

Before the Electrical Workers Registration Board

CE No. 21873

Electrical Worker: Colin McFadden (the Respondent)

Registration Number: E 244598

Electrical Worker Number: EW 104492

Registration Class: Electrician

Decision of the Board in Respect of the Conduct of an Electrical Worker Under section 147(G) and 147 (M) of the Electricity Act 1992

Hearing Location: Timaru

Hearing Type: In Person

Hearing Date: 18 July 2019

Decision Date: 18 July 2019

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(a)(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 5 December 2016 at [Omitted], Mr Colin McFadden 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 has certified work that he has failed to test.

Or in the Alternative

2. On or around 5 December 2016 at [Omitted], Mr Colin McFadden 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 has certified work that he has failed to test in breach of regulation 63(1) of the Electricity (Safety) Regulations 2010.

Second Alleged Disciplinary Offence

3. On or around 5 December 2016 at [Omitted], Mr Colin McFadden provided a false or misleading return being an offence under section 143(f) of the Act, IN THAT, he has certified work that he has failed to test.
- [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.

Procedure

- [8] The matter proceeded on the basis of an Agreed Statement of Facts.
- [9] The Respondent appeared.
- [10] The appearance of the Investigator and Counsel for the investigator was excused.

Evidence

- [11] 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

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

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.

[12] The matter proceeded on the basis of an Agreed Statement of Facts. Within the Agreed Statement of Facts the Investigator noted that the First Alternative of the First Alleged Disciplinary Offence was not being pursued.

[13] The Statement set out that the Respondent had carried out the pre-wire of two residential units. He was then sent by his employer to an architectural build. His employer engaged a contractor and a trainee employee to complete the fit-off. The employer then asked the Respondent to certify the prescribed electrical work.

[14] Following completion, the Complainant had concerns that the power supply to unit one was still on when he turned off the main switch and it was back feeding from unit two hot water circuit breaker. The Investigator engaged Mr Peter MacMillan to carry out a review of the prescribed electrical work. He ascertained that the circuit breakers that controlled the distribution boards on the units were incorrectly labelled. The front distribution board was operated by the circuit breaker labelled rear distribution board.

[15] The Respondent accepted in the Agreed Statement of Facts that he had failed to carry out adequate testing of the installation, resulting in the incorrect switchboard labelling being left undetected and that he had signed a certificate of compliance indicating that the work was compliant when it was not.

[16] The Respondent submitted:

I have let myself down as I felt under pressure to certify the entire installation, instead of the work I actually carried out being the prewire only. Regardless of this the main switchboard should have been labelled properly and I again apologise for this not happening. I can only suggest a mix of very high workload and the multiple tradesmen associated with the job as an in-site into how this over-site occurred".

[17] At the hearing the Respondent also noted that the events took place in the lead up to Christmas and that it was a high pressure period.

[18] 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

- [19] 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 has certified work that he has failed to test in breach of regulation 63(1) of the Electricity (Safety) Regulations 2010
- [20] 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 has certified work that he has failed to test.
- [21] The reasons for the Board's decisions follow.

Contrary to an Enactment

- [22] Contrary to an enactment is the least serious alternatives. The Investigator had sought leave to withdraw the First Alternative of negligence and incompetence. The Board considered that was appropriate.
- [23] When considering an allegation of contrary to an enactment the Board need only determine whether, on the balance of probabilities, the relevant enactment has been breached – in the instance the Electricity (Safety) Regulations 2010. The charge is a form of strict liability offence in that it is liability without fault. Negligence need not be proved⁵. In this respect the provisions of Regulation 11 are noted:

11 Strict liability offences

- (1) *Subclauses (2) and (3) apply to every offence in these regulations except those that specifically refer to a defendant's state of knowledge or intention regarding the facts constituting the offence.*
- (2) *In a prosecution for an offence to which this subclause applies, it is not necessary for the prosecution to prove that the defendant knew or intended the facts that constitute the offence.*

- [24] In this instance the allegation was that the Respondent had failed to test contrary to regulation 63(1) of the Safety Regulations which states:

63 Testing prescribed electrical work on low and extra-low voltage installations

- (1) *All prescribed electrical work done on a low or extra-low voltage installation or part installation must be tested—*
- (a) *for operational safety; and*
- (b) *to ensure that the installation or part installation is not electrically unsafe; and*

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

- (c) *as required by regulation 59 or 60, as the case requires; and*
- (d) *in the case of an installation or part installation that does not comply with Part 2 of AS/NZS 3000, in accordance with the verification or testing process set out in the certified design for the installation or part installation.*

- [25] Testing in this instance should have included a visual inspection to verify that the prescribed electrical work complies with the requirements of AS/NZS 3000:2007⁶. A visual inspection should have ascertained the labelling error.
- [26] Given the above factors the Board finds that the disciplinary charge has been committed.

Certification

- [27] 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 irrelevant⁷.
- [28] The returns referred to are issued under the Safety 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.
- [29] The Board has made a finding that the required testing had not been completed. In this respect it is to be noted that under regulation 66(2)(b) of the Safety Regulations states that prescribed electrical work will have been done lawfully and safely if the required testing has been successfully completed. As it had not the statement made in the certificate of compliance was a false one.

Penalty, Costs and Publication

- [30] 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.
- [31] The Respondent made submissions at the hearing as regards penalty, costs and publication.

⁶ Refer clause 8.2 of AS/NZS 3000:2007

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

Penalty

[32] 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.

[33] 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 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.

[34] The Board noted that the charges before it were at the lower end of the disciplinary scale. It also noted that the Respondent was placed in a difficult position by his employer and that the noncompliant work had been carried out by another authorised electrical worker. Whilst the worker could have been held accountable for the issue the Respondent, by signing the combined electrical safety certificate and certificate of compliance took responsibility for the work. The Board therefore adopted a starting point of a censure.

[35] The Respondent was very cooperative with the investigation and the hearing. He travelled to Timaru to allow for the Board to deal with the matter in a timely manner. He accepted responsibility for his wrongdoing at the earliest opportunity. He expressed his remorse for what had occurred.

[36] In his submissions to the Board the Respondent outlined the personal impact of the complaint and investigation. He stated that following the matter coming to light he made a decision to leave the industry. He has chosen not to renew his licence. He stated that he has been troubled by the events and that he has sought counselling as a result.

[37] The Board decided, based on the above factors, that it would not take any action. This option is open to the Board and it is only exercised in rare circumstances. In this instance the Board considers that is appropriate and it is hoped that the Respondent will be encouraged by the Board's decision not to leave the industry as he has shown, by his approach to the investigation and hearing and by his genuine remorse

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

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

that he has learnt from the matter and the Board doubts that he will transgress again.

Costs

- [38] 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.
- [39] 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.
- [40] 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.*
- [41] Based on the above the Board's costs order is that the Respondent is pay the sum of \$200 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

- [42] Normally, as a consequence of a decision a respondent's name and the disciplinary outcome is recorded in the public register of electrical workers¹².
- [43] In this instance the Board has taken no action. Section 128(1)(viii) of the Act which requires an entry in the register to be made stipulates that it applies if any action is taken by the Board under section 147M. In this instance the Board has not taken any action. As such there will be no record of the matter in the public register. The Respondent's electrical worker file will, however, note the matter.
- [44] Given the above the board will not order any further publication under section 147Z of the Act. In accordance with the principles of open justice and open reporting which is enshrined in the Bill of Rights Act 1990¹³ the Respondent will be named in this decision.
- [45] 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.

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 Refer sections 128 of the Act

¹³ Section 14 of the Act

- [46] The Board will be writing an article in relation to the matter in the Electron. The article will not name the Respondent. It will focus on the lessons to be learnt from the case including the risks of signing off on work other electrical workers have completed.

Penalty, Costs and Publication Orders

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

Penalty: Pursuant to section 147M(1)(h) of the Electricity Act 1992, the Board makes no order and takes no action.

Costs: Pursuant to section 147N of the Act, the Respondent is ordered to pay costs of \$200 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

Publication: The Registrar will not record the Board's action in the Register of Electrical Workers.

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.

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

Right of Appeal

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

Signed and dated this 29 day of July 2019.



Mel Orange
Presiding Member

ⁱ Section 147M of the Act

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- (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.*