

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2023] NZERA 130  
3178679

BETWEEN	KALEM BROWN Applicant
AND	MALBEC ORCHARDS LIMITED Respondent

Member of Authority:	Claire English
Representatives:	Kristen Westwood and Andrew Burton, advocates for the Applicant Doug Abraham, advocate for the Respondent
Investigation Meeting:	19 January 2023 at Napier
Submissions received:	26 January and 24 February 2023 from Applicant 9 February 2023 from Respondent
Determination:	15 March 2023

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Mr Kalem Brown worked as a scanner for Malbec Orchards Limited (Malbec) in its packhouse. On 29 March 2022, Mr Brown went into an unauthorised area where heavy machinery was kept. When the machine operator saw Mr Brown in that area, he attempted to speak with Mr Brown, but Mr Brown exited the area and attempted to avoid the operator. The operator followed Mr Brown, who then pushed him, punched him, and kicked him when he fell to the floor. Mr Brown's work mates intervened to pull him off the operator. Mr Brown was then asked to wait outside by the packhouse Quality Controller while the operator was given first aid. Mr Brown threatened her,

saying with foul language that she should “shut up” or she “would be next”. Shortly thereafter, Mr Brown exited the packhouse. He engaged with the Office Manager. Mr Brown also told her to “shut up” or she “would be next”, and that she should “shut up” or she would “get it”. Both the Office Manager, and the Quality Controller believed that Mr Brown might be violent towards them or attack the operator again. Mr Brown left the premises, and later that day, his employment was terminated for threatening management.

[2] Mr Brown raises a claim of unjustified dismissal, and seeks lost wages and compensation for hurt and humiliation. Malbec says that his dismissal was justified, its process was appropriate in the circumstances, and in any event, Mr Brown’s conduct is such that no remedies are appropriate.

### **The Authority’s investigation**

[3] For the Authority’s investigation written witness statements were lodged from eight witnesses, being Mr Brown himself, his mother Leanne Brown, his father Damien Brown, and for the respondent, Fred Koster, Jo Salisbury, Phil Martin, Oliver Ryan, and Melva Bushett. All witnesses answered questions under affirmation from me and the parties’ representatives. The representatives also gave closing submissions.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

### **The issues**

[5] The issues requiring investigation and determination were:

- (a) Was Mr Brown unjustifiably dismissed?
- (b) If Malbec’s actions were not justified (in respect of dismissal), what remedies should be awarded, considering:
  - Lost wages (subject to evidence of reasonable endeavours to mitigate loss); and
  - Compensation under s123(1)(c)(i) of the Act
- (c) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Mr Brown that contributed to the situation giving rise to his dismissal?

- (d) Should either party contribute to the costs of representation of the other party.

## **Background**

[6] Mr Brown was employed by Malbec to work in its packhouse. He started work on Friday 18 February 2022. Mr Brown did not attend work at all the following week, explaining that he chose not to attend work for “personal reasons”. On his fourth, fifth, and sixth weeks of work, Mr Brown did not attend work as he had Covid-19.

[7] On his 7<sup>th</sup> week of work, Mr Brown worked for 11 and three-quarter hours, before being dismissed for threatening behaviour on 29 March 2022.

[8] Over the 7 weeks of his employment, Mr Brown worked for a total of 60 hours.

[9] Mr Brown’s job was to scan the filled boxes that had been loaded onto pallets prior to them be strapped down and transported. Once he had scanned the boxes and verified they had been labelled and recorded correctly, the pallet would be moved a short distance to the strapping area, where an automated strapping machine would strap the boxes on to the pallets.

[10] The automated strapping machine was a new machine that had been specially imported and installed at the beginning of February. Two people, Oliver Ryan (the owner operator of Malbec) and Fred Koster, were trained to use the machine. Because of the size and force of the machine, it was situated in a caged area surrounded with fencing. The fences bore multiple large warning labels.

[11] Mr Brown had not been trained in the use of the strapping machine. He acknowledged that he was not authorised to go into the strapping area. On the day in question, Mr Koster had been called away from the strapping machine to assist with another task. Seeing that Mr Koster was absent, Mr Brown went into the strapping area, and began scanning boxes sitting on a pallet ready for strapping. He explained that he’d deliberately done this in Mr Koster’s absence as Mr Koster “didn’t like” him being in the strapping area.

