

Before the Electrical Workers Registration Board

	CAS No. CE 21983
Electrical Worker:	Robert Stockley (the Respondent)
Registration Number:	E 268058
Electrical Worker Number:	EW 127066
Registration Class:	Electrician

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:	Wellington
Hearing Type:	In Person
Hearing Date:	17 July 2019
Decision Date:	19 July 2019

Board Members Present:

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

Appearances: Jodi Ongley 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

Introduction..... 2

Background to the Hearing 4

Procedure 4

Function of Disciplinary Action 4

Evidence..... 5

 The Prescribed Electrical Work..... 5

 The Charges – First Allegation 6

 Second Allegation 7

 Third Allegation..... 8

 Fourth Allegation 8

 Submissions..... 8

Legal Provisions 9

Board’s Conclusion and Reasoning..... 11

 Findings on the First Particular 11

 Findings on the Second Particular 12

 Findings on the Third Particular 14

 Findings on the Fourth Particular 14

Penalty, Costs and Publication..... 15

 Penalty 15

 Costs..... 16

 Publication 16

Penalty, Costs and Publication Orders 17

Submissions on Penalty, Costs and Publication 18

Right of Appeal..... 18

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 of Proceeding dated 7 January 2019. The notice set out on alleged disciplinary offence that had been laid in alternatives of negligence or incompetence under section 143(a)(i) and contrary to an enactment under section 143(a)(ii). The alleged disciplinary offence contained three specific allegations or particulars.

[3] At a prehearing conference convened by the Presiding Member on 5 April 2019 Counsel for the Investigator sought leave to amend the charges that were filed adding a fourth particular. On 8 April 2019 the Presiding Member granted leave. The fourth particular was added.

[4] A revised notice dated 6 June 2019 was issued. The disciplinary offences set out in that notice were:

First Alleged Disciplinary Offence

1. On or around 2 July 2018 at [REDACTED], Mr Robert Stockley 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) Incorrectly wired main switch/isolator was installed on the distribution board; and/or
- (b) No labelling was used to identify that there was a second independent power supply for the lighting circuit which had been connected to a separate switch on socket outlet; and/or
- (c) Two switch sockets have been connected to the load side of the main switch without any additional circuit protection; and/or
- (d) No mechanical protection was provided to the lighting cable.

Or in the Alternative

2. On or around 2 July 2018 at [REDACTED], Mr Robert Stockley 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) Incorrectly wired main switch/isolator was installed on the distribution board; and/or
- (b) No labelling was used to identify that there was a second independent power supply for the lighting circuit which had been connected to a separate switch on socket outlet; and/or
- (c) Two switch sockets have been connected to the load side of the main switch without any additional circuit protection; and/or
- (d) No mechanical protection was provided to the lighting cable.

In breach of regulations 13, 14 and 59 of the Electricity (Safety) Regulations 2010.

Background to the Hearing

- [5] The Respondent provided a response sheet on 4 March 2019 in which he raised an allegation that the complaint was vexatious. At the prehearing conference the Presiding Member advised that further detail would be required if the Respondent wished to pursue the allegation. The Presiding Member directed that further submissions with regards to a vexatious complaint should be received in writing to the Board Officer by close of business 16 May 2019. No submissions were received. No consideration was given by the Board as to whether the complaint was vexatious.
- [6] The Respondent also gave notice that he wanted the matter to be heard in private. The Presiding Member confirmed an application could be made verbally on the day of the hearing and that the burden is on the Respondent to establish why the matter should be held in private. The Respondent was also informed that a matter being heard in private is not the same as prohibiting publication of a matter.

Procedure

- [7] Prior to the hearing the Respondent and the Board were provided with all of the documents the Investigator had in her power or possession.
- [8] Following the Board receiving the evidence and submissions from the parties. The Board discussed whether Board Member Keys should take part in the Board's deliberations. The Board noted that the Respondent and Mr Keys were competing candidates in a forthcoming local body election. It was decided that, so as to remove any perception of bias, he would take no part in the Board's deliberations. No other Member had any conflicts of interest in relation to the matters under consideration.

Function of Disciplinary Action

- [9] 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.
- [10] 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."

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

- [11] 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.

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 events that lead to the complaint and the prescribed electrical work that was carried out were generally accepted by the parties. No additional evidence was led as regards those events. What was in contention was whether the prescribed electrical work amounted to a disciplinary offence, or not. To assist the Board both the Investigator and the Respondent had expert witnesses appear and provide their opinions.

