

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2023] NZERA 91  
3161481

BETWEEN                      RHONDA JEAN BURRIDGE  
Applicant

AND                              DC LINEHAUL LIMITED  
Respondent

Member of Authority:        Antoinette Baker

Representatives:            Applicant in person  
Shima Grice, counsel for the Respondent

Investigation Meeting:      6 December 2022

Submissions received:      On the day from the Applicant  
On the day from the Respondent

Determination:              28 February 2023

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Ms Burridge was employed part time for several weeks in the second half of 2018 by the respondent (DCL). Her role was to drive a long-haul truck and trailer that transported bread from Picton to Christchurch in a return trip. The sole director of DCL is Mr Cooper.

[2] Ms Burridge says she was unjustifiably dismissed procedurally and substantively for speeding, smoking in the cab and logbook irregularities. She also says she was underpaid due to DCL not providing her with an agreed three days of work and wages per week and paying her for less than the agreed hourly rate of pay. She claims various remedies including compensation.

[3] DCL denies the claims and says it followed a procedure that was fair, dismissing Ms Burrige for reasons that were justified.

### **The Authority's investigation**

[4] I made a preliminary determination dated 12 August 2022 that Ms Burrige was able to continue her claims. The issues resolved were related to whether she had raised a grievance within time and whether she had lodged her claims in the Authority within three years.<sup>1</sup>

[5] I held an investigation meeting for the substantive matter by audio visual means. Mr Cooper provided a brief of written evidence as timetabled. Ms Burrige did not provide the same, despite prompting by the Authority. She was questioned at the meeting about the material she had already provided to the Authority, where this material was relevant.

[6] Ms Burrige chose to provide material on the eve of the investigation meeting. To the extent that this information is relevant I have considered it. However, this late provided material largely raised issues unconnected to my investigation and has not been considered.

[7] At the end of the investigation meeting Ms Burrige chose to give oral submissions. DCL's counsel had sent to the Authority and to Ms Burrige written submissions on the afternoon before the meeting. DCL's counsel spoke to these at the end of the investigation meeting. I then reserved my determination indicating that I did not require any further evidence or material from the parties to be sent to the Authority.

[8] Ms Burrige of her own volition emailed the Authority with a lengthy narrative on 22 December 2022 which referred to material that I did not find was relevant to my investigation. Accordingly, that material has not been considered.

[9] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination states findings of fact and law, expresses conclusions on issues necessary to dispose of the matter and specifies orders made. It does not record all evidence and submissions received.

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<sup>1</sup> *Rhonda Jean Burrige v DC Linehaul Limited* [2022] NZERA 386

**The issues**

[10] The issues are:

- (a) Did DCL justifiably dismiss Ms Burridge?
- (b) If not, what remedies are to be awarded for
  - i. Compensation
  - ii. Lost income including associated holiday entitlements
  - iii. Lack of notice paid at termination?
- (c) Should any remedies for the grievance be reduced under s 24 of the Act for blameworthy conduct by Ms Burridge?
- (d) Has DCL breached an agreement with Ms Burridge by not providing her with three days of work per week, and if so what if any wages compensation should DCL pay to her?
- (e) Has DCL breached an agreement with Ms Burridge to pay her a higher hourly rate than she was paid, and if so what if any arrears of wages are owed to her?
- (f) Are costs to be awarded to either party?

**Further background to the employment relationship problem**

[11] The Applicant, Ms Burridge, and another person (T) drove a truck and trailer as 'tandem' drivers on a run transporting bread products for DCL's client, a bread distributor. Ms Burridge and T's former employer lost the contract for this work. DCL won the contract and continued to employ Ms Burridge and T.

[12] Ms Burridge was employed by DCL from either 1 October 2018 or, as both parties confirm, earlier, on a more informal basis in September 2018 when there was some urgency upon DCL to continue the run after a third party pulled out of their obligations sooner than expected.

