

Before the Electrical Workers Registration Board

CE No. 22363
Electrical Worker: Jonathan Hale (the Respondent)
Registration Number: I 261568
Electrical Worker Number: EW 083308
Registration Class: Inspector

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

Hearing Location: By Videoconference
Hearing Type: In Person
Hearing and Decision Date: 19 August 2021

Board Members Present:

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

Appearances: Emma Dowse 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(g) and 143(f) of the Act.

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Summary of the Board’s Decision

- [1] The Respondent employed, directed, or permitted any unauthorised persons to do prescribed electrical work and provided false or misleading returns. No penalty order has been made, but the Respondent is to pay costs of \$250.

Introduction

- [2] The hearing resulted from a complaint about the conduct of the Respondent and a report under section 147G(1) of the Act from the Investigator that the complaint should be considered by the Board.
- [3] The Respondent was served with a notice setting out the alleged disciplinary offences the Investigator reported should be considered by the Board. They were:

First Alleged Disciplinary Offence

- Between 27 August and 6 October 2020 at **[Omitted]**, Mr Jonathan Hale has employed, directed, or permitted any unauthorised person to do any prescribed electrical work being an offence under section 143(g) of the Act, IN THAT, he engaged Mr Damian Te Tuhi and Sheldon Church, who were unauthorised persons, to install and connect cables and fittings.

Second Alleged Disciplinary Offence

- On or around 2 October 2020 at **[Omitted]**, Mr Jonathan Hale has provided a false or misleading return being an offence

under section 143(f) of the Act, IN THAT, he certified prescribed electrical work carried out by unauthorised persons that he did not test or connect.

Third Alleged Disciplinary Offence

3. On of around 6 October 2020 at **[Omitted]**, Mr Jonathan Hale has provided a false or misleading return being an offence under 143(f) of the Act, IN THAT, he certified prescribed electrical work carried out by unauthorised persons that he did not test or connect.
- [4] Prior to the hearing, the Respondent and the Board were provided with all of the documents the Investigator had in his/her power or possession.
- [5] No Board Members declared any conflicts of interest in relation to the matters under consideration.

Function of Disciplinary Action

- [6] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*¹ and in New Zealand in *Dentice v Valuers Registration Board*².
- [7] Disciplinary action under the Act is not designed to redress issues or disputes between a complainant and a respondent. In *McLanahan and Tan v The New Zealand Registered Architects Board*,³ Collins J. noted that:
- “... the disciplinary process does not exist to appease those who are dissatisfied The disciplinary process ... exists to ensure professional standards are maintained in order to protect clients, the profession and the broader community.”*
- [8] The Board can only inquire into “the conduct of an electrical worker” with respect to the grounds for discipline set out in section 143 of the Act. It does not have any jurisdiction over contractual matters.

Procedure

- [9] The matter proceeded on the basis of an Agreed Statement of Facts.
- [10] Counsel for the Investigator sought leave to have the Second Charge amended to record the correct date of 3 September 2020. The Respondent did not object. Under section 156A of the Act, the Board has the power to amend or revoke a notice. As there was no object, the application was granted.

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

- [11] Counsel also noted that the Agreed Statement of Facts was signed in 2021 and not 2020, as stated on the document.

Evidence

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

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

- [13] Whilst the matter proceeded on the basis of an Agreed Statement of Facts, the Board also heard from Respondent prior to it making a decision.
- [14] The Agreed Statement of Facts set out that the Respondent was engaged to install between seven and nine switches, a heated towel rail and a garage sensor light. The Respondent employed three persons to carry out various parts of the work over a number of days.
- [15] On 27 August 2020, two of the employees attended the site and carried out prescribed electrical work, including carrying out the applicable tests and connected the power to the prescribed electrical work. An invoice (INV-26256) was issued for the completed work. The Respondent did not visit the site on 27 August 2020. He did not carry out the connections or test the prescribed electrical work prior to it being connected. The Respondent considered he was providing remote supervision of the prescribed electrical work.
- [16] On or around 3 September 2020, the Respondent issued a certificate of compliance (CoC) for the work carried out by the two employees (HAL-15468C1). The CoC did not name any person as being “supervised” or as having carried out the prescribed electrical work. The only name on the CoC was the Respondents. The CoC certified that the work had been done lawfully and safely.
- [17] The two employees were not registered or licensed electrical workers. One of them had held a Trainee Limited Certificate and was nearing the point where he could apply for registration. The Limited Certificate had, however, lapsed a short period before the prescribed electrical work was carried out. The Respondent was not aware that the Trainee Limited Certificate had lapsed, and he did not, at the time, have any systems in place to track licenses.
- [18] On 1 October 2020, a registered and licensed electrical worker in the employ of the Respondent continued the work. On or around 6 October 2020, the Respondent issued a CoC for further work carried out by his two unregistered and unlicensed

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

employees and that of the licensed electrical worker (HAL-15468C5). The CoC named all three persons as having been supervised by the Respondent. Once again, the Respondent had not carried out the connections or tested the work.

