

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2020] NZERA 433
3056712

BETWEEN EKD
 Applicant

AND QDA
 Respondent

Member of Authority: Helen Doyle

Representatives: Applicant in person
 Daniel Erickson, counsel for the Respondent

Investigation Meeting: 4 August 2020

Submissions Received: 4 August 2020 from the Applicant
 17 August 2020 from the Respondent

Date of Determination: 20 October 2020

DETERMINATION OF THE AUTHORITY

- A There is an order for continued and permanent non-publication of the names of the parties and any matters that may identify them.**
- B EKD was unjustifiably dismissed from his employment with QDA.**
- B Taking contribution into account QDA is ordered to pay to EKD:**
- (i) Compensation under s 123 (1)(c)(i) of the Employment Relations Act 2000 of \$9000 without deduction.**
- (ii) \$71.56 being reimbursement of the filing fee.**

Prohibition from publication

[1] Following an application by EKD, the Authority prohibited from publication, the names and identities of the parties in a preliminary determination about whether the personal

grievance was raised within 90 days.¹ The order was extended to both parties given the location of the workplace and the possibility of identification of the applicant.

[2] The respondent, who at that time was represented by QDA's Human Resource Advisor, did not object to non-publication. The Authority referred to reasons in its determination supporting non-publication as being known to the parties but did not consider it necessary to set those out in the preliminary determination.

[3] The parties attended mediation but the matter did not resolve.

[4] Mr Erickson was instructed and advised that QDA has a neutral stance on publication.

[5] The matter has now progressed to a substantive determination and it is appropriate to readdress whether non-publication should be continued and if so, the basis for this.

[6] The Authority has some medical information that pertains to EKD from a psychiatrist.² Further medical information about EKD was requested after QDA became concerned about inappropriate conduct/interpersonal interactions at work. This led to EKD being asked to give consent to a medical assessment. Consent was duly given. A brief record from EKD's consultation with a psychiatrist was provided to QDA.

[7] The general principle is that justice should be administered openly and that a high standard must be met to depart from that principle with evidence of specific adverse consequences.³

[8] The Employment Court has commented on an increasing awareness about the impact of publication on future employment prospects of individual's named in litigation and access to justice.⁴

[9] In this particular case, there is the usual potential impact of publication on future job prospects, but also unusual behaviour on the part of EKD. EKD is therefore particularly vulnerable to any publication with respect to his ability to earn a living in the future even if successful with his claim.

¹ *EKD v QDA* [2019] NZERA 609.

² Attached to the statement of problem.

³ *XYZ v ABC* [2017] NZEmpC 40 at [65] and [66] with reference to the Supreme Court in *Erceg v Erceg* [2016] NZSC 135.

⁴ *Elisera v Allianz New Zealand Limited* [2019] NZEmpC 123 at [63].

[10] The Authority has the power to prohibit publication of parts of the names of any party under clause 10(1) of the second schedule of the Employment Relations Act 2000 (the Act).

[11] Weighing as I must the general principle of open justice with the particular features in this case, I am satisfied that there should be an order for continued and permanent non-publication of the names and identities of the parties. I so order under clause 10(1) of the second schedule to the Act.

Employment relationship problem

[12] EKD was employed by QDA on 2 October 2017 in the position of Driver/Multisystems Operator. In that role he reported to a supervisor and drove heavy vehicles in accordance with the nature of QDA's business.

[13] EKD was dismissed on 16 July 2018 with two weeks' notice paid in lieu. He says that his dismissal was unjustified and that the conduct was of a minor nature that would not justify dismissal.

[14] QDA says that the dismissal was justified as EKD was in receipt of a final written warning at the time that his employment was terminated.

[15] EKD in his statement of problem recorded that he wanted to be reinstated or have reimbursement "of loss of continuity". If the Authority reaches the point of consideration of remedies then I have concluded that EKD is seeking reinstatement, reimbursement of lost wages and compensation. Mr Erickson, appropriately in my view, took no issue with the way the remedies were described. He addressed these remedies in his written submissions on the day of the investigation meeting.

The issues

[16] The Authority needs to determine the following issues in this case:

- (a) What does the test of justification require the Authority to consider when there is a claim for unjustified dismissal?
- (b) What were the reasons for EKD's dismissal?
- (c) What are the material provisions in his employment agreement and what policies were relevant.