[13] Without an apparent break in their driving for the previous employer, Ms Burridge and T continued to drive the bread run for DCL. Ms Burridge says that she and T met with Mr Cooper in Picton on a date that is not clearly identified by either party. The extent to which employment terms and conditions were discussed at this meeting between the three of them or between Ms Burridge and Mr Cooper is in dispute. Mr Cooper says the discussion covered all

terms and conditions. Ms Burrridge describes a situation where she chose to stand back and allowed T to speak on behalf of them both.

[14] A draft individual employment agreement (IEA) was provided by DCL to T to peruse at some point, if not at the Picton meeting, then sometime after the meeting. Ms Burrridge explains that she and T wanted to change two things: a condition about restricting T's ability to take on other driving work, and the restriction about them smoking in the cab of the truck. No IEA was ever signed by Ms Burrridge. She says she was never provided with one in her name.

[15] DCL commenced a disciplinary process against Ms Burrridge in a message from Mr Cooper on Tuesday 30 October 2018 inviting her to a meeting that same morning saying:

I will be back at picton [sic] by 1030, I ask that u meet me at 11 am at the wharf Cv hut to discuss serious employment matters.

[16] Ms Burrridge responded with the following:

I have a serious employment matter as well it's called being lied to. If you have a [sic] issue with my employment there is correct procedures to go through lieing [sic] and replacing me with no chance to rectify is a breach of the employment laws. Send me an email as honestly I'm quite baffled with what I have

[17] Ms Burrridge says that she understood at this stage she was being replaced because she heard T on the phone to Mr Cooper while he stood in front of her, and that the conversation included a request by Mr Cooper that T pass on a work-related access item to a third-party driver. DCL says the driver was being trained as a relief driver and was not replacing Ms Burrridge at the time.

[18] Mr Cooper then sent a letter from DCL dated 26 October 2018 but emailed on 30 October 2018 at 7.09pm (first disciplinary letter). The letter was headed: "Invitation to attend a disciplinary meeting about potential misconduct" and raised issues about speeding, smoking in the cab of the truck and logbook irregularities that DCL said contravened "Logbook work rules and are offences against the Land Transport Act 1998." The letter continued to say that

Ms Burrige had refused to meet at the Picton Wharf on 30<sup>th</sup> October 2018 but also went on to refer to a process that allowed Ms Burrige to be heard at a “meeting”. No date or time was proposed for a meeting.

[19] The first disciplinary letter included that Ms Burrige could obtain support to help her, and that any feedback was asked for by 5pm on 1<sup>st</sup> November 2018 after which DCL would consider Ms Burrige’s responses and undertake “any further required investigation” before making a decision. DCL included that a final decision could result in dismissal without notice because DCL regarded the allegations as serious. It included that the process may be “unsettling” and “confidential counselling and support is available” to Ms Burrige.

[20] On 31 October 2018 at 8.43 am DCL sent a further email to Ms Burrige apparently responding to an issue Ms Burrige raised about the work roster. It referred to an “understanding” that Ms Burrige had worked unexpectedly on Monday 29 October 2018 and that Wednesday was a day off as requested by her and this meant that she would not be rostered on again until the following week based on her work of 1-2 days per week.

[21] Ms Burrige replied on 31 October 2018 at 9.50am saying she believed that DCL had suspended her because she was employed for three days per week. She connected this to the disciplinary process claiming DCL was obliged to offer her three days per week on pay pending DCL’s disciplinary investigation. She referred to wanting to take advantage of the counselling offered in DCL’s letter inviting her to respond to the allegations and said, “If it was an accident acc [sic] would recommend “10 appointments” saying “this has really knocked me around something crazy” that she was not sleeping, had headaches, her confidence was shattered, that she was embarrassed and devastated.

[22] DCL replied on 31 October 2018 at 1:07 pm and restated it had employed Ms Burrige for 1-2 days per week to relieve T in his driving; that Ms Burrige had not been suspended and that, “In the meantime please focus and seek advice as to your reply to the serious misconduct issues. Your reply is due by 5pm Thursday 1<sup>st</sup> November.” This was the next day.

