

Before the Electrical Workers Registration Board

CE No. 22597

In the matter of:

A disciplinary hearing before the Electrical Workers Registration Board

Between:

The Ministry of Business Innovation and Employment

And

Paul Browning a registered and licensed electrical worker (E 812, EW 035228, 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**

Hearing Location:

Wellington

Hearing Type:

In Person

Hearing and Decision Date:

17 August 2023

Board Members Present:

Mr R Keys, Registered Inspector (Presiding)

Ms J Davel, Lay Member

Ms M Kershaw, Registered Electrician

Ms A Yan, Registered Electrical Engineer

Appearances:

R Boyd 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 disciplinary offences under sections 143(a)(i), 143(a)(II), 143(b)(ii) and 143(f) of the Act.

Contents

Summary of the Board’s Decision	2
Introduction	2
Function of Disciplinary Action	5
Procedure	5
Evidence	5
Board’s Conclusion and Reasoning	6
First Offence	7
Contrary to an Enactment.....	11
Negligence.....	11
Risk of Serious Harm or Significant Property Damage	14
Second Offence	14
Penalty, Costs and Publication	15
Penalty	15
Costs.....	16
Publication	17
Penalty, Costs and Publication Orders	18
Right of Appeal	18

Summary of the Board’s Decision

[1] The respondent completed a switchboard upgrade in a negligent manner and in a manner that created.

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 27 March 2018 at [OMITTED], Gisborne, Mr Paul Browning 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:

- (a) Failed to provide adequate over current protection for installed conductors (95mm² copper tails jointed with 240mm² alloy submain

cable) for the red and white phases where these were connected to the moulded case circuit breaker (MCCB); and/or

- (b) Failed to ensure a reliable electrical connection of the said 95mm² copper tails to the MCCB; and/or
- (c) Failed to provide adequate over current protection for installed conductors being 2 x 120mm² flexible copper conductors per phase on the basis of an incorrect maximum current setting at the main isolator; and/or
- (d) Failed to ensure that the bare main earthing conductor was insulated, and failed to distinguish the said existing bare earthing conductor (forming the installation wiring) as a main earthing conductor; and/or
- (e) Failed to ensure that termination stubs on the LV side of the transformer (live parts) had been fitted with an adequate degree of insulation; and/or
- (f) Failed to provide adequate support of installed 4 core 240mm² alloy submain cable; and/or
- (g) Failed to provide adequate over current protection for installed conductors (being a 4 core 240mm² alloy cable) on the basis of an incorrect maximum current setting of the MCCB in question; and/or
- (h) Failed to ensure that the configuration of the protective earthing system inside the "Main Mill" distribution board was aligned with an MEN protective earthing system; and/or
- (i) Failed to ensure that an RCBO (switch gear and control gear) had been accessible for the purposes of operation.

In breach of regulations 13(1), 20(1)(a), 20(2)(a) and (d), 59(1) of the Electricity (Safety) Regulations 2010.

Or in the Alternative

2. On or around 27 March 2018 at [OMITTED], Gisborne, Mr Paul Browning 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) Failed to provide adequate over current protection for installed conductors (95mm² copper tails jointed with 240mm² alloy submain cable) for the red and white phases where these were connected to the moulded case circuit breaker (MCCB); and/or
 - (b) Failed to ensure a reliable electrical connection of the said 95mm² copper tails to the MCCB; and/or

- (c) Failed to provide adequate over current protection for installed conductors being 2 x 120mm² flexible copper conductors per phase on the basis of an incorrect maximum current setting at the main isolator; and/or
- (d) Failed to ensure that the bare main earthing conductor was insulated, and failed to distinguish the said existing bare earthing conductor (forming the installation wiring) as a main earthing conductor; and/or
- (e) Failed to ensure that termination stubs on the LV side of the transformer (live parts) had been fitted with an adequate degree of insulation; and/or
- (f) Failed to provide adequate support of installed 4 core 240mm² alloy submain cable; and/or
- (g) Failed to provide adequate over current protection for installed conductors (being a 4 core 240mm² alloy cable) on the basis of an incorrect maximum current setting of the MCCB in question; and/or
- (h) Failed to ensure that the configuration of the protective earthing system inside the "Main Mill" distribution board was aligned with an MEN protective earthing system; and/or
- (i) Failed to ensure that an RCBO (switch gear and control gear) had been accessible for the purposes of operation.

Or in the Alternative

3. On or around 27 March 2018 at [OMITTED], Gisborne, Mr Paul Browning 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) Failed to provide adequate over current protection for installed conductors (95mm² copper tails jointed with 240mm² alloy submain cable) for the red and white phases where these were connected to the moulded case circuit breaker (MCCB); and/or
 - (b) Failed to ensure a reliable electrical connection of the said 95mm² copper tails to the MCCB.

