Board was also concerned that the Respondent took the approach that installing an RCD on all circuits was the safest course of action. RCDs are not the primary means by which electrical safety is assured. The primary means is carrying out the PEW in a compliant manner and testing the work to ensure it is safe. An RCD provides a level of additional safety under certain circumstances. An RCD may not operate as intended under certain fault conditions, including where a circuit has not been wired in a compliant manner, and, as such, it cannot always be relied on as a safety mechanism.

[72] The Board also questioned the Respondent about the systems and processes that he uses on-site to ensure compliance. The Respondent did not appear to have a robust process, did not have written checklists that he completed on-site, used his diary to

record test results, and generally completed his compliance records after the work had been completed when he returned to his office. The Board would expect, at a minimum, that a competent electrical worker would have a checklist based on Section 8 of AS/NZS3000 on hand when carrying out testing to ensure that all the required tests have been completed and the correct test results have been recorded on it.

Consideration

- [73] The importance of testing cannot be understated. It is the fundamental method by which the safety of PEW is ascertained. A failure to test, or to test in full accordance with Part 8 of AS/NZS3000, puts people and property at risk. That is what has occurred in this matter. The Respondent did not test, and as a consequence, a person lost their life. Put another way, if the Respondent had carried out the required tests, then it would have been identified that what he had assumed was an earth conductor was live and that the fitting he had installed was not electrically safe.
- [74] Two of the factors the Board has to consider when imposing a penalty are the protection of the public and deterrence. Protection of the public can be promoted by the Board sending a strong deterrence message to other electrical workers that there will be serious consequences if a practitioner fails to test. That deterrence can come by way of a significant penalty being imposed.
- [75] At the same time, it is important that the Board is consistent in the application of penalties and that it takes into consideration all aggravating and mitigating factors.
- [76] Taking the above and the submissions received into account, the Board adopted a starting point of the cancellation of the Respondent's licence. Whilst cancellation may appear to be at odds with previous Board decisions, the Board notes the seriousness of the offending, the fact that a person lost their life as a result of it, and the finding that the Respondent has been grossly negligent, which places the conduct at the highest level of disciplinary offending. Also, a fine is not an option that is open to the Board.
- [77] As noted above, the Board also considers that a significant penalty is required to not only deter the Respondent from future conduct but also to send a strong signal to other electrical workers. Electrical workers need to understand that testing must always be undertaken and that there will be serious consequences if they fail to do so.
- [78] Turning to mitigating factors, the Respondent has accepted accountability and responsibility, although that has come about following a defended hearing and a finding that he was guilty of other offences under the Electricity Act and the District Court. Notwithstanding, he is entitled to a reduction in the penalty because of his acceptance. Also, as noted, the Respondent has been penalised by the District Court and has been ordered to pay \$150,000 reparation, \$50,000 of which has been paid. The Board has noted that the Respondent has sought to retain his licence so that he can both pay the remaining \$100,000 and support himself and his wife, who works for his business. At the same time, he does have assets that he could realise to

satisfy the remaining amount but has chosen not to. The Board would also note that whilst electrical work is the Respondent's current trade, it is not the only way in which he or his wife could, in the future, derive an income.

- [79] Other mitigating factors that the Board has taken into consideration are that the Respondent has not previously appeared before the Board, his age and his remorse. The Board also notes the time it has taken for this matter to be dealt with.
- [80] Taking those factors into account and noting the Board's reservations as to the Respondent's competence, the Board has decided that it will reduce the penalty to one of a suspension combined with a training order. The suspension will deter the Respondent and other electrical workers. The training will address the Board's competency concerns. The specific order the Board will make is that the Respondent's license will be suspended until the latter of a period of two years or the successful completion by the Respondent, at his own cost, of the Board's Theory and Regulations exams and its Practical 1, 2 and 3 assessments.
- [81] The Respondent should note that whilst the Board has suspended his licence, he will be able to work within the electrical industry in accordance with section 76 of the Act and the Board's supervision guidelines.

Costs

- [82] Under section 147N of the Act, the Board may require the Respondent to pay the Board any sum that it considers just and reasonable towards the costs and expenses of and incidental to the investigation, the prosecution and the hearing.
- [83] 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 case.³²
- [84] In *Collie v Nursing Council of New Zealand*,³³ 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.

