

## Before the Electrical Workers Registration Board

CE No. 22279

Electrical Worker: Ross Johnston (the Respondent)

Registration Number: E 4879

Electrical Worker Number: EW 024951

Registration Class: Electrician

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### Decision of the Board in Respect of the Conduct of an Electrical Worker

#### Under section 147G and 147M of the Electricity Act 1992

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Hearing Location: Christchurch

Hearing Type: In Person

Hearing and Decision Date: 19 November 2021

#### Board Members Present:

Mr M Orange, Barrister (Presiding)

Mr R Keys, 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 T Sagaga for the Investigator

Mr T Brown for the Respondent

#### Procedure:

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

#### Board Decision:

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

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### Summary of the Board’s Decision

- [1] The Respondent provided a false or misleading return contrary to section 143(f) of the Act. The Board decided to take no disciplinary action. 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. The charge was that:
- On or around 14 January 2020, Mr Ross Johnston has, with respect to a 1975 Caravan Registration [OMITTED], provided a false or misleading return being an offence under section 143(f) of the Act, IN THAT, he:
- (a) failed to date and provide a full description of the prescribed electrical work carried out on the certificate of compliance; and/or
- (b) failed to provide an Electrical Safety Certificate.
- [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*<sup>1</sup> and in New Zealand in *Dentice v Valuers Registration Board*<sup>2</sup>.

[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*,<sup>3</sup> 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 and Submissions

[10] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>4</sup>. 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.*

[11] The Board heard evidence from the Respondent and took submissions from his Counsel prior to it making its decision.

[12] The matter proceeded on the basis of an Agreed Statement of Facts. The Statement set out that the Respondent was engaged to reconnect a protective earthing conductor to the chassis of a Caravan. The Respondent also carried out the following prescribed electrical work: running new main earth; replacing 40amp RCBO; altering lighting circuit for a double plug with existing light switch; replacing illegal lighting

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

<sup>2</sup> [1992] 1 NZLR 720 at p 724

<sup>3</sup> [2016] HZHC 2276 at para 164

<sup>4</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

wire; fixing illegally wired RCBO; replacing cord connectors on lead; and work on the caravan inlet plug.

- [13] On completion, the Respondent issued a Certificate of Compliance (CoC) and a warrant of electrical fitness. The Investigator sought an opinion from [OMITTED], an electrical inspector [OMITTED], about the certification provided. His opinion was that the CoC did not comply with the requirements of Safety Regulations. In particular, he noted that the Respondent had failed to date and provide a full description of the prescribed electrical work on his Certificate of Compliance (CoC) carried out and had failed to provide an Electrical Safety Certificate (ESC).
- [14] The CoC and ESC were issued together with an invoice that provided a date on which the prescribed electrical work was carried out and full details of the work that was completed.
- [15] The Respondent submitted that there was no prescribed form for a CoC or ESC and that the Electrical Workers Registration Board's website states: "Feel free to attach any additional pages, information, drawings and documents to a CoC or RoI to provide the necessary detail." Counsel submitted that the Respondent had always understood that accompanying documents could be included to provide the necessary detail. It was accepted by the Investigator's expert that it would not have been possible to record the level of detail contained in the invoice in the one-page CoC and ESC that the Respondent issued and that the invoice recorded the date of issue, details of the prescribed electrical work carried out and details of the dates and time that the prescribed electrical work was carried out.
- [16] The Respondent did accept that he did not comply with the requirements of regulation 67(1)(c) with respect to the CoC in that AS/NZS 3001 was a relevant standard that should have been referred to. He submitted that he did not appreciate that he had to do this, as the standard-issue form he was using did not call for this information and that it was an error on his part, for which he accepted responsibility. He submitted the omission was not intentional.
- [17] Counsel for the Respondent noted that although the section of the CoC/ESC titled ESC was not filled in, there is no prescribed form for an ESC. He submitted that what was relevant was whether the information provided complied with the requirements of the Safety Regulations and, in particular, regulation 74A(3). He also noted that regulation 111A(2) provides that where certificates are consolidated
- (a) if any of the information required by these regulations for each certificate is the same, that information need not be repeated in the consolidated document; and
  - (b) the authentication mark needs to be included in or on the document only once.

