

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 183
5390646

BETWEEN TESSEMA ABOHAY
 Applicant

AND VAN DEN BRINK POULTRY
 LIMITED
 Respondent

Member of Authority: Christine Hickey

Representatives: Philippa Tucker, Counsel for Applicant
 Bridget Smith, Counsel for Respondent

Investigation Meeting: 29 and 30 April 2013 at Christchurch

Submissions received: 15 May 2013 from Applicant
 15 May 2013 from Respondent

Determination: 9 September 2013

DETERMINATION OF THE AUTHORITY

- A. Van Den Brink Poultry Limited did not racially discriminate against or racially harass Mr Abohay.**
- B. Tessema Abohay was unjustifiably dismissed.**
- C. Van Den Brink Poultry Limited must pay Tessema Abohay \$4,447.04 gross in lost remuneration and \$2,400 in compensation.**

Employment relationship problem

[1] From August 2004 Tessema Abohay worked at Brinks South Island Limited, now Van Den Brink Poultry Limited (“Brinks”), as a boner. Mr Abohay considers that in 2008 when John Smith became production manager treatment towards him changed, and became inconsistent. He considers he was subject to unwarranted disciplinary action.

[2] By April 2010 Mr Abohay considered that he was subject to different treatment by Mr Smith on the basis of his colour, race and nationality. Mr Abohay is from Ethiopia.

[3] Mr Abohay wrote a letter to Brinks complaining of Mr Smith's treatment of him and also made a complaint to the Human Rights Commission. He later withdrew his complaint from the Human Rights Commission because he was *concerned about damaging his employment relationship*. He did not raise a personal grievance about the issues.

[4] On 26 April 2012 Mr Abohay made a written complaint against another boner, Darryl Rice. On 4 May 2012 there was an incident between Mr Abohay and Mr Rice which Mr Abohay says was racial harassment. Mr Rice followed Mr Abohay to the car park after their shifts had finished. The incident culminated in Mr Abohay putting up his foot which connected with Mr Rice's thigh. Mr Abohay says he did not put up his foot to kick Mr Rice but in self-defence as he believed Mr Rice was about to strike him.

[5] After an investigation by Brinks Mr Abohay was dismissed for assaulting Mr Rice.

Claims

[6] Mr Abohay claims that he was unjustifiably dismissed.

[7] He also claims that he was subject to discrimination and racial harassment at work by Mr Smith and by Mr Rice. He claims that Brinks has failed to take whatever steps were practicable to prevent the repetition of racially harassing behaviour by Mr Rice and Mr Smith culminating in the incident on 4 May 2012 after which he was dismissed.

[8] By way of remedy Mr Abohay claims lost wages of \$11,117.60 and \$10,000 compensation for humiliation, loss of dignity and injury to his feelings.

Issues

[9] The Authority needs to determine:

- (i) Whether Mr Abohay was racially harassed in his employment;

- (ii) Whether Mr Abohay was racially discriminated against in his employment;
- (iii) Whether Mr Abohay was unjustifiably dismissed, including:
- Whether Mr Rice's complaint of being kicked was true;
 - Whether Brinks had substantive justification for considering Mr Abohay had committed serious misconduct;
 - If there was serious misconduct whether dismissal was within a range of actions a fair and reasonable employer could have imposed.
 - Whether the process carried out by Brinks was procedurally fair and reasonable.

Sequence of relevant events

[10] Mr Abohay asks for his 2010 letter of complaint to be taken into account as background information or context showing a pattern of behaviour against him ultimately leading to his dismissal.

[11] Mr Abohay also relies on an incident or incidents involving a former colleague Mohammed Khan in June 2010 as showing a pattern of racial discrimination against him. I am asked to take it into account as relevant background information.

[12] On 15 June 2010 Mr Khan made a written complaint against Mr Abohay alleging that Mr Abohay had verbally insulted him. Mr Smith investigated the incident. He obtained written statements from two witnesses who Mr Khan had nominated. Mr Abohay alleged that Mr Khan had thrown his cup of tea at his head. Mr Khan denied that. A first disciplinary meeting was held but adjourned so that Mr Smith could investigate what the two witnesses for Mr Abohay had seen.

[13] The result of the complaints from Mr Khan and Mr Abohay about each other was verbal warnings to both of them. Mr Abohay remains unhappy about that result.

[14] The apparent genesis of the altercation between the two of them was Mr Abohay's concern about fairness to him on the boning table. That general issue

was also at the root of the issues between Mr Abohay and Mr Rice in April and May 2012.

Was Mr Abohay racially discriminated against or racially harassed in his employment?

[15] Ms Tucker submits that a number of matters from the date of Mr Smith's employment amount to discrimination against Mr Abohay by the employer or by the employer's representative, Mr Smith. It is unclear which particular complaints are alleged to be discrimination and which to be racial harassment.

[16] Sections 103(1)(c) and 103(1)(e) of the Employment Relations Act 2000 (the Act) include in the definition of a personal grievance a claim that an employee was discriminated against and that an employee has been racially harassed in the employee's employment.

[17] The relevant part of s.104 of the Act says for the purposes of s.103(1)(c):

an employee is discriminated against in that employee's employment if the employee's employer or a representative of that employer, by reason directly or indirectly of any of the prohibited grounds of discrimination specified in section 105 ...

(a) *refuses or omits to offer or afford to that employee the same terms of employment, conditions of work, fringe benefits, or opportunities for training, promotion, and transfer as are made available for other employees of the same or substantially similar qualifications, experience, or skills employed in the same or substantially similar circumstances;*
or

(b) *dismisses that employee or subjects that employee to any detriment, in circumstances in which other employees employed by that employer on work of that description are not or would not be dismissed or subjected to such detriment;*
or

...

(2) *For the purposes of this section, **detriment** includes anything that has a detrimental effect on the employee's employment, job performance, or job satisfaction.*

[18] Section 105 of the Act includes colour, race and ethnic or national origins amongst the prohibited grounds of discrimination referred to in s.104. The list of prohibited grounds of discrimination contains the same grounds specified in the Human Rights Act 1993.

