

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Vaughan William Atkinson (Applicant)  
**AND** The Chief Executive, Department of Corrections (Respondent)  
**REPRESENTATIVES** Vaughan Atkinson In person  
Les Taylor & Phillip Cornege, Counsel for Respondent  
**MEMBER OF AUTHORITY** Vicki Campbell  
**INVESTIGATION MEETING** 10 February 2006  
**SUBMISSIONS RECEIVED** 22 February 2006 from Applicant  
27 February 2006 from Respondent  
**DATE OF DETERMINATION** 15 May 2006

DETERMINATION OF THE AUTHORITY

**Employment Relationship Problem**

[1] Mr Vaughan Atkinson was employed by the Department of Corrections as a Probation Officer with the New Zealand Community Probation Service (“Probation Service”) from 6 August 1998 until 24 September 2003 when he was dismissed for serious misconduct. He was dismissed after an incident between him and an ex-employee of the Probation Service, Mr Kevin Pilbrow which saw Mr Atkinson punch Mr Pilbrow in the face.

[2] Following an investigation into the incident Mr Atkinson was dismissed. He says that dismissal was unjustified and seeks remedies including reinstatement.

[3] The Probation Service denies the dismissal was unjustified.

[4] In undertaking its role in determining this employment relationship problem the Authority must consider the evidence available to the employer at the time the decision to dismiss was made. Further, the Authority must, in determining whether the dismissal was justified, consider whether the employer’s decision can be shown to have been based on a reasonably

founded belief, honestly held and on the balance of probabilities that serious misconduct had occurred.

[5] The issues for determination are:

- Whether the respondent conducted a full and fair inquiry into the incident;
- Whether a decision to dismiss was open to a fair and reasonable employer in the circumstances, including the fact that Mr Atkinson was allegedly acting in self defence, and if not;
- Whether Mr Atkinson contributed to the situation which gave rise to the personal grievance and whether reinstatement is reasonably practicable in all the circumstances.

### **Did the respondent conduct a full and fair inquiry into the incident?**

[1] Fairness and reasonableness requires that an employee is given an understandable account of the allegations of misconduct with sufficient particulars and enough time to provide the employee with a real as opposed to a nominal opportunity to refute the allegations or mitigate the conduct. The Court has also set out the minimum requirements of procedural fairness to be applied by an employer in an investigation into serious misconduct:

- a. notice to the employee of the specific allegation of misconduct and of the likely consequence if the allegation is established;
- b. a real as opposed to a nominal opportunity for the employee to attempt to refute the allegation or explain or mitigate his or her conduct; and
- c. an unbiased consideration of the employee's explanation, free from predetermination and uninfluenced by irrelevant considerations.

(NZ (with exceptions) *Food Processing etc IUOW v Unilever NZ* [1990] 1 NZILR 35).

### *Role of Probation Officers*

[6] The Probation Service is responsible for managing the sentences of offenders who have received community-based sentences. Offenders have usually been convicted of a criminal offence, many related to violence. The Probation Service has a strategic goal to reduce re-offending. To assist in the achievement of that goal Mr Atkinson and all other Probation Officers are required to role model behaviours consistent with high standards.

[7] Probation Officers are frequently required to deal with the criminal, aggressive and violent behaviours of the offenders under their management. Probation Officers receive training to help them understand how volatile situations can develop and how to defuse them. Part of their training also includes helping offenders recognise the links between decisions made, actions taken,

and offending. This requires offenders to be taught to take responsibility for their decisions and their consequences.

*Terms of employment*

[8] Mr Atkinson was subject to a collective employment agreement dated 1 June 2003. Clause 2.2 of the collective agreement requires employees to ...maintain high standards of integrity and conduct. The agreement also requires employees to comply with the Department of Correction's code of conduct and sets out a framework for dealing with disciplinary matters. The third schedule to the collective agreement sets out the process for dealing with employment relationship problems and provides information on the services available to assist in such resolution.

[9] The code of conduct sets out the standards of behaviour expected of all employees which is encapsulated within three principles. The third principle is about not compromising the Department through personal behaviour and states:

If you work with offenders you will be held to particularly high standards of personal behaviour and compliance with the law as you should be a role model for offenders. [my emphasis]

The code lists examples of serious misconduct. Included in the examples are:

- Violence or threats of violence against clients or others in the workplace;
- Threatening, abusive or insulting behaviour to any person in the workplace

*The incident*

[10] On Friday, 9 May 2003 at approximately 4.45pm Mr Atkinson was approaching the car park at the Kaitaia Service Centre. Mr Pilbrow arrived just ahead of him and parked his car in such a way that it prevented Mr Atkinson from entering.