[12] Mr Koster then returned. When he saw Mr Brown in the strapping area without authorisation, Mr Koster called out to Mr Brown.

[13] Mr Brown explained he did not wish to speak with Mr Koster, so he did not respond. Instead, he promptly exited the strapping area, and instead of returning to his own work area, moved away to avoid speaking with Mr Koster.

[14] Mr Koster followed Mr Brown. Mr Koster explained that he needed to know why Mr Brown was in the strapping area where he was not authorised to be, and also that he was attempting to remind Mr Brown that the strapping area was potentially dangerous, and Mr Brown should not be in that area.

[15] Mr Brown says that Mr Koster swore at him, and this was “provocation”.

[16] Mr Brown stepped inside the Tally Clerk’s office, followed by Mr Koster.

[17] Mr Brown admits that he then shoved Mr Koster. (In contrast, Mr Koster says that Mr Brown kicked him.) Mr Koster grabbed Mr Brown, both to keep from falling over and to stop Mr Brown.

[18] Mr Koster and Mr Brown overbalanced, and fell out of the Tally Clerk’s Office. Mr Brown got free of Mr Koster’s grip, and by his own admission, punched Mr Koster in the face.

[19] Mr Koster fell to the ground, and, again by his own account, Mr Brown repeatedly kicked Mr Koster in the stomach and head. Mr Brown states that he was pulled off Mr Koster by two of his work mates.

[20] Mr Koster went outside. His face was bleeding, and he was unsteady on his feet. The imprint of Mr Brown’s shoe was visible on his face. He sustained concussion and damage to his eye socket, as well as experiencing pain from where he was kicked. Mr Koster continues to experience painful headaches, as well as ongoing pain in his eye socket, and a deterioration in his eyesight in the eye that was hit.

[21] Mr Koster gave evidence at the investigation meeting. It was apparent that as well as the on-going physical effects, he continued to experience both trauma and distress from Mr Brown’s attack in his place of work.

[22] Other staff alerted the Packhouse Manager, Mr Phil Martin, the Quality Controller, Ms Melva Bushett, and the Office Manger, Ms Jo Salisbury, that there had been a fight. Mr Ryan was not at work that day as he was ill with Covid-19.

[23] Mr Martin saw Mr Brown in the packhouse in an agitated state, and told him to go outside and wait. Mr Martin then went to find out what had happened.

[24] Mr Brown did not go outside. He was then found by Ms Bushett, who also asked him to step outside. Both Mr Martin and Ms Bushett explained that they asked Mr Brown to go outside so as to afford him some privacy, and a place to calm down, as well as keeping him separate from Mr Koster.

[25] Mr Brown told Ms Bushett that she should “Fuck off, or you’ll be next”. She records that Mr Brown’s demeanour as he said this was angry and agitated. He was fidgeting, with his hands clenched into fists. Ms Bushett was visibly in distress during the investigation meeting in recalling what had happened and how it felt to have Mr Brown follow her outside after saying this to her. Mr Martin came back as Mr Brown said this to Ms Bushett, and heard this comment.

[26] Mr Brown then went outside. He was joined by his mother, Ms Leanne Brown, who also worked at Malbec. Ms Brown was defensive of her son, and had received the impression that Mr Koster had attacked him. She attempted to remonstrate with Mr Koster who was also sitting on a bench outside, receiving first aid. Ms Salisbury placed herself in front of Mr Koster.

[27] It is clear from the evidence that there was some discussion, cross-talk, and raised voices. The CCTV footage, while not determinative of the matter<sup>1</sup>, does show that Mr Brown repeatedly attempted to approach Mr Koster and that Ms Salisbury placed herself between Mr Brown and Mr Koster. Mr Brown then attempted to move around Ms Salisbury to be closer to Mr Koster. Ms Salisbury moved so as to ensure she remained between Mr Brown and Mr Koster. Mr Brown then stepped closer to Ms Salisbury, and began moving his arms about, close to her.

[28] At some point Mr Brown told Ms Salisbury “shut the fuck up or you will be next”, and “shut the fuck up, or you’ll get the same treatment”.