[19] Section 109 says that for the purposes of section 103(1)(e) of the Act:

... an employee is racially harassed in the employee's employment if the employee's employer or a representative of that employer uses language (whether written or spoken), or visual material, or physical behaviour that directly or indirectly—

- (a) expresses hostility against, or brings into contempt or ridicule, the employee on the ground of the race, colour, or ethnic or national origins of the employee; and*
- (b) is hurtful or offensive to the employee (whether or not that is conveyed to the employer or representative); and*
- (c) has, either by its nature or through repetition, a detrimental effect on the employee's employment, job performance, or job satisfaction.*

[20] Section 117 of the Act applies where the person undertaking the racial harassment is not the employer, but, for example another employee so that where:

- (1)(a) An employee is subjected to behaviour of the kind described in section 109 by a person (not being a representative of the employer) who is in the employ of the employee's employer or who is a customer or client of the employer.*

...

- (2) If this section applies, the employee may make a complaint about that request or behaviour to the employee's employer or to a representative of the employer.*
- (3) The employer or representative, on receiving a complaint under subsection (2), must inquire into the facts.*
- (4) If the employer or representative is satisfied that the request was made or that the behaviour took place, the employer or representative must take whatever steps are practicable to prevent any repetition of such a request or of such behaviour.*

[21] Section 118 of the Act applies if:

- (a) ... a person in relation to whom an employee has made a complaint under section 117(2) either—*
 - (i) makes to that employee after the complaint a request of the kind described in section 108(1)(a); or*
 - (ii) subjects that employee after the complaint to behaviour of the kind described in section 108(1)(b) or section 109; and*
- (b) the employer of that employee, or a representative of that employer, has not taken whatever steps are practicable to prevent the repetition of such a request or such behaviour.*
- (2) If this section applies, the employee is deemed for the purposes of this Act and for the purposes of any employment agreement to have a personal grievance by virtue of having been sexually harassed or racially harassed, as the case may be, in the course of the employee's employment as if the request or behaviour were that of the employee's employer.*

[22] Ms Tucker listed a number of what she called *racial allegations* against Mr Smith in a summary in her submissions. They are:

- 8 April 2008 – warning issued for failing to wear a beard mask although no beard masks were available;
- 9 December 2008 – disciplinary action for taking meat from a tray;
- In the letter of 3 April 2010 – sent home on sick leave and then Mr Smith refused to pay sick pay;
- In the letter of 3 April 2010 – temporary demotion of duties by Mr Smith for no apparent reason although reinstated after complaint letter;
- In the letter of 3 April 2010 – protective glove needing to be fixed or replaced but Mr Smith failed to take appropriate action and Mr Abohay's glove was discovered by him in Mr Smith's bottom drawer;
- In the letter of 3 April 2010 – Mr Smith refused to let Mr Abohay perform light duties after an injury although light duties were available;
- 15 March 2010 – Mr Smith prompting Mr Khan to make a complaint against Mr Abohay and consequent disciplinary action against Mr Abohay;
- 18 June 2010 – further allegations made by Mr Khan of dubious validity and Mr Abohay again subjected to disciplinary action and inconsistent/disparate treatment;
- Removal of Mr Abohay's additional 1.5 hour duties four months prior to dismissal without consultation and without good reason;
- On-going failure by Mr Smith to promote Mr Abohay to a contract boner – Mr Smith promoted others in preference to Mr Abohay;

- 26 April 2012 – failure to act on a written complaint regarding Mr Rice. The supervisor's action¹ was only to notify Mr Rice who became aggressive and angry and lead to the confrontation leading to Mr Abohay's dismissal;

Allegations in the April 2010 letter

[23] Mr Abohay's letter to Brinks dated 3 April 2010 contains the allegations of racism listed above as being in the letter and others about Mr Smith racially discriminating against Mr Abohay and encouraging others to do so and in one case putting someone up to make a complaint about Mr Abohay.

[24] Ms Tucker enumerated a number of deficiencies in how Mr Abohay considered that Brinks dealt with his 2010 letter of complaint raising racism on Mr Smith's part.

[25] However, it was common ground at the investigation meeting that Mr Abohay had withdrawn his complaint from the Human Rights Commission based on the letter as well as reached an agreement with Brinks that all warnings would be wiped from his record.

[26] Mr Smith also gave evidence that in about July 2010, he thinks just after Mr Abohay and his wife had a new baby, Mr Abohay came into his office, shook his hand and said *we'll forget what happened in the past and start with a clean slate*. Mr Abohay agreed that he had initiated making peace with Mr Smith in 2010 and decided not to pursue his complaints any further.

[27] I also note that Mr Smith has responded to each of historic Mr Abohay's allegations against him. He denies that he has ever treated Mr Abohay differently and negatively because of his race.

[28] Although the matters Mr Abohay was concerned about in 2010 are ways in which he feels he was disadvantaged any racial discrimination must be:

By reason of: this phrase, well known in legal contexts, conveys, among other things, that:

¹ Mr Abohay's and Mr Rice's supervisor was Ms Allison Strange. Mr Smith is her direct superior.

- (i) *Not every refusal or oversight or subjection to detriment is a discrimination but it is so only if it is by reason of one of the factors listed;*
- (ii) *The reason need not be the only one but it must be an operative or causative reason, a link between the reason or omission being necessary (although it can often be presumed if it is the only available explanation for the different treatment);*
- (iii) *The emphasis is on the employer's subjective state of mind, objectively ascertained.²*

[29] Even if I consider that I could deal with the historic allegations in these proceedings there is no evidence, other than Mr Abohay's subjective belief, that any detriment, or perceived detriment, to Mr Abohay by Mr Smith's actions or inactions was *by reason of* his colour, race, nationality or ethnic origin.

[30] However, I consider that the employment relationship problem or problems from 2010 were satisfactorily resolved in 2010. I cannot take these matters into account as claims of personal grievances of discrimination or racial harassment.

[31] I also consider that it is not in the interests of natural justice to take into account the alleged deficiencies identified by Mr Abohay and Ms Tucker in the way Brinks dealt with the complaint as evidence identifying a pattern of racist behaviour leading to disadvantage to Mr Abohay and ultimately to his dismissal. Those matters were not pursued at the time and it is not fair to the employer to allow them to be taken into account now. If Mr Abohay was dissatisfied with his employer's processes in 2010 all issues may have been able to be resolved then if he had pursued his complaints. However, he did not notify his employer he remained dissatisfied. To the contrary he withdrew his claims or at least did not proceed with them.

Removal of Mr Abohay's additional 1.5 hour duties

[32] Mr Abohay alleges Mr Smith unilaterally removed some additional duties Mr Abohay performed for which he was paid for an extra 1.5 hours of work. Ms Tucker's submissions state that this happened four months before the dismissal. There was no personal grievance raised in relation to this allegation before Mr Abohay was dismissed. No personal grievance arising out of this was raised in the letter sent by Ms Tucker to Brinks dated 16 July 2012 raising Mr Abohay's claim that he was unjustifiably dismissed. This issue was not raised as a personal grievance of

² *Kelly v Tranz Rail* [1997] ERNZ 476 at 497

unjustified disadvantage and I decline to deal with it as one. However, I will look at it briefly to consider whether it is relevant background to Mr Abohay's claim of racial harassment by Mr Rice.

