

Before the Electrical Workers Registration Board

CE No. 22426

In the matter of:

A disciplinary hearing before the Electrical Workers Registration Board

Between:

The Ministry of Business Innovation and Employment

And

Joseph Coleman a registered and licensed electrical worker (E 265293, EW 116580, 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:

Napier and by audio visual link

Hearing Type:

In Person

Hearing Dates:

19 October 2022 and 7 December 2022

Decision Date:

9 January 2023

Board Members Present:

Mr M Orange, Barrister (Presiding)

Mr R Keys, Registered Inspector

Mr M Macklin, Registered Inspector

Ms J Davel, Lay Member

Ms A Yan, Registered Electrical Engineer

Appearances:

R Hill 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 sections 143(a)(i) 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 negligent manner and provided a false or misleading return. He is fined \$2,000 and ordered to pay costs of \$2,800. A record of the disciplinary offending will be recorded on the Public Register for a period of three years.

The Board

- [2] The Board is a statutory body established under the Electricity Act.¹ Its functions include hearing complaints about and disciplining persons to whom [Part 11](#) of the Act.

¹ Section 148 of the Act.

Introduction

- [3] The hearing resulted from a complaint about the conduct of the Respondent and a report under section 147G(1) of the Act from the Investigator² that the complaint should be considered by the Board. Under section 147T of the Act, the Investigator must prosecute the matter at a Board hearing who may be represented by counsel.
- [4] 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 20 March 2020 at [OMITTED], Queenstown, Mr Joseph Coleman 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 adequately carry out the application of two joints to an underground mains cable; and/or
 - (b) Failed to bury an underground cable at the correct depth; and/or
 - (c) Failed to install underground marker (warning) tape; and/or
 - (d) Failed to ensure that any openings for cable entry into the distribution switchboard greater than 5mm were sealed to prevent possible drafting effect which would spread fire

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

Or in the alternative

2. On or around 20 March 2020 at [OMITTED], Queenstown, Mr Joseph Coleman 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 adequately carry out the application of two joints to an underground mains cable; and/or
 - (b) Failed to bury an underground cable at the correct depth; and/or
 - (c) Failed to install underground marker (warning) tape; and/or
 - (d) Failed to ensure that any openings for cable entry into the distribution switchboard greater than 5mm were sealed to prevent possible drafting effect which would spread fire.

² Under section 145 of the Act, an Investigator is appointed by the Chief Executive of the Ministry

Second Alleged Disciplinary Offence

3. On or around 20 March 2020 at [OMITTED], Queenstown, Mr Joseph Coleman has provided a false or misleading return being an offence under section 143(f) of the Act, IN THAT, he provided a Certificate of Compliance for prescribed electrical work that had not been carried out lawfully and safely.

[5] 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.

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

Function of Disciplinary Action

[7] 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*³ and in New Zealand in *Dentice v Valuers Registration Board*⁴.

[8] 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*,⁵ 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.”

[9] 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

[10] The hearing concerned on 19 October 2022. At the hearing, the Respondent put forward evidence in his defence and noted that he had a witness, a former employee ([OMITTED]), that was on site when the prescribed electrical work was carried out, who could corroborate his defence. He stated that a statement might have been provided by the employee as part of the investigation. The Board file did not contain any statements from him. The hearing was adjourned part heard so that the Respondent could call his witness with an opportunity to present further evidence

³ *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

⁴ [1992] 1 NZLR 720 at p 724

⁵ [2016] HZHC 2276 at para 164

from his witness. The hearing resumed on 7 December 2022, at which time Mr [OMITTED] was called.

- [11] At the conclusion of the hearing on 7 December 2022, both parties were provided with an opportunity to file closing statements.

Evidence

- [12] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁶. 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.