[11] There is a dispute as to whether or not Mr Pilbrow saw Mr Atkinson, however, what is common ground is that Mr Atkinson tooted his horn at Mr Pilbrow to indicate he should move his vehicle out of his way. Mr Pilbrow ignored Mr Atkinson's attempt to draw his attention to his plight. I accept that by the time Mr Pilbrow was making his way to the offices at the Service Centre he was well aware that Mr Atkinson was parked behind his vehicle. Mr Atkinson says Mr Pilbrow gave him an angry glare as he walked towards the service centre offices.

[12] Mr Atkinson became angry and frustrated at Mr Pilbrow's lack of response and continued to use his horn. Mr Atkinson says the purpose of using his horn was twofold, firstly, to let Mr Pilbrow know of his objection to being left without entry to the car park, and secondly to encourage him to move his car.

[13] After a very short time Mr Pilbrow returned towards his car. When he was close to Mr Atkinson's car, he told Mr Atkinson that if [Mr Atkinson] wanted him to move his car, [Mr Atkinson] should get out of his car and ask him. Mr Atkinson decided to get out of his car. As he opened his door Mr Pilbrow kicked the door with his foot and struck Mr Atkinson with it. Notes from interviews held during the investigation into this matter by the Probation Service show that Mr Pilbrow believed Mr Atkinson was trying to hit him with the door, something Mr Atkinson denies.

[14] Mr Atkinson says that when Mr Pilbrow kicked the door with his boot the door hit him and that this action by Mr Pilbrow constituted an assault. Mr Atkinson then retaliated by punching Mr Pilbrow in the face with his closed fist. I have concluded that in order for Mr Atkinson to punch Mr Pilbrow fully in the face with a close fist, he must firstly, have been completely out of his car and secondly he must have come around the side of the door. This would indicate that Mr Atkinson was partially out of the car when the door was kicked by Mr Pilbrow. That would account for Mr Atkinson's injury to his leg and ribs, sustained when the door hit him.

[15] Mr Pilbrow then grabbed Mr Atkinson with both hands and the pair began to tussle. Mr Atkinson and Mr Pilbrow ended up scuffling on the gravel and the incident ended with Mr Pilbrow pinning Mr Atkinson to the ground.

[16] Mr Grant Henderson, another Probation Officer, witnessed the last part of the tussle and pulled the two men off each other. Mr Atkinson got back into his car and drove it out of the service centre and parked it on the kerbside. He then called the police and reported that he had been assaulted.

### *The investigation*

[17] On the day of the incident (9 May) Mr Marty Maioha, the Service Manager responsible for the Probation Service centre in Kaitaia received notification of the incident. Later that evening, in response to a message left on his cell phone by Mr Maioha, Mr Atkinson provided his view of the events that had taken place and advised Mr Maioha that he had made a complaint to the Police and had visited his doctor.

[18] On 13 May 2003, Mr Don Robertson was assigned to undertake a preliminary fact finding exercise to determine whether a full investigation into serious misconduct was warranted. Mr Robertson provided the probation service with a copy of his report.

[19] On 26 May 2003 Ms Lisa Pitman, the Area Manager for Kaitaia met with Mr Atkinson to advise that a formal investigation into serious misconduct would be undertaken. Ms Pitman confirmed her advice and the allegations relating to the serious misconduct against Mr Atkinson in a letter that same day.

[20] On 28 May 2003 Mr Atkinson was put on special paid leave to enable him the opportunity to seek advice and to provide a response to the Probation Service's proposal that he be suspended. Also on that day Mr Atkinson was advised he was being charged by the Police with common assault. This was as a result of a complaint made by Mr Pilbrow against Mr Atkinson. Incidentally Mr Pilbrow was also charged with common assault as a result of the complaint made by Mr Atkinson against Mr Pilbrow. However, on 31 July 2003 the charges against both men were withdrawn by the Police.

[21] On 5 June 2003 Mr Atkinson advised Ms Pitman that he felt the suspension was appropriate given the relative seriousness of the allegations. He was formally suspended on pay on 10 June 2003.

[22] On 15 June 2003 Ms Pitman wrote to Mr Atkinson confirming the venue at which Mr Atkinson would be provided with an opportunity to give his preliminary response to the allegations outlined in the letter of 26 May. Mr Atkinson was also invited to provide written submissions. He was advised he could bring a support person as well has a representative to the meeting. Ms Pitman outlined for Mr Atkinson the names of the people she intended to interview as part of the investigation process and invited Mr Atkinson to add to the list.

