

**Attention is drawn to paragraph 1 prohibiting publication of certain information contained in this determination**

Determination Number: CA 125/06  
File Number: CEA 64/06

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

**BETWEEN** Colin Eade (Applicant)

**AND** Chief Executive in Respect of the Department of Corrections  
(Community Probation Service) (Respondent)

**REPRESENTATIVES** Andrew Shaw, Counsel for Applicant  
Karen Spackman and Phillip Cornegé, Counsel for Respondent

**MEMBER OF AUTHORITY** Helen Doyle

**INVESTIGATION MEETING** Christchurch 2 June 2006

**DATE OF DETERMINATION** 17 August 2006

DETERMINATION OF THE AUTHORITY

***Order for non-publication***

[1] I make an order under clause 10(1) of schedule 2 of the Employment Relations Act 2000 prohibiting publication of the names of any of the offenders named in the documents and witness statements that have been lodged with the Employment Relations Authority in this case.

***The Employment Relationship Problem***

[2] The applicant, Colin Eade, is employed by the Community Probation Service division of the Department of Corrections ("CPS"). Mr Eade commenced as a probation officer with CPS on 12 March 2001 and is based in Ashburton.

[3] Part of Mr Eade's role is to supervise the sentence of community work and provide supervision and support to the community work supervisors.

[4] On 10 September 2005 Mr Eade was telephoned by a community work supervisor, John Kahu, to assist with an offender who had become angry and destroyed some native plants. The offender, who I shall refer to from hereon as X, was on a register with the service which indicated risk and mental health issues.

[5] When Mr Eade arrived at the site X, who was standing down a bank, was holding a spade. Mr Eade took some time to assess the situation and discussed the matter with Mr Kahu. Mr Eade asked X to put the spade down and come to where he was standing. X said to Mr Eade *say please*.

[6] Mr Eade told X again to come to where he was standing. X became angry, threw the spade away into the river and came up the bank abusing Mr Eade as he did so. Mr Eade grabbed X's shirt as he felt that X may attack him.

[7] X then went off down a track and picked up a large stone and threw it at Mr Eade. He missed and then threw another stone which also missed Mr Eade. As X was about to pick up a third stone Mr Eade advanced toward him with Mr Kahu and they both restrained X.

[8] Whilst restrained by the two men X hit Mr Eade on his left leg twice with a large stone which he held in his left hand. Mr Eade felt pain from the blows and saw that X was holding a stone. He punched X on the right side of his head with a closed fist and told X to stop hitting him. X was then allowed up by Mr Eade and Mr Kahu. He picked up a broken handle which Mr Eade and Mr Kahu were able to force away from him. X then walked away and damaged a work vehicle windscreen with a stone.

[9] The police were called and arrived at the site. X was subsequently charged with assault and wilful damage and sentenced to a period of imprisonment.

[10] Mr Eade was not charged with an offence. Mr Eade had a large haematoma and abrasion as a result of being hit with the stone.

[11] There was an investigation by CPS into Mr Eade's actions during which time he was on special leave and then suspended. Following the investigation Mr Eade received a written warning for 12 months duration.

[12] Mr Eade says that the written warning is an unjustified action causing disadvantage as he was acting in self defence when he punched X in the head with a closed fist.

[13] Mr Eade is also critical of the procedure adopted by CPS and says that the length of the period of special leave and suspension amount to unjustified actions that have caused him disadvantage. Mr Eade also says that the period of time from the incident to the decision was excessive.

[14] CPS say that Mr Eade was justifiably given a warning for punching an offender in the head and that the decision to issue him with a warning was made following a full and fair investigation.

[15] CPS says that Mr Eade was justifiably suspended because of the seriousness of the allegations he was facing. CPS say that once it decided that Mr Eade's actions did not warrant dismissal he was invited to return to work and that its investigation was not unduly long and did not disadvantage Mr Eade.

### ***The Issues***

[16] The Authority is required to determine the following issues:

Whether the process used to investigate the allegation was fair and reasonable and in particular:

- (a) The placement of Mr Eade on special leave.
- (b) The length of suspension.

- (c) The period for CPS to complete its investigation and make a final decision of almost three months.