- (d) What was the final written warning for?
- (e) Was the process one that a fair and reasonable employer could have undertaken?
- (f) Could a fair and reasonable employer have concluded misconduct of a nature that justified dismissal considered in light of the final written warning?
- (g) Could a fair and reasonable employer have made a decision to dismiss?
- (h) If the dismissal was unjustified then what remedies are available, is reinstatement practicable and reasonable, and are there issues of contribution.

What does the test of justification require the Authority to consider in a claim for unjustified dismissal?

[17] The Authority is asked to consider whether EKD was justifiably dismissed. In doing so, it is required to apply the justification test in s 103A of the Act. The Authority does not determine justification by considering what it may have done in the circumstances. It is required under the test to consider on an objective basis whether the actions of QDA and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[18] The Authority must assess under this test whether there was substantive justification for dismissal. That means that it must consider whether any conduct could be concluded by QDA fairly and reasonably to be misconduct of a sufficiently serious nature that could justify dismissal in all the circumstances. In this case there is a final written warning.

[19] Fairness factors about any process adopted that must be considered by the Authority are set out in s 103A(3) of the Act. These are whether the allegations against EKD were sufficiently investigated, whether the concerns were raised with him, whether he had a reasonable opportunity to respond to them and whether such response was considered genuinely before dismissal. The Authority may take into account other factors as appropriate and must not determine a dismissal to be unjustified solely because of defects in the process if they were minor and did not result in EKD being treated unfairly.

[20] As a fair and reasonable employer QDA could also be expected to comply with the good faith obligations that are set out in s 4 of the Act.

What were the reasons for EKD's dismissal

[21] EKD was invited to a disciplinary meeting by letter dated 3 July 2018 from the Branch Manager who I shall call AC. The incident that was referred to in the letter arose on the previous day 2 July 2018 at approximately 16:45 when the vehicle that EKD was driving was backed into a sign secured to a barrier wall resulting in minor damage to the sign and to the vehicle.

[22] The allegations that EKD was asked to attend a disciplinary investigation meeting to explain were those ultimately found made out in reaching the decision to dismiss.

[23] The two reasons for dismissal arose out of that one incident.

[24] The first reason for dismissal is that EKD failed to operate his vehicle in a safe manner in breach of s 3.1 of his employment agreement and specifically a breach of s 3.1(c) of the Safe Driving Policy.

[25] The second reason is that EKD failed to immediately report a vehicle incident as a requirement of clause 3.2(c) of the Safe Driving Policy. This was stated to be a breach of 3.1 of EKD's employment agreement, specifically a failure to comply with policies and 19.2 of the employment agreement, being a failure to advise immediately.

[26] A final written warning was taken into account.

What are the material provisions in the employment agreement and policies for consideration

[27] Clause 3.1 of the employment agreement provided that EKD would comply with rules, policies and procedures.

[28] Clause 19.2 of the employment agreement provided as follows:

If the employee is in any way involved in an accident or incident (whether or not injury or damage has been sustained) while engaged in work for the employer, he/she agrees to advise the employer of the details of any such accident or incident immediately, or where this is not possible, without delay. The employer will log any incident or injury that has occurred in the accident register.

[29] In the safe driving policy the provisions referred to during the disciplinary process were clause 3.2(c) that provides a driver must immediately report any accident or incident that

they are involved in to their direct manager, regardless of the perceived/actual damage cost (if any), or severity of the incident which:

- (a) Resulted in any vehicle and/or plant and equipment under their control being damaged;
- (b) Resulted in any other property damage, altercation or injury; or
- (c) Resulted in a near miss;

[30] If required, an employee must immediately submit themselves to a post-incident drug and alcohol test following an incident.

[31] Clause 3.1(c) provided that operating vehicle plant or equipment must be undertaken in a safe manner in accordance with operating procedures and obligations.

What was the final written warning for?

[32] A final written warning was provided to EKD by letter dated 3 May 2018. It was with respect to four separate incidents. The first was that a truck fault had not been previously reported. The second was that there was damage to a vehicle belonging to QDA and a private garage. It was accepted that that incident had been reported appropriately by EKD. The third and fourth events relied on were that EKD was not wearing a seatbelt on two separate occasions.

[33] It was noted in the final warning outcome that the facts relating to each incident were accepted by EKD as correct at the disciplinary meeting. There was also reference to discussions about interpersonal relations with colleagues and EKD's commitment to be cooperative to facilitate any resolutions necessary in the future. The letter containing the final warning recorded as follows:

This letter records agreement to a final written warning which is underlying that any further breach of employment obligations whatsoever may again result in further disciplinary action, including instant dismissal.

Earlier issues

[34] After the final written warning there was a training/competency assessment with EKD on 28 May 2018. He undertook that successfully.

