

Before the Electrical Workers Registration Board

CE No. 22272

Electrical Worker: David McIlwraith (the Respondent)

Registration Number: I 1661

Electrical Worker Number: EW 025804

Registration Class: Inspector

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: Christchurch

Hearing Type: In Person

Hearing and Decision Date: 19 November 2021

Board Members Present:

Mr M Orange, Barrister (Presiding)

Mr R Keys, Registered Inspector

Ms M Kershaw, Registered Electrician

Ms J Davel, Lay Member

Ms A Yan, Registered Electrical Engineer

Mr M Perry, Registered Electrician

Appearances: Emma Dowse 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 offences under sections 143(a)(i) and 143(f) of the Act.

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Summary of the Board’s Decision

[1] The Respondent carried out prescribed electrical work in a negligent manner and provided a false or misleading warrant of electrical fitness. He is fined \$500 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. On or around 24 October 2019 Mr David McIlwraith 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 failed to adequately test a Nomad Caravan, registration number Y532D and issued a Warrant of Electrical Fitness that had the following non-compliant issues:

- a. No residual current device (RCD) protection provided on the sub-circuits; and/or

- b. No overcurrent protection fitted to ensure that the maximum demand did not exceed the rating of the supply lead and supply lead fittings; and/or
- c. No earthing system connected to the Xpelair fan body, which was designed to be earthed

In breach of regulation 78 of the Electricity (Safety) Regulation 2010 which required the WoEF to be issued in accordance with AS/NZS 3001.2008

Or in the Alternative

- 2. On or around 24 October 2019 Mr David McIlwraith 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 failed to adequately test a [OMITTED] Caravan, registration number [OMITTED] and issued a Warrant of Electrical Fitness that had the following non-compliant issues:
 - a. No RCD protection provided on the subcircuits; and/or
 - b. No overcurrent protection fitted to ensure that the maximum demand did not exceed the rating of the supply lead and supply lead fittings; and/or
 - c. No earthing system connected to the Xpelair fan body, which was designed to be earthed.

Second Alleged Disciplinary Offence

- 3. On or around 24 October 2019 Mr David McIlwraith has failed to provide a return / provided a false or misleading return being an offence under section 143(f) of the Act, IN THAT he issued a Warrant of Electrical Fitness on [OMITTED] Caravan, [OMITTED] that did not meet all the lawful requirements as set out in regulation 78 of Electricity (Safety) Regulations 2010.

[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.

- [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 evidence from the Respondent prior to it making its decision.
- [12] The matter proceeded on the basis of an Agreed Statement of Facts which set out that the Respondent, a licensed Electrical Inspector, was engaged to carry out an electrical verification by the owner of a caravan in anticipation of selling it. On 24 October 2019, the Respondent tested the caravan and provided a warrant of electrical fitness (WoEF). Issuing a WoEF comes within the provisions for periodic verification within the Safety Regulations. It must be completed in accordance with AS/NZS:3001.2008 and to regulation 78(2) of the Safety Regulations.
- [13] The Respondent issued the WoEF notwithstanding that the caravan did not have an installed residual current device (RCD). It was a regulatory requirement that it have one.