- [18] The Respondent noted that between the CoC/ESC and invoice:
- He recorded that the work had been done lawfully and safely.
  - He noted that it was safe to connect.
  - He certified that he had tested the installation in accordance with the Electrical Safety Regulations.
  - He identified the location of the installation or part installation to which it relates, being the caravan.
  - He included the authentication mark.
  - He provided a date of issue and included the dates that the work was undertaken.
  - He detailed the work completed.
  - He signed the document. He also dated invoice 7514, but he accepts he did not date the CoC and ESC document.
  - He recorded his name and registration number.
- [19] The Respondent acknowledged that he did not clearly state whether the ESC related to the whole of the installation or just specified parts of it as per the requirements of regulation 74A(3)(b) of the Safety Regulations. The Respondent submitted that he did not appreciate that he had to make this clear and noted that even the standard form he was using did not provide for this to be specified in the section titled ESC. Notwithstanding, he accepted that it was an error, and he accepted responsibility for noting that it was not intentional.
- [20] In summary, the Respondent accepted that he had carried out prescribed electrical work and that both the COC and ESC were not correctly completed, but he submitted that the failings were not deliberate as he genuinely believed that he had undertaken the prescribed electrical work as legally required and had issued certification of the prescribed electrical work undertaken as required.
- [21] It was noted that, in consultation with the Investigator and the Investigator's expert, the Respondent had issued a revised COC and ESC to the customer, which met the regulatory requirements and that there were no allegations that the prescribed electrical work was completed negligently or was not safe.
- [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** provided a false or misleading return being an offence under section 143(f) of the Act, in that, he failed to date and provide a full description of the prescribed electrical work carried out on a Certificate of Compliance and that he failed to provide an Electrical Safety Certificate.

- [24] 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 irrelevant<sup>5</sup>.
- [25] The returns referred to are issued under the Regulations. There is a requirement that an ESC is 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 CoC is issued, in addition to an ESC, for high and general risk prescribed electrical work. A CoC must state that the prescribed electrical work has been done lawfully and safely and that the information in the certificate is correct.
- [26] The specific allegations were that the Respondent failed to date and provide a full description of the prescribed electrical work carried out on the certificate of compliance and that he failed to provide an ESC.
- [27] Submissions were made that the description and date were provided by way of an attached invoice and that, by completing the CoC portion of a combined ESC/CoC, an ESC had, in effect been provided given the provisions of section 111A of the Safety Regulations. Other aspects were accepted.
- [28] Looking first at the question of the date and description. The Board accepted that the attached invoice did provide a date and description and that additional documentation can be attached to certification so as to provide a fuller and more complete record. The Board found, however, that the invoice had not been incorporated into the CoC/ESC and, as such, that it did not provide a date or a full description of the prescribed electrical work.
- [29] In coming to this decision, the Board noted that certification is provided for the benefit of the recipient and other persons who need to rely on it, such as the owner, the person who contracted for the work, other electrical workers and regulators. In this respect, the provisions of regulations 74E and 74G of the Safety Regulations as regards who certification is to be provided to is noted.
- [30] The Board's view is that it is important that recipients of certification can, by viewing the document, ascertain its contents. The CoC/ESC that was provided by the Respondent, as a standalone document, did not contain a date or a full description of the prescribed electrical work. With the invoice, it did. The problem, however, was that the CoC/ESC did not make any reference to the invoice. Put another way; there was nothing to indicate to a recipient of the CoC/ESC that it relied on an additional document, namely the Respondent's invoice. As such, had the CoC/ESC expressly referred to the invoice, it would have satisfied the regulatory

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<sup>5</sup> *Taylor Bros Ltd v Taylor Group Ltd* [1988] 2 NZLR 1

requirements. As it did not, there was nothing to alert the reader that the invoice was intended to form part of the CoC/ESC.

- [31] The second aspect of the allegations was that the Respondent had failed to provide an ESC. The certificate that was issued was a combined CoC/ESC. The CoC portion had been completed. The ESC portion did not contain any details.
- [32] The requirement for an ESC is provided for in regulation 74A of the Safety Regulations. It provides:

