

Before the Electrical Workers Registration Board

CE No. 22334
Electrical Worker: Nathan Shugg (the Respondent)
Registration Number: E 259813
Electrical Worker Number: EW 103134
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: Wellington
Hearing Type: In Person
Hearing and Decision Date: 20 July 2021

Board Members Present:

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

Appearances: Mr O Upperton for the Investigator
Mr J Hutton, Master Electrician's assisting the Respondent

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), 143(a)(ii) and of 143(f) of the Act.

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Summary of the Board’s Decision

[1] The Respondent committed disciplinary offences when he carried out prescribed electrical work negligently and in a manner contrary to AS/NZS3000. The Respondent also provided a false or misleading certificate of compliance. He is fined the sum of \$1,500 and ordered to pay costs of \$900. The matter was dealt with at a defending hearing.

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 of Hearing setting out the alleged disciplinary offences the Investigator reported should be considered by the Board. They were:

First Alleged Disciplinary Offence

1. Between 18 August 2019 and 13 February 2020 at [Omitted], Mr Nathan Shugg has carried out or caused to be carried out prescribed electrical work in a manner contrary to any enactment relating to prescribed electrical work that was in force at the time the work was done being an offence under section 143(a)(ii) of the Act, IN THAT, he has:
 - a. Failed to provide accessible isolation switch; and/or
 - b. Failed to adequately protect cables and conductors where passing over sharp metal edges; and/or
 - c. Failed to terminate disconnected and spare cables found adjacent to the Gas Water; and/or
 - d. Failed to provide supports or fixings for lighting cable in pantry; and/or
 - e. Failed to provide adequate protection to power cable covered by skirting board.

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

Or in the Alternative

2. Between 18 August 2019 and 13 February 2020 at [Omitted], Mr Nathan Shugg 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 has:
 - a. Failed to provide accessible isolation switch; and/or
 - b. Failed to adequately protect cables and conductors where passing over sharp metal edges; and/or
 - c. Failed to terminate disconnected and spare cables found adjacent to the Gas Water; and/or
 - d. Failed to provide supports or fixings for lighting cable in pantry; and/or
 - e. Failed to provide adequate protection to power cable covered by skirting board.

Second Alleged Disciplinary Offence

3. Between 18 August 2019 and 13 February 2020 at [Omitted], Mr Nathan Shugg has provided a false or misleading return being an offence under section 143(f) of the Act, IN THAT, he has provided a certificate 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.

- [6] The allegation that the Respondent had failed to terminate disconnected and spare cables found adjacent to the Gas Water was not pursued by the Investigator.

Function of Disciplinary Action

- [7] 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.

- [8] 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.”

- [9] 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.

Background to the Complaint

- [10] The matter was originally set down to be heard on 21 April 2021. On 22 April 2021, the Respondent sought an adjournment on the grounds that his industry representative and a witness were not available. The adjournment was granted.

Evidence

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

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

- [12] The Board heard evidence from:

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

Ann Hart	Ministry of Business Innovation and Employment, Investigator
David Olsen	Electrical Inspector, Expert for the Investigator
Nathan Shugg	Respondent
[Omitted]	Builder, witness for the Respondent

- [13] The Board also received a signed Agreed Statement of Facts in which the Respondent accepted that he had committed the Second Alleged Disciplinary Offence that he had provided a false or misleading return contrary to section 143(f) of the Act.
- [14] Ms Hart's and Mr Olsen's evidence was in the form of briefs of evidence. Ms Hart's outlined the receipt of the complaint and admitted, amongst other things, a copy of the complaint and the Respondent's reply to it.
- [15] Mr Olsen's brief outlined his review of the complaint, expressed opinions in relation to it and admitted a report that he had completed for the Investigator into evidence. Mr Olsen's opinions and report formed the basis of the charges laid by the Investigator in the First Alleged Disciplinary Offence.
- [16] By way of background, the Respondent was engaged by [Omitted] building company to complete the electrical fit-out of a new residential dwelling. The full scope of the intended prescribed electrical work was not completed as a result of an interruption to the work by Covid and a subsequent commercial dispute between the builder and the owner. The Respondent generally noted that when he left the site prior to the Covid lockdown, he was not aware that he would not be returning and had not been able to return and complete the work and that, had he been able to return, he would have attended to some of the alleged compliance issues. When advised that he would not be able to return, he issued a certificate of compliance (CoC) for what had been completed. The CoC incorporated a written statement detailing what was incomplete.
- [17] [Omitted] confirmed the details of the commercial dispute.
- [18] After the complaint had been made, the Responded issued a second CoC, which provided further and more accurate details.
- [19] When the Respondent's involvement in the build came to an end, the installation was part livened. The power supply was through the builder's supply that had been installed. The Respondent stated power was supplied to allow for testing and for the builders use.

