

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2015] NZERA Auckland 167  
5542931

BETWEEN

PAUL BIDDICK  
Applicant

A N D

BULK LINES LIMITED  
Respondent

Member of Authority: Rachel Larmer

Representatives: Geoffrey Jackett, Advocate for the Applicant  
Robyn Hedley, HR and Payroll Manager of Respondent

Investigation Meeting: 11 June 2015 at Auckland

Oral Determination  
delivered: 11 June 2015

Record of Oral  
Determination: 12 June 2015

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**DETERMINATION OF THE AUTHORITY**

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- A. Bulk Lines Limited's dismissal of Mr Paul Biddick was unjustified.**
- B. Bulk Lines Limited is ordered to pay Mr Biddick:**
- (a) \$10,030 lost remuneration;**
  - (b) \$4,000 distress compensation;**
  - (c) \$2,000 costs;**
  - (d) \$71.56 to reimburse his filing fee.**

**Employment relationship problem**

[1] On 15 July 2013 Mr Biddick was employed by Freight Lines Limited as a Class 5 Professional Driver. On 9 February 2014 Freight Lines Limited split its bulk division off and Mr Biddick's employment was transferred to Bulk Lines Limited

(Bulk Lines). Mr Glenn Raymond was Mr Biddick's manager. On 11 August 2014 Mr Raymond suspended Mr Biddick.

[2] On 18 August 2014 Mr Biddick was dismissed for serious misconduct. Bulk Lines says that Mr Biddick was dismissed because he had become abusive to staff members, was disruptive to the smooth running of the daily business and refused to follow any instructions with an orderly willing approach.

[3] Mr Biddick claims that his dismissal was substantively and procedurally unjustified.

[4] Mr Biddick says he was unjustifiably dismissed because on 07 August 2014 he raised concerns about the safety of the vehicle (F/N 543) he had been required to drive. Mr Biddick was concerned that the rear doors on the vehicle did not close properly after a new cover had been fitted to it which prevented the door from folding back flush against the truck.

[5] Mr Biddick claims this restricted his view when reversing the vehicle because he could not see anyone approaching the vehicle from the left side if he was backing. Mr Biddick believed this situation impaired his line of vision which he says could potentially cause an accident. Mr Biddick was also concerned that the vehicle's exhaust brakes were not operating correctly.

[6] Mr Biddick claims that Bulk Lines did not adequately or appropriately investigate his legitimate health and safety concerns but instead disciplined then dismissed him.

[7] Bulk Lines accept that F/N 543 had an intermittent problem with its exhaust brakes even after these had been repaired on 6 August. Bulk Lines say that was not a safety issue as it was not a COF requirement and was purely an auxiliary mechanism.

[8] Bulk Lines says the door Mr Biddick complained about had been like that for several months. It had never caused an issue and no-one had complained about it.

[9] Bulk Lines admits the vehicle door did not pin back hard against the side of the truck because the covers that had been fitted no longer allowed that but it does not agree that causes a potential safety issue.

[10] Bulk Lines believes that Mr Biddick complained about F/N 543 because he wanted to drive vehicle F/N 796 instead. Bulk Lines believes that Mr Biddick was finding excuses not to drive F/N 543 so it would be sent in for repair so he could be left without a vehicle and be paid to do nothing. Mr Biddick strongly disputes that and says he had genuine safety concerns.

[11] Mr Raymond alleges that Mr Biddick became disruptive abusive and threatening to him and others about the F/N 543 situation when he was instructed to continue to drive the vehicle.

[12] Mr Raymond also claims that Mr Biddick argued with Mr Shaun Pogan, National Operations Manager of Bulk Lines and threatened to go down to Tauranga and “*sort Mr Pogan out*”. Mr Biddick denies this allegation.

[13] Mr Pogan did not give evidence about this and no documents were produced to support a complaint or investigation into such issues. This allegation was not specifically recorded in the disciplinary allegation letter and I find it was also never put to Mr Biddick during the disciplinary process.

[14] Mr Biddick denies he was abusive, threatening or disruptive but admits he was unhappy that his safety concerns were not addressed so was unwilling to drop his concerns despite management telling him it did not intend to do anything about them.

[15] Mr Biddick recognises that the engine brakes are not a COF requirement but he says that in his experience they are a secondary braking system which preserves the main brake function and acts as a safety valve for slowing vehicles prior to engaging the main brakes. Mr Biddick says that he considered the additional brakes were necessary because his route took him along the Browns Hill on Glenbrook-Waiuku Road.