[29] Ms Salisbury was frightened by this. She considered that Mr Brown was issuing a genuine threat to her, and that given his agitated state and the injuries he had inflicted

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<sup>1</sup> There is no audio track on the CCTV footage, and it does not show facial expressions due to distance and angle.

on Mr Koster, he might carry it out. At the investigation meeting, she demonstrated discomfort and distress while recalling what had happened. She, Mr Martin, and Mr Koster, all describe Mr Brown as remaining angry and agitated, and constantly pacing.

[30] Mr Brown initially said that he did not recall threatening Ms Bushett or Ms Salisbury. Under questioning, he accepted that he “probably” said those things, and that it was “likely” that he said those things as he was “in a heated moment”.

[31] Ms Brown, in discussion with Ms Salisbury, then called the police. Ms Brown says the police told her to wait on the side of the road, so she did. At some point, Ms Brown returned to pick up her bag. When it became clear that the police would not be attending, Ms Brown and Mr Brown went home.

[32] Mr Ryan was not present at the packhouse that day, as he was ill with Covid-19. His house was nearby. Ms Salisbury went to tell him what had happened. Mr Ryan recalls that he was quite unwell. At Ms Salisbury’s urging, he spoke with Ms Salisbury across the garden, and recalls that she appeared distressed, which was very different from her usual demeanour. He says that he thought at the time that the situation must have been serious, as Ms Salisbury had an elderly father, and was taking what measures she could to avoid Covid-19 for her father’s sake.

[33] With Mr Ryan’s support, Ms Salisbury emailed Mr Brown via Ms Brown’s email address that afternoon, terminating his employment. The email stated:

I am writing to advise you and Kalem that Kalem has been instantly dismissed due to serious misconduct and not allowed back on this property .

The serious misconduct that he performed was the threats that he constantly dished out to the QC and myself, while trying to sort out the altercation between Kalem and the strapper.

[34] There was some discussion about why the email was sent to Mrs Brown, rather than Mr Brown. Given Mrs Brown’s evidence that she routinely acted as a liaison for her son on employment and other matters in a similar manner, nothing flows from this. There was no dispute that the email was promptly conveyed to Mr Brown.

[35] Mr Brown advises that he was surprised by the dismissal. He said it was fine for him to be in the strapping area, as long as the machine was not actually in operation<sup>2</sup>, and that if he had not been dismissed, things could have been sorted out between him and Mr Koster.

[36] Mr Brown advises that he has experienced depression and suicidal thoughts since being dismissed. His parents, Ms Brown and Mr Dominic West, support this. They also state that in their view, Mr Brown had the right to defend himself, and acted in self-defence.

### **Findings**

[37] I must first determine if Mr Brown was unjustifiably dismissed. If I find this to be the case, I must then determine what remedies might be appropriate.

[38] Mr Brown was dismissed for threatening management staff, namely Ms Salisbury and Ms Bushett. I have no hesitation in finding that, on the balance of probabilities, Mr Brown did threaten Ms Salisbury and Ms Bushett with violence, as they say he did. Their evidence is clear and consistent. It is also consistent with contemporaneous notes made by themselves and other staff at the time, and with what can be gleaned from the CCTV footage. Mr Brown himself accepted that he probably said the words “fuck off or you’ll be next”, “shut the fuck up or you will be next”, and “shut the fuck up or you’ll get the same treatment” when Ms Salisbury and Ms Bushett attempted to engage with him. He also said it was likely that he had used such language, and that this would be in keeping with his agitated emotional state at the time. Mr Brown’s admissions as to what he said are in addition to his admissions about his attack on Mr Koster, which I deal with in more detail below.

[39] The law is clear that threats of violence in the workplace are not acceptable, and threats made by an employee can justify dismissal<sup>3</sup>. This is particularly so where other

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<sup>2</sup> Which contradicts his other evidence that he was not authorised to be in the restricted area around the strapping machine.

<sup>3</sup> *Airline Stewards and Hostesses of New Zealand Industrial Union of Workers v Air New Zealand Ltd* [1982] NZArbCJud 1; [1982] ACJ 1 (12 February 1982); and *Corbett v Nelson Pine Industries Ltd*, ERA Christchurch CA37/08, 9 April 2008.

employees in the workplace have a genuine fear of violence due to the surrounding circumstances<sup>4</sup>, as was the case here.