[33] The statement of problem lists *removing his one hour a day preparation job* as an example of different treatment Mr Abohay considers he was subject to on the basis of his *race, nationality and colour*.

[34] Mr Abohay says that he was reliant on the extra work and that:

One day Mr Smith gave it to another lady called Beanie [I am satisfied he means Bernie] ... No reason was given I was just told that from today another lady would be doing the job. I protested and Allison said Mr Smith had given it to her but she would get it back for me. She did but for only one hour. Then Mr Smith took it away again.

[35] Mr Smith says that it was not him who would have removed those duties but Allison Strange, Mr Abohay's supervisor.

[36] Ms Strange says that because of a change in the way things were set up for boning the amount of preparation changed. She remembers discussing the change with Mr Abohay and telling him that she wanted to give the work to a packer boner who earned less than Mr Abohay. She says that she cannot:

remember the full conversation but my recollection is that Tessema agreed to it. I would not have taken that work off Tessema if he hadn't agreed to itMy recollection is that he agreed that Bernie (Bernadette) would be able to do it and with his agreement, we asked her to do the reduced work setting up the boning room.

[37] No evidence has been presented that the decision made to remove Mr Abohay from the boning room set up duties, whether by his agreement or not, was *by reason of his colour, race, ethnic or national origin*. Rather it was because the employer had reorganised how the boning room was set up and wished to save some money. It is not an example of racial discrimination against Mr Abohay.

On-going failure by John Smith to promote Mr Abohay

[38] This claim was raised for the first time in Mr Abohay's written statement of evidence prepared for the Authority's proceedings. I do not intend to treat it as a claim for a personal grievance as it was raised far outside the 90-day time limit and was not raised as a claim in the statement of problem. It is not in the interests of natural justice to expect the employer to deal with the claim at such a late stage.

However, I will look at it briefly to consider whether it is relevant background to Mr Abohay's claim of racial harassment by Mr Rice.

[39] Mr Abohay says that prior to Mr Smith beginning work Alan Martin, Brink's site manager, had told him he would be promoted from a packer boner to a contract boner when a contract boner left. However, Mr Martin did not promote him. Mr Abohay says after Mr Smith took over contract boners have left but *other people have been promoted over me*.

[40] Mr Smith says that contract boners are in a *historic position* and *nowadays we hire people as packer boners so it isn't true that new contract boners have been appointed either*.

[41] There is no evidence that this issue demonstrates racial discrimination against Mr Abohay.

Allegations made by Mr Khan

[42] I consider it important to address allegations made about Mr Khan's complaints about Mr Abohay. Hailesslassie Behre was present as Mr Abohay's supporter at two meetings, in June and July 2010. The meetings were called to deal with Mr Khan's complaint of Mr Abohay swearing at and abusing him. There was some discussion at the meeting about Brinks giving Mr Abohay a warning but Mr Smith then suggested that it would not give him a warning if he agreed to attend life skills training about ethnic origins and offensive behaviour. Mr Abohay was resistant to that idea as he considered that Mr Khan was more in the wrong because he threw a cup. Brinks then suggested that the training would be offered for all staff but that Mr Abohay would have to agree to attend.

[43] In the end the result was recorded on 14 July 2010 as:

No action taken decided to drop disciplinary hearing and advise group counselling.

[44] There was no further complaint made by Mr Abohay about Mr Khan or about the company's handling of Mr Khan's complaint after that until Mr Behre's written evidence prepared for the investigation meeting and dated 9 April 2013.

[45] Mr Behre says that he was present at the first meeting called to deal with Mr Khan's complaint against Mr Abohay on 25 June 2010. He says that after the meeting:

I was standing by the big freezer outside at Brinks. Some staff were smoking. I spoke to Mr Khan. I asked him what his problem was with Tessema. He said he had no problem with Tessema – that he was a friend. I said why would make a fight with a friend. He said the management were causing fights between him and Tessema. I said who was that and he said John Smith. Mr Khan said John Smith had told him to complain about Tessema and that if he did not they would fire him. Mr Khan was a Halal processor. He said the place was getting him down and he left to work in Auckland shortly after that.

[46] Mr Behre then goes on to say that he attended the second meeting on 5 July 2010 and there were discussions about the allegations Mr Abohay had made in his letter of complaint. He says that Mr Smith accepted six out of eight of the allegations. Mr Smith denies accepting any of Mr Abohay's allegations of racism.

[47] John Reid was Mr Abohay's Meat Worker's Union representative at the 5 July 2010 meeting. I have read his notes. There is no record in Mr Reid's notes of any substantive discussion about the letter. Instead, Mr Reid records:

A new time to be set for another meeting about Tessema's letter about John Smith to be set ...all partys (sic) happy with that.

[48] In his written evidence Mr Smith did not specifically respond to Mr Behre's allegation that he put Mr Khan up to complaining about Mr Abohay. However, neither had Mr Abohay raised that as an issue prior to these proceedings.

[49] I am astounded that Mr Abohay and Mr Behre attended the second meeting about Mr Khan's complaint and did not mention, at least to Mr Abohay's union advocate Mr Reid, that after the first meeting Mr Khan said he had been put up to complaining about Mr Abohay by a threat from Mr Smith. In fact, after that date Mr Abohay withdrew his complaint from the Human Rights Commission and did not proceed any further with his complaints against Mr Smith. If Mr Behre's allegation was true I would consider that Mr Abohay had greater reason than ever to proceed with his complaints based on Mr Smith's racism. The fact that he did not do so at the time casts significant doubt on the reliability of Mr Behre's evidence.

[50] Although I cannot consider the Khan incident and complaints as a claim of unjustified disadvantage the evidence is clear that Mr Abohay was not disadvantaged

in any way as a result of the investigation and disciplinary process; he did not even receive a warning. He was not treated in any disparate manner to Mr Khan despite his and Mr Alaimalo's³ beliefs about that.

Sale Alaimalo's evidence

[51] There is also an allegation from Sale Alaimalo a current Brinks employee and boner, that Mr Rice's evidence about Mr Abohay kicking him was fabricated. Ms Tucker submits that therefore the dismissal was procedurally flawed.

