

Before the Electrical Workers Registration Board

	CE No. 22103
Electrical Worker:	Antony David Harrington (the Respondent)
Registration Number:	I 2982
Electrical Worker Number:	EW 046779
Registration Class:	Inspector

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

Hearing Location:	Dunedin
Hearing Type:	In Person
Hearing Date:	19 July 2019
Decision Date:	19 July 2019

Board Members Present:

Mel Orange (Presiding)
Michael Macklin, Registered Inspector
Monica Kershaw, Registered Electrician
Mac McIntyre, Registered Electrician
Jane Davel, Lay Member
Russell Keys, Registered Inspector
Ashley Yan, Registered Electrical Engineer

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 section 143(b)(ii) and section 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. Between 1 July 2017 and 23 October 2018 at [REDACTED] Mr Antony Harrington has negligently created a risk of serious harm to any person, or a risk of significant property damage, through having carried out or caused to be carried out prescribed electrical work being an offence under section 143(b)(ii) of the Act, IN THAT, he:
 - (a) caused a risk of fire by installing heaters too close to adjacent materials; and/or
 - (b) caused risk of electric shock by not providing protection for live parts; and/or
 - (c) caused risk of electric shock by not providing mechanical protection for a sub-main cable; and/or
 - (d) Compromised the earthing system by installing an earth electrode at less than the required depth.

Or in the Alternative

2. Between 1 July 2017 and 23 October 2018 at [REDACTED], Mr Antony Harrington 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) caused a risk of fire by installing heaters too close to adjacent materials; and/or
 - (b) caused risk of electric shock by not providing protection for live parts; and/or
 - (c) caused risk of electric shock by not providing mechanical protection for a sub-main cable; and/or
 - (d) Compromised the earthing system by installing an earth electrode at less than the required depth.

Or in the Alternative

3. On or around at [REDACTED], Mr Antony Harrington 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) caused a risk of fire by installing heaters too close to adjacent materials; and/or
 - (b) caused risk of electric shock by not providing protection for live parts; and/or
 - (c) caused risk of electric shock by not providing mechanical protection for a sub-main cable; and/or
 - (d) Compromised the earthing system by installing an earth electrode at less than the required depth.

In breach of regulations regulation 59, and 13 of the Electricity (Safety) Regulations 2010.

Second Alleged Disciplinary Offence

4. Between 1 July 2017 and 23 October 2018 at [REDACTED], Mr Antony (Tony) Harrington has failed to provide a return being an offence under section 143(f) of the Act, IN THAT, he provided a false or misleading return.

[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 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 appeared.
- [10] The appearance of the Investigator and Counsel for the investigator was excused.
- [11] The Board noted that the Agreed Statement of Facts only dealt with particulars (a) and (d) of the First Alleged Disciplinary Offence. The Board proceeded on the basis that the allegations in particulars (b) and (c) were not being pursued by the Investigator. The Respondent affirmed that this was his understanding.

Evidence

- [12] 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

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

² [1992] 1 NZLR 720 at p 724

³ [2016] HZHC 2276 at para 164

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

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 matter proceeded on the basis of an Agreed Statement of Facts. The Statement set out that the Respondent had been engaged to carry out prescribed electrical work as part of a renovation of a house. The work was reviewed by Mr Stephen Doust. He noted that a bathroom heater had been installed too close to adjacent materials creating a risk of fire from excessive heat. He also noted the Respondent had driven a new earth peg which was not to the required depth.
- [14] In the Agreed Statement of Facts the Respondent accepted that he had negligently created a risk of serious harm to any person or a risk of significant property damage by failing to install bathroom heaters in accordance with the manufacturer's instructions and by installing an earth electrode at less than the required depth causing the earthing system to be compromised.
- [15] At the hearing the Respondent stated that the positioning of the bathroom heater was in the centre of the wall and that he should have reassessed its position when circumstances changed. He also stated that the property had an existing earth peg that was no longer accessible. Given this he decided to install a new earth peg but in doing so he struck rock which limited the depth he could install it at. The Respondent noted that matters escalated before he had an opportunity to rectify the earth peg. He did reposition the heater to a safe location.
- [16] The Agreed Statement of Facts did not deal with matters pertaining to the combined electrical safety certificate and certificate of compliance. The allegation was put to the Respondent at the hearing. He accepted that he had provided a false or misleading return.
- [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 summary.

Board's Conclusion and Reasoning

- [18] The Board has decided that the Respondent **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 caused a risk of fire by installing heaters too close to adjacent materials and compromised the earthing system by installing an earth electrode at less than the required depth.
- [19] The reasons for the Board's decisions follow.

Serious Harm or Significant Property Damage

- [20] The Board has found that the most serious of the alternatives applied. The Respondent accepted that this was the applicable charge. The Board agreed.

[21] 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.*

[22] Significant property damage is not defined in the Act. Section 16(1)(b)(ii) of the Act, which relates to notification of accidents, also refers to serious harm and to property damage. In respect of damage it requires notification where there is:

damage to any place or part of a place that renders that place or that part of that place unusable for any purpose for which it was used or designed to be used before that accident.