[23] Ms Burrige emailed DCL on 31 October 2018 at 10.10pm saying she was “with T when the job was arranged, I was not employed 1 to 2 days just check my first week I worked

3 days paid for”. Ms Burrridge referred to the arrangement with the previous employer where she worked three days and T worked four in alternate weeks. She criticised Mr Cooper and T for being prepared to commence employment with DCL without a signed contract.

[24] Ms Burrridge sent a further email to DCL dated 1 November at 3.59am (first feedback) and replied to the allegations raised in the first disciplinary letter in a lengthy discursive narration that at times is difficult to follow and is at times aggressive in manner towards Mr Cooper personally. The email included:

### *Smoking*

- a. that she was aware that Mr Cooper had talked to T about not smoking in the truck, but they never agreed to this or that Mr Cooper said it was “OK”
- b. that she and T had not signed a written employment agreement agreeing to not smoke in the cab
- c. that other companies turn a blind eye to drivers smoking in the cab
- d. that they were “clean smokers” and used lemon smelling wipes
- e. that there may be human rights issues about not allowing her to smoke in the truck, but she wasn’t sure
- f. that she and T did not agree to work for DCL unless they could smoke because it calmed their nerves and helped them continue driving without breaks, a schedule claimed to be imposed on them by DCL
- g. that older drivers like her and T are needed to drive trucks over young ones, many of whom are non-smokers, because the younger drivers crash their trucks
- h. if she had known that smoking was an issue, she would have grabbed some “smelly toxic spray to cover up the smell” but this type of spray has an adverse effect on other drivers so “I don’t use it out of respect for other drivers.”

### *Speeding*

- a. that the GPS readings Mr Cooper relied on (being the GPS installed in the truck by the bread distributor) were wrong or the road-testing points were wrong

- b. that if she drove at 85km per hour other truck drivers would abuse her and that people tried to pass her if she drove within the speed limit and therefore this meant they are in danger of being killed over taking her when they do this
- c. that Mr Cooper was “a prick who doesn’t like speeding”
- d. that Mr Cooper thinks that Ms Burrige and T are “speed freak cunts.”

*Logbook irregularities*

- a. that T had filled in and made a mistake in her logbook for which she said he was a “twat”
- b. that examples of the logbook material supported her position that she was employed by DCL to work four days per week.

[25] Ms Burrige sent a further email to DCL on 2 November 2018 at 12.02am (the second feedback). That can be summarised as follows:

*Smoking*

- a. that the reason for smoking in the cab was to ensure the run was done in time without stopping for breaks

*Logbook irregularities*

- b. that after going through her logbook there were “at times” wrong dates because of starting before midnight
- c. that she took the logbook to “her licence guy” (unidentified) who checked her logbook and “he seemed to think its ok”
- d. that her logbook irregularities included “a couple of muck ups with [T] changing my dates when he got confused” and that she had told him not to write in her logbook but what he did was “only human” and that it would only attract a “warning rather than a ticket”
- e. that DCL was having her and T work in their breaks cleaning the truck and her “licence guy” said this was “against the law”
- f. that a lack of breaks was “forcing your staff to speed”

- g. that she and T were employed at an hourly rate of \$28.50 per hour and not at a “run rate”
- h. that she disagrees about DCL not wanting T to work driving for another company
- i. that she had never seen a draft contract for herself, but T had been given one
- j. that DCL was training a replacement driver for the South Island and had suspended her from her employment while making serious allegations against her
- k. that Mr Cooper did not understand employment law including “laws that changed in 2016”
- l. that Mr Cooper was lying and bullying her
- m. that by paying her annual leave this admits she is “full time’ and so she should be paid for 3 days per week
- n. that she and T refused to meet because she said Mr Cooper had lied and bullied her and they had “reasonable grounds” not to meet and wanted everything in writing.

[26] Both of the above summarised emails can reasonably be described as lengthy and discursive using a stream-of-consciousness way of narrating.