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

- [14] The caravan was sold in January 2020 to the complainant. During the relocation of the caravan, the complainant found issues with the caravan and engaged a different electrical inspector to carry out an inspection.
- [15] [OMITTED] from [OMITTED] carried out an inspection and found that the caravan had several areas of electrical non-compliance. She provided a report dated 3 February 2020 detailing the remedial repairs required to meet compliance standards.
- [16] The Investigator submitted that the installation did not comply with the existing electrical regulatory requirements that were in force when the caravan was constructed as the switchboard did not have a main earth neutral (MEN) link or connection present which was required and would have been installed at that time of construction. On that basis, the Investigator submitted that the transitional provisions under regulation 113 of the Safety Regulations did not apply.
- [17] The Investigator noted that the connectable installation (caravan) needed to be upgraded and to have RCD protection on all sub-circuits prior to being certified by the Respondent. It was also noted that there was a requirement to have over-current protection to ensure the maximum demand did not exceed the rating of the supply lead and fittings. In this respect, the supply lead and supply fitting was rated at no greater than 16 amps (industry standard), and the overcurrent protection on the switchboard for the three sub-circuits consisted of two 15-amp miniature circuit breakers and one rewirable porcelain fuse, which would have equated to over 30-amps. As such, the total overcurrent protection exceeded the 16-amp rating of the supply lead and supply fittings.
- [18] The Investigator engaged an expert, [OMITTED], an Electrical Inspector, who found that the Respondent had failed to identify a number of fundamental non-compliant and safety issues during his periodic verification of the caravan, including:
- Switchboard - No MEN Link (neutral/earth link) and no RCD protection was provided (for final sub-circuits). This did not meet the supply arrangements or safety requirements of (AS/NZS 3001 clause 6.9(d));
 - Switchboard - No over current protection was fitted. This did not meet the supply arrangements or safety requirements of (AS/NZS 3001 clause 6.4); and
 - Appliances - (Xpelair fan) Continuity of earthing conductors. An Xpelair connected to the electricity supply via a three pin plug did not exhibit continuity between the metal parts of the fan and the earth pin of the connecting plug. (AS/NZS 3001 clause 6.2).
- [19] In response to the complaint, the Respondent accepted that he had been engaged to inspect the caravan and provide a WoEF, but that he did not carry out any prescribed electrical work. The Investigator noted that since the WoEF was issued by the

Respondent, the Board had determined in proceeding CE22184 that the issuing of WoEF was prescribed electrical work.

- [20] The Respondent outlined that he was having health issues at the time and did not know how he let the other non-compliant issues noted above go un-noticed. He expressed his opinion that the 1000km delivery journey may have disturbed screw fixings in the light switches and “most likely caused the earth bonding on the panel to show a different reading”.
- [21] Notwithstanding, the Respondent subsequently accepted in the Agreed Statement of Facts that he had carried out prescribed electrical work in inspecting the caravan and that he had carried it out in breach of section 143(a)(ii) of the Act (in a manner contrary to any enactment relating to prescribed electrical work in force at the time) and, in particular, regulation 78 of the Safety Regulations which require that a WoEF is issued in accordance with AS/NZS:3001.2008. The Respondent also accepted that the prescribed electrical work was contrary to AS/NZS:3001.2008 because he failed to adequately test the caravan and issued a WoEF that contained the noted non-compliance issues.
- [22] In the alternative, the Respondent accepted that he had carried out prescribed electrical work in breach of section 143(a)(i) of the Act in that he had carried out or caused to be carried out prescribed electrical work in a negligent or incompetent manner.
- [23] The Respondent also accepted that he had breached section 143(f) of the Act when he issued a WoEF that was misleading because the caravan did not, in fact, meet all the lawful requirements as set out in regulation 78 of the Safety Regulations, which stipulates that every warrant of electrical fitness for a connectable installation must be issued in accordance with AS/NZS:3001, section C3 of which requires that a WoEF shall only be issued for the periodic inspection of a connectable installation that has been inspected and tested in accordance with the requirements of clauses C6 and C7.
- [24] The Respondent outlined various mitigating factors in the Agreed Statement of Facts. He noted that he was remorseful and accepted that he had failed to undertake adequate testing and had issued a WoEF for the caravan when he should not have done so. The Investigator accepted that the remorse was genuine. The Agreed Statement of Facts also outlined that the Respondent suffers from ill-health and that the Investigator accepted that this was, at least in part, causative of the failure to undertake adequate testing. The Investigator also acknowledged the Respondent’s age and the fact that he works infrequently, and the delay in bringing the matter before the Board.