Accessible Isolation Switch

- [20] The allegation was that a cooktop appliance isolation switch located in the pantry was not adjacent or readily available for access as required by AS/NZS3000:2007 4.7.1.

- [21] The Respondent gave evidence that it was not practicable to install a switch in an accessible location given the design of the kitchen and the kitchen joinery. The one accessible surface on which the switch could have been installed was a medium density fibreboard (MDF) sheet which the Respondent assessed as not being suitable for the installation of cables and switches. An alternative solution of installing the switch in an adjacent scullery cupboard was adopted. The switch was not visible from the position of the cooktop.
- [22] A submission was made that the cooktop was not an open cooking surface incorporating electric heating. The submission was based on the cooktop being an induction device.

Mains Cable Cabinet Entry

- [23] In respect of the mains cable, the allegation was that it had been drawn through the Main Switchboard/Meterboard cabinet, which had a hole with sharp metal edges which had made contact with the cables outer sheath. Bushes were not provided to protect the cable or to securely fix the mains cable in position, and that two cabinet penetrations were not closely fitted to ensure fire prevention. Mr Olsen considered the two matters were breaches to AS/NZS3000:2007 clause 3.10.3.5.
- [24] The Board was provided with photographs of the conductor and the holes the allegations related to:



Photograph One



Photograph Two

- [25] The first photograph shows the two holes, one at the top and one lower left-hand corner. The second shows a close up of the top hole—the allegation relating to sharp edges related to the second photograph.
- [26] The evidence before the Board was that the black shown above in the photograph was the cables outer sheath and not a conduit.
- [27] The cabinet was installed by the blocklayer. The Respondent gave evidence that he created the top hole through the cabinet and the concrete behind to create a path for the mains cable. He stated that the cable channel he created through the concrete was narrow and that there would have been less than 5mm of space between the channel and the cables drawn through it. He submitted that the narrowness of the channel through the concrete would have restricted cable movement and air being drawn through the hole into the cabinet. He submitted that, on this basis, it was unlikely that the cable would be abraded or that excess air would be drawn if there was a fire in the cabinet.

- [28] The Respondent stated he would have bushed the hole had he been able to return and complete his work and that the work in the switchboard was not complete.

Pantry Cable Support

- [29] An allegation was also made that the Respondent had failed to provide supports or fixings for cabling to protect and minimise damage. The allegation related to a cable for lighting to the upper portion of a pantry. It was found unsecured with potential for movement and damage. The allegation was that its installation was contrary to AS/NZS3000:2007 3.3.2.6 and 3.3.2.8. the following photograph shows the cable.



- [30] The Respondent stated that the cable was for future use and that it was not connected at the switchboard. There was no labelling to this effect. It was not within any form of protective conduit.
- [31] The Respondent submitted that the cable was a redundant conductor and that it was no different, from a compliance perspective, from a disconnected and disused conductor. The Respondent also noted that the cable was approximately 2000mm above the ground and at the back of the cupboard, which was approximately 480mm back from the cupboard edge. He submitted that the position of the cable and the limited access meant any disruption or damage was unlikely.