Second Alleged Disciplinary Offence

4. On or around 27 March 2018 at [OMITTED], Gisborne, Mr Paul Browning has provided a false or misleading return being an offence under section 143(f) of the Act, IN THAT, he falsely certified prescribed electrical work as being lawful and safe when significant elements of the work were not lawful and were electrically unsafe.

- [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*¹ and in New Zealand in *Dentice v Valuers Registration Board*².
- [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.

Evidence

- [10] 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.

- [11] The Board heard from the Respondent prior to it making a decision.

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

³ [2016] HZHC 2276 at para 164

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

- [12] As noted, the matter proceeded on the basis of an Agreed Statement of Facts. The Statement set out that the Respondent was engaged to carry out a main switchboard replacement in a commercial installation. After the replacement had been completed, an on-site electrician made a complaint, which alleged the switchboard replacement was not compliant. The complaint noted that after the replacement, plant operators noticed a burning smell coming from the main switch room. On opening the door, they found the room filled with smoke. The plant was switched off, and an electrician was called. That Electrician found that the copper tails on the red and white phase conductors supplying the sub-circuit to the processing plant had over-heated and sustained considerable damage.
- [13] The Investigator sought the opinion of Mr Mark Carter, an Electrical Inspector. He reviewed the prescribed electrical work (PEW), and his findings resulted in the allegations as set out in the Notice of Proceeding.
- [14] The Respondent initially put forward that the issues may have been caused by other electrical workers who had been on site after he had completed his PEW. He later accepted that this was not the case after it was confirmed that the other workers had not carried out any PEW on the replacement switchboard. The Respondent also accepted that he had committed the disciplinary offences as set out in the Notice of Proceeding and expressed his remorse.
- [15] 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.

Board's Conclusion and Reasoning

- [16] The Board has decided that the Respondent **has** committed the following disciplinary offences:
1. 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:
 - (a) Failed to ensure that the bare main earthing conductor was insulated, and failed to distinguish the said existing bare earthing conductor (forming the installation wiring) as a main earthing conductor;
 - (b) Failed to provide adequate support of installed 4 core 240mm² alloy submain cable; and
 - (c) Failed to ensure that an RCBO (switch gear and control gear) had been accessible for the purposes of operation.

In breach of regulations 13(1), 20(1)(a), 20(2)(a) and (d), 59(1) of the Electricity (Safety) Regulations 2010.

2. Carried out prescribed electrical work in a negligent manner, being an offence under section 143(a)(i) of the Act in that he:
 - (a) Failed to ensure a reliable electrical connection of the said 95mm² copper tails to the MCCB;
 - (b) Failed to provide adequate over current protection for installed conductors being 2 x 120mm² flexible copper conductors per phase on the basis of an incorrect maximum current setting at the main isolator;
 - (c) Failed to ensure that termination stubs on the LV side of the transformer (live parts) had been fitted with an adequate degree of insulation; and
 - (d) Failed to ensure that the configuration of the protective earthing system inside the "Main Mill" distribution board was aligned with an MEN protective earthing system.
3. 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) Failed to provide adequate over current protection for installed conductors (95mm² copper tails jointed with 240mm² alloy submain cable) for the red and white phases where these were connected to the moulded case circuit breaker (MCCB); and
 - (b) Failed to ensure a reliable electrical connection of the said 95mm² copper tails to the MCCB.
4. Provided a false or misleading return being an offence under section 143(f) of the Act in that he falsely certified prescribed electrical work as being lawful and safe when significant elements of the work were not lawful and were electrically unsafe.

[17] The reasons for the Board's decisions follow.

First Offence

[18] The charges put before the Board were laid in the alternatives of negligently creating a risk of serious harm to any person, or a risk of significant property damage under section 143(b)(ii) of the Act and, as alternatives, negligence or incompetence under section 143(a)(i) and contrary to an enactment under section 143(a)(ii).