- [25] At the hearing, the Respondent outlined that the events were his “worst nightmare”, that he had 57 years of experience in the trade and 28 years of experience with caravans. He was not able to explain the lapse and failures that occurred.
- [26] 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

- [27] The Board has decided that the Respondent **has** carried out or caused to be carried out prescribed electrical work in a negligent manner being an offence under section 143(a)(i) of the Act, in that, he failed to adequately test a caravan and issued a Warrant of Electrical Fitness that had the following compliance issues:
- (a) no residual current device protection provided on the subcircuits; and
 - (b) no overcurrent protection fitted to ensure that the maximum demand did not exceed the rating of the supply lead and supply lead fittings; and
 - (c) no earthing system connected to the Xpelair fan body, which was designed to be earthed.
- [28] 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 issued a Warrant of Electrical Fitness for a caravan that did not meet all the lawful requirements as set out in regulation 78 of Electricity (Safety) Regulations 2010.
- [29] The reasons for the Board’s decisions follow.

Negligence

- [30] 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).
- [31] There is a hierarchy to the disciplinary charges in that the Board needs to first consider whether the prescribed electrical work was carried out or caused to be carried out in a manner that was contrary to an enactment. If the Board finds in the affirmative, it then needs to consider whether the conduct reaches the threshold for a finding of negligence or incompetence. If that threshold is met, the Board then needs to consider whether a risk of serious harm or significant property damage was created.
- [32] Contrary is a form of strict liability offence in that all that need to be proven is that the relevant enactment has been breached – in the 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. 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.*

[33] Turning to negligence and/or incompetence there are no statutory definitions of the terms. It is noted, however, that they are not the same. In *Beattie v Far North Council*⁶ Judge McElrea noted:

[43] Section 317 of the Act uses the phrase "in a negligent or incompetent manner", so it is clear that those adjectives cannot be treated as synonymous.

[34] Negligence is considered to be 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*⁷ test of negligence which has been adopted by the New Zealand Courts⁸.

[35] Incompetence is a lack of ability, skill, or knowledge to carry out or supervise prescribed electrical work to an acceptable standard. *Beattie* put it as "*a demonstrated lack of the reasonably expected ability or skill level*". In *Ali v Kumar and Others*,⁹ it was stated as "*an inability to do the job*".

[36] The New Zealand Courts have stated that assessment of negligence and/or incompetence in a disciplinary context is a two-stage test¹⁰. 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.

[37] 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 Act¹¹.

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

⁶ Judge McElrea, DC Whangarei, CIV-2011-088-313

⁷ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

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

⁹ *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

¹⁰ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

¹¹ *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

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 practitioner¹².

[38] The Board notes that the purposes of the Act are:

1A Purposes

The purposes of this Act are—

- (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*
- (e) *to provide for the regulation of electrical workers.]*

[39] The Board also notes, as regards acceptable standards, that all prescribed electrical 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.

[40] Turning to seriousness in *Collie v Nursing Council of New Zealand*,¹³ 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.

[41] A preliminary matter that needs to be addressed is whether a periodic verification of a caravan is prescribed electrical work. In a previous matter before the Board, it determined that the issuing of a warrant of electrical fitness was prescribed electrical work. The full reasons were outlined in that decision. In short, however, the Board decided that the actions came within the definition of "maintenance". The Board set out:

[16] Maintenance is not defined in AS/NZS3000. It is defined in IEC 60050 which defines maintenance as the "combination of all technical and

¹² *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

¹³ [2001] NZAR 74

management actions intended to retain an item in, or restore it to, a state in which it can perform as required” .