Skirting Board Cable Protection

- [32] The final allegation in the First Alleged Disciplinary Offence was that a power cable was installed in a manner where it would have been behind a floor skirting board. A

hole is penetrating at, through or above the bottom plate of the internal wall contrary to AS/NZS3000:2007 3.9.4.2(a).

- [33] The cable was installed at floor level. It passed around the room beside the wall from one socket outlet to the next. The Investigator alleged the installation of the skirting covering the cable had two issues. One, the skirting board installed by others could damage or pierce the cable when installed, and two, when the cable was covered by the skirting it would have been less than 50mm from the surface.
- [34] The photograph below shows the cable in its intended position. The skirting board had been removed to allow the floor to be sanded. The conductor had been installed outside of the wall as it was a replacement conductor for a damaged conductor, and the Respondent stated it was not possible to draw a new conductor in the wall.



- [35] The Respondent submitted that, as the conductor was protected by a residual current device (RCD), an exception in AS/NZS3000:2007 3.9.4.4 applied.

Closing Submission

- [36] The Respondent noted, in closing, stated that he did not have any prior experience with dealing with incomplete jobs, he did not consider that the prescribed electrical work was electrically unsafe and that Master Electricians had provided training on completing CoCs in circumstances where the intended scope of work has not been completed.

Board's Conclusion and Reasoning

[37] The Board has decided that the Respondent **has**:

- (1) 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 accessible isolation switch; and
- (2) 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 protect cables and conductors where passing over sharp metal edges; and
- (3) 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 supports or fixings for lighting cable in pantry; and
- (4) 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 provide adequate protection to power cable covered by skirting board; and
- (5) provided a false or misleading return being an offence under section 143(f) of the Act, in that, he provided a certificate for prescribed electrical work that was not compliant.

[38] The finding under section 143(f) was made on the basis of the Respondent's acceptance of the allegation and on the basis of the findings that prescribed electrical work had been carried out in a non-compliant manner.

[39] In respect of the other findings the First Alleged Disciplinary Offence was laid in the alternatives of contrary to an enactment under section 143(a)(ii) of the Act or negligence or incompetence under section 143(a)(i) of the Act.

[40] 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.

[41] 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 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*

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

- (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.*

[42] It is also to be noted, as regards the allegations made, that regulation 59 of the Safety Regulations stipulates:

59 Low and extra-low voltage installations to comply with AS/NZS 3000

- (1) *Every low or extra-low voltage domestic installation, or part of a domestic installation, must be installed, tested, inspected, and connected so as to comply with Part 2 of AS/NZS 3000 if it has a maximum demand at or below—*
 - (a) *80 amperes per phase if single-phase; or*
 - (b) *50 amperes per phase if multi-phase.*

[43] The installation came within those provisions and, as such, had to comply with AN/NZS 3000.

[44] There is no legal requirement that the prescribed electrical work be electrically unsafe, as defined in the Safety Regulations for the Board to make disciplinary findings.

[45] 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.

[46] 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.

[47] 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

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)

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*".

- [48] 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.
- [49] 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. 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.
- [50] 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.]*

- [51] 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.
- [52] Turning to seriousness in *Collie v Nursing Council of New Zealand*¹³ the Court's noted, as regards the threshold for disciplinary matters, that:

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

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

¹³ [2001] NZAR 74

[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.

- [53] Turning to the allegations, each will be discussed separately and in light of the above legal provisions.

Accessible Isolation Switch

- [54] The allegation was that the prescribed electrical work had been completed in a manner that was contrary to clause 4.7.1 of AS/NZS3000:2007. It provides:

4.7 COOKING APPLIANCES

4.7.1 Switching device

A circuit for a fixed or stationary cooking appliance have an open cooking surface incorporating electric heating, e.g. cooktop, deep fat fryer, barbecue griddle or similar, shall be provided with a switch, operating in all active conductors in a visible and readily accessible positions

Switches shall be marked to identify the appliance controlled.