[23] On 17 June 2003 Mr Atkinson complained that the investigation into serious misconduct was being undertaken by Ms Pitman and that this contravened a mediated settlement agreement reached on 30 May 2002. That settlement agreement required any investigations of any matter pertaining to Mr Atkinson to be undertaken by an officer outside the Northern area.

[24] On that same date, Mr Warwick Duell, Regional Manager Southern, contacted Mr Atkinson and advised him that he was now undertaking the investigation. Mr Duell confirmed the earlier advice provided by Ms Pitman that the allegations he was investigating were:

- On 9 May 2003 you were involved in an altercation in the car park of the Kaitaia Service Centre;
- Upon entering the car park in your car at around 4.40pm, you found Kevin Pilbrow's car parked in your car park, and that you sounded your horn repeatedly until Kevin Pilbrow came out of the Service Centre;

- During the altercation you punched Kevin Pilbrow in the face, with a closed fist;
- You wrestled with Kevin Pilbrow, until Grant Henderson broke the altercation and the Police were called; and
- On 28 May 2003 you were charged by the Police with common assault and that you are due to appear in the Kaitaia District Court on 17 June 2003.

[25] Mr Duell advised Mr Atkinson that he would investigate the circumstances surrounding the allegations and then decide whether to take any further action. Mr Duell clarified that if the misconduct was proven it would likely constitute serious misconduct. Mr Duell then outlined the relevant sections from the code of conduct applicable to Mr Atkinson's situation. Mr Duell advised Mr Atkinson that possible consequences included summary dismissal.

[26] Mr Duell set out the process he would follow which included meeting first with Mr Atkinson and then other staff and witnesses to the altercation. Mr Duell confirmed his view that the initial reasons for Mr Atkinson's suspension continued to exist and would be continued. He advised Mr Atkinson that he was happy to review the suspension at any time.

[27] Mr Atkinson points to this notification by Mr Duell to show that Mr Duell did not start his investigation from the beginning but relied on Ms Pitman's "*biased*" allegations as he received them. I consider the allegations set out by Mr Duell in his letter dated 17 June 2003 outlined a fair and accurate summary of the allegations of misconduct for which Mr Atkinson would be required to provide his explanations. There was no evidence at the investigation meeting which could support an allegation that with Ms Pitman or Mr Duell were biased in their approach to the identifying and setting out the allegations.

[28] On 20 June 2003 Mr Duell met with Mr Atkinson and discussed the incident with him and received his side of the story.

[29] On 30 June 2003 Mr Duell interviewed all those who were either involved in, or witnessed the altercation between Mr Atkinson and Mr Pilbrow. Notes of each of the interviews were taken and provided to Mr Atkinson for comment. I am satisfied that Mr Atkinson had a full opportunity to comment on the notes from all the interviews. The documents filed in the Authority contain comments highlighted in bold, which were Mr Atkinson's responses and were sent to Mr Duell during the investigation.

[30] Mr Duell met with Mr Atkinson on 16 July 2003 to discuss the notes from each of the interviews and to receive Mr Atkinson's submissions.

[31] Mr Duell compiled a draft report from his investigations and provided a copy to Mr Atkinson on 6 August 2003. On 12 August 2003 Mr Atkinson met with Mr Duell to discuss the draft report and his preliminary findings that Mr Atkinson had committed serious misconduct. Mr Atkinson provided a full response to the report, both in writing and orally at the meeting.

[32] Mr Duell adjourned the disciplinary meeting in order to consider Mr Atkinson's response and to finalise his report into the allegations. His final report dated 26 August 2003 confirms Mr Duell's preliminary findings that serious misconduct had occurred. Mr Atkinson was dismissed on 16 September 2003.

[33] On 10 March 2004 Mr Atkinson made a written complaint to the Probation Service regarding the actions of the department. In particular Mr Atkinson alleged that the Probation Service had:

- Sacked the innocent victim;
- Upheld the accounts of other parties despite their lack of correlation and obvious deceit;
- Upheld the account of the aggressor's de facto partner;
- Acted in defiance of a mediation agreement by reinstating a vacated written warning to his personal file;
- Breached department procedure by not employing an independent fact-finder;
- Attempted to mislead his PSA advocate;
- Failed to advise him regarding taking a personal grievance under the collective agreement;
- Employed an investigator who was rude and intimidating.

