

**In the Electrical Workers Registration
Board at Christchurch**

CAS 1675

In the matter of a disciplinary proceeding pursuant to section 147(G) and (M) of the Electricity Act 1992 (“the Act”)

Against **Kelso**
Electrician (E12465)

Hearing 24 June 2016

Decision: 11 July 2016

Judgement of the Board

Introduction

[1] Mr Kelso faced one disciplinary offence in relation to prescribed electrical work. The charge was laid in alternatives. They were that

- (a) on 15 September 2015 at [REDACTED], he 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 a disciplinary offence under section 143(b)(ii) of the Act, in that, he failed to ensure that [REDACTED] a holder of an Electrical Limited Certificate (ELC) was adequately supervised on site when [REDACTED] fitted a Miniature Circuit Breaker (MCB) onto the busbar whilst a switchboard was energised;

or in the alternative:

- (b) on 15 September 2015, at [REDACTED], he carried out or caused to be carried out prescribed electrical work in a negligent or incompetent manner being a disciplinary offence under section 143(a)(i) of the Act, in that, he failed to ensure that [REDACTED] a holder an ELC was adequately supervised on site when [REDACTED] fitted a MCB onto the busbar whilst a switchboard was energised;

or in the alternative:

- (c) on 15 September 2015 at [REDACTED], he 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 a disciplinary offence under section 143(a)(ii) of the Act, in that, he failed to ensure that [REDACTED] a holder an ELC was adequately supervised on site when [REDACTED] fitted a MCB onto the busbar whilst a switchboard was energised in breach of regulations 13 and 16 of the Electricity (Safety) Regulations 2010.

[2] The complaint was made in writing by WorkSafe New Zealand. The complaint identified [REDACTED] as the person being complained about. [REDACTED] is the holder of a Limited Certificate¹. As such he is not subject to the Act's disciplinary provisions².

[3] Tina Mead was appointed as the Investigator³. In her Investigator Report she identified Mr Alistair Kelso, a registered and licensed person, as [REDACTED] supervisor and completed the report on the basis that he was the responsible person. Mr Kelso and [REDACTED] were both in the employ of JLE Electrical. Mr Kelso as the South Island Branch Manager and [REDACTED] as a trainee apprentice.

[4] The Investigation Report determined a complaint should be considered by the Electrical Workers Registration Board ("the Board"). Under s 147G of the Act if the Investigator reports that a complaint should be considered by the Board the Board must

¹ Issued by the Board under s 78 of the Act

² under s 142 of the Act the disciplinary provisions in Part 11 only apply to registered persons and to provisional licence holders

³ Pursuant to s 145 of the Act

hold a hearing to determine whether it should exercise its disciplinary powers under s 147M.

[5] The disciplinary offences were laid in a Notice of Hearing dated 12 April 2016 and were set down for a hearing on 24 June 2016.

[6] At the hearing the Investigator was represented by Aaron McIlroy, solicitor. Mr Kelso was assisted by Mr Gary House, industry representative.

[7] Mr Kelso was provided with all of the materials the Investigator had in her power or possession which were associated with the complaint.

[8] No Board Members declared any conflicts of interest in relation to the matters under consideration.

Procedure

[9] Two days prior to the hearing Mr House contacted the Board secretary by phone and advised that he considered the amount of time allowed for the hearing was inadequate. He considered a minimum of two days would be required. The Board requested that he put his request for additional time in writing and that he specify the reasons why additional time was required, details of the witnesses he was intending to call and whether he was seeking an adjournment to allow a new hearing date to be allocated. Mr House responded stating that his submissions would take some time. No request was made for an adjournment.

[10] At the commencement of the hearing Mr House advised the Board of various conflicts of interest he considered existed for him. The Board saw the conflicts as matters between him and Mr Kelso and advised that, provided Mr Kelso was prepared to continue to instruct him (having been appraised of the conflicts), then the Board did not see that there was any impediment to the hearing proceeding.

[11] Mr House also raised issues with a lack of time for him to prepare. He advised he had been instructed two weeks prior and had been ill since. He also queried the absence of the investigator. He was asked whether his client was seeking an adjournment and time was allowed for Mr House and Mr Kelso to consider the matter. Mr House informed the Board that an adjournment was not sought. The matter proceeded.

Evidence

[12] The matter proceeded as a defended hearing.

[13] All persons giving evidence were sworn in prior to giving evidence and all evidence was recorded. 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 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.

[14] The disciplinary charges related to a high energy electrical flash which caused a burn injury to [REDACTED] when he was carrying out prescribed electrical work on a

switchboard that was not electrically isolated from the supply. Counsel for the Investigator submitted, amongst other things, there was:

... an absence of any supervision or oversight in relation to the work that [REDACTED] was carrying out and that there were no registered practitioners monitoring [REDACTED] work (and that) it appears that there was no system in place in relation to supervising [REDACTED] work.

