

Before the Electrical Workers Registration Board

	CE No. 22205
Electrical Worker:	Damian Rogers (the Respondent)
Registration Number:	E 19654
Electrical Worker Number:	EW 086057
Registration Class:	Electrician

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

Hearing Type:	On the Papers
Hearing Date:	23 April 2020
Decision Date:	23 April 2020

Board Members Present:

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

Procedure:

The matter was considered by the Electrical Workers Registration Board (the Board) under the provisions of Part 11 of the Electricity Act 1992 (the Act), the Electricity (Safety) Regulations 2010 (the Regulations) and the Board's Disciplinary Hearing Rules.

Board Decision:

The Respondent **has** committed a disciplinary offence under sections 143(c) 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 offence the Investigator reported should be considered by the Board. It was:
- On or around 16 July 2019 at [REDACTED] Mr Damian Rogers has failed to have complied with a term or condition of the person’s registration or licence being an offence under section 143(c) of the Act, IN THAT, he carried out prescribed electrical work and that he certified that work without holding an active practising licence.*
- [3] Prior to the hearing the Respondent and the Board were provided with all of the documents the Investigator had in his/her power or possession.
- [4] No Board Members declared any conflicts of interest in relation to the matters under consideration.

Function of Disciplinary Action

- [5] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*¹ and in New Zealand in *Dentice v Valuers Registration Board*².

¹ *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

- [6] Disciplinary action under the Act is not designed to redress issues or disputes between a complainant and a respondent. In *McLanahan and Tan v The New Zealand Registered Architects Board*³ Collins J. noted that:

“... the disciplinary process does not exist to appease those who are dissatisfied The disciplinary process ... exists to ensure professional standards are maintained in order to protect clients, the profession and the broader community.”

- [7] The Board can only inquire into “the conduct of an electrical worker” with respect to the grounds for discipline set out in section 143 of the Act. It does not have any jurisdiction over contractual matters.

Procedure

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

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

Evidence

- [10] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁴. The Board notes that as regards evidence in proceedings before it that the provisions of section 147W of the Act apply. This section states:

In all proceedings under this Part, the Board may, subject to section 156, receive as evidence any statement, document, information, or matter that may in its opinion assist it to deal effectively with the matter before it, whether or not it would be admissible as evidence in a court of law.

- [11] The matter proceeded on the basis of an Agreed Statement of Facts. The Statement set out that on or around 17 July 2019 the Respondent installed an underground mains cable and provided a certificate of compliance (CoC) for the work.

- [12] On 2 September 2019, whilst completing a Record of Inspection (ROI) for the installation an Electrical Inspector, the Complainant in the matter, accessed the Register of Electrical Workers and discovered that the Respondent’s practising licence had expired in June 2015.

- [13] On 17 October 2019, in response to the complaint, the Respondent advised that his lack of a current practising licence was due to computer illiteracy. He noted he faced difficulties in uploading his photo identification to the EWRB website and, for this reason, he was unable to complete his application for renewal. He stated:

“It is with Great Regret, Shame, & Huge Stress, that the complaint lodged against me has been brought before you, and I ask that some compassion be

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

shown whilst reviewing this matter. This is the first complaint of any nature to be lodged against me. Although any complaint is 'serious', the nature-of this complaint is solely of a 'Clerical' nature, and not that of a 'Competency' nature." [sic]

- [14] On 16 April 2020 the Respondent, by email, accepted the Agreed Statement of Facts.
- [15] The general rule is that all facts in issue or relevant to the issue in a case must be proved by evidence. As the Investigator and Respondent agreed to the facts as outlined above it was not necessary to call any further evidence or to test the evidence as outlined in the summary.

Board's Conclusion and Reasoning

- [16] The Board has decided that the Respondent failed to comply with a term or condition of his registration or licence being an offence under section 143(c) of the Act, in that, he carried out prescribed electrical work and that he certified that work without holding an active practising licence.
- [17] Section 74 of the Act restricts the doing or assisting with prescribed electrical work to authorised person. A class of authorised persons are registered persons those that hold a current practising licence.
- [18] The Respondent's licence expired on 30 June 2015. He did not renew his licence until after the complaint was made. During the intervening period he was not a licensed person and was therefore not authorised to carry out or supervise prescribed electrical work.

Penalty, Costs and Publication

- [19] 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.
- [20] The matter was dealt with on the papers. Included was information relevant to penalty, costs and publication. The Board decided to make the appropriate orders.

Penalty

- [21] 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*⁵ 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

⁵ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

punishment and deterrence must also be taken into account in selecting the appropriate penalty to be imposed.

- [22] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*⁶ 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.
- [23] The Respondent submitted that he did not relicense because of computer issues and in particular difficulties uploading his photograph. It should be noted that provision is made for electrical workers to relicense manually using the post. The excuses are not accepted.
- [24] The Board does note that there were no allegations of substandard nor noncompliant work. Notwithstanding the Respondent has been carrying out prescribe electrical work illegally and may well have put persons property at risk by issuing invalid certification for the work that he has done. He has not contributed to the costs of electrical worker licensing over the intervening period.
- [25] Based on the above factors the Board decided that a fine was the appropriate form of penalty. The Board adopted a starting point of \$1,500. It increased the penalty by the sum of \$500 to \$2,000 on the basis that the Respondent failed to relicense for an extened period which included renewal rounds in 2017 and 2019 during which he again failed to relicense and that he took no steps to attempt to get his licence when he experienced technical difficulties.
- [26] The Respondent has shown remorse and has pleaded guilty to the offending. He is entitled to a reduction. The fine will be reduced by 25% leaving a final amount of \$1,500.

Costs

- [27] 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.
- [28] 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 case⁷.

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

⁷ *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.

[29] In *Collie v Nursing Council of New Zealand*⁸ 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.

[30] Based on the above the Board's costs order is that the Respondent is pay the sum of \$225 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

[31] 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 Act⁹. 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.

[32] 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.

[33] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990¹⁰. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction¹¹. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive¹². 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*¹³.

[34] 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 interest¹⁴. 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.

⁸ [2001] NZAR 74

⁹ Refer sections 128 of the Act

¹⁰ Section 14 of the Act

¹¹ Refer sections 200 and 202 of the Criminal Procedure Act

¹² *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

¹³ *ibid*

¹⁴ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

- [35] Based on the above the Board will publish a general article in the Electron summarising the matter but will not order further publication. The Respondent will be identified in the Electron. The Board considers that this is appropriate so that other electrical workers can check whether they have relied on certification provided by the Respondent at times when he was not licenced.
- [36] 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

- [37] 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 \$225 (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 be named in the publication.

- [38] 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

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

Signed and dated this 29th day of April 2020



Mel Orange
Presiding Member

ⁱ **Section 147M of the Act**

- (1) *If the Board, after conducting a hearing, is satisfied that a person to whom this Part applies is guilty of a disciplinary offence, the Board may—*
- (a) *do 1 or more of the following things:*

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- (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:

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- (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.*