The Prescribed Electrical Work

- [14] The Respondent was engaged to provide power to a skyline garage and to install two socket outlets and four fluorescent lights. The Respondent installed the supply and fittings as what he described as a final sub-circuit which originated at a C20 30mA RCBO the Respondent had installed.
- [15] Following the installation another electrical worker, [REDACTED], attended the property for an unrelated job. The electrical worker considered the installation should have used a distribution board with overload protection in the garage. The Respondent returned to carry out further prescribed electrical work and to modify the configuration of the garage wiring. [REDACTED] made a complaint about the Respondent’s work.
- [16] The Investigator sought an opinion on the prescribed electrical work. Mr John McAlpine was engaged to review the installation. He reviewed and provided an opinion on the revised configuration. He considered there was noncompliant prescribed electrical work. No comment was made on the original configuration about which the complaint was made. Mr McAlpine’s opinion resulted in the charges that were put before the Board.
- [17] The Respondent, in his response to the complaint described the revised configuration as follows:

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

Prior to the PDL692X combination socket/switch I installed a 6-way switchboard (GWRDB6) with a single pole main switch feeding the sockets and a C6 MCB feeding the lighting circuit. Short circuit and residual current protection for the entire circuit and overload protection for the sockets was provided by the C20 RCBO in the house. Overload protection for the fixed lighting load was provided by the C6 MCB. COCESC000050 covers all work to this point.

- [18] The certificate referred to by the Respondent described the prescribed electrical work as:

Install new 6mm submain to new garage distribution board protected by C20 30mA RCBO on house main distribution board. Submain buried in conduit to 600mm between house and garage. Install garage final subcircuit to three socket outlets: one at distribution board, one for garage door opener and two at work bench. Install garage final sub circuit to four double 58W fluorescent light fittings via C6 MCB.

- [19] Notwithstanding the response to the complaint and the certification the Respondent and his expert, Mr Alan Knewstubb maintained that the supply to the garage was a final sub-circuit and that, as such, the work was compliant.
- [20] Mr McAlpine for the Investigator took the position that the wiring, as presented, was a sub-main feeding a distribution board and there were noncompliant elements as set out in the charges.

The Charges – First Allegation

- [21] The Board had four allegations before it. The first was that there was an incorrectly wired main switch/isolator installed on the distribution board. Mr McAlpine produced the following photograph:



- [22] Mr McAlpine's opinion was that the switch labelled "main switch" was fed by a sub main from the main switchboard and that it was contained within a distribution board. In his opinion labelling the switch as a "main switch" created an expectation that all of the fittings within the garage would be isolated if the switch was placed in the off position. He noted that the lighting circuit in the garage had been fed from the live side of the switch which meant that power would continue to flow to the lights if the switch was turned off. In essence the switch only isolated the two sockets located adjacent to the distribution board. Mr McAlpine's report stated:

The main switch did not isolate the lighting circuit. This presents an electrical hazard as the home owner should have been able to rely on the fact that the main switch would have isolated the installation which would have rendered the installation safe if there had been a problem or if the homeowner had wanted to work on the lights connected to the circuit.

- [23] The Respondent gave evidence that he used the enclosure that the switch was just that, an enclosure and not a distribution board. Both he and Mr Knewstubb submitted that the wiring within the garage was a final sub-circuit with protection and isolation being provided at the point of origin at the main switch board.
- [24] The Respondent further submitted that there was no risk to persons or property as only an authorised person could legally carry out prescribed electrical work on the fittings within the garage and that such a person would proceed on the basis of prove test prove which would ensure that the circuit to the fitting was de-energised.
- [25] Mr Knewstubb also noted that there is no restriction on labelling a switch that is not a main switch as "main switch". His submission is that any number of switches in an installation can be labelled as "main switch".
- [26] It was also submitted that notwithstanding the allegation there was still effective protection in place by way of a residual current device at the main switch board.

Second Allegation

- [27] The second allegation was that there was no labelling to identify that there was a second independent power supply for the lighting circuit. The allegation related to the dual socket outlet shown in the photograph above and to the switch contained within it that controlled the lighting. Mr McAlpine's opinion was that, as the switch socket had an additional power supply to it from the lighting circuit breaker, there was a requirement to provide a label or warning that identified this additional power supply.
- [28] The Respondent and Mr Knewstubb provided their opinions that the standard Mr McAlpine referenced did not apply to the circumstances under consideration. The submission was that clause 2.3.2.1 of AS/NZS 3000:2007 related to live parts connected to more than one power supply whereas the live parts in the socket were each only connected to one power supply. Put another way whilst there was more than one live part in the fitting each live part only had one power supply going to it.

