

**IN THE DISTRICT COURT
AT WELLINGTON**

**CIV-2016-085-000245
[2016] NZDC 21951**

BETWEEN TRAVIS DEAN GRICE
Appellant

AND THE PLUMBERS, GASFITTERS AND
DRAINLAYERS BOARD
First Respondent

AND HELEN MARY MITCHELL
Second Respondent

Hearing: 2 November 2016

Appearances: D G Hayes for the Appellant
D A Laurenson QC for the Respondents

Judgment: 2 November 2016

**ORAL JUDGMENT OF JUDGE B DAVIDSON:
[Appeal under s 162 Plumbers, Gasfitters and Drainlayers Act 2006 ("Act")]**

Appeal

[1] This is an appeal under s 162 of the Act against a decision of the Board given on 17 March 2016.

[2] In that decision, the Board:

- (a) found that the appellant was guilty of a disciplinary offence under s 89(c) of the Act, of failing to comply with a term of his certifying gasfitter's licence under cl 3(10) of the Plumbers, Gasfitters and Drainlayers Board (Gasfitting Registration and Licensing) Notice 2010 in that he did not ensure that his supervisee (Julian Henson), worked in his presence when undertaking gasfitting work;

- (b) found unproved a second offence under s 89(a)(ii) of the Act;
- (c) fined the appellant \$2,500 and ordered him to pay a contribution towards costs in the sum of \$10,000.

Appeal grounds

[3] Four broad grounds are raised by the appellant:

- (a) that the Board had no jurisdiction to consider the charge because the 2010 gazette notice was unlawful in that it was ultra vires the Board's power under s 30 of the Act to prescribe by gazette notice for registration and licensing matters;
- (b) there were significant breaches of various statutory requirements of the complaint procedure, including a lack of complaint against the appellant himself, the Board taking on its own complaint, and not properly informing the appellant of the complaint;
- (c) the Board breached the requirement of natural justice under s 112 of the Act in that the Board's own supervision policy was equivocal and officially induced an error on the part of the appellant which is the basis of the charge against him;
- (d) the penalty imposed was inappropriate and/or excessive.

[4] The respondents say:

- (a) the charge correctly reflected cl 3(10) of the 2010 gazette notice which in turn was lawful and validly issued;
- (b) no complaint procedural requirements have been breached;

- (c) there was no breach of the rules of natural justice; in particular the Board's supervision policy clearly embraced the appropriate terms of the 2010 gazette notice;
- (d) the penalty imposed was appropriate, not excessive, and within the range available to the Board.

Factual background

[5] The facts are undisputed. Indeed, it is abundantly clear that the evidence before the Board was well capable of proving the requisite elements of the s 89(c) charge.

[6] On 3 October 2013, the appellant's supervisee, Julian Henson, was undertaking gasfitting work at a residential property at 9 Coldwell Place, Hamilton. This involved installing a continuous flow water heater and associated gaswork. When doing so, the appellant as supervisor was not present but, it seems, available for advice by telephone.

[7] After installation, Henson tested the gas pressure at the meter and, finding an apparent fault, at the appellant's suggestion reported the matter to the gas supplier. A representative of the gas supplier or meter reading business attended and as a result, in a way I will come to in a moment, lodged a complaint with the Board.

[8] The complaint was lodged by a Mr Bill Miller electronically on 2 December 2013. As I have mentioned, he worked for either the gas supplier, Vector, or its agent.

[9] Relevant details of the online form are as follows. As to its subject, it refers to it being online advice of unlawful work form. It said it was in respect of Julian Henson and provided personal details for him. It provided details of where the work was completed and when. It went on to detail as follows:

AMS received a complaint about its new GMS installed at 9 Coldwell Place on 3 October 2013 from Julian Henson. Investigations into the complaint suggest that Julian Henson completed the commissioning of the installation

when he was not registered for gasfitting. The certifier of the gas certificate, Travis Grice, does not appear to have been present at the time of the commissioning.

[10] It went on to say that this indicated that Travis Grice was not onsite at the time.

[11] The next day, 3 December 2013, the Board's solicitor wrote to Mr Henson inviting his comment on the complaint. In the letter, the Board's solicitor said:

William complains that you carried out substandard and unsupervised gas fitting work ...

