

Before the Electrical Workers Registration Board

CE No. 22116
Electrical Worker: Trevor Whiting (the Respondent)
Registration Number: E 19879
Electrical Worker Number: EW 087584
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: Auckland
Hearing Type: In Person
Hearing Date: 19 September 2019
Decision Date: 19 September 2019

Board Members Present:

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

Appearances: Sarah Blick for the Investigator

Procedure:

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

Board Decision:

The Respondent **has** committed a disciplinary offence under section 143(b)(ii) of the Act.

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Introduction

- [1] The hearing resulted from a complaint about the conduct of the Respondent and a report under section 147G(1) of the Act from the Investigator that the complaint should be considered by the Board.
- [2] The Respondent was served with a notice setting out the alleged disciplinary offences the Investigator reported should be considered by the Board. They were:

First Alleged Disciplinary Offence

- 1. On or around February 2016 at [REDACTED] [REDACTED] Mr Trevor Whiting 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. Failed to provide automatic disconnection of supply by failing to install a MEN link on the installation; and/or
 - b. Failed to control a water heater supply by providing a main switch; and/or
 - c. Failed to adequately test the work prior to connection, resulting in an unsafe situation.

Or in the alternative

2. On or around February 2016 at [REDACTED]
[REDACTED] Mr Trevor Whiting 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. Failed to provide automatic disconnection of supply by failing to install a MEN link on the installation; and/or
 - b. Failed to control a water heater supply by providing a main switch; and/or
 - c. Failed to adequately test the work prior to connection, resulting in an unsafe situation.

Or in the Alternative

3. On or around at [REDACTED] Mr Trevor Whiting 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. Failed to provide automatic disconnection of supply by failing to install a MEN link on the installation; and/or
 - b. Failed to control a water heater supply by providing a main switch; and/or
 - c. Failed to adequately test the work prior to connection, resulting in an unsafe situation
- In breach of regulations 13(1) and 59(1) of the Electricity (Safety) Regulations 2010.

Second Alleged Disciplinary Offence

4. On or around February 2016 at [REDACTED]
[REDACTED] Mr Trevor Whiting has failed to provide a return being an offence under section 143(f) of the Act, IN THAT he failed to complete an Electrical Safety Certificate for general electrical work.

- [3] 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.
- [4] No Board Members declared any conflicts of interest in relation to the matters under consideration.

Function of Disciplinary Action

[5] 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.

[6] 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.”

[7] 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

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

Evidence

[9] 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.

[10] The matter proceeded on the basis of an Agreed Statement of Facts. The Statement set out that the Complainant had purchased a residence knowing that the vendor had recently engaged an electrician to undertake electrical maintenance. The Complainant was provided with a Certificate of Compliance (“COC”) for the electrical maintenance work which he relied on when he made the purchase.

[11] The CoC noted the Respondent had “Install[ed] 230V MEN distribution board, including, Main switch, RCD’s x 5 and MCB’s x 17. New outlets in lounge and kitchen

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

² [1992] 1 NZLR 720 at p 724

³ [2016] HZHC 2276 at para 164

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

replaced like for like. New 230V Sub-main for shed including new sub-board, main switch and three MCB's."

- [12] On 22 February 2016, prior to livening, the Respondent electrically tested the installation and recorded his findings on the CoC. He crossed out the Electrical Safety Certificate ("ESC") section of the CoC.
- [13] On 17 December 2018 the Complainant engaged another electrical worker to undertake electrical work. That electrical worker discovered the electrical work the Respondent had previously undertaken was non-compliant, in that there was no earth link in the distribution board; there was an incorrectly installed main switch; and there were incorrectly wired power points in the hallway and outside.
- [14] The Investigator engaged Mr Stephen Doust, an Electrical Inspector, to provide a technical report on the compliance of the Respondent's work. The Report found various noncompliance issues which resulted in the charges laid.
- [15] The Respondent accepted the findings in Mr Doust's report and accepted responsibility for the non-compliant work, noting:

The MEN link should only have been removed temporarily for an installation resistance test of complete installation and may have been forgotten to be reconnected. A visual inspection would have shown the MEN connection link been made before leaving site. It seems there was a mix up in the sequential testing regime.

- [16] The Respondent further noted that he was:
- genuinely shocked, upset and deeply remorseful, pleading guilty, in writing, to having failed to meet the rules and regulations ...*
- [17] Mr Doust also noted that there was a risk of serious harm in respect of the manner in which the prescribed electrical work was completed and the Respondent accepted that he had negligently created such a risk.
- [18] The Respondent also accepted that he had failed to provide an electrical safety certificate for the prescribed electrical work.
- [19] The general rule is that all facts in issue or relevant to the issue in a case must be proved by evidence. As the Investigator and Respondent agreed to the facts as outlined above it was not necessary to call any further evidence or to test the evidence as outlined in the summary.