**74A Electrical safety certification**

- (1AA) *This regulation applies to prescribed electrical work on—*
- (a) *an installation; or*
  - (b) *a part installation; or*
  - (c) *any fitting that supplies an installation or a part installation with electricity.*
- (1) *After the work referred to in subclause (1AA) is complete, the person who completed the work must issue an electrical safety certificate for the installation or part installation if the person is satisfied that—*
- (a) *the installation or part installation is safe to use, on the grounds that it is electrically safe and complies with these regulations; and*
  - (b) *where the prescribed electrical work comprised the maintenance or alteration of, or the addition to, the installation or part installation, the work has not adversely affected any other part of the installation.*
- (2) *For the purposes of subclause (1), if an installation or part installation was disconnected from a power supply while the prescribed electrical work was done, the work is complete only once the installation or part installation is connected or reconnected to a power supply.*
- (3) *An electrical safety certificate must—*
- (a) *include a statement that the person issuing it is satisfied that the installation or part installation is connected to a power supply and is safe to use; and*
  - (b) *clearly state whether the electrical safety certificate relates to the whole of the installation or just to specified parts of it; and*
  - (c) *identify the location of the installation or part installation to which it relates; and*
  - (d) *include or have on it the authentication mark, as specified in regulation 111B; and*
  - (e) *give the date on which the connection was done; and*
  - (f) *be signed and dated by—*
    - (i) *the person who did the connection; and*
    - (ii) *if the person who did the connection was acting under supervision, the supervisor; and*

- (g) *give the name and registration number of—*
  - (i) *the person who did the connection; or*
  - (ii) *if that person was acting under an employer licence, the employer’s licence number; or*
  - (iii) *if the person in subparagraph (i) was acting under supervision, the registration number of the supervisor.*
- (4) *If prescribed electrical work is done without disconnecting the power supply, references in subclause (3)(e) to (g) to connection must be taken to be references to the completion of the work.*
- (5) *An electrical safety certificate issued for an installation or part installation is, for the purposes of section 19(1)(e) of the Building Act 2004, a certificate that confirms that any prescribed electrical work done on the installation or part installation complies with the building code.*

[33] Counsel for the Respondent submitted that the above requirements had been met on the basis that the information had been provided within the CoC portion of the certificate. This was on the basis of regulation 111A, which provides:

**111A Consolidation of certificates**

- (1) *The following certificates relating to an installation may be consolidated in a single document:*
  - (a) *any certificates of compliance (including any associated records of inspection) for prescribed electrical work done on all or any part of the installation:*
  - (b) *any electrical safety certificates for the whole or any part of the installation.*
- (2) *Where certificates are consolidated—*
  - (a) *if any of the information required by these regulations for each certificate is the same, that information need not be repeated in the consolidated document; and*
  - (b) *the authentication mark needs to be included in or on the document only once.*

[34] The Board accepts that, where a combined CoC/ESC is provided, the detail that is contained in the CoC portion does not have to be repeated in the ESC. For that reason, most combined forms contain the majority of the information in the CoC portion. Regulation 111A does not, however, state that only a CoC or an ESC need be provided. The Board considers the intention of the regulation is to prevent unnecessary duplication of information that is required in both a CoC and an ESC, not to negate the requirement to issue both an ESC and a CoC. The certificates are different. They serve different purposes. For that reason, as noted above, the Safety Regulations clearly require two documents – a CoC and an ESC, which can be contained in one document.



[35] The fundamental difference between a CoC and an ESC is that the latter must include a statement that the person issuing it is satisfied that the installation or part installation is connected to a power supply and “is safe to use”. The “safe to use” statement is not a CoC requirement. The required statement in a CoC is that it is “safe to connect”. The Respondent’s CoC, even if it was intended to be a consolidated document, did not contain the “safe to use” statement. The Respondent’s CoC stated:

*I certify that the completed prescribed electrical work to which this certificate applies, has been done lawfully and safely and the information in the certificate is correct in that the installation or part installation:*

- *has an earthing system that is correctly rated*
- *contains fittings which are safe to connect to a power supply*
- *has been satisfactorily tested in accordance with Electrical Safety Regulations 2010.*
- *is safe to connect*

[36] The Board also considers that for any certificate to be valid, it must be signed and dated, noting that the date of certification may be different from the date on which the prescribed electrical work was carried out. Signing and dating is not providing repeated information as per regulation 111A, it is the act of certifying and taking responsibility for the statements contained in the form and it says the recipient can rely on what the issuer has stated in it. The date and signature turn a form into a valid certificate.

[37] For those reasons, the Board did not accept the submission that the Respondent had issued an ESC when he provided a CoC.

