

Before the Electrical Workers Registration Board

CE No. 22658

In the matter of:

A disciplinary hearing before the Electrical Workers Registration Board

Between:

The Ministry of Business Innovation and Employment

And

Baoren Wang a registered and licensed electrical worker (E 260635, EW 117279, Electrician) (the Respondent)

**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:

Wellington

Hearing Type:

In Person – Formal Proof

Hearing and Decision Date:

22 February 2024

Board Members Present:

Mr R Keys, Registered Inspector (Presiding)

Mr M Orange, Barrister

Ms S Cameron, Registered Electrician

Mr T Wiseman, Registered Inspector

Mr J Hutton, Registered Inspector

Ms E Mogford, Lawyer

Appearances:

M Denyer for the Investigator

Procedure:

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

Board Decision:

The Respondent **has** committed disciplinary offences under sections 143(b)(ii), (a)(i) and (f) of the Act.

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Summary of the Board’s Decision

- [1] The Respondent negligently created a risk of serious harm, carried out prescribed electrical work in an incompetent manner, and provided a false or misleading return. He was fined \$5,000 for what was serious offending and ordered to pay costs of \$2,250. A record of the disciplinary offending will be recorded on the public Register for a period of three years.

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:

First Alleged Disciplinary Offence:

1. Between August 2018 – December 2019 at[OMITTED] Mr Baoren Wang 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 adequate protection against dangers arising from direct contact with live parts in that he left an unprotected live energised cable in the heat pump room; and/or
- (b) Utilised and connected conductors of an incorrect insulation colour as active conductors in light switch terminals; and/or
- (c) Failed to consider fundamental aspects relating to the size and quantity of conductors to be connected to electrical fittings and removed significantly greater amounts of insulation from conductors to be connected than what was required, resulting in unreliable electrical connections and a heightened risk of access to live parts; and/or
- (d) Failed to provide mandatory RCD protection to final sub circuits supplying lighting and socket outlets in that the RCD was bypassed.

In breach of regulations 13, 20, 59 of the Electricity (Safety) Regulations 2010.

Or in the Alternative

2. Between August 2018 – December 2019 at[OMITTED] Mr Baoren Wang 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 adequate protection against dangers arising from direct contact with live parts in that he left an unprotected live energised cable in the heat pump room; and/or
- (b) Utilised and connected conductors of an incorrect insulation colour as active conductors in light switch terminals; and/or
- (c) Failed to consider fundamental aspects relating to the size and quantity of conductors to be connected to electrical fittings and removed significantly greater amounts of insulation from conductors to be connected than what was required, resulting in unreliable electrical connections and a heightened risk of access to live parts; and/or
- (d) Failed to provide mandatory RCD protection to final sub circuits supplying lighting and socket outlets in that the RCD was bypassed.

Or in the Alternative

3. Between August 2018 – December 2019 at[OMITTED] Mr Baoren Wang 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 provide adequate protection against dangers arising from direct contact with live parts in that he left an unprotected live energised cable in the heat pump room.

Second Alleged Disciplinary Offence:

4. On or around August 2018 – December 2019 at[OMITTED] Mr Baoren Wang has provided a false or misleading return being an offence under section 143(f) of the Act, IN THAT, he:
 - (a) Certified the work as safe and lawful when aspects of the installation were electrically unsafe, and/or
 - (b) Provided a Certificate of Compliance which did not meet the regulatory requirements pertaining to the required information, in that it does not detail the connection and extent of mains work completed.

Service

- [4] The Respondent was given notice of the complaint on 27 January 2023. The Investigator subsequently attempted to contact the Respondent by phone and email and sought a response to the complaint. The Respondent did not respond.
- [5] Prior to considering the disciplinary charge, the Board needs to determine whether the Respondent has been provided with notice of it and with an opportunity to respond. This is to ensure that he is afforded his right to natural justice as section 156 of the Act stipulates that the Board “must observe the rules of natural justice”.
- [6] The principles of natural justice require that hearings are conducted in a manner that ensures that a respondent is given a fair opportunity to be heard, to contradict the evidence and that the decision-making process is conducted fairly, transparently and in good faith. In terms of a fair hearing, a respondent should be given the opportunity to respond to an allegation which, with adequate notice, might be effectively refuted. The Act recognise those principles and prescribes a process that must be complied with when a complaint is made. That process includes providing the Respondent with a copy of the complaint, an opportunity to respond to it¹ and to appear and be heard at a hearing.²
- [7] In this matter, the Respondent did not appear at the hearing. Nor did he engage in the investigation process.
- [8] Section 147H of the Act requires that the Respondent be served with a notice of the disciplinary hearing (Notice of Hearing).

