

Before the Electrical Workers Registration Board

CE No. 22195

Electrical Worker: Barry Forsyth (the Respondent)

Registration Number: E 7447

Electrical Worker Number: EW 043099

Registration Class: Electrician

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: Auckland

Hearing Type: In Person

Hearing Date: 20 March 2020

Decision Date: 20 March 2020

Board Members Present:

Mel Orange (Presiding)

Michael Macklin, Registered Inspector

Jane Davel, Lay Member

Russell Keys, Registered Inspector

Ashley Yan, Registered Electrical Engineer

Appearances: Rebecca Denmead 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) and 143(f) of the Act.

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Introduction

- [1] 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.
- [2] 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 29 March 2019 at [REDACTED] [REDACTED] Mr Barry Forsyth 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 used and enlivened an existing circuit’s dedicated green coloured protective earthing conductor as an active phase conductor for the installation of a new circuit to the motorised louvres in breach of regulations 59 of the Electricity (Safety) Regulations 2010.

Or in the Alternative

2. On or around 29 March 2019 at [REDACTED] [REDACTED] Mr Barry Forsyth 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 used and enlivened an existing circuit’s dedicated green coloured protective earthing conductor as

an active phase conductor for the installation of a new circuit to the motorised louvres.

Or in the Alternative

3. On or around 29 March 2019 at [REDACTED] [REDACTED] Mr Barry Forsyth 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 used and enlivened an existing circuit's dedicated green coloured protective earthing conductor as an active phase conductor for the installation of a new circuit to the motorised louvres.

Second Alleged Disciplinary Offence

4. On or around 29 March 2019 at [REDACTED] [REDACTED] Mr Barry Forsyth has failed to provide a return being an offence under section 143(f) of the Act, IN THAT, he:
- Did not issue and/or provide an ESC within 20 working days after the part installation was connected to the supply; and/or
 - Did not issue and/or provide a CoC within 20 days after the work was completed or connected to the supply.

- [3] 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.
- [4] No Board Members declared any conflicts of interest in relation to the matters under consideration.

Function of Disciplinary Action

- [5] 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.
- [6] 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

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

maintained in order to protect clients, the profession and the broader community.”

- [7] 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

- [8] The matter proceeded on the basis of an Agreed Statement of Facts.
- [9] The Respondent did not appear.

Evidence

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

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

- [11] The matter proceeded on the basis of an Agreed Statement of Facts. The Statement set out that the Respondent was engaged to complete the electrical connection motorised louvre system. The Respondent used an existing dedicated circuit supplying a (class 1) earthed lighting circuit to supply electrical current. In doing so he used an earth wire as a live conductor. The Investigator alleged that in doing so the Respondent failed to provide earth protection to the existing light fitting and that by in the event of a fault there would be no earth protection which could result in an electric shock.
- [12] The Respondent noted that he had supplied the louvre system with an exiting lighting supply as a temporary measure. He accepted that a new conductor needed to be installed for the louvre but stated that he had not been able to install it as his assistant failed to attend to job. He noted that he was under pressure to complete the job prior to the Easter break as the home was a holiday residence.
- [13] The Respondent had intended to return and complete the installation but had been unable to coordinate a return visit. The work remained in a temporary state. The Respondent did not invoice for the work or provide any certification for it.
- [14] The Respondent’s work was carried out on or about 29 March 2019. In July 2019 another electrical worker attended the property and noted that an earth conductor had been used as a live conductor and made a complaint to the Board.

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

- [15] The Investigator engaged an expert to provide an opinion. The expert noted that the use of green/yellow sheathed or insulated cables as live conductors is prohibited by section 3.8.1 of AS/NZS 3000:2007 and that the work was classed as general risk prescribed electrical work which requires that a certificate of compliance be issued.
- [16] The Respondent accepted that he had engaged in conduct that constituted the disciplinary offences.
- [17] It was left open to the Board to decide the seriousness of the offending and therefore which of the alternative disciplinary offences was appropriate. Counsel for the Investigator did note that the expert considered there was a risk of electric shock and that the offence under section 143(b)(ii) of the Act may be appropriate.
- [18] 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 summary.

Board's Conclusion and Reasoning

- [19] The Board has decided that the Respondent **has** negligently created a risk of serious harm to any person, 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 used and enlivened an existing circuit's dedicated green coloured protective earthing conductor as an active phase conductor for the installation of a new circuit to the motorised louvres.
- [20] The Board has also decided that the Respondent **has** failed to provide returns being an offence under section 143(f) of the Act.

First Disciplinary Offence

- [21] The charges in the First Disciplinary Offence 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) and, as alternatives, negligence or incompetence under section 143(a)(i) and contrary to an enactment under section 143(a)(ii).
- [22] 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.
- [23] Contrary is a form of strict liability offence in that all that need be proven is that the relevant enactment has been breached – in the instance the Electricity (Safety)

Regulations 2010 or any of the cited standards within Schedule 2 of the Regulations. The Board does not need to find that there was intention, fault or negligence⁵.

