

## Before the Electrical Workers Registration Board

CE No. 22240

Electrical Worker: Peter Armitage (the Respondent)

Registration Number: I 243127

Electrical Worker Number: EW 044325

Registration Class: Inspector

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### Decision of the Board in Respect of the Conduct of an Electrical Worker

#### Under section 147G and 147M of the Electricity Act 1992

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Hearing Location: Auckland

Hearing Type: In Person

Hearing and Decision Date: 19 October 2020

Board Members Present:

Mel Orange (Presiding)  
Michael Macklin, Registered Inspector  
Jane Davel, Lay Member  
Russell Keys, Registered Inspector  
Martin Perry, Registered Electrician

Appearances: Martin Denyer for the Investigator

#### **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 a disciplinary offence under section 143(b)(ii) of the Act.

## Contents

<b>Summary of the Decision</b> .....	2
<b>Introduction</b> .....	2
<b>Function of Disciplinary Action</b> .....	4
<b>Evidence</b> .....	4
<b>Board’s Conclusion and Reasoning</b> .....	7
<b>Penalty, Costs and Publication</b> .....	13
Penalty .....	13
Costs.....	14
Publication .....	15
<b>Penalty, Costs and Publication Orders</b> .....	15
<b>Right of Appeal</b> .....	16

## Summary of the Decision

- [1] The Respondent negligently created a risk of serious harm or significant property damage by failing to ensure correct polarity and phase rotation testing in 11kv cables. He is fined \$1,000 and ordered to pay costs of \$750.

## Introduction

- [2] 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.
- [3] The Respondent was served with a notice setting out the alleged disciplinary offences the Investigator reported should be considered by the Board. The charges were:

### ***First Alleged Disciplinary Offence***

1. *On or around 26 June 2019 at [Omitted], Mr Peter Armitage 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:*
  - a. *Supervised and/or carried out the connection of 11kv cables into a ring main unit (RMU) transposing multiple phase conductors; and/or*
  - b. *Failed to ensure correct polarity and phase rotation testing in 11kv cables H274 and H285; and/or*
  - c. *Failed to comply with the requirements of relevant certified design for 11kv installation by not connecting the equipotential*

*bonding of reinforced steel within the concrete pad or the connection of the transformer neutral star point to the main earth bar.*

*Or in the Alternative*

2. *On or around 26 June 2019 at [Omitted], Mr Peter Armitage 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;*
  - a. *Supervised and/or carried out the connection of 11kv cables into a RMU transposing multiple phase conductors; and/or*
  - b. *Failed to ensure correct polarity and phase rotation testing in 11kv cables H274 and H285; and/or*
  - c. *Failed to comply with the requirements of relevant certified design for 11kv installation by not connecting the equipotential bonding of reinforced steel within the concrete pad or the connection of the transformer neutral star point to the main earth bar.*

***Second Alleged Disciplinary Offence***

3. *On or around 26 June 2019 at [Omitted], Mr Peter Armitage has provided a false or misleading return being an offence under section 143(f) of the Act, IN THAT, he issued an Electricity Safety Certificate certifying prescribed electrical work as being safe to use when it was electrically unsafe.*

***Third Alleged Disciplinary Offence***

4. *On of around 26 June 2019 at [Omitted], Mr Peter Armitage has provided a false and misleading return being an offence under section 143(f) of the Act, IN THAT, he issued a Certificate of Compliance certifying prescribed electrical work had been done lawfully and safely and that the information in the certificate and attached documents is correct.*

[4] 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.

[5] No Board Members declared any conflicts of interest in relation to the matters under consideration.

### Function of Disciplinary Action

[6] 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*<sup>1</sup> and in New Zealand in *Dentice v Valuers Registration Board*<sup>2</sup>.

[7] 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*<sup>3</sup> 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.”*

[8] 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. It does not have any jurisdiction over contractual matters.

