Employment Court of New Zealand

QDA v EKD [2021] NZEmpC 139 (23 August 2021)

Last Updated: 27 August 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA ŌTAUTAHI

[2021] NZEmpC 139
EMPC 352/2020

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for a non-publication order
BETWEEN	QDA Plaintiff
AND	EKD Defendant

Hearing:	1 and 2 June 2021 (Heard at Christchurch)
Appearances:	D Erickson and S England-Hall, counsel for plaintiff A Williams and K Bucher, counsel for defendant
Judgment:	23 August 2021

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] EKD (Mr D) was a driver of heavy waste collection vehicles, as an employee of QDA.1

[2] After a first and final warning was imposed for a driving issue, Mr D faced an inquiry in relation to a further driving issue, and a reporting issue. He had reversed his vehicle into a sign secured to a barrier wall which caused minor damage; it was also alleged he had not reported the incident with sufficient promptitude.

1 Non-publication orders apply – see paras [127]–[133].

[3] After attending a disciplinary investigation meeting to explain what occurred, a decision was made to dismiss him with two weeks' notice paid in lieu.

[4] Subsequently, Mr D raised a personal grievance which resulted in the Employment Relations Authority determining that he had been unjustifiably dismissed on substantive and procedural grounds.2 The Authority concluded that a fair and reasonable employer could not have reached the decision to dismiss and that Mr D was entitled to compensation for humiliation, loss of dignity and injury to feelings of

$10,000, reduced by 10 per cent for contributory conduct to $9,000.

[5] QDA subsequently brought a challenge to the determination on a de novo basis. It says that the steps taken were justified, especially in light of the health and safety concerns it held. Mr D says in response that the Authority's outcome was correct.

[6] The issues for the Court are whether the actions of the employer were justified, and if not, what compensatory remedy should follow.

Evidence

Background facts

[7] Much of the background is not in dispute. Mr D commenced work at the Timaru branch of QDA on 2 October 2017. His role as a Driver – Multi System Operator required him to drive heavy vehicles fitted with in-cab operated side-lifters on public roads and private accessways, collecting material from curb-side rubbish and recycling bins, and returning it to a transfer station for processing.

[8] Mr D worked under an individual employment agreement (IEA) dated 29 September 2017.

[9] Health and safety obligations on the part of the employer and the employee were emphasised in the IEA. Relevant to the present case was this obligation:

19.2 If the employee is in any way involved in an accident or incident (whether or not injury or damage has been sustained) while engaged

2 *EKD v QDA* [2020] NZERA 433 (Member Doyle).

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.

[10] Another provision required Mr D to comply with the company's rules, policies and procedures. Also relevant is QDA's Safe Driving Policy, which emphasised the importance of professional driving and operating practices.

[11] For its part, QDA was to provide a vehicle that was fit for purpose, complying with relevant safety and statutory requirements. It also recognised it had a responsibility to ensure the safe use and operation of its vehicles, undertaking to provide appropriate driver assessments, as well as training and information as deemed necessary, which would include road safety and specialised vehicle training.

[12] Under the Safe Driving Policy each driver was to:

Immediately report any accident or incident that they are involved in to their direct manager, regardless of the perceived / actual damage costs (if any) or severity of the incident, which

i. Resulted in any [QDA] vehicle and/or plant and equipment under their control being damaged;
ii. Resulted in any other property damage, altercation or injury; or iii Resulted in a near miss.

[13] During Mr D's first six months of employment, a number of complaints from colleagues, customers and/or the public relating to his potentially inappropriate conduct or interpersonal interactions were received.

[14] These resulted in a meeting with Mr D, who advised that he may have Asperger Syndrome. As a consequence, a brief report was obtained from the Mental Health and Addiction Service of the local District Health Board, Mental Health and Addiction Services, in which the employer was advised:

... while [Mr D] 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.

[15] The Branch Manager, Ms C, concluded there did not appear to be any medically significant issues, albeit Mr D had an unusual interpersonal communication

style. She and Mr S, the Operations Supervisor to whom Mr D reported, noted that these problems could put others on edge, because his comments could be misperceived. Ms C said that she and Mr S would generally try and discuss such issues with Mr D. She said that conversations could easily get "off track" and would sometimes take one to two hours to reach a point where they felt Mr D clearly understood what was being communicated to him. Their approach was to work with Mr D to address the effects of these issues.

[16] In addition, during the initial phase of Mr D's employment there were several "driver-at-fault" incidents. In one instance Mr D hit a vehicle with the truck he was driving, and on another impacted a letterbox. He was spoken to by Mr S on both occasions. No other steps were taken.