Board's Conclusion and Reasoning

- [20] 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 failed to:

- (a) provide automatic disconnection of supply by failing to install a MEN link on the installation; and
- (b) control a water heater supply by providing a main switch; and
- (c) adequately test the work prior to connection, resulting in an unsafe situation.

[21] The Board reached its decision on the basis of the Agreed Statement of Facts and the Respondent's acceptance that he had committed a disciplinary offence under section 143(b)(ii) of the Act. It agreed that the tests for serious harm had been met. Serious harm is defined in section 2 of the Act as:

- (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.*

[22] Actual serious harm need not occur. There need only be a risk that either serious harm or significant property damage 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.

[23] The manner in which the installation was completed meant that there was a very real risk of serious harm. The MEN system and main switches are both fundamental aspects of electrical safety.

[24] The Board has also decided that the Respondent **has** failed to provide a return being an offence under section 143(f) of the Act in that he failed to complete an electrical safety certificate.

Penalty, Costs and Publication

[25] 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.

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

Penalty

[27] 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

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

*Patel v Complaints Assessment Committee*⁶ 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.

- [28] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*⁷ 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.
- [29] The Board noted that the matters were serious and that the penalty needed to reflect this. The Respondent gave evidence that the event had had a significant impact on him and his business. He also submitted that he has made changes to his business practices since and that he was confident there would not be a recurrence.
- [30] The Board adopted a starting point of a fine of \$3,000 which was consistent with penalties imposed for similar matters. It noted the early acceptance of responsibility and that the matter was dealt with by way of an Agreed Statement of Facts. On this basis it decided to reduce the fine by 50% to \$1,500.

Costs

- [31] 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.
- [32] 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 case⁸.
- [33] In *Collie v Nursing Council of New Zealand*⁹ 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.

⁶ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

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

⁸ *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.

⁹ [2001] NZAR 74

- [34] Based on the above the Board's costs order is that the Respondent is pay the sum of \$500 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

- [35] 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 Act¹⁰. 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.
- [36] 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.
- [37] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990¹¹. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction¹². Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive¹³. 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*¹⁴.
- [38] 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 interest¹⁵. 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.
- [39] Based on the above the Board will not order further publication.
- [40] 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.

¹⁰ Refer sections 128 of the Act

¹¹ Section 14 of the Act

¹² Refer sections 200 and 202 of the Criminal Procedure Act

¹³ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

¹⁴ *ibid*

¹⁵ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Penalty, Costs and Publication Orders

[41] 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 \$500 (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.

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

Right of Appeal

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

Signed and dated this 3 day of October 2019.



Mel Orange
Presiding Member

ⁱ Section 147M of the Act

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

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- (c) order that the person's registration or practising licence (or both), or the person's provisional licence, be restricted for any period that the Board thinks fit, in either or both of the following ways:
 - (i) by limiting the person to the work that the Board may specify:
 - (ii) by limiting the person to doing, or assisting in doing, work in certain circumstances (for example, by limiting the person to work only on approved premises or only in the employ of an approved employer):
 - (d) order that the person be disqualified from doing or assisting in doing prescribed electrical work that the person would otherwise be authorised to do in that person's capacity as a person to whom this Part applies—
 - (i) permanently, or for any period that the Board thinks fit; or
 - (ii) until that person does 1 or more of the things specified in subsection (2):
 - (e) order the person to do 1 or more of the things specified in subsection (2) within the period specified in the order:
 - (f) order the person to pay a fine not exceeding \$10,000:
 - (g) order that the person be censured:
 - (h) make no order under this subsection.
- (2) The things that the person can be required to do for the purposes of subsection (1)(b), (d), and (e) are to—
 - (a) pass any specified examination:
 - (b) complete any competence programme or specified period of training:
 - (c) attend any specified course of instruction.
 - (3) The Board may take only 1 type of action in subsection (1) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b), (c), (e) or (g).
 - (4) No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an—
 - (a) offence for which the person has been convicted by a court; or
 - (b) infringement offence for which the person has been issued with an infringement notice and has paid an infringement fee.
 - (5) The Board must not exercise any authority conferred by this section in respect of any offence committed by any person before the date of that person's registration or, as the case may be, the date on which that person's provisional licence was issued if at that date the Board was aware of that person's conviction for that offence.
 - (6) If a person is registered under Part 10 in respect of more than 1 class of registration, the Board may exercise its powers under subsection (1)(a) to (e) in respect of each of those classes or 1 or more of those classes as the Board thinks fit.]

ii Section 147ZA Appeals

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

Section 147ZB Time for lodging appeal

An appeal under section 147ZA must be brought within—

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