¹ Section 146(4) of the Act.

² Section 147 of the Act.

- [9] Section 156B of the Act stipulates how notices can be served by the Board. The methods of service include sending it by email to the person's email address, which was how the notice was served.
- [10] Under section 128(2)(b) of the Act, the Register of Electrical Workers must contain contact details, which can include an email address. The email address that was used was the address that the Respondent provided and maintained on the Register. It is also noted that section 126(1)(c) of the Act states that the purposes of the Act include "to facilitate the administrative, disciplinary, and other functions of the Board, under this Act."
- [11] Given the above, the Board finds that the required notice was validly served.
- [12] It is noted that the Respondent is not obliged to attend a hearing or to respond to a complaint. The requirement is that he is given the opportunity to do so. As that has occurred, natural justice requirements have been met. The Board, therefore, decided that it would consider the matter.
- [13] The Board also notes that the purposes of the disciplinary provisions in the Act would be defeated if an electrical worker was able to avoid complaints by not engaging in investigations or appearing at hearings. As such, it is appropriate that it deals with the matter.

Function of Disciplinary Action

- [14] 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*³ and in New Zealand in *Dentice v Valuers Registration Board*⁴.
- [15] 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*,⁵ 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."*
- [16] 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.

³ *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

⁴ [1992] 1 NZLR 720 at p 724

⁵ [2016] HZHC 2276 at para 164

Procedure

[17] Because the Respondent had not engaged in the disciplinary process, the matter proceeded as a formal proof hearing.

Evidence

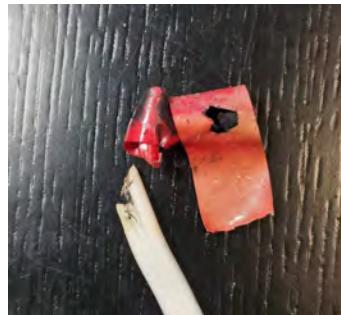
[18] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁶. The Board notes, as regards evidence in proceedings before it, that the provisions of section 147W of the Act apply. This section states:

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.

[19] The Board received signed witness statements from the Investigator's witnesses. Those statements established the essential facts of the allegations. They were that between August 2018 and December 2019, the Respondent was engaged to carry out prescribed electrical work (PEW) associated with the construction of a new house. The owner had a number of issues following completion, and another electrical worker was engaged to carry out remedial work. He identified safety and compliance issues. A complaint was made by the owner. Photographs of the Respondent's work were provided. A sample of those photographs follows:



Exposed Live Conductor



Exposed Live Conductor



Exposed Conductors

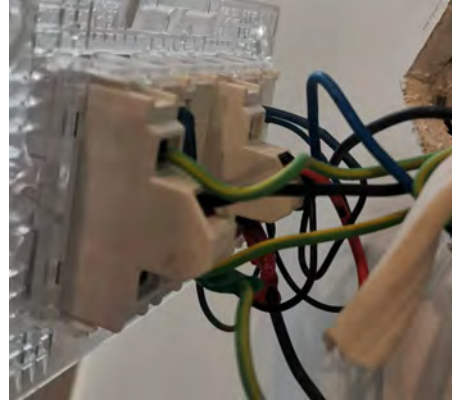


Exposed Conductors

⁶ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1



Earth and neutral used as phase



Earth and neutral used as phase

- [20] The Investigator sought an opinion from Mr Mark Carter, an Electrical Inspector, on what those photographs showed. His opinion resulted in the charges as laid. His evidentiary statement noted:

Exposed Live Parts

11. *I found that Mr Wang had breached the mandatory installation requirements of AS/NZS 3000:2007 in that he had failed to provide adequate protection against the dangers arising from direct contact with live parts. Mr Wang had left an energised cable hanging in the heat pump room located in the basement of the house. It is evident that the only means of protection against access to the live conductors was a loosely applied section of electrical tape.*
12. *The manner in which Mr Wang left the wiring in question represented an electrically unsafe installation that created a risk of serious harm to persons, or property damage, in that he had failed to provide adequate measures to prevent accidental direct or indirect contact with exposed fittings or exposed conductive parts of the works or installations.*