- [19] There is a hierarchy to the disciplinary charges in that the Board needs to first consider whether the prescribed electrical work was carried out or caused to be carried out in a manner that was contrary to an enactment. If the Board finds in the affirmative, it then needs to consider whether the conduct reaches the threshold for a finding of negligence or incompetence. If that threshold is met, the Board then needs to consider whether a risk of serious harm or significant property damage was created.
- [20] 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.
- [21] Turning to negligence and/or incompetence, there are no statutory definitions of the terms. It is noted, however, that they are not the same. In *Beattie v Far North Council*⁶ Judge McElrea noted:
- [43] Section 317 of the Act uses the phrase “in a negligent or incompetent manner”, so it is clear that those adjectives cannot be treated as synonymous.*
- [22] Negligence is considered to be 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*⁷ test of negligence which has been adopted by the New Zealand Courts⁸.
- [23] Incompetence is a lack of ability, skill or knowledge to carry out or supervise prescribed electrical work to an acceptable standard. *Beattie* put it as “*a demonstrated lack of the reasonably expected ability or skill level*”. In *Ali v Kumar and Others*,⁹ it was stated as “*an inability to do the job*”.
- [24] The New Zealand Courts have stated that an assessment of negligence and/or incompetence in a disciplinary context is a two-stage test¹⁰. 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.
- [25] 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

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

⁶ Judge McElrea, DC Whangarei, CIV-2011-088-313

⁷ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁸ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

⁹ *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

¹⁰ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

assessment of what is appropriate conduct, bearing in mind the purpose of the Act,¹¹ 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 practitioner¹².

[26] 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*
- (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.]*

[27] The Board also notes, as regards acceptable standards, that all prescribed electrical work 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.

[28] Turning to seriousness in *Collie v Nursing Council of New Zealand*,¹³ 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.

[29] With respect to a risk of serious harm or significant property damage, serious harm is defined in section 2 of the Act. It means:

death; or

¹¹ *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

¹² *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

¹³ [2001] NZAR 74

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.

[30] 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:*
- (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:*

[31] 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.

[32] 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).

[33] 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 fanciful¹⁴.

¹⁴ Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd (The Wagon Mound No 2) [1967] 1 AC 617

Contrary to an Enactment

[34] The prescribed electrical work was carried out on a low-voltage installation. Under the Safety Regulations, the work had to be carried out in accordance with AS/NZS 3000 because regulation 59 stipulates:

59 Low and extra-low voltage installations to comply with AS/NZS 3000

(1) *Every low or extra-low voltage domestic installation, or part of a domestic installation, must be installed, tested, inspected, and connected so as to comply with Part 2 of AS/NZS 3000 if it has a maximum demand at or below—*

(a) *80 amperes per phase if single-phase; or*

(b) *50 amperes per phase if multi-phase.*

[35] The Board received evidence that the prescribed electrical work had not been completed in accordance with AS/NZS 3000, and the Respondent accepted that evidence and agreed that the work was not in accordance with it. As such, the prescribed electrical work set out in the First Offence was carried out in a manner that was contrary to an enactment.

[36] Aspects of the work were, however, more serious. As such, the Board made findings that those aspects met the tests for negligence and for the negligent creation of a risk of serious harm or significant property damage.

Negligence

[37] As noted, aspects of the non-compliant prescribed electrical work were more serious. With respect to the failure to ensure a reliable electrical connection of copper tails to the MCCB, the failure to provide adequate over-current protection, the failure to ensure that termination stubs on the LV side of the transformer (live parts) had been fitted with an adequate degree of insulation, and the failure to ensure the configuration of the protective earthing system aligned with an MEN protective earthing system, the Respondent had been negligent.

[38] The Board made its findings of negligence with respect to those matters on the basis that the provisions of regulation 13 of the Safety Regulations had been breached. It states:

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.*

[39] 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.

[40] 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:*
 - (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.*
- (2) *Works and installations are also deemed to be electrically unsafe if—*
 - (d) *connections between conductors, and between conductors and other fittings, are not secure and reliable; or*
 - (e) *fittings are installed in such a way that any designed cooling conditions are impaired;*

[41] Also, under regulation 73A(1) an electrical worker has certain obligations that must be complied with and which were not:

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; and*
 - (c) *if a certificate of compliance is required for the work, either issue or sight a certificate of compliance issued no earlier than 6 months before the installation or part installation is connected; and*
 - (d) *if the work is required to be inspected, either inspect the work and complete a record of inspection or sight a record of inspection given by another person no earlier than 6 months before the installation or part installation is connected; and*
 - (da) *if the work is required to be inspected and a certificate of compliance is required for the work, attach the certificate of compliance or a copy of the certificate of compliance to the record of inspection; and*
 - (e) *in the case of a low voltage installation or part installation, do all of the following:*
 - (i) *ensure that the polarity and phase rotation of the supply are correct:*
 - (ii) *ensure that the protection of the supply is correctly rated:*
 - (iii) *ensure that the installation or part installation to be connected is compatible with the supply system:*
 - (iv) *if the supply is from a MEN system, verify that there is a main earthing system.*
- (2) *Before a person connects a high voltage installation or part installation to a power supply, the person must comply with the requirements of regulation 38(2) as if references in that regulation to works were references to the installation or part installation.*
- (3) *If the person who connects an installation or part installation has not done the testing required by these regulations personally, the person must sight documentation, signed by the person who did the tests, that sets out what tests were carried out and what the results were.*