[40] I have found that Mr Brown threatened Ms Salisbury and Ms Bushett with violence, and I also find that they reasonably believed they were at risk of violence from Mr Brown. Mr Brown's actions in this respect were unacceptable. They are sufficient to justify dismissal.

[41] Mr Brown also suggested explicitly at the investigation meeting that the matter as a whole could have been "worked out" or "sorted out" if he had not been dismissed. After hearing the evidence, I reject this suggestion as being entirely impractical and inappropriate. In suggesting that his extreme and violent attack on another employee in the workplace could somehow have been "worked out", particularly in circumstances where Mr Brown commenced by deliberately flouting known safety requirements, and concluded by threatening management (who were trying to assist him and Mr Koster) with physical violence, Mr Brown demonstrates that he has fundamentally no insight into the seriousness of his own poor behaviour. He also demonstrates that he has no insight into the seriousness of the on-going physical and mental trauma that he inflicted on Ms Salisbury, Ms Bushett, and of course, Mr Koster.

[42] Malbec had substantive justification for dismissing Mr Brown.

[43] I must also consider whether Mr Brown's dismissal was carried out in a procedurally fair way, as required by the statutory test of justification at section 103A of the Act.

[44] Mr Brown's dismissal occurred in circumstances where he had been asked to step outside. He immediately threatened Ms Bushett for making this simple and unexceptional request, meaning she was not able to engage with him in any meaningful way. Once outside, he and his mother went up to Mr Koster and began arguing with him, despite Mr Koster visibly being offered first aid at the time. When Ms Salisbury asked them to step away from Mr Koster, she was also threatened with violence. Mr Brown did not offer any explanation for any of his actions. To the contrary, he told Ms Salisbury who was his acting manager to "shut the fuck up" when she was attempting

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<sup>4</sup> See *Airline Stewards and Hostesses of New Zealand Industrial Union of Workers v Air New Zealand Ltd* [1982] NZArbCJud.

to speak with him. He then left the workplace. Mr Brown was then later dismissed by email.

[45] The critique of the process followed by Malbec is that no attempt was made to obtain Mr Brown's side of the story, or to consider his explanation before arriving at the decision to dismiss.

[46] On a superficial level, this might appear to be correct. Ms Salisbury did not sit down with Mr Brown and discuss with him that threats of violence were not acceptable in the workplace, before seeking his explanation, and only then acting to dismiss. However, Mr Brown's actions placed her in a difficult position. He had actively refused to speak to her, and then threatened her with violence if she continued talking to him. He had also threatened Ms Bushell for attempting to speak with him.

[47] It might be said that Ms Salisbury should have invited Mr Brown back later for a formal disciplinary meeting. However, this would have required her to accept that he might use this as an opportunity to assault her as he had said he would, and would also have also put Mr Koster and Ms Bushell at risk of physical harm. I have found that Ms Salisbury, Ms Bushell, and Mr Koster all genuinely believed that Mr Brown was willing and able to attack them as he had just done to Mr Koster. In dismissing Mr Brown as she did, Ms Salisbury chose not to expose herself or the other two employees under her care to the possibility of (further) physical violence.

[48] In addition, Mr Brown's actions in assaulting Mr Koster would also have been canvassed, and my view is that there is no realistic possibility that Mr Brown would have retained his employment under the circumstances.

[49] Overall, the inescapable conclusion is that Mr Brown's own actions created the situation that led to his dismissal.

[50] There was a process failure by Malbec in not at least attempting to provide a further opportunity for Mr Brown to comment before the final decision to dismiss was made. In the circumstances, I view this as an unjustified disadvantage grievance.

[51] I must then consider whether what remedies might flow from this unjustified disadvantage, and the extent to which Mr Brown contributed to his dismissal in a way which fairly requires a reduction in any remedies that might be awarded to him.

[52] The Employment Court has set out principles for the assessment of such difficult circumstances, in *Xtreme Dining Ltd v Dewar*<sup>5</sup>. The court quoted with approval the comments of Chief Judge Goddard, stating:

“It is open to the Tribunal, in cases in which it thinks that the employee should recover nothing, to say so as part of the process of assessing compensation. A nil award is the equivalent of nominal or token damages at common law and would convey the Tribunal's view that the case should never have been brought ... . If the employee has behaved in a way that is strongly causative of the situation that gave rise to the personal grievance, and that behaviour was reprehensible in a way that is relevant to the employment relationship and was known to the employer before dismissing the employee, so that it can be said that but for the employees bad behaviour the employer probably would not have considered dismissing the employee, then the Tribunal may be justified in awarding no compensation for injury to the employees feelings or reputation or for humiliation.”