### Evidence

[9] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>4</sup>. The Board notes that 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.*

[10] The Board heard evidence from the Respondent and received briefs of evidence and heard evidence from the following:

[Omitted]	Complainant, witness for the Investigator, High Voltage Maintenance Supervisor for [Omitted]
Mark Carter	Inspector, Expert for the Investigator
Brendan Erasmuson	The Investigator

[11] Dickson Gray Electrical Limited (DGE), was engaged by [Omitted] to install a new totalpad kiosk substation at [Omitted]. The kiosk, once installed, would form part of the ring circuit of electrical supply for the [Omitted]. The Respondent, an employee

<sup>1</sup> *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

<sup>2</sup> [1992] 1 NZLR 720 at p 724

<sup>3</sup> [2016] HZHC 2276 at para 164

<sup>4</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

of DGE, was tasked with the connection of the kiosk to an existing 11kv mains cable. Aspects of the work were subcontracted and were carried out by other registered and licensed electrical workers. At the hearing, the Respondent accepted that he was in overall charge of the 11kv connection and that his role included approving the work prior to livening processes being undertaken.

- [12] The subcontracted work included the termination of the 11kv cable onto isolators at each side of a newly installed Ring Main Unit (RMU). The work was carried out by [Omitted] of [Omitted]. Following the completion of [Omitted] work, [Omitted] gave a verbal assurance to the Respondent that the polarity and phase rotation for the connections was correct.
- [13] [Omitted], a registered electrician and employee of [Omitted] who had been engaged by DGE to test the transformer, switchgear, and HV cables stated, in a report provided to the Board as part of the Investigator's documentation, that he had not carried out phase rotation or polarity testing due to time constraints and that relied on the verbal assurance of [Omitted] that it was correct. The Respondent also gave evidence at the hearing as regards time constraints noting that the work needed to be completed prior to the ensuing weekend.
- [14] On 20 June 2019, following the completion of the terminations, the Respondent issued a combined Certificate of Compliance (CoC) and Electrical Safety Certificate (ESC) certifying the work as connected to a supply and safe to use. At the hearing, the Board heard evidence that the certification was required by [Omitted] as part of their livening process.
- [15] The CoC detailed and ticked the tests that had been completed, including a polarity (independent earth), insulation resistance, earth continuity, equipotential bonding, phase rotation and fault loop impedance. The work was then inspected by an Electrical Engineer [Omitted] (IPENZ registration [Omitted]). [Omitted] was not a registered electrical worker. Notwithstanding he issued a Record of Inspection (RoI) certifying the work. The RoI was also required by [Omitted] for livening.
- [16] The CoC/ESC and RoI were then provided to [Omitted] who hold the high voltage maintenance contract for [Omitted]. [Omitted] were overseeing and reviewing the install and were responsible for final commissioning. When carrying out pre-livening checks mandated by [Omitted], [Omitted] identified that neither the equipotential bonding of reinforced steel within the concrete pad, nor the connection of the transformer neutral star point to the main earth, had been completed.
- [17] At the hearing, evidence was received from [Omitted] that there was a requirement that the work be carried out in accordance with [Omitted] design specifications. An Underground Reticulation Earthing HT Customer Substation and Distribution Substation drawing was produced. The Investigator submitted that the [Omitted] drawing was a certified design under regulation 58 of the Safety Regulations.

- [18] The Respondent gave evidence that he was not aware of the [Omitted] drawing or the requirement for the install to be completed in accordance with it. The Respondent produced his own Earthing Schematic for the [Omitted] project. [Omitted] evidence was that he was not aware of Earthing Schematic produced by the Respondent but agreed that the earthing arrangements in both diagrams were the same.
- [19] On the day following certification, the Respondent connected the transformer neutral star point to the main earth and the equipotential bonding of reinforcing steel within the concrete pad. Two cables were then energised up to the two respective isolators on the RMU by [Omitted] and left in the open position.
- [20] Before final commissioning, [Omitted] re-checked the installation and carried out further testing of the RMU terminals. The testing identified the transposition of multiple conductors across all three phases. The Respondent undertook the required corrections to the polarity of the respective conductors and informed [Omitted] when this had been completed.
- [21] The Respondent accepted that he relied on assurances from other parties that the work had been carried out correctly. He stated that he was present when electrical tests were carried out but that he did not carry out any of his own tests. He completed his certification on the basis of the assurances he received. He accepted that if the phasing was not correct that the testing would have been incorrect. He had not, when he completed his certification, received any documentation from [Omitted] as regards testing.
- [22] Mr Carter gave evidence that if the transposition had gone undetected and the isolators for each cable been closed, the resulting short circuit would have affected the safety of personnel, property and the operation of [Omitted]. His opinion was that the fault current would have been likely to result in an explosion and/or fire with potential for serious injury or death. His brief of evidence stated that the fault current would have been in the thousands of amps. The Respondent challenged the opinion and questioned Mr Carter as to the calculations he had carried out to form his opinion. Mr Carter stated he relied on his knowledge and experience, not on calculations. Mr Armitage produced a photograph of the specification plate from the kiosk which stated it was rated for 53kA fault current. He submitted that if the switch was capable of handling the fault current, there would not have been the risks that Mr Carter considered there would have been.
- [23] The Respondent noted that earthing had been completed prior to living and that he was not aware that there was an earth connection within the concrete pad on which the kiosk was placed. He also noted that prior to the livening process being undertaken the connection to the transformer had been locked off.
- [24] The Board questions those present about whether the prescribed electrical work (PEW) had been carried out on an installation or whether, under the Act, it was