[17] In March and April 2018, Mr D was involved in some further health and safety incidents and potential breaches. It was decided that a disciplinary process should be commenced with regard to the following issues:

- 9 March 2018 – failure to immediately report a truck fault;
- 13 March 2018 – hit garage door;
- 31 March 2018 – driving without a seatbelt fastened;
- 9 April 2018 – driving without a seatbelt fastened.

[18] These issues were discussed with Mr D at a disciplinary meeting. The employer then wrote to him imposing a first and final warning, noting that the key points which had arisen from the disciplinary meeting were:

- Mr D had accepted the facts in relation to each incident as being correct.
- He had accepted he had breached his employment obligations.
- He had indicated he regretted his actions and assured Ms C this would not happen again.

- Ms C had discussed concerns relating to interpersonal relations with colleagues. Mr D had committed to being cooperative in allowing Mr S to facilitate any resolutions necessary to enhance positive work relations.
    - Mr D committed to following all instructions in the future. This arose because there had been a discussion as to missing collection services (that is, missed streets) as a consequence of not following route instructions and on-kerb positioning of bins.

[19] On 10 May 2018, a member of the public complained as to how Mr D had spoken to them. Ms C decided to hold a preliminary investigation meeting. In a subsequent letter recording the content of their discussions, she confirmed no further action would be taken, but several aspects of the incident were recorded. These focused on communication issues, including Mr D's acknowledgment that people who did not know him well may perceive some of his behaviours as being disconcerting, offensive or even intimidating. It was emphasised to him that careful judgement was required to avoid being misunderstood, or which could create a poor image of QDA in the eyes of others. Mr D was asked to maintain open communication with Mr S on such issues, so he would understand any particular situation and assist him as necessary.

[20] On 28 May 2018, Mr D undertook a training and competency assessment with the Branch Instructor, which was the usual procedure following an incident such as that which had occurred on 13 March 2018. It covered all aspects of sideload operations, including the use of the rear-facing camera and reversing mirrors of a heavy vehicle.

Incident of 2 July 2018

[21] Late in the afternoon of 2 July 2018, Mr D was driving a side-loader vehicle belonging to QDA's fleet. He said the vehicle was one used when the main rotation of vehicles was unavailable, for instance, if it was in the course of being processed for a warrant of fitness.

[22] Mr D said this was a difficult vehicle to drive as it was a single axle which meant its steering was different to that of other vehicles. The grabbing-arm was old and could operate in an unpredictable manner. The vehicle was dual-operational, which meant it could be operated from the left side when picking up bins but had to be driven on the right side when travelling on the road or covering distance.

[23] At the end of his working day, Mr D drove into a publicly accessible yard area where QDA vehicles could be parked. This area was adjacent to a shingle park where Mr D would normally position the vehicle he had been driving. He was operating from the right-hand side because he had just come in from the road.

[24] Mr D reversed the vehicle for overnight parking purposes. He wished to extend the rear bin over a wall behind the truck in order to ensure that another vehicle could move safely in front of his parked vehicle. This was an issue which the driver of the other vehicle had previously spoken to him about. He said he was accommodating that driver's request. He understood this was a safety issue for the other driver. He was certain there was no other vehicle or person in the area.

[25] He said his right-hand mirror was properly adjusted for the manoeuvre. The left-hand mirror on which he relied was adjusted in such a way as to allow the driver to see a lower view of the rear of the vehicle to assist bin pickups when operating it from the left side.

[26] A reversing camera was positioned at the rear of the vehicle. Its monitor in the cab could not be adjusted for right-hand drive operation because the stalk on which it rested was broken. That day, Mr D had used cable-ties to fix it, the result being that the monitor was permanently angled towards the left-hand side of the cab for left-hand operations. Mr D said it was more important that the monitor be set up for left-hand operations, as the vehicle operated from that side whilst "in the field". This meant he could not use the monitor when operating from the right-hand side of the cab, as was the case at the time of the incident.

[27] Mr D said the day was overcast and that it was beginning to get dark as it was mid-winter. He reversed cautiously and slowly. He was unaware his vehicle hit the sign; he said he had not seen it.

[28] I interpolate to say that QDA's evidence as to the consequences of this manoeuvre was that the two uprights of angle-iron which held the sign were bent backwards by almost 45 degrees. The truck had minor panel and paint damage where the angle-iron had scraped the rear door. The costs of repair were minor.

[29] After Mr D exited the vehicle, another employee approached him and told him he had hit the sign. He did not expand any further as to what he had seen.

[30] Mr D said he now knew that the sign was for customers on the other side of the wall – that is, it faced away from the area into which he was reversing. He believed his vehicle had impacted it with very little force.

[31] Mr D immediately located Ms C. She was in a utility vehicle with another employee. Because it appeared she was having an "intense" discussion with that person, he waited. He felt he should not interrupt given the nature of the meeting he was observing.