[52] Mr Alaimalo said in his written signed statement:

Two weeks ago I was approached by Darryl. We were talking and he told me that the company had told him to make up a false statement that Tessema had kicked him. He said the only reason Tessema was sacked was because of the accusation he made that he was told to say Tessema had kicked him. But that is not the way it happened. Darryl told me he was swinging his arms at Tessema. Tessema put his leg up in self defence. He did not say who in the company had told him to say this.

[53] Mr Rice denies that to be the case and says that Mr Alaimalo's:

... statement is completely false ... I didn't make up my statement Tessema did kick me and other people saw it happen; Michael, Stephen and Adam.

[54] At the investigation meeting I questioned Mr Alaimalo about his written statement. He said that he and Mr Rice had been sharing a pair of earphones listening to music while they worked and they were asked not to do so. Mr Rice then said to Mr Alaimalo that perhaps he should go to the employer and say that he made up the allegation that Mr Abohay kicked him. Mr Alaimalo's evidence suggested that if Mr Rice did say that he had fabricated evidence against Mr Abohay he did so when he was feeling aggrieved towards Brinks management.

[55] I suggested to Mr Alaimalo that what he told me in his verbal evidence was not the same thing as Mr Rice saying that he **did** make up the allegation at the employer's instigation. He disagreed with me and is clear that he understood Mr Rice to be saying he did make up the allegation.

[56] For the following reasons, whatever Mr Alaimalo understood Mr Rice to have said to him, I do not consider that Mr Rice was put up to making an allegation that

³ See below.

Mr Abohay kicked him, or said that he was put up to doing so. Instead he speculated out loud to Mr Alaimalo that maybe he should go to the company and tell it he had made up the allegation. That is not the same as saying that he did make up the allegation:

- Mr Abohay admits that he put his foot up and it connected with Mr Rice's thigh. The only difference between what Mr Rice and Mr Abohay believe about the 'kick' is that Mr Abohay says he did not mean to kick Mr Rice and was acting in self-defence as Mr Rice moved towards him;
- Mr Rice did not initiate the complaint about the 4 May 2012 incident; Mr Abohay did;
- Two witnesses (Michael Butcher⁴ and Stephen Kent) made statements for the employer's investigation that they saw Mr Abohay kick Mr Rice. I was able to question one of those witnesses, Mr Butcher, whose evidence was credible and supported Mr Rice's evidence. If Mr Rice was lying then Mr Butcher and Mr Kent would have to have been as well. I do not consider that to have been likely;
- There was no objective supporting evidence that Mr Rice had raised his arm or hand to Mr Abohay.

[57] I do not accept that it is proved that Mr Rice lied about Mr Abohay kicking him. However, whether Mr Abohay was justifiably dismissed for this is considered below.

[58] Mr Alaimalo also says he considers there is racism at Brinks, particularly in who is chosen to be disciplined by Mr Smith. He says that:

John seems to pick on black people and Pacific islanders. I am Samoan.

...don't see any Pakeha in the office only ever people of my race

⁴ Mr Butcher is Allison Strange's son. Ms Strange was Mr Abohay's, Mr Rice's and Mr Butcher's supervisor.

[59] Mr Alaimalo witnessed the 2012 cup throwing incident between Mr Abohay and Mr Khan and wrote a statement supporting Mr Abohay at the time. In relation to that incident he says *I saw Tessema being treated differently by John Smith.*

[60] Mr Alaimalo says that he has also made a complaint about Mr Rice and his aggression towards him at work but he has not heard anything about what was happening about the complaint and could not remember when he made the complaint.

[61] In response to questioning from Ms Smith Mr Alaimalo says that someone else, but not him, made a complaint about Mr Rice saying the word *nigger*.

[62] Again, despite Mr Alaimalo's genuinely held belief that there is racism in how Brinks, through Mr Smith, treats its employees, there is no specific evidence from Mr Alaimalo that would allow me to conclude that Mr Abohay has been discriminated against *by reason of* his colour, race, or ethnic or national origin.

[63] Also I am not dealing with any complaint made by Mr Alaimalo or another employee about racial harassment or discrimination. I can only deal with Mr Abohay's claims.

Failure to act on written complaint regarding Mr Rice's behaviour

[64] Ms Tucker submits that Brinks failed to act adequately in response to Mr Abohay's April 2012 complaint to Ms Strange about Mr Rice's behaviour towards him in the boning room. She says that Mr Rice racially harassed Mr Abohay, as defined in s.109 of the Act. Ms Tucker submits that Mr Abohay complained to his employer about the racial harassment, as required under s.117(2) of the Act. Brinks then failed to take practicable steps to prevent a repetition of the racially harassing language or behaviour under s.118(2) of the Act meaning that Mr Abohay is deemed to have been racially harassed in the course of his employment as if the behaviour was that of Brinks.

[65] In April 2012 Mr Abohay made a written complaint about Mr Rice alleging that Mr Rice swore at him and threatened him by saying:

*... everytime I weigh my meat Darryl looks at me. ...I was standing there and he said F**k you c**t. I said stop swearing at me every day. Tessema said what the f**k is your problem. Darryl said it's you f**king c**t. I went to my cone he went to his cone. He came*

*over to me and said I will see you after work c**t you are going down.*

*I walked away and seen Allison. (this happens every day)
(most of the boners heard it).*

[66] Ms Strange assisted Mr Abohay to put the complaint into writing as he is not confident about his ability to express himself in English in writing. Mr Abohay disputed that the copy of the complaint produced for these proceedings was a copy of the original complaint written by Ms Strange; he says it is not in his words. He says that he remembers it being written on graph paper, such as out of a maths book. Ms Strange says that she wrote it out on a plain piece of paper that she took out of the photocopier and that she does not have a maths book or graph paper at work.

[67] On the second day of the investigation meeting Brinks produced the original complaint that Ms Strange says she wrote out for Mr Abohay. It is more likely than not that the complaint that I have seen is the actual complaint made by Mr Abohay and handwritten by Ms Strange. There is no mention in that complaint of any racially discriminatory, abusive or harassing words or behaviour by Mr Rice and I find that Mr Abohay did not complain to Ms Strange of any words or threats used by Mr Rice based on Mr Abohay's colour, race, or ethnic or national origins.

[68] Therefore, Brinks cannot have failed to take any practicable steps to prevent a repetition of racially harassing behaviour by Mr Rice as it did not know of any; Mr Abohay had not alleged that Mr Rice was racially harassing him.