- [13] The Board heard evidence from the following witnesses prior to it making a decision:

Joseph Coleman	Respondent
[OMITTED]	Complainant, Electrician
[OMITTED]	Electrical Inspector – witness for the Investigator
David Olsen	Electrical Inspector – expert for the Investigator
[OMITTED]	Property Owner – witness for the Investigator
[OMITTED]	Electrician – witness for the Respondent
[OMITTED]	Investigator

- [14] The Respondent was engaged to carry out prescribed electrical at [OMITTED], Queenstown. The work included the installation of a mains cable which was carried out by the Respondent. Mr [OMITTED], the Respondent's employee at the time, was also on-site carrying out prescribed electrical work. He did not assist with the installation of the mains cable but stated that he did observe the installed cable.
- [15] The mains cable was installed by the Respondent in or about October 2019 when a builder's temporary supply was installed by the Respondent. The cable was covered over except for the pillar box end, where the connection to the supply was to be made. In March 2020, the Respondent moved the connection from the temporary supply to the installation.
- [16] In March 2021, Mr [OMITTED] attended the property to carry out further prescribed electrical work. He had been engaged to provide a power supply to an additional dwelling at the property by Mr [OMITTED]. Mr [OMITTED]'s intention was to split the main supply that the Respondent had installed. In preparation, he had the network

⁶ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

isolate the power supply, and he tested the main cable. His testing established that there was a dead short on one of the phases and on the neutral. Mr [OMITTED] then exposed the main cable to allow him to investigate further. His investigations revealed that the cable had not been buried to the required depth, that there was no warning marker tape over the top of the cable and that two joints in the mains cable had failed with water having entered the cable. He made a complaint about what he found. He provided photographs of what he found with his complaint.



- [17] At the hearing, Mr [OMITTED] clarified that the cable was not buried to a depth of 600mm from the pillar box where the network supply connects to the installation supply and that it was virtually on the surface for about 2 meters. He stated that it was the same situation where the mains cable entered the house and that he would have expected the supply cable to come up directly underneath the pillar box.
- [18] Mr [OMITTED] gave evidence that he had not engaged any other electrical workers to carry out prescribed electrical work at the property until such time as Mr [OMITTED] was engaged. Mr [OMITTED] confirmed that the Respondent had been assisted by Mr [OMITTED].
- [19] The Respondent's evidence was that he installed the mains cable and that he had measured the trench depth, and had installed danger tape at about 300mm above the mains cable. In his response to the complaint, he stated:
- 1. The Mains has been joined approximately 2 metres from the boundary box and 1 metre from the metre box*
 - 2. The joins have been made using standard practice, in the photos you can see the basic heatshrink covering each lug and then Raychem heatshrink covering the all connections, you can also see the glue coming out of the end which is when the Raychem has sealed the join*
 - 3. I personally used my Insulation resistance meter (Multifunction Fluke) to test the mains, with a pass result,*
 - 4. [OMITTED] from [OMITTED] completed the inspection and also tested the Mains (with joins already completed) with his Multifunction tester with a pass result (the result will be on the high risk COI)*
 - 5. I personally completed the heatshrink using a gas torch as I have been taught and shown by many Electricians with the exact same technique looking for the Raychem to be minimized onto the NSCU and protected with the glue coming out at each end I did not see any split or such in the Raychem when the join was completed.*
 - 6. [OMITTED] was advised of each join and had advised us on the arrangement on the switchboard and on the meterbox and myself and [OMITTED] completed this to his standard, [OMITTED] was satisfied with this and therefore livened the mains cable*
- [20] At the hearing, the Respondent again described the method and materials he used to join the cables and stated that he tested the work when he was finished. He described his method as:

With performing the join, what I have been shown is you've got your through-lugs and they're going to be all staggered. It's going to be approximately 100 to 150ml. This is performing the join. You've got heat shrink over each lug and then we've got a main piece of Raychem going over the top. In this case we

used a boot as well, and another piece of Raychem; so there were two pieces of Raychem. Then it has been heat shrunk down and then buried.

- [21] Mr [OMITTED] was the Electrical Inspector who was engaged by the Respondent to inspect the mains work both at the time of the temporary connection and again when the mains cable was connected to the installation. He stated that the Respondent completed the two main cable joints whilst he was on site but that he did not witness the joints being made. Mr [OMITTED] gave evidence at the hearing that he did not see any danger tape.
- [22] Mr [OMITTED]'s evidence was that he was carrying out fitting off work inside the premises when the Respondent was installing the mains cable. He stated that the trench was open and that he saw danger tape and that the trench had been dug to the required depth. Mr [OMITTED]'s initial evidence was that he had not worked on the cable but that he just saw it. In response to questions from the Respondent, he stated he had made closer inspections of the Respondent's work, and he confirmed the manner in which the Respondent stated he had carried out the work. Mr [OMITTED]'s evidence tended to adapt to meet the evidence that the Respondent was seeking.
- [23] Mr Olsen, an expert witness engaged by the Investigator, reviewed the complaint file and provided an opinion. He did not complete a site visit. His report resulted in the charges laid against the Respondent. His report summarised the issues as:

6.2. In conducting a file review, I find:

6.2.1. Poor technique in joining conductors as per Items 5.4.1.1 has compromised the integrity of the Mains cable,

6.2.2. Poor installation methods such as no underground marker tape warning those digging and mains cable at a shallow depth has compromised the safety of any persons who may dig in the area of the buried Mains Cable.