[17] Whether, assessed objectively, the decision to issue Mr Eade with a written warning was a justifiable action under section 103A and a decision a fair and reasonable employer would have made in all the circumstances. An unjustified action can include disadvantage from an unjustified warning – *Alliance Freezing Company (Southland) Limited v NZ Amalgamated Engineering etc IUOW* [1989] ERNZ Sel Cas 575.

[18] One of the issues requiring determination is whether the decision was unfair given that the investigation report writer, Linda Winskell, found Mr Eade acted in self-defence in her investigation report of 13 October 2004.

### ***The contractual provisions governing Mr Eade's employment***

[19] Mr Eade's work as a probation officer was at the material time covered by the PSA collective employment agreement with CPS 1 June 2003 to 31 May 2006.

[20] Mr Eade acknowledged in March 2001 and then again in August 2003 that he had received a copy of the code of conduct for Department of Correction employees.

[21] The code of conduct is based on three principles of conduct. The relevant principles in this matter relied on by CPS were the first principle that employees should fulfil their lawful obligations to Government with professionalism and integrity and the second principle that employees should perform their duties honestly, faithfully and efficiently, respecting the rights of the public, colleagues and offenders.

[22] The code of conduct refers on page 19 about respect for the rights of others. It provides that it is unacceptable to subject offenders to physical or verbal violence, abuse, intimidation, or threats.

[23] The code of conduct refers on page 20 to role modelling and this part of the code recognises that employees play an important role in reducing re-offending and that the working relationships with offenders must be based upon the principles of courtesy and respect for the dignity of others. Page 24 provides that during employees work with offenders an employee will be held to particularly high standards of personal behaviour and compliance with the law as they should be a role model for offenders.

[24] The examples of serious misconduct on page 28 of the code of conduct include violence or threats of violence against offenders or others in the workplace.

### ***Recommendation for a full investigation report and placement of Mr Eade on special leave and the decision to suspend***

[25] Brian McKenzie was acting area manager for the Dunedin area, which includes Ashburton, at the time of the alleged incident. In his role as acting manager he received an incident report on 12 September 2005 advising that Mr Eade had punched an offender in the head.

[26] On 14 September 2005 Mr McKenzie travelled to Ashburton to review the worksite and was shown around by Mr Eade. Mr McKenzie took some photographs of the worksite.

[27] After that visit and a discussion with Mr Eade, Mr McKenzie produced an incident investigation report which recommended that a full employment investigation take place.

[28] On 15 September 2005 Mr McKenzie wrote to Mr Eade and advised that the allegation that he may have punched X in the head was a serious allegation and that he had asked Linda Winskill, Service Manager Christchurch, to undertake an investigation into the circumstances surrounding the incident. He made reference to the possibility of disciplinary action including summary dismissal if the act was substantiated. Mr McKenzie referred in his letter to the principles in the code of conduct and said that he was considering whether Mr Eade should be suspended on pay for the rest of the investigation.

[29] Mr McKenzie also said in the same letter that Mr Eade should be given an opportunity to discuss suspension and he was therefore placing him on special leave on pay until 23 September 2005 when there was to be a meeting to discuss whether or not Mr Eade should be suspended. Mr Eade was advised of his right to bring a support person or representative of his choice to the meeting and about his entitlement to access the employee assistance programme.

[30] Mr Eade was on pre-arranged annual leave on 16 and 17 September 2005. He was rostered off on 18 and 19 September 2005 and did not go to work on 20 September because he was sick.

[31] Mr Eade's service manager, Anne Western, did not hand Mr Eade the letter from Mr McKenzie and advise Mr Eade that he was on special leave until 21 September 2005.

[32] Mr Eade emailed Mr McKenzie on 21 September 2005. He confirmed his attendance at the meeting and advised that he would not be making any submissions in relation to any proposed period of suspension. He said that he was happy to cooperate with the enquiry and would be asking a Christchurch probation officer, Heather Smyth, to be present at the meeting on 23 September.

[33] It was confirmed at the meeting on 23 September that Mr Eade would be suspended from the time of the meeting. Mr McKenzie handed to Mr Eade a letter confirming the suspension and the letter provides that Mr Eade accepted that he should be suspended during the investigation and confirming that such suspension would be on full pay. Mr Eade was concerned about the use of the word *suspension* on his work record and he asked Mr McKenzie to call it something else.