- [24] There was evidence that the provision in clause 3.8.1 of AS/NZS 3000:2017 had been breached. AS/NZS 3000:2017 is a cited standard. Regulation 59 of the Safety Regulations also stipulates that all low voltage installations must comply with AS/NZS 3000:2017. The wiring carried out by the Respondent did not comply. The prescribed electrical work was, therefore carried out in a manner that was contrary to an enactment.
- [25] Negligence 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*⁶ test of negligence which has been adopted by the New Zealand Courts⁷.
- [26] The New Zealand Courts have stated that assessment of negligence in a disciplinary context is a two-stage test⁸. 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.
- [27] 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 Act⁹. 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 practitioner¹⁰.
- [28] 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*

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

⁶ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

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

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

⁹ *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

¹⁰ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

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

[29] As noted above, as regards acceptable standards, all prescribed electrical work must comply with the Electricity (Safety) Regulations 2010 and the cited Standards and Codes of Practice.

[30] Turning to seriousness in *Collie v Nursing Council of New Zealand*¹¹ 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.

[31] The Board, which includes persons with expertise in the electrical industry, considered the Respondent had departed from an acceptable standard of conduct. The conduct was deliberate and whilst the Respondent considered it had been completed in a temporary manner it was left in that state for a considerable period of time. Moreover there was a very real risk that a person could have received an electric shock as a result of it. For those reasons the Board finds that the conduct was sufficiently serious enough for it to make a finding of negligence.

[32] Looking at the risk of electric shock the Board found that it arose from the use of an earth conductor as a live conductor. There is a blanket prohibition on the use of green/yellow conductors as active or neutral conductors. The reason is that persons should be able to expect earth conductors not to be live. A person cutting into a green/yellow conductor that is live would receive an electric shock.

[33] The Board did not find that there was a risk of electric shock from the light fitting. Whilst it was no longer earthed the fitting it was supplying was double insulated and, as such, it did not need to be earthed and was electrically safe without an earth.

[34] As there was a risk of electric shock the Board found that the requirements of section 143(b)(ii) of the Act had been satisfied, that is that there was a risk of serious harm. Serious harm is defined in section 2 of the Act. It means:

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

¹¹ [2001] NZAR 74

- [35] The consequences of an electric shock can result in one or more of the above definitions.
- [36] Actual serious harm 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 fanciful¹².
- [37] Given the above the Board found that the Respondent had negligently created a risk of serious harm to any person.

Certification

- [38] The final charge relates to the failure to provide a return. Determining whether a return has not been is a question of fact to be decided objectively and the intention of the issuer is irrelevant¹³.
- [39] 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.
- [40] The Respondent accepted that he had not provided the required returns.

Penalty, Costs and Publication

- [41] Having found that one or more of the grounds in section 143 applies the Board must, under section 147M of the Act¹, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [42] The matter was dealt with on the basis of an Agreed Statement of Facts. Included was information relevant to penalty, costs and publication and the Board has decided to make orders.

Penalty

- [43] 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*¹⁴ commented on the role of "punishment" in giving penalty orders stating that punitive orders are, at times,

¹² *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd (The Wagon Mound No 2)* [1967] 1 AC 617

¹³ *Taylor Bros Ltd v Taylor Group Ltd* [1988] 2 NZLR 1

¹⁴ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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.

- [44] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*¹⁵ 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 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.
- [45] The offending in respect of creating a risk of serious harm is at the upper end of the disciplinary scale. No actual harm was caused, and it was fortunate that another electrical worker identified the non-compliant work and put it right.
- [46] Based on the above the Board decided that an appropriate starting point for a penalty was a fine of \$3,000. This amount reflects the seriousness of the matter and is consistent with other penalties imposed by the Board.
- [47] The Board noted that the circumstances surrounding the offending and it has taken them into account. The Board does, however, note that even if prescribed electrical work is done in a temporary manner it still has to be done compliantly.
- [48] The Board has also taken into account that the Respondent cooperated with the investigation and that he accepted responsibility. On this basis the Board decided to reduce the fine to \$1,500.

Costs

- [49] 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.
- [50] 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 case¹⁶.
- [51] In *Collie v Nursing Council of New Zealand*¹⁷ where the order for costs in the tribunal was 50% of actual costs and expenses the High Court noted that:

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

¹⁶ *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.

¹⁷ [2001] NZAR 74

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.

- [52] Based on the above the Board's costs order is that the Respondent is pay the sum of \$500 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

- [53] 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 Act¹⁸. 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.
- [54] 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.
- [55] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990¹⁹. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²⁰. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²¹. 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*²².
- [56] 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 interest²³. 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.
- [57] Based on the above the Board will order further publication in the Electron. The Respondent will not be named or identified in it.

¹⁸ Refer sections 128 of the Act

¹⁹ Section 14 of the Act

²⁰ Refer sections 200 and 202 of the Criminal Procedure Act

²¹ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

²² *ibid*

²³ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

[58] 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

[59] 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 \$500 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

Publication: The Registrar shall record the Board's action in the Register of Electrical Workers in accordance with section 128(1)(c)(viii) of the Act.

The Respondent will be named in this decision.

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

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

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

Right of Appeal

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

Signed and dated this 31st day of March 2020



M. J. 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.*