[15] Counsel for the Investigator did not call any witnesses and relied on the file before the Board which included:

- (a) Worksafe New Zealand Duty Holder Review Investigation Report;
- (b) email from [REDACTED], Duty Holder Review Officer, High Hazard and Specialist Services dated 27 October 2015 to JLE Electrical summarising the outcome of the duty holder review;
- (c) written response from Mr Kelso;
- (d) written statement from [REDACTED]; and
- (e) copies of revised JLE supervision procedures and other documentation attached to the Duty Holder Review Investigation Report.

[16] The Duty Holder Review provided noted various steps being taken by JLE as the employer to prevent a similar event from occurring including a review of its supervision procedures and noted that the duty holder review was complete and the file would be closed.

[17] The written response from Mr Kelso outlined the work being undertaken by JLE at the time of the incident and detailed the staff who undertook the work. They were:

- (a) [REDACTED] – Electrician
- (b) [REDACTED] – Electrician
- (c) [REDACTED] – Electrician
- (d) [REDACTED] – Limited Certificate (Electrician)
- (e) [REDACTED] – Limited Certificate (Electrician)
- (f) [REDACTED] – Trade Assistant

[18] Mr Kelso outlined that on 15 September 2015 [REDACTED] was working under general supervision and working in the vicinity of [REDACTED]. He went on to state:

Without being asked, he ([REDACTED]) decided to terminate a circuit breaker in a switchboard but did not isolate the electricity to the switchboard before starting work. In making this decision he did not follow the established JLE health and safety procedures that all JLE employees are required to follow ...

[19] Mr Kelso also outlined his responsibilities as regards [REDACTED] stating that whilst he was the nominated supervisor he does not supervise [REDACTED] everyday tasks:

... my responsibility as [REDACTED] nominated supervisor ensures that he is not asked or required to do electrical work without suitable supervision, instruction or personal protection equipment.

And

His ([REDACTED]) work up until the incident was frequently monitored by the senior electricians on site who would have continued to monitor the installation of a new circuit breaker had they known he was going to run a new circuit.

[20] In the statement from [REDACTED] he accepted responsibility for the incident and put it down to a "momentary lack of judgement". He also noted that:

At the time of the incident I was working in close proximity to the senior electrician under general supervision.

[21] Included in the documentation provided were JLE Pre Start Minutes of Meeting for the days before and after the incident but not for 15 September 2015, the day of the incident. The Minutes disclosed the workers involved at the site before and after the incident. A diagram of the incident created by JLE as part of its response to Worksafe recorded the persons present at the time as well as their locations at the site.

[22] [REDACTED] and Mr Kelso gave evidence at the hearing.

[23] [REDACTED] gave evidence and was questioned by the Board and Counsel for the Investigator. His evidence included:

- (a) his experience noting that he was, at the time, a third year senior apprentice and had passed his theory and regulations exams and his practical assessments;
- (b) an acknowledgement that at the time of the incident personal events were playing on his mind;
- (c) acceptance that onsite procedures were adequate, he was aware of them and that the incident was a result of his lapse in concentration, not the procedures on site or the supervision he was under;
- (d) evidence as to what occurred on the day including that the switchboard was being energised and de-energised from time to time as commissioning was underway and that he was or should have been aware of this and it should have been apparent to him that the switchboard was electrically live when he installed the miniature circuit breaker; and
- (e) details as to the chain of management and control on the site. [REDACTED] noted that at each site and on each job he goes to the senior licensed person on site and that he considered he was under those persons supervision when on site. On the day in question he believed [REDACTED] was his supervisor and stated that his work was regularly checked by the licensed persons on site including by [REDACTED].

[24] Mr Kelso gave evidence and was questioned by the Board and Counsel for the Investigator. His evidence included:

- (a) details on his role at JLE;
- (b) details on how [REDACTED] came to be in the employ of JLE and [REDACTED] induction process including health and safety induction and his impressions of him as a worker and employee and how he considered the events on the day to have been out of character;
- (c) general detail on JLE health and safety and supervision processes noting that whilst JLE developed a specific supervision policy after the incident they relied on and used the Board's supervision procedures prior to that and at the time of the incident;
- (d) details on his role as [REDACTED] nominated supervisor versus the role of licensed persons on site who carry out onsite supervision of non-licensed persons. Mr Kelso was also questioned on the job descriptions used at JLE including that of Service Delivery Coordinator which he considered [REDACTED] fell within; and
- (e) confirmation that when on a work site all staff know who they are to refer to and deal with for instructions and if issues arise.