[27] DCL emailed Ms Burrige on 2 November 2018 at 10:43am attaching a letter headed ‘Preliminary Findings Regarding Allegations of Serious Misconduct’ (second disciplinary letter). The letter refers to feedback received but gives no details about their content and Mr Cooper states, “I have taken your feedback into account and have decided that it is appropriate to dismiss you without notice on the basis of your serious misconduct.”

[28] The second disciplinary letter attaches a “schedule of GPS records compared to [Ms Burrige’s] logbook entries” putting forward a schedule comparing the GPS with Ms Burrige’s logbook showing days where maximum speed on the GPS exceeded the speed limit. Mr Cooper indicated “26 offences” he had found. It invited any further comment by 5pm on 3 November 2018 noting that this was a “new issue”.

[29] Ms Burrige replied to DCL’s second disciplinary letter in a brief email to DCL dated 3 November 2018 at 2.04pm. It can be summarised as:

*About the logbook material*

- a. “That’s quite interesting I think you [sic] find 15 minutes out here and there will be down to using 4 different clocks [T’s] if he’s with me or my ipod or my clock or the dash clock”
- b. that it “would have been handy” if DCL had told her about this issue after the first week of timesheets were submitted
- c. that the 11.5 hours was “time limited” to get the run done
- d. that she was unaware that the truck moving in a “private area” off the main road (when they were cleaning the truck as asked to do on unpaid breaks) was a problem, and will be good to know “in the future”
- e. that she understood “you’ve fired me so I’m not going to waste any more time with you. Please confirm I’m fired? Thank you.”

[30] DCL emailed Ms Burrige Sunday 4 November 2018 at 12.26 pm attaching a letter headed “termination of your employment – dismissal without notice” (third disciplinary letter). The grounds for dismissal included:

- a. “consistently” speeding over the 90-kilometre speed limit, that she was previously warned on 10 October 2018 and that the speeding had continued
- b. smoking in the cab of the truck, that Ms Burrige had been warned not to do so and continued to do so
- c. logbook irregularities - both those referred to in the original invite to the disciplinary meeting and the further allegations emailed on 2 November 2018 to Ms Burrige with the schedule and that Ms Burrige had not responded to those further allegations.
- d. that the feedback provided has been considered and based on this and the actions alleged, DCL decided to dismiss immediately.

[31] Ms Burrige raised a personal grievance in an email attachment dated 28 January 2019.

[32] Mr Cooper complained to the police about Ms Burrige’s alleged speeding and logbook irregularities just before DCL dismissed her. A police investigation followed.

Ms Burridge was charged with a single ‘representative’ logbook offence for making a false statement in her logbook. This carried a maximum fine of \$2,000.00.

[33] A defended hearing was scheduled for February 2020 but did not proceed. The outcome for Ms Burridge appears to have been that if she completed logbook training the charge would be withdrawn. She disputes that she pleaded guilty for this to happen.

### **Did DCL justifiably dismiss Ms Burridge?**

[34] Section 103A of the Act requires the Authority to assess whether an employer has shown that its decision to dismiss was justified based on what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. This includes asking whether the employer’s substantive reasons were sufficient to justify the dismissal and whether the procedure the employer followed in making the decision was fair. Minor defects in the disciplinary procedure may not support a finding of unfair procedure if they have not had an unfair effect on the employee.

[35] Under s 103A of the Act the following factors are considered to measure an employer’s fair process leading to a decision to dismiss:

- i. whether subject to resources available, the allegations against an employee were sufficiently investigated
- ii. whether the allegations were raised with the employee
- iii. whether the employee was given a reasonable opportunity to respond to the allegations
- iv. whether the employer genuinely considered feedback before making a decision
- v. any other appropriate factors

[36] To prove it is justified to dismiss an employee, an employer needs to prove its decision was fair and reasonable. The New Zealand Court of Appeal has said this includes having “clear evidence upon which any reasonable employer could safely rely or having carried out

reasonable inquiries” finds that on the balance of probabilities “grounds for believing ... the employee was at fault.”<sup>2</sup>

[37] It is not for the Authority to re-run the case and decide what it thinks the outcome should have been based on matters that have been investigated or discovered by the employer or others after the employment ended.