[34] To address Mr Atkinson's concerns about the investigation the Probation Service engaged Mr Greg Potts of Martin Jenkins & Associates to review the investigation and disciplinary process carried out by Mr Duell. A full copy of Mr Potts' report has been made available for the Authority. Mr Potts has undertaken a comprehensive analysis of the steps taken, the chronology of events and the relevant process requirements set by Probation Service policy, the collective employment agreement and natural justice. Mr Potts' conclusion was that the investigation was very thorough; that Mr Atkinson's complaints could not be upheld; and that the investigation process, treatment of evidence and actions taken by the department were appropriate.

[35] Mr Potts addressed each of Mr Atkinson's concerns and made specific findings on each. I have now been able to assess the evidence available to the parties at the time of the investigation and disciplinary action. I have set out Mr Potts' findings relating to each of Mr Atkinson's complaints below:

Complaint that the Department has:

- upheld the accounts of other parties despite their lack of correlation and obvious deceit; and

- upheld the account of the aggressor's de facto partner

Throughout the investigation there were conflicting accounts and "changing stories" to some degree. This is not unusual in this sort of situation where events occur rapidly and individuals have their own perceptions. The records of evidence and reports by the investigator indicate that he has considered each element of the evidence and exercised a judgement where conflict or inconsistencies exist. These judgements appear reasonable. I see no evidence of "obvious deceit", let alone any instances of such deceit being upheld.

Complaint that the Department has:

- acted in defiance of a mediation agreement by reinstating a vacated written warning to his personal file;
- breached department procedure by not employing an independent fact-finder

... Mr Robertson's exercise was the preliminary step to an employment investigation as envisaged by the mediation agreement.

...The mediation agreement refers to investigations and this does not, and indeed could not, practically preclude local management from any role when an incident of this nature occurs. Local management is obliged to take some action when matters of this nature come to its attention. The role of Mr Robertson and Ms Pitman in the initial fact-finding exercise and then outlining the allegations to Mr Atkinson and Mr Duell did not breach the mediation agreement.

Mr Atkinson also asserts that Mr Duell mistakenly "piggy-backed" on Mr Robertson's findings rather than start with a clean slate. However, the documentation makes it clear that the investigation started from scratch and was a very thorough exercise involving considerable time and expense to gather all the relevant evidence. In fact Mr Duell advises me that he did not even see the report from Mr Robertson until Mr Atkinson gave it to him.

Complaint that the department has:

- failed to advise him regarding taking a personal grievance under the collective agreement;
- sacked the innocent victim

...The requirement to advise an employee of the right to pursue a personal grievance (PG) is one of a number of "principles" to be followed. It is non-specific as to when or how this advice must occur. The intent is obviously to ensure that the employee is not disadvantaged through being unaware of the ability to pursue a PG, and therefore potentially miss the opportunity to challenge the employer's actions.

Mr Atkinson disputed a wide range of matters throughout the investigation. The final decision to dismiss him was made following a meeting between the parties on 16 September, and this was conveyed to him by way of emailed letter (as agreed) on 24 September. At this point Mr Atkinson became aggrieved by the decision to dismiss, and he conveyed this to the Chief Executive by email on 8 October. On 9 October the department advised Mr Atkinson that his complaint would be treated as a PG, and the appropriate processes then followed.

...Mr Atkinson was dismissed as a result of a thorough investigation and justifiable finding that he was guilty of serious misconduct.

That the department has:

- attempted to mislead his PSA advocate;
- employed an investigator who was rude and intimidating (this complaint relates to the meeting held on 16 September).

I spoke to both [Mr Duell and Mr Fury [PSA delegate]] and they both clearly recall that Mr Duell did not make any statement to the effect that Mr Atkinson would not be dismissed. Mr Fury advises that following the phone discussion he advised Mr Atkinson to respond in a certain manner, in which case things were "looking good". However, this was Mr Fury's own assessment of the situation and not what Mr Duell had told him.

I spoke to all the other parties who were at that meeting (16 September) and the evidence is that Mr Duell used stronger language than at previous meetings and that there was considerable argument

between Mr Atkinson and Mr Duell. Mr Duell advises that he was making a last attempt to try and get Mr Atkinson to understand how serious the situation was and recognise that his behaviour had been inappropriate. Mr Fury advises that he does not recall Mr Duell being “rude” or “intimidating” during the meeting. He does recall that Mr Atkinson was trying to re-litigate virtually everything and that Mr Duell had to try and bring him back to the reason for the meeting – to focus on the proposed disciplinary action.