### **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 Act<sup>i</sup>, 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 *Patel v Complaints Assessment Committee*<sup>6</sup> commented on the role of “punishment” in

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<sup>6</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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*,<sup>7</sup> 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.
- [42] Counsel for the Respondent submitted that the Respondent did not intentionally provide a false and misleading return, that he had been corporative throughout the investigation, he had issued a revised Certificate of Compliance and Electrical Safety Certificate, and that there were no allegations that the prescribed electrical work was completed negligently or was not safe. The Board accepted those submissions. It was also submitted that the offending was minor and at the lower end of the scale. Reference was made to other cases that had come before the Board and to the penalties imposed on them. An application to suppress details of the disciplinary offending was also made under section 153 of the Act.
- [43] Based on the submissions made and the mitigating factors present, the Board decided that it would, pursuant to section 147M(1)(h) of the Act, “make no order”. The Board considered that this was appropriate as the conduct was not intentional, the Respondent had learnt from the matter, and the breach was technical in nature in that there were no safety issues with the work.

### Costs

- [44] 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.
- [45] 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 case<sup>8</sup>.

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<sup>7</sup> 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

<sup>8</sup> *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.

- [46] In *Collie v Nursing Council of New Zealand*,<sup>9</sup> 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.*

- [47] In *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society*,<sup>10</sup> 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.*

- [48] 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 simple. Adjustments based on the High Court decisions above are then made.

- [49] 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

- [50] As a consequence of its decision, the Respondent's name and the disciplinary outcomes would, ordinarily, be recorded in the public register as required by the Act<sup>11</sup>. This is because section 128 of the Act stipulates:

**128 Matters to be contained in register**

- (1) *The register must contain all of the following information, to the extent that the information is relevant, for each registered person:*
- (c) *the following information about the status and history of the person's registration and practising licence (if any):*

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<sup>9</sup> [2001] NZAR 74

<sup>10</sup> CIV-2011-485-000227 8 August 2011

<sup>11</sup> Refer sections 128 of the Act

(viii) *any action taken under section 127 (as in force immediately before the commencement of this section) or section 147M on a disciplinary matter in respect of the person in the last 3 years*

- [51] As no order has been made under section 147M, it follows that no action has been taken and that the matter will not appear on the public register.
- [52] 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 1990<sup>12</sup>. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction<sup>13</sup>. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive<sup>14</sup>. 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*<sup>15</sup>.
- [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 interest<sup>16</sup>. 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] An application was made for an order under section 153 of the Act to suppress the publication of the Respondent's name in relation to the proceeding. The grounds were that the nature of the offending was minor and technical in nature. Counsel noted the mitigating factors present and submitted that publication would have a negative impact on the Respondent's reputation as an electrician and would bring his name into disrepute. Counsel submitted:

*While counsel accepts that it is a punitive consequence of offending that a offender's name is published, on the basis of the facts in this case, counsel*

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<sup>12</sup> Section 14 of the Act

<sup>13</sup> Refer sections 200 and 202 of the Criminal Procedure Act

<sup>14</sup> *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

<sup>15</sup> *ibid*

<sup>16</sup> *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

*submits that the consequences of publication to (the Respondent) would be disproportionate to the level of offending.*

[57] Under section 153(3) of the Act, the Board may:

- (3) *If the Board is of the opinion that it is proper to do so, having regard to the interests of any person and to the public interest, it may, of its own motion or on the application of any party to the proceedings,—*
  - (a) *Order that the whole or any part of a hearing shall be held in private:*
  - (b) *Make an order prohibiting the publication of any report or account of any part of any proceedings before it, whether held in public or in private:*
  - (c) *Make an order prohibiting the publication of the whole or any part of any documents produced at any hearing:*
  - (d) *Make an order prohibiting the publication of the name or any particulars of the affairs of—*
    - (i) *Any person who is the subject of proceedings before it:*
    - (ii) *Any other person.*

[58] As noted, the starting point is that in New Zealand is open justice and open reporting. As such good grounds have to be shown as to why a matter or details should be suppressed. In the Criminal Procedure Act, the grounds are<sup>17</sup>:

*Publication would be likely to:*

- (a) *cause extreme hardship to the person charged, a witness or a person connected to those persons or the matters; or*
- (b) *cast suspicion on another person that may cause undue hardship to those persons; or*
- (c) *cause undue hardship to any victim of the offence; or*
- (d) *create a real risk of prejudice to a fair trial; or*
- (e) *endanger the safety of any person; or*
- (f) *lead to the identification of another person whose name is suppressed by order or by law; or*
- (g) *prejudice the maintenance of the law, including the prevention, investigation, and detection of offences; or*
- (h) *prejudice the security or defence of New Zealand.*

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<sup>17</sup> Refer ss 200 and 202 of the Criminal Procedure Act

[59] In *Robertson v Police*<sup>18</sup> the Court of Appeal confirmed the position it took in *Fagan v Serious Fraud Office*<sup>19</sup> that the section contemplates a two-stage approach as regards the Criminal Procedure Act:

[40] *At the first stage, the judge must consider whether he or she is satisfied that any of the threshold grounds listed in 200(2) has been established. That is to say, whether publication would be likely to lead to one of the outcomes listed in subs (2). The listed outcomes are prerequisites to a court having jurisdiction to suppress the name of a defendant. It is "only if" one of the threshold grounds has been established that the judge is able to go on to the second stage.*

[41] *At the second stage, the judge weighs the competing interests of the applicant and the public, taking into account such matters as whether the applicant has been convicted, the seriousness of the offending, the views of the victims and the public interest in knowing the character of the offender.*

[60] As regards the word "likely" in *H v R*<sup>20</sup> the Court stated:

[17] *The meaning of the word "likely" was considered by the Court of Appeal in R v W, where the case concerned automatic name suppressions under the Criminal Justice Act 1985. The Court held that the phrase "likely to lead to the identification" of the victim meant there had to be an "appreciable risk" that this would occur.*

*I conclude that the word "likely" in s 202 means more than "may" so that a mere possibility would not suffice. However, it is not necessary for an applicant for an order under s 202 to show that the risk of harm is such that it is more likely than not to occur. In my view, the word "likely" in s 202 means a real risk that cannot be readily discounted.*

[61] Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive<sup>21</sup>. In *N v Professional Conduct Committee of Medical Council*<sup>22</sup> the High Court pointed to the following factors:

*The tribunal must be satisfied that suppression is desirable having regard to the public and private interests and consideration can be given to factors such as:*

- *issues around the identity of other persons such as family and employers;*

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<sup>18</sup> [2015] NZHC 1501

<sup>19</sup> [2013] NZCA 367

<sup>20</sup> [2015] NZHC 1501

<sup>21</sup> *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

<sup>22</sup> *ibid*

- *identity of persons involved and their privacy and the impact of publication on them; and*
- *the risk of unfairly impugning the name of other practitioners if the responsible person is not named.*

[62] Accordingly, any application must be considered in light of the above.

[63] The Board decided that the grounds for suppression were not made out. The mitigating factors were relevant to penalty consideration. In terms of the finding having a negative impact on the Respondent's reputation, that is an inevitable outcome of a disciplinary finding. It is not enough, of itself, to make an order under section 153 of the Act. Furthermore, the Board notes that, as it has not made an order under section 147M of the Act, the Respondent's name will not appear on the public register and, as such, there is less risk of the Respondent's conduct coming to light.

[64] Looking more specifically at whether further publication should be ordered, the Board has accepted that whilst there were no good reasons to suppress, the reasons put forward for suppression were such that the Board will not order further publication under section 147Z of the Act.

#### **Penalty, Costs and Publication Orders**

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

**Penalty:** Pursuant to section 147M(1)(h) of the Electricity Act 1992, no disciplinary 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 Registrar shall not 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 not be published by way of an article in the Electron.**

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

[66] 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

[67] The right to appeal Board decisions is provided for in section 147ZA and 147ZB of the Act<sup>ii</sup>.

Signed and dated this 15<sup>th</sup> day of December 2021.



**Mr M Orange**  
Presiding Member

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### <sup>i</sup> 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:*



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- (f) order the person to pay a fine not exceeding \$10,000:
  - (g) order that the person be censured:
  - (h) make no order under this subsection.
- (2) The things that the person can be required to do for the purposes of subsection (1)(b), (d), and (e) are to—
- (a) pass any specified examination:
  - (b) complete any competence programme or specified period of training:
  - (c) attend any specified course of instruction.
- (3) The Board may take only 1 type of action in subsection (1) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b), (c), (e) or (g).
- (4) No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an—
- (a) offence for which the person has been convicted by a court; or
  - (b) infringement offence for which the person has been issued with an infringement notice and has paid an infringement fee.
- (5) The Board must not exercise any authority conferred by this section in respect of any offence committed by any person before the date of that person's registration or, as the case may be, the date on which that person's provisional licence was issued if at that date the Board was aware of that person's conviction for that offence.
- (6) If a person is registered under Part 10 in respect of more than 1 class of registration, the Board may exercise its powers under subsection (1)(a) to (e) in respect of each of those classes or 1 or more of those classes as the Board thinks fit.]

***ii Section 147ZA Appeals***

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

***Section 147ZB Time for lodging appeal***

*An appeal under section 147ZA must be brought within—*

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