[38] Doing my best to ascertain from the way Ms Burrige has put forward her claim on paper, and after her answers to my questions at the investigation meeting, she claims that DCL did not investigate sufficiently including not meeting with her, did not warn her of the things it dismissed her for; predetermined the decision; did not genuinely consider her feedback; and carried out a hasty disciplinary process.

*Lack of a meeting*

[39] A disciplinary meeting did not occur. DCL says Ms Burrige refused to attend one when invited. I find it was reasonable that she refused to attend because Mr Cooper’s first invite referred to a “serious employment problem” but gave no details. A reasonable employer could be expected to have renewed the invitation to a meeting when it gave further details of the allegations. DCL did not invite Ms Burrige to a meeting in the first disciplinary letter despite calling it an invite to a meeting.

[40] While DCL did not appear to ask for another meeting before the first informal invitation and simply referred to the initial refusal to meet as being an end to the meeting issue, Ms Burrige made it clear in her second feedback that she (and T) had no intention of meeting. Her written evidence says that her reason was because the place to meet was too public and unsuitable. I find this was a reasonable excuse not to meet when answering the first informal request. However, Ms Burrige’s oral evidence was that she would still not meet after the first disciplinary letter because she believed Mr Cooper had already replaced her and there was no point in a meeting.

[41] Ms Burrige has not satisfied me that her belief that she was replaced was reasonable. She says it was based on over hearing Mr Cooper ask T to provide an access device to a bakery (on their run) to another driver. This appears to have also been the reason to accuse Mr

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<sup>2</sup> *Airline Stewards & Hostesses of New Zealand Union v Air New Zealand Limited* (1990) 3 NZLR 549 (CA) at 556.

Cooper of lying to her when she first responded to his initial request to meet at the wharf. I find Mr Cooper's evidence more plausible. I find it likely that he was simply training a relief driver. It is common ground that Mr Cooper initially relieved the run. Recruiting or training a relief driver is consistent with him not having to do this. Needing a relief driver is consistent with his description of maintaining continuity of the bread run for the South Island.

[42] Accordingly, I find that the absence of a meeting, while not pushed for by DCL, was not likely going to be an opportunity taken up by Ms Burrige in any event.

*Did DCL sufficiently investigate the allegations about smoking in the cab?*

[43] I find that DCL did likely sufficiently investigate the issues raised about smoking in the cab. While Ms Burrige says issues were raised with T about smoking, her first feedback shows me that she knew DCL did not allow smoking in the cab even if this was raised as an issue through T. She acknowledged she knew it was a condition in the offered IEA to T and she says she did not agree with it.

[44] Ms Burrige's feedback on smoking is contradictory. I prefer Mr Cooper's evidence that he did not agree to her smoking in the cab. I find Ms Burrige did not agree with her employer's instruction not to smoke in the cab. While DCL had not yet finalised an IEA with Ms Burrige, based on her first and second feedback, it could be reasonably satisfied that she was not going to adhere to not smoking in the cab.

[45] Ms Burrige's feedback to DCL includes her suggestion that her human rights may be breached if she could not smoke in the cab. However, I find it reasonable to expect that an employee would understand that non-smoking in workplaces has been part of New Zealand's law for some years.

[46] DCL received feedback that it could reasonably have taken to mean that Ms Burrige had smoked in the cab while driving; that she knew that DCL had told her not to; and that she was not going to comply. This was all consistent with the allegations and observations put to Ms Burrige in DCL's first disciplinary letter. Accordingly, I find that DCL sufficiently investigated this issue.

*Did DCL sufficiently investigate the allegations about speeding?*

[47] I find that DCL sufficiently investigated issues of speeding. I make this finding because while Mr Cooper had likely raised issues about speeding only with T after reviewing the GPS on the truck, Ms Burrige confirmed that she knew the issues had been raised with T and her feedback to DCL to the allegations comes from a “we” point of view.