[34] Mr McKenzie made some enquiries with human resources and confirmed with Mr Eade by email that was undated, but probably sent a day or so after 23 September 2005, that the department policy required Mr Eade be suspended. Mr McKenzie indicated in his email that he had been told the time frame may take 2 weeks.

[35] Mr Eade took the time frame to be the period of suspension. Mr McKenzie said that the reference to two weeks was the time for Ms Winskill's investigation but not the whole process. I find in all likelihood Mr McKenzie was referring to the investigation by Ms Winskill taking two weeks. I accept that Mr Eade misunderstood what the time frame referred to.

[36] Mr McKenzie was not involved in the process again after advising Mr Eade of his suspension. This was because the Area Manager for the Dunedin area of CPS, Lesley Campbell, returned from overseas leave on 25 October 2005 and assumed responsibility for making the decision in Mr Eade's case.

### ***Special leave***

[37] One of Mr Eade's complaints in terms of the procedural fairness was that Mr McKenzie in his letter of 15 September 2005 initially proposed placing him on special leave from 15 September 2005 until 23 September 2005 which is a period longer than 48 hours.

[38] The Department's human resources manual under managing misconduct and poor performance provides that *it is usual to place the respondent employee on special leave with pay for 48 hours to give him or her the opportunity to prepare submissions on why suspension should not occur.*

[39] I do not find this is a contractual obligation. It can be taken though as an indication of what the department would consider to be the usual and therefore reasonable process before suspension takes place. As Mr Eade was not actually placed on special leave before 21 September as provided in the letter of 15 September 2005 there can be no corresponding disadvantage to him in terms of special leave.

[40] I have also considered whether Mr Eade was disadvantaged by a slightly longer than usual period of special leave between 21 and 23 September 2005. The justification for the slightly longer time frame was that Mr McKenzie had to travel from Dunedin for the meeting which took place at 1.00pm on 23 September 2005. Mr Eade did not wish to make submissions about suspension but in my view should still quite properly have been given the opportunity to meet with the person making the decision about suspension. The special leave period was only slightly in excess of 48 hours. I do not find that Mr Eade was disadvantaged by this slightly longer period on special leave.

### ***Decision by CPS to investigate and suspend***

[41] I accept that CPS, given an allegation that Mr Eade had punched an offender in the head, was obliged to conduct an investigation.

[42] Mr Eade maintained from the time of the initial incident that he had acted in self defence but given the seriousness of the allegation the decision to suspend was appropriate so that the matter could be investigated. Clause 2.2(g) of the collective agreement provides for placement of an employee on suspension pending an investigation if the offence is sufficiently serious.

### ***The Linda Winskill report***

[43] Ms Winskill was appointed by Mr McKenzie to conduct the investigation on 27 September 2005.

[44] Ms Winskill viewed all the relevant reports and correspondence about the incident to that date and interviewed Mr Eade twice as well as 7 other people.

[45] There was some discussion during Mr Eade's first interview on 3 October 2005 with Ms Winskill about suspension. Ms Winskill reminded Mr Eade that EAP was available. Mr Eade made a comment to Ms Winskill that although he was initially very unhappy with his suspension he couldn't read anything into the decision.

[46] Ms Winskill's report was completed on 13 October 2005. Given the number of persons interviewed I conclude that the report was completed within a reasonable timeframe and accordingly there can be no complaint about that timeframe.

[47] In her report Ms Winskill found that Mr Eade did punch X in the head and the allegation in Mr McKenzie's letter of 15 September 2005 was therefore upheld.

[48] Ms Winskill then went on in paragraph 9.3 to make say:

9.3 *Further I note that X was clearly out of control at the work site. He appears to have been unwilling to leave the site with Colin Eade and his violent behaviour escalated. Restraining him and physically removing him from the work site was a decision made in the heat of the moment that may not have been appropriate in hindsight but understandable under those circumstances.*

*Colin Eade states that he punched X as a response to being hit on the leg with a rock by X, to such a degree that it inflicted an injury. He felt justified in punching him to get him to stop and stated that it was a spur of the moment decision made in self-defence. I accept the claim that it was in self defence since there was only one punch delivered which stopped X and he calmed down a little at that point. It is however, regrettable that it progressed to this stage and, in my opinion, could have been dealt with differently given that there were two staff members holding the offender.*

[49] Mr Eade took a note of a telephone conversation he had with Ms Winskill on 10 October 2005 and he records in writing that she said *I probably shouldn't be saying this, but I don't think this is going anywhere isn't going to go anywhere*. Ms Winskill could not recall making that comment to Mr Eade but accepted that she could have said something along the lines that it was not looking like he would lose his job but not that there would be no consequence. In any event Mr Eade knew that Ms Winskill was not going to make a final decision in the matter.

