

Before the Electrical Workers Registration Board

	CE No. 22151
Electrical Worker:	Barry Manning (the Respondent)
Registration Number:	E 12210
Electrical Worker Number:	EW 045326
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:	On the Papers
Hearing Date:	23 April 2020
Decision Date:	23 April 2020

Board Members Present:

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

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 offences under sections 143(b)(ii) and 143(f) of the Act.

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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 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 at [REDACTED] Mr Barry Manning 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 connect the main neutral cable to the MEN point; and/or
 - (b) failed adequately test an installation following prescribed electrical work leaving it electrically unsafe.

In breach of regulations 13, 63 and 73A of the Electricity (Safety) Regulations 2010.

Or in the Alternative

2. On or around 5 April 2019 at [REDACTED] Mr Barry Manning 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 connect the main neutral cable to the MEN point; and/or
 - (b) failed adequately test an installation following prescribed electrical work leaving it electrically unsafe.

Or in the Alternative

3. On or around 5 April 2019 at [REDACTED] Mr Barry Manning has 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 an offence under section 143(b)(ii) of the Act, IN THAT, he:
 - (a) failed to connect the main neutral cable to the MEN point; and/or
 - (b) failed adequately test an installation following prescribed electrical work leaving it electrically unsafe.

Second Alleged Disciplinary Offence

4. On or around 5 April 2019 at [REDACTED] Mr Barry Manning has provided a false and misleading return being an offence under section 143(f) of the Act, IN THAT, he certified prescribed electrical work as being safe when it was electrically unsafe.
- [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.

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

- [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.

Procedure

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

- [9] The appearance of the Investigator and Counsel for the investigator was excused.

Evidence

- [10] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁴. 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.

- [11] The matter proceeded on the basis of an Agreed Statement of Facts. The Statement set out that on 5 April 2019 the Respondent was engaged by Automated Metering Systems (AMS) via an agreement with ██████████ to install a smartmeter to an internal switchboard. Following completion, a fault was reported to ██████████ from the householder. A faultmen visited the property and found that the load side neutral conductor was not connected to the new meter. A report noted the line-side neutral was attached to the meter, the load-side neutral had been cut and was sitting, disconnected, behind the switchboard not connected to the new meter, effectively leaving the neutral bar with no neutral.

- [12] The Investigator engaged Mr Steve Doust, an Electrical Inspector, to review the prescribed electrical work. His report concluded the Respondent had failed to adequately test the installation following prescribed electrical work in contrary to AS/NZS 3000:2007 8.3.9 and regulation 73A(1) of the Electricity (Safety) Regulations 2010. Mr Doust stated:

³ [2016] HZHC 2276 at para 164

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

“ ... failure to connect the neutral would have resulted in a high earth fault loop impedance, which would not have shown up with a simple voltage check. The resultant impedance would have caused circuit protection to fail to operate under fault conditions, causing a high risk of serious harm”.

- [13] In response to the allegation the Respondent noted he did not get the opportunity to re-visit the property, when the fault was reported, and was not advised of the incident until approximately one week after and that it was a challenging job due to the age and location of the switchboard. The switchboard was located in an internal hall which did not provide any natural light and was surrounded by clutter. The switchboard was approximately 70 years old and was mounted onto the wall providing limited access (150mm approximately) to the wiring behind it. In regard to the incident report comments on testing he advised that he was not sure how the fault would have been discovered other than a visual test and that it would have been difficult to test due to the limited space behind the switch board and [his] reluctance to move the cables behind the switchboard any more than I have to or to put my hands behind this switch board.
- [14] The Agreed Statement of Facts recorded that the Respondent accepted that the testing he carried out failed to ensure the load side neutral conductor was connected to the new meter.
- [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 summary.

Board’s Conclusion and Reasoning

- [16] The Agreed Statement of Facts left the level of offending under the First Alleged Disciplinary Offence open to the Board to determine the appropriate level of offending.
- [17] The Board decided that the Respondent 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 an offence under section 143(b)(ii) of the Act, in that, he:
- (a) failed to connect the main neutral cable to the MEN point; and
 - (b) failed adequately test an installation following prescribed electrical work leaving it electrically unsafe.
- [18] The Board has also decided that the Respondent provided a false and misleading return being an offence under section 143(f) of the Act, in that, he certified prescribed electrical work as being safe when it was electrically unsafe.