[16] The disciplinary allegation letter was emailed to Mr Biddick on 11 August. It instructed him to attend a disciplinary meeting on 18 August to address four allegations which it considered amounted to serious misconduct. The disciplinary letter says:

- *Early last week you were instructed you would be required to drive Unit 543 for 8 days while the usual driver was away on leave. In my opinion you are familiar with the run and quite capable of driving the unit. You refused to oblige with this request and have since been extremely difficult to deal with.*

*You have also been making threats towards the company and your fellow workers.*

- *You turned up late to work which caused disruption to other drivers and the planned workload for that day. I ended up having to waste time finding another ride for you which was especially made difficult as I was in Whangarei working on another job. You were aware that I was away and that I was relying on the team back in Auckland to get on with their workload.*
- *Whilst in Whangarei throughout most of last week I have been receiving abusing threatening texts relating to the vehicle, equipment and other drivers.*
- *You have been badmouthing the company to our customers and generally portraying the company in a bad light as the customers have come back complaining about your demeanour to me.*

[17] The disciplinary meeting lasted for approximately 45 minutes. Mr Biddick says he then waited a further 30-45 minutes after which he was informed by Mr Raymond that his employment had been terminated. The meeting in which Mr Biddick was dismissed lasted about 5-10 minutes.

## **Issues**

[18] The following issues are to be determined:

- (a) Was Mr Biddick's dismissal justified?
- (b) If not, what if any remedies should be awarded?
- (c) What, if any, costs should be awarded?

## **Was Mr Biddick's dismissal justified?**

### *Justification test*

[19] Justification is to be assessed in accordance with the justification test in s.103A of the Employment Relations Act 2000 (the Act). This requires the Authority to objectively assess whether Bulk Lines' actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time that Mr Biddick was dismissed.<sup>1</sup>

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<sup>1</sup> Section 103A(2) of the Act

[20] A fair and reasonable employer is expected to comply with its statutory obligations which include the s.4(1A) duty of good faith and the four procedural fairness tests in s.103A(3) of the Act. Section 103A(5) of the Act precludes the Authority from determining a dismissal was unjustified solely because of minor procedural defects which did not result in unfairness to the employee.

*Did Bulk Lines comply with its good faith obligations?*

[21] Section 4(1A) of the Act requires an employer that is proposing to make a decision that may adversely impact on the continuation of an employee's employment to provide that employee with access to relevant information and an opportunity to comment on that information before a final decision is made.

[22] I find that Bulk Lines did not meet its good faith obligations because it failed to provide Mr Biddick with any of the information which supported the disciplinary allegations or of Bulk Lines' investigations into its disciplinary concerns. This omission meant Mr Biddick was deprived of an opportunity to comment on the information Bulk Lines had which had put his ongoing employment in jeopardy, contrary to the requirements of s.4(1A) of the Act.

[23] I find that Bulk Lines' failure to comply with its good faith obligations fundamentally undermines its ability to justify his dismissal.

*Did Bulk Lines comply with the four procedural tests in s.103A(3) of the Act?*

[24] I find that Bulk Lines breached s.103A(3)(a) because it did not sufficiently investigate the concerns it had about Mr Biddick before it dismissed him. Mr Raymond says his investigations consisted of speaking to:

- a. Mr Sean Pogan, National Operations Manager. No notes of this discussion were taken and nor was the content of it communicated to Mr Biddick before he was dismissed.
- b. Catherine (a dispatcher) who said she was sick of Mr Biddick moaning about F/N 543. No notes of this discussion were taken and it was not disclosed to Mr Biddick before he was dismissed.

[25] Mr Raymond told the Authority that he didn't need to investigate further because he knew what Mr Biddick had done wrong because his "*bad behaviour*" had

been directed at Mr Raymond. Mr Raymond did not pass any specific information about his concerns to Mr Biddick, other than what was recorded in the disciplinary allegations letter. It was unfair and unreasonable for Mr Raymond to conduct the disciplinary investigation when he was the main witness.

[26] I consider that the failure to take notes of relevant discussions, to obtain relevant information (such as statements from staff, customers and management who claimed to have been adversely affected by Mr Biddick's conduct, written complaints from customers, copies of the text messages relied on to support the disciplinary allegations or an analysis of why they were considered unacceptable) means the investigation was insufficient.

[27] The Authority had no evidence before it to identify what exactly Mr Biddick was alleged to have done that was disruptive, threatening or abusive.

[28] The failure to sufficiently investigate its concerns means Bulk Lines is unable to satisfy the Authority that it complied with the requirements of s.103A(3)(a) of the Act.