Third Allegation

- [29] The third allegation was that two switch sockets have been connected to the load side of the main switch without any additional circuit protection. Again, the allegation relied on the opinion that the garage was fed by a submain and contained a sub-board. Mr McAlpine submitted that although the circuits were protected by a 20 amp RCBO located in the main switchboard in the house there was no local overload / short circuit / RCD protection. In his opinion as the circuit originated from a distribution board the protection for the circuit should be located within the distribution board. He noted that if a fault was to occur on the power circuit the circuit breaker in the house would trip which would also result in the loss of power to the lighting circuit as well. Mr McAlpine relied on a supply circuit discrimination clause in AS/NZS 3000:2007.
- [30] The Respondent reiterated his submission that the enclosure was not a distribution board and that his using an enclosure that can also be used as a distribution board did not make it one.
- [31] The Respondent and Mr Knewstubb also submitted that there was no requirement for extra circuit protection within the garage and that discrimination was provided upstream at the main switchboard in that the installed protection provided discrimination between the installation and the supply fuse on the distribution network.

Fourth Allegation

- [32] The fourth allegation was that there was mechanical protection was provided to the lighting cable which ran over truss gang nail plates. Photographs were provided of the cables. They showed cables position closed to the roofing iron on the vertical plane of the truss. Mr McAlpine gave evidence that there were sharp edges on more than one of the plates and that the trusses were used for storage. Mr Stockley stated that he had not observed any sharp edge and that there was little or no movement of the cables and that there was no evidence of damage to them when he placed them in conduit to satisfy Mr McAlpine's concerns. Mr Knewstubb submitted that there was no risk of mechanical damage and no requirement under AS/NZS 3000 to provide mechanical protection in such circumstances.

Submissions

- [33] The experts appearing before the Board made submissions, both in writing and at the hearing, as regards the Energy (Safety) Regulations and the relevant electrical standards that applied. Those submissions will be dealt with as part of the Board's discussion on the allegations put before it.

Legal Provisions

- [34] The charges put before the Board were laid in the alternatives of contrary to an enactment under section 143(a)(ii) and, as an alternative, negligence and incompetence under section 143(a)(i). There is a hierarchy to these 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.
- [35] Contrary 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

- (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.*

- [36] 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.

- [37] 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.
- [38] 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 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*”.

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

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)

⁹ *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

- [39] 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.
- [40] 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.
- [41] 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.]*

- [42] 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.
- [43] Turning to seriousness in *Collie v Nursing Council of New Zealand*¹³ the Court's noted, as regards the threshold for disciplinary matters, that:

[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

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

which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness.

Board's Conclusion and Reasoning

- [44] The Board has decided that the Respondent **has** carried out prescribed electrical work in a manner contrary to an 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
- (a) there was an incorrectly wired main switch/isolator installed on the distribution board;
 - (b) No labelling was used to identify that there was a second independent power supply for a lighting circuit which had been connected to a separate switch on socket outlet; and
 - (c) two switch sockets had been connected to the load side of the main switch without any additional circuit protection.
- [45] The Board has decided that the Respondent **has not** committed a disciplinary offence in respect of the allegations in particulars (d) of the charges.
- [46] The reasons for the Board's decisions follow.

Findings on the First Particular

- [47] The wording of the first allegation was that the Respondent had incorrectly wired main switch/isolator installed on the distribution board. The essence of the allegation was that what was labelled as a main switch did not isolate all of the circuits in the garage and
- [48] In coming to its decision, the Board has found that the Respondent's intention when wiring the garage was to wire it as an outbuilding with a distribution board. This is evidenced by his certificate of compliance which stated:

Install new 6mm submain to new garage distribution board protected by C20 30mA RCBO on house main distribution board. Submain buried in conduit to 600mm between house and garage. Install garage final subcircuit to three socket outlets: one at distribution board, one for garage door opener and two at work bench. Install garage final sub circuit to four double 58W fluorescent light fittings via C6 MCB.