- [55] The notes that accompany the standard includes a note that the switch should be mounted within two metres of the cooking appliance.
- [56] The above requirements had not been met. The switch was within a cupboard and was not, therefore, visible and readily accessible.
- [57] The Respondent submitted that it was not practicable to install a switch in a compliant position. That is not a defence. Other avenues should have been explored, such as using conduit and mounts on the MDF or installing a false cavity.
- [58] The Respondent also submitted that the cooktop was not an open cooking surface. That submission is not accepted. The Respondent did not provide any expert opinions to substantiate that it was not an open cooktop other than his own opinion that an induction cooktop only operates when a metal conductor is on it. Hazards, including cooking fires, could still occur, and a visible and accessible means of isolation is still required.
- [59] As a means of isolation was provided, albeit in the wrong place, the Board did not consider that the transgression was serious enough for it to make a finding of negligence or incompetence.

Mains Cable Cabinet Entry

- [60] The Investigator provided evidence as regards the size of the holes in the cabinet. The Notice of Proceeding did not, however, include the allegation, and as such, it

would be contrary to the rules of natural justice for the Board to make a finding with respect to it.

- [61] The Notice of Proceeding did give notice of the allegation that there was inadequate protection of a conductor where it passed over sharp metal edges. The evidence of this was compelling. The photographs showed sharp metal edges and visible damage to the outer sheathing of the mains cable.
- [62] The Respondent submitted that the concrete channel through which the cable passed would have constricted its movement and, thereby, mitigated the risk of damage. The Board as noted that the cable had already been damaged and that the manner in which the cable had been installed did not meet the requirements of clause 3.10.3.5 of AS/NZS 3000:2017, which stipulates:

3.10.3.5 Passage for Conductors

Where conductors or cables, including flexible cables and flexible cords, are to be threaded through conduits, tubes or channels, or passed through opening formed in metalwork, such as tubes, channels, conduit ends or openings shall be of adequate size and shall –

- (a) Be provided with bushes that are securely fixed in place; or*
- (b) If not bushed, have no sharp edges or projecting angles or projecting edges that would be likely to damage a conductor or the insulation, braiding or sheathing of a cable.*

- [63] The Respondent also submitted that he would have rectified the issue if he had been allowed to return. Counsel for the Investigator noted that the CoC issued did not exclude the mains cable as incomplete work. The power had been connected, and the cable had already been damaged. The Respondent should have completed the work in a compliant manner as and when it was undertaken. Bushing the hole or taking one of the other available measures in clause 3.10.3.5 should have taken place prior to the cable being installed, not after. It was on this basis, and on the basis that the issue was more serious and the Respondent's failing more fundamental, that the Board decided that the Respondent had been negligent in that his conduct fell below that to be expected of a competent electrical worker.

Pantry Cable Support

- [64] Clause 3.3.2.6 deals with the risks of impact. Clause 3.3.2.8 deals with other mechanical stresses and provisions for supports and fixings to restrict the movement of cables. Both require that wiring systems be installed so as to minimise the risk of mechanical damage. Protection can be provided in a number of ways, including the location selected. The Respondent's submissions were, in essence, that the location selected meant that the risk of damage was minimised.
- [65] The Respondent also submitted that the cable was not connected and, as such, the AS/NZS 3000 requirements did not apply.

- [66] Under clause 1(1)(a) of Schedule 1 of the Safety Regulations, which provides further definition of prescribed electrical work, the installation, connection, or maintenance of conductors used in works or installations is prescribed electrical work. The clause applies irrespective of whether the cable is connected to a power supply. It is designed to ensure that conductors are installed in a compliant manner. The Board was satisfied that the AS/NZS 3000 requirements applied to the conductor that was on the top of the pantry.
- [67] The conductor was not affixed or restrained. It was not in a conduit or other protective device. It was pushed to the back of the cabinet. There was nothing to stop it from being disturbed from that position. There was a risk that, if the space above the cupboard was used for storage, that the conductor could be damaged. If it was connected to a power supply at a later point in time, there was a risk that the protective insulation on it may have been compromised. The Respondent did not tag the conductor out of his CoC or issue any advice as regards it. Given those factors, the Board finds that the work was completed in a manner that was contrary to an enactment but that the conduct was not serious enough for a finding of negligence or incompetence.

