

Before the Electrical Workers Registration Board

CE No. 22497
Electrical Worker: Dennis O'Leary (the Respondent)
Registration Number: I 3043
Electrical Worker Number: EW 028957
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: Timaru
Hearing Type: In Person
Hearing and Decision Date: 21 April 2022

Board Members Present:

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

Appearances: Ms Hill 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(a)(ii) of the Act.

Contents

Summary of the Board's Decision	2
Introduction	2
Function of Disciplinary Action	3
Procedure	4
Suppression Application	4
Withdrawal of Charges	4
Evidence	5
Board's Conclusion and Reasoning	5
Penalty, Costs and Publication	6
Penalty	6
Costs.....	7
Publication	8
Penalty, Costs and Publication Orders	11
Right of Appeal	11

Summary of the Board's Decision

- [1] The Respondent carried out prescribed electrical work in a manner that was contrary to the Electricity (Safety) Regulations 2010 and to AS/NZS 3000:2007. He is censured and ordered to pay costs of \$250. The disciplinary offending will be recorded on the Register of electrical workers for a period of three years.

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 31 May 2021 at [OMITTED], Mr Dennis Francis O'Leary 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 provide mechanical protection to conductors with basic insulation; and/or*

- b. Failed to provide adequate measures to prevent accidental direct or indirect contact with exposed live conductors.*

In breach of regulations 20(1), 20(2) and 59 of the Electricity (Safety) Regulations 2010.

Or in the Alternative

- 2. On or around 31 May 2021 at [OMITTED], Mr Dennis Francis O'Leary 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 provide mechanical protection to conductors with basic insulation; and/or*
 - b. Failed to provide adequate measures to prevent accidental direct or indirect contact with exposed live conductors.*

Or in the Alternative

- 3. On or around 31 May 2021 at [OMITTED], Mr Dennis Francis O'Leary 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 provide mechanical protection to connectors or conductors with basic insulation; and/or*
 - b. Failed to provide adequate protection against accidental direct or indirect contact with live parts or conductors.*

Second Alleged Disciplinary Offence

- 4. On or around 31 May 2021 at [OMITTED], Mr Dennis Francis O'Leary has provided a false or misleading return being an offence under section 143(f) of the Act, IN THAT, he has provided a certificate of compliance for prescribed electrical work that was not compliant.*

- [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.

Suppression Application

- [10] Prior to the hearing, the Respondent filed an application for suppression under section 153 of the Act. The application was not opposed. Oral submissions, in addition to those that were set out in the written application, were received from the Respondent.
- [11] In his written submissions, the Respondent stated that others becoming aware in his community would cause him extreme distress and hardship and that naming him would be disproportionate.
- [12] The Board sought clarification as regards whether the Respondent was seeking a private hearing and blanket suppression or whether he was seeking an order that he not be named in any Board publication of the hearing outcome.
- [13] The Respondent stated he was not seeking a private hearing. The matter proceeded as a public hearing, and the Board informed the Respondent that it would consider the publication submission as part of its deliberations on penalty, costs and publication.

Withdrawal of Charges

- [14] Counsel for the Investigator filed an opening submission. She advised the Board that the Investigator was not pursuing the Second charge. The matter proceeded on the basis that only the First charge was under consideration.

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

Evidence

[15] 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.

[16] The Board heard from the Respondent prior to it making its decision.

[17] As noted, the matter proceeded on the basis of an Agreed Statement of Facts. It set out that the Respondent had been engaged to replace a number of power sockets and that, in doing so, he left two live wires in the bathroom of the property that did not have mechanical protection or adequate measures to prevent accidental direct or indirect contact with exposed live conductors. The Respondent accepted that the work had been completed in a manner that was contrary to the Electricity (Safety) Regulations 2010 and to AS:NZS 3000:2007. The Respondent submitted that the conductors had acceptable insulation as they were pushed into Wago connectors with no bare wires showing and were then covered with warning labels. He further submitted that there was no risk to persons as a result of his actions.

[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 Statement.

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 failed to provide mechanical protection to conductors with basic insulation and to provide adequate measures to prevent accidental direct or indirect contact with exposed live conductors in breach of regulations 20(1), 20(2) and 59 of the Electricity (Safety) Regulations 2010.

[20] The Board made its decision on the basis of the Agreed Statement of Facts and the Respondent's acceptance that he had committed the disciplinary offences.

[21] Contrary to an enactment is a form of strict liability offence in that all that need 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

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

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.*

[22] The accepted evidence set out that the prescribed electrical work had been carried out in a manner that was contrary to the Electricity (Safety) Regulations and to the mandated provisions in AS/NZS 3000:2007. As such, the disciplinary offence has been committed.

Penalty, Costs and Publication

[23] 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.

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

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*⁶ 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.

[26] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*⁷ 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

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

⁶ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

prior to considering any aggravating and/or mitigating factors. The same applies to disciplinary proceedings under the Electricity Act.

- [27] The disciplinary offending was at the lower end of the scale. At the same time, the Respondent is an electrical inspector. It is expected that he would lead by example. In mitigation, the Respondent accepted that he had committed the disciplinary offence. He has not previously appeared before the Board. In those circumstances, and based on the above, the Board decided to censure the Respondent. A censure is a public expression of disapproval of the Respondent's conduct.

