

Before the Electrical Workers Registration Board

	CE No. 22369
Electrical Worker:	Phillip Horncastle (the Respondent)
Registration Number:	I 260931
Electrical Worker Number:	EW 115166
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 video conference
Hearing Type:	In Person
Hearing and Decision Date:	22 July 2021

Board Members Present:

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

Appearances:	Mr A Miller for the Investigator
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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(f) of the Act.

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Summary of the Board’s Decision

- [1] The Respondent committed three disciplinary offences under section 143(f) of the Act, two of which were failures to provide a return within the required timeframes and one of which was the provision of a false or misleading return. The Respondent is censured and ordered 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

- (a) On 14 October 2020 at [Omitted], Mr Phillip Horncastle failed to provide any return required under any enactment relating to prescribed electrical work being an offence under section 143(f) of the Act, IN THAT, he has failed to provide a certificate of compliance within 20 working days for work carried out between May and August 2019.

Second Alleged Disciplinary Offence

- (b) On 14 October 2020 at [Omitted], Mr Phillip Horncastle has provided a false or misleading return being an offence under section 143(f) of the Act, IN THAT, he

has provided a certificate of compliance for work that did not name the persons supervised and detailed it had been tested when it had not.

Third Alleged Disciplinary Offence

(c) On or around 13 October and November 2020 at [Omitted], Mr Phillip Horncastle has failed to provide any return being an offence under section 143(f) of the Act, IN THAT, he has not provided a return for remedial prescribed electrical work carried out on 13 October 2020.

- [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.

Evidence

[10] 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

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

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 Board heard evidence from the Respondent prior to it making a decision.
- [12] The matter proceeded on the basis of an Agreed Statement of Facts. The Statement set out that the Respondent was engaged to carry out the initial wiring of a renovation of the property. The prescribed electrical work (PEW) was carried out by a trainee in July 2019, but the work was not connected until internal linings were installed a few months later. A Certificate of Compliance (CoC) dated 14 October 2019 was issued by the Respondent for that work on 14 October 2020.
- [13] In May 2020, the Respondent was engaged by the Complainant to install new socket outlets and light switches in an upgrade of the wiring at the property. Again, the Respondent did not carry out the PEW himself. Electrical workers in his employment did. On 27 August 2020, a CoC was provided for PEW that was completed in May 2020. The Respondent did not visit the site. The CoC provided:
- (a) did not name the person(s) being supervised. It detailed that the work had been tested when it had not; and
 - (b) it was not provided to the Complainant within 20 working days of connection but was supplied upon the Complainant's request on 12 October 2020.
- [14] On 11 October 2020, it was discovered that not all sockets were working and that they had not been connected at the switchboard. On 13 October 2020, a trainee attended the site and carried out the connections at the switchboard. When requesting a CoC for this remedial work, the Complainant was advised that the CoC dated 27 August 2020 would also cover the work carried out on 13 October 2020. The Respondent's wife (a non-registered person) issued the advice.
- [15] The Investigator engaged Mr David Olsen (I 245614) to conduct a review of the investigation file and to produce a technical report setting out his findings. Mr Olsen summarised the non-compliance in the installation as:
- (a) Testing of the PEW was not complete;
 - (b) Certification was not supplied to the person contracting the work in the correct time frame as per the Electricity Safety Regulations;
 - (c) Certification was not accurate and was false.
- [16] The Respondent accepted, in the Agreed Summary of Facts, that he had

- (a) failed to provide any return required under any enactment relating to prescribed electrical work being an offence under section 143(f) of the Act, in that, he failed to provide a certificate of compliance within 20 working days for PEW carried out between May and August 2019;
- (b) provided a false and misleading return being an offence under section 143(f) of the Act, in that, he provided a certificate of compliance for work that did not name the persons supervised and detailed that the PEW had been tested when it had not; and
- (c) failed to provide any return being an offence under section 143(f) of the Act, in that, he did not provide a return for remedial prescribed electrical work carried out on 13 October 2020.

[17] There were no safety or compliance concerns with the PEW carried out.

[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 Statement.