Was Mr Abohay unjustifiably dismissed?

[69] Boners are paid on the volume of boned out chicken they produce. Once they have filled a bin, which weighs between 20 and 25 kilogrammes, they take the bin to scales where the weight is noted against their name. There are occasions on which an incorrect weight is recorded or a weighed bin is missed. Mr Abohay says that around the relevant time he had a concern that some of his bins had not been recorded and he reported that to the office. He says that he was told to watch and wait for the weight to be recorded. He says that if Mr Rice was behind him waiting to have his bin measured he would get angry with Mr Abohay waiting because he was holding him up.

[70] Mr Rice says that what a boner should do is put his bin on the scales, look and see the weight then push the bin off the scales and watch the person write the weight down. Instead, Mr Abohay left his bin on the scales until the weight was recorded. That meant that everyone in the queue had to hold their heavy bins for longer than necessary. He says that about 3-4 times a day he would be directly behind Mr Abohay.

[71] Mr Abohay says that after his complaint to Ms Strange about Mr Rice's behaviour in the boning room he expected that there would have been better supervision of Mr Rice's behaviour on the boning table. Ms Strange says that Brinks did increase supervision and oversight of the boning table after Mr Abohay's complaint. She says that she resolved to increase the supervision and overview of the boning area. She told Mr Rice this when she reported Mr Abohay's complaint to him. Ms Strange says that she told Mr Abohay that she:

...would keep an eye on things in the boning room.

[72] Mr Rice agrees that on more than one occasion he did speak to Mr Abohay about hurrying up on the scales. He says that he was frustrated however; he denies getting angry with Mr Abohay. He says:

This wasn't a [sic] one off incident, this was happening regularly – everyday you could be caught behind him and he would hold you up.

... I deny that I tried to provoke him, harassed him or was offensive to him in or out of work. I have never spoken to him outside of work other than the incident in the carpark ...

I never threatened to hit Tessema or told him I was going to take him down.

[73] Mr Abohay's and Mr Rice's versions of events of what happened on 5 May 2012 differ. However, there are certain similarities. They both agree that Mr Rice talked to Mr Abohay at the end of their shift. Mr Rice says it was about Mr Abohay leaving his bin on the scales too long. Mr Abohay says Mr Rice accused him of complaining about him to management and was abusing him by using foul language.

[74] They also agree that Mr Rice followed Mr Abohay out of the building and towards the car park and was continuing to disagree with Mr Abohay's leaving his bins on the scales for what Mr Rice considered was too long. I am satisfied that there was abusive language going both ways and both parties were in a heated frame of

mind. I am also satisfied that Mr Rice actively looked for Mr Abohay outside and initiated the argument. He was angry not only about Mr Abohay's approach to weighing his bins but also about Mr Abohay's written complaint about him⁵.

[75] Mr Rice and Mr Abohay agree that Mr Rice was following along behind Mr Abohay but then moved in front of him so that they were face to face to each other with Mr Abohay walking forwards and Mr Rice walking backwards.

[76] What happened next is at the crux of a decision of whether Mr Abohay committed serious misconduct by way of an assault on Mr Rice or not. Mr Abohay says that Mr Rice moved quickly towards him and he thought Mr Rice was going to hit him. He says he put up his leg to stop Mr Rice hitting him. He agrees that his foot connected with Mr Rice's leg but does not categorise that as a kick. He says Mr Rice moved towards his foot and that he only put up his foot in self-defence to block Mr Rice and did not intend to kick him.

[77] Mr Abohay says he put his foot up rather than his hands as he was rolling a cigarette so his hands were full.

[78] He said that to back up his statement that he did not hit out at Mr Abohay.

[79] Mr Rice denies raising his hand to Mr Abohay or gesturing as if he was going to hit him. He says he moved forward quickly with his upper body towards Mr Abohay causing Mr Abohay to flinch. Mr Rice says that he had his hands full at the time and could not have hit out at Mr Abohay without dropping what he was carrying. Mr Rice says he was not rushing at Mr Abohay or moving towards him in any way when Mr Abohay kicked him. He says that kick was forceful enough to propel him backwards. He says the kick left a dusty footprint on the front of his trousers on his upper thigh.

[80] Both men continued yelling at each other as they separated and went to their cars. Mr Rice then went over to Mr Abohay's car and continued to yell at him when Mr Abohay drove off. Mr Butcher and Mr Kent were not close enough to hear all that was said.

⁵ Michael Butcher's and Stephen Kent's written statements support that conclusion.

[81] On the first day back at work, 7 May 2012, Mr Abohay made a complaint to Ms Strange. He had been assisted to put his complaint into words by a friend. The relevant part of the written complaint says:

After I had changed my clothing and was walking to the carpark, he followed me. He continued using foul language and invited me to fight him.

He came close to my face, and continued with his abuse and challenging him (sic – I am satisfied this is meant to say “me”) to fight. I told him that I did not go to work to fight and to leave me alone. I tried to ignore him by rolling a smoke and walking to my car. I suddenly saw him swing his fist at me and I instinctively kicked out at him.

Michael was behind us and Daryn [sic] asked if he saw what happened. I changed the way I went to my car to avoid contact with Daryn. When I got in my car, Daryn persisted in trying to fight with me and was again swearing and cursing at me. At this time, he disclosed personal information about my family. He described my wife’s nationality, my children and the whereabouts of my sisters. All was accurate information. He said that he was going to “kill me” and “take all my family down”.

I am fearful for my families [sic] safety and also my own safety. I do not want to leave this job that I have had for 8 years. I enjoy the job and the majority of my work mates. Daryn is the only one I get grief from and I would like to know and resolve what issues he has with me.

I am really scared at work at the moment and believe that as I am the only black person in the factory, there is a racial element to the constant abuse and threats I am receiving from Daryn.

[82] Ms Strange reported Mr Abohay’s complaint to Mr Smith. Mr Smith then asked Mr Rice for his version of events. This was the first complaint that Mr Abohay made to Brinks alleging a racial element to Mr Rice’s abuse.

[83] At the investigation meeting Mr Rice denied ever using any racist abuse or language directed at Mr Abohay and said that he was not racist.

[84] Mr Smith points out that Mr Rice did not initiate any complaint about Mr Abohay but when he gave Brinks his version of events he stated that Mr Abohay had kicked him. Mr Butcher and Mr Kent were also asked to give written statements.