Identification of Conductors

13. *I found that Mr Wang breached the mandatory installation requirements of AS/NZS 3000:2007 in that he had utilised and connected conductors of an inappropriate and incorrect insulation colour (green/yellow and black) as active conductors connected to a number of light switches.*
14. *This practice represented an electrically unsafe installation, in that the use of green/yellow insulated conductors as active conductors may result in future electrical workers inadvertently cutting energised conductors, assuming that these are non-energised protective earth conductors. The installation also creates a risk that the inadvertent connection of protective earthing conductors forming future new wiring to energised protective earthing conductors may result in a*

situation where accessible earthed metallic surfaces would become energised. If this occurred, both instances above would result in a significant risk of electric shock.

Electrical Connections

15. *I found that Mr Wang breached the mandatory installation requirements of AS/NZS 3000:2007 in that he had failed to consider fundamental aspects relating to the size and quantity of conductors to be connected to electrical fittings.*
16. *Mr Wang had connected multiple 1mm² black insulated conductors to a strip connector in a manner that conductors were excessively twisted to a point that the breakage of one or more conductors could occur. Moreover, multiple 2.5mm² neutral and earth conductors had been twisted together to connect these to the rear terminals of a socket outlet. The number and cross-sectional area of the conductors was such that they were not adequately accommodated within the respective terminals. In both instances, significantly greater amounts of insulation had been removed from conductors to be connected than what was required. This resulted in an electrically unsafe installation in that the connections made between conductors and between conductors and electrical fittings were insecure and unreliable.*

RCD Protection

17. *I found that Mr Wang had bypassed the RCD which was intended to protect two lighting circuits and one circuit supplying socket outlets, preventing the RCD from operating as intended. Therefore, Mr Wang breached the mandatory installation requirements of AS/NZS 3000:2007 in that through bypassing the RCD in question, he had failed to provide mandatory RCD protection to final sub circuits supplying lighting and socket outlets in a domestic electrical installation.*
18. *This created an electrically unsafe installation in that the intended operation of the RCD in question had been impaired as a result of the actions of Mr Wang*

Certification of Prescribed Electrical Work

19. *I found that Mr Wang had incorrectly and falsely certified the prescribed electrical work conducted by him as being lawful and safe. There were significant and fundamental elements of the prescribed electrical work carried out by him that were not lawful in that they did not meet the mandatory safety requirements of AS/NZS 3000:2007, thereby breaching the Safety Regulations. I also found that in completing the Certificate of Compliance Mr Wang had not accurately*

described the actual work completed i.e., he did not detail the connection and that had been completed e.g. MEN switchboard, main earthing system etc.

First Offence

- [21] The charges put before the Board were laid in the alternatives of negligently creating a risk of serious harm to any person or a risk of significant property damage under section 143(b)(ii) and, as alternatives, negligence or incompetence under section 143(a)(i) and contrary to an enactment under section 143(a)(ii). Only one of the allegations, however, was laid under section 143(b)(ii), the failure to provide adequate protection against dangers arising from direct contact with live parts. The Board noted, however, that other aspects of the First Offence, and in particular the use of earth conductors as phase conductors, may have created a risk of serious harm and, as such, have met the tests for an offence under section 143(b)(ii) of the Act.
- [22] The Board's findings were, with respect to:
- (a) the failure to provide adequate protection against dangers arising from direct contact with live parts, the Respondent negligently created a risk of serious harm;
 - (b) utilising connected conductors of an incorrect insulation colour as active conductors in light switch terminals, the Respondent was incompetent;
 - (c) the failure to consider fundamental aspects relating to the size and quantity of conductors to be connected to electrical fittings and removing significantly greater amounts of insulation from conductors to be connected than what was required, resulting in unreliable electrical connections and a heightened risk of access to live parts, the Respondent was incompetent; and
 - (d) the failure to provide mandatory RCD protection to final sub-circuits supplying lighting and socket outlets, the Respondent was incompetent.
- [23] There is a hierarchy to the disciplinary charges in that the Board needs to first consider whether the prescribed electrical work was carried out or caused to be carried out in a manner that was contrary to an enactment. If the Board finds in the affirmative, it then needs to consider whether the conduct reaches the threshold for a finding of negligence or incompetence. If that threshold is met, the Board then needs to consider whether a risk of serious harm or significant property damage was created.
- [24] Contrary to an enactment is a form of strict liability offence in that all that has to 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 negligence.⁷

- [25] 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*,⁸ 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.