- [85] In *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society*,³⁴ the High Court noted:

[46] All cases referred to in Cooray were medical cases and the Judge was careful to note that the 50 per cent was the general approach that the Medical Council took. We do not accept that if there was any such approach, it is necessarily to be taken in proceedings involving other disciplinary bodies. Much will depend upon the time involved, actual expenses incurred, attitude

³² *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.

³³ [2001] NZAR 74

³⁴ CIV-2011-485-000227 8 August 2011

of the practitioner bearing in mind that whilst the cost of a disciplinary action by a professional body must be something of a burden imposed upon its members, those members should not be expected to bear too large a measure where a practitioner is shown to be guilty of serious misconduct.

[47] Costs orders made in proceedings involving law practitioners are not to be determined by any mathematical approach. In some cases 50 per cent will be too high, in others insufficient.

- [86] 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 moderately complex. Adjustments based on the High Court decisions above are then made.
- [87] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$675 toward the costs of and incidental to the matter. In setting the amount of costs the Board took into account that the Respondent had agreed to the matter proceeding by way of an Agreed Statement of Facts.

Publication

- [88] As a consequence of its decision, the Respondent's name and the disciplinary outcomes will be recorded in the public register as required by the Act³⁵. The Board can, pursuant to section 147Z of the Act, also order publication over and above the public register notation. Under section 147Z the Board may, if no appeal is brought within 20 working days of its decision, direct the Registrar to cause a notice stating the effect of the decision or order, the reasons for the decision or order, and (unless the Board directs otherwise) the name of the person in respect of whom the decision or order was made, to be published in the Gazette and any other publications as may be directed by the Board.
- [89] 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.
- [90] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990³⁶. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction³⁷. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive³⁸. 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*³⁹.

³⁵ Refer sections 128 of the Act

³⁶ Section 14 of the Act

³⁷ Refer sections 200 and 202 of the Criminal Procedure Act

³⁸ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

³⁹ *ibid*

- [91] 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 interest⁴⁰. 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.
- [92] Based on the above, the Board will publish a general article in the Electron summarising the matter but will order further publication. The Respondent will be identified in the Electron. The Board, under section 147Z of the Act, also orders that a press release be drafted and issued summarising the matter and the Board's findings.

Penalty, Costs and Publication Orders

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

Penalty: Pursuant to section 147M(1)(b) of the Electricity Act 1992, the Respondent's licence be suspended until the latter of a period of two years or the successful completion of the following training, the Respondent's own cost, ordered under section 147(2) of the Act:

- (a) completion of the Board's theory exam;
- (b) completion of the Board's regulations exam; and
- (c) completion of the Board's practical 1, 2 and 3 assessments.

Costs: Pursuant to section 147N of the Act, the Respondent is ordered to pay costs of \$675 (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 Electrical Workers in accordance with section 128(1)(c)(viii) of the Act.

The Respondent will be named in this decision, which will be publicly available on the Board's website.

A summary of the matter will be published by way of an article in the Electron which will focus on the lessons to be learnt from the case. The Respondent will be named in the publication.

In terms of section 147Z of the Act, there will be action taken to publicly notify the Board's action.

- [94] The Respondent should note that the Board may refuse to relicence an electrical worker who has not paid any fine or costs imposed on them.

Suppression Order

- [95] At the commencement of the hearing, the Board made various interim suspension orders. The Board noted that it would review the suspension orders and issue final orders when it delivered its substantive decision.

⁴⁰ Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

- [96] Under section 153(3) of the Act, the Board may prohibit the publication of any report or account of any part of any proceedings before it or make an order prohibiting the publication of the whole or any part of any documents produced. The Board may make such orders it is of the opinion that it is proper to do so, having regard to the interests of any person and to the public interest.
- [97] The Board notes that various suppression orders were made by the District Court. Those orders included suppression of the address at which the events took place and the name of the person who owned that property. To avoid doubt, the Board makes the same orders.
- [98] Counsel for the Respondent requested that the Respondent's financial details provided with his affidavit be suppressed.
- [99] As previously noted, the starting point is that in New Zealand, there is a principle of open justice and open reporting. As such good grounds have to be shown as to why a matter or details should be suppressed. In the criminal jurisdiction, the Criminal Procedure Act sets out various grounds for suppression.⁴¹ Within the disciplinary hearing jurisdiction, the Courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive⁴². In *N v Professional Conduct Committee of Medical Council*,⁴³ the High Court pointed to the following factors:
- The tribunal must be satisfied that suppression is desirable having regard to the public and private interests and consideration can be given to factors such as:*
- *issues around the identity of other persons such as family and employers;*
 - *identity of persons involved and their privacy and the impact of publication on them; and*
 - *the risk of unfairly impugning the name of other practitioners if the responsible person is not named.*
- [100] The Board finds that there is limited public interest or value in the Respondent's financial information being published, and it considers that there may be an adverse impact on the Respondent's privacy if the documents provided to the Board are not suppressed. Accordingly, the Board makes an order prohibiting the publication of the detailed financial records provided to the Board by the Respondent.