[32] His hours of work that day were from 6.00 am to 4.00 pm. After waiting for approximately five minutes, he decided to leave the premises as he needed to catch the last bus home, scheduled to depart at 5.30 pm. He also had evening commitments. He was already more than one hour past his scheduled finish time of 4.00 pm. He therefore took an event reporting pad home with the intention of lodging a completed form the next morning.

[33] Mr D says that he did just that. On 3 July 2018 he placed the completed incident form on Mr S's desk upon arriving at work at his usual time of 5.45 am. In it, and in a Vehicle Condition Report which he also completed, he included reference to the issue concerning the monitor for the rear camera, stating in effect he had undertaken a temporary repair with cable-ties.

[34] Subsequently, he asked another employee to cover his shift as he wished to take a sick day. This person covered his morning shift. Mr D went to a café where he telephoned a QDA employee in charge of payroll. She confirmed he could not claim a sick day, so he returned to the work premises intending to complete the rest of the shift. However, he says he was stopped by Mr S, as a result of which the relief driver took over. For payroll purposes, he was shown as having taken a day in lieu.

[35] Turning to the company's position, Ms C said that when she was sitting in the cab of the utility vehicle late on 2 July 2018, she observed Mr D waiting for her. She had waved to him, signalling her openness to engage. Mr D then walked off. When the conversation had concluded, she attempted to locate Mr D, but he had left the site.

[36] At about 6.00 pm she learned that an employee had observed Mr D reversing his truck into a sign, attached to the back of a clean-fill bunker. She was told that Mr D had been unaware he had hit the sign until the employee informed him this was the case.

[37] She checked Mr S's desk to see if an incident form had been completed. As there was no such form, she assumed that Mr D must have telephoned Mr S.

[38] She said that QDA's payroll records showed Mr D taking an alternate holiday on 3 July 2018.

[39] It was unclear when she became aware of this. That day she discussed the incident with colleagues. It was agreed that because Mr D appeared to have been involved in a "driver-at-fault" incident while on a final warning, a disciplinary meeting should take place. With the assistance of Human Resources (HR), she began preparing a letter on that topic, although she did not give it to Mr D until he returned to work on 4 July 2018.

[40] Mr S denied either receipt of the incident form on 3 July 2018 or that he spoke to Mr D that day.

Disciplinary meetings

[41] On 4 July 2018, Mr D was given a letter signed by Ms C, advising him of an intended disciplinary meeting. It had been agreed with Mr D that the meeting would take place on 5 July 2018, and that the following allegations would be discussed:

1. Failure to operate your vehicle in a safe manner, being a breach of s3.1 of your employment agreement; specifically breach of the Safe Driving Policy s 3.1(c).
2. Failure to immediately report a vehicle incident, as a requirement of the Safe Driving Policy s3.2(c) being a breach of:
    (a) s3.1 of your employment agreement; specifically failure to comply with policies; and/or
    (b) s19.2 of your employment agreement; specially failure to advise immediately.

[42] Mr D was advised that if it was determined he had breached his employment obligations, disciplinary action may result up to and including dismissal. He was reminded of his right to seek advice, including specialist advice and/or to have a representative or support person attend. There was no reference to the final warning, or its potential relevance.

[43] In fact, the disciplinary meeting spanned two occasions, because when it commenced on 5 July 2018, it was interrupted. The process resumed on 10 July 2018.

[44] The meetings were attended by Mr D on the one hand, and on the other, Ms C, Mr S, and Mr G who provided HR support – albeit Mr G attended the second meeting by phone. Ms C took handwritten notes of the first meeting but not of the second, although she did record a conversation she had with Mr G as to issues she was considering when reaching her final conclusions.

[45] Ms C said she asked Mr D to respond to each of the concerns raised. With regard to the assertion there had been a failure to operate a vehicle safely, Mr D accepted he had hit the sign. He said he had not needed to take notice of the sign, and he was more focused on whether there were any people around. He also said he was trying to get as close to the rear wall, so that there was room for another vehicle to be operated. He was using his mirrors, but not the reversing camera, which was "pointing to the left".

[46] He said he had tried to report the incident to Ms C, but she was busy, and he had left the site to avoid Mr S, which is why he had reported the incident the following morning.

[47] There was a discussion as to communication issues between Mr D and Mr S. Mr S said that when he tried to discuss incidents with Mr D he would "flare up"; Mr D said that in his view it was Mr S who would "flare up".

[48] At the commencement of the resumed meeting on 10 July 2018, Mr D confirmed he did not want to be represented or to have support. He was asked whether he wished to add anything to what had been discussed at the first meeting. Ms C said his responses to date did not give her confidence that he took responsibility for working in a safe manner. She referred to a statement made by Mr D that it was not his fault he had not seen the sign.