[85] Mr Rice’s handwritten statement says:

I was walking over to the scales with my tray. There were about 4 people also waiting to have their trays weighed. I noticed there was a tray still on the scales and “Summer” looking over the shoulder of

*Robin watching her write down his weight. I said "oh". Summer turned to me and said "what's your f***ken problem" which I replied "you are, move your tray"!! He did and muttered under his breath as he walked away.*

*While cleaning my gear I said to him "why can't you just move your tray off so we can all get out of here"!! "Everyone was waiting for you." He replied "f***k you bitch. You're the problem". I said "ooohh! don't go down that track again. If you want to talk we can outside [sic]".*

*As I opened the main door to leave I saw "Summer" walking past the office. I asked him "why do you think that I'm the problem when you leave your trays on the scales". He replied "look at you I don't have to talk to a little bitch like you". I leaned towards him and said "ohh now you've got an attitude". He then kicked me just above my knee leaving a footprint mark on my pants. I looked up to see about five staff who saw it all. Mic said he will be a witness and Adam said to ring the Police. I started at him about his eyes not being straight and I'm the last person to be f***king with.*

*Summer walked right around the building and I went left. By the time I reached my car he had reached his. He looked at me and pulled the fingers at me. I walked about three cars up and said "you're just f**ked off that you kicked me and everybody saw it now you can't get out of it, ay?". He turned got in his car and drove out as did I.*

As a result of this I don't feel safe working with "Summer". I feel intimidated by him and with his assault on me and his constant problems with other staff members I feel it's only a matter of time when he could stab and hurt others. I have contacted my family lawyer and am awaiting his reply.

[86] Mr Abohay was suspended on full pay while Brinks investigated the allegation. Mr Martin, the site manager, undertook the investigation and the disciplinary process. Once Mr Abohay had been suspended, Mr Martin called Mr Reid to inform him about the disciplinary process. They organised a time for the disciplinary meeting. Mr Smith spoke to the witnesses again who confirmed the written statements they had provided. Mr Abohay was informed that the issue was a serious one and was being treated as a possible assault on Mr Rice which might lead to Mr Abohay's dismissal.

[87] The disciplinary meeting took place on 10 May 2012. It was attended by Mr Abohay who was represented by Mr Reid and Donna Brunton from the Union, Mr Martin and Ms Strange. Mr Abohay was asked for his explanation of the situation. In Mr Martin's written evidence, he says that Mr Abohay admitted that he had kicked Mr Rice but said that he did that because Mr Rice had moved towards him to hit him

and he was acting in self-defence. At the investigation meeting, Mr Abohay denied that he had made any admission of kicking Mr Rice.

[88] Mr Abohay was told that the witnesses had said that Mr Rice was not threatening to hit him and that it appeared to Mr Martin that Mr Abohay had not acted in self-defence. Mr Abohay and his Union representatives were given a copy of the witness statements.

[89] Mr Martin says that he had to consider whether Mr Rice had lunged towards Mr Abohay or threatened to hit him so that Mr Abohay could be said to have been acting in self-defence. Ultimately, he concluded that Mr Abohay was not acting in self-defence. He relied on the information he had from the two written witness statements and the follow up conversations with the witnesses. He considered that those statements supported Mr Rice's version of events. He considered that while Mr Rice did move forward towards Mr Abohay, there was no independent evidence that Mr Rice had lunged at or threatened to hit Mr Abohay.

[90] Brinks considered that Mr Abohay could have walked away from the situation rather than hitting out at Mr Rice. Mr Martin asked Mr Abohay why he did not walk away and Mr Abohay maintained that he had acted in self-defence because Mr Rice had gone to hit him.

[91] There was then a break in the meeting. Mr Martin says he considered all of the information he had including what Mr Abohay had told him. He determined that Mr Rice's account supported by statements from the other two witnesses was to be preferred to Mr Abohay's account. He then considered what disciplinary action was appropriate. Mr Martin says that the company:

... takes a very dim view of employees being engaged in physical assaults and the company has for many years now terminated employees who have engaged in such assaults.

[92] Mr Martin says he had to consider whether it was appropriate to dismiss Mr Abohay or whether there was an appropriate alternative to dismissal. However:

If we had not dismissed Tessema we would be saying to other employees that physical altercations were ok, when that is completely contrary to the company's principles. Physical contact with other employees will not be tolerated and it is on that basis I made the decision to dismiss Tessema.

[93] Mr Abohay was summarily dismissed.

[94] Mr Abohay believes that Mr Rice was not disciplined at all for his part in the altercation. However, Mr Martin says that the company recognised that Mr Rice had a part to play in the incident. His view was that Mr Rice could have been the instigator but:

... that he was only a verbal instigator of the confrontation and had not acted out in a physical way. However, Tessema had. He could have walked away but did not. Darryl received a warning for his part in the incident and was not dismissed.

[95] Mr Rice agreed that he had received a warning for his part in the incident.

[96] The justification for Mr Abohay's dismissal is determined under the statutory test in s.103A of the Employment Relations Act 2000. The test requires the Authority to decide the question of justification objectively.

[97] The Authority may not substitute its opinion for that of the employer⁶, but in applying the test it must consider whether Brinks acted fairly in concluding Mr Abohay was guilty of serious misconduct and, in particular, whether before deciding to dismiss him, it:

- Sufficiently investigated the allegation against him - having regards to its resources;
- Raised its concerns with him;
- Gave him a reasonable opportunity to respond to the concerns; and
- Genuinely considered any explanation regarding the allegations⁷.

[98] If an employer fails in any one its four duties listed in s.103A(3) a dismissal may be found to be unjustified.

[99] I also need to consider whether Brinks had reasonable grounds for concluding that the misconduct in question occurred, and it amounted to serious misconduct; and whether there were any other relevant factors.

⁶ *Angus v Ports of Auckland* [2011] EmpC 160

⁷ Section 103A(3) of the Employment Relations Act 2000

[100] A relevant factor to take into account could be whether there was unjustifiable disparate treatment of Mr Abohay and Mr Rice.

[101] The disciplinary procedure is set out in the general information booklet which Mr Abohay was given after its introduction in 2007. Under the heading of Instant Dismissal it reads:

The Company believes that certain actions are considered more serious and should be dealt with in a more direct manner. To that end the disciplinary process outlined above will not apply to the following actions or ones of a similar nature.-

...

**Fighting on Company premises or during work hours*

[102] At the investigation meeting Mr Abohay said:

I put my leg up to defend myself and he jumped onto my foot but I didn't mean to kick him.

[103] Fighting has been defined by the courts to be *physical combat engaged in willingly by both parties*⁸. There is no evidence that Mr Rice engaged in actual physical violence towards Mr Abohay.