- [49] Regulation 67(2)(b) of the Safety Regulations states that a certificate of compliance must describe the work done. Under regulation 65 prescribed electrical work is deemed to be complete once a certificate of compliance is issued. A certificate of compliance is a document that others are entitled to rely on and in this respect regulation 69(c) states that it is an offence to issue a certificate of compliance that contains incorrect information.

- [50] The Respondent maintained that notwithstanding his certificate of compliance the installation was not a submain to a distribution board but that it was a final sub-circuit. If that submission was accepted then the Respondent would have been in breach of regulation 69 and liable of a level 2 penalty which, in the case of an individual, is a fine not exceeding \$10,000.
- [51] It is also important to consider how the homeowner and others including safety services would perceive the garage wiring and the certification. The owner was presented with a certificate of compliance that stated it was a submain and a distribution board. The enclosure used has every appearance of a distribution board. It contains a switch that is labelled as a main switch. It would not be unreasonable to expect persons who are seeking to isolate the power supply to the garage to expect that by turning off what was labelled as the main switch that the power supply to the fittings in that garage would be isolated. As a result of how the garage was wired that would not have occurred.
- [52] It is also important to note the purposes of the Act as outlined above. They include the protection of persons and property. The Board is required to promote those purposes.
- [53] Having found that the garage was supplied by a sub-main and a distribution board the Board finds that the provisions of clause 2.3.4.1(b) of AS/NZS 3000:2007 applies. It stipulates that a main or isolating switch or switches shall be installed in an outbuilding to control the electrical installation in the outbuilding.
- [54] Clause 2.3.3 of AS/NZS 3000:2007, in respect of main switches stipulates that they are to provide for effective isolation of electricity supply. The main switch installed did not provide effective isolation. On this basis the Board finds that the Respondent has carried out prescribed electrical work in a manner that was contrary to AS/NZS 3000:2007 which is a cited standard in Schedule 2 of the Safety Regulations. The elements of section 143(a)(ii) have therefore been satisfied.
- [55] The Board did not, however, consider that the Respondent's conduct reached the threshold for action to be taken under section 143(a)(i). Whilst his conduct may have fallen below the standards expected of a registered and licensed electrician the conduct was not sufficiently serious to warrant a finding of negligence or incompetence.

Findings on the Second Particular

- [56] The second particular related to a failure to identify a second independent power supply for the lighting circuit which had been connected to a separate switch on a socket outlet. Mr McAlpine submitted that clause 2.3.2.1 had been breached. Mr Knewstubb submitted that the live parts in the socket were each only connected to one power supply and as such that the clause did not apply.
- [57] The Board has made a finding that the garage had been wired as a sub main to a distribution board. Given this finding the Board accepts Mr McAlpine's submission

that there were two separately controlled sub circuits supplies connected to live parts within the enclosure and that labelling was therefore required so as to ensure the safety of persons carrying out repairs or maintenance. Without a cautionary label an electrical worker or other person may not have been aware of this and their safety could have been put at risk.

[58] In coming to its decision, the Board has applied a purposive approach to the interpretation of AS/NZS3000. A purposive approach is one that promotes the overall intention or purpose of a legislative provision. In this respect 5 of the Interpretation Act 1999. It states:

5 *Ascertaining meaning of legislation*

- (1) *The meaning of an enactment must be ascertained from its text and in the light of its purpose.*
- (2) *The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.*
- (3) *Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.*

[59] Whilst AS/NZS 3000 is not an enactment it does, within the context of a cited standard, come within the legislative framework and as such it is appropriate to apply a purposive approach to its interpretation. On this basis it is clear that the overall purpose of section 2.3 of AS/NZS 3000 is that ensuring the safety of persons who carry out repairs or maintenance. This is because of the overriding provisions to clause 2.3.2.1 in clause 2.3.1 which stipulates:

Electrical installations shall be provided with devices to prevent or remove hazards associated with the electrical installation and for maintenance of electrically activated equipment.

Electrical installations shall include all switching devices or other means of disconnection necessary to enable operations, repairs and maintenance work to be carried out with safety.

[60] It is noted that there is then general requirement under clause 2.3.2.1 that every circuit shall be capable of being isolated from each of the supply conductors. The clause goes onto provide that a group of circuits may be isolated by a common switch and that:

Provision shall be made to enable isolation of electrical equipment and to prevent electrical equipment from being inadvertently energised. The means of isolation shall be such that a deliberate action in addition to the normal method of operation is required to energise the circuit.

