

Before the Electrical Workers Registration Board

	CE No. CE22169
Electrical Worker:	Michael O’Keeffe (the Respondent)
Registration Number:	E 266269
Electrical Worker Number:	EW 138000
Registration Class:	Electrician

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

Hearing Location:	Auckland
Hearing Type:	In Person
Hearing Date:	19 March 2020
Decision Date:	19 March 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

Appearances: Martin Denyer 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 a disciplinary offence under section 143(b)(ii) 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:
1. *On or around December 2018 to 15 January 2019 at [REDACTED] [REDACTED] Mr Michael O’Keeffe 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 failed to ensure adequate measures to prevent accidental contact with exposed electrical parts.*

Or in the Alternative
 2. *On or around December 2018 to 15 January 2019 at [REDACTED] [REDACTED] Mr Michael O’Keeffe 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 ensure adequate measures to prevent accidental contact with exposed electrical parts.*

Or in the Alternative
 3. *On or around December 2018 to 15 January 2019 at [REDACTED] [REDACTED] Mr Michael O’Keeffe 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 ensure adequate measures to prevent accidental contact with exposed part in breach of regulations 13, 16, 20 and 59 of the Electricity (Safety) Regulations 2010.

- [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.

Evidence

- [9] 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:

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

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.

- [10] The Board heard from the Respondent and from his employer.
- [11] The matter proceeded on the basis of an Agreed Statement of Facts. The Statement set out that the Respondent was engaged by a production facility to carry out prescribed electrical work associated with the relocation of a production line. The work involved the disconnection and reconnection to two machines, a de-coiler and a press. During commissioning and testing a staff member at the production line received an electric shock when he picked up a live unterminated conductor. The conductor had been disconnected from a stop button by the Respondent and was picked up by the staff member when he was investigating why the de-coiler was not working.
- [12] The Respondent noted that the relocation was a difficult task which required problem solving and involved multiple visits. He had been asked to disconnect the stop button, had done so, and then returned to his task. He thought he had disconnected all the power points and that exposed wires would not pose a danger. The Christmas period intervened, and he forgot that he had disconnected the stop button conductor. He had expected that he would be present when testing and commissioning was undertaken but was not.
- [13] The Respondent accepted that he did not communicate adequately with production line staff and that he should have locked the machine out between visits. He accepted he should have locked the whole line out when he knew he would need to be present to oversee the functional tests.
- [14] The Respondent accepted responsibility for what occurred and was remorseful. He gave evidence that business processes have been changed since to ensure lock outs are used. The Respondent accepted that he had negligently created a risk of serious harm.

Board's Conclusion and Reasoning

- [15] The Board has decided that the Respondent **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 failed to ensure adequate measures to prevent accidental contact with exposed electrical parts.
- [16] The Board reached its decision on the basis of the evidence as disclosed in the Agreed Statement of Facts and on the Respondent's acceptance that he had negligently created a risk of serious harm.

- [17] The Board noted that the elements of negligence and of serious harm had been satisfied.
- [18] 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*⁵ test of negligence which has been adopted by the New Zealand Courts⁶.
- [19] There was a clear departure when the Respondent failed to take appropriate steps to ensure appropriate or adequate measures were taken to ensure persons could not come into contact with exposed live electrical parts.
- [20] Serious harm is defined in section 2 of the Act. It means:

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

- [21] A person received an electric shock. The consequences of an electric shock come within section 23 of the Health and Safety at Work Act 2015.

Penalty, Costs and Publication

- [22] Having found that one or more of the grounds in section 143 applies the Board must, under section 147M of the Act¹, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [23] The Respondent made submissions at the hearing as regards penalty, costs and publication. His employer also provided a character reference and spoke to the business processes that have been changed since.
- [24] Counsel for the Investigator also made a submission. Counsel noted that the case was very similar to CAS 1921 and that the Board should adopt a similar starting point as regards a fine.

Penalty

- [25] 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*⁷ 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:

⁵ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁶ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

⁷ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

[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.

- [26] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*⁸ 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.
- [27] The Board decided to adopt the starting point from CAS 1921 of a fine of \$5,000. The starting point reflected the seriousness of the matter. The Board noted that the Respondent did not take the steps to protect persons and property that he should have and that he made assumptions that resulted in a person being harmed.
- [28] The Board took into account the mitigating factors present, including that the Respondent was placed under pressure to complete the prescribed electrical work, the complexity of working within a production facility, that he did take some steps albeit inadequate ones and that training and process changes have been implemented since. It reduced the fine, on the basis of the mitigation by \$2,500.
- [29] The Board also took into account the Respondent's responsible approach to the complaint, his acceptance of wrongdoing and that the matter was dealt with by way of an agreed statement of facts. It applied a further reduction of \$1,000.
- [30] The final fine is set at \$1,500.

Costs

- [31] 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.
- [32] 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 case⁹.
- [33] In *Collie v Nursing Council of New Zealand*¹⁰ where the order for costs in the tribunal was 50% of actual costs and expenses the High Court noted that:

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

⁹ *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.

¹⁰ [2001] NZAR 74

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.

- [34] Based on the above the Board's costs order is that the Respondent is 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

- [35] 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 Act¹¹. 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.
- [36] 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.
- [37] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990¹². The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction¹³. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive¹⁴. 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*¹⁵.
- [38] 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 interest¹⁶. 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.
- [39] Based on the above the Board will order further publication. The Respondent will not be named in it.

¹¹ Refer sections 128 of the Act

¹² Section 14 of the Act

¹³ Refer sections 200 and 202 of the Criminal Procedure Act

¹⁴ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

¹⁵ *ibid*

¹⁶ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

[40] 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

[41] 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 \$1,500.

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.

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 other than as noted above.

[42] 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

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

Signed and dated this 31st day of March 2020



M. J 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:*

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- (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.*