Plumbers, Gasfitters and Drainlayers Board

CANNELL v McKERCHAR

Plumbers, Gasfitters & Drainlayers Board Disciplinary Decision (2023/16)

Summary

Andrew David McKerchar, Certifying Plumber, Certifying Gasfitter, Journeyman Drainlayer, was charged with carrying out sanitary plumbing in a manner contrary to an enactment. The charge related to sanitary plumbing work carried out at a residential address in Geraldine.

Mr McKerchar pleaded guilty to the charge.

The Board considered Mr McKerchar's conduct was low to moderate in terms of seriousness. The Board accepted there were no aggravating factors in the case and that Mr McKerchar was entitled to credit for pleading guilty, being cooperative throughout the process, having no previous disciplinary offending, and being remorseful.

The Board ordered Mr McKerchar to pay a fine of $1,500 and pay $3,300 towards costs.

IN THE MATTER OF a disciplinary hearing pursuant to section 101 of the Plumbers, Gasfitters, and Drainlayers Act 2006

BETWEEN **MELISSA CANNELL**

Investigator

AND **ANDREW DAVID McKERCHAR**
Certifying Plumber, Certifying Gasfitter, Journeyman Drainlayer, of Timaru

Registered Person

DECISION OF THE BOARD
1 NOVEMBER 2023

Hearing:	Held in Wellington on the papers on 6 September 2023
Members sitting:	Diana Kuhtz-Covich (Chair), Barry Willcox, James Smith, Selwyn Hikuroa, Sue Simons
Counsel:	Jessica Ah Koy for the investigator Timothy Jackson for Mr McKerchar
Legal advisor:	Tim Bain

Disciplinary hearing

1. On 6 September 2023, the Plumbers, Gasfitters and Drainlayers Board (**Board**) held a disciplinary hearing on the papers to consider a complaint by [redacted] against Andrew McKerchar, Certifying Plumber, Certifying Gasfitter, Journeyman Drainlayer. The complaint related to sanitary plumbing work carried out at 11 Hislop Street, Geraldine.

Guilty plea

2. On 26 July 2023, Mr McKerchar pleaded guilty to a charge of carrying out sanitary plumbing in a manner contrary to an enactment and signed an agreed summary of facts the main points of which were:

    a. In or around August or September 2021, Mr McKerchar installed a new shower in the bathroom at 11 Hislop Street, Geraldine (**property**).

    b. The plumbing work was part of wider bathroom renovations to make the bathroom an "accessible" bathroom for [redacted] who is elderly. The new shower was in a different location to the old shower and required the replacement of sanitary fixtures and their associated pipework and fittings.

    c. Upon using the shower, [redacted] discovered the cold side of the shower mixer was connected to the hot water pipe and *vice versa*. She also found the hot water was very hot, causing burns.

    d. [redacted] informed her nephew who was a certifying plumber and certifying drainlayer. [redacted] nephew visited the property and tested the hot water temperature and found it to be 70 degrees Celsius. There was no tempering valve on the hot water pipe. The work was subsequently remediated by an employee of [redacted] nephew.

    e. Mr McKerchar carried out sanitary plumbing in a manner contrary to an enactment because he did not install a tempering valve on the hot water line into the shower resulting in scalding water when the shower was used depending on where the mixer was turned to. This was contrary to clause G12.3.6 of the New Zealand Building Code and therefore contrary to the Building Regulations 1992.

3. The Board was satisfied that the facts in the agreed summary of facts meant that Mr McKerchar had committed a disciplinary offence under section 89(a)(ii) of the Plumbers, Gasfitters, and Drainlayers Act 2006 (**Act**).

Penalty and costs submissions

4. On behalf of the investigator, Ms Ah Koy submitted that the principles and purposes of disciplinary proceedings were well established. They were to protect the public and maintain proper industry standards. She submitted that the principles that were

relevant to the assessment of penalty in disciplinary proceedings were the need to ensure rehabilitation, treat practitioners consistently where possible, and to impose the least severe penalty appropriate in the circumstances.

5. Ms Ah Koy submitted that Mr McKerchar's conduct in this case was serious given his failure to install a tempering valve had meant that [redacted] was exposed to 70 degree water and had suffered burns as a result. Ms Ah Koy submitted that the Acceptable Solutions and Verification Methods for compliance with G12 of the Building Code expressly recognised elderly people as a group at greatest risk from scalding. While accepting that Mr McKerchar's conduct was a one-off error, Ms Ah Koy submitted that it was still a serious error.