[17] *Notably, from the definition, the Board considers that actions required under AS/NZS 3001 to issue a warrant of electrical fitness come within the management actions intended to retain an item in the state in which it can perform as required. In particular, the testing requirements in C7 require that the person issuing the warrant of electrical fitness carry out tests to ensure electrical fittings in a caravan can perform as required. In the Board’s view, testing is the equivalent of “a management action”.*

[18] *The Board is also of the view that the issue of a warrant of electrical fitness comes within the plain and ordinary meaning of the term “maintenance” and that such a finding is in accordance with the purpose of the Electricity Act.*

[19] *The common dictionary meaning of the term maintenance is the process of preserving a condition or the process of keeping something in good condition. Maintain is causing or enabling a condition to continue and to keep in good condition by regularly checking or repairing. Again, looking at the requirements in AS/NZS 3001, it is clear that the actions required to issue a warrant of electrical fitness come within these definitions. The Electrical Inspector is, by inspecting and testing a caravan, checking the good condition of the connectable installation.*

[20] *Turning to the purpose of the Electricity Act section 1A states:*

1A Purposes

The purposes of this Act are—

- (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*

(e) to provide for the regulation of electrical workers.

[21] Section 1A includes the regulation of electrical workers. The Act goes on, in Part 11, to provide a disciplinary regime for electrical workers. Section 143 of the Act sets out the disciplinary provisions that the Board may consider. Most, but not all, of the charges that can be laid against an electrical worker, require that prescribed electrical work was carried out.

[22] Looking at the conduct in question, if issuing a warrant of electrical fitness was not prescribed electrical work then the Board would have no jurisdiction except for offences under section 143(c) of the Act – failing to comply with a term or condition of a licence, or 143(f) in respect of returns required under an enactment. That, in turn, would mean that in the event an Electrical Inspector negligently or incompetently carried out a warrant of electrical fitness, that the Board would not be able to take any disciplinary action. The counter-position is that if the Board does have jurisdiction, it can take steps to protect the public through the penalties available to it under section 147M of the Act including by suspending or cancelling a licence or ordering training. In this respect, it is to be noted that the infringement regime that also applies does not and cannot prevent an electrical worker from continuing to issue warrants of electrical fitness, no matter how negligent or incompetent they may have been, whereas the Board, through disciplinary action, can. Accordingly, the Board considers that interpreting the issue of a warrant of electrical fitness to come within the term maintenance promotes the purpose of the Act.

[23] Given the above, the Board finds that the issue of a warrant of electrical fitness was prescribed electrical work in that it was maintenance. On this basis the Board further finds that the prescribed electrical work was carried out in a manner that was contrary to an enactment as per the charge before it.

[42] Turning to the Respondent's conduct, he issued a warrant of electrical fitness for a connectable installation (caravan) that did not meet compliance requirements. In doing so he carried out prescribed electrical work in a manner that was contrary to the provisions of regulation 78(2) of the Safety Regulations, which states:

78 Issue of warrants of electrical fitness for connectable installations

(2) Every warrant of electrical fitness for a connectable installation must be issued in accordance with AS/NZS 3001 ...

[43] The finding is made on the basis that the caravan had, when certified, multiple instances of non-compliance with the provisions of AS/NZS:3001.

- [44] Having determined that the prescribed electrical work had been carried out in a manner that was contrary to an enactment, the Board needs to consider the seriousness of the contraventions to determine whether the conduct reaches the threshold for a disciplinary finding of negligence or incompetence.
- [45] Looking at the levels of non-compliance in the caravan and noting that they should have easily been identified by an Electrical Inspector, the Board decided that the Respondent's conduct did reach the threshold for a finding of negligence. There were serious failings. The non-compliant aspects of the caravan should have been identified, and the warrant of electrical fitness should not have been issued until such time as they had been addressed.

Certification

- [46] The second charge 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 irrelevant¹⁴. All that is required of the Board is to determine whether a return, a warrant of electrical fitness required under regulations 76 to 78 of the Regulations, was false or misleading. The evidence before the Board established that it was false or misleading as the connectable installation did not meet the requirements of AS/NZS 3001. Accordingly, the charge is upheld.

Penalty, Costs and Publication

- [47] 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.
- [48] The Respondent made submissions at the hearing as regards penalty, costs, and publication.

Penalty

- [49] 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*¹⁵ 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.