[29] I find that Bulk Lines failed to comply with s.103A(3)(b) of the Act because it failed to raise its concerns with Mr Biddick before he was dismissed. There is no dispute that Mr Biddick was not given any details or other supporting information about:

- a. Exactly how he had been "*extremely difficult to deal with*";
- b. What "*threats*" he had made towards the company, when and how;
- c. What "*threats*" he had made to fellow works, when and how;
- d. What "*disruption*" he caused to other drivers;
- e. What "*threatening texts*" he sent, to whom, when and why they were considered threatening;
- f. How he had "*badmouthed*" the company, when and to whom;
- g. How he had "*been portraying the company in a bad light*", to who and when that had occurred;

- h. What customers had been “*complaining*” about him, when and why;
- i. What complaints had been made about his “*demeanour*” by whom, when and why.

[30] I find that the failure to provide Mr Biddick with any information apart from the letter instructing him to attend a disciplinary meeting which contained the allegations meant that Bulk Lines failed to adequately raise its specific concerns with him before he was dismissed.

[31] I also find that Bulk Lines failed to give Mr Biddick a reasonable opportunity to respond to its concerns before he was dismissed, contrary to s.103A(3)(c) of the Act. Mr Biddick was deprived of a reasonable opportunity to respond because he was not fully or fairly informed of the specific concerns or of the evidence which supported such concerns.

[32] I also consider that Bulk Lines failed to genuinely consider Mr Biddick’s explanation in relation to its concerns before it dismissed him, contrary to the requirements of s.103A(3)(d) of the Act.

[33] The disciplinary letter says “*Paul, the company regards this continued bad behaviour as most serious. In our view your conduct has fallen below the expected standards and attitudes of a Professional Driver employed by Bulk Lines Limited.*”

[34] I find that Mr Raymond appears to have approached the disciplinary process with a closed mind because he had already formed the view that Mr Biddick had been threatening, disruptive, abusive and difficult. Mr Barker also appears to have predetermined the outcome because his decision to dismiss Mr Biddick was made without him having all relevant information, without him speaking to Mr Biddick, and without him considering any mitigating factors.

[35] I find that the failure to provide Mr Biddick with the information which supported Bulk Lines’ specific concerns meant that he was unable to provide an explanation, which therefore could not have been genuinely considered in breach of the s.103A(3)(d) of the Act.

[36] Bulk Lines has breached its statutory procedural fairness obligations in respect of all of the four procedural fairness tests in s.103A(3) of the Act. These failures

cannot be described as minor procedural defects. I find that the breaches identified above were significant and did result in Mr Biddick being treated unfairly. Section 103A(5) of the Act therefore does not preclude the Authority from finding that Mr Biddick had been unjustifiably dismissed.

*Other factors to consider*

[37] The failure to provide the information in para [27] above is a fundamental omission. It is not open to an employer who is acting fairly and reasonably to fail to provide specific details about the disciplinary concerns and information relevant to such concerns. I find this serious omission deprived Mr Biddick of an opportunity to fully understand and therefore adequately respond to the issues of concern.

[38] Mr Biddick told the Authority he thought the discipline meeting was about his safety concerns and he could not believe he had been disciplined for raising safety issues.

[39] Mr Raymond and Ms Hedley both told the Authority that the decision maker was Bulk Lines' Managing Director, Peter Barker. Mr Raymond phoned Mr Barker to tell him what Mr Biddick had said during the disciplinary meeting. No information or notes or minutes of the meeting were passed to Mr Barker before he made his decision to dismiss Mr Biddick. Nor did he speak to Mr Biddick personally.

[40] Mr Biddick was entitled to provide his explanation to the decision maker in person. Mr Raymond says that he did not raise any mitigating factors with Mr Barker before Mr Barker decided to dismiss Mr Biddick. Because Mr Barker did not speak to Mr Biddick, the latter was deprived of an opportunity to have mitigating factors considered.

[41] Ms Hedley says that Mr Barker and Mr Raymond's manager (Sean Pogan) discussed Mr Biddick and the disciplinary issues before he was dismissed. No information about these discussions was produced to the Authority. Mr Biddick was unaware of such discussions so could not respond to them. I consider it likely that such discussions unfairly impacted on and/or influenced the outcome of the disciplinary process.

[42] Mr Raymond told the Authority that most of the disciplinary concerns about Mr Biddick's conduct came from him. I consider it was unfair and unreasonable for

Mr Raymond to run the disciplinary meeting and for him to be the person who communicated Mr Biddick's responses to the decision maker (Mr Barker) when he was effectively the main witness to the alleged wrongdoing.

[43] Mr Biddick was never made aware of Mr Raymond's specific concerns or the evidence that supported them so Mr Biddick was prejudiced because he was not in a position to respond.

