

Before the Electrical Workers Registration Board

CE No. 22249

Electrical Worker: David Walsh (the Respondent)

Registration Number: LMD271277

Electrical Worker Number: EW 071661

Registration Class: Line Mechanic Distribution

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: Auckland

Hearing Type: In Person

Hearing and Decision Date: 14 December 2020

Board Members Present:

Mr M Orange (Presiding)
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
Mr M Perry, Registered Electrician

Appearances: Rebecca Garden for the Investigator
Phyllis Strachan for 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 a disciplinary offence under section 143(b)(ii) of the Act.

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Summary of the Board’s Decision

- [1] The Respondent negligently created a risk of serious harm or significant property damage when he carried out prescribed electrical work causing a phase and neutral transposition. He is fined the sum of \$1,500 and ordered to pay costs of \$225.

Introduction

- [2] The hearing resulted from a complaint about the conduct of the Respondent and a report under section 147G(1) of the Act from the Investigator that the complaint should be considered by the Board.

- [3] The Respondent was served with a notice setting out the alleged disciplinary offences the Investigator reported should be considered by the Board. They were:

1. *On or around 26 June 2019 at [Omitted], Mr David Walsh 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 colour coded the phase and neutral cables resulting in a transposition of the mains cable; and/or

(b) failed to correctly test the polarity of the phase and neutral conductors leaving the installation electrically unsafe.

In breach of Electricity Act 1992 section 82 and regulations 13, 20, 59 and 63 of the Electricity (Safety) Regulations 2010.

Or in the Alternative

2. *On or around 26 June 2019 at [Omitted], Mr David Walsh 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 colour coded the phase and neutral cables resulting in a transposition of the mains cable; and/or*
 - (b) *failed to correctly test the polarity of the phase and neutral conductors leaving the installation electrically unsafe.*

Or in the Alternative

3. *On or around 26 June 2019 at [Omitted], Mr David Walsh has negligently created a risk of serious harm to any person, or a risk of significant property damage, through having carried out or caused to be carried out prescribed electrical work being an offence under section 143(b)(ii) of the Act, IN THAT, he:*
- (a) *incorrectly colour coded the phase and neutral cables resulting in a transposition of the mains cable; and/or*
 - (b) *failed to correctly test the polarity of the phase and neutral conductors leaving the installation electrically unsafe.*

- [4] Prior to the hearing, the Respondent and the Board were provided with all of the documents the Investigator had in his/her power or possession.
- [5] No Board Members declared any conflicts of interest in relation to the matters under consideration.

Function of Disciplinary Action

- [6] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*¹ and in New Zealand in *Dentice v Valuers Registration Board*².
- [7] Disciplinary action under the Act is not designed to redress issues or disputes between a complainant and a respondent. In *McLanahan and Tan v The New Zealand Registered Architects Board*³ Collins J. noted that:

“... the disciplinary process does not exist to appease those who are dissatisfied The disciplinary process ... exists to ensure professional standards are

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

maintained in order to protect clients, the profession and the broader community.”

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

Procedure

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

Evidence

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

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

- [11] The matter proceeded on the basis of an Agreed Statement of Facts. The Statement set out that the Respondent was carrying out prescribed electrical work which involved the replacement of a pole. The Respondent was assisted by another Distribution Line Mechanic. The specific work involved the disconnection of cables on another pole before the pole requiring replacement could be removed. Once the new pole was in place, the assisting Line Mechanic reconnected the cables which then travelled underground to a dwelling house. After the cable had been removed from the pole, the Respondent reconfigured the connection of the neutral screen cable, which included stripping back the active (blue) and neutral (black) cores. He put the covers back on the wrong way in that the black cover was put on the phase and the coloured cover was on the neutral. The assisting Line Mechanic then reconnected the cables up the pole with blue to blue, assuming it was the active conductor and black to black assuming it was the neutral conductor.
- [12] The Respondent accepted that he was responsible for the testing of the installation and for signing the Northpower certification documents prior to livening. The assisting Line Mechanic notified the Respondent that he had made the final connections for the electricity to flow. The Respondent commenced testing. He used a Fluke T5-600 meter to test the earth. The method used to test was to connect the voltage probe into the banana plug connection of his trailing earth and the election chosen on the meter only provided a voltage indication. He also undertook a loop impedance test and a polarity test. The Respondent did not carry out the tests in a correct manner. The result was a cross-polarity to the supply which had the potential for injury to persons and property.

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

- [13] The Respondent noted he had 43 years' experience as a line mechanic, that the street he was working on was a busy thoroughfare and numerous cars and busses continued to use it while the job was underway requiring traffic management as one lane was closed. The Respondent stated he had to urgently signal a bus to slow down because of excessive speed causing a hazard. He accepted he put the wrong colour coding over the "covers". He believed he was distracted on the day due to personal circumstances and the vehicle hazard.
- [14] The Respondent was cooperative and accepted that he had incorrectly colour coded the phase and neutral cables resulting in a transposition of the mains cable and had failed to correctly test the polarity of the phase and neutral conductors leaving the installation electrically unsafe.
- [15] The general rule is that all facts in issue or relevant to the issue in a case must be proved by evidence. As the Investigator and Respondent agreed to the facts as outlined above, it was not necessary to call any further evidence or to test the evidence as outlined in the Statement.