[36] I am satisfied that the investigation into the alleged misconduct was thorough, fair and reasonable. Mr Duell interviewed every possible witness to the event. Mr Atkinson provided full and detailed responses to each allegation including his view that he had acted in self-defence and that Mr Pilbrow had provoked him. The evidence shows that Mr Duell carefully considered each of Mr Atkinson’s responses and provided tentative conclusions which he then put to Mr Atkinson for further response.

[37] Even if I had not been satisfied that the investigation had been full and fair, Mr Atkinson had a second opportunity to have the decision of Mr Duell overturned. As soon as he raised his concerns about the process and the outcome, the Probationary Service arranged for an independent person to complete a comprehensive review of the investigation and disciplinary action.

**Was a decision to dismiss open to a fair and reasonable employer in the circumstances, including the fact that Mr Atkinson was allegedly acting in self defence?**

[38] In order to justify a dismissal the Court of Appeal in *Man O’War Farm Limited v Bree*, CA, 169/02, 31 July 2003, para 30 has stated:

... an employer must have reasonable grounds for believing and must honestly believe that there has been misconduct by the employee of sufficient gravity to warrant dismissal. An employer must also carry out the dismissal in a manner that is procedurally fair. The minimum requirements of procedural fairness are that the employer has properly investigated the allegations, given the employee an opportunity to be heard and considered (with an open mind) that explanation before making the decision to dismiss (*Mazengarb’s Employment Law* (6ed, 2003) para 103.57).

[39] It is not the role of the Authority to substitute its decision to dismiss or not, for that of the Probation Service. Rather, the role of the Authority is to determine whether the decision to dismiss Mr Atkinson was a fair and reasonable one in the circumstances.

[40] In *W & H Newspapers v Oram* [2000] 2 ERNZ 448, 457, the Court of Appeal at paragraphs [31] and [32] said that

The Court has to be satisfied that the decision to dismiss was one that a fair and reasonable employer could have taken. Bearing in mind that there may be more than one correct response open to a fair and reasonable employer, we prefer to use this in terms of “could” rather than “would” used in the formulation used in the

second *BP Oil case* [1992] ERNZ 483 (CA) at 487.

The burden on the employer is not that of proving to the Court the employee's serious misconduct, but of showing that a full and fair investigation disclosed conduct capable of being regarded as serious misconduct.

[41] In *Oram* the Court of Appeal held that if a fair and reasonable employer is able to view the conduct disclosed by its investigation as deeply impairing of the basic trust and confidence essential to the employment relationship, it is hardly necessary for the employer to consider whether in all the circumstances the employee ought to be dismissed, since dismissal will be within a range of disciplinary measures available to the employer for it to choose from.

[42] On 26 August 2003 Mr Duell wrote to Mr Atkinson and outlined his preliminary conclusions taking into account the submissions made by Mr Atkinson during the investigation process. Mr Duell tentatively concluded that serious misconduct had occurred on 9 May 2003 and that his preliminary view as to appropriate disciplinary action is that Mr Atkinson should be dismissed.

[43] Mr Duell met with Mr Atkinson and his representative on 16 September 2003 to hear Mr Atkinson's response to his tentative view that Mr Atkinson should be dismissed. He then took time to consider what Mr Atkinson had said.

[44] On 24 September 2003 Mr Duell wrote to Mr Atkinson outlining his conclusions that Mr Atkinson had committed serious misconduct when he was involved in the altercation with Mr Pilbrow, in particular, when he punched Mr Pilbrow in the face with a closed fist. Mr Duell explained in his letter that he had taken into account Mr Atkinson's behaviour during the investigation process, particularly his conduct in denying all responsibility for the incident and his refusal to accept his behaviour was wrong.

[45] The code of conduct prohibits the use of violence in the workplace. A punch to the head of another person, in the case a member of the public, constitutes violence, whether or not the person is defending themselves from an assault.

[46] Mr Atkinson has maintained throughout the investigation undertaken by Mr Duell and at the Authority's investigation meeting that he punched Mr Pilbrow in self-defence and that he was entitled to. He has continued to maintain that Mr Pilbrow started the whole incident by leaving his car in such a position that Mr Atkinson could not get into the car park.

[47] Generally, assault will be viewed as a type of an event that may amount to serious misconduct and constitute grounds for instant dismissal (*N Z Meat Processors etc IUOW v Richmond Ltd* <http://www.brookersonline.co.nz/databases/modus/caselaw/empunrep/empunrep%244263E/popup.cd?popup=FolioPopup%245&si=15&sid=3gjsx5umt1m7lbkg0khalmf0i5lsf413i&hli=2&sp=empunrep>). However, each case must be viewed in light of its own facts.