[48] I take from Ms Burrige’s feedback to DCL during the disciplinary process that (like the smoking issues) she did not agree with either the instruction not to exceed the legal speed limit because keeping to the limit would unreasonably hold up other drivers and open her up for abuse from them or endanger them because they would try and overtake her. Alternatively, Ms Burrige feedback that Mr Cooper had said it was ok to keep under 100 kilometres and/or that she had to speed to make it to the destination in time, using expletives to criticise Mr Cooper for being against her driving above the speed limit. While her evidence is that Mr Cooper had sanctioned her to drive above the speed limit by saying this to T, I find this unlikely. Mr Cooper has a background in traffic enforcement. I accept his evidence that there was likely a commercial risk to DCL’s business given the truck carried the client’s livery and the client had no tolerance for speeding. It is not a stretch to accept that the client would have also faced a reputational risk if drivers did the run in its labelled truck over the speed limit. I accept the submission for DCL that this risk was also that DCL could face regulatory sanctions for its driver’s driving behaviour.

[49] While Ms Burrige says that the subsequent police process did not result in speeding charges against her, that was a subsequent and independent process. At the time of the disciplinary process DCL had GPS records for at least six consecutive shifts where the maximum speed recorded was between 95 kilometres and 97 kilometres. The speed limit for this type of vehicle is 90 kilometres. It also had Ms Burrige’s lengthy feedback which included her admissions that she disagreed with Mr Cooper’s views about not driving over the limit. I find in these circumstances that DCL sufficiently investigated this issue.

*Did DCL sufficiently investigate the allegations about logbook irregularities?*

[50] I find that DCL did not sufficiently investigate the logbook irregularities to the extent that it raised a significant list of new specific details in the schedule attached to the second

disciplinary letter, a letter that while asking for feedback about these “new” issues, also stated it dismissed Ms Burridge from her employment.

[51] I have already considered the nature of the feedback that Ms Burridge gave to DCL. However, I find it reasonable for her to have concluded that the second disciplinary letter had dismissed her from her employment and that this went some way to her decision to give a minimal response to the “new” logbook issues. To some extent the tight timeframe exacerbated this issue.

[52] Accordingly, on the issue of logbook irregularities I do not find that DCL sufficiently investigated before deciding to dismiss.

*Did DCL predetermine the outcome of instant dismissal?*

[53] At the time DCL emailed the second disciplinary letter Ms Burridge and Mr Cooper were also messaging about the two or three day per week shift issue. Mr Cooper emailed Ms Burridge:

Yes thank you, I have already heard what u are up to at the wharf, the storm is coming, Cviu [police traffic division] have been advised of log book offences, I think it is good that an independent party take a look at both [T] and your logbook entries.

[54] Standing back from this and considering what likely happened here I find an element of predetermination in Mr Cooper’s action in complaining to the Police before deciding to dismiss Ms Burridge for the logbook issues. Mr Cooper explained to me that there was an urgency linked to road safety. However, a reasonable employer could have considered suspension on pay while it conducted its investigation rather than a rapid process before the driver was due back at work, if the issue was reasonably one of high risk to road safety.

*Was Ms Burridge’s feedback genuinely considered*

[55] I have already referred to Ms Burridge’s style of feedback. It contained personalised criticisms of Mr Cooper using expletives in an aggressive manner.

[56] However, for the same reasons as above I find it unlikely that DCL genuinely considered or gave time for feedback about the new logbook details but likely did so for the smoking and speeding. While there are no real details about DCL's response to the details of Ms BurrIDGE's feedback there are responses from Mr Cooper to other messaging about Ms BurrIDGE saying that the GPS was faulty (in relation to speeding) and he denies this to be the case. Evidence later provided shows a third-party check that the GPS was likely accurate. In any event Ms BurrIDGE fed back confirmation that it was necessary to drive over the speed limit and that she did not agree to not smoke in the cab.

[57] In the circumstances I find that DCL likely genuinely considered what Ms BurrIDGE fed back about the smoking and speeding issues after extrapolating it from the wider material she put forward. I exclude from this finding the logbook issues.