[12] A fortnight later on 17 December 2013, the Board's solicitor wrote to the appellant. The Board's solicitor said:

Mr Miller complains that Julian Henson was not adequately supervised while undertaking gas fitting work at 9 Coldwell Place, Chartwell, Hamilton.

[13] The letter enclosed a copy of the complaint. Comment was invited.

[14] The letter went on to say that the complaint and the appellant's response would be provided to the Registrar who would determine whether the complaint was a matter that the Board could inquire into.

[15] The letter provided the appellant with information about the Board's complaint and investigation processes both online and, indeed in writing by enclosing a brochure setting out a complaint and discipline guide.

[16] The appellant replied on 23 December 2013. In it, he said:

It is unclear from Mr Miller's letter what the adequate supervision relates to.

[17] On 17 April 2014 the Board appointed the second respondent (Helen Marshall), to investigate the complaint made by William Miller against the appellant.

[18] Sometime after interviewing the appellant and making other investigations, a preliminary investigation report was forwarded to the appellant for comment. He chose to do so through his lawyer.

Relevant provisions of the Act, Gazette Notice and supervision policy

[19] A number of provisions of the Act are relevant. They are:

3 Purposes of this Act

The purposes of this Act are—

- (a) to protect the health and safety of members of the public by ensuring the competency of persons engaged in the provision of sanitary plumbing, gasfitting, and drainlaying services; and
- (b) to regulate persons who carry out sanitary plumbing, gasfitting, and drainlaying.

4 Interpretation

In this Act, unless the context otherwise requires,—

...

supervision, in relation to any work, means that the work is undertaken under the control and direction of a person authorised under this Act to do the work or, in the case of sections 19, 21, 22, and 25, a person authorised to supervise work under those sections as is sufficient to ensure—

- (a) that the work is performed competently; and
- (b) that while the work is being undertaken, appropriate safety measures are adopted; and
- (c) that the completed work complies with the requirements of—
 - (i) regulations; and
 - (ii) in the case of sanitary plumbing or drainlaying, regulations under the Building Act 2004; and
 - (iii) in the case of gasfitting, regulations under the Gas Act 1992.

...

21 Exemption for gasfitting under supervision

A person may do, or assist in doing, any gasfitting if—

- (a) the work done by that person is carried out under the supervision of a person who—
 - (i) holds a current practising licence that authorises the person to supervise the work; or
 - (ii) is authorised to supervise the work under section 20; and

- (b) while that work is done, no pipe or appliance in respect of which that work is done is connected to any supply of gas; and
- (c) the work is—
 - (i) tested and certified in accordance with regulations made under section 54 of the Gas Act 1992; and
 - (ii) connected to a supply of gas by the person who supervises the work.

...

30 Board may prescribe other registration and licensing matters

- (1) The Board may, by notice in the *Gazette*,—
 - ...
 - (b) prescribe for each class of registration the terms and conditions subject to which persons are registered as registered persons; and
 - (c) prescribe for each class of registration the terms and conditions subject to which practising licences are issued; and
 - (d) prescribe requirements relating to competent and safe work practices and the testing of those practices; and

...

...

48 Practising licence subject to terms and conditions

- (1) A practising licence issued to a registered person is subject to—
 - ...
 - (b) any other terms and conditions that the Board thinks fit.

...

...

89 Disciplinary offence

For the purposes of this subpart, a person to whom this subpart applies is guilty of a disciplinary offence if that person is found, in any proceedings under this subpart, or in any appeal under Part 4,—

...

- (c) to have failed to have complied with a term or condition of the person's registration or licence; or

...

90 Complaints

- (1) Any person (including any person in the service of the Crown acting in his or her official capacity) may complain to the Board about the conduct of a person to whom this subpart applies by making the complaint in the prescribed manner to the Registrar.
- (2) However, a complaint may not be made under subsection (1) by the Board, a member of the Board, or the Registrar.
- (3) The Registrar must, as soon as practicable after receiving a complaint,—
 - (a) inform the Board; and
 - (b) inform the person complained against of the general nature of the complaint.
- (4) However, if the Registrar is satisfied that the complaint is frivolous or vexatious,—
 - (a) subsection (3) does not apply; and
 - (b) section 91 does not apply; and
 - (c) the Registrar must inform the complainant that the complaint will not be investigated or proceeded with.