[49] Mr D said he believed this did not warrant dismissal, taking into account his total service history and the volume of work done since the last incident.

[50] There was then a break when Ms C discussed the situation with Mr S and Mr G. In that discussion, she referred to her concern as to whether Mr D was able to perform his role safely. She said he had been involved in regular "driver-at-fault" vehicle incidents, which often occurred while reversing.

[51] She was also concerned that Mr D did not seem to fully understand the safety implications as to what had occurred when he had hit an object with a heavy vehicle. There was a potential for someone to be seriously hurt or killed.

[52] The other issue was his failure to immediately report what had happened. He had been made aware of this requirement on numerous occasions; most recently he had been reminded of this obligation following an incident which had occurred in March 2018. This had been relevant to the imposition of the final warning.

[53] Ms C believed the incident had been reported on 4 July 2018, two days after the incident. She said this was backed up by the company's payroll records, which

showed he had been away the previous day. She said that documents noting the incident having been reported on 3 July 2018 were incorrect. Even if that had been the case, lodging the document the next day was too late, given the IEA and policy obligations. Mr D should have reported the incident before he left work on 2 July 2018. There were good reasons for having such a requirement, including a need to decide whether post-incident drug and alcohol testing should be undertaken.

[54] Ms C said she also discussed with Mr G and Mr S the option of a lower disciplinary sanction, such as another warning. She wrote in her notes:

What's in the goodwill bank account Service/extra mile/teamwork (fit)??

Nil

[55] She said these notes were made when she was considering whether there were any mitigating factors that could be taken into account. Potential positive aspects of his performance were outweighed, however, by the overriding health and safety considerations. She no longer had confidence in Mr D to operate QDA vehicles without further incident, or to follow its procedures. Accordingly, she told her colleagues that she proposed to dismiss him on notice.

[56] The meeting resumed with Mr D. Ms C told him of the proposed outcome. She asked him whether he had anything to say in response. Mr D said he did not accept the proposal and wanted to remain in employment. Ms C confirmed that she no longer had the necessary confidence in Mr D to continue employment without further incident. She accordingly terminated his employment.

[57] Ms C confirmed this outcome in a letter sent to Mr D on 13 July 2018. He responded on 16 July 2018, protesting the dismissal. He said there had been no health and safety issue because no person had been close to the vehicle or could have been involved in any "physical or dangerous way". He had reported the incident in good faith and in reasonable time. A written report had not been requested and had been placed on his supervisor's desk "at the start of the clock in time the following day".

The parties' submissions

[58] Mr Erickson, counsel for QDA, strongly asserted that the decision taken was one which could have been reached by a fair and reasonable employer, on both substantive and procedural grounds.

[59] In summary:

a. QDA's process and decision were what a fair and reasonable employer could have done in all the circumstances.
b. If there were any procedural deficiencies, these were minor and did not result in Mr D being treated unfairly. That is, they made no unfair difference to the outcome.
c. If Mr D was unjustifiably dismissed, there should be a reduction in any remedies awarded in his favour to account for his own contribution to the circumstances that gave rise to the grievance.

[60] Mr Williams, counsel for Mr D, submitted in summary:

a. Mr D denied that he failed to operate his vehicle safely and denied that he failed to report the incident within a reasonable timeframe.
b. He said it was now clear that Mr D's employment was terminated for broader reasons than those notified – including a pattern of alleged driving problems and concerns about his interpersonal relations. Neither of these grounds were identified as part of the disciplinary process.
c. In summary, Mr D's dismissal was unjustified on substantive and procedural grounds, and he was entitled to a substantial remedy.

Legal principles

[61] The Court must assess what occurred under s 103A of the Employment Relations Act 2000 (the Act). The test of justification requires consideration of whether the employer's actions and how the employer acted were what a fair and reasonable employer could have done in all the circumstances. The section goes on to identify four factors which the Court must consider in applying the test and provides that the Court may consider any other factors it thinks appropriate.3

[62] The Court is required to examine the issue of justification objectively. It may not substitute its decision for what a fair and reasonable employer could have done in the circumstances. There may be a range of responses open to a fair and reasonable employer. The requirement is for an assessment of substantive fairness and reasonableness, not a minute and pedantic scrutiny to identify failings.4

[63] The principles of s 103A are to be read alongside the requirements of s 4 of the Act. The parties, whether employer or employee, must deal with each other in good faith. Amongst other things, the duty of good faith requires them to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are responsive and communicative.

Analysis

Was the employer's process fair and reasonable?

[64] The first consideration I consider relates to the sufficiency of the employer's investigation.