- [26] 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*⁹ test of negligence which has been adopted by the New Zealand Courts.¹⁰
- [27] 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*,¹¹ it was stated as "*an inability to do the job*".
- [28] The New Zealand Courts have stated that an assessment of negligence and/or incompetence in a disciplinary context is a two-stage test¹². The first is for the Board to consider whether the practitioner has departed from the acceptable professional standard of conduct. The second is to consider whether the departure is significant enough to warrant a disciplinary sanction.
- [29] 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 Act,¹³ which includes protecting the health and safety of members of the public in connection with the supply and use of electricity, and promoting the prevention of damage to property in connection with the supply and use of electricity. 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 practitioner.¹⁴

⁷ *Blewman v Wilkinson* [1979] 2 NZLR 208

⁸ Judge McElrea, DC Whangarei, CIV-2011-088-313

⁹ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

¹⁰ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

¹¹ *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

¹² *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

¹³ *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

¹⁴ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

- [30] 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.
- [31] Turning to seriousness in *Collie v Nursing Council of New Zealand*,¹⁵ the Court 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.*
- [32] With respect to a risk of serious harm or significant property damage, serious harm is defined in section 2 of the Act. It means:
- death; or*
- injury that consists of or includes loss of consciousness; or*
- a notifiable injury or illness as defined in section 23 of the Health and Safety at Work Act 2015.*
- [33] 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.*
- [34] As section 16 refers to both serious harm and 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).
- [35] 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 fanciful¹⁶.

¹⁵ [2001] NZAR 74

¹⁶ *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd (The Wagon Mound No 2)* [1967] 1 AC 617

Contrary to an Enactment

[36] The prescribed electrical work was carried out on a low-voltage installation. Under the Safety Regulations, the work had to be carried out in accordance with AS/NZS 3000 because regulation 59 stipulates:

59 Low and extra-low voltage installations to comply with AS/NZS 3000

(1) *Every low or extra-low voltage domestic installation, or part of a domestic installation, must be installed, tested, inspected, and connected so as to comply with Part 2 of AS/NZS 3000 if it has a maximum demand at or below—*

(a) *80 amperes per phase if single-phase; or*

(b) *50 amperes per phase if multi-phase.*

[37] The Board received evidence that the prescribed electrical work had not been completed in accordance with AS/NZS 3000. As such, the prescribed electrical work set out in the First Offence was carried out in a manner that was contrary to an enactment.

Incompetence

[38] Aspects of the non-compliant prescribed electrical work were, however, more serious. With respect to those aspects, the Board found that the Respondent had carried out the prescribed electrical work in an incompetent manner.

[39] The Board made its findings of negligence with respect to allegations (b), (c) and (d) in the First Alleged Disciplinary Offence on the basis that the work was not completed to the standard that is expected of a knowledgeable and skilled electrical worker and had not been completed in accordance with the provisions of regulation 13, 20 and 73A of the Safety Regulations. Regulation 13 states:

13 Doing work on works, installations, fittings, and appliances

(1) *A person who does work on any works or installation, or on any part of any works or installation, must ensure—*

(a) *that the resulting works or installation, or part of the works or installation, is electrically safe; and*

(b) *if the work is on only part of any works or installation, that the work has not adversely affected the electrical safety of the rest of the works or installation.*

[40] The terms electrically safe and unsafe are defined in regulation 5 of the Safety Regulations:

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.*

[41] Further, regulation 20 deems certain installations to be unsafe:

20 Electrically unsafe works and installations

- (1) Works and installations are deemed to be electrically unsafe if there are not measures in place that do at least 1 of the following:
 - (a) prevent accidental direct or indirect contact with exposed fittings or exposed conductive parts of the works or installations:
- (2) Works and installations are also deemed to be electrically unsafe if—
 - (a) the characteristics of any fittings used in the works or installations are impaired; or
 - (b) conductors are inadequately identified; or
 - (c) where colour is used to identify conductors in a standard low voltage domestic installation that is being installed (other than in light fittings, connections to appliances, and wiring within a fitting),—
 - (i) the neutral conductor is identified by any colour except black; and
 - (ii) black is used to identify a conductor other than the neutral conductor; or
 - (d) connections between conductors, and between conductors and other fittings, are not secure and reliable; or

[42] Also, under regulation 73A(1), an electrical worker has certain obligations that must be complied with and which were not:

73A Before connecting installations to power supply

- (1) *Before connecting to a power supply a low or extra-low voltage installation or part installation on which prescribed electrical work has been done, the person doing the connection must—*
- (a) *be satisfied that the installation or part installation is safe to connect; and*
- (b) *be satisfied that the testing required by these regulations has been done;*

Risk of Serious Harm or Significant Property Damage

[43] With respect to exposed conductors, the prescribed electrical work was unsafe under regulation 5 and did not comply with regulation 13 and 20, and the Respondent had not complied with regulation 73A of the Safety Regulations. Further, the Respondent, in completing the work in the manner that he did, had not met acceptable industry standards, and, as the transgressions were serious, he had completed the work in a negligent manner. Turning to the risk of serious harm, live conductors were exposed, and there was a risk of electrocution as a result.

Second Offence

- [44] The charge under section 143(f) of the Act related to the provision of a false or misleading return. Determining whether a return is false or misleading is a question of fact to be decided objectively and the intention of the issuer is irrelevant¹⁷.
- [45] The returns referred to are issued under the Regulations. There is a requirement that an Electrical Safety Certificate be issued for all prescribed electrical work. It must contain a statement to the effect that the installation or part installation is connected to a power supply and is safe to use. There is also a requirement that a Certificate of Compliance is issued for high and general risk prescribed electrical work. A Certificate of Compliance must state that the prescribed electrical work has been done lawfully and safely and that the information in the certificate is correct.
- [46] The specific allegations were that the Respondent's certification was false or misleading because he had certified his prescribed electrical work as safe and lawful when aspects were electrically unsafe and because his Certificate of Compliance did not meet the regulatory requirements pertaining to the required information. The evidence provided established the allegations, and the Board found that the offence had been committed.

Board's Decision

- [47] The Board has decided that the Respondent **has** committed disciplinary offences under sections 317(1)(b)(ii), (a)(i) and (f) as set out in the Notice of Proceeding.

¹⁷ *Taylor Bros Ltd v Taylor Group Ltd* [1988] 2 NZLR 1

Penalty, Costs and Publication

- [48] 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.
- [49] The matter was dealt with as a formal proof hearing. It received information relevant to penalty, costs and publication, and the Board has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

- [50] The Board has the discretion to impose a range of penalties, which are set out in section 147M of the Act. Exercising that discretion and determining the appropriate penalty requires that the Board balance various factors, including the seriousness of the conduct and any mitigating or aggravating factors present.¹⁸ It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:¹⁹
- (a) protection of the public and consideration of the purposes of the Act;²⁰
 - (b) deterring other Electrical Workers from similar offending;²¹
 - (c) setting and enforcing a high standard of conduct for the industry;²²
 - (d) penalising wrongdoing;²³ and
 - (e) rehabilitation (where appropriate).²⁴
- [51] Overall, the Board should assess the conduct against the range of penalty options available in section 318 of the Act, reserving the maximum penalty for the worst cases²⁵ and applying the least restrictive penalty available for the particular offending.²⁶ In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty²⁷ that is consistent with other penalties imposed by the Board for comparable offending.²⁸

¹⁸ *Ellis v Auckland Standards Committee* 5 [2019] NZHC 1384 at [21]; cited with approval in *National Standards Committee (No1) of the New Zealand Law Society v Gardiner-Hopkins* [2022] NZHC 1709 at [48]

¹⁹ Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

²⁰ Section 3 Building Act

²¹ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²² *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

²³ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

²⁴ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354; *Shousha v A Professional Conduct Committee* [2022] NZHC 1457

²⁵ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²⁶ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

²⁷ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²⁸ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

