

Before the Electrical Workers Registration Board

CE No. 22469

In the matter of:

A disciplinary hearing before the Electrical Workers Registration Board

Between:

The Ministry of Business Innovation and Employment

And

Burnard George James a registered and licensed electrical worker (E 251745, EW 114086, 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:

Auckland

Hearing Type:

In Person

Hearing and Decision Date:

15 March 2023

Board Members Present:

Mr R Keys, Registered Inspector (Presiding)

Ms J Davel, Lay Member

Ms M Kershaw, Registered Electrician

Mr M Macklin, Registered Inspector

Ms A Yan, Registered Electrical Engineer

Mr M Orange, Barrister

Appearances:

John Hilario 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 two disciplinary offences under section 143(f) of the Act.

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Summary of the Board’s Decision

- [1] The Respondent failed to provide returns for prescribed electrical work within prescribed time frames. He is censured and ordered to pay costs of \$500. A record of the disciplinary offending will be recorded on the Public Register for a period of three years.

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 offences the Investigator reported should be considered by the Board.³ They were:

First Alleged Disciplinary Offence

1. On or around 9 August 2021 to 19 August 2021, Mr Burnard James has failed to provide a return being an offence under section 143(f) of the Act, IN THAT, he did

¹ Section 148 of the Act.

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

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.

not provide a Certificate of Compliance, or an Electrical Safety Certificate for Prescribed Electrical Work he carried out within the maximum allowable timeframes established under Regulation 74 at [OMITTED].

Second Alleged Disciplinary Offence

2. On or around 9 August 2021 to 19 August 2021, Mr Burnard James has failed to provide a return being an offence under section 143(f) of the Act, IN THAT, he did not provide a Certificate of Compliance, or an Electrical Safety Certificate for Prescribed Electrical Work he carried out within the maximum allowable timeframes established under Regulation 74 at [OMITTED].

Third Alleged Disciplinary Offence

3. On or around 9 August 2021 to 19 August 2021, Mr Burnard James has failed to provide a return being an offence under section 143(f) of the Act, IN THAT, he did not provide a Certificate of Compliance, or an Electrical Safety Certificate for Prescribed Electrical Work he carried out within the maximum allowable timeframes established under Regulation 74 at [OMITTED].

- [5] The Board noted that the Investigator's charges incorrectly referenced regulation 74 of the Safety Regulations (Reconnecting or restoring power supply to certain low voltage installations). The correct reference should have been 74E (What happens to certificates of compliance) and 74G (What happens to electrical safety certificates). However, given the particulars provided in the charges and the responses made by the Respondent, the Board considered that the error had not prejudiced the Respondent and that he had been given fair notice of the allegations 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*⁴ and in New Zealand in *Dentice v Valuers Registration Board*.⁵
- [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*,⁶ 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."

⁴ *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

⁵ [1992] 1 NZLR 720 at p 724

⁶ [2016] HZHC 2276 at para 164

- [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.

Evidence

- [9] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁷. 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.

- [10] The Respondent, an Electrician, carried out work for the Complainant, an Electrical Service Technician who was working toward becoming an Electrician. The complaint made was that the Respondent had not provided three Certificates of Compliance for work that the Complainant had contracted the Respondent to carry out.
- [11] The Respondent, in turn, alleged the Complainant was carrying out prescribed electrical work that he was not authorised to do. He also stated that he had completed the Certificates of Compliance for the work that he had been contracted to do and that he had provided the Certificates to the owners because the Complainant was not available due to him being in a different city to the Respondent.
- [12] The Respondent also stated that he had not carried out any prescribed electrical work at [OMITTED]. The Investigator’s documentation included supporting documentation provided by the Complainant consisting of job system references and an invoice issued by the Respondent.

Board’s Conclusion and Reasoning

- [13] The Board has decided that the Respondent **has**:
- (a) failed to provide a return being an offence under section 143(f) of the Act, in that, he did not provide a Certificate of Compliance, or an Electrical Safety Certificate for Prescribed Electrical Work he carried out within the maximum allowable timeframes established under Regulation 74E and 74G of the Safety Regulations at [OMITTED]; and
 - (b) failed to provide a return being an offence under section 143(f) of the Act, IN THAT, he did not provide a Certificate of Compliance, or an Electrical Safety Certificate for Prescribed Electrical Work he carried out within the maximum allowable timeframes established under Regulation 74E and 74G of the Safety Regulations at [OMITTED].