6.2.3. Evidence by photos illustrate the installation or certain fittings and accessories without following manufacturer's instructions has given potential for cable joint failure,

6.2.4. Poor workmanship can be seen by the evidence in the photos, may be in part or in entirely all from inadequate knowledge, skills or competency.

- [24] With specific reference to cable joints, his report noted:

5.4.1.1 Cable joints as assembled by Joseph Coleman – (see in Photos 1, 2) did not apply the Heavy Wall heat shrink to Manufacturer's instructions - (see Appendix E).

As discovered, the outer Heavy Wall heat shrink was not completed satisfactory for the purpose of excluding ingress of water; an opening

in the sealing of a buried cable joint can allow water ingress to surround the crimp connectors covered with light duty heat shrink of the live conductors contained within.

Any imperfections of "thin wall heat shrink" covering the crimp connections a passage of electricity starts to flow leading to electrical arcing and failure of the connections/electrical cable joint. One such cable joint was cut open to find water contained within – (see Photo 3)

And

5.4.1.3 TA Response

Item 5.4.1.1 above illustrates the fittings (cable joints) that form part of the installation were not done safely or lawfully.

The cable joint fittings being subjected to ingress of moisture having every opportunity for cable failure, arcing, connections deterioration, voltage fluctuations, loss of a neutral connection but not limited to these.

[25] At the hearing, Mr Olsen provided a brief of evidence when he confirmed. In it, he set out his conclusions as regards the Respondent's prescribed electrical work:

12. *Specifically, as it relates to the Notice of Proceedings, I concluded that Mr Coleman carried out PEW. I found the following non-compliance in the work carried out by Mr Coleman:*
 - a. *used poor technique in joining the conductors in the underground mains cable. Mr Coleman had failed to adequately carry out the application of Heavy Wall heat Shrink. This allowed water to enter one of the joints compromising the integrity of the mains cable - a breach of ESR 20(2)(a), 28(9), 59(2), AS/NZS 3000:2007 3.1.2(f), 3.7.2.1.1 (f), and 3.7.2.10.*
 - b. *failed to install underground marker tape and bury the mains cable to the required depth of 500 mm. Compromising the safety of any person digging in the area of the buried mains cable - a breach of ESR 59(2), AS/NZS 3000:2007 3.11.4.4(a) and 3.11.4.5.*
 - c. *failed to ensure that any openings in the distribution switchboards greater than 5mm were sealed to prevent possible drafting effect which would spread fire - a breach of ESR 59(2) and AS/NZS 3000:2007 2.9.7.*

And

15. *I further found that the Respondent had provided a false and misleading Certificate of compliance (COC) and Electrical Safety Certificate (ESC) as the COC (15-MS-JC), dated 19 March 2020 states the PEW was done safely and lawfully, which is incorrect.*

[26] The Respondent did not accept Mr Olsen's findings. The Respondent did not believe the photographs taken of the cable joints were of his work. Alternatively, he submitted that his connections had been tampered with after completion. The Respondent questioned Mr Olsen as to why the cable had not failed earlier under normal operating conditions. Mr Olsen stated:

Olsen: Yeah. What I explained to him (the Respondent) and I will explain here, it depends on the imperfections in the heat shrinking around the live conductors, and that if there was a passage of electricity between them, then yes a fault would appear and it would show up in electrical testing done by an insulation tester. So, it really depends on the environment in which those conductors are, whether the integrity is there while water is surrounding those conductors.

Chair: If water had got in there at all, would you expect a fault?

Olsen: Yes. Well, again what I say is, it depends on how good the integrity is of the work done around those live conductors and where the exposed conductors are, where they are crimped.

And

Chair: I go back to the question I asked earlier. If there is water in a joint, in your expert opinion, would you expect a fault to arise and for something to happen that was noticeable by way of the equipment failing, something tripping, or is the water just going to sit there and it's going to happily carrying on operating?

Olsen: Under most conditions the deterioration takes place and a fault appears.