[35] There were some earlier issues that were dealt with informally between EKD and his supervisor before the final written warning. The letter inviting EKD to a disciplinary meeting did not refer to those matters.

Obtaining a medical assessment

[36] Following a written complaint dated 9 February 2018 about EKD his supervisor TS and AC met with him. There was reference by EKD to the fact that he may have Asperger's Syndrome and with his consent, a medical assessment at QDA's cost was undertaken to consider behaviours and complaints in the context of relevant medical consideration.

[37] On 17 March EKD attended an appointment with a psychiatrist and a mental health team. The only information released back to QDA was:

While EKD presents with some unusual ideas we do not believe he currently poses a risk to himself or others. He does not wish to engage with our service at this time but we would be happy to see him in the future if needed.

[38] QDA was initially supportive of EKD and took appropriate steps, including significant training. There was then a step taken to properly understand why some behaviour was occurring and whether there was a medical explanation for that. That could in turn have informed any need to make accommodations within the work place. It is unfortunate, objectively assessed, that the medical advice was not of more assistance to QDA. It may have been that patient confidentiality prevented more being said.

Was the process one that a fair and reasonable employer could have carried out?

[39] There was one disciplinary meeting that took place on 10 July 2018. There were no notes available to the Authority for the first part of the meeting which was to hear the explanation from EKD. There was then an adjournment and some notes taken after the resumption when the decision to dismiss was made.

[40] EKD confirmed that he did not want to be represented at the meeting. For QDA there was attendance at the meeting by AC and TS. DG the human resource advisor attended by phone.

[41] EDK had been advised he could have a representative or a support person in the 3 July letter. He had been supplied, by way of attachment to the letter, with a copy of an incident

report, safe driving policy, relevant sections of the employment agreement and a copy of the 31 May 2018 final written warning. Those matters accorded with procedural fairness.

[42] AC started off the meeting by reading through the content of the 3 July 2018 letter about the allegations.

EKD's explanation

[43] EKD did not dispute he had backed into the sign. He said that he had parked back to assist others get by and in doing so reversed past the wall so the back of the truck extended over the wall and hit the sign. He failed to see the sign. In her evidence AC recorded that EKD noted that it was getting dark. EKD was unaware he had hit the sign until told by another person and when made aware pulled the truck forward. He attempted to see AC after the incident and she recalled him hovering about. AC was talking to someone and he went home as it was home time. EKD said that he left the event report on the desk of his supervisor the following day on 3 July 2018.

[44] EKD considered that the matter was minor and he should not be dismissed because of his history of service and work undertaken since the last incident.

Adjournment taken

[45] AC who was the decision maker said that after she discussed all the information relating to the incident with EKD an adjournment was taken. In the adjournment AC talked with TS and DG. She considered EKD's responses, attitude about the incident, the circumstances of the incident and service history including the final written warning. The notes that were recorded reflect that service and team work (fit) were considered with respect to what may be in the "goodwill bank". The word "nil" follows. Two question marks followed team fit. She said that she had serious concerns about EKD's ability to do the job properly. She was concerned that he continued to have incidents and failed to operate safely. She was also concerned that EKD minimised the action of hitting a sign and the failure to immediately report. AC said that she was worried that next time someone could be seriously hurt or killed.

[46] Alternatives to dismissal such as a final written warning were considered but AC said that she no longer had confidence in EKD.

Resumption and decision to dismiss

[47] The meeting then resumed and EKD was advised that it had been found he had breached his employment obligations and that it was proposed an outcome would be dismissal with notice. EKD did not accept that and wanted to remain employed.

[48] The outcome was that EKD was dismissed that with two weeks' pay in lieu.

Conclusion on procedural fairness

[49] It was accepted by DG that the incident on 2 July 2018 was not one that on its own would have justified dismissal and that the final warning was taken into account.

[50] Having heard the evidence and considered the documentation there are aspects of the process that I conclude were unfair and not in a minor way.

[51] I am not satisfied that QDA properly investigated when EKD had completed the event pad form about the incident. The date the event form was filled out and the circumstances around doing so could be expected to be weighed and considered by a fair and reasonable employer in making a decision about dismissal. This is particularly so when EKD was seen heading towards AC to report on the day of the incident but was put off because she was talking to someone else. He referred in his evidence to them having a "serious conversation." He also said that he had taken the event note pad home to fill out and then returned the next day to report. Further investigation was needed about that. Whilst other steps could have been taken by EKD the date actually reported is an important aspect to weigh in terms of any delay if reporting is not immediate.⁵

[52] It was stated by TS and AC in written and oral evidence during the Authority investigation meeting that the event was reported by EKD on 4 July 2018 rather than 3 July 2018, and only after TS asked EKD to complete the event form. The evidence was that EKD was on leave on 3 July. EKD did not accept that the event was reported on 4 July. He maintained that the event was reported the next day by way of an event pad form left on TS's desk. The notes, such as they are, from the disciplinary meeting do not support that it was put to EKD that the incident was reported on a date other than 3 July.