Board's Conclusion and Reasoning

- [16] The Board has decided that the Respondent **has** negligently created a risk of serious harm to any person, or a risk of significant property damage, through having carried out or caused to be carried out prescribed electrical work being an offence under section 143(b)(ii) of the Act, in that, he incorrectly colour coded the phase and neutral cables resulting in a transposition of the mains cable and failed to correctly test the polarity of the phase and neutral conductors leaving the installation electrically unsafe.
- [17] To make a finding under section 143(b)(ii) of the Act, the Board must make a finding that there was a risk of serious harm or significant property damage. 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.*

- [18] The relevant parts of Section 23 of the Health and Safety at Work Act 2015 are:

23 Meaning of notifiable injury or illness

- (1) *In this Act, unless the context otherwise requires, a notifiable injury or illness, in relation to a person, means—*
- (a) *any of the following injuries or illnesses that require the person to have immediate treatment (other than first aid):*
 - (i) *the amputation of any part of his or her body;*
 - (ii) *a serious head injury;*
 - (iii) *a serious eye injury;*
 - (iv) *a serious burn;*

- (v) *the separation of his or her skin from an underlying tissue (such as degloving or scalping):*
- (vi) *a spinal injury:*
- (vii) *the loss of a bodily function:*
- (viii) *serious lacerations:*
- (b) *an injury or illness that requires, or would usually require, the person to be admitted to a hospital for immediate treatment:*
- (c) *an injury or illness that requires, or would usually require, the person to have medical treatment within 48 hours of exposure to a substance:*

[19] 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.

[20] 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).

[21] 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.

[22] Section 143(b)(ii) also requires that the Respondent be found to have been negligent. Negligence is 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*⁶ test of negligence which has been adopted by the New Zealand Courts⁷.

[23] The New Zealand Courts have stated that an assessment of negligence in a disciplinary context is a two-stage test⁸. The first is for the Board to consider whether the practitioner has departed from the acceptable standard of conduct of a

⁵ Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd (The Wagon Mound No 2) [1967] 1 AC 617

⁶ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁷ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

⁸ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

professional. The second is to consider whether the departure is significant enough to warrant a disciplinary sanction.

[24] 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 Act⁹. 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 practitioner¹⁰.

[25] 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.]*

[26] 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.

[27] Turning to seriousness in *Collie v Nursing Council of New Zealand*¹¹ 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 which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness.

[28] Looking at the conduct in question, the Respondent made an error when he incorrectly colour coded cables. That mistake led to and caused the transposition. He

⁹ *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

¹⁰ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

¹¹ [2001] NZAR 74

also failed to adequately test. Had he carried out the required tests in the correct manner, the transposition would have been identified and rectified. It is to be noted that, under the Electricity (Safety) Regulations 2010, testing is a mandatory requirement and is fundamental to the safety regime under the Regulations. The installation was left in an electrically unsafe as per regulation 5 of the Safety Regulations state as a result of the Respondent's conduct:

5 Meanings of electrically safe and electrically unsafe

In these regulations, unless the context otherwise requires—

electrically safe means, in relation to works, installations, fittings, appliances, and associated equipment, that there is no significant risk that a person or property will be injured or damaged by dangers arising, directly or indirectly, from the use of, or passage of electricity through, the works, installations, fittings, appliances, or associated equipment

electrically unsafe means, in relation to works, installations, fittings, appliances, and associated equipment, that there is a significant risk that a person may suffer serious harm, or that property may suffer significant damage, as a result of dangers arising, directly or indirectly, from the use of, or passage of electricity through, the works, installations, fittings, appliances, or associated equipment.

- [29] The Board finds that a reasonable practitioner would have correctly coded the cables and would have carried out the correct testing prior to the installation being livened. The Respondent's failures were serious transgressions. The installation that was livened was, as a result of the Respondent's conduct, not electrically safe. There was a significant risk that a person or property would be injured or damaged. Given those factors, the Board, which includes persons with expertise in the electrical industry, was satisfied that the Respondent had committed an offence under section 143(b)(ii) of the Act.

Penalty, Costs and Publication

- [30] 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.
- [31] The Respondent made submissions at the hearing as regards penalty, costs and publication.

Penalty

- [32] 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*¹² 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.

- [33] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*¹³ 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.
- [34] The offending was serious. A commensurate penalty is required. The Board considered suspending the Respondent’s licence and imposing a training order. The Board noted, however, that the Respondent’s employer had arranged for training including training on testing. His employer was also monitoring his reintegration into line work. Given those factors, the Board decided that a suspension was not required. The Board instead, decided to impose a fine. It adopted a starting point of a fine of \$5,000.
- [35] The Respondent was stood down from his role as a foreman and his pay was reduced as a result of the incident. He was remorseful and has cooperated. He has accepted responsibility. The Board has taken those factors into account as mitigation. The Respondent also submitted that he was distracted by on-site traffic and by personal issues. The Board does not consider that those matters are mitigating factors. The Respondent should have identified and taken steps to deal with the distractions.
- [36] Taking the mitigating factors into account, the Board has decided that it would reduce the fine to \$1,500.

¹² HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

Costs

- [37] 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.
- [38] 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 case¹⁴.
- [39] In *Collie v Nursing Council of New Zealand*¹⁵ 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.

- [40] Based on the above the Board's costs order is that the Respondent is to pay the sum of \$225 toward the costs of and incidental to the matter. In setting the amount of costs, the Board took into account that the Respondent had agreed to the matter proceeding by way of an Agreed Statement of Facts.

Publication

- [41] 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 Act¹⁶. 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.
- [42] 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.
- [43] Within New Zealand, there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990¹⁷. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction¹⁸. Within the disciplinary

¹⁴ *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.

¹⁵ [2001] NZAR 74

¹⁶ Refer sections 128 of the Act

¹⁷ Section 14 of the Act

¹⁸ Refer sections 200 and 202 of the Criminal Procedure Act

hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive¹⁹. 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*²⁰.

- [44] 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 interest²¹. 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.
- [45] Based on the above, the Board decided that there were surrounding circumstances which meant that further named publication was not warranted. The Board will, however, publish a general article in the Electron summarising the matter but will not order further publication. The Respondent will not be identified in the Electron.
- [46] 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

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

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

Costs: Pursuant to section 147N of the Act, the Respondent is ordered to pay costs of \$225 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

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

The Respondent will be named in this decision.

A summary of the matter will be published by way of an article in the Electron which will focus on the lessons to be learnt from the case. The Respondent will not be named in the publication.

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

¹⁹ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

²⁰ *ibid*

²¹ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Right of Appeal

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

Signed and dated this 15th day of January 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:*
 - (iii) *order that the person may not apply to be reregistered or re-licensed before the expiry of a specified period:*
 - (b) *order that the person's registration or practising licence (or both), or the person's provisional licence, be suspended—*
 - (i) *for any period that the Board thinks fit; or*
 - (ii) *until that person does 1 or more of the things specified in subsection (2):*
 - (c) *order that the person's registration or practising licence (or both), or the person's provisional licence, be restricted for any period that the Board thinks fit, in either or both of the following ways:*
 - (i) *by limiting the person to the work that the Board may specify:*
 - (ii) *by limiting the person to doing, or assisting in doing, work in certain circumstances (for example, by limiting the person to work only on approved premises or only in the employ of an approved employer):*
 - (d) *order that the person be disqualified from doing or assisting in doing prescribed electrical work that the person would otherwise be authorised to do in that person's capacity as a person to whom this Part applies—*
 - (i) *permanently, or for any period that the Board thinks fit; or*
 - (ii) *until that person does 1 or more of the things specified in subsection (2):*
 - (e) *order the person to do 1 or more of the things specified in subsection [\(2\)](#) within the period specified in the order:*
 - (f) *order the person to pay a fine not exceeding \$10,000:*
 - (g) *order that the person be censured:*
 - (h) *make no order under this subsection.*
- (2) *The things that the person can be required to do for the purposes of subsection (1)(b), (d), and (e) are to—*
- (a) *pass any specified examination:*
 - (b) *complete any competence programme or specified period of training:*

-
- (c) attend any specified course of instruction.
- (3) The Board may take only 1 type of action in subsection (1) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b), (c), (e) or (g).
- (4) No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an—
- (a) offence for which the person has been convicted by a court; or
- (b) infringement offence for which the person has been issued with an infringement notice and has paid an infringement fee.
- (5) The Board must not exercise any authority conferred by this section in respect of any offence committed by any person before the date of that person's registration or, as the case may be, the date on which that person's provisional licence was issued if at that date the Board was aware of that person's conviction for that offence.
- (6) If a person is registered under Part 10 in respect of more than 1 class of registration, the Board may exercise its powers under subsection (1)(a) to (e) in respect of each of those classes or 1 or more of those classes as the Board thinks fit.]

ⁱⁱ Section 147ZA Appeals

- (1) A person who is dissatisfied with the whole or any part of any of the following decisions, directions, or orders may appeal to the District Court against the decision, direction, or order:
- (e) any decision, direction, or order under any of sections 108, 109, 120, 133, 137, and 153 or Part 11 (except section 147C).

Section 147ZB Time for lodging appeal

An appeal under section 147ZA must be brought within—

- (a) 20 working days after notice of the decision, direction, or order was given to, or served on, the appellant; or
- (b) any further time that the District Court may allow on application made before or after the expiration of that period.