[27] Mr Olsen was examined by the Respondent about the means and methods of sealing a cable joint and what was depicted in photographs of those joints. Mr Olsen remained firm in his opinion that the cable joints had not been completed in an acceptable manner and that there was no evidence of tampering other than to allow photographs to be taken of the connections. In this respect, Mr [OMITTED] stated, in relation to the following photograph, which showed exposed cables that had been separated as opposed to photographs of the heat shrink joints:

Board: Can you just explain that photograph to me, in how that cable to be in the condition it is in that photograph please?

[OMITTED]: *I bit of that was probably me using the heat gun and the knife to try and open it up bit by bit, to try and determine where the fault was. Like, I did have a boot over that, a four-way boot, one for each phase and one for the neutral. So, it was me trying to split. There I would have said it would have been me trying to split the cable to determine where the fault was.*

Board: *You've removed an external layer of protection to get to that point of the cable?*

[OMITTED]: *Correct.*



- [28] The Respondent did not question any witnesses with regard to the allegation that switchboard holes had not be adequately sealed or present any evidence that they were.

Submissions

- [29] The Respondent submitted that the Investigator had not proved his case. In particular, he noted that test measurements of the trench had not been taken, Mr [OMITTED]'s tests results had not been provided, there was no evidence of an actual failure of the mains cable and that the evidence had been tampered with. Further, he submitted that Mr [OMITTED]'s evidence supported his evidence that the work was compliant. Finally, he submitted that the complaint was vexatious, noting he had a previous history with the property owner.

- [30] Counsel for the Investigator noted the following evidence with regard to the tampering allegation made by the Respondent. The passage of evidence related to the photographs of the heat shrink joints complained about:

Chair: And that was the condition it was in when you took the photo?

[OMITTED]: Correct.

Chair: You haven't exposed anything, removed anything or done anything to that, other than clear the soil away from it?

[OMITTED]: Correct

- [31] Counsel also noted that other allegations made about the property owner and the veracity of the complaint related to allegations that were not pursued by the Investigator. Counsel submitted the complaint was not vexatious.
- [32] Counsel summarised the evidence supporting each charge and submitted, in relation to the cable joints:

5. Mr Coleman accepts that he did the joins and submits that "there is no evidence that the join actually failed". However, this is not what is being claimed by the Investigator. The Investigator is claiming that Mr Coleman failed to adequately carry out the application of two joints to an underground mains cable, i.e. the join had not been carried out in accordance with the manufacturer's guidelines. As a consequence, the join had failed over time and there was water ingress. Mr Olsen gave evidence that if there was no water in the soil, initially, then you would expect a "good insulation test and there would be no fault initially".⁵ Counsel for the investigator submits that the join passing tests at the time they were completed does not prevent the join from failing over time.

Board's Conclusion and Reasoning

- [33] Prior to considering the allegations, the submission that the complaint was vexatious will be dealt with.
- [34] Section 144(4) of the Act contains provisions that relate to frivolous and vexatious complaints. It states that the Registrar may, when the complaint is received, consider whether it is frivolous or vexatious. The Board is not involved in the Registrar's considerations. No definitions of the terms are provided.
- [35] Vexatious complaints are those which are improperly motivated, such as where they lack merit or are instituted primarily to distress, annoy or embarrass rather than to obtain the remedy sought. There may, in any complaint made, be elements of it which are vexatious. Of itself, that is not enough to make a complaint vexatious. The Board considers the complaint needs to have been made predominately for that purpose and to lack value or merit. This is not the case with the matters before the Board. It is appropriate that the Board considers the allegations.
- [36] That being the case, the Board has decided that the Respondent **has** 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 adequately carry out the application of two joints to an underground mains cable; and/or
 - (b) Failed to bury an underground cable at the correct depth; and/or
 - (c) Failed to install underground marker (warning) tape; and/or
 - (d) Failed to ensure that any openings for cable entry into the distribution switchboard greater than 5mm were sealed to prevent possible drafting effect which would spread fire.
- [37] The charge was 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 Board made a finding of negligence on the basis that the Respondent, when carrying out the prescribed electrical work, departed from what is considered to be an accepted standard of conduct. The full reasons follow.
- [38] The Board has also decided that the Respondent provided a false or misleading return being an offence under section 143(f) of the Act, in that he provided a Certificate of Compliance for prescribed electrical work that had not been carried out lawfully and safely. Again, the Board's reasoning follows.
- [39] In making its decisions, the Board has preferred the evidence of the witnesses for the Investigator over the evidence of the Respondent and Mr [OMITTED]. The Board found that the evidence of what was found on the cables being exposed was credible. There was no evidence of other electrical workers carrying out prescribed electrical work on the main cable in the intervening period or of any tampering once the cable was exposed.