[65] A QDA employee witnessed the incident. Another employee conveyed this information to Ms C on the evening of 2 July 2018; Mr S says he learned of this information on the morning of 3 July 2018.

[66] Despite this being known, the employee was spoken to only informally. No notes were made of the conversation. Ms C candidly conceded that documentation relating to the interview could not be found. Nor is there any evidence that Mr D was told the witness had been interviewed.

3 Employment Relations Act 2000, s 103A(3) and (4).

4 *Angus v Ports of Auckland Ltd (No 2)* [2011] NZEmpC 160, [2011] ERNZ 466 at [36]–[44]; and

Cowan v Idea Services Ltd [2020] NZCA 239, [2020] ERNZ 252 at [18] and [40].

[67] In his evidence, Mr S accepted the employee was an important witness, since he had observed what had happened. In hindsight, he said, notes should have been taken of the conversation.

[68] Mr S also confirmed that an employee in an adjacent transfer station kiosk, operated by the local authority, was in a position to have observed the incident. He had approached and spoken to an employee of that entity. He did not make a record of the interview and did not provide information about what he was told to Mr D. He did not think it would have been prudent to have done so, because, it seemed, Mr S's view was that his information would only have related to the extent of damage.

[69] As I shall discuss more fully later, also relevant to the matters under consideration were the events of 3 July 2018, when the company proceeded on the basis that a report of the incident was not given until 4 July 2018. An aspect of that issue pertained to a conversation Mr D said he had with an employee who he asked to cover his shift and who did so. Mr S said he spoke to this person a few days before the hearing in the court. But this individual was not spoken to at the time when the incident would have been fresh in the mind, and Mr D was not informed as to his observations.

[70] Related to this was the fact Mr D said he had telephoned a payroll employee, as a result of which, he took a day's leave rather than sick leave. This too was relevant to what he said and did on 3 July 2018. There is no evidence the company interviewed the payroll officer.

[71] Mr Erickson submitted that the information obtained at the time from the two persons who were nearby, took the matter no further. Mr D had conceded he reversed his vehicle into the sign, so that it was unnecessary to obtain further information on this point.

[72] The difficulty with this approach is that it is not known what further information direct witnesses may have been able to provide as to how the incident unfolded, given factors such as speed; evidence of Mr D checking spatial awareness; extent of light; or any other relevant factors.

[73] A full and proper investigation necessarily requires all relevant witnesses to be properly interviewed.5 That did not occur.

[74] Another omission concerns the problem Mr D had encountered with the camera monitor. Although he had referred to this issue in the incident form and Vehicle Condition Report, it appears this issue was not investigated or considered at the investigation meeting. Such a finding follows from the fact that it was only at the hearing of the challenge in the Court that it was appreciated by witnesses for the employer, particularly Mr S, that Mr D had been referring to the monitor and not to the camera itself. He was recorded as having said at the disciplinary meeting that "the camera was pointing to the left", but the Vehicle Condition Report and incident form, when read together, clarified he was referring to its monitor. Consequently, there was no consideration as to the significance of this fact given the obligations held by the employer as to the provision of vehicles fit for purpose.

[75] I have touched already on the issue concerning the date of the tendering of the incident form. This point was material to the second of the two allegations Mr D faced.

[76] At the investigation meeting, Mr D told Ms C and her colleagues that he had reported the incident "the following morning". Plainly, this was not accepted. This was another point which was not investigated when there was evidence clearly indicating it needed to be. Evidence which supported the conclusion that the form was submitted on 3 July 2018, was:

a. The incident form is dated 3 June 2018 (it being accepted that Mr D had been mistaken as to the month).
b. Ms C entered the incident form on the company's registered database, Vault, on 3 July 2018, and prior to the investigation meetings. In it, she recorded that Mr D had left the site without speaking to anyone and "completed the alert the next morning" when he arrived at work.

5. *Singh v Sheridee Holdings Limited t/a New World Opotiki* EmpC Auckland AC53/05, 22 September 2005; *Clarke v AFFCO NZ Ltd* [2011] NZEmpC 17 at [32]; and *Gazeley v Oceania Group (NZ) Ltd* [2013] NZEmpC 234, [2013] ERNZ 727 at [28]–[30] and [92].

c. The details entered in Vault referred to the incident as having occurred at

4.20 pm, the time noted on the form prepared by Mr D. The independent witnesses had suggested that the incident had occurred at 4.45 pm and had advised Mr S accordingly. Ms C must have used the incident form lodged by Mr D when entering details of the incident in Vault on 3 July 2018.

d. The letter provided by Ms C to Mr D inviting him to a disciplinary meeting was dated 3 July 2018; moreover, it stated that he had not notified the incident to his supervisor until after his scheduled start time of 3 July 2018.
e. As already noted, during the disciplinary meeting, Mr D himself said he had lodged the report on the morning following the incident. He repeated this point in an email he sent to his employer soon after his dismissal. His position on this point was consistent, and in line with the foregoing points.