6. Ms Ah Koy referred the Board to its previous decisions in the cases of *Radovich v Frogley* (2019/13), *Costelloe v Liang* (2018/12) and *Costelloe v Harmse* (2018/4). In the *Frogley* case, Mr Frogley was found guilty of failing to ensure a tempering valve was installed on a replacement hot water cylinder. The Board recognised the risk of scalding from untampered water in that case and adopted a starting point for the fine in that case of $5,000 to $5,500 (recognising that there were additional faults in that case). In the *Liang* and *Harmse* cases, the practitioners pleaded guilty to charges of carrying out sanitary plumbing contrary to an enactment. Fines of $2,300 and $3,350 were ordered in their cases.

7. Ms Ah Koy submitted that Mr McKerchar's case had similarities with all of the referenced cases. Although there had not been multiple defects with the work Mr McKerchar carried out as there had been in the *Frogley* and *Harmse* cases, no one had suffered any physical harm in those cases. [redacted] was an elderly person who was scalded as a result of Mr McKerchar's defective work.

8. Ms Ah Koy submitted that the appropriate penalty in this case was a fine with a starting point of $5,500 to $6,000. She submitted the investigator was not aware of any aggravating factors in this case, and Mr McKerchar was entitled to credit for his guilty plea and lack of previous disciplinary offending.

9. Ms Ah Koy submitted that the Board could require Mr McKerchar to pay a contribution towards the costs and expenses of the investigation, prosecution, and hearing. She submitted that the usual starting point for an order of costs was half of the actual costs. Given that Mr McKerchar's guilty plea and cooperation had helped to keep the costs down, Ms Ah Koy submitted that the Board may wish to consider a reduction from the starting point.

10. On behalf of Mr McKerchar, Mr Jackson referred to the non-punitive nature of disciplinary penalties and submitted that a fact-specific approach was appropriate. Mr Jackson submitted that natural justice considerations were important in determining penalty, as was the importance of maintaining industry standards.

11. Mr Jackson accepted the investigator's characterisation of Mr McKerchar's failure to install a tempering valve in this case as a one-off error. Mr Jackson submitted that Mr McKerchar's error had to be viewed in light of the fact that he had not altered the temperature of the shower when he relocated it. As there had not been a tempering valve on the shower before it was moved, the water temperature in the shower was the same as it had always been. He submitted that [redacted] would have expected the temperature of the water to be the same as it was previously.

12. Mr Jackson submitted that Mr McKerchar was not given the opportunity to remedy the defect with the shower. Had he been given that opportunity, Mr Jackson submits Mr McKerchar would have acted quickly and responsibly to install a tempering valve. In addition, he would have apologised for his oversight. Mr Jackson submitted that it is unlikely that a complaint would have resulted had Mr McKerchar been given the opportunity to do these things.

13. Mr Jackson submitted that Mr McKerchar is an otherwise capable and responsible tradesperson who has no previous disciplinary offending and had not been the subject of other complaints. He submitted that it is highly unlikely that Mr McKerchar will appear before the Board again and the prosecution has therefore achieved its primary purpose.

14. Mr Jackson submitted that Mr McKerchar would be willing to undergo any training the Board considered appropriate and would welcome any steps he might take to improve the quality of his work. Mr McKerchar is self-employed and a sole trader and while he makes an acceptable but modest living, Mr Jackson submitted his means to pay a fine were limited.

15. Mr Jackson submitted that the cost of the work carried out was relevant to any fine the Board may impose. In this respect, he submitted that a fine in the range of $5,000 to $6,000 as sought by the investigator was disproportionate to the nature of the fault. Given Mr McKerchar's personal circumstances, Mr Jackson submitted that such a fine would also be punitive in effect.

16. Mr Jackson did not agree that the cases referred to by the investigator were comparable authorities. He submitted that the *Frogley* case involved supervision failings as well as work that was defective in multiple respects. He submitted that both the cases of *Liang* and *Harmse* involved faults that were more serious than in Mr McKerchar's case.