First Offence

[19] The First Alleged Offence was laid in the alternatives of negligently creating a risk of serious harm or significant property damage, carrying out or causing to be carried out in a negligent or incompetent manner or in a manner contrary to an enactment.

[20] To make a finding on the First Alternative the Board must make a finding that there was a risk of serious harm or significant property damage. Serious harm is defined in section 2 of the Act. It means:

- (a) *death; or*
- (b) *injury that consists of or includes loss of consciousness; or*
- (c) *a notifiable injury or illness as defined in section 23 of the Health and Safety at Work Act 2015.*

[21] The relevant parts of Section 23 of the Health and Safety at Work Act 2015 are:

23 Meaning of notifiable injury or illness

- (1) *In this Act, unless the context otherwise requires, a notifiable injury or illness, in relation to a person, means—*
- (a) *any of the following injuries or illnesses that require the person to have immediate treatment (other than first aid):*
 - (i) *the amputation of any part of his or her body:*
 - (ii) *a serious head injury:*
 - (iii) *a serious eye injury:*
 - (iv) *a serious burn:*
 - (v) *the separation of his or her skin from an underlying tissue (such as degloving or scalping):*
 - (vi) *a spinal injury:*
 - (vii) *the loss of a bodily function:*
 - (viii) *serious lacerations:*
 - (b) *an injury or illness that requires, or would usually require, the person to be admitted to a hospital for immediate treatment:*
 - (c) *an injury or illness that requires, or would usually require, the person to have medical treatment within 48 hours of exposure to a substance:*

[22] Significant property damage is not defined in the Act. Section 16(1)(b)(ii) of the Act, which relates to notification of accidents, also refers to serious harm and to property damage. In respect of damage it requires notification where there is:

damage to any place or part of a place that renders that place or that part of that place unusable for any purpose for which it was used or designed to be used before that accident.

- [23] As section 16 refers to both serious harm and to damage the Board considers significant property damage in section 143(b)(ii) should be interpreted in line with the definition in section 16(1)(b)(ii).
- [24] Actual serious harm or significant property damage need not occur. There need only be a risk that either might occur. The risk must be real in that there needs to be a material or substantial possibility, chance or likelihood that serious harm or significant property damage will occur. A real risk has also been described as one that a reasonable person would not brush aside as being far-fetched or fanciful⁵.
- [25] The Board considered that the tests for serious risk and/or significant property damage had been met. It noted Mr Doust's opinion as regards serious harm. It also noted that there was a risk of fire as a result of protective devices being inoperative.
- [26] The First Alternative also requires that the Respondent be found to have been negligent. Negligence is the departure by an electrical worker, whilst carrying out or supervising prescribed electrical work, from an accepted standard of conduct. It is judged against those of the same class of licence as the person whose conduct is being inquired into. This is described as the *Bolam*⁶ test of negligence which has been adopted by the New Zealand Courts⁷.
- [27] The New Zealand Courts have stated that assessment of negligence in a disciplinary context is a two-stage test⁸. The first is for the Board to consider whether the practitioner has departed from the acceptable standard of conduct of a professional. The second is to consider whether the departure is significant enough to warrant a disciplinary sanction.
- [28] When considering what an acceptable standard is the Board must have reference to the conduct of other competent and responsible practitioners and the Board's own assessment of what is appropriate conduct, bearing in mind the purpose of the Act⁹. The test is an objective one and in this respect it has been noted that the purpose of discipline is the protection of the public by the maintenance of professional standards and that this could not be met if, in every case, the Board was required to take into account subjective considerations relating to the practitioner¹⁰.
- [29] The Board notes that the purposes of the Act are:

1A Purposes

The purposes of this Act are—

⁵ Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd (The Wagon Mound No 2) [1967] 1 AC 617

