

Before the Electrical Workers Registration Board

CE No. 22110
Electrical Worker: Tahi Spinks (the Respondent)
Registration Number: IM 273158
Electrical Worker Number: EW 089110
Registration Class: Inspector (Mining)

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

Hearing Location: Tauranga
Hearing Type: In Person
Hearing Date: 11 October 2019
Decision Date: 8 November 2019

Board Members Present:

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

Appearances: Sarah Blick for the Investigator

Procedure:

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

Board Decision:

The Respondent **has** committed disciplinary offences under sections 143(b)(ii) and section 143(f) 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:

First Alleged Disciplinary Offence

1. On or around 29 May 2018 at [REDACTED] the Respondent 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 installed a 63amp RCBO (residual current breaker with overcurrent protection) that was too large to protect the lead from overcurrent fault resulting in the potential to create a fire risk.

Or in the Alternative

2. On or around 29 May 2018 at [REDACTED] the Respondent 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 installed a

63amp RCBO that was too large to protect the lead from overcurrent fault resulting in the potential to create a fire risk.

Or in the Alternative

3. On or around 29 May 2018 at [REDACTED] the Respondent 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 installed a 63amp RCBO that was too large to protect the lead from overcurrent fault resulting in the potential to create a fire risk in breach of regulations 60(1)(e) of the Electricity (Safety) Regulations 2010.

Second Alleged Disciplinary Offence

1. On or around 29 May 2018 at [REDACTED] the Respondent failed to provide a return or provided a false and misleading return being an offence under section 143(f) of the Act, IN THAT, has provided a combined Electrical Safety Certificate / Certificate of Compliance (ESC/CoC).

[3] Prior to the hearing the Respondent and the Board were provided with all of the documents the Investigator had in his power or possession.

[4] No Board Members declared any conflicts of interest in relation to the matters under consideration.

Amendment to Charges

[5] The Board noted that the charge referred to a residual current circuit breaker with overload (RCBO) whereas the facts indicted that he had installed a residual current circuit breaker (RCCB).

[6] Under section 156A of the Act the Board has a power to amend or revoke a notice. It provides:

156A Power to amend or revoke

(1) *The Board's power to make, issue, give, or publish any order, notice, exemption, or other instrument includes the power to—*

(a) *amend or revoke it:*

(b) *revoke it and replace it with another.*

[7] The Board was satisfied that the Respondent had been given fair notice of the actual matter the Investigator was alleging and that he would not be prejudiced by the Board exercising its power to amend the charge. The charge is accordingly amended to read "... installed a 63amp RCCB".

Function of Disciplinary Action

[8] 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.

[9] 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.”

[10] 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

[11] The matter proceeded on the basis of an Agreed Statement of Facts.

Evidence

[12] 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.

[13] The Respondent appeared and confirmed the signed Agreed Statement of Facts which set out that the Respondent was engaged by a Caravan Importer to convert a caravan from the United Kingdom to New Zealand standards. In doing so he changed the caravan power points to New Zealand power points and replaced the existing (United Kingdom) RCD main switch with a 63 amp RCCB New Zealand main switch. A combined Certificate of Compliance/Electrical Safety Certificate ("COC/ESC") was issued by the Respondent as was a Warrant of Electrical Fitness.

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

² [1992] 1 NZLR 720 at p 724

³ [2016] HZHC 2276 at para 164

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

- [14] The caravan was sold and the purchaser was concerned at the compliance of the electrical fittings. The purchaser engaged an Electrical Inspector who found that the 63amp RCCB that the Respondent had installed was over rated and would not protect the supply lead and fittings from overcurrent.
- [15] The Investigator engaged Mr Steven Doust, an Electrical Inspector, to provide an opinion. He found that the RCCB installed by the Respondent did not provide compliant overcurrent protection as connectable installations, except caravans incorporating a neutral/earth link or connection, shall have overcurrent protection fitted to ensure that the maximum demand does not exceed the rating of the supply lead and supply lead fittings. He further added that this was in breach of the Electricity (Safety) Regulation 2010 in that:
- The switchboard in the caravan is made up of a main switch (RCCB) and three circuit breakers rated at 16Amps, 6Amps and 6Amps. There is a potential then for the cumulative total current flow to be 28Amps, which would exceed the current rating of the supply lead. By not limiting the current at the switchboard to the required rating (16Amps) the Respondent, by installing a 63Amp Residual Current Breaker has created the potential for the supply cord to become overheated should full load capacity have been present.*
- [16] Mr Doust's report noted that over-current protection was a requirement under Clause C6.4 of AS/NZS 3001:2008, a standard which is cited in the Regulations.
- [17] The Respondent accepted that that the 63 Amp RCCB he installed did not provide overcurrent protection which created the potential for the supply cord to become overheated should full load capacity have been present and that he had breached section 143(b)(ii) of the Act. He submitted that he had always believed that overcurrent protection was to protect downstream and therefore believed that any 16a plug would be protected to this current rating.
- [18] The Respondent also accepted that he had breached section 143(f) of the Act, in that he provided a false or misleading return by certifying the installation was safe to connect when it was not compliant.
- [19] The Summary of Facts noted that the Respondent has, since receiving the complaint, spent time with a technical advisor who has tutored him on overcurrent devices and the standards required around them.
- [20] 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

- [21] The Board has decided that the Respondent **has** 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.
- [22] The Board has also decided that the Respondent **has** provided a false and misleading return being an offence under section 143(f) of the Act.
- [23] The reasons for the Board's decisions follow.