⁴¹ Refer ss 200 and 202 of the Criminal Procedure Act

⁴² *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

⁴³ *ibid*

Right of Appeal

[101] The right to appeal Board decisions is provided for in sections 147ZA and 147ZB of the Actⁱⁱ.

Signed and dated this 7th day of October 2024



R Keys
Presiding Member

ⁱ Section 147M of the Act

- (1) *If the Board, after conducting a hearing, is satisfied that a person to whom this Part applies is guilty of a disciplinary offence, the Board may—*
- (a) *do 1 or more of the following things:*
 - (i) *order that the person's registration or practising licence (or both) be cancelled:*
 - (ii) *order that the person's provisional licence be cancelled:*
 - (iii) *order that the person may not apply to be reregistered or re-licensed before the expiry of a specified period:*
 - (b) *order that the person's registration or practising licence (or both), or the person's provisional licence, be suspended—*
 - (i) *for any period that the Board thinks fit; or*
 - (ii) *until that person does 1 or more of the things specified in subsection (2):*
 - (c) *order that the person's registration or practising licence (or both), or the person's provisional licence, be restricted for any period that the Board thinks fit, in either or both of the following ways:*
 - (i) *by limiting the person to the work that the Board may specify:*
 - (ii) *by limiting the person to doing, or assisting in doing, work in certain circumstances (for example, by limiting the person to work only on approved premises or only in the employ of an approved employer):*
 - (d) *order that the person be disqualified from doing or assisting in doing prescribed electrical work that the person would otherwise be authorised to do in that person's capacity as a person to whom this Part applies—*
 - (i) *permanently, or for any period that the Board thinks fit; or*
 - (ii) *until that person does 1 or more of the things specified in subsection (2):*
 - (e) *order the person to do 1 or more of the things specified in subsection (2) within the period specified in the order:*
 - (f) *order the person to pay a fine not exceeding \$10,000:*
 - (g) *order that the person be censured:*
 - (h) *make no order under this subsection.*
- (2) *The things that the person can be required to do for the purposes of subsection (1)(b), (d), and (e) are to—*
- (a) *pass any specified examination:*
 - (b) *complete any competence programme or specified period of training:*
 - (c) *attend any specified course of instruction.*
- (3) *The Board may take only 1 type of action in subsection (1) 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), (c), (e) or (g).*

-
- (4) No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an—
- (a) offence for which the person has been convicted by a court; or
 - (b) infringement offence for which the person has been issued with an infringement notice and has paid an infringement fee.
- (5) The Board must not exercise any authority conferred by this section in respect of any offence committed by any person before the date of that person's registration or, as the case may be, the date on which that person's provisional licence was issued if at that date the Board was aware of that person's conviction for that offence.
- (6) If a person is registered under Part 10 in respect of more than 1 class of registration, the Board may exercise its powers under subsection (1)(a) to (e) in respect of each of those classes or 1 or more of those classes as the Board thinks fit.]

ii Section 147ZA Appeals

- (1) A person who is dissatisfied with the whole or any part of any of the following decisions, directions, or orders may appeal to the District Court against the decision, direction, or order:
- (e) any decision, direction, or order under any of sections 108, 109, 120, 133, 137, and 153 or Part 11 (except section 147C).

Section 147ZB Time for lodging appeal

An appeal under section 147ZA must be brought within—

- (a) 20 working days after notice of the decision, direction, or order was given to, or served on, the appellant; or
- (b) any further time that the District Court may allow on application made before or after the expiration of that period.