“works”. [Omitted] believed it was works as it was a part of [Omitted] distribution network. Mr Carter also accepted that it was most likely works.

### **Board’s Conclusion and Reasoning**

[25] 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 ensure correct polarity and phase rotation testing in 11kv cables.

[26] As regards to the remaining allegations in the First Alleged Disciplinary Offence the Board has also decided that the Respondent **has not**:

- (a) supervised and/or carried out the connection of 11kv cables into a RMU transposing multiple phase conductors; or
- (b) failed to comply with the requirements of relevant certified design for 11kv installation by not connecting the equipotential bonding of reinforced steel within the concrete pad or the connection of the transformer neutral star point to the main earth bar.

[27] The Board has also decided that the Respondent **has not** committed the Second or Third Alleged Disciplinary Offences.

[28] The Board made a finding in respect of one aspect of the charge, that of failing to ensure correct polarity and phase rotation testing in 11kv cables. The Board considered that there was a degree of similarity between the allegation of failing to ensure and the allegation of supervising and/or carrying out. Given the evidence before the Board, including the evidence that the Respondent’s role included approving the work prior to livening, the Board decided that failing to ensure was the more appropriate finding.

[29] With respect to the finding that the Respondent had not failed to comply with a certified design the Board made its decision on the basis that it had not been provided with a certified design or evidence that one had not been complied with. Neither the [Omitted] drawing nor the Earthing Schematic met the requirements under regulation 58 of the Safety Regulations in that certified designs relate to installations whereas the PEW was carried out on “works”.

[30] The Board decided that the PEW had been completed on works and not on an installation on the basis of the definitions of those terms in the Act:

***electrical installation—***

(a) *means—*

- (i) *in relation to a property with a point of supply, all fittings beyond the point of supply that form part of a system that is used to convey electricity to a point of consumption, or used to generate or store electricity; and*

- (ii) *in relation to a property without a point of supply, all fittings that form part of a system that is used to convey electricity to a point of consumption, or used to generate or store electricity; but*
- (b) *does not include any of the following:*
  - (i) *an electrical appliance:*
  - (ii) *any fittings that are owned or operated by an electricity generator and that are used, designed, or intended for use in or in association with the generation of electricity, or used to convey electricity from a source of generation to distribution or transmission lines:*
  - (iii) *any fittings that are used, designed, or intended for use in or in association with the conversion, transformation, or conveyance of electricity by distribution or transmission lines*

**works—**

- (a) *means any fittings that are used, or designed or intended for use, in or in connection with the generation, conversion, transformation, or conveyance of electricity; but*
- (b) *does not include any part of an electrical installation*

*In this Act, **point of supply**, in relation to a property, means the point or points on the boundary of the property at which exclusive fittings enter that property, except that,—*

- (a) *if there are both high voltage lines and a transformer owned by the electricity distributor on the property, the point of supply is the point at which electricity from the transformer enters exclusive fittings; or*
- (b) *if there are non-exclusive fittings on the property, the point of supply is the point at which those fittings become exclusive fittings; or*
- (c) *if the exclusive fittings on the property are owned by a consumer that is a tenant or licensee of the owner or occupier of the property, the point of supply is the point at which those exclusive fittings enter the area leased or licensed by the consumer; or*
- (d) *if there is specific agreement that any other point on the property is the point of supply, the point of supply is the agreed point;—*