...

91 Registrar must appoint investigator

- (1) The Registrar must, as soon as practicable after receiving a complaint, appoint an investigator to investigate the complaint unless the Registrar acts under section 90(4).
- (2) The person appointed as the investigator must not be a member of the Board or the person who made the complaint.
- (3) No person who is employed by a local authority may be appointed to be an investigator without the prior consent of that authority.

...

93 Investigator's powers

- (1) An investigator, for the purpose of investigating a complaint,—
 - (b) may, by written notice served on any person, require that person to—

- (i) produce for inspection, within any reasonable period that the investigator may specify, any document or class of document in the possession or under the control of the person:
- (ii) provide, within any reasonable period that the investigator may specify, any information or class of information that the investigator may require; and

...

- (3) Every person who is required to supply information or documents to an investigator has the same privileges in relation to the supply of the information or documents as witnesses have in any court.

...

112 Rules of natural justice to be observed

- (1) In carrying out its functions and duties under this subpart, the Board must observe the rules of natural justice.
- (2) Without limiting subsection (1), at a hearing held by the Board under this subpart, the person to whom the hearing relates is entitled to appear and be heard, either personally or by the person's representative.

...

137 Functions of Board

The functions of the Board are—

...

- (e) to prescribe standards or requirements relating to competent and safe work practices and the testing of those practices:

...

- (s) to do any other things as may, in the Board's opinion, be necessary for the effective administration of this Act:

....

[20] Relevant also is the 2010 Gazette Notice. Clause 3(10) reads as follows:

The certifying gasfitter must ensure that during the first two years of working under an exemption pursuant to s 21 of the Act, the exempt person is at all times working in the presence of the certifying gasfitter supervising them or a licensed gasfitter who is supervised by the same certifying gasfitter or a person authorised pursuant to s 21(b) of the Act.

[21] Relevant also is the Board's then-applicable supervision policy. It included:

1. Purpose

- 1.1 The Plumbers, Gasfitters, and Drainlayers Act 2006 provides for people carrying out restricted sanitary plumbing, gasfitting and drainlaying work to be supervised by tradespeople with a certain level of expertise.
- 1.2 The purpose of this policy is to set out the Board's expectations of supervisors and supervisees who are engaged in supervision arrangements, to ensure that supervision is sufficient and is being carried out in accordance with the purposes of the Act, that is to protect the health and safety of members of the public by ensuring the competency of persons engaged in the provision of sanitary plumbing, gasfitting, and drainlaying services and in regulating persons who carry out such work.

2. Scope

- 2.1 This policy covers all requirements relating to supervision arising from the Act and from *Gazette* notices the Board has published.
- 2.2 The Board applies this policy to all supervision arrangements that are or should be authorised by the Act.

3. Legislation and relevant policies

- 3.1 The following legislation is relevant to this policy:
 - a the Plumbers, Gasfitters, and Drainlayers Act 2006
 - ...
 - c the Plumbers, Gasfitters and Drainlayers (Gasfitting Registration and Licensing) Notice 2010

4. Definitions

- 4.1 In this policy, unless the context otherwise requires:
 - ...
 - c **Gazette notices** means the Plumbers, Gasfitters and Drainlayers (Plumbing Registration and Licensing Notice 2010, and the Plumbers, Gasfitters and Drainlayers (Gasfitting Registration and Licensing) Notice 2010, and the Plumbers, Gasfitters and Drainlayers (Drainlaying Registration and Licensing) Notice 2010
 - d **supervision** has the same meaning is that set out in section 4 of the Act
 - ...

5. Principles of good supervision

5.1 The following principles guide all Board considerations of supervision:

- a Supervision is carried out in accordance with the Act including taking account of its purposes.
- b Supervision is undertaken under the control and direction of a supervisor with arrangements that are sufficient to ensure that:
 - i the work is performed competently
 - ii while the work is being undertaken, appropriate safety measures are adopted
 - iii the completed work complies with applicable law.
- c Supervision is an essential term and condition of a person's practising licence and is carried out in accordance with any terms and conditions placed on a person's licence including those set out in *Gazette* notices.
- d Supervision arrangements are reasonable in their circumstances taking into account the entirety of the arrangements including the supervisor-to-supervisee ration, the frequency of contact, and the geographic distance between supervisor and supervisee.