Serious Harm or Significant Property Damage

- [24] The charges put before the Board were laid in the alternatives of negligently creating a risk of serious harm to any person, or a risk of significant property damage under section 143(b)(ii) and, as alternatives, negligence or incompetence under section 143(a)(i) and contrary to an enactment under section 143(a)(ii).
- [25] There is a hierarchy to the disciplinary charges in that the Board needs to first consider whether the prescribed electrical work was carried out or caused to be carried out in a manner that was contrary to an enactment. If the Board finds in the affirmative it then needs to consider whether the conduct reaches the threshold for a finding of negligence or incompetence. If that threshold is met the Board then needs to consider whether a risk of serious harm or significant property damage was created.
- [26] In this instance the Respondent has accepted that 143(b)(ii) is the appropriate disciplinary offence. The Board agreed.
- [27] Serious harm is defined in section 2 of the Act. It means:
- (a) *death; or*
 - (b) *injury that consists of or includes loss of consciousness; or*
 - (c) *a notifiable injury or illness as defined in section 23 of the Health and Safety at Work Act 2015.*

- [28] Significant property damage is not defined in the Act. Section 16(1)(b)(ii) of the Act, which relates to notification of accidents, also refers to serious harm and to property damage. In respect of damage it requires notification where there is:

damage to any place or part of a place that renders that place or that part of that place unusable for any purpose for which it was used or designed to be used before that accident.

- [29] As section 16 refers to both serious harm and to damage the Board considers significant property damage in section 143(b)(ii) should be interpreted in line with the definition in section 16(1)(b)(ii).

- [30] Actual serious harm or significant property damage need not occur. There need only be a risk that either might occur. The risk must be real in that there needs to be a material or substantial possibility, chance or likelihood that serious harm or significant property damage will occur. A real risk has also been described as one that a reasonable person would not brush aside as being far-fetched or fanciful⁵.
- [31] There was evidence before the Board that the lack of overload protection could result in a fire. As such the tests for serious harm and/or significant property damage have been met.

Certification

- [32] The Respondent has also accepted that his return was false or misleading return. Determining whether a return is false or misleading is a question of fact to be decided objectively and the intention of the issuer is irrelevant⁶.
- [33] 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.
- [34] On the basis of the facts before the Board which showed that the installation was not safe the combined CoC/ESC was false.

Penalty, Costs and Publication

- [35] 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.
- [36] The Respondent made submissions at the hearing as regards penalty, costs and publication. The submissions included the provision of a reference substantiating that he had undertaken remedial instruction.

Penalty

- [37] 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 Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd (The Wagon Mound No 2) [1967] 1 AC 617

⁶ *Taylor Bros Ltd v Taylor Group Ltd* [1988] 2 NZLR 1

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.

- [38] 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.
- [39] An offence under section 143(b)(ii) is one of the most serious that can come before the Board. A commensurate penalty is required. Accordingly, on the basis of previous penalty imposed, the Board adopted a starting point of \$2,000.
- [40] The board did not note any aggravating features. There were mitigating factors including that the Respondent accepted responsibility and that he voluntarily undertook remedial training. He is entitled to discounts for those matters. The fine is reduced by \$1,000 in recognition of the early acceptance and by \$500 for the undertaking of remedial training. The final penalty is set at a fine of \$500.

Costs

- [41] 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.
- [42] 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.
- [43] 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:
- 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.*
- [44] 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.

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

Publication

- [45] 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.
- [46] 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.
- [47] 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.
- [48] 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.
- [49] Based on the above the Board will not order further publication.
- [50] 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.

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

Penalty, Costs and Publication Orders

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

Penalty: Pursuant to section 147M(1)(f) of the Electricity Act 1992, the Respondent is ordered to pay a fine of \$500.

Costs: Pursuant to section 147N of the Act, the Respondent is ordered to pay costs of \$250 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

Publication: The Registrar shall record the Board's action in the Register of Electrical Workers in accordance with section 128(1)(c)(viii) of the Act.

The Respondent will be named in this decision.

In terms of section 147Z of the Act, there will not be action taken to publicly notify the Board's action.

[52] The Respondent should note that the Board may refuse to relicense an electrical worker who has not paid any fine or costs imposed on them.

Right of Appeal

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

Signed and dated this 8th day of November 2019



Mel Orange
Presiding Member

ⁱ Section 147M of the Act

- (1) *If the Board, after conducting a hearing, is satisfied that a person to whom this Part applies is guilty of a disciplinary offence, the Board may—*
- (a) *do 1 or more of the following things:*
 - (i) *order that the person's registration or practising licence (or both) be cancelled;*
 - (ii) *order that the person's provisional licence be cancelled;*
 - (iii) *order that the person may not apply to be reregistered or re-licensed before the expiry of a specified period;*
 - (b) *order that the person's registration or practising licence (or both), or the person's provisional licence, be suspended—*
 - (i) *for any period that the Board thinks fit; or*
 - (ii) *until that person does 1 or more of the things specified in subsection (2):*

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- (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.