⁵ Clause 19.2 of the employment agreement.

[53] That the event form was filled out on 4 July is inconsistent with some other communication at the time.

[54] The first inconsistency is with the event form itself. Whilst the month is incorrectly filled out as June rather than July by EKD the date is referred to as 3 June 2018.

[55] The second inconsistency is with the incident report completed by AC and entered into the system on 3 July and provided with the letter of 3 July to EKD. It refers to the event being reported by 3 July 2018. In the event description it states amongst other matters about the 2 July incident that:

Initial actions taken

After completing end of day procedures EKD went to find his supervisor or the Manager to notify them. He was not able to speak to either of them. EKD left site without speaking to anyone and completed the alert the next morning. He completed the alert the next morning after arriving at site at 8.30am.

[56] The third inconsistency is the letter inviting EKD to the disciplinary meeting from AC dated 3 July 2018. In her oral evidence AC said that she probably started drafting the letter on 3 July but completed it on 4 July. The letter does indicate EKD was given the letter on 4 July as he signed for it on that date. The letter refers to the incident being not notified by EKD to TS until after his scheduled start time on 3 July. A copy of the incident report attached to that letter is consistent with that date.

[57] There is also the letter sent by AC to EKD after the dismissal on 10 July confirming the outcome. It notes a key point from the meeting as below:

You had attempted to see me after you returned to the office but I was unavailable. You did not call TS but chose to leave an 'event pad' note on his desk the next day.

[58] Then there is the email that EKD sent to AC and DG raising his personal grievance on 16 July 2018, six days after dismissal. It was never responded to by QDA. EKD provided it to the Authority to support that he had raised his grievance when QDA maintained that he had not, but in so doing did not provide this email. EKD's email states amongst other matters:

---The matter of not reporting immediately would be contested in a legal sense as all NZ Law has an element of what would reasonably be termed in good faith and reasonable time. The written report was not verbally requested by anyone and was on my supervisors desk at the start of clock in time the following day.

[59] I cannot be satisfied that the date of provision of the event pad form by EKD was investigated sufficiently. Alternatively there is a breach of the good faith obligations in s 4(1A)(c)(i) and (ii) of the Act that EKD was not provided with information known to QDA that was relevant to the continuation of his employment, and given an opportunity to comment on it. That is that he had recorded the event on the event pad and left it on his supervisors desk on a date and in circumstances other than those on the incident report and as recorded in the letter inviting him to the disciplinary meeting.

[60] Having heard evidence from AC I am also concerned that some matters taken into account in reaching a decision to dismiss were not put to EKD for his comment. Whilst it is appropriate to consider the history of employment, consideration was placed on team fit. Team fit had been an issue but would have to be considered with the medical situation. It is a different type of matter than that which EKD was answering about reversing into a sign and not reporting immediately.

[61] Further the evidence for AC suggested that some other driving incidents dealt with informally may have been considered in the mix. I accept that it was clear the incidents that resulted in the final written warning would be taken into account. I could not be satisfied to the required degree that all matters relied on in making the decision to dismiss were put to EKD so that he could respond to them. It is clear to the Authority from other matters written that had these earlier incidents dealt with informally been put EKD would have had something to say about them. On its own perhaps not such a significant procedural matter however when viewed with the other issues becomes more so when considering the overall fairness of the process.

[62] I find for the reasons above that there was procedural unfairness that was more than minor and that it did cause unfairness to EKD. The process was not that which a fair and reasonable employer could have undertaken. This is particularly so in a case where the seriousness of the actions required careful and fair assessment with any mitigating factors. The process was not in accordance with the statutory test and the procedural fairness factors. It was not what a fair and reasonable employer could have done in all the circumstances.

Could a fair and reasonable employer have concluded misconduct of a nature that justified dismissal considered in light of the final written warning?

[63] For both breaches the lack of procedural fairness overlaps with the substantive findings available in this case about the seriousness of the incidents and therefore conclusions that it justified dismissal.