[104] Mr Abohay believes that Mr Rice acted as if he was going to strike him. There is evidence to the contrary which could be considered to outweigh his evidence.

[105] At the investigation meeting Mr Abohay consistently denied that he kicked Mr Rice and also denied that he had admitted to that in the investigation and disciplinary process. Mr Reid and Mr Martin recalled that Mr Abohay had admitted to kicking Mr Rice. However, Ms Strange's recollection was that Mr Abohay had denied kicking Mr Rice.

[106] Mr Rice's credibility was brought into issue by Mr Alaimalo. Both Mr Rice and Mr Alaimalo gave affirmed evidence and were questioned by me and by Ms Smith. I have dealt with the likelihood of Mr Alaimalo's evidence being correct above. I accept Mr Rice's evidence about Mr Abohay having kicked him.

[107] I consider that Mr Abohay relies on a fine point in that he raised his foot and it connected with Mr Rice's thigh, however, he considers that not to have been a kick. He did not consider it a kick because he denies meaning to kick Mr Rice and says he was merely intending to protect himself from what he apprehended was an imminent

⁸ *Housham v Juken New Zealand Ltd* [2007] ERNZ 183, at

attack. However, from Mr Abohay's written complaint about Mr Rice and Mr Rice's written response, even if Mr Abohay did not verbally accept that he had kicked Mr Rice, Brinks was entitled to conclude that a kick by Mr Abohay occurred. The issue is whether the kick amounted to serious misconduct justifying dismissal in all the circumstances.

[108] In making a decision about whether to dismiss an employee for assaulting another employee it is not sufficient for an employer to rely solely on its policy that any such conduct will result in a dismissal. An employer must investigate and consider all aspects of the incident in deciding whether an assault amounted to serious misconduct in all the circumstances. Put bluntly some assaults are more serious than others. A technical assault, such as gently moving someone to one side who refuses to let you past, is less likely to be justifiably classified as serious misconduct.

[109] Provocation⁹ and the nature of the industry are also relevant circumstances that should be taken into account.

[110] Mr Rice's evidence at the investigation meeting after questioning from me revealed a level of aggression and doggedness from him towards Mr Abohay on 4 May 2012 that may not have been clear to Brinks at the time it made its decision to dismiss Mr Abohay. In considering whether the dismissal was justified I can only take into account what the employer knew at the time it made its decision to dismiss. However, I consider the relevance of Mr Rice's behaviour below in my consideration of whether Brinks sufficiently investigated and took into account all relevant matters.

[111] The industry is a dangerous one as employees work with knives. Mr Abohay and Mr Rice worked in close proximity to one another using knives. However, the altercation between them, while it occurred on company premises, was not during work hours and was not while they had knives in their hands.

[112] Brinks knew from Mr Abohay's and Mr Rice's statements that Mr Rice had instigated the confrontation. It was necessary to take into account how Mr Rice had acted towards Mr Abohay in deciding whether how Mr Abohay acted when he kicked out amounted to serious misconduct. In Mr Rice's written statement he said that he leaned towards Mr Abohay and said *Ohh, now you've got an attitude. He then kicked me.*

⁹ Although not strictly in the criminal law sense of the word.

[113] In Mr Martin's evidence he says that he told the union representatives that in a case of physical assault the company would always look to dismiss. He said that:

... the union took that onboard and that they understood the seriousness of the issue but they told us to take into account the previous relationship between the two parties.

[114] Mr Martin then goes on to set out what he did take into account which was that he did not consider Mr Abohay acted in self-defence. In itself, that was a reasonable conclusion based on the weight of the evidence available to him. Mr Martin also concluded that if he did not dismiss Mr Abohay other employees would think:

physical altercations were ok, when that is completely contrary to the company's principles. Physical contact with other employees will not be tolerated and it is on that basis I made the decision to dismiss Tessema.

[115] In the Housham case, cited with approval by Judge Couch in *Murphy v Steel & Tube New Zealand Ltd*¹⁰, the Chief Judge of the Employment Court wrote:

While a "zero tolerance" policy towards workplace violence is admirable in principle, the devil is, as always, in the detail of what is meant by a policy that has been sloganised. It cannot be a reasonable policy if it purports to be applied to any involvement in any physical altercation whatsoever. Nor can it be a reasonable policy or practice for an employer to dismiss summarily all the employees in any way involved in any physical altercation. While an employer is entitled to have a "zero tolerance" policy in the sense that employees engaged culpably in violence in a safety sensitive workplace should be liable to dismissal, that does not absolve that employer from the critical assessment of all of the relevant circumstances in which that employee may have been involved in the altercation. Such an analysis is especially important where there is a so-called "zero tolerance" approach¹¹.

[116] That is not to say that an employee who has assaulted another should not be subject to a disciplinary process; zero tolerance may be able to be applied in that way quite fairly. However, what must not happen is that dismissal is automatically applied to all employees who commit an assault without a careful and nuanced investigation and process of consideration of a range of potential remedies including dismissal.

[117] Ms Strange says that after the 26 April 2012 complaint:

¹⁰ (2007) 4 NZELR 719, at paragraph 57.

¹¹ Ibid, paragraph [25]

I arranged for extra supervision in the boning room to make sure there weren't any issues between Tessema and Darryl.

I did not see and was not made aware of any further issues between Tessema and Darryl in the boning room, so I am confident that the additional supervision achieved its purpose.

[118] Mr Abohay says he was not aware of any increased supervision at the boning table.

[119] However, in his written evidence for the investigation meeting Mr Butcher says:

I worked on the same shift as Tessema and Darryl. Before the incident happened I recall Tessema and Darryl had been arguing. They had been arguing for a couple of days.

[120] That evidence would have been available to Mr Martin and been able to be taken into account if the full context of the dispute had been investigated in more depth.

[121] I conclude that whatever arrangements Ms Strange had put in place to oversee the boning room were inadequate because they did not pick up that Mr Rice and Mr Abohay were still having arguments at the boning table, particularly in the two days leading up to the incident.

[122] The similarity between Mr Abohay's allegation in the complaint that Mr Rice said *I will see you after work c**t you are going down* and Mr Rice's written admission of *I said "ooohh! don't go down that track again. If you want to talk we can go outside"* should have put Brinks on notice that there was a likely link between Mr Rice's earlier behaviour complained of by Mr Abohay and that on 4 May 2012. Brinks should have investigated that.

