

## **Before the Electrical Workers Registration Board**

CE No. 22092

Employer Licence Holder: Wells Instrument and Electrical Services Limited (Wells)

Employer Licences: ORG000158

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### **Indicative Decision of the Board in Respect of the Conduct of an Employer Licence Holder Under section 120 of the Electricity Act 1992**

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Hearing Type: On the Papers

Decision Date: 20 March 2020

#### **Board Members Present:**

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

#### **Procedure:**

The matter was considered by the Electrical Workers Registration Board (the Board) under the provisions of Part 10, Subpart 2 of the Electricity Act 1992 (the Act), the Electricity (Safety) Regulations 2010 (the Regulations) and the Board's Complaints Against Employer Licence Holders Rules.

#### **Indicative Board Decision:**

Wells **has not** breached section 120(1)(e) of the Act.

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## Introduction

- [1] The on the papers hearing resulted from a complaint about prescribed electrical work carried out by Wells under the authority of Employer Licences issued by the Board under section 115 of the Act.
- [2] Wells was served with a Notice of Hearing dated 7 October 2019 setting out the allegations.

## The Allegations

- [3] The complaint was made by [REDACTED], an employee of [REDACTED], a division of [REDACTED] (the Complainant). It related to prescribed electrical work carried out at [REDACTED]. The complaint set out that an electrical worker who was carrying out prescribed electrical work at the property received an electric shock which, it was alleged, resulted from a transposition caused by a Wells employee who was completing a meter replacement. The complaint summarised that the Wells employee fitted a new meter and that he used a residual current device (RCD) in the switchboard for a load test and in doing so transposed a neutral conductor connecting it to the phase conductor.
- [4] Wells denied the allegation. It submitted that the transposition was pre-existing and/or that it was caused by the other electrical worker on site. It further denied that the employee had carried out a load test on an RCD.
- [5] The matter the Board decided to investigate was whether section 120(1)(e) of the Act had been breached by a person carrying out prescribed electrical work under the authority of the Wells Employer Licence.

[6] Section 120(1)(e) of the Act provides:

**120 Cancellation, suspension, and other actions in relation to employer licences**

(1) *The Board may (in relation to a matter raised by a complaint or by its own inquiries) take any of the actions referred to in subsection (2) in relation to an employer licence if it is satisfied that the employer licence holder—*

(e) *has failed to ensure that the prescribed electrical work done by employees of that person—*

(i) *is at all times carried out safely and competently; and*

(ii) *complies with the requirements of this Act and any regulations.*

**Procedure**

[7] Section 121 of the Act requires that the employer licence holder be given the opportunity to respond to a complaint:

**121 Board must give employer licence holder reasonable opportunity to be heard**

*The Board must not take any of the actions referred to in section 120 unless it has first—*

(a) *informed the employer licence holder concerned as to why it may take any of those actions; and*

(b) *given that person a reasonable opportunity to make written submissions and be heard on the question, either personally or by that person's representative.*

[8] The Act does not provide any processes or procedures in respect of the investigation of complaints other than the above. The Board does maintain Rules on how complaints against employer licence holders are dealt with – O-R-07A Complaints Against Employer Licence Holders (the Rules).

[9] The initial investigation was carried out under the direction of the Registrar. The Board appointed legal counsel to assist.

[10] A prehearing conference was held on 29 November 2019. Legal Counsel for Wells sought further information and disclosure. A formal request was subsequently made. A Board Minute was issued on 11 February 2020 providing for further investigations and disclosure. Wells was granted an opportunity to respond to the further disclosure.