Negligence

- [40] To make a finding of negligence, the Board needs to 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.
- [41] 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 negligence⁷.
- [42] Turning to negligence, it is the departure by an electrical worker, whilst carrying out or supervising prescribed electrical work, from an accepted standard of conduct. It is judged against those of the same class of licence as the person whose conduct is being inquired into. This is described as the *Bolam*⁸ test of negligence which has been adopted by the New Zealand Courts⁹.
- [43] The New Zealand Courts have stated that an assessment of negligence 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.
- [44] 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 Act¹¹. 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.
- [45] 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.*

⁷ *Blewman v Wilkinson* [1979] 2 NZLR 208

⁸ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁹ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

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

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

- (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.]*

[46] 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.

[47] 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.

[48] The Board assessed the specific allegations against the above.

Cable Joints

[49] The photographs provided and the evidence given showed that the method to seal the joints made to prevent water ingress had failed. Mr [OMITTED]'s evidence was that he took photographs of the cable joints in the condition that he found them. There was no evidence of any other electrical worker carrying out any prescribed electrical work in the intervening period. Mr [OMITTED] also tested the cable and found a fault. Whilst he may not have recorded his test results, his evidence that he tested and that he found a fault is sufficient to establish that the Respondent's work had not been carried out in an acceptable manner.

[50] 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—*

¹³ [2001] NZAR 74

- (a) 80 amperes per phase if single-phase; or
- (b) 50 amperes per phase if multi-phase.

[51] The Board received evidence, as set out in Mr Olsen's report, that the prescribed electrical work had not been completed in accordance with AS/NZS 3000. As such, the prescribed electrical work was carried out in a manner that was contrary to an enactment. Beyond that, the Board noted 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.

[52] 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.

[53] Further, regulation 20(2) deems certain installations to be unsafe. Relative to the cable joints, regulations 20(2)(d) and (g) were not complied with:

20 Electrically unsafe works and installations

- (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

(g) *cables (including underground cables) are inadequately protected against the risk of damage by the nature of their covering or their method of installation;*

[54] Also, under regulation 73A(1), an electrical worker has certain obligations that must be complied with, 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;*

[55] Given the above, the Board found that the Respondent had carried out prescribed electrical work in a manner that was not in accordance with the standards to be expected of an electrical worker.

[56] Turning to seriousness, the transgressions were not inadvertence or oversight. Ensuring that joints in underground cables are protected against water ingress is fundamental to electrical safety. The manner in which they were completed showed a lack of care and attention to detail. As such, the transgressions were sufficiently serious enough to warrant a disciplinary finding of negligence.

Cable Depth and Marker Tape

[57] Again, the evidence presented by the Investigator's witnesses established, on the balance of probabilities, that the mains cable had not been buried to the required depth across the entire length of the cable and that marker tape had not been installed. Mr Olsen's evidence established that the failures were a breach of AS/NZS 3000 and, thereby, it was prescribed electrical work that had not been carried out in accordance with an enactment.

[58] The same provisions as regards unsafe electrical installations noted above applies. Again, on that basis, the Board found that the Respondent had carried out prescribed electrical work in a manner that was not in accordance with the standards to be expected of an electrical worker and that the failures were serious enough to warrant a disciplinary outcome.

Switchboard

[59] The Respondent did not contest the allegations as regards the switchboard. Notwithstanding, it is for the Investigator to present evidence that establishes that the offence has been committed. Mr Olsen's report established that the switchboard gaps exceeded the allowable amount and that there had been a breach of AS/NZS 3000. It follows that the work was carried out in a manner that was contrary to an enactment.

- [60] Looking at the tests for negligence, regulations 13, 5 and 73A of the Safety Regulations noted above apply. There are no direct provisions in terms of regulation 20 which deem the installation to be unsafe. The risk noted, however, is that if a fire were to occur, it might not be contained. AS/NZS 3000 requires that openings in switchboards have a close fit. The notes to the specific provision (clause 2.9.7 of AS/NZS 3000:2007) state that 5 mm of free space is a close fit and that anything greater requires sealing. Note 2 stipulates:

There is a very high risk that wiring enclosures, especially those that enter at the top or sides of a switchboard, will contribute to the spread of fire and for this reason care needs to be taken to ensure that these wiring systems are provided with close-fitting entries. In some cases internal sealing should be provided.