⁶ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁷ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

⁸ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

⁹ *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

¹⁰ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

- (a) *to provide for the regulation, supply, and use of electricity in New Zealand; and*
- (b) *Repealed.*
- (c) *to protect the health and safety of members of the public in connection with the supply and use of electricity in New Zealand; and*
- (d) *to promote the prevention of damage to property in connection with the supply and use of electricity in New Zealand; and*
- (da) *to provide for the regulation of fittings and electrical appliances that are, or may be, exported pursuant to an international trade instrument; and*
- (d) *to provide for the regulation of electrical workers.*

[30] The Board also notes, as regards acceptable standards, that all building work must comply with the Electricity (Safety) Regulation 2010 and the cited Standards and Codes of Practice in Schedule 2 of the Regulations. As such, when considering what is and is not an acceptable standard they must be taken into account.

[31] Turning to seriousness in *Collie v Nursing Council of New Zealand*¹¹ the Court's noted, as regards the threshold for disciplinary matters, that:

[21] Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness.

[32] The Board's finding of negligence relates to the Respondent's failure to test. Testing is a fundamental aspect of safe electrical work. The self-certification regime under which prescribed electrical work operates relies on testing to ensure people and property are protected.

[33] Given the above factors the Board, which includes persons with extensive experience and expertise in carrying out and supervising prescribed electrical work, considered the Respondent has departed from what the Board considers to be an accepted standard of conduct and that the conduct was sufficiently serious enough to warrant a disciplinary outcome.

Second Offence

[34] The second charge relates 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 irrelevant¹².

[35] The return referred to, an electrical safety certificate, is issued under the Regulations. One must be issued for all prescribed electrical work on installations. It

¹¹ [2001] NZAR 74

¹² *Taylor Bros Ltd v Taylor Group Ltd* [1988] 2 NZLR 1

must contain a statement to the effect that the installation or part installation is connected to a power supply and is safe to use. In this instance, as a result of the compliance matters noted, the installation was not safe to use.

Penalty, Costs and Publication

- [36] 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.
- [37] The matter was dealt with on the papers. Included was information relevant to penalty, costs and publication. The Board decided to make the appropriate orders.

Penalty

- [38] 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*¹³ 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.

- [39] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*¹⁴ 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.
- [40] The disciplinary offending is serious. Creating a risk of serious harm and significant property damage is at the higher end of the disciplinary scale. It puts the purposes of Act,¹⁵ which includes the protection of the health and safety of members of the public in connection with the supply and use of electricity and the promotion of the prevention of damage to property in connection with the supply and use of electricity, at risk. A commensurate penalty is warranted. In this instance the Board decided that a significant fine was warranted. A starting point of \$4,000 was adopted. This is consistent with fines imposed for similar offending by the Board.

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

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

¹⁵ Section 1A of the Act.

[41] The Respondent has cooperated and has accepted his wrongdoing. He is entitled to a reduction in the penalty. The fine will be reduced to \$3,000.

Costs

[42] 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.

[43] 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 case¹⁶.

[44] In *Collie v Nursing Council of New Zealand*¹⁷ 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.

[45] Based on the above the Board's costs order is that the Respondent is pay the sum of \$675 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

[46] 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 Act¹⁸. 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.

[47] 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.

[48] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990¹⁹. The Criminal Procedure Act 2011 sets out

¹⁶ *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.

¹⁷ [2001] NZAR 74

¹⁸ Refer sections 128 of the Act

¹⁹ Section 14 of the Act

grounds for suppression within the criminal jurisdiction²⁰. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²¹. 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*²².

- [49] 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 interest²³. 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.
- [50] 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.
- [51] 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

- [52] 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 \$3,000.

Costs: Pursuant to section 147N of the Act, the Respondent is ordered to pay costs of \$675 (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.

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

- [53] 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.

²⁰ Refer sections 200 and 202 of the Criminal Procedure Act

²¹ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350


²² *ibid*

²³ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Right of Appeal

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

Signed and dated this 29th day of April 2020



Mel 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:*
 - (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.