We respectfully agree with this dicta. It is one thing for the decision maker to conclude that a personal grievance is established but that disgraceful conduct on the part of an employee means it is not just or equitable to award remedies — under s 123; it is quite another for the decision maker to undertake a process of fixing remedies, and then determine that those remedies should not be awarded at all. Such an artificial process cannot have been intended<sup>6</sup>.

[53] The court went on to say<sup>7</sup>:

We conclude that s 124 does not permit complete removal of a previously established remedy. Rather, when there is misconduct which is so egregious that no remedy should be given, notwithstanding the establishing of a personal grievance, the Authority or Court may take that factor into account in its s 123 assessment in a manner that conforms with “equity and good conscience”. The absence of a remedy in rare cases, notwithstanding the establishing of a personal grievance may be appropriate. The Court of Appeal reached this conclusion where there is disgraceful misconduct discovered after a dismissal. We consider that the statutory scheme allows for the same outcome in other instances where, for example, there has been outrageous or particularly egregious employee misconduct.

[54] This means I must consider whether Mr Brown’s behaviour was strongly causative of the situation that gave rise to his personal grievance, and whether his behaviour was reprehensible, outrageous, or egregious, such that it would not be just and equitable to award him any remedies.

[55] I have found that Mr Brown’s actions and behaviour were strongly causative of the situation that gave rise to his personal grievance of unjustified disadvantage.

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<sup>5</sup> [2016] NZEmpC 136, Employment Court, Christchurch.

<sup>6</sup> Ibid, at paragraphs [206] and [207].

<sup>7</sup> Ibid, at paragraph [216].

[56] I also consider that Mr Brown's actions fall into the category of outrageous or particularly egregious employee misconduct. There are three aggravating factors leading to this conclusion. The first is the severe level of violence visited by Mr Brown upon Mr Koster, with repeated kicking of Mr Koster while he lay on the ground causing Mr Koster to have physical and mental injuries that persist to this day. The second is that Mr Brown instigated the entire matter, first by deliberately entering the unauthorised area around the strapping machine in Mr Koster's absence, and then by assaulting Mr Koster when Mr Koster attempted to talk with him about it<sup>8</sup>. Finally, Mr Brown threatened his managers who were merely asking him to step outside and tell his side of the story.

[57] He now raises a grievance, essentially on the grounds that they should have persisted in trying to engage with him once he had shut down their attempts to inquire and threatened them with violence if they continued to engage with him. It would not be just or equitable to award Mr Brown any remedies based on that failure to engage in these circumstances. In a real sense, Mr Brown has been the author of his own misfortune.

[58] Finally, I record that Mr Brown suggested at the investigation meeting that his attack on Mr Koster had been "in self defence". This suggestion is clearly self-serving, and Mr Brown appears to not appreciate that it is directly contradicted by his own evidence about what happened, including that he admitted that he began the altercation by assaulting Mr Koster, and that he admitted that he repeatedly kicked Mr Koster while Mr Koster was lying on the ground such that he had to be pulled off Mr Koster by workmates. For the record, I reject this suggestion, together with the suggestion made on Mr Brown's behalf that somehow this amounted to a situation where Mr Brown had been attacked.

### **Outcome**

[59] Mr Brown's unjustified dismissal claim is not made out. Mr Brown's unjustified disadvantage grievance is made out, but due to his own extreme misconduct, which was causative of the situation that led to the grievance, I find that it would not be just or equitable to award any remedies. No orders in favour of Mr Brown are made.

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<sup>8</sup> Although there is a difference of opinion between Mr Brown to avoid speaking with him.

## **Costs**

[60] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

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

[62] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>9</sup>

Claire English  
Member of the Employment Relations Authority

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<sup>9</sup> Please note the Authority's Practice Note on costs, effective from 2 May, available at <https://www.era.govt.nz/assets/Uploads/practice-note-2>