- [11] Following the additional disclosure, a “without prejudice” letter dated 12 March 2020 was provided by Wells.
- [12] On 20 March 2020 a conference call was convened with Wells and its Legal Counsel to discuss how the matter would proceed. The Presiding Member indicated that the Board would deal with the matter on the papers and by way of an indicative decision with a right for Wells to respond to it or to seek a formal hearing if it disagreed with the findings. On the basis that Wells retained the right to seek that the Board’s indicative decision be set aside and for a formal hearing to be held, consent was given for the without prejudice letter of 12 March 2020 to be taken into consideration as part of the indicative decision process.
- [13] It should be noted that the procedure the Board uses for employer licence matters is inquisitorial, not adversarial. An employer licence complaint is not prosecuted before the Board. Rather, it is for the Board to carry out any further investigation that it considers is necessary prior to it making a decision. In this respect the Act provides that the Board may regulate its own procedures. It has what is described as a summary jurisdiction in that the Board has a degree of flexibility in how it deals with matters; it retains an inherent jurisdiction beyond that set out in the enabling legislation . As such it may depart from its normal procedures if it considers doing so would achieve the purposes of the Act and it is not contrary to the interests of natural justice to do so. It was on this basis that the Board has decided that a formal hearing was not necessary.

**Board’s Indicative Decision**

- [14] The Board has decided that Wells has not breached section 120(e) of the Act. The Board’s decision has been formed on the basis of two considerations.
- [15] The first is that Board does not consider that the evidence currently before it establishes, on the balance of probabilities, that the transposition was caused by the Wells employee.
- [16] The second is that, even if the employee did cause the transposition, the Board has decided that Wells had in place the necessary system of operation to ensure the prescribed electrical work would have been carried out safely, competently and compliantly had those systems been adhered to. It is important to note in this respect that it does not necessarily follow that section 120(e) of the Act will have been breached if an employee carries out prescribed electrical work under an employer licence in a noncompliant manner. It may be an indicator of a failure. What has to be determined is whether the employer had the necessary systems in place to ensure the prescribed electrical work would have been carried out safely, competently and compliantly had those systems been adhered to.

### Evidentiary Standard

- [17] The Board must be satisfied on the balance of probabilities that the offending has occurred. The relevant authority is *Z v Dental Complaints Assessment Committee*<sup>1</sup> where Justice McGrath in the Supreme Court of New Zealand stated:

*[102] The civil standard has been flexibly applied in civil proceedings no matter how serious the conduct that is alleged. In New Zealand it has been emphasised that no intermediate standard of proof exists, between the criminal and civil standards, for application in certain types of civil case. The balance of probabilities still simply means more probable than not. Allowing the civil standard to be applied flexibly has not meant that the degree of probability required to meet the standard changes in serious cases. Rather, the civil standard is flexibly applied because it accommodates serious allegations through the natural tendency to require stronger evidence before being satisfied to the balance of probabilities standard.*

*[105] The natural tendency to require stronger evidence is not a legal proposition and should not be elevated to one. It simply reflects the reality of what judges do when considering the nature and quality of the evidence in deciding whether an issue has been resolved to “the reasonable satisfaction of the Tribunal”. A factual assessment has to be made in each case. That assessment has regard to the consequences of the facts proved. Proof of a Tribunal’s reasonable satisfaction will, however, never call for that degree of certainty which is necessary to prove a matter in issue beyond reasonable doubt.*

- [18] An extensive investigation was undertaken. The Board has been provided with signed witness statements and with responses to the allegation from Wells. The Board has not yet tested the evidence. The Act does not, however, provide the Board with the ability to summons witnesses or to take evidence on oath. Nor do the provisions under section 147W of the Act, which allow for relaxed rules of evidence, apply as the section states it only applies to Part 11 whereas employer licence matters and section 120 come within Part 10.
- [19] Given the above limitations the Board has proceeded on the basis of an evaluation of both the inculpatory and exculpatory documentary evidence to determine whether the evidence, as presented, would be sufficient to prove, on the balance of probabilities and applying the requirement for strong evidence as noted in *Z v Dental Complaints Assessment Committee*, that the Wells employee caused a transposition.
- [20] On that basis the Board has decided that the documentary evidence has not established to the required standard that the Wells employee caused the transposition.