[123] It appears to me that Mr Martin was implementing a zero tolerance to violence policy which overrode other considerations. I am particularly concerned that in making the decision to dismiss Mr Martin did not take into account Mr Abohay's complaint about Mr Rice's aggressive attitude towards him made on 26 April 2012; only nine days before the incident. The complaint by Mr Abohay combined with the justifiable conclusion that Mr Rice was the instigator in the confrontation should have put Brinks on notice to investigate the incident a little more deeply and enquire into

working relations between Mr Rice and Mr Abohay after the complaint and before 4 May 2012.

[124] I consider that in all the circumstances Brinks failed to adequately investigate all of the relevant circumstances in which Mr Abohay kicked out at Mr Rice despite the union having asked Mr Martin to consider the history between Mr Abohay and Mr Rice. That was partly because it applied a zero tolerance to violence without making *the critical assessment of all of the relevant circumstances*¹². That was not a justifiable stance.

[125] I have taken account of resources available to Brinks and conclude that it was not a lack of resources that inhibited the adequacy of the investigation but a lack of depth in the investigation brought about by Mr Martin's view of the zero tolerance policy.

[126] I consider the lack of an adequate investigation to have been more than minor and to have led to Mr Abohay being treated unfairly.

[127] The allegation of disparate treatment of Mr Rice and Mr Abohay cannot be sensibly assessed in light of the finding that Mr Abohay's dismissal was unjustified and therefore I do not make a finding about disparate treatment.

[128] I conclude that the decision to dismiss Mr Abohay was not one a reasonable employer could have made in all the circumstances at the time the decision was made. Mr Abohay has a personal grievance for unjustified dismissal which means I must consider remedies.

Remedies

[129] Ms Smith submits that if I do consider that Mr Abohay was unjustifiably dismissed remedies should be limited given the limited evidence of loss and Mr Abohay's significant contributory conduct.

Lost remuneration

[130] Mr Abohay is seeking his full lost wages for the first eight weeks after his dismissal, amounting to \$9,150.40. Mr Abohay started a new job on 11 July 2012.

¹² *Horsham*, ibid footnote 8.

However, he earns less than he did at Brinks. He seeks the shortfall between his pay at Brinks and his new pay of \$491.80 per week for a further four weeks.

[131] Section 123(1)(b) of the Act allows me to provide for the reimbursement by Amcor of the whole or any part of wages Mr Abohay lost as a result of his grievance. Section 128(2) of the Act provides that I must order Brinks to pay Mr Abohay the lesser of a sum equal to his lost remuneration or to three months' ordinary time remuneration. Since Mr Abohay obtained work within the three months after his dismissal I need to award him his actual lost remuneration for the three months, or thirteen weeks, after his dismissal.

[132] I am satisfied Mr Abohay mitigated his loss adequately by seeking, and obtaining, other work.

[133] Mr Abohay seeks lost wages for the first thirteen weeks after his dismissal only. Brinks must pay Mr Abohay \$9,150.40 for the first eight weeks after dismissal and the shortfall of \$1,967.20 for a further four weeks; which totals \$11,117.60. However, this will be subject to my consideration of his contribution to his personal grievance.

Compensation

[134] Mr Abohay also claims \$10,000 compensation under s.123(1)(c)(i) of the Act. He says:

I felt very sad when I lost the job – it was my only skill and I loved my job and I was very good at it. It made me proud to do it. ...I was very upset about losing it.

...It put pressure on my marriage and on my kids. ...Having to tell my friends and family was very hard. I often still feel very upset about it.

[135] It was clear from my observation of Mr Abohay in the investigation meeting that he is still negatively affected by the dismissal.

[136] In all the circumstances, I consider Brinks should pay Mr Abohay \$6,000, subject to my consideration of his contribution.

Contribution

[137] Ms Tucker submits that Mr Abohay acted in self-defence and therefore, following the Chief Judge's finding in *Housham*, Mr Abohay cannot be said to have contributed to his personal grievance. Because I found that the procedure alone was sufficient to make Mr Abohay's dismissal unjustified I did not make a finding on whether or not he acted in self-defence.

[138] Mr Abohay genuinely believes that he acted in self-defence and he certainly could be considered to have been provoked by Mr Rice's aggressive behaviour towards him on 4 May 2012, which included walking in front of him and getting between him and his car.

[139] However, I do not accept Ms Tucker's submission that *Housham* establishes that it is sufficient that Mr Abohay apprehended that he was going to be physically assaulted by Mr Rice to be justified in assaulting Mr Rice. What the Chief Judge said was:

An employee attacked by another or reasonably fearing imminent physical attack by another is not required to offer no resistance at all, run away (especially if operating dangerous machinery), or meekly submit to the assault. Such an employee is entitled to take reasonable steps in all the circumstances to avoid actual or imminent assault. ... No hard and fast rules can or should be provided. Every case is different and what amounts to a reasonable response to actual or impending violence will depend on those unique circumstances as fairly and reasonably ascertained by the employer¹³.

[140] Mr Abohay was not physically attacked by Mr Rice. Mr Abohay's apprehension of Mr Rice's imminent attack had to be based on reasonable grounds; he had to *reasonably* fear imminent attack before he would be entitled to take reasonable steps to avoid it. Mr Abohay says Mr Rice swung his fist at him and he instinctively raised his foot. However, eye witness testimony does not bear out his belief that Mr Rice swung his fist or even lifted an arm or hand to him. At most eye witness evidence establishes that Mr Rice leaned his body in close to Mr Abohay. Also there is no evidence of a verbal threat of violence by Mr Rice.

[141] In the *Housham* case and the *Murphy* case the employees who acted in self-defence had actually been assaulted by their fellow employees before striking out in self-defence. That is significantly different to this case.

¹³ Ibid, paragraph [24]

[142] I consider Mr Abohay's apprehension of an imminent attack was not based on reasonable grounds and therefore in kicking out at Mr Rice, even if he did not mean to hurt him, his behaviour was blameworthy. I consider that his blameworthy behaviour contributed to his dismissal.

[143] I consider Mr Abohay's behaviour means that the remedies for unjustified dismissal should be reduced by 60%.

[144] Therefore, Brinks must pay Mr Abohay \$2,400 in compensation and \$4,447.04 gross in lost wages.

Costs

[145] Costs are reserved. Mr Abohay is legally aided.

[146] The parties are invited to agree on the matter of costs. If they are unable to do so any party seeking costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have 14 days from the date of receipt of the memorandum in which to file and serve a memorandum in reply.

Christine Hickey

Member of the Employment Relations Authority