17. Mr Jackson submitted that the investigator relied on harm to [redacted] to elevate the seriousness of Mr McKerchar's conduct. However, he submitted that there was insufficient information about the nature and extent of [redacted] burns and the Board should therefore be cautious in relying on it.

18. In all of the circumstances, Mr Jackson submitted that a fine in the region of $1,000 was appropriate and the lowest level necessary to achieve the aims and purposes of the proceedings.

19. Mr Jackson submitted that an order of costs had the potential to be punitive in nature as well as disproportionate to the fault, both specifically and on a totality basis. Mr Jackson referred to Mr McKerchar's early guilty plea and his cooperation with the prosecution as steps that had helped to minimise costs. He submitted that Mr McKerchar's actual legal costs were $1,150 and he should not be penalised for things that were outside of his control such as prosecutorial and Board costs.

20. In response to Mr McKerchar's submissions on penalty and costs, Ms Ah Koy submitted that the investigator's position was that in failing to install a tempering valve on the shower, Mr McKerchar had failed to comply with the Building Code. She submitted it was irrelevant that there may have been no pre-existing tempering valve on the shower. Similarly, Ms Ah Koy submitted that the nature and extent of any burns suffered by [redacted] was not relevant to assessing the gravity of Mr McKerchar's conduct. It was the fact of her suffering harm which was relevant.

21. With regard to Mr Jackson's submission that a costs order had the power to be punitive, Ms Ah Koy submitted that the purpose of costs orders is to ensure that industry does not have to bear all of the costs for disciplinary proceedings where a practitioner pleads guilty to or is found guilty of disciplinary offending.

Decision on penalty

22. When it comes to imposing penalties in disciplinary cases, the Board's primary considerations are the need to protect the health and safety of the public and maintain industry standards. Any disciplinary penalty should aim to ensure the competency of a practitioner by holding them to account for their offending, assist with their rehabilitation, and deter them and other practitioners from disciplinary offending.

23. The Board considered Mr McKerchar's conduct in this case was low to moderate in terms of seriousness. The Board considered that the risk of scalding from overheated water already existed at the property because of the lack of a pre-existing tempering valve. However, Mr McKerchar's crossing of the pipework had increased the risk of [redacted] being scalded and this had happened.

24. The Board accepted that there were no aggravating factors personal to Mr McKerchar and that his early guilty plea, cooperation, and lack of previous disciplinary offending were mitigating factors in his favour. The Board also accepted that Mr McKerchar was remorseful and would have corrected the defect and apologised if he had been given the opportunity to do so.

25. The Board considered a fine was an appropriate penalty in this case and determined that the starting point should be $2,500. Recognising the mitigating factors, the Board reduced the fine to $1,500.

Costs

26. Section 107 of the Act provides that, in addition to any penalty imposed, the Board may order a registered person to pay a reasonable sum towards the costs and expenses incidental to the investigation of the complaint, prosecution, and hearing. The Board was provided with a schedule of estimated costs for the investigations, prosecution and hearing amounting to $8,259.31.

27. The Board accepted that Mr McKerchar's guilty plea and cooperation had avoided the costs of a full hearing and determined that he should pay $3,300 towards costs which was around 40% of the total costs.

Publication

28. In accordance with section 74(1)(c)(viii) of the Act, the Board orders that details of the action taken against Mr McKerchar in this matter be recorded on the register of plumbers, gasfitters, and drainlayers. Any other publication of the Board's orders will be at the discretion of the Registrar of Plumbers, Gasfitters and Drainlayers.

Board orders

29. Being satisfied that Mr McKerchar was guilty of a disciplinary offence under section 89(a)(ii) of the Act, the Board made the following orders:

    a. Pursuant to section 106(1)(f) of the Act, Mr McKerchar pays a fine of $1,500.

    b. Pursuant to section 107 of the Act, Mr McKerchar pays $3,300 towards the costs of the investigation, prosecution, and hearing.

Appeal

30. If Mr McKerchar is dissatisfied with the whole or any part of this decision or these orders, he may appeal to the District Court under section 162(1)(f) of the Act. Any appeal must be brought within 20 working days from the date on which this formal written decision is received, or within any other timeframe the District Court may allow.

Dated 1 November 2023

Signed



_____

Diana Kuhtz-Covich
Chair
Plumbers, Gasfitters and Drainlayers Board