[48] In general it will be unreasonable to dismiss an employee who has acted solely in self-defence (see *Pilkington (New Zealand) Limited v Sangha* [1999] 2 ERNZ 263). However, it must be an extreme case of self-defence which would justify blows being made upon a person (see *McGregor v Armour Creations Ltd & Northern Labour District Saddlers & Canvas Workers' Union* [1990] 1 NZLR).

[49] Although *provocation* provides no defence to assault in criminal law, in employment law an inquiry should be made to determine whether an employee's conduct was ...sufficiently inconsistent with the continuation of the worker's contract of employment so as to justify dismissal... and that provocation may mitigate the significance of an assault (*Central Clerical Workers Union v E V McConnell Ltd (t/a Bridge Service Station* 1990] 3 NZILR 1048 <http://www.brookersonline.co.nz/databases/modus/caselaw/empunrep/empunrep%244263E/popup.cd?popup=FolioPopup%247&si=15&sid=3gjsx5umt1m7lbkg0khalmf0i5lsf413i&hli=2&sp=empunrep>).

[50] In his final conclusions on 24 September 2003 Mr Duell had considered Mr Atkinson's submissions on self-defence and makes his conclusion:

I do not accept that you were acting in self-defence when you punched Mr Pilbrow. As set out in my report and my letter of 26 August I have found it very difficult to believe that punching Mr Pilbrow, in the situation described by the witnesses, was necessary to protect yourself. A punch to the face is a significant act of violence and I do not believe that Mr Pilbrow's behaviour warranted such action.

[51] Mr Duell had formed a view that Mr Atkinson had escalated the situation and that he had a number of other options available to him such as driving away. In his report dated 26 August Mr Duell comments:

After the door was kicked, Mr Atkinson chose to alight from the car and punch Mr Kevin Pilbrow in the face. This behaviour is not what is expected from a Probation Officer who was on duty and in a public place. Mr Kevin Pilbrow was a visitor to the office, a member of the public, and Mr Atkinson had a responsibility to do every thing available to him to avoid escalating an [sic] situation that was becoming increasingly volatile.

[52] In response to submissions by Mr Atkinson that he was aware Mr Pilbrow had a fighting and behavioural history Mr Duell concluded ...[T]his should have added caution to his behaviour. It seems to have had the opposite effect.

[53] Mr Duell found that Mr Atkinson's behaviour, that is, the sounding of the car horn through to the violent physical altercation, to be inappropriate and certainly did not demonstrate behaviours which could be considered a "role model for offenders".

[54] There is no dispute that Mr Atkinson sat on his car horn after Mr Pilbrow stopped his car directly in the access way to the car park and that this prevented Mr Atkinson from entering the car park. It is not disputed that Mr Atkinson opened his car door and Mr Pilbrow kicked it with his boot and that this action resulted in Mr Atkinson being hit by the car door. It is common ground that Mr Atkinson then punched Mr Pilbrow in the face. It is also common ground that the altercation continued with Mr Pilbrow eventually getting the better of Mr Atkinson and eventually the parties were pulled apart by Mr Henderson.

[55] I accept that the tooting of the car horn could not constitute serious misconduct. What Mr Atkinson's actions did do, however, was to escalate the situation. A reasonable person in Mr Atkinson's position would probably have got out of their car and asked Mr Pilbrow to move his car. Even after Mr Pilbrow had approached Mr Atkinson and told him all he had to do was get out of his car and ask for him to move it, Mr Atkinson had the option of staying in his car, winding his window down and politely requesting Mr Pilbrow to move his car. Mr Atkinson did not do this.

[56] Mr Atkinson then opened his car door which was then kicked back into his body by the boot of Mr Pilbrow. At that point, Mr Atkinson could have got back into his car. Instead he chose to punch Mr Pilbrow in the belief that Mr Pilbrow was about to attack him. I do not accept that this was the use of reasonable force to dissuade Mr Pilbrow from a threat of violence.

[57] In all the circumstances, I have concluded that it was open to the Probation Service, as a fair and reasonable employer, to conclude that Mr Atkinson's conduct was sufficiently serious as to constitute serious misconduct warranting summary dismissal. Mr Atkinson does not have a personal grievance and I can be of no further assistance to him.

Vicki Campbell  
Member of Employment Relations Authority