Costs

- [28] 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.
- [29] 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 case⁸.
- [30] In *Collie v Nursing Council of New Zealand*⁹ 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.

- [31] In *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society*,¹⁰ the High Court noted:

[46] *All cases referred to in Cooray were medical cases and the Judge was careful to note that the 50 per cent was the general approach that the Medical Council took. We do not accept that if there was any such approach, it is necessarily to be taken in proceedings involving other disciplinary bodies. Much will depend upon the time involved, actual expenses incurred, attitude of the practitioner bearing in mind that whilst the cost of a disciplinary action by a professional body must be something of a burden imposed upon its 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.*

⁸ *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.

⁹ [2001] NZAR 74

¹⁰ CIV-2011-485-000227 8 August 2011

- [32] 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.
- [33] 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

- [34] 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 of the Act, 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.
- [35] 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.
- [36] 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.
- [37] 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.
- [38] The Respondent made an application under section 153 of the Act to have details of the proceeding suppressed. Under section 153(3) of the Act, the Board may:

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

- (3) *If the Board is of the opinion that it is proper to do so, having regard to the interests of any person and to the public interest, it may, of its own motion or on the application of any party to the proceedings,—*
- (a) *Order that the whole or any part of a hearing shall be held in private:*
 - (b) *Make an order prohibiting the publication of any report or account of any part of any proceedings before it, whether held in public or in private:*
 - (c) *Make an order prohibiting the publication of the whole or any part of any documents produced at any hearing:*
 - (d) *Make an order prohibiting the publication of the name or any particulars of the affairs of—*
 - (i) *Any person who is the subject of proceedings before it:*
 - (ii) *Any other person.*

[39] In considering suppression, the starting point is, as noted above, open justice and reporting. As such good grounds have to be shown as to why a matter or details should be suppressed. In the Criminal Procedure Act the grounds are¹⁷:

Publication would be likely to:

- (a) *cause extreme hardship to the person charged, a witness or a person connected to those persons or the matters; or*
- (b) *cast suspicion on another person that may cause undue hardship to those persons; or*
- (c) *cause undue hardship to any victim of the offence; or*
- (d) *create a real risk of prejudice to a fair trial; or*
- (e) *endanger the safety of any person; or*
- (f) *lead to the identification of another person whose name is suppressed by order or by law; or*
- (g) *prejudice the maintenance of the law, including the prevention, investigation, and detection of offences; or*
- (h) *prejudice the security or defence of New Zealand.*

[40] In *Robertson v Police*¹⁸ the Court of Appeal confirmed the position it took in *Fagan v Serious Fraud Office*¹⁹ that the section contemplates a two-stage approach as regards the Criminal Procedure Act:

[40] *At the first stage, the judge must consider whether he or she is satisfied that any of the threshold grounds listed in 200(2) has been established. That is to say, whether publication would be likely to lead*

¹⁷ Refer ss 200 and 202 of the Criminal Procedure Act

¹⁸ [2015] NZHC 1501

¹⁹ [2013] NZCA 367

to one of the outcomes listed in subs (2). The listed outcomes are prerequisites to a court having jurisdiction to suppress the name of a defendant. It is "only if" one of the threshold grounds has been established that the judge is able to go on to the second stage.

[41] *At the second stage, the judge weighs the competing interests of the applicant and the public, taking into account such matters as whether the applicant has been convicted, the seriousness of the offending, the views of the victims and the public interest in knowing the character of the offender.*

[41] As regards the word "likely" in *H v R*²⁰ the Court stated:

[17] *The meaning of the word "likely" was considered by the Court of Appeal in R v W, where the case concerned automatic name suppressions under the Criminal Justice Act 1985. The Court held that the phrase "likely to lead to the identification" of the victim meant there had to be an "appreciable risk" that this would occur.*

I conclude that the word "likely" in s 202 means more than "may" so that a mere possibility would not suffice. However, it is not necessary for an applicant for an order under s 202 to show that the risk of harm is such that it is more likely than not to occur. In my view, the word "likely" in s 202 means a real risk that cannot be readily discounted.

[42] Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²¹. In *N v Professional Conduct Committee of Medical Council*²² the High Court pointed to the following factors:

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.*

[43] 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,

²⁰ [2015] NZHC 1501

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

however, common practice in disciplinary proceedings to protect the names of other persons involved as naming them does not assist the public interest.

- [44] Accordingly, any application must be considered in light of the above.
- [45] The Respondent's grounds for his application were based on his reputation and standing in the community. The Board did not consider that the grounds met the requirements set out above. An order under section 153 of the Act will not be made.
- [46] In terms of publication, the Board will publish a general article in the Electron summarising the matter but will not order further publication. The Respondent will not, however, be identified in the Electron article.

Penalty, Costs and Publication Orders

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

Penalty: Pursuant to section 147M(1)(d) of the Electricity Act 1992, the Respondent is censured.

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.

- [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 eleventh day of May 2022.



M Orange
Presiding Member

ⁱ Section 147M of the Act

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