[64] I do not conclude the statutory test for justification is satisfied. The procedural unfairness is such that a fair and reasonable employer could not have formed the view that EKD's actions on 2 July 2018 amounted to misconduct of the nature that would justify dismissal because of the formal written warning.

Could a fair and reasonable employer have reached the decision to dismiss?

[65] A fair and reasonable employer could not have reached the decision to dismiss. EKD has made out his personal grievance that his dismissal was unjustified and he is entitled to consideration of remedies.

Remedies

Lost wages

[66] There was no evidence of lost wages. EKD secured other employment almost immediately and was paid two weeks in lieu of notice.

[67] In those circumstances I make no award for lost wages as there was no evidence of loss.

Reinstatement

[68] EKD's employment ended on 10 July 2018. His dismissal took place before reinstatement became the primary remedy. It was clear from his evidence that he enjoyed his work although he was becoming concerned about the increasing number of issues being raised with him. This was to the extent that he had begun to look for other work before dismissal and therefore was able to secure new work quickly afterward. From what EKD said I was not reassured he could re-establish a good relationship with TS if reinstated although he spoke highly of AC.

[69] I have also had regard to the work history and the number of incidents over a comparatively short period of time and QDA's concerns about that.

[70] I do not find that reinstatement would be practicable and reasonable in all the circumstances.

[71] No order is made for reinstatement.

Compensation

[72] There was not a great deal of evidence about the impact of dismissal but it is clear that EKD considered the matter was not serious enough to justify his dismissal and that did cause him hurt and humiliation. In his final submissions he made a comment that is illustrative of that to the effect of questioning "can any [person] made a mistake without having to find blame." I have also placed weight on the fact that within days of his dismissal he raised again his concerns about the outcome of dismissal. There was no response at that time.

[73] EKD has a strong sense of fairness and what is right and wrong to the extent that some years later this matter still affects him. I have taken into account that he found alternative employment almost immediately.

[74] Subject to any findings about contribution I conclude an appropriate award in all the circumstances for compensation would be the sum of \$10,000.

Contribution

[75] The Authority is required, under s 124 of the Act, in deciding the nature and extent of the remedies to be provided to consider the extent to which the actions of EKD contributed to the personal grievance. If required the Authority may reduce the remedies that would have been awarded accordingly.

[76] This is the only time the Authority needs to reach a view on the balance of probabilities about what occurred.

[77] In his submission Mr Erickson suggested a reduction of 50-75% because EKD failed to operate the vehicle safely and failed to immediately notify the incident.

[78] There was no dispute that EKD reversed into the sign and it caused some damage to the sign and paintwork of the truck. He was trying to leave some room for another truck with a hook attachment so his backing was objectively well intentioned but careless. He said that his cameras were not in a position to pick up the sign. It is clear that the connection with the sign was unintentional although it could be seen as a breach of the safe driving policy and it was a driving incident.

[79] The damage was very minor. There was then a failure to report immediately however there was some initial intention to do so. On hearing from EKD he considered that AC was talking about something serious with another person and did not want to interrupt. That was not unreasonable. He could have waited or telephoned TS but said that it was the time he usually finished for the day. I also understood from his answers some initial reservation because he did not want to be “told off.” I was unable to conclude with any level of certainty that the event form was not placed it on TC’s desk the morning of the day after the incident. There was delay in reporting but it was on the balance of probabilities not significant. I also note that the incident was known about shortly after it occurred.

[80] One of the concerns from AC was that there was no ability to obtain a drug and alcohol test from EKD because the incident was not reported. AC knew about the incident on the day it occurred after EKD had left the site, as did others. It was not a situation where there was no awareness of the incident at all. EKD could have been called and asked to complete a test if it was thought that was required. The wording in the driving policy in clause 3.2 (d) is that “if required, an employee must immediately submit themselves for a post-incident drug and alcohol test following accident.” Presumably not every incident requires such testing.

[81] There was some blameworthy conduct on the part of EKD particularly with respect to the failure to report immediately that he had connected with the sign. I consider a justifiable reduction is 10 %.⁶

⁶ Maddigan v Director –General of Conservation [2019] NZEmpC 190.

Costs

[82] EKD was not represented and has not therefore incurred costs. He is entitled to reimbursement of his filing fee of \$71.56.

Orders made

[83] QDA is ordered to pay to EKD the following sums:

- (a) Compensation under s 123(1)(c)(i) of the Act taking contribution into account in the sum of \$9000.
- (b) \$71.56 being reimbursement of the filing fee.

Helen Doyle
Member of the Employment Relations Authority