

Before the Electrical Workers Registration Board

CE No. 22554

In the matter of:

A disciplinary hearing before the Electrical Workers Registration Board

Between:

The Ministry of Business Innovation and Employment

And

Jackson Gilbert a registered and licensed electrical worker (E264452, EW 116746, 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:

Christchurch

Hearing Type:

In Person

Hearing and Decision Date:

21 April 2023

Board Members Present:

Mr R Keys, Registered Inspector (Presiding)
Ms M Kershaw, Registered Electrician
Mr M Macklin, Registered Inspector
Ms A Yan, Registered Electrical Engineer
Mr M Perry, Registered Electrician
Mr M Orange, Barrister

Appearances:

C Milesi-Humm for the Investigator

Procedure:

The matter was considered by the Electrical Workers Registration Board (the Board) under the provisions of Part 11 of the Electricity Act 1992 (the Act), the Electricity (Safety) Regulations 2010 (the Regulations) and the Board's Disciplinary Hearing Rules.

Board Decision:

The Respondent **has** committed a disciplinary offence under section 143(f) of the Act.

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Summary of the Board’s Decision

- [1] The Respondent failed to provide a record of work within the prescribed time frame. The Board decided that it would not take any disciplinary action under section 1477M of the Act. The Respondent is ordered to pay costs of \$225.

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.

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 offence the Investigator reported should be considered by the Board. It was:

On or around 15 March 2022 at [OMITTED], Mr Jackson Gilbert has failed to provide a return, being an offence under section 143(f) of the Act, IN THAT, he failed to provide a Certificate of Compliance and Electrical Safety Certificate within 20 days of the completion of Prescribed Electrical Work.

¹ Section 148 of the Act.

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

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

Evidence

- [11] 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.

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

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

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

- [13] As noted, the matter proceeded on the basis of an Agreed Statement of Facts. The Statement set out that the Respondent's company (Electro) was engaged to carry out prescribed electrical work (PEW) associated with a new build. The actual work was carried out by an employee of Electro, not the Respondent. That employee broke his leg, and his licence lapsed while the dispute was ongoing.
- [14] The last date Electro worked at the Property was 22 February 2022. Correspondence ensued as regards a dispute and the possibility of Electro returning to the site. On 11 March 2022, the Complainant advised that Electro could not return to the site. Then, on 15 March 2022, the Complainant's lawyer sent the Respondent a Notice of Dispute and requested a Certificate of Compliance (COC). A COC was issued on 29 April 2022, which was outside of the prescribed time limit. The Respondent issued it on the basis that the actual electrical worker was no longer licensed.
- [15] The Respondent stated that he had always been always willing to provide a COC, but he had hoped that the dispute could be resolved and that Electro would be permitted to return to the site to complete the PEW.
- [16] The Respondent accepted that he had failed to provide a CoC within the specified time frame.
- [17] The general rule is that all facts in issue, or relevant to the issue in a case, must be proved by evidence. As the Investigator and Respondent agreed to the facts as outlined above, it was not necessary to call any further evidence or to test the evidence as outlined in the Statement.

Board's Conclusion and Reasoning

- [18] The Board has decided that the Respondent failed to provide a Certificate of Compliance and Electrical Safety Certificate within 20 days of the completion of Prescribed Electrical Work.
- [19] The Board made the finding on the basis of the Respondent's acceptance that he had committed the disciplinary offence. In making the finding, the Board noted that, under regulation 74E(2) of the Safety Regulations, a CoC must be issued within 20 days of completion. In this matter, completion occurred when the Respondent's services were terminated. As the CoC was not issued within the 20 day time frame, the offence had been committed.

Penalty, Costs and Publication

- [20] 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.
- [21] The Respondent made submissions at the hearing as regards penalty, costs and publication.

Penalty

- [22] 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.⁷ It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:⁸
- (a) protection of the public and consideration of the purposes of the Act;⁹
 - (b) deterring other Licensed Building Practitioners from similar offending;¹⁰
 - (c) setting and enforcing a high standard of conduct for the industry;¹¹
 - (d) penalising wrongdoing;¹² and
 - (e) rehabilitation (where appropriate).¹³
- [23] 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 cases¹⁴ and applying the least restrictive penalty available for the particular offending.¹⁵ In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty¹⁶ that is consistent with other penalties imposed by the Board for comparable offending.¹⁷
- [24] 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.¹⁸
- [25] The Respondent made a submission that, at the time, he was not sure what he should do in the circumstances of the employee who carried out the work no longer being licensed. He stated that this was the reason for the delay.
- [26] Ordinarily, the Board would impose a censure or small fine for an offence of this type. However, given the particular circumstances of this case, the factors noted above, the Respondent's clean disciplinary history and his cooperation, the Board

⁷ *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]

⁸ Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

⁹ Section 3 Building Act

¹⁰ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

¹¹ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

¹² *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

¹³ *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

¹⁴ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

¹⁵ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

¹⁶ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

¹⁷ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

¹⁸ 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.

has decided that it will, under section 147M(1)(h) of the Act, make no disciplinary order. In essence, this means the Board will not take any disciplinary action.

Costs

- [27] 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.
- [28] 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 case¹⁹.
- [29] In *Collie v Nursing Council of New Zealand*,²⁰ 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.*
- [30] In *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society*,²¹ the High Court noted:
- [46] *All cases referred to in Cooray were medical cases and the Judge was careful to note that the 50 per cent was the general approach that the Medical Council took. We do not accept that if there was any such approach, it is necessarily to be taken in proceedings involving other disciplinary bodies. Much will depend upon the time involved, actual expenses incurred, attitude of the practitioner bearing in mind that whilst the cost of a disciplinary action by a professional body must be something of a burden imposed upon its members, those members should not be expected to bear too large a measure where a practitioner is shown to be guilty of serious misconduct.*
- [47] *Costs orders made in proceedings involving law practitioners are not to be determined by any mathematical approach. In some cases 50 per cent will be too high, in others insufficient.*
- [31] 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 moderate. Adjustments based on the High Court decisions above are then made.
- [32] 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

¹⁹ *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.

²⁰ [2001] NZAR 74

²¹ CIV-2011-485-000227 8 August 2011

costs, the Board took into account that the Respondent had agreed to the matter proceeding by way of an Agreed Statement of Facts.

Publication

- [33] Normally, as a consequence of a decision a respondent's name and the disciplinary outcome is recorded in the public register of electrical workers²².
- [34] In this instance the Board has taken no action. Section 128(1)(viii) of the Act which requires an entry in the register to be made stipulates that it applies if any action is taken by the Board under section 147M. In this instance the Board has not taken any action. As such there will be no record of the matter in the public register. The Respondent's electrical worker file will, however, note the matter.
- [35] Given the above the board will not order any further publication under section 147Z of the Act. In accordance with the principles of open justice and open reporting which is enshrined in the Bill of Rights Act 1990²³ the Respondent will be named in this decision.
- [36] 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

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

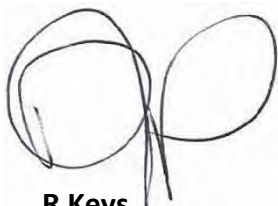
Costs: Pursuant to section 147N of the Act, the Respondent is ordered to pay costs of \$225 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

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

Right of Appeal

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

Signed and dated this 29th day of May 2023



R Keys
Presiding Member

²² Refer sections 128 of the Act

²³ Section 14 of the Act

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.*