[25] Neither Mr Kelso nor [REDACTED] were able to account for why there was no Pre Start documentation available for the day of the incident. [REDACTED] was sure a pre start meeting had occurred and that the person noted as being on site that day would have been present.

[26] Mr House made a short closing submission and made reference to an article and an industry forum.

Legal Principles

Burden and standard of proof

[27] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed. The relevant authority is *Z v Dental Complaints Assessment Committee*⁴. The following passages delivered by McGrath J are relevant:

The civil standard has been flexibly applied in civil proceedings no matter how serious the conduct that is alleged. In New Zealand it has been emphasised that no intermediate standard of proof exists, between the criminal and civil standards, for application in certain types of civil case. The balance of probabilities still simply means more probable than not. Allowing the civil standard to be applied flexibly has not meant that the degree of probability required to meet the standard changes in serious cases. Rather, the civil standard is flexibly applied because it accommodates serious allegations through the natural tendency to require stronger evidence before being satisfied to the balance of probabilities standard. ...

The natural tendency to require stronger evidence is not a legal proposition and should not be elevated to one. It simply reflects the reality of what judges do when considering the nature and quality of the evidence in deciding whether an issue has been resolved to "the

⁴ [2009] 1 NZLR 1

reasonable satisfaction of the Tribunal". A factual assessment has to be made in each case. That assessment has regard to the consequences of the facts proved. Proof of a Tribunal's reasonable satisfaction will, however, never call for that degree of certainty which is necessary to prove a matter in issue beyond reasonable doubt. ...

Despite these exceptions, the rule that a flexible approach is taken to applying the civil standard of proof where there are grave allegations in civil proceedings remains generally applicable in England. There is accordingly a single civil standard, the balance of probabilities, which is applied flexibly according to the seriousness of the matter to be proved and the consequences of proving them. We are satisfied that the rule is long established, sound in principle, and that in general it should continue to apply to civil proceedings in New Zealand. ...

Accordingly, we are of the view that in this country there is no good reason for creating an exception covering disciplinary tribunals. A flexibly applied civil standard of proof should be adopted in proceedings under the Act in other similarly constituted disciplinary proceedings in New Zealand unless there is a governing statute or other rule requiring a different standard.

Disciplinary Charges

[28] The offences have been laid as alternatives of negligently creating a risk of serious harm to any person or a risk of significant property damage, carrying out or causing to be carried out prescribed electrical work in a negligent or incompetent manner and carrying out prescribed electrical work in a manner contrary to an enactment.

[29] Serious harm was, at the time of the alleged disciplinary offence, defined in section 2 of the Act as meaning:

- (a) death; or
- (b) injury that consists of or includes loss of consciousness; or
- (c) injury that necessitates the person suffering the injury—
 - (i) being admitted to hospital; or
 - (ii) receiving medical treatment from a health practitioner who is, or is deemed to be, registered with an authority established or continued by section 114 of the Health Practitioners Competence Assurance Act 2003 as a practitioner of a particular health profession

[30] There is no statutory definition of the terms negligence or incompetence. They were, however, considered in the case of *Beattie v Far North Council*⁵ where Judge McElrea provided useful guidance on the interpretation of these terms:

...the term negligence...focuses on a practitioner's breach of their duty in a professional setting. The test as to what constitutes negligence... requires as a first step in the analysis, a determination of whether or not, in the Tribunal's judgment, the practitioner acts or omissions fall below the standards reasonably expected of a... practitioner in the circumstances of the person appearing before

⁵ Judge McElrea, DC Whangarei, CIV-2011-088-313

the Tribunal. Whether or not there has been a breach of the appropriate standards is measured against standards of a responsible body of the practitioner's peers.

[31] Judge McElrea continued:

...a "negligent manner" of working is one that exhibits a serious lack of care judged by the standards reasonably expected of such practitioners, while an "incompetent" manner of working is one that exhibits a serious lack of competence (or deficient in the required skills)...

...negligent" and "incompetent" have a considerable area of overlap in their meanings, but also have a difference focus – negligence referring to a manner of working that shows a lack of reasonably expected care, and incompetence referring to a demonstrated lack of reasonably expected ability or skill level...

Supervision

[32] Under s 74 of the Act restricts the carrying out of prescribed electrical work to certain authorised persons. The Act also creates various exemptions including an exemption under s 77(1) for trainees⁶. It provides:

- (1) *A person may do, or assist in doing, any prescribed electrical work if—*
- (a) *that work is within the limits prescribed in regulations made for the purposes of this section; and*
 - (b) *the person is a trainee in relation to the work; and*
 - (c) *the work done by that person is carried out in accordance with a limited certificate issued by the Board to the trainee under section 78.*

[33] Under s 78(2) of the Act the Board may issue a limited certificate "*subject to any terms and conditions that the Board thinks fit*". The Board, as a matter of course, issues all limited certificates with the condition that all prescribed electrical work is carried out under the supervision of a licensed person who is authorised to carry out the work being supervised.