- [52] In general, when determining the appropriate penalty, the Board adopts a starting point based on the principles outlined above prior to considering any aggravating and/or mitigating factors present.²⁹
- [53] The Respondent has previously appeared before the Board.³⁰ The offending in this matter, however, predated the decision that was made in that matter. As such, the conduct under consideration has to be viewed as a first offence.
- [54] The Respondent is no longer licensed. He is registered. The Board was advised that he had left the country. It is unclear if he will return and will relicence.
- [55] The Board has found the Respondent to be incompetent as an electrical worker. Similar findings were made in the previous matter that came before the Board. In that matter, the Respondent's licence was suspended on receipt of the complaint. The suspension was lifted after he had completed a competency course. As that course was completed after the work in this matter took place, it follows that ordering further training is not a viable course of action. Further, as the Respondent is not licensed, imposing restrictions on his licence is not an open course of action. Given the seriousness of the offending, the Board is left with the options of cancelling the Respondent's registration or imposing a fine. As this is technically a first offence, the Board settled on a fine. It adopted a starting point of \$5,000, an amount which reflects the seriousness of the offending. There are no aggravating or mitigating factors. No adjustments will be made.

Costs

- [56] 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.
- [57] 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 case.³¹
- [58] In *Collie v Nursing Council of New Zealand*,³² 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.

²⁹ In *Lochhead v Ministry of Business Innovation and Employment* 3 November [2016] NZDC 21288 the District Court recommended that the Board adopt the approach set out in the Sentencing Act 2002.

³⁰ *Baoren Wang* [2021] EWRB 22386

³¹ *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.

³² [2001] NZAR 74

[59] In *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society*,³³ the High Court noted:

[46] All cases referred to in Cooray were medical cases and the Judge was careful to note that the 50 per cent was the general approach that the Medical Council took. We do not accept that if there was any such approach, it is necessarily to be taken in proceedings involving other disciplinary bodies. Much will depend upon the time involved, actual expenses incurred, attitude of the practitioner bearing in mind that whilst the cost of a disciplinary action by a professional body must be something of a burden imposed upon its members, those members should not be expected to bear too large a measure where a practitioner is shown to be guilty of serious misconduct.

[47] Costs orders made in proceedings involving law practitioners are not to be determined by any mathematical approach. In some cases 50 per cent will be too high, in others insufficient.

[60] The Board has adopted an approach to costs that uses a scale based on 50% of the average costs of different categories of hearings: simple, moderate and complex. The current matter was moderate to complex. Adjustments based on the High Court decisions above are then made.

[61] The manner in which a licensed person responds to a disciplinary complaint and conducts their defence can also be taken into consideration by the Board. In *Daniels v Complaints Committee*,³⁴ the High Court held that it was permissible to take into account as an adverse factor that the practitioner had responded to the complaints and discipline process in a belligerent way. Whilst the Respondent has not been belligerent, he has not cooperated, and a formal proof hearing was necessary as a result.

[62] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$2,250 toward the costs of and incidental to the matter. The amount is the Board's scale amount for a defended matter.

Publication

[63] 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 Act³⁵. 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.

³³ CIV-2011-485-000227 8 August 2011

³⁴ [2011] 3 NZLR 850.

³⁵ Refer sections 128 of the Act

- [64] 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.
- [65] Within New Zealand, there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990.³⁶ The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction³⁷. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive³⁸. 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*³⁹.
- [66] 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 interest⁴⁰. 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.
- [67] Based on the above, the Board will publish a general article in the *Electron* summarising the matter. The Respondent will be identified in the *Electron*.

Penalty, Costs and Publication Orders

- [68] 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 \$5,000.

Costs: Pursuant to section 147N of the Act, the Respondent is ordered to pay costs of \$2,250 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

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

The Respondent will be named in this decision, which will be publicly available on the Board's website.

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 be named in the publication.

- [69] 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.

³⁶ Section 14 of the Act

³⁷ Refer sections 200 and 202 of the Criminal Procedure Act

³⁸ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

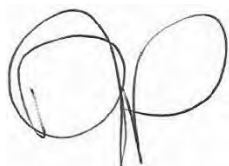
³⁹ *ibid*

⁴⁰ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

Right of Appeal

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

Signed and dated this 20th day of March 2024



R Keys
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:*

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- (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.