

Before the Electrical Workers Registration Board

	CAS No. CE22172
Electrical Worker:	Hayden Kerr (the Respondent)
Registration Number:	E 278592
Electrical Worker Number:	EW 124766
Registration Class:	Electrician

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:	Wellington
Hearing Type:	In Person
Hearing and Decision Date:	23 July 2020

Board Members Present:

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

Appearances:	Alistair 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 a disciplinary offence under section 143(f) of the Act.

Contents

Introduction	2
Function of Disciplinary Action	2
Evidence	3
Board’s Conclusion and Reasoning	4
Penalty, Costs and Publication	4
Penalty	5
Costs.....	5
Publication	6
Penalty, Costs and Publication Orders	6
Right of Appeal	6

Introduction

[1] The hearing resulted from a complaint about the conduct of the Respondent and a report under section 147G(1) of the Act from the Investigator that the complaint should be considered by the Board.

[2] The Respondent was served with a Notice of Hearing setting out the alleged disciplinary offences the Investigator reported should be considered by the Board. They were:

First Alleged Disciplinary Offence

1. On or around 25 September 2018 at [REDACTED] Mr Hayden Kerr has provided a false or misleading return being an offence under section 143(f) of the Act, IN THAT, he certified the installation as being electrically safe when it was not.

Second Alleged Disciplinary Offence

2. On or around 25 September 2018 at [REDACTED] Mr Hayden Kerr has provided a false and misleading return being an offence under section 143(f) of the Act, In THAT, he has issued a Certificate of Compliance for non-compliant prescribed electrical work.

[3] Prior to the hearing the Respondent and the Board were provided with all of the documents the Investigator had in his/her power or possession.

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

Function of Disciplinary Action

[5] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards

of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*¹ and in New Zealand in *Dentice v Valuers Registration Board*².

- [6] Disciplinary action under the Act is not designed to redress issues or disputes between a complainant and a respondent. In *McLanahan and Tan v The New Zealand Registered Architects Board*³ Collins J. noted that:

“... the disciplinary process does not exist to appease those who are dissatisfied The disciplinary process ... exists to ensure professional standards are maintained in order to protect clients, the profession and the broader community.”

- [7] The Board can only inquire into “the conduct of an electrical worker” with respect to the grounds for discipline set out in section 143 of the Act. It does not have any jurisdiction over contractual matters.

Evidence

- [8] 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 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.

- [9] The matter proceeded on the basis of an Agreed Statement of Facts. It set out that the Respondent was engaged to upgrade the switchboard and some circuits. At the time the Respondent was not a registered or licensed electrical worker. On 27 September 2018 Mr Kerr became a registered and licensed electrician. On the same day, he issued a combined Certificate of Compliance (“CoC”) and Electrical Safety Certificate (“ESC”), with only the ESC section of the form filled out.
- [10] On 19 June 2019, the complainant was at the property to install a smart meter. The complainant found that the work undertaken was not of a good standard and was of the view that the work was electrically unsafe.
- [11] Mr John McAlpine (E 3921) of McAlpine Electrical Services Limited was engaged by the Investigator to provide a technical report. He carried out a site visit. Mr McAlpine found a number of issues with both the CoC/ESC issued as well as the work carried

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

out. As the Respondent was not registered or licensed at the time he carried out the work the Investigator did not pursue him for the non-compliant work.

- [12] The Respondent accepted that he issued a CoC/ESC for prescribed electrical work (“PEW”) that was non-compliant.
- [13] 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

- [14] The Board has decided that the Respondent provided a false and misleading return being an offence under section 143(f) of the Act, In THAT, he has issued a CoC for non-compliant PEW.
- [15] The Board decided that a single finding was appropriate noting that there was an element of duplication in the charges and that the second charge was more appropriate.
- [16] The Respondent should note that 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.
- [17] The returns referred to are issued under the Regulations. There is a requirement that an ESC be issued for all PEW. 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 for high and general risk PEW. A CoC must state that the PEW has been done lawfully and safely and that the information in the certificate is correct.
- [18] The return stated that the work was safe to connect. It was not. As such it was a false or misleading return.

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

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

Penalty

[21] 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*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.

[22] 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 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.

[23] The Board noted that there was a background to the matter which related to the period when the Respondent was an employee, that the matters were not serious and that the Respondent had only just been licensed at the time of the offending. It also noted that the Respondent took the matter seriously and undertook, of his own volition, remedial training.

[24] As the transgression was minor in nature and that the Respondent has acknowledged it and put systems and processes in place to ensure he does not transgress again the Board has decided that a penalty is not required. In this respect the disciplinary provisions in section 147M of the Act include a provision that the Board, can if it considers it appropriate, make no order. Given the above factors, the Board has decided that it will, on this occasion, take no action. The Respondent should note, however, that any future transgressions will not be treated so lightly.

Costs

[25] 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.

[26] 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

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

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

that the percentage can then be adjusted up or down having regard to the particular circumstances of each case⁸.

- [27] 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:

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.

- [28] Based on the above the Board's costs order is that the Respondent is pay the sum of \$125 toward the costs of and incidental to the matter.

Publication

- [29] As the Board has decided it will not take any action then matter will not be recorded on the Register. Nor will the Board order any further publication of the matter. The Board is not, however, ordering a suppression of this decision or any matters relating to it.

Penalty, Costs and Publication Orders

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

Penalty: Pursuant to section 147M(1)(h) of the Electricity Act 1992, the Board will take no action.

Costs: Pursuant to section 147N of the Act, the Respondent is ordered to pay costs of \$125 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

- [31] The Respondent should note that the Board may refuse to relicense an electrical worker who has not paid any fine or costs imposed on them.

Right of Appeal

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

Signed and dated this 3rd day of August 2020



Mel Orange
Presiding Member

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

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.*