- (4) *A person who undertakes the connection of an installation or part installation is entitled (if acting in good faith) to rely on the veracity of any certificates of compliance relating to prescribed electrical work done on the installation or part installation, and on the veracity of any equivalent certificate issued under these regulations before 1 July 2013.*
- (5) *To avoid doubt, in this regulation connection refers to the prescribed electrical work that is the final step that will allow electricity to flow in the installation or part installation on which other prescribed electrical work has been done.*

[42] On the basis of the above and the Agreed Statement of Facts, the Board found that the Respondent had carried out prescribed electrical work a manner that was not in accordance with the standards to be expected of an electrical worker and that the transgressions were sufficiently serious enough to warrant a disciplinary finding of negligence.

Risk of Serious Harm or Significant Property Damage

[43] With respect to the failure to provide adequate over-current protection for installed conductors (95mm² copper tails jointed with 240mm² alloy submain cable) for the red and white phases where they were connected to the moulded case circuit breaker (MCCB) and the failure to ensure a reliable electrical connection of the said 95mm² copper tails to the MCCB, the Board decided that, in addition to the prescribed electrical work meeting the tests for negligence outlined above, it also met the test for a finding under section 143(b)(ii) of the Act. The prescribed electrical work was unsafe, and there was a risk of serious harm or significant property damage and, with respect to the latter, heat did build up, and a fire was a risk.

Second Offence

[44] 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 irrelevant¹⁵.

[45] 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.

[46] The specific allegations were that the Respondent falsely certified prescribed electrical work as being lawful and safe when significant elements of the work were

¹⁵ *Taylor Bros Ltd v Taylor Group Ltd* [1988] 2 NZLR 1

not lawful and were electrically unsafe. The Respondent accepted the allegations. Accordingly, the offence has been committed.

Penalty, Costs and Publication

- [47] 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.
- [48] The Respondent made submissions at the hearing as regards penalty, costs and publication.

Penalty

- [49] 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.¹⁶ It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:¹⁷
- (a) protection of the public and consideration of the purposes of the Act;¹⁸
 - (b) deterring other Licensed Building Practitioners from similar offending;¹⁹
 - (c) setting and enforcing a high standard of conduct for the industry;²⁰
 - (d) penalising wrongdoing;²¹ and
 - (e) rehabilitation (where appropriate).²²
- [50] Overall, the Board should assess the conduct against the range of penalty options available in section 318 of the Act, reserving the maximum penalty for the worst cases²³ and applying the least restrictive penalty available for the particular offending.²⁴ In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty²⁵ that is consistent with other penalties imposed by the Board for comparable offending.²⁶

¹⁶ *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]

¹⁷ Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

¹⁸ Section 3 Building Act

¹⁹ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²⁰ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

²¹ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

²² *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

²³ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²⁴ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

²⁵ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²⁶ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

- [51] 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.²⁷
- [52] The offending was serious. A commensurate penalty is required. The Board adopted a starting point of a fine of \$3,000, an amount that is consistent with other penalties imposed by the Board for similar offences. The Respondent cooperated with the investigation and accepted that he had committed disciplinary offences. On that basis, the Board reduced the fine to \$1,500.

Costs

- [53] 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.
- [54] 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 case²⁸.
- [55] In *Collie v Nursing Council of New Zealand*,²⁹ 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.

- [56] In *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society*,³⁰ 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.

²⁷ 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.

²⁸ *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.

²⁹ [2001] NZAR 74

³⁰ CIV-2011-485-000227 8 August 2011

[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.*

- [57] 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.
- [58] 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.

Publication

- [59] 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 Act³¹. 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.
- [60] 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.
- [61] Within New Zealand, there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990³². The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction³³. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive³⁴. 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*³⁵.
- [62] 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 interest³⁶. It is,

³¹ Refer sections 128 of the Act

³² Section 14 of the Act

³³ Refer sections 200 and 202 of the Criminal Procedure Act

³⁴ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

³⁵ *ibid*

³⁶ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

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

- [63] 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.
- [64] 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.

Penalty, Costs and Publication Orders

- [65] 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 \$1,500.

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.

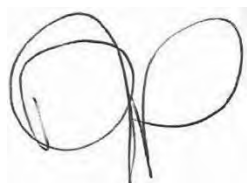
A summary of the matter will be published by way of an article in the Electron, which will focus on the lessons to be learnt from the case. The Respondent will not be named in the publication.

- [66] 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

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

Signed and dated this 4th day of October 2023

A handwritten signature in black ink, appearing to be 'R Keys', written over a light blue rectangular background.

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.*