- [19] In response to the complaint, the Respondent accepted that the work carried out on 27 August 2020 involved the installation of power sockets, cables, protection devices (RCCB) light and testing of the work. He stated that one of the employees was a trainee, and he quoted the trainee's Limited Certificate number. The Respondent subsequently, in the Agreed Statement of Facts, accepted that he had employed, directed or permitted any unauthorised persons to carry out prescribed electrical work. The Respondent also accepted that he had on or around 3 September 2020 and again on or around 6 October, provided a false and misleading return being an offence under 143(f) of the Act, in that he certified prescribed electrical work carried out by unauthorised persons that he did not test or connect.
- [20] The Agreed Statement of Facts noted that the Respondent had sustained a moderate traumatic brain injury on 28 February 2020.
- [21] At the hearing, the Respondent provided further context. He noted that the employee whose Trainee Limited Certificate had expired had worked for him for seven years and that the Limited Certificate expired at the same time as his head injury. He stated that the expiry was an oversight, and that the worker was very competent and that he did have some interaction with the workers over the phone. The Respondent also referred to commercial and contractual issues with the owner of the property for whom the work was being carried out.
- [22] 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

- [23] The Board has decided that the Respondent **has** employed, directed, or permitted any unauthorised person to do any prescribed electrical work being an offence under section 143(g) of the Act.
- [24] The Board has also decided that the Respondent **has** committed two offences under section 143(f) of the Act by providing false or misleading returns.
- [25] The reasons for the Board's decisions follow.

Unauthorised Persons

- [26] Section 74 of the Act places restrictions on who can carry out prescribed electrical work. It states:

74 *Restrictions on doing or assisting with prescribed electrical work*

- (1) *A person must not do any prescribed electrical work, or assist in doing any prescribed electrical work, unless that person is authorised to do so under this section.*
- (2) *The following persons may do prescribed electrical work, or assist in doing prescribed electrical work, within the limits prescribed in regulations (if any):*
 - (a) *a registered person who is authorised to do, or assist in doing, the work under a current practising licence:*
 - (b) *a person who is authorised to do, or assist in doing, the work under a provisional licence:*
 - (c) *a person who is authorised to do, or assist in doing, the work under an employer licence.*
- (3) *A person does not do any prescribed electrical work, or assist in doing any prescribed electrical work, in breach of this section if that work is done in accordance with any of sections 75 to 80.*
- (4) *A body corporate that is responsible for any prescribed electrical work does not do any prescribed electrical work, or assist in doing any prescribed electrical work, in breach of this section if the natural person or natural persons who actually do, or assist in doing, that work are authorised to do so under this Act.*
- (5) *Subsection (1) is subject to subsections (3) and (4) and sections 75 to 81.*
- (6) *For the purposes of this Part and Part 10, regulations means regulations made under section 169.*

[27] Sections 75 to 80 of the Act provide for various exemptions. Section 77 provides an exemption for trainees who carry out prescribed electrical work under supervision. A trainee is a person who holds a trainee limited certificate issued by the Board⁵. Section 76 creates a more general exemption for any person to carry out prescribed electrical work under supervision. There are differences, however, in what can be carried out by a trainee as compared to non-trainees. In essence, there are limitations placed on non-trainees.

76 Exemption for work done under supervision

A person (the supervised person) may do any prescribed electrical work, or assist in doing any prescribed electrical work, if—

- (a) *that work is within the limits prescribed in regulations made for the purposes of this section; and*
- (b) *the work done by the supervised person is carried out under the supervision of a registered person who holds a current practising licence issued under this Act that authorises the person to supervise electrical work; and*

⁵ Refer section 77(2) of the Act.