[77] Mr S said Mr D could not have left the incident form on his desk early the following morning, because the office would have been locked. However, it was suggested that this was not always the case and/or there was an alternative entrance by which Mr D could have accessed Mr S's desk. This point suggests Mr D's evidence was correct.

[78] Also relevant to this point is the evidence touched on earlier concerning the conversations Mr D had with a stand-in driver and with the payroll officer. This was followed, Mr D said, by a conversation he had with Mr S who was in his own vehicle, and at which time it was confirmed a relief driver should take over his shift.

[79] Mr S's account of what happened on 3 July 2018 was uncertain. His recollection appears to be influenced by the belief which both he and Ms C had that Mr D simply was not at work on 3 July 2018 because of the entry in the leave record. On this point I prefer Mr D's evidence.

[80] The date on which Mr D tendered the incident form was an important issue. It was central to the second of the two allegations which were under consideration; and it was also relevant to his reliability, which became a key consideration when Ms C considered whether dismissal was appropriate.

[81] Next, I turn to the issues as to whether the employer raised the concerns it had and/or gave Mr D a reasonable opportunity to respond before taking the step it did.

[82] Relevant to these requirements is the fact that Mr D was invited to an investigation where he was to respond to two particular allegations. In reality, the ambit of the disciplinary meeting was broader. It considered what were described in evidence as "wider matters". Mr G said that these, for example, related to a pattern of incidents that had been of concern over time, and where a final warning had been issued. Ms C agreed, stating that the wider matters also involved the interpersonal difficulties Mr D was having.

[83] There is no evidence that Ms C told Mr D that the incident which was under investigation was a further example of a particular type of "driver-at-fault" incident, particularly when reversing. Nor is there any indication that Mr D was told he should have a nil score in relation to his service, his willingness to go the extra mile, or his fit in the employer's team – even when he alluded to this factor. The seriousness of the position due to a previous final warning having been given was not referred to. The result was Mr D was not given an adequate opportunity to outline his position on these issues.

[84] As mentioned, Ms C noted that it could take time for Mr D to clearly understand what was being communicated to him in the circumstances. A fair and reasonable employer could, in these circumstances, be expected to take particular care in explaining and discussing all elements of the concerns it held, particularly when it knew from previous exchanges with the employee that this was necessary.

[85] Nor were these matters raised in the letter informing Mr D of the intended investigation. Mr Erickson submitted that the "wider issues" were not raised in the letter advising Mr D of the investigation because they were not the "predominant motive" for the disciplinary process. He argued that Ms C was particularly concerned about two health and safety allegations. He also submitted that the consideration of factors in the "goodwill bank account" was merely an assessment of the mitigating factors raised by Mr D; Ms C concluded these factors were not entitled to weight. Further, Mr Erickson argued that not inviting comment on these factors fell within s 103A(5) of the Act, that is, the flaw was minor and did not result in Mr D being treated unfairly.

[86] It was accepted by all that the driving incident was relatively minor, that the real issue of concern was the broader picture arising from the fact there had been a pattern of driving incidents and that these concerns were catalysed by Mr D's personality challenges. Ms C also concluded that Mr D did not appreciate the safety issues and the seriousness of the circumstances. The point of the misunderstanding was that Mr D construed "health and safety" as relating to potential risk to persons in the vicinity of the vehicle, he being certain there were none. Ms C had a broader view as to the potential health and safety issues. This dichotomy was not teased out.

[87] In my view, these matters were significant, and not minor. By not addressing them carefully with Mr D, he was treated unfairly by not having an opportunity to respond to them.

[88] Finally, I turn to the question of whether QDA genuinely considered Mr D's responses. This consideration ties in with the factors I have already considered. Mr D's position was serious. Yet it had not been made sufficiently clear to him this was the case. This problem was exacerbated by the fact that the employer was considering factors which it had not expressly stated were relevant to the decision – particularly those which related to interpersonal issues.

[89] Ms C's evidence as to the difficulties of communicating with Mr D leads to consideration of the company's obligation to consider whether Mr D needed further support for the purposes of the disciplinary process. He initially waived the right to have support or representation, at the outset of the first meeting.

[90] However, I accept Mr William's submission that QDA could be expected to have given Mr D another opportunity to receive support at the point where it was actively considering dismissal, and he did not appear to appreciate the seriousness of the circumstances.

