

Before the Electrical Workers Registration Board

CE No. 22377
Electrical Worker: Caleb Lemkus (the Respondent)
Registration Number: E 276289
Electrical Worker Number: EW 129118
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 Type: In Person by videoconference
Hearing and Decision Date: 21 October 2021

Board Members Present:

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

Appearances: Ms Sagaga 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 disciplinary offence under sections 143(a)(ii) and 143(f) of the Act.

Contents

Summary of the Board’s Decision..... 2

Introduction..... 2

Function of Disciplinary Action 3

Procedure 4

Evidence..... 4

Board’s Conclusion and Reasoning..... 5

 Contrary to an Enactment..... 6

 Certification..... 7

Penalty, Costs and Publication..... 7

 Penalty 7

 Costs..... 8

 Publication 9

Penalty, Costs and Publication Orders 10

Right of Appeal..... 10

Summary of the Board’s Decision

[1] The Respondent committed a disciplinary offence under section 143(a)(ii) of the Act when he carried out prescribed electrical work in a manner that was contrary to the Safety Regulations and to AS/NZS 3000:2007. The Respondent also provided a false or misleading return contrary to section 143(f) of the Act. He is fined \$250 and ordered to pay costs of \$250.

Introduction

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

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

First Alleged Disciplinary Offence

1. Between October 2018 – April 2019 at [OMITTED], Mr Caleb Lemkus has carried out or caused to be 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 an offence under section 143(a)(ii) of the Act, IN THAT, he:

- a) failed to utilise “heavy duty” insulating conduit without further mechanical protection; and/or

- b) failed to ensure that orange marker tape was located at approximately 50% of the depth of cover above the underground wiring system or any additional mechanical protection provided for that system.

In breach of Safety Regulations 59 of the Electricity (Safety) Regulations 2010.

Or in the Alternative:

- 2. Between October 2018 – April 2019 at [OMITTED], Mr Caleb Lemkus has carried out or caused to be carried out prescribed electrical work in a negligent or incompetent manner being an offence under section 143(a)(i) of the Act, IN THAT, he:
 - a) failed to utilise “heavy duty” insulating conduit without further mechanical protection; and/or
 - b) failed to ensure that orange marker tape was located at approximately 50% of the depth of cover above the underground wiring system or any additional mechanical protection provided for that system.

Second Alleged Disciplinary Offence

- 3. On 3 April 2019 at [OMITTED], Mr Caleb Lemkus has provided a false or misleading return being an offence under section 143(f) of the Act, IN THAT, he certified the prescribed electrical work carried out at the Property as being done lawfully and safely when some elements of the work carried out were contrary to mandatory installation requirements of AS/NZS3000:2007.

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

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

Function of Disciplinary Action

[6] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*¹ and in New Zealand in *Dentice v Valuers Registration Board*².

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

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

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

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

Procedure

- [9] The matter proceeded on the basis of an Agreed Statement of Facts.

Evidence

- [10] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁴. The Board notes, as regards evidence in 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 from the Respondent prior to it making its decision.
- [12] As noted, the matter proceeded on the basis of an Agreed Statement of Facts. The Statement set out that the Respondent, an employee electrician, carried out prescribed electrical work at an off-grid rural property. The work included installing underground wiring.
- [13] The Investigator obtained a report on the prescribed electrical work, following receipt of the complaint, from Mr David Olsen, an Electrical Inspector. He found:
- (a) *by not utilizing “heavy duty” insulating conduit that requires additional mechanical protection, the conduit used was not suitable for direct burying and therefore deemed to be electrically unsafe pursuant to regulation 20(2)(g) of the Regulations;*
 - (b) *by failing to ensure the orange marker tape was located at the required depth, the Work is therefore deemed to be electrically unsafe pursuant to regulation 20(2)(g) of the Regulations; and*

³ [2016] HZHC 2276 at para 164

⁴ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

- (c) *the Respondent had issued a false and misleading Certificate of Compliance.*

[14] The Respondent, in the Agreed Statement of Facts, accepted:

13. *... that, in a manner contrary to an enactment, he has carried out PEW at the Property, in that he:*
- a) *failed to provide adequate mechanical protection to the buried cable, in breach of regulation 59 of the Regulations;*
 - b) *failed to ensure that orange marker tape was located at approximately 50% of the depth of cover above the underground wiring system or any additional mechanical protection provided for that system, in breach of the regulation 59 of the Regulations.*
14. *... he engaged in conduct that constitutes the disciplinary offence under s 143(a)(ii) of the Electricity Act 1992, on the basis of the facts set out in this agreed statement of facts.*
15. *... he engaged in conduct that constitutes the disciplinary offence under s 143(f) of the Electricity Act 1992, in that he issued a certificate of compliance for PEW that was carried out in contrary to mandatory installation requirements of AS/NZS3000:2007.*

[15] 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

[16] The Board has decided that the Respondent **has** carried out or caused to be 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 an offence under section 143(a)(ii) of the Act, IN THAT, he:

- (a) failed to utilise "heavy duty" insulating conduit without further mechanical protection; and
- (b) failed to ensure that orange marker tape was located at approximately 50% of the depth of cover above the underground wiring system or any additional mechanical protection provided for that system

in breach of Safety Regulations 59 of the Electricity (Safety) Regulations 2010.

[17] The Board has also decided that the Respondent **has** provided a false or misleading return being an offence under section 143(f) of the Act, in that, he certified the prescribed electrical work carried out at the Property as being done lawfully and

safely when some elements of the work carried out were contrary to mandatory installation requirements of AS/NZS3000:2007.

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

Contrary to an Enactment

[19] The charges put before the Board were laid in the alternatives of negligence or incompetence under section 143(a)(i) and contrary to an enactment under section 143(a)(ii) of the Act.

[20] The parties agreed that the Respondent had committed an offence under section 143(a)(ii) of the Act in that he had carried out prescribed electrical work in a manner that was contrary to an enactment. The Board agreed. Contrary to an enactment is a form of strict liability offence in that all that need to be proven is that the relevant enactment has been breached – in this instance the Electricity (Safety) Regulations 2010 or any of the cited standards within Schedule 2 of the Regulations. The Board does not need to find that there was intention, fault or negligence⁵.

[21] The specific legislative provision breached was regulation 59 of the Safety Regulations which states:

59 Low and extra-low voltage installations to comply with AS/NZS 3000

(1) *Every low or extra-low voltage domestic installation, or part of a domestic installation, must be installed, tested, inspected, and connected so as to comply with Part 2 of AS/NZS 3000 if it has a maximum demand at or below—*

(a) *80 amperes per phase if single-phase; or*

(b) *50 amperes per phase if multi-phase.*

(2) *Every other low or extra-low voltage installation or part installation must be installed, tested, inspected, or connected so as to comply with either—*

(a) *Part 2 of AS/NZS 3000; or*

(b) *a certified design prepared in accordance with Part 1 of AS/NZS 3000.*

[22] The evidence before the Board was that the part installation had not been installed in accordance with the provisions of Part 2 of AS/NZS 3000:2007,⁶ specifically clause 3.11.4.4 *Minimum depth of cover* and the requirements in Table 3.6 and clause 3.11.4.5 *Identification of underground wiring*.

⁵ *Blewman v Wilkinson* [1979] 2 NZLR 208

⁶ The 2007 version of AS/NZS 3000 is cited in Schedule 2 of the Safety Regulations as the version that must be complied with.

Certification

- [23] 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 irrelevant⁷.
- [24] The returns referred to are issued under the Regulations. There is a requirement that an Electrical Safety Certificate be 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 Certificate of Compliance is issued for high and general risk prescribed electrical work. A Certificate of Compliance must state that the prescribed electrical work has been done lawfully and safely and that the information in the certificate is correct.
- [25] As the prescribed electrical work the Respondent had carried out had been done in a manner that was contrary to an enactment, it followed that the certification was false or misleading.

Penalty, Costs and Publication

- [26] 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.
- [27] The Respondent made submissions at the hearing as regards penalty, costs and publication.

Penalty

- [28] 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.

- [29] 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

⁷ *Taylor Bros Ltd v Taylor Group Ltd* [1988] 2 NZLR 1

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

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

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.

