

Before the Electrical Workers Registration Board

	CE No. 22466
Electrical Worker:	Philip James Brown (the Respondent)
Registration Number:	I 2390
Electrical Worker Number:	EW 023894
Registration Class:	Inspector

Decision of the Board in Respect of the Conduct of an Electrical Worker Under section 147G and 147M of the Electricity Act 1992

Hearing Location:	Audio visual link
Hearing Type:	In Person
Hearing and Decision Date:	17 November 2022

Board Members Present:

Mr R Keys, Registered Inspector (Presiding)
Ms M Kershaw, Registered Electrician
Mr M Macklin, Registered Inspector
Ms J Davel, Lay Member
Ms A Yan, Registered Electrical Engineer

Appearances:	Rochelle Hill for the Investigator
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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 section 143(a)(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 in a manner that was contrary to an enactment, and he provided certification that was false or misleading. The Respondent is disqualified from doing Warrants of Electrical Fitness until such time as he completes a course of instruction. The Respondent is ordered to pay costs of \$225. A record of the disciplinary offending will be recorded on the public register for a period of three years.

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. They were:

First Alleged Disciplinary Offence

1. On or around 08 September 2015 at Motorhome Registration [OMITTED], Mr Philip Brown has carried out or caused to be carried out prescribed electrical work in a manner contrary to any enactment relating to prescribed electrical work that was in force at the time the work was done being an offence under section 143(a)(ii) of the Act, IN THAT, he failed to adequately test a Motorhome Registration [OMITTED] and issued a Warrant of Electrical Fitness that had the following non-compliant issues:

- a) The installation did not contain a switchboard; and/or
- b) The installation did not contain a residual current device (RCD) and/or circuit breakers for overcurrent protection.

In breach of regulation 78 of the Electricity (Safety) Regulations 2010.

Or in the Alternative

- 2. On or around 08 September 2015 at Motorhome Registration [OMITTED], Mr Philip Brown 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 adequately test a Motorhome Registration [OMITTED] and issued a Warrant of Electrical Fitness that had the following non-compliant issues:
 - a) The installation did not contain a switchboard; and/or
 - b) The installation did not contain an RCD and/or circuit breakers for overcurrent protection.

Second Alleged Disciplinary Offence

- 3. On or around 08 September 2015 at Motorhome Registration [OMITTED], Mr Philip Brown has provided a false or misleading return being an offence under section 143(f) of the Act, IN THAT, he issued a Warrant of Electrical Fitness on Motorhome Registration [OMITTED] that did not meet all the lawful requirements as set out in regulation 78 of Electricity (Safety) Regulations 2010.

- [4] Prior to the hearing, the Respondent and the Board were provided with all of the documents the Investigator had in their 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*¹ and in New Zealand in *Dentice v Valuers Registration Board*².

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

² [1992] 1 NZLR 720 at p 724

- [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*,³ Collins J. noted that:

“... the disciplinary process does not exist to appease those who are dissatisfied The disciplinary process ... exists to ensure professional standards are maintained in order to protect clients, the profession and the broader community.”

- [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.

Procedure

- [9] The matter proceeded on the basis of an Agreed Statement of Facts.

- [10] The appearance of Counsel for the Investigator was excused.

Evidence

- [11] 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.

- [12] The Board heard from the Respondent prior to it making a decision.
- [13] As noted, the matter proceeded on the basis of an Agreed Statement of Facts. It set out that the Respondent was engaged to provide a Warrant of Electrical Fitness (WoEF) for a motorhome. He carried out an electrical inspection and electrical testing of the motorhome and issued a WoEF. The motorhome was then on sold on two occasions. The then-current owner decided to sell it and sought a renewal of the WoEF. The Electrical Inspector engaged to issue a WoEF identified a number of issues and lodged a complaint.
- [14] The essence of the complaint was that the Respondent had failed to adequately test the motorhome and had then issued a WoEF in breach of regulation 78 of the Electrical (Safety) Regulations 2010 when the installation did not contain a switchboard or a residual current device (RCD) or circuit breakers for overcurrent protection. From that, it followed that the WoEF issued by the Respondent was false and misleading as it certified work as safe when it was not.