[23] As section 16 refers to both serious harm and to damage the Board considers significant property damage in section 143(b)(ii) should be interpreted in line with the definition in section 16(1)(b)(ii).

[24] Looking at the facts the earthing system had been comprised. That system is fundamental to the safety of an electrical installation. A heater had been installed in a manner that created a risk of fire.

[25] It is to be noted that serious harm, as per the definition in the Act⁵, nor significant property damage need not occur for the Board to make a finding. 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 fanciful⁶.

[26] Given the facts in the case there was a risk of both serious harm and significant property damage.

[27] To make a finding under section 143(b)(ii) of the Act also requires that the Board find that the Respondent was negligent. 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*⁷ test of negligence which has been adopted by the New Zealand Courts⁸.

⁵ Refer to section 2 of the Act for the full definition.

⁶ *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd (The Wagon Mound No 2)* [1967] 1 AC 617

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

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

- [28] The New Zealand Courts have stated that assessment of negligence in a disciplinary context is a two-stage test⁹. 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.
- [29] 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 Act¹⁰. 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 practitioner¹¹.
- [30] The Board notes that the purposes of the Act are:

1A Purposes

The purposes of this Act are—

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

- [31] 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.
- [32] Turning to seriousness in *Collie v Nursing Council of New Zealand*¹² 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

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 at p.33

¹¹ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

¹² [2001] NZAR 74

which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness.

- [33] Looking at the conduct in question the Respondent, an Electrical inspector, has carried out prescribed electrical work in a noncompliant manner. The level of noncompliance was significant. It was not a case of inadvertence, error or oversight. With respect to the earth peg the Respondent knew it was not compliant yet chose to leave the property connected to a power supply notwithstanding the noncompliance.
- [34] Taking the above factors into account the Board, which includes persons with extensive knowledge and experience in the electrical industry, has found that the Respondent was negligent and that his conduct was sufficiently serious enough to warrant a disciplinary outcome.

Certification

- [35] The second charge relates 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 irrelevant¹³.
- [36] 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.
- [37] The work had not been completed in a lawful nor safe manner. Nor was the installation safe to use. Given these factors the elements of the charge have been satisfied.

Penalty, Costs and Publication

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

Penalty

- [40] 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

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

*Patel v Complaints Assessment Committee*¹⁴ 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.

- [41] 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.
- [42] The two transgressions under section 143(b)(ii) are serious matters. There was the potential for serious harm of significant property damage.
- [43] The Board also notes that the Respondent has previously been found guilty of similar disciplinary offences. Those offences took place at about the same time as the current offending and given this the Board is not treating the current matter as a second offence¹⁶. What the early offending does show, however, is a pattern of behaviour and the Board has considered that this is an aggravating factor.
- [44] The Board also notes that the Respondent holds a licence as an Electrical Inspector. The Board expects Inspectors to set the standards especially as they are authorised to carry out high risk inspections of the prescribed electrical work of others.
- [45] The Respondent noted that there were personal matters in his life at the time which impacted on his work performance. He has been cooperative and has accepted responsibility. The matter was dealt with by way of an agreed statement of facts. Those are all mitigating factors the Board can take into consideration.
- [46] Based on the above factors the Board has decided that it will disqualify the Respondent from carrying out the prescribed electrical work that an Electrical Inspector can do until such time as he satisfies the Board that he is competent to be an Inspector. To do this he will be required to pass the practical assessment required for an electrician to be granted registration and licensing as an Electrical Inspector.
- [47] In essence the Respondent's registration and licence will be that of an Electrician until such time as he has passed the required assessment and his registration and licence will be recorded as such in the Register of Electrical Workers. The costs of any required instruction or assessment are to be borne by the Respondent.

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

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

¹⁶ Refer CAS1920.

Costs

- [48] 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.
- [49] 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.
- [50] 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.*
- [51] Based on the above the Board's costs order is that the Respondent is pay the sum of \$250 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

- [52] 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 Act¹⁹. 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.
- [53] 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.
- [54] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990²⁰. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²¹. Within the disciplinary

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 Refer sections 128 of the Act

²⁰ Section 14 of the Act

²¹ Refer sections 200 and 202 of the Criminal Procedure Act

hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²². 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*²³.

- [55] 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 interest²⁴. 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.
- [56] Based on the above the Board will publish the matter in the Electron by way of an article about the need to follow manufacturer's instructions and to change how an installation is carried out and completed if circumstances change. The Respondent will not be identified in that publication.
- [57] 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

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

Penalty: Pursuant to section 147M(1)(d)(ii) of the Electricity Act 1992, the Respondent's registration or practising licence, is restricted to that of an Electrician until such time as the Respondent successfully completes the Board's Electrical Inspector practical assessment under section 147M(2)(a) of the Act.

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 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.

- [59] 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.

²² *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

²³ *ibid*

²⁴ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Right of Appeal

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

Signed and dated this 29th day of July 2019



Mel 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.*

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- (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.*