- (c) *except as provided in any regulations, while that work is being carried out by the supervised person, no part of the work is connected to a power supply; and*
- (d) *the work is—*
 - (i) *tested and certified in accordance with regulations; and*
 - (ii) *connected to a power supply by a registered person who holds a current practising licence issued under this Act that authorises the person to supervise electrical work.*

[28] The person who carried out the prescribed electrical work had been a trainee. His Trainee Limited Certificate had lapsed. When it lapsed, he ceased to be a trainee. This is because of the requirement in the exemption in section 77(2) of the Act that:

the work done by that person is carried out in accordance with a limited certificate issued by the Board to the trainee under section 78.

[29] The lapse of the limited certificate meant that the person who carried out the prescribed electrical work fell within the provisions of section 78. The facts before the Board, however, showed that the requirements in section 76(2) had not been complied with in that the work was not connected to a power supply by the Respondent, who was the registered person who held a current practising licence issued under the Act. As such, the Respondent could not rely on the provisions of section 76. That being the case, the Respondent did allow an unauthorised person to carry out prescribed electrical work, which was contrary to the provisions of section 74 of the Act.

[30] It should be noted that allowing an unauthorised person to carry out prescribed electrical work is a serious matter. The restrictions created in the Act are put in place so as to ensure that prescribed electrical work is only carried out or supervised by competent persons. This ensures that the purposes of the Act are promoted. Those purposes include⁶:

- (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*

[31] The Respondent should also note that his conduct came within the provisions of section 162 of the Act, which states:

162 Offence to engage in prescribed electrical work in breach of section 74

Every person who does, or assists in doing, any prescribed electrical work in breach of section 74 commits an offence and is liable on

⁶ Refer section 1A of the Act.

conviction to a fine not exceeding \$50,000 in the case of an individual, or \$250,000 in the case of a body corporate.

- [32] The Board does note that the offending came about as a result of an oversight and a failure in business systems. That is a matter to be taken into consideration when the Board deals with what the appropriate penalty should be. It does, however, raise a salient lesson. There is a risk in electrical workers assuming others are licensed. Due diligence should always be undertaken, checks made, and systems put in place to ensure prescribed electrical work is carried out in accordance with the provisions of the Act.
- [33] It is also to be noted that the disciplinary offence is a strict liability one. The Investigator does not have to prove any intention. It is enough that the elements of the offence have been committed. The Board does not need to find that there was intention, fault or negligence⁷ to make a decision. Given those factors and the above matters, the Board found that the offence had been committed.

False or Misleading Return

- [34] 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 irrelevant⁸.
- [35] 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.
- [36] The certification issued stated that the prescribed electrical work had been carried out lawfully when it had not. As such, both returns were false or misleading.

Penalty, Costs and Publication

- [37] 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.
- [38] The Respondent made submissions at the hearing as regards penalty, costs and publication.

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

⁸ *Taylor Bros Ltd v Taylor Group Ltd* [1988] 2 NZLR 1

Penalty

[39] 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*⁹ 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.

[40] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*,¹⁰ 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.

[41] The Respondent cooperated with the investigation and accepted responsibility. There were no issues with the prescribed electrical work that had been carried out. The employee whose Limited Certificate has lapsed was, it appeared, competent. The Respondent was, at the time, operating on the mistaken belief that his employee was a trainee. The Board has taken the fact that it was an oversight and not intentional conduct into account. The Respondent also noted that his head injury was impacting his decision making at the time and that he has put systems in place to ensure that the issues does not occur again.

[42] Taking all of the above matters into account, the Board has decided that it will not make a disciplinary order. It has made that decision on the basis that an order would, in the specific circumstances of this case, be out of proportion to the offending. The Board does, however, caution the Respondent that it is very unlikely that any future disciplinary infractions will be treated in the same manner and that whilst the offending will not be recorded on the Register it will be recorded on the Respondent’s licensing record.

Costs

[43] 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.

[44] 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

⁹ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

that the percentage can then be adjusted up or down having regard to the particular circumstances of each case¹¹.

- [45] In *Collie v Nursing Council of New Zealand*¹² 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.

- [46] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$250 toward the costs of and incidental to the matter. In setting the amount the Board took into account that the Respondent had agreed to the matter proceeding by way of an Agreed Statement of Facts.

Publication

- [47] Ordinarily, as a consequence of its decision, the Respondent's name and the disciplinary outcomes would be recorded in the public Register as required by the Act¹³. In this instance, however, because the Board has made no order under section 147M of the Act, it follows that there will be no record of the matter on the Register.
- [48] The Board can, pursuant to section 147Z of the Act, 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.
- [49] 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.
- [50] Within New Zealand, there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990¹⁴. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction¹⁵. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive¹⁶. The High Court provided

¹¹ *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.