### **Was DCL overall justified to instantly dismiss Ms BurrIDGE?**

[58] I have found that DCL did not sufficiently investigate the logbook offences and there were procedural issues with the way this was dealt with. However, I have to consider here that the dismissal was based on three grounds. I therefore have to ask myself whether based on the dismissal for the smoking and speed issues was DCL justified to dismiss immediately for serious misconduct?

[59] I consider that Ms BurrIDGE was justifiably dismissed for serious misconduct for the allegations about speeding and smoking. While the process was hasty, DCL had before it evidence of maximum speeds reached in the truck on days Ms BurrIDGE drove her shifts and these exceeded the speed limit. It put these things to Ms BurrIDGE. She defended them by denying them (saying the GPS was wrong) or inconsistently with this, defended her reasons for driving over the speed limit. Her feedback about needing to do so because other drivers would be unhappy and would take risks and/or because Mr Cooper was being unreasonable about going over the speed limit were things that a reasonable employer in DCL's position could have been seriously concerned about. Road safety is at the heart of this type of concern. I also accept the submission for DCL that its own liability was also at risk.

[60] Ms Burrige's feedback about smoking in the cab could reasonably have indicated to DCL that Ms Burrige was not going to accept any instruction that she was not to smoke in the cab of the truck, a refusal that again added to what a fair and reasonable employer could have taken to be a serious inroad into the trust and confidence that underpins employment relationships. I further accept the submission for DCL that like speeding, there is a regulatory sanction against an employer under smoke free legislation. In these circumstances I find it likely that no amount of warning to Ms Burrige would have made any difference here. Her view point was expressed very clearly to DCL.

[61] Accordingly, the two issues of speeding and smoking were both things that once considered in terms of the feedback given in the disciplinary process (albeit a process that was hasty) were within the scope of what a reasonable employer could have decided justified immediate dismissal for serious misconduct.

**Has DCL breached an agreement with Ms Burrige by not providing her with three days of work per week, and if so what if any wages compensation should DCL pay to her?**

[62] Ms Burrige is seeking lost wages described in her statement of problem as "some sort of" money owing for lost wages. The raising of the personal grievance referred to a claim of over \$2,000.00 without specificity about this. Ms Burrige, despite being given opportunities to provide her evidence or get herself assistance with her claim, progressed no further in providing the Authority with sufficient details about this part of what appears to be a claim related to not being offered work for three or four days per week.

[63] I took a pragmatic approach and asked both parties questions about this part of Ms Burrige's claim at the investigation meeting. The issue rests upon whether DCL breached an agreement to offer Ms Burrige work for three days per week instead of one to two days per week with T covering the remaining week of shifts.

[64] In the messaging that occurred during the disciplinary process Ms Burrige appeared to say either that she was employed by DCL to work alternate weeks with T of three and four days per week, or for three days per week. She refers Mr Cooper to her previous employer to check the days of the week she had worked for him which she says was consistent with this.

In the alternative Mr Cooper in those email exchanges says he had not agreed to employ her beyond one to two days per week and references discussions with T about hours of work and his commitments elsewhere and that Mr Cooper would relief drive to give Ms Burrridge and T time off together. Ms Burrridge in her messaging said she was not in a relationship with T and continued to say she was employed for either three to four days per week. She includes that this is supported by payslips showing accrued annual leave.

[65] The unsigned IEA that DCL provided in its evidence (as that which DCL submits applied to Ms Burrridge's employment) refers to "1-2" days per week. I am not satisfied that this was ever given to Ms Burrridge. Just after Ms Burrridge started work for DCL there is an email from Mr Cooper's wife (who did the accounts)<sup>3</sup> to ask Ms Burrridge for her IRD and kiwi saver documents and to explain that Mr Cooper would bring her IEA to her when they next met. As I understand it Mr Cooper is North Island based so face to face contact was intermittent at the Picton wharf. There is no evidence that Ms Burrridge received an IEA in her own name, even in draft form. That may have been the intention, but it likely did not eventuate.