[34] Regulation 93 of the Electrical (Safety) Regulations 2010 (the Regulations) sets the limits of work a trainee may do:

93 *Limits of work that trainees may do*
For the purposes of section 77(1)(a) of the Act, the prescribed electrical work that a trainee may do, or assist in doing, is any work that is within the particular class of work for which the trainee is seeking registration, and that is within the scope of work that the trainee's supervisor is authorised to do.

[35] It follows that a trainee holding a Limited Certificate and training to be an electrician must be supervised by a person holding the class of registration of an electrician or electrical inspector or electrical engineer and a current practising licence.

⁶ Under s 77(2) a trainee is defined as:

- (2) In this section, trainee—
- (a) means a person who is undergoing instruction or training in any class of prescribed electrical work for the purpose of obtaining registration as a registered person; and
 - (b) includes an apprentice who is working in the electricity industry.

[36] Supervision in turn is defined in s 2 of the Act as:

Supervision, in relation to any work, means that the work is undertaken under such control and direction of a person authorised under this Act to do the work [or, in the case of section 76, a person authorised to supervise work under that section] as is sufficient to ensure—

- (a) That the work is performed competently; and*
- (b) That while the work is being undertaken, appropriate safety measures are adopted; and*
- (c) That the completed work complies with the requirements of any regulations made under section 169 of this Act:*

[37] The definition was considered in *Electrical Workers Registration Board v Gallagher*⁷. Judge Tompkins stated at paragraph 24:

As is made apparent by the definition of "supervision" in the Act, that requires control and direction by the supervisor so as to ensure that the electrical work is performed competently, that appropriate safety measures are adopted, and that when completed the work complies with the requisite regulations. At the very least supervision in that context requires knowledge that work is being conducted, visual and other actual inspection of the work during its completion, assessment of safety measures undertaken by the person doing the work on the site itself, and, after completion of the work, a decision as to compliance of the work with the requisite regulations.

[38] Finally the Board maintains Supervision Procedures for Trainees⁸. These provide guidance as to the responsibilities of the supervisor and supervisee.

[39] Given the requirements of the Act and Regulations and noting the Boards Supervision Procedures the Board considers the level of supervision required will depend on the circumstances under which the prescribed electrical work is being undertaken and the abilities of the trainee being supervised. A supervisor needs to assess each situation and determine the level of supervision which is appropriate. Consideration should be given to factors including but not limited to:

- (a) the type and complexity of the prescribed electrical work to be supervised;
- (b) the experience of the person being supervised;
- (c) the supervisor's experience in working with the person being supervised and their confidence in their abilities;
- (d) the number of persons or projects being supervised; and
- (e) the geographic spread of the prescribed electrical work being supervised.

⁷ *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

⁸ Dated October 2010

Decision

[40] The Board has come to a decision that, on the basis of the evidence before it, Mr Kelso **has not** committed a disciplinary offence.

Board's Reasoning

[41] The first point to note is that it is not the Board's role to investigate and determine the cause of the incident but to make a decision on whether or not Mr Kelso has failed to provide adequate supervision of a trainee.

[42] In considering Mr Kelso's liability the Board notes that a distinction needs to be made between a "nominated supervisor" for training and licensing purposes and the person who is "actually supervising" the completion of prescribed electrical work.

[43] Within the electrical industry there is a common practice of a person being noted as a trainee's supervisor for the purposes of their training but not necessarily for the purpose of supervising them carrying out prescribed electrical work. For example apprentices training within a major nationwide training system have, as their nominated supervisor, an executive of the training organisation. That person does not, however, supervise the day to day work of the apprentices. Rather they are supervised by licensed persons with whom they are obtaining practical experience.

[44] Looking at the circumstances before the Board it considers Mr Kelso was [REDACTED] [REDACTED] nominated supervisor in terms of his Limited Certificate and general training but not the supervisor of the prescribed electrical work [REDACTED] was carrying out when the incident occurred. As such, if there was any failing in the supervision of [REDACTED] [REDACTED] it was not Mr Kelso's failing.

[45] In coming to its decision the Board is not making any decision on the adequacy of the actual supervision provided by the licensed person or persons on site at the time of the incident or on the employers' policies and procedures.

Date: 11 July 2016

Signature:



Presiding Member, Electrical Workers Registration Board