***Period 13 October until advice suspension lifted received on 27 October 2005***

[50] When Ms Campbell returned from leave on 25 October 2005 she assumed responsibility for the decision in Mr Eade's case. As Mr McKenzie had not been involved since Ms Winskill had completed her report there was no particular disadvantage to Mr Eade with Ms Campbell assuming responsibility except a two week delay for Mr Eade in seeing the report and returning to work from suspension.

[51] Ms Campbell telephoned Mr Eade on 26 October. She sent by email to Mr Eade a copy of Ms Winskill's report and a letter advising that in light of the report the allegation can be upheld and that her preliminary view was that Mr Eade had committed serious misconduct. She said that her tentative recommendation was that Mr Eade receive a final written warning. Mr Eade was given an opportunity to comment on this preliminary view at a meeting on 1 November 2005. Mr Eade was advised of his right to be represented and about EAP.

[52] Mr Eade responded by email and requested additional time before meeting to consult a lawyer. He also requested a return to work. Ms Campbell agreed to an extension of time for meeting until 7 November 2005 and agreed to lift Mr Eade's suspension.

***Was the suspension period too long?***

[53] In my view, the only period where there could have been some complaint about delay in terms of suspension was for the period between 13 October and 27 October 2005. Mr McKenzie lost his decision-making delegations once Ms Campbell returned on 25 October 2005. It was not clear if he would have been able to complete the decision making process before 25 October 2005. This may

well have resulted in more delays. I am satisfied there was justification in these circumstances for the delay of two weeks until Ms Campbell returned to New Zealand.

[54] Mr Eade remained on full pay and when Ms Campbell returned to New Zealand she quickly assumed responsibility for the decision making and made contact with Mr Eade. When it was clear that Mr Eade was not going to be dismissed he was permitted to return to work.

[55] I have already found that suspension was justified in this case. Looking at all the circumstances I am not satisfied that suspension was unduly long. There was some justification for leaving the matter until Ms Campbell was back in the country otherwise there was a possibility that it could have resulted in a longer period of suspension. I do not find that Mr Eade has a claim that he was disadvantaged as a result of the length of the suspension.

### ***The Process of Decision Making***

#### ***7 November 2005***

[56] Ms Campbell attended a meeting on 7 November 2005 with Mr Eade, Mr Shaw and Ms Smyth as Mr Eade's support person. Alex Goodall, the regional Human Resource Advisor attended to take notes of the meeting.

[57] Mr Shaw did most of the talking on Mr Eade's behalf and put forward that self-defence was a complete defence to the allegation and asked why the matter had even got to that stage. Mr Shaw also said that if probation officers could not act in self defence then that would be a breach of CPS health and safety obligations. Mr Shaw said at the meeting that Mr Eade was using his best endeavours to disarm X from three different weapons, spade, stick and stones.

[58] Ms Campbell concluded after discussion with Mr Eade that he had not attended a managing threatening situations training course (MTS course) but that she was sure he had been nominated to attend. Mr Eade could not remember why he had not done the course. Ms Campbell also asked Mr Eade some questions to see if he had some insight into why the confrontation had occurred or what he may have done differently. Mr Eade maintained his actions were appropriate.

[59] Ms Smyth said that Mr Eade's actions seemed consistent with what she was recently taught at a MTS course and that when she talked to one of the instructors about Mr Eade's situation he said that *it sounded like it was handled like he thought it should be*.

[60] There was also some discussion about the length of the suspension and special leave.

### ***Further correspondence after the meeting***

[61] After the meeting Ms Campbell wrote to Mr Eade on 11 November 2005. Ms Campbell set out the submissions that had been made by Mr Eade on 7 November and concluded that:

- Although Ms Winskill had concluded in her report that Mr Eade acted in self defence her use of the