*and, in this definition,—*

**exclusive fittings** *means fittings used or intended to be used for the purpose of supplying electricity exclusively to that property*

**high voltage lines** *means lines conveying electricity at a voltage of 1 000 volts or more*

**property—**

- (a) *means the land within the boundary where the electricity is consumed:*



- (b) *includes the whole of the property, if the property is occupied wholly or partially by tenants or licensees of the owner or occupier:*
- (c) *includes the whole of any property that has been subdivided under the Unit Titles Act 2010*

**specific agreement** may be an agreement—

- (a) *entered into by—*
  - (i) *the existing consumer; or*
  - (ii) *any person with a greater interest in the property than the consumer (such as the consumer’s landlord); or*
  - (iii) *any body corporate under the Unit Titles Act 2010 or the registered owner of the land to which the unit plan relates; and*
- (b) *entered into by the electricity distributor or the electricity retailer; and*
- (c) *entered into before or after the date on which this provision comes into force.*

- [31] The Board notes, from a search of the Participant Register maintained under the Electricity Industry Act 2010, that [Omitted] is registered as a market participant under that Act in the capacity of an electricity distributor and as a line owner.
- [32] The Board also noted that the kiosk was being installed as part of a distribution network owned and operated by [Omitted] which was designed to convey electricity to installations with a point of supply that would then consume the electricity. As such, by definition, the PEW was being carried out on works.
- [33] As the PEW was carried out on works there was no regulatory requirement for an ESC, CoC, or RoI to be issued. The obligation to issue an ESC or a CoC is only in respect of an installation. A RoI must be issued for high-risk PEW. The PEW did not come within the definitions of high risk in regulation 6A of the Safety Regulations. Given that certification was not “a required return” under the Safety Regulations, the Board cannot make any findings under section 143(f) of the Act. This is because section 143(f) relates to failing to provide any return required under any enactment relating to prescribed electrical work or to have provided a false or misleading return. In this instance, the allegation was that the return was false or misleading. Whilst the CoC and ESC may have been false or misleading; they were not returns that were required under an enactment. Rather they were required by the network owner as part of their compliance and commissioning requirements. Accordingly, the elements of the offence had not been satisfied, and the Board could not find that a disciplinary offence had been committed.
- [34] Whilst the certification was not required because the PEW was carried out on works there are, however, requirements in regulation 38 of the Safety Regulations which deal with the testing of works and which must be complied with. In particular, there is a requirement in subsection (2) that:

*Before connecting new works to a power supply, the person doing the connection must—*

- (a) *be satisfied that tests have been carried out that ensure that the completed works are electrically safe; and*
- (b) *ensure that—*
  - (i) *the polarity and phase rotation of the supply are correct;*

[35] It is on the basis of the failure to meet those requirements that the Board made its decision that the Respondent had failed to ensure correct polarity and phase rotation testing in 11kv cables. The Board's decision that the Respondent had negligently created a risk of serious harm or significant property damage on the following basis.

[36] Negligence is the departure by an electrical worker, whilst carrying out or supervising PEW, 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*<sup>5</sup> test of negligence which has been adopted by the New Zealand Courts<sup>6</sup>.

[37] The New Zealand Courts have stated that an assessment of negligence in a disciplinary context is a two-stage test<sup>7</sup>. The first is for the Board to consider whether the practitioner has departed from the acceptable standard of conduct of a professional. The second is to consider whether the departure is significant enough to warrant a disciplinary sanction.

[38] 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<sup>8</sup>. 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<sup>9</sup>.