6. Expectations of a supervisor

6.1 Every authorise supervisor:

- a complies with the terms and conditions of their licence(s)
- b provides control and direction sufficient to ensure:
 - i work is planned (methodology, appropriate materials, risks, health and safety) and agreed between supervisor and supervisee and includes direction for situations where unplanned circumstances are encountered
 - ii work is performed competently
 - iii appropriate safety measures are adopted
 - iv completed work complies with all applicable law
- c ensures that the supervisee is competent to perform the tasks they undertake
- d ensures that the supervisee complies with all applicable laws
- e ensures that supervision arrangements are reasonable in their circumstances taking into account the entirety of the arrangements including the relevant law, the knowledge of

the supervisee, the supervisor-to supervisee ration, the frequency of contact, and the geographic distance between supervisor and supervisee

f uses reasonable judgment.

First ground of appeal: charge wrongly required proof that appellant was absent during the gasfitting work.

[22] Mr Hayes made two submissions under this head. Firstly that the charge wrongly required proof that the appellant was not present at the time of the gasfitting work. He argued that because gas was not actually connected at the time of the work, the presence of the appellant was not a requirement. All that was required was supervision, as defined in the Act, which should be given a wide interpretation as meaning available for supervision and advice.

[23] Secondly, he submitted that the 2010 Gazette Notice was ultra vires the Act in stating a requirement for presence at cl 3.10.

[24] Mr Laurensen submitted that the charge properly complied with cl 3.10 of the Gazette Notice in requiring the presence of the certifying gasfitter. He submitted that cl 3.10 was consistent with the purposes of the Act, the definition of supervision, and clearly within the rulemaking power under s 30.

[25] I agree with the respondent's submissions. In my view, cl 3.10 falls well within the scope of ss 28 and 30, is consistent with the purposes of the Act, is consistent with the definition of supervision, and the requirements of s 21.

[26] When considered as a whole, the requirement of the presence of a certifying gasfitter is obvious, clearly reflecting issues of competence and safety. It needs to be borne in mind that a supervisee could be on his or her first day of such work. The requirement of the presence of a supervisor for two years, in my view, is entirely appropriate and consistent with the various statutory provisions I have referred to.

Second ground of appeal: breaches of the complaint process

[27] Mr Hayes submitted that there had been no complaint against Mr Grice, that the Board generated its own complaint against him, and did not properly inform him that it was a complaint. He also suggested that the delay in appointing an investigator from 17 December 2013 to 17 April 2014 breached the requirement under s 91(1) of the Act that the appointment be made as soon as practicable after receiving a complaint.

[28] Mr Laurenson submitted that any complaint needed to be viewed widely; but in any event, it was clearly directed, in part at least, when it was made, against the lack of adequate or proper supervision by the appellant.

[29] He submitted that it was abundantly clear by the terms of the letter to the appellant on 17 December 2013 that it was a complaint and that his comment was being called for. He says that the overall effect of the letter could be seen in no other way. It did not amount, he submitted, to the Board generating its own complaint.

[30] Again, I agree with the respondent. It is critical to refer to the detail that I set out of the online complaint of 2 December 2013. Viewed as a whole, in my view, it was well capable of being seen as a complaint against both Mr Henson and the appellant, his supervisor.

[31] As Mr Laurenson also submitted, what is critical is the detail of the complaint, not the fact that it may nominate a particular person. Many clients, homeowners, for example, would be absent from their property when such work was undertaken and would not necessarily know the name of the person who actually undertook the work, nor know the contractual or employment relationship between the person undertaking the work and the business retained to do it.

[32] Critical, therefore, in assessing whether this amounted to a complaint against the complainant is the level of detail contained in the online form.

[33] Even the letter the following day to Mr Henson referred to him undertaking unsupervised gasfitting work.

[34] The letter to the appellant on 17 December 2013 was clearly notice of a complaint as required by s 90(3) of the Act. The letter was so titled. It enclosed a copy of the complaint. It invited comment and it is said that the complaint and response would be considered before deciding what course of action would be taken next. As I have noted, it went on to provide advice about the complaint and investigation processes.