- [30] On the basis of the gravity of the offending, and taking into account other matters of a similar nature that have come before the Board, a starting point of a fine of \$750 was adopted.
- [31] The Respondent took responsibility for the disciplinary offending and cooperated at an early stage with the investigation. He stated he has learnt from the matter and that he has changed his practices as a result. In particular, he noted that he double-checks the work of those that he supervises and that he has learnt to seek answers from authoritative sources if he is in doubt. The Respondent is entitled to a reduction in the penalty in recognition of those mitigating factors. The fine is reduced to one of \$250.

Costs

- [32] 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.
- [33] 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.
- [34] 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.*
- [35] 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*

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

¹² CIV-2011-485-000227 8 August 2011

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.

[36] 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 in nature. Adjustments based on the High Court decisions above are then made.

[37] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$250 toward the costs of and incidental to the matter. In setting the amount of costs the Board took into account that the Respondent had agreed to the matter proceeding by way of an Agreed Statement of Facts.

Publication

[38] 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.

[39] 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.

[40] 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.

¹³ Refer sections 128 of the Act

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*

- [41] 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.
- [42] Based on the above, the Board will publish a general article in the Electron summarising the matter but will not order further publication. The Respondent will not be identified in the Electron.
- [43] 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

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

Penalty: Pursuant to section 147M(1)(f) of the Electricity Act 1992, the Respondent is ordered to pay a fine of \$250.

Costs: Pursuant to section 147N of the Act, the Respondent is ordered to pay costs of \$250 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

Publication: The Registrar shall record the Board's action in the Register of Electrical Workers in accordance with section 128(1)(c)(viii) of the Act.

The Respondent will be named in this decision.

A summary of the matter will be published by way of an article in the Electron which will focus on the lessons to be learnt from the case. The Respondent will not be named in the publication.

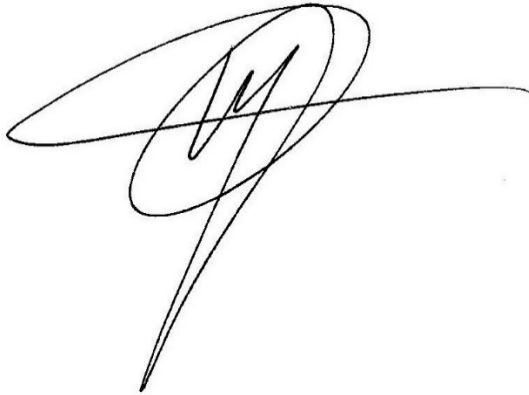
- [45] The Respondent should note that the Board may refuse to relicense an electrical worker who has not paid any fine or costs imposed on them.

Right of Appeal

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

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

Signed and dated this second day of November 2021



M M Orange
Presiding Member

ⁱ Section 147M of the Act

- (1) *If the Board, after conducting a hearing, is satisfied that a person to whom this Part applies is guilty of a disciplinary offence, the Board may—*
- (a) *do 1 or more of the following things:*
 - (i) *order that the person's registration or practising licence (or both) be cancelled:*
 - (ii) *order that the person's provisional licence be cancelled:*
 - (iii) *order that the person may not apply to be reregistered or re-licensed before the expiry of a specified period:*
 - (b) *order that the person's registration or practising licence (or both), or the person's provisional licence, be suspended—*
 - (i) *for any period that the Board thinks fit; or*
 - (ii) *until that person does 1 or more of the things specified in subsection (2):*
 - (c) *order that the person's registration or practising licence (or both), or the person's provisional licence, be restricted for any period that the Board thinks fit, in either or both of the following ways:*
 - (i) *by limiting the person to the work that the Board may specify:*
 - (ii) *by limiting the person to doing, or assisting in doing, work in certain circumstances (for example, by limiting the person to work only on approved premises or only in the employ of an approved employer):*
 - (d) *order that the person be disqualified from doing or assisting in doing prescribed electrical work that the person would otherwise be authorised to do in that person's capacity as a person to whom this Part applies—*
 - (i) *permanently, or for any period that the Board thinks fit; or*
 - (ii) *until that person does 1 or more of the things specified in subsection (2):*
 - (e) *order the person to do 1 or more of the things specified in subsection (2) within the period specified in the order:*
 - (f) *order the person to pay a fine not exceeding \$10,000:*

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- (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.