[91] Mr G confirmed that no consideration was given to this possibility either in the private meeting held with Ms C at the end of the process prior to her indicating what she intended to do; or when the meeting resumed. Given the employer's clear understanding of Mr D's difficulties, this was a flaw in the employer's process.

[92] Standing back, I consider there were a range of procedural errors which were not those which a fair and reasonable employer could have taken in all the circumstances.

Substantive fairness

[93] The first allegation related to safe operation of Mr D's vehicle.

[94] Whilst it is clear the company operates a health and safety policy a key component of which relates to safe operation of the vehicle fleet, this particular incident has to be seen in context. QDA witnesses accepted that the incident itself is was not one which on its own could have justified dismissal.

[95] In the details of the incident which Ms C recorded in Vault, the incident was described as "severity – insignificant". Mr S accepted it was "minor". He also said that it was not uncommon for drivers to incur minor "driver-at-fault" incidents whilst gaining experience.

[96] Next, consideration must be given to the evidence concerning the apparent inadequate use of rear vision mirrors and a reversing camera. No evidence was given that, had Mr D used the exterior mirrors of the vehicle, the two metal struts and sign could have been seen.

[97] The focus must therefore be on the reversing camera. It was apparently in a position which could have picked up these items and observed on the cab monitor if it

had been correctly positioned for a right-hand driver. However, there was a problem with the configuration of the monitor, as discussed earlier.

[98] I have already noted Mr D referred to the defect both in the incident form and in the Vehicle Condition Report, and that there is no evidence that this issue was investigated at the time or considered by the employer during the investigation meeting.

[99] The Safe Driving Policy referred to QDA's obligation to provide a vehicle that was fit for purpose. Arguably, this had not occurred in respect of the reversing camera. This was an important contextual matter that a fair and reasonable employer could be expected to have considered in determining whether there was a culpable breach of the policy on the part of the employee.

[100] Mr D said in evidence that the day was overcast. That too may have been a contributory factor relevant to whether a conclusion of breach of a policy requirement justifying discipline could have been reached.

[101] Turning to the assertion of the failure to immediately report a vehicle incident, I proceed on the basis that Mr D wanted to notify Ms C as to what had occurred immediately after the incident but was unable to do so. His ordinary hours of work had concluded, and he had a bus he needed to catch to get home and to meet commitments. He also said he did not want to ring Mr S because he thought there would be a "flare up" which he would have found unpleasant. Consequently, he took a notification pad home for completion, and left the document on Mr S's desk early the next morning.

[102] The question is whether that falls within the confines of his obligation to report incidents under his IEA, and under the company's Safe Driving Policy. There is not a complete alignment between the two. Mr D is entitled to the benefit of the more benevolent provision of his IEA, which states he was to report an accident or incident immediately, or where that was not possible, without delay. Arguably, he did so. As he put it in the email he sent soon after the dismissal, he had acted in good faith.

[103] The difficulty which arose in QDA's consideration of this issue was that it proceeded on the basis that the form had not been presented "without delay" because it was not provided until 4 July 2018. I find that belief drove the conclusion reached on the second allegation.

[104] Mr Erickson submitted that consideration needed also to be given to a provision contained in an hours of work clause of the IEA, which indicated that normal work times might be varied by agreement, so as to include those when requested by an employer to meet the genuine and reasonable demands of a position.

[105] The allegation Mr D faced was not put on this basis. Nor is there evidence that a request had been made by QDA for Mr D to stay at work until he had spoken to either Ms C, rung Mr S, or completed an incident form when circumstances of this kind occurred.

[106] In short, the context with regard to each allegation was not straightforward.

Was dismissal justified?

[107] Finally, I consider whether the decision to terminate Mr D's employment was a justified response. I have already discussed the fact that wider matters were taken into account that were not discussed adequately or at all. On the face of it, it appears it was those factors which led Ms C to conclude she had lost confidence in Mr D, and that dismissal was therefore appropriate.

[108] Mr Erickson emphasised the fact that issues of health and safety have a special status when it comes to considering justification for dismissal, that they are not "just another ingredient in the mix", 6 and that the Court "should exercise caution in reaching a decision contrary to that of the employer where safety issues are involved".7

[109] I agree, but the circumstances of the present case were quite unusual. Ms C was concerned that Mr D seemed not to be taking the circumstances seriously. A point which appears not to have been considered was that on previous occasions where

6 *Air New Zealand Ltd v Samu* [1994] 1 ERNZ 93 at [95].

7 *Willis v Fonterra Cooperative Group Ltd* [2010] NZEmpC 80 at [66].

breaches of policy had obviously occurred, Mr D had freely conceded this, and accepted the consequences. On this occasion, he held a different view. His reasons for this were not teased out or understood.