¹⁴ *Taylor Bros Ltd v Taylor Group Ltd* [1988] 2 NZLR 1

¹⁵ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

- [50] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*,¹⁶ 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 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.
- [51] The Board noted the mitigation set out in the Agreed Statement of Facts as well as the Respondent's cooperation, acceptance of wrongdoing and clean record as an electrical worker. The Board also noted, and took into account, the delay in the matter coming before the Board and the impact this has had on the Respondent. Finally, the Board accepted that its findings on issuing warrants of electrical fitness were recent. It has taken the approach of being lenient with respect to transgressions until such time as the industry is fully familiar with the findings. At the same time, the transgressions were serious, and the non-compliance issues could have resulted in harm to persons or loss of property.
- [52] Given the above factors, the Board decided to adopt a starting point of a fine of \$1,500. It reduced the fine by \$500 on the basis that the Respondent accepted his wrongdoing and by a further \$500 in recognition of the other mitigating factors that were present. The fine is, therefore, set at \$500.

Costs

- [53] 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.
- [54] 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 case¹⁷.
- [55] In *Collie v Nursing Council of New Zealand*,¹⁸ 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.*
- [56] In *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society*,¹⁹ the High Court noted:

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

¹⁷ *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.

¹⁸ [2001] NZAR 74

¹⁹ CIV-2011-485-000227 8 August 2011

[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 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.

- [57] 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. Adjustments based on the High Court decisions above are then made.
- [58] 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

- [59] Ordinarily, as a consequence of its decision, the Respondent's name and the disciplinary outcomes would be recorded in the Public Register as required by the Act²⁰. In this instance, however, because the Board has made no order under section 147M of the Act it follows that there will be no record of the matter on the Register.
- [60] The Board can, pursuant to section 147Z of the Act, 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.
- [61] 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.
- [62] Within New Zealand, there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990²¹. The Criminal Procedure Act 2011 sets out

²⁰ Refer sections 128 of the Act

²¹ Section 14 of the Act

grounds for suppression within the criminal jurisdiction²². Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²³. 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*²⁴. It noted that the tribunal must be satisfied that suppression is desirable having regard to the public and private interests, and consideration can be given to factors such as:

- issues around the identity of other persons such as family and employers;
- identity of persons involved and their privacy and the impact of publication on them; and
- the risk of unfairly impugning the name of other practitioners if the responsible person is not named.

[63] 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 interest²⁵.

[64] The Respondent sought orders prohibiting publication under section 153 of the Act. Specific grounds were not provided other than the stigma of a disciplinary finding being on his record. The Board notes that this is a natural outcome of any disciplinary finding and is not, of itself, sufficient for orders to be made under section 153 of the Act. Notwithstanding, the Board will not overtly publish the matter in the Electron or otherwise. The Respondent will be named in this decision, and a record of the offending will be on the Register.

Penalty, Costs and Publication Orders

[65] 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 \$500.

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.

²² Refer sections 200 and 202 of the Criminal Procedure Act

²³ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

²⁴ *ibid*

²⁵ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

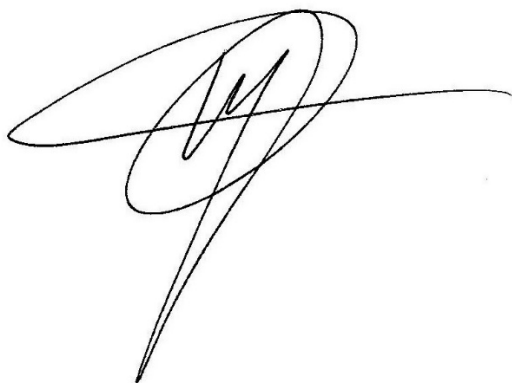
A summary of the matter will not be published in the Electron. In terms of section 147Z of the Act, there will not be action taken to publicly notify the Board's action.

- [66] 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

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

Signed and dated this fifteenth day of December 2021.

A handwritten signature in black ink, appearing to be 'Mel Orange', written in a cursive style with a large loop at the top and a long tail extending downwards.

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.