³ [2016] HZHC 2276 at para 164

⁴ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

- [15] The Respondent, in the Agreed Statement of Facts, acknowledged that he had carried out the prescribed electrical work set out in the Notice of Proceeding and accepted that the work covered by the WoEF issued was in breach of the Safety Regulations in that it did not meet the requirements AS/NZS 3000:2007 and AS/NZS 3001:2008. Further, the Respondent accepted responsibility and expressed his remorse.
- [16] The Investigator and the Respondent expressed their agreement that the Respondent's conduct was contrary to an enactment.
- [17] 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 Agreed Statement.
- [18] At the hearing, the Board questioned the Respondent about his knowledge of AS/NZS 3001 and Appendix C of that standard which deals specifically with the type of prescribed electrical work that the Respondent had undertaken. The Respondent was not able to answer the questions and did not display a knowledge of the regulatory instrument.

Board's Conclusion and Reasoning

- [19] The Board has decided that the Respondent **has** carried out or caused to be carried out prescribed electrical work in a manner contrary to any enactment relating to prescribed electrical work that was in force at the time the work was done being an offence under section 143(a)(ii) of the Act, IN THAT, he failed to adequately test a Motorhome Registration [OMITTED] and issued a Warrant of Electrical Fitness that had the following non-compliant issues; the installation did not contain a switchboard or a residual current device or circuit breakers for overcurrent protection.
- [20] The Board has also decided that the Respondent provided a false or misleading return being an offence under section 143(f) of the Act when he issued a Warrant of Electrical Fitness on Motorhome Registration [OMITTED] that did not meet all the lawful requirements as set out in regulation 78 of Electricity (Safety) Regulations 2010.
- [21] The reasons for the Board's decisions follow.

First Offence

- [22] The charges put before the Board were laid in the alternatives of negligence or incompetence under section 143(a)(i) and contrary to an enactment under section 143(a)(ii). The Investigator and the Respondent submitted that the appropriate finding was one of carrying out prescribed electrical work in a manner that was contrary to an enactment. The Board agreed.

- [23] Contrary to an enactment is a form of strict liability offence in that all that need be proven is that the relevant enactment has been breached – in the instance the Electricity (Safety) Regulations 2010 or any of the cited standards within Schedule 2 of the Regulations. The Board does not need to find that there was intention, fault, or negligence⁵.
- [24] In a previous matter relating to prescribed electrical work carried out on a connectable installation, the Board found that issuing a Warrant of Electrical Fitness was prescribed electrical work in that it was maintenance⁶. That matter also related to an Inspector issuing a Warrant of Electrical Fitness for a non-compliant connectable installation. The Board found that the electrical worker had carried out prescribed electrical work in a manner that was contrary to an enactment.
- [25] In the present matter there was clear evidence that the motorhome did not comply with the provisions of AS/NZS 3000 or AS/NZS 3001. Both are cited in the Safety Regulations as Standards that must be complied with in relation to connectable installations. It follows that, in issuing a Warrant of Electrical Fitness in such circumstances and on the basis of previous findings by the Board, the Respondent did carry out prescribed electrical work in a manner that was contrary to an enactment.

Certification

- [26] The charge before the Board is in respect of the second provision, “to have provided a false or misleading return”. All that is required of the Board is to determine whether a return, a Warrant of Electrical Fitness required under regulations 76 to 78 of the Regulations, was false or misleading. 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 irrelevant⁷.
- [27] The evidence before the Board established that the connectable installation did not meet the requirements of AS/NZS 3000 or AS/NZS 3001, whereas the certification was a statement that it did. As such, the certification was false or misleading.

Penalty, Costs and Publication

- [28] 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.
- [29] The Respondent made submissions at the hearing as regards penalty, costs, and publication.

⁵ *Blewman v Wilkinson* [1979] 2 NZLR 208

⁶ *Graham* [2020] EWRB 22184

⁷ *Taylor Bros Ltd v Taylor Group Ltd* [1988] 2 NZLR 1

Penalty

[30] 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*⁸ 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.

[31] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*,⁹ 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.