[110] I am not persuaded that the conclusion Mr D should be dismissed on notice was a step that could have been taken by a fair and reasonable employer in the particular circumstances.

[111] Mr D's personal grievance is accordingly established on procedural and substantive grounds.

Remedies

[112] The Authority, when assessing compensation for humiliation, loss of dignity and injury to feelings referred to comments Mr D had made at the Authority hearing which suggested he was hurt by the fact that he was blamed for what had occurred, and also the fact that within days of his dismissal he raised concerns about the outcome of the dismissal, to which there had been no response. The Authority found he had a strong sense of fairness in what is right and wrong to the extent that some years later this matter still affects him.

[113] At the hearing in the Court, Mr D said he felt hurt because he did not think that what actually occurred should be characterised as a "health and safety matter" and it impacted on his ability to obtain a driving job which, for him, was a serious issue given his age.

[114] Mr Williams emphasised to Mr D's strong sense of justice and fairness, which had been challenged by the fact of the dismissal. As he had made clear in his evidence, he had been particularly concerned that the decision to dismiss him had involved consideration of factors beyond the driving incident on 2 July 2018, and how he reported it.

[115] Although the evidence given by Mr D as to the consequences of the dismissal was brief, a consideration both of what Mr D said on this topic and of the

circumstances generally provides a sufficient foundation for a finding as to this remedy.

[116] Mr Erickson submitted that this was a Band 1 case, that is, an award of $10,000 or less. Mr Williams submitted that the sum of $40,000 would be appropriate, which would be at the high end of Band 2.

[117] I accept Mr Erickson's submission and find that an appropriate starting point is $10,000.

[118] I turn next to contribution.

[119] Mr Erickson submitted that there should be a significant reduction for contribution. He said Mr D had created an inherently dangerous situation. He had failed to operate the vehicle in a safe manner, including making his own repairs to the stalk of the camera monitor using cable ties, so it could not be used from the right- hand side of the vehicle; and he had failed to immediately notify the incident. He suggested there was an element of recklessness in Mr D's conduct, warranting a reduction of 50 to 75 per cent.

[120] Mr Williams did not address this issue.

[121] Mr D's driving caused damage, but it was minor. The Court was told that repairs would have amounted to "a couple of hundred dollars".

[122] Mr D must carry some responsibility for the incident, since it led directly to the employment relationship problem, albeit he had acted in good faith.

[123] An appropriate reduction is 10 per cent.

Result

[124] The challenge fails. I direct that Mr D is to be paid $9,071.56. As this amount was paid into Court by QDA as security, I direct that the sum and accrued interest is now to be paid by the Registrar to Mr D.

[125] I reserve costs. My preliminary view is that QDA should pay these to Mr D on a 2B basis, albeit recognising that Mr Williams was briefed shortly before the substantive hearing. I encourage the parties to resolve any costs issue on the basis of this indication if possible. If that does not prove possible, memoranda may be filed.

Non-publication of names

[126] Finally, I deal with the issue of non-publication of name. The Authority made an order of non-publication of name essentially on medical grounds. A mirror order has subsisted in the Court, on an interim basis until now.

[127] Mr Williams noted that Mr D is 62 years of age. He holds, and has held, a number of low wage jobs. He is currently employed in seasonal work, although he aims to seek stable and better paid employment.

[128] QDA neither consents to, nor opposes, the making of a permanent order.

[129] Whilst no clear diagnosis exists, it is clear there are a number of interpersonal issues as already discussed. In a report obtained after the cessation of Mr D's employment with QDA, a consultant psychiatrist said he does not suffer from any significant mental disorder, but he has an odd personality trait, with philosophical and bizarre beliefs, but not to the extent of a delusion disorder. He had been on medication for this in the past.

[130] I note that the general principle of open justice should not be displaced lightly. Increasingly, there is a recognition that an employee's ability to pursue legal entitlements under the Act, without the fear that doing so may damage future employment prospects, is a factor which is of particular relevance to the balancing exercise. Such a consideration may lead to a finding that the broader interests of justice meet the high standard necessary to displace the open justice presumption.8

[131] Those factors are relevant in this case. Given age and the nature of the circumstances I have been required to review, I consider there is a distinct risk that

8 *Chief of New Zealand Defence Force v Darnley* [2021] NZEmpC 40, [2021] ERNZ 123 at [2].

publication could affect Mr D's future employment prospects. A permanent order in relation to his name and identifying details is therefore appropriate. Publication of the employer and its staff could lead to ready identification of Mr D. A similar order must therefore be made in relation to QDA and those of its staff who were involved in Mr D's dismissal.

[132] I grant a permanent order of non-publication accordingly.

Judgment signed at 2.30 pm on 23 August 2021

B A Corkill Judge