[44] Mr Raymond told the Authority that he did not investigate Mr Biddick's safety concern because he (Mr Raymond) did not consider it had merit. Mr Raymond should have passed Mr Biddick's hazard identification on to the Health & Safety Committee to investigate but that did not occur. No record of Mr Biddick's safety concerns was made by Mr Raymond or Bulk Lines.

[45] I do not consider a fair or reasonable employer could have disciplined Mr Biddick without having fully and fairly investigated whether his safety concerns and hazard identification had merit. Mr Biddick says he did not drop the issue (his safety concerns) even though management wanted him to forget it because he was genuinely concerned and nothing had been done about it. The safety concerns were therefore a relevant matter that needed to be properly addressed, but which I find was not.

*Could a fair and reasonable employer have concluded that Mr Biddick had engaged in serious misconduct?*

[46] I find that Bulk Lines' failure to comply with any of the minimum procedural fairness requirements or with the good faith obligations in the Act, together with the other failures identified are not the actions of a fair and reasonable employer. These substantial defects mean that Bulk Lines was not in a position to fairly or reasonably conclude that Mr Biddick had engaged in serious misconduct.

[47] I therefore find that Mr Biddick's dismissal was not substantively justified.

*Outcome*

[48] I find that Bulk Lines' dismissal of Mr Biddick was procedurally and substantively unjustified.

## **What, if any, remedies should be awarded?**

*Did Mr Biddick mitigate his loss?*

[49] I am satisfied on the balance of probabilities that Mr Biddick appropriately mitigated his loss. He obtained casual employment immediately after his dismissal. In early December he obtained a short term temporary contract, and then obtained permanent full time employment on 5 January 2015.

*What if any lost remuneration should be awarded?*

[50] Mr Biddick claims lost remuneration of \$10,030. This amount is calculated on the basis of an average working week of 53 hours for the 12 months preceding Mr Biddick's dismissal. Mr Biddick was paid \$20 per hour so his loss over 10.5 weeks is \$11,130. The amount he earned during casual employment (\$1,100) must be deducted from his lost remuneration claimed. ( $\$11,130 - \$1,100 = \$10,030$ ).

[51] I order Bulk Lines, under s.128(2) of the Act, to pay Mr Biddick \$10,030 under s.123(1)(b) of the Act to compensate him for the remuneration he has lost.

*What if any distress compensation should be awarded?*

[52] Mr Biddick gave evidence of his frustration, distress, stress and upset at being unjustifiably dismissed for what he considered to be health and safety issues. He says he was shocked to be dismissed for raising safety concerns.

[53] Mr Biddick's dismissal put a strain on his relationship; he suffered financial pressure due to no income which meant he fell behind on his child support payments. Mr Biddick feels his reputation was diminished by his dismissal. He also sought counselling to assist him to deal with the adverse effects his dismissal had on him.

[54] I order Bulk Lines to pay Mr Biddick \$4,000 under s.123(1)(c)(i) of the Act to compensate him for the humiliation, loss of dignity and injury to feelings he has suffered as a result of his unjustified dismissal.

*Should remedies be reduced on the grounds of contribution?*

[55] Having determined that Mr Biddick has an unjustified dismissal grievance, the Authority is required to consider the extent to which his actions contributed towards the situation that gave rise to his dismissal grievance and, if so, to reduce remedies

accordingly. Contribution denotes blameworthy conduct which is to be established on the balance of probabilities.

[56] I consider that the evidence does not support a finding that Mr Biddick engaged in conduct which contributed to his dismissal grievance. Mr Biddick raised his health and safety concerns with his manager and continued to follow up such concerns when action was not taken to address them. I do not find that amounts to blameworthy conduct which warrants a reduction in remedies to reflect contribution.

[57] There was simply no evidence produced to the Authority to support any of the other concerns Bulk Lines had about Mr Biddick's alleged misconduct. Bulk Lines is therefore unable to prove contribution to the required standard. Accordingly I find that remedies are not to be reduced.

**What, if any, costs should be awarded?**

[58] Mr Biddick, as the successful party, is entitled to a contribution towards his actual costs. Adopting the current notional daily tariff of \$3,500 as a starting point then adjusting it pro-rata for the time spent in the investigation meeting gives a notional starting point for assessing costs of \$2,000.

[59] Neither party identified any factors which they say should result in the notional starting tariff of \$2,000 being adjusted and I am not aware of any. I am satisfied Mr Biddick has incurred actual costs in excess of \$2,000 so it is appropriate to make a costs award in his favour.

[60] Mr Biddick has also incurred a filing fee of \$71.56 which he is entitled to be reimbursed for.

[61] Bulk Lines is ordered to pay Mr Biddick \$2,000 towards his actual costs plus \$71.56 to reimburse his filing fee.

**Rachel Larmer**  
**Member of the Employment Relations Authority**