[32] The matter was dealt with by way of an Agreed Statement of Facts. The Respondent cooperated with the investigation and accepted his wrongdoing. Those are mitigating factors. The Respondent also described his personal circumstances, which the Board took into account. The Board also took into account the Respondent’s lack of knowledge of the provisions in AS/NZS 3001, which apply to connectable installations. The lack of knowledge was concerning, and the Board was cognisant of the need to protect the public.

[33] Taking all of the factors into account, the Board decided to make orders under sections 147M(1)(d) and 147M(2)(c) of the Act. Those orders are that the Respondent will be disqualified from doing Warrants of Electrical Fitness until he satisfactorily completes, at his own cost, a course of instruction in AS/NZS 3001:2008+A2.

[34] The course of instruction is to be delivered by a training provider approved by the Registrar, and the training provider shall provide a report on the training and its outcome to the Registrar on its completion. The Registrar shall, on the basis of that report, determine if the Respondent has satisfied the Board’s training order and may, at his discretion, refer the matter back to the Board for consideration. On successful completion of the course of instruction, the disqualification will be lifted. Until such time as it is, the disqualification is to be recorded on the Public Register.

⁸ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

Costs

[35] 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.

[36] 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 case¹⁰.

[37] In *Collie v Nursing Council of New Zealand*,¹¹ 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.

[38] In *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society*,¹² 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 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.

[39] The Board has adopted an approach to costs that uses a scale based on 50% of the average costs of different categories of hearings, simple, moderate, and complex. The current matter was simple. Adjustments based on the High Court decisions above are then made.

[40] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$225 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.

¹⁰ *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.

¹¹ [2001] NZAR 74

¹² CIV-2011-485-000227 8 August 2011

Publication

- [41] 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 Act¹³. 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.
- [42] As a general principle, such further public notification may be required where the Board perceives a need for the public and/or the profession to know of the findings of a disciplinary hearing. This is in addition to the Respondent being named in this decision.
- [43] Within New Zealand, there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990¹⁴. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction¹⁵. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive¹⁶. 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*¹⁷.
- [44] The courts have also stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published in the public interest¹⁸. 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.
- [45] Based on the above, the Board will publish a general article in the Electron summarising the matter but will not order further publication. The Respondent will not be identified in the Electron.
- [46] The Respondent should also note that the Board has not made any form of order under section 153(3) of the Act which allows for prohibition of publication.

¹³ Refer sections 128 of the Act

¹⁴ Section 14 of the Act

¹⁵ Refer sections 200 and 202 of the Criminal Procedure Act

¹⁶ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

¹⁷ *ibid*

¹⁸ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Penalty, Costs and Publication Orders

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

Penalty: Pursuant to section 147M(1)(d) of the Electricity Act 1992, the Respondent is disqualified from doing Warrants of Electrical Fitness until he satisfactorily completes, at his own cost, and pursuant to section 147M(2)(c) of the Act, a course of instruction in AS/NZS 3001:2008+A2 and as further detailed in paragraphs [33] and [34] above.

Costs: Pursuant to section 147N of the Act, the Respondent is ordered to pay costs of \$225 (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.

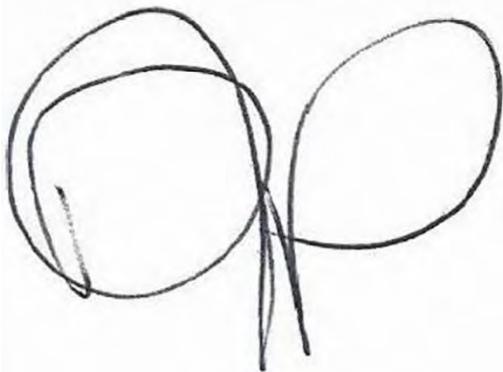
A summary of the matter will be published by way of an article in the Electron which will focus on the lessons to be learnt from the case. The Respondent will not be named in the publication.

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

Right of Appeal

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

Signed and dated this twenty-third day of November 2022.

A handwritten signature in black ink, consisting of several overlapping loops and a long vertical stroke at the end, positioned above the name and title of the signatory.

Mr 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

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- (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.*