Board's Conclusion and Reasoning

[19] The Board has decided that the Respondent **has** committed the three disciplinary offences under section 143(f) of the Act as charged in that:

- (a) On 14 October 2020 at [Omitted], the Respondent failed to provide any return required under any enactment relating to prescribed electrical work being an offence under section 143(f) of the Act, in that, he failed to provide a certificate of compliance within 20 working days for work carried out between May and August 2019;
- (b) On 14 October 2020 at [Omitted], the Respondent provided a false or misleading return being an offence under section 143(f) of the Act, in that, he provided a certificate of compliance for work that did not name the persons supervised and detailed it had been tested when it had not; and
- (c) On or around 13 October and November 2020 at [Omitted], the Respondent failed to provide any return being an offence under section 143(f) of the Act, in that, he did not provide a return for remedial prescribed electrical work carried out on 13 October 2020.

[20] The reasons for the Board's decisions follow.

Failure to Provide

[21] The charges were all laid under section 143(f) of the Act. The first and third related to failures to provide returns within the prescribed timeframes. A CoC must, under regulation 65 of the Safety Regulations, be issued for all general and high risk prescribed electrical work on installations or part installations. Under regulation 74E(2) of the Safety Regulations, a CoC must be issued within 20 days of completion.

Regulation 74E(4) requires that a copy be provided on demand within 10 working days from listed persons.

- [22] An ESC must, under regulation 74A of the Safety Regulations, be issued for all prescribed electrical work on installations, part installations or any fitting that supplies an installation or a part installation with electricity. Under regulation 74C, an ESC must be issued within 20 days after connection.
- [23] On the basis of the evidence before the Board, it was clear that the Respondent did not issue a CoC or an ESC within the required timeframes. As such, the disciplinary offence has been committed.

False or Misleading

- [24] The second charge 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 irrelevant⁵.
- [25] The returns referred to are issued under the Regulations. There is a requirement that a CoC 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. A CoC must, under regulation 66 of the Safety Regulations, also contain all of the information stipulated in regulation 67(1) and (2).
- [26] The evidence before the Board was that a return provided did not contain all of the required information. Regulation 66 of the Safety Regulations stipulate that a CoC must contain the information in regulation 67(1) and (2). Regulation 67(1)(a) requires that a CoC state that the PEW has been completed in accordance with AS/NZS 3000. That standard requires that testing be completed prior to connection. Regulation 67(2)(ca) requires that the CoC give the name of any person who was supervised. Neither of those requirements were met. As such, the disciplinary offence has been committed.

Penalty, Costs and Publication

- [27] 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.
- [28] The Respondent made submissions at the hearing as regards penalty, costs and publication.

Penalty

- [29] 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

⁵ *Taylor Bros Ltd v Taylor Group Ltd* [1988] 2 NZLR 1

*Patel v Complaints Assessment Committee*⁶ 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.

- [30] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*,⁷ 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.
- [31] The Board adopted a starting point of a modest fine. It noted that the Respondent is an Inspector and should be an industry leader and fully aware of certification requirements. The Respondent cooperated with the investigation. He accepted responsibility at the earliest opportunity. Those are mitigating factors. The Respondent also put forward certain personal circumstances that impacted his work performance at the time. He also outlined changes to business practices and systems that have been implemented as a result of the complaint. The Board has taken those factors into consideration.
- [32] Based on the above, the Board’s penalty decision is that, in this instance, the Respondent is to be censured. A censure is a public expression of disapproval.

Costs

- [33] 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.
- [34] 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 case⁸.
- [35] In *Collie v Nursing Council of New Zealand*,⁹ where the order for costs in the tribunal was 50% of actual costs and expenses, the High Court noted that:

⁶ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

⁸ *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.

⁹ [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.

- [36] 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 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

- [37] 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 Act¹⁰. 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.
- [38] 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.
- [39] Within New Zealand, there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990¹¹. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction¹². Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive¹³. 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*¹⁴.
- [40] 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 interest¹⁵. 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.

¹⁰ Refer sections 128 of the Act

¹¹ Section 14 of the Act

¹² Refer sections 200 and 202 of the Criminal Procedure Act

¹³ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

¹⁴ *ibid*

¹⁵ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

- [41] Based on the above, the Board will publish a general article in the Electron summarising the matter but will not order further publication. The Respondent will not be identified in the Electron.
- [42] 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 the prohibition of publication.

Penalty, Costs and Publication Orders

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

Penalty: Pursuant to section 147M(1)(g) of the Electricity Act 1992, the Respondent is censured.

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.

- [44] 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

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

Signed and dated this 9th day of August 2021



Mr M Orange
Presiding Member

ⁱ Section 147M of the Act

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

ⁱⁱ Section 147ZA Appeals

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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.*