[35] More than that, in the way that I have also mentioned, it is clear by the appellant's response on 23 December that he saw it in exactly that light.

[36] As well, I am not persuaded that the delay of 4 months until the appointment of an investigator was undue. In part, of course, it is probably explained by the Christmas/New Year vacation. No prejudice from that delay was pointed to, either at the hearing before the Board or before me today. Although perhaps it could be said to be not ideal, I can see absolutely no prejudice whatsoever.

Third ground of appeal: breach of the natural justice rules in that the Board's own supervision policy was equivocal and induced the appellant's error or misunderstanding

[37] Mr Hayes submitted that the Board's own supervision policy was unclear or, rather, failed to make clear that the presence of the certifying gasfitter was required. He pointed to cl 2.1 of the policy which, as I have noted, reads as follows:

This policy covers all requirements relating to supervision arising from the Act and from the Gazette Notices the Board has published.

[38] In my view, it is clear that the supervision policy was subject to other provisions. The policy document itself makes that abundantly plain. It pointed to the relevant legislation, including the Act, and the Gazette Notices. This is repeated and emphasised on a number of occasions within the policy document.

[39] Clause 5.1 provides principles to guide Board considerations of supervision. These included, again, emphasis on competency of work and appropriate safety

measures. In my view, as the Board noted in its decision, the supervision policy clearly embraced the appropriate and applicable Gazette Notice. That the appellant may not have read the notice cannot be held out as some officially induced error on the part of the Board at all, even if that concept had any applicability in considering whether a disciplinary charge had been proved.

[40] In my view, the policy document was obvious and made clear that it was to be read in conjunction with the Act and the appropriate notices. Nothing could have been clearer.

[41] Mr Hayes also submitted that the letter of 17 December 2013 to the appellant inviting comment from him undermined his protection against self-incrimination afforded by s 93(3). But that protection, of course, was not engaged at this time. It only became engaged upon the appointment of the investigator in April 2014.

[42] An invitation to comment was obvious so that the Board could fulfil its complaint filtering function under s 90 of the Act. In any event, the letter to the appellant made it clear that any comment he did make would be referred to the investigator; so he was on notice.

[43] I cannot see any reason from any of these alleged breaches, either of the rules of natural justice or the way that the letter of 17 December invited comment, as being sufficient to justify dismissal of the charge.

Fourth ground of appeal: penalty

[44] Dealing with the issue of penalty, the Board said as follows:

...

63 The Board views its disciplinary function as an important one because it provides the Board with a means by which registered tradespeople that potentially expose the public to health and safety risks can be held accountable. Such proceedings give the Board an opportunity to identify and, where possible, promote the competence of registered tradespeople by identifying conduct which falls below the standard expected of a registered person. Where it is possible and appropriate, the Board considers the main focus of disciplinary proceedings to be rehabilitation rather than punishment.

64 In this case, the Board considered the following aggravating factors:

- a Mr Grice had an obligation to read the Gazette Notice. The Board noted that the supervision policy clearly stated that supervision was to be carried out in accordance with any terms and conditions placed on a person's licence including those set out in the Gazette Notice. The Board did not believe that the supervision policy was ambiguous in its references to the Gazette Notice.
- b Mr Grice did not follow his supervisory obligations as set out in the Gazette Notice. Given Mr Grice was a certifying gasfitter for seven years prior to 2013 and supervised an exemption holder in 2011 he should have been aware of and followed his supervisory obligations as set out in the Gazette Notice.

...

[45] In my view, the fine imposed clearly reflected the seriousness with which the Board (which has to be seen as its own expert in this field) saw the matter. It was regarded by the Board seriously and the fine appropriately reflected it.

[46] As to the costs awarded, actual and reasonable costs totalled in excess of \$23,000. An order that the appellant pay \$10,000 (less than 50% of those costs) was well within the discretion available to the Board.

Outcome

[47] For those reasons, none of the grounds of appeal are made out. The appeal is dismissed.

Costs

[48] I have heard no submissions on the issue of costs on the appeal. They will be reserved and counsel are invited to file appropriate memoranda within 14 days.

B Davidson
District Court Judge