[39] The Board notes that the purposes of the Act are:

**1A Purposes**

*The purposes of this Act are—*

- (a) *to provide for the regulation, supply, and use of electricity in New Zealand; and*
- (b) *Repealed.*
- (c) *to protect the health and safety of members of the public in connection with the supply and use of electricity in New Zealand; and*

<sup>5</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

<sup>6</sup> *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

<sup>7</sup> *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

<sup>8</sup> *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

<sup>9</sup> *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

- (d) *to promote the prevention of damage to property in connection with the supply and use of electricity in New Zealand; and*
- (da) *to provide for the regulation of fittings and electrical appliances that are, or may be, exported pursuant to an international trade instrument; and*
- (e) *to provide for the regulation of electrical workers.]*

[40] The Board also notes, as regards acceptable standards, that all PEW must comply with the Electricity (Safety) Regulation 2010 and the cited Standards and Codes of Practice in Schedule 2 of the Regulations. As such, when considering what is and is not an acceptable standard, they must be taken into account.

[41] Turning to seriousness in *Collie v Nursing Council of New Zealand*<sup>10</sup> the Court's 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.*

[42] Turning to a risk of serious harm or significant property damage. Serious harm is defined in section 2 of the Act. It means:

- (a) *death; or*
- (b) *injury that consists of or includes loss of consciousness; or*
- (c) *a notifiable injury or illness as defined in section 23 of the Health and Safety at Work Act 2015.*

[43] The relevant parts of Section 23 of the Health and Safety at Work Act 2015 are:

**23 Meaning of notifiable injury or illness**

- (1) *In this Act, unless the context otherwise requires, a notifiable injury or illness, in relation to a person, means—*
  - (a) *any of the following injuries or illnesses that require the person to have immediate treatment (other than first aid):*
    - (i) *the amputation of any part of his or her body:*
    - (ii) *a serious head injury:*
    - (iii) *a serious eye injury:*
    - (iv) *a serious burn:*
    - (v) *the separation of his or her skin from an underlying tissue (such as degloving or scalping):*
    - (vi) *a spinal injury:*
    - (vii) *the loss of a bodily function:*
    - (viii) *serious lacerations:*

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<sup>10</sup> [2001] NZAR 74

- (b) *an injury or illness that requires, or would usually require, the person to be admitted to a hospital for immediate treatment:*
- (c) *an injury or illness that requires, or would usually require, the person to have medical treatment within 48 hours of exposure to a substance:*

[44] Significant property damage is not defined in the Act. Section 16(1)(b)(ii) of the Act, which relates to notification of accidents, also refers to serious harm and to property damage. In respect of damage it requires notification where there is:

*damage to any place or part of a place that renders that place or that part of that place unusable for any purpose for which it was used or designed to be used before that accident.*

[45] As section 16 refers to both serious harm and to damage the Board considers significant property damage in section 143(b)(ii) should be interpreted in line with the definition in section 16(1)(b)(ii).

[46] Actual serious harm or significant property damage need not occur. There need only be a risk that either might occur. The risk must be real in that there needs to be a material or substantial possibility, chance or likelihood that serious harm or significant property damage will occur. A real risk has also been described as one that a reasonable person would not brush aside as being far-fetched or fanciful<sup>11</sup>.

[47] Turning to the conduct in question, the Respondent accepted that he was in overall charge of the PEW being undertaken. Other registered and licensed persons were also involved and were at fault. One connected the cables out of phase rotation; another failed to adequately test. The Respondent relied on assertions of the two electrical workers that the phase rotation was correct when it was not. On the basis of those assertions, he signed the documentation which was then relied on by others. He did so because of time pressures placed on him by others. In providing the documentation, he took responsibility for the errors others had made. Fortunately, prior to the cables being energised, further testing was carried out, and the error was identified and rectified.

[48] The Respondent submitted that downstream electrical equipment would have been able to deal with any fault currents that may have arisen. Whilst that may have been the case, electrical workers should not rely on safety devices to rectify and deal with non-compliant electrical work. Those devices are fail-safe devices designed to deal with unforeseen issues that may arise during operation. They are not designed, nor are they required to be installed, so as to compensate for non-compliant PEW. Nor should they be relied on as the primary means of safety. There is no guarantee that they will operate when called upon. The primary form of safety is the completion of PEW in a safe and compliant manner in the first instance.

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<sup>11</sup> *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd (The Wagon Mound No 2)* [1967] 1 AC 617

[49] The Board, which includes registered and licensed electrical workers with considerable knowledge and experience, considered that the PEW had not been carried out in an acceptable manner. The Board finds that an electrical worker in the position of the Respondent would have, at the least obtained and verified written test results prior to completing documentation that represented that the PEW was safe to use. As such, it finds that the Respondent was negligent. It further finds that the conduct fell seriously short of acceptable standards such that a disciplinary finding should be made and that, as there was a risk of serious harm or significant property damage from the non-compliant PEW, the elements of section 143(b)(ii) of the Act have been satisfied.