[66] However, I am satisfied that Ms Burrridge likely saw T's IEA which shows "5 days" per week. She also says that she and T objected to the clauses about doing other driving work (T) and smoking in the cab. Mr Cooper says that given there are only seven shifts on a week (one per day) then that could only leave a maximum of two shifts for Ms Burrridge.

[67] Timesheets and payslips show Ms Burrridge worked three shifts on only two weeks of her employment being the weeks ending 7 October and 28 October 2018. The other (at least) three weeks she worked show she completed one shift one week and two shifts for the other two weeks. This was all after she drove with T 'informally' in September 2018 for DCL and then just prior to the final week where a dispute arose during the disciplinary process about the week that commenced with a public holiday on the 29 October 2018.

[68] Standing back and considering the above I find that this was a situation where the employment of Ms Burrridge was morphing from an informal rushed commencement that likely did not clearly clarify the days to be worked for DCL or where both she and (as is her

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<sup>3</sup> Email A Cooper to R Burrridge dated 12 October 2018.

own evidence) T had not agreed to the issues about whether T would or could drive for others. The latter issue may well have impacted what was agreed to about shifts.

[69] DCL has not helped its situation here by not formalising in an IEA what was agreed to before taking on Ms Burrige. Mr Cooper describes ‘inheriting’ her and ‘T’ from the business that lost the contract to him and blames the previous contractor for ‘talking them up’. Ms Burrige on the other hand criticises the situation where she was employed without a contract when she appears to have chosen to allow T to speak for her and to coat tail onto his role in the informal way she did when she started driving for DCL.

[70] Overall, I do not accept Mr Cooper’s evidence that everything was carefully agreed as to the terms and conditions of employment before DCL agreed to employ Ms Burrige. However, I am not satisfied there was a clear agreement as to the number of shifts she would do per week.

[71] While Ms Burrige, during the disciplinary process, claimed Mr Cooper had suspended her this was based on a claim of her not getting offered a third day of work that week I have not taken this point further due to finding I have insufficient evidence or information to support any agreement that she was to be employed three to four days per week.

[72] Accordingly, Ms Burrige’s claim to be compensated for money she says was owed to her by her not receiving three to four shifts of work per week is dismissed.

**Has DCL breached an agreement with Ms Burrige to pay her a higher hourly rate than she was paid, and if so what if any wages compensation should DCL pay to her?**

[73] Payslips show that Ms Burrige was paid a “Basic Income” which shows in the payslips without public holidays as consistent with the “run rate” of \$327.75 per trip that is consistent with the template IEA for Ms Burrige. While I find she did not receive this draft before her employment ended, Mrs Cooper’s email to her on 12 October 2018 anticipates her being given one. Even if I am wrong that this was likely the draft IEA to be offered to Ms Burrige, the payslips appear to support that Ms Burrige was being paid per “run rate”.

[74] I do not accept Ms Burrridge's submission that she was entitled to be paid a higher rate per hour because she was accruing holiday pay on her payslips. Equally I do not accept this supports the above claim that she was employed to work three to four days per week. Part time employees should accrue holiday pay. The legislation does not support an 8% top up except in circumstances that do not appear to apply here.<sup>4</sup>

[75] Accordingly, based on the above I have not found that Ms Burrridge was wrongly paid in terms of hourly rate or per run.

### **Summary of outcome**

[76] For the above reasons:

- a. Ms Burrridge's claim that DCL was unjust to terminate her employment is dismissed and no remedies follow.
- b. Ms Burrridge's claim to be paid wages arrears due to not being offered and then paid three days per week or not being paid at a higher daily rate is dismissed.

### **Costs**

[77] DCL asks me to reserve costs. Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[78] If they are not able to do so and an Authority determination on costs is needed DCL may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Ms Burrridge has 14 days to lodge any reply. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[79] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless circumstances or factors required an upward or downward adjustment of that tariff.<sup>5</sup>

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<sup>4</sup> Section 28 Holidays Act 2003

Antoinette Baker  
Member of the Employment Relations Authority

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<sup>5</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].