- [61] A note to the clause stipulates that precautions may include “warning tags or notices”. Clause 2.3.2.1 then goes on to state:

Where an item of equipment or enclosure contains live parts connected to more than one supply, a notice shall be placed in such a position that any person gaining access to live parts will be warned of the need to isolate those parts from the various supplies.

- [62] Given the above the Board has decided that the disciplinary offence has been committed.

Findings on the Third Particular

- [63] The third allegation was two switch sockets had been connected to the load side of the main switch without any additional circuit protection. Mr McAlpine relied on clause 2.5.7.2 of AS/NZS 3007:2007. The clause relates to general supply circuit discrimination.
- [64] The actual allegation was that two switch sockets had been connected to the load side of the main switch without any additional circuit protection.
- [65] Section 2.4 of A/NZS 3000 provides for fault protection. Section 2.5 for protection against overcurrent. The provisions include a requirement for automatic disconnection of supply.
- [66] Clause 2.5.1.2 deals with submains and final sub circuits. The Board has found that the wiring to the garage was a submain. As such, the distribution board becomes a point of origin for sub circuits. That being the case there was, under clause 2.5.1.2 a requirement for protection at the origin of each circuit at the distribution board. The socket outlets did not have any local protection. As such the disciplinary offence has been committed.

Findings on the Fourth Particular

- [67] The final allegation related to a failure to provide mechanical protection. Reliance was placed on clause 3.1.2(f) of AS/NZS 3007:2007 which is a general statement as to protection against mechanical damaged and to clause 3.3.2.8. which relates to mechanical stress.
- [68] Given the placement of the cables on a vertical plane close to the roofing material the Board finds that there was not a risk of mechanical damage and as such that there was no breach of AS/NZS3000:2007.

Penalty, Costs and Publication

- [69] 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.
- [70] The Board heard evidence during the hearing relevant to penalty, costs and publication and has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

- [71] 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*¹⁴ 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.

- [72] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*¹⁵ 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.
- [73] The Board noted the circumstances under which the complaint came to the Board's attention. It also notes that the work that resulted in the allegations that were put before the Board came about as a result of remedial work undertaken and not as a consequence of the prescribed electrical work that lead to the complaint. It considers those are mitigating factors.
- [74] At the same time the Board noted the Respondent's general approach to the hearing and to his work was not necessarily one of putting safety first. It was concerned at his attitude that if a homeowner received an electric shock as a result of his work then that would be their fault as they would have been carrying out illegal work. Whilst that may well be the case it is not a good place to start from when carrying out prescribed electrical work. The Board would expect an electrical worker to

¹⁴ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

consider safety implications and reasonable take steps to protect persons. It is better to do more than may necessarily be required than to look for ways to strictly comply but potentially put persons at risk.

- [75] Notwithstanding the above Board has decided, on the basis of the matter being at the lower end of the scale and having taken the mitigation heard into account that a censure will be a sufficient penalty for this matter. A censure is a formal expression of disapproval.

Costs

- [76] 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.
- [77] 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 case¹⁶.
- [78] In *Collie v Nursing Council of New Zealand*¹⁷ 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.

- [79] Based on the above the Board's costs order is that the Respondent is pay the sum of \$1,000 toward the costs of and incidental to the matter. This is significantly less than 50% of actual costs.

Publication

- [80] 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 Act¹⁸. 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.
- [81] 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

¹⁶ *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.

¹⁷ [2001] NZAR 74

¹⁸ Refer sections 128 of the Act

of a disciplinary hearing. This is in addition to the Respondent being named in this decision.

- [82] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990¹⁹. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²⁰. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²¹. 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*²².
- [83] 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, however, common practice in disciplinary proceedings to protect the names of other persons involved as naming them does not assist the public interest.
- [84] Based on the above the Board will not order further publication.
- [85] 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

- [86] 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 \$1,000 (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.

- [87] 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.

¹⁹ Section 14 of the Act

²⁰ Refer sections 200 and 202 of the Criminal Procedure Act

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

Submissions on Penalty, Costs and Publication

[88] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on 6th September 2019. The submissions should focus on mitigating matters as they relate to the penalty, costs and publication orders. If no submissions are received then this decision will become final. If submissions are received then the Board will meet and consider those submissions prior to coming to a final decision on penalty, costs and publication.

Right of Appeal

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

Signed and dated this 6th day of August 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):*
 - (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*

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- (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.