### **Penalty, Costs and Publication**

[50] Having found that one or more of the grounds in section 143 applies the Board must, under section 147M of the Act<sup>i</sup>, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.

[51] The Respondent made submissions at the hearing as regards penalty, costs and publication.

### Penalty

[52] 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*<sup>12</sup> 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.*

[53] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*<sup>13</sup> the Court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Electricity Act they have the advantage of simplicity and transparency. The Court recommended adopting a starting point for a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors. The same applies to disciplinary proceedings under the Electricity Act.

[54] The Board took into account the involvement of other electrical workers and their failings. The Respondent acknowledged that, in future, he would demand written

<sup>12</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>13</sup> 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

test results, would not rely on verbal assurances and he would not allow himself to be pressured in that he would ensure that he took the time required to ensure compliance. He noted the incident as a learning experience.

- [55] Matters under section 143(b)(ii) are serious. There were not, however, any aggravating factors. The errors were identified and corrected prior to livening. No one was harmed. No property was damaged. On this basis, the Board adopted a starting point of a fine of \$2,500.
- [56] There were mitigating factors. The involvement of other electrical workers was, in particular, a contributing factor. Those workers could also have been disciplined had complaints about them been made. The Board cannot raise complaints, and it does not have any form of inquiry jurisdiction. As such, it cannot deal with the conduct of those persons. It can, however, take their involvement into account in determining the appropriate penalty.
- [57] Based on the above, the Board has decided that the fine will be reduced from \$2,500 to a fine of \$1,000.

#### Costs

- [58] 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, prosecution and the hearing.
- [59] 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<sup>14</sup>.
- [60] In *Collie v Nursing Council of New Zealand*<sup>15</sup> 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.*
- [61] The matter was dealt with at a hearing. The Board's scale costs for a hearing of this type would ordinarily be in the vicinity of \$1,500. Not all of the charges were upheld. The Respondent's defence of the matter was warranted. Notwithstanding it is still appropriate that the Respondent contributes to the costs of the investigation and hearing.
- [62] Based on the above, the Board has decided that the Respondent should pay the sum of \$750 toward the costs of and incidental to the matter.

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<sup>14</sup> *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.

<sup>15</sup> [2001] NZAR 74

## Publication

- [63] 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 Act<sup>16</sup>. 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.
- [64] 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.
- [65] Within New Zealand, there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990<sup>17</sup>. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction<sup>18</sup>. Within the disciplinary hearing jurisdiction, the Courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive<sup>19</sup>. 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*<sup>20</sup>.
- [66] 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 interest<sup>21</sup>. 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.
- [67] The matter will be summarised in the Electron. The Respondent will not, on the basis that he was not the only person at fault, be named in that publication. He will be named in this decision which will be published on the Board's website.
- [68] The Respondent should note that the Board has not made any form of order under section 153(3) of the Act which allows for the prohibition of publication.

## **Penalty, Costs and Publication Orders**

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

**Penalty: Pursuant to section 147M(1)(f) of the Electricity Act 1992, the Respondent is ordered to pay a fine of \$1,000.**

<sup>16</sup> Refer sections 128 of the Act

<sup>17</sup> Section 14 of the Act

<sup>18</sup> Refer sections 200 and 202 of the Criminal Procedure Act

<sup>19</sup> *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

<sup>20</sup> *ibid*

<sup>21</sup> *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

**Costs:** Pursuant to section 147N of the Act, the Respondent is ordered to pay costs of \$750 (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.

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 not be named in the publication.

In terms of section 147Z of the Act, there will not be action taken to publicly notify the Board's action.

[70] 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.

### Right of Appeal

[71] The right to appeal Board decisions is provided for in section 147ZA and 147ZB of the Act<sup>ii</sup>.

Signed and dated this 29<sup>th</sup> day of October 2020



**M. J. Orange**  
Presiding Member

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### <sup>i</sup> 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):



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- (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.