⁷ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

- [14] The Board has also decided that the Respondent **has not** failed to provide a Certificate of Compliance, or an Electrical Safety Certificate for Prescribed Electrical Work he carried out within the maximum allowable timeframes at [OMITTED].
- [15] The Board made the finding in relation to [OMITTED] on the basis that the Complainant had not proven, on the balance of probabilities, that the Respondent had carried out prescribed electrical work at the property. In essence, there was competing evidence and insufficient corroborating evidence to establish that he had carried out prescribed electrical work at the address.
- [16] In terms of the two charges that have been upheld ([OMITTED] and [OMITTED] regulation 74E(2) of the Safety Regulations provides that the “responsible person” (the Respondent) must, within 20 days after completing the work, provide a copy of the certificate of compliance for prescribed electrical work to the person who contracted for the work or, if that person is not readily available, to the occupier or owner of the place or thing in which the installation or part installation is located. Regulation 74G(1)(a) of the Safety Regulations contains the same provision for Electrical Safety Certificates.
- [17] The two regulations stipulate that the certification must be provided to the “person who contracted for the work”. That was the Complainant. The certification could have been provided to the owner if the Complainant was not readily available. The Respondent argued that, as the Complainant was in a different city, he was not readily available.
- [18] The Safety Regulations do not stipulate the method by which certification is to be provided. The Act, however, allows for notices to be given by post or email. In this respect, it is noted that the Respondent provided his invoices to the Complainant by email. The Board saw no reason why the Respondent could not have provided the certification to the Complainant by means other than physically delivering it to him, such as by email as an attached PDF as he did have his email contact details or by post. As such, the Board found that the Respondent had committed the disciplinary offences as the Complainant, who contracted for the work, was readily available.

Penalty, Costs and Publication

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

Penalty

- [20] 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*⁸ 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.

- [21] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*,⁹ 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.
- [22] The Board adopted a starting point of a fine. Ordinarily, for such matter like this, a fine both punishes and deters and is, therefore, appropriate. On this occasion, however, there were mitigating factors, including that the certification was provided to the owner and that there was an obvious dispute between the Complainant and the Respondent. Given those factors, the Board decided that it would censure the Respondent. A censure is an expression of disapproval of conduct.

Costs

- [23] 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.
- [24] 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 case¹⁰.
- [25] In *Collie v Nursing Council of New Zealand*,¹¹ 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.

⁸ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

¹⁰ *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.

¹¹ [2001] NZAR 74

[26] In *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society*,¹² 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.

[27] 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 and was dealt with at a defended hearing. Adjustments based on the High Court decisions above are then made.

[28] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$500 toward the costs of and incidental to the matter. The Board did start at \$1,000 but reduced the amount on the basis that the Respondent was partially successful in his defence of the allegations.

Publication

[29] 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 Act¹³. 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.

[30] 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.

¹² CIV-2011-485-000227 8 August 2011

¹³ Refer sections 128 of the Act

- [31] 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 guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*¹⁷.
- [32] 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.
- [33] Based on the above, the Board will not order further publication.
- [34] 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

- [35] 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 \$500 (GST included) towards the costs of, and incidental to, the inquiry of the Board.
- Publication:** The Registrar shall record the Board's action in the Register of Electrical Workers in accordance with section 128(1)(c)(viii) of the Act.
- The Respondent will be named in this decision.**
- In terms of section 147Z of the Act, there will not be action taken to publicly notify the Board's action.**
- [36] 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.

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

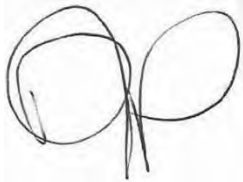
¹⁷ *ibid*

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

Right of Appeal

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

Signed and dated this 28th March 2023



R Keys

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.*