Skirting Board Cable Protection

- [68] The final allegation was that a conductor that was to be covered by a skirting board would not comply with clause 3.9.4.2(a) or AS/NZS3000:2007, which deals with wiring systems near building surfaces, in this instance within 50mm of the surface of a wall. If the wiring system is within 50 mm then protection is required. The Respondent submitted that protection had been provided by way of an RCD in accordance with the provisions of clause 3.9.4.4 and that the wiring was, therefore, compliant.
- [69] Clause 3.9.4.3.1 of AS/NZS3000:2007 stipulates that there are prohibited locations for wiring systems:
- Wiring systems shall not be installed through any space formed between roofing or wall-lining materials and its immediate supporting member*
- [70] The question for the Board was whether clause 3.9.4.4 applied. In this respect the Board noted that it applies to wiring systems installed in accordance with 3.9.4.2 and 3.9.4.3.2. Clause 3.9.3.1 is excluded from the provision, which is consistent with it dealing with prohibited locations. The Board, therefore, found that the wiring was not compliant with AS/NZS 3000.
- [71] Turning to the question of seriousness, the Board noted that there was a very real risk that a skirting point fixing or, indeed, any other fixing that penetrated the skirting board could pierce the conductor. Moreover, a competent electrical worker should be aware of the dangers posed by a conductor in close proximity to the surface and should take the appropriate action. The conductor should have been installed in the wall. That may have caused damage to linings that would have had to

of been repaired, but that is preferable to a conductor being left in a dangerous position. As such, the Board decided that the Respondent had been negligent.

False or Misleading Return

- [72] The charge under section 143(f) of the Act 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.
- [73] The returns referred to are issued under the Regulations. There is a requirement that an Electrical Safety Certificate be issued for all prescribed electrical work. It must contain a statement to the effect that the installation or part installation is connected to a power supply and is safe to use. There is also a requirement that a Certificate of Compliance is issued for high and general risk prescribed electrical work. A Certificate of Compliance must state that the prescribed electrical work has been done lawfully and safely and that the information in the certificate is correct. As the work had not been completed in accordance with compliance requirements, the certification was false or misleading.

Penalty, Costs and Publication

- [74] 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.
- [75] The Respondent made submissions at the hearing as regards penalty, costs and publication.

Penalty

- [76] 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

- [77] 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.
- [78] The Board adopted a starting point of a fine of \$2,000. The amount was consistent with penalties imposed by the Board for similar offending. It reflected the nature of the offending. There were no aggravating factors, although the Respondent's reluctance to accept the manner he had carried out prescribed electrical work was substandard was disconcerting. There were some mitigating factors, including that the Respondent accepted the allegation under section 143(f) of the Act, that he had learnt from the matter, had undertaken some training and had not previously appeared before the Board. On the basis of those mitigating factors, the Board decided that the fine would be reduced to \$1,500.

Costs

- [79] 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.
- [80] 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.
- [81] 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.*
- [82] The Board's scale of costs for a defended hearing is \$1,125. There was some limited cooperation. The costs have been reduced to recognise this. The Board's costs order is that the Respondent is to pay the sum of \$900 toward the costs of and incidental to the matter.

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

Publication

- [83] 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 Act¹⁹. 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.
- [84] 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.
- [85] Within New Zealand, there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990²⁰. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²¹. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²². 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*²³.
- [86] 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 interest²⁴. 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.
- [87] Based on the above, the Board will publish the matter in the Electron but the Respondent will not be identified.
- [88] 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.

¹⁹ Refer sections 128 of the Act

²⁰ Section 14 of the Act

²¹ Refer sections 200 and 202 of the Criminal Procedure Act

²² *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

²³ *ibid*

²⁴ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Penalty, Costs and Publication Orders

[89] 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 \$900 (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.

[90] 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

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

Signed and dated this Thursday 19th August 2021.



Mr 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:*

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- (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—

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- (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.*