- [61] Switchboards are at greater risk of a fire occurring, given the number of connections that are made within them and the risk that poor connections may resonate and catch fire. If that does occur, it is important that any such fire is contained.
- [62] The holes that were in the switchboard were large, and no attempt had been made to seal them. One example of the three openings is shown below.



- [63] The failure was not a marginal one. Given this, and the above legal provisions, the Board found that the Respondent had carried out prescribed electrical work in a manner that was not in accordance with the standards to be expected of an electrical worker and that the failures were serious enough to warrant a disciplinary outcome.

False or Misleading Certification

- [64] 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 irrelevant¹⁴.

¹⁴ *Taylor Bros Ltd v Taylor Group Ltd* [1988] 2 NZLR 1

- [65] 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.
- [66] The specific allegation was that the Certificate of Compliance was false or misleading as the related prescribed electrical work had not been completed lawfully or safely. The Board has made findings that the work was not carried out by the Respondent in a safe and compliance manner. It follows that the offence has been committed.

Penalty, Costs and Publication

- [67] 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.
- [68] The Board heard evidence during the hearing relevant to penalty, costs and publication and has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

- [69] 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*¹⁵ 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.

- [70] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*,¹⁶ 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.

¹⁵ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

- [71] The Board adopted a starting point of a fine of \$2,000, an amount that is consistent with other matters that have come before the Board.
- [72] The Respondent has previously appeared before the Board in relation to a disciplinary matter. In April 2021, the Board made a finding that the Respondent had committed disciplinary offences under sections 143(a)(i) and 143(f) of the Act. The conduct in this matter took place at or about the same time as the Board was considering the earlier matter. As such, for the purposes of considering the appropriate penalty, this matter cannot be taken as a second offence, and it is not an aggravating factor.
- [73] There are no other known mitigating or aggravating factors. As such, the fine will remain at \$2,000. There may, however, be mitigating factors that the Board is not aware of. The Respondent will have an opportunity to make submissions and to bring them to the Board's attention if they exist.

Costs

- [74] 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.
- [75] 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 case¹⁷.
- [76] In *Collie v Nursing Council of New Zealand*,¹⁸ 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.*
- [77] In *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society*,¹⁹ 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*

¹⁷ *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.

¹⁸ [2001] NZAR 74

¹⁹ CIV-2011-485-000227 8 August 2011

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.

- [78] The Board has adopted an approach to costs that uses a scale based on 50% of the average costs of different categories of hearings, simple, moderate and complex. The current matter was moderately complex. Adjustments based on the High Court decisions above are then made.
- [79] In total, the matter amounted to a full-day hearing. The Board's scale costs for a full day defended hearing is \$3,150. The Respondent is not entitled to any discounts or reductions. However, a small amount of the hearing time was not caused by the Respondent. Accordingly, the Board's costs order will be slightly reduced. The Respondent is to pay the sum of \$2,800 toward the costs of and incidental to the matter.

Publication

- [80] 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 Act²⁰. 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.
- [81] 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.
- [82] Within New Zealand, there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990.²¹ The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²². Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²³. 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*²⁴.

²⁰ Refer sections 128 of the Act

²¹ Section 14 of the Act

²² Refer sections 200 and 202 of the Criminal Procedure Act

²³ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

²⁴ *ibid*

- [83] 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 interest²⁵. 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.
- [84] 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 be identified in the Electron.

Penalty, Costs and Publication Orders

- [85] 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 \$2,000.

Costs: Pursuant to section 147N of the Act, the Respondent is ordered to pay costs of \$2,800 (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 be named in the publication.

- [86] 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.

Submissions on Penalty, Costs and Publication


- [87] The Board invites the Investigator and the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **21 February 2023**. The submissions should focus on aggravating or mitigating matters as they relate to the penalty, costs and publication orders. If no submissions are received then this decision will become final. If submissions are received then the Board will meet and consider those submissions prior to coming to a final decision on penalty, costs and publication.

²⁵ Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

Right of Appeal

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

Signed and dated this 24th day of January 2023



M Orange
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.