¹² [2001] NZAR 74

¹³ Refer sections 128 of the Act

¹⁴ Section 14 of the Act

¹⁵ Refer sections 200 and 202 of the Criminal Procedure Act

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

guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*¹⁷.

- [51] The courts have also stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published in the public interest¹⁸. It is, however, common practice in disciplinary proceedings to protect the names of other persons involved as naming them does not assist the public interest.
- [52] Based on the above, and taking into account that no penalty order has been made, the Board will not carry out any further publication.
- [53] The Respondent should note, however, 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

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

Penalty: Pursuant to section 147M(1)(h) of the Electricity Act 1992, no order is made

Costs: Pursuant to section 147N of the Act, the Respondent is ordered to pay costs of \$250 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

Publication: The matter will not be recorded on the Register of Electrical Workers.

The Respondent will be named in this decision.

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

- [55] 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

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

Signed and dated Thursday 2nd September 2021.



Mr M Orange
Presiding Member

¹⁷ *ibid*

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

ⁱ Section 147M of the Act

- (1) *If the Board, after conducting a hearing, is satisfied that a person to whom this Part applies is guilty of a disciplinary offence, the Board may—*
- (a) *do 1 or more of the following things:*
 - (i) *order that the person's registration or practising licence (or both) be cancelled:*
 - (ii) *order that the person's provisional licence be cancelled:*
 - (iii) *order that the person may not apply to be reregistered or re-licensed before the expiry of a specified period:*
 - (b) *order that the person's registration or practising licence (or both), or the person's provisional licence, be suspended—*
 - (i) *for any period that the Board thinks fit; or*
 - (ii) *until that person does 1 or more of the things specified in subsection (2):*
 - (c) *order that the person's registration or practising licence (or both), or the person's provisional licence, be restricted for any period that the Board thinks fit, in either or both of the following ways:*
 - (i) *by limiting the person to the work that the Board may specify:*
 - (ii) *by limiting the person to doing, or assisting in doing, work in certain circumstances (for example, by limiting the person to work only on approved premises or only in the employ of an approved employer):*
 - (d) *order that the person be disqualified from doing or assisting in doing prescribed electrical work that the person would otherwise be authorised to do in that person's capacity as a person to whom this Part applies—*
 - (i) *permanently, or for any period that the Board thinks fit; or*
 - (ii) *until that person does 1 or more of the things specified in subsection (2):*
 - (e) *order the person to do 1 or more of the things specified in subsection (2) within the period specified in the order:*
 - (f) *order the person to pay a fine not exceeding \$10,000:*
 - (g) *order that the person be censured:*
 - (h) *make no order under this subsection.*
- (2) *The things that the person can be required to do for the purposes of subsection (1)(b), (d), and (e) are to—*
- (a) *pass any specified examination:*
 - (b) *complete any competence programme or specified period of training:*
 - (c) *attend any specified course of instruction.*
- (3) *The Board may take only 1 type of action in subsection (1) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b), (c), (e) or (g).*
- (4) *No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an—*
- (a) *offence for which the person has been convicted by a court; or*
 - (b) *infringement offence for which the person has been issued with an infringement notice and has paid an infringement fee.*
- (5) *The Board must not exercise any authority conferred by this section in respect of any offence committed by any person before the date of that person's registration or, as the case may be, the date on which that person's provisional licence was issued if at that date the Board was aware of that person's conviction for that offence.*
- (6) *If a person is registered under Part 10 in respect of more than 1 class of registration, the Board may exercise its powers under subsection (1)(a) to (e) in respect of each of those classes or 1 or more of those classes as the Board thinks fit.]*

ⁱⁱ Section 147ZA Appeals

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- (1) *A person who is dissatisfied with the whole or any part of any of the following decisions, directions, or orders may appeal to the District Court against the decision, direction, or order:*
- (e) *any decision, direction, or order under any of sections 108, 109, 120, 133, 137, and 153 or Part 11 (except section 147C).*

Section 147ZB Time for lodging appeal

An appeal under section 147ZA must be brought within—

- (a) *20 working days after notice of the decision, direction, or order was given to, or served on, the appellant; or*
- (b) *any further time that the District Court may allow on application made before or after the expiration of that period.*