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<sup>1</sup> [2009] 1 NZLR 1

[21] A hearing, where the evidence could be tested and witnesses questioned, may result in a different finding. However, given the Board’s finding that not all of the elements of the section 120(e) have been established it considers a hearing is not required.

### **Elements of the Offence**

[22] The elements of section 120(e) that have to be satisfied, if the Board is to uphold a complaint and take action, are a failure to ensure prescribed electrical work was carried out safely, competently and in compliance with the requirements of the Act.

#### The First Elements – A Failure to Ensure

[23] The Act and the Safety Regulations set up a framework for ensuring prescribed electrical work is carried out safely, competently and compliantly.

[24] The main requirement is that in section 115:

#### **115 Employer licence**

(1) *A person is, on application in the prescribed form (if any) and on payment of the prescribed fee (if any), entitled to be issued with an employer licence by the Board if the person satisfies the Board that the person will at all times maintain a system of operation—*

(a) *that complies with the requirements that are prescribed by regulations; and*

(b) *that is sufficient to ensure that employees of that person who do, or assist in doing, prescribed electrical work—*

(i) *are competent to carry out the range of work for which they are employed; and*

(ii) *receive the supervision and training that is necessary to ensure that the work—*

(A) *is carried out safely and competently; and*

(B) *complies with the requirements of this Act and any regulations.*

[25] The section refers to a “system of operation”. The Safety Regulations set out the requirements for a system of operation in regulation 94:

#### **94 Requirements for system of operation of holders of employer licences**

(1) *For the purposes of section 115(1)(a) of the Act, the requirements for the system of operation that must be maintained by the holder of an employer licence are that the holder—*

(a) *identifies the prescribed electrical work (identified prescribed electrical work) that will be undertaken under the licence; and*

(b) *identifies the skills and training required in order to carry out each kind of identified prescribed electrical work; and*

(c) *has in place procedures for each of the following:*

- (i) *carrying out, supervising, and monitoring the identified prescribed electrical work:*
    - (ii) *investigating injuries caused to persons, and damage caused to property, as a result of carrying out any identified prescribed electrical work:*
    - (iii) *taking action to prevent, and in response to, injuries to persons or damage to property that results from carrying out the identified prescribed electrical work;*  
*and*
  - (d) *maintains a manual that sets out the matters listed in subclause (2).*
- (2) *The manual referred to in subclause (1)(d) must set out—*
- (a) *all the matters referred to in subclause (1)(a) to (c); and*
  - (b) *the names of every employee of the holder who is to carry out identified prescribed electrical work, along with a description of the identified prescribed electrical work that each employee is trained, and has the skills, to do; and*
  - (c) *the location and address of each place of work from which the holder of the licence operates, and that is intended to be covered by the licence; and*
  - (d) *a contact person for the licence, who must be an employee of the holder, identified by name or position.*

[26] The Board has no discretion as regards to the issue of an employer licence. It must, under section 116 of the Act, issue one if an applicant produces certification from an approved person to the effect that their system of operation complies with the legislative requirements. The requirements for certification are provided for in regulation 95 of the Safety Regulations:

**95 Certification of system of operation**

- (1) *For the purposes of section 116(1) of the Act, an approved person may certify a system of operation if the approved person is satisfied that—*
- (a) *the system of operation is sufficient to ensure that the employer’s employees who do, or assist in doing, prescribed electrical work—*
    - (i) *are competent to carry out the range of work for which they are employed; and*
    - (ii) *receive the supervision and training necessary to ensure that the work is carried out safely and competently, and that the work complies with the requirements of the Act and these regulations; and*
  - (b) *the employer has and maintains a manual referred to in regulation 94(1)(d) that complies with regulation 94(2); and*
  - (c) *the procedures referred to in regulation 94(1)(c) are being followed.*

(2) *The form of the certificate may be prescribed by the Board.*

[27] Wells has been certified in accordance with the above. It's compliance with the employer licence requirements was therefore established as at the time of certification. As part of the investigation Wells submitted information about its system of operation and details on training, quality assurance and auditing that applied at the time of the incident.

[28] Counsel for Wells submitted, in a letter dated 12 March 2020 to the Board:

7 *However, putting those matters aside, should the EWRB find [REDACTED] did cause the transposition, the EWRB must consider whether the elements of s 120 are met i.e it must be satisfied to the required legal threshold that Wells, an employer licence holder, failed to ensure:*

- (a) *that the prescribed electrical work done by employees of that person—*
  - (i) *is at all times carried out safely and competently; and*
  - (ii) *complies with the requirements of this Act and any regulations.*

8 *In this respect, it is noted as outlined in Wells' preliminary response and the attached without prejudice letter from Mr Wells:*

- (a) *Wells has a robust employer licence system, procedures, training and requirements for its staff approved to undertake meter installations to ensure all work is carried out safely and competently.*
- (b) *Wells processes, procedures and manuals comply with the requirements of the Electricity Act and regulations, approved by an accredited EWRB auditor.*
- (c) *Of critical importance to this present case, Wells requires its staff to complete work in accordance with Wells Approved Metering Test House Manual and specified workflow requirements provided for on a handheld device. It then collects that data and has it quality checked in real time.*
- (d) *There were no circumstances that would have put Wells on notice that [REDACTED] was not going to carry out work safely and competently. [REDACTED] electrical competencies and safety training was up to date. His previously completed work identified no compliance issues. [REDACTED] work had been the subject of Wells "audits".*



- 9 *If the EWRB determined [REDACTED] caused the transposition (which is disputed), then he did so outside the authority and control and the requirements of Wells. In those circumstances, it is difficult to see how the EWRB could conclude that Wells failed under s 120 to ensure its employees carried out work safely, competently and in accordance with the requirements of the Act.*
- 10 *To hold an employer licence holder liable under s 120 in these circumstances would be to hold an employer licence holder to an impractical and unreasonable standard. Such a finding would suggest Wells must have supervisors on site with its employer licence technicians to essentially watch them undertake their work. That burden would go against the core purpose of the employer licence regime. Nor has it been identified as a step required to be undertaken by Wells during audits of its procedures. We consider Wells has done everything reasonably practicable to ensure that its employees carried out work safely, competently and in accordance with the required regulations and standards.*

- [29] The Board agrees. As noted above the failure of a single employee to adhere to the employer licence holder's system of operation may be an indicator of a failure of the system itself. What is required for the Board to make a finding of a breach, however, is evidence of a systemic failure that resulted in the non-compliant prescribed electrical work. The Board, on reviewing the system of operation documentation provided, decided that the system of operation was fit for purpose and that, if followed, it would, on the balance of probabilities, have ensured the prescribed electrical work was carried out safely, competently and compliantly.
- [30] Having made that decision, the Board need not consider whether the other elements of the offence have been established.

#### **Submissions on Draft Decision**

- [31] The Board's decision is indicative. Whilst the finding is that Wells has not breached section 120(e) of the Act Wells is, in accordance with the process the Board stated it would adopt, invited to provide further evidence and/or to make written submissions on the Board's findings by no later than the close of business on 5 June 2020.
- [32] If submissions are received, then the Board will meet and consider those submissions. If no submissions or further evidence is received within the time frame specified, then this decision will become final.
- [33] Wells may, having received and considered the Board's Draft Decision, request that an in-person hearing is conducted. Any such request is to be made by 5 June 2020. If a request is made the Board will consider it and will set the matter down for a

hearing if the Board considers that it would be in the interests of natural justice to do so.

### **Right of Appeal**

[34] The right to appeal Board decisions is provided for in section 147ZA and 147ZB of the Act<sup>i</sup>.

Signed and dated this 8<sup>th</sup> day of May 2020



**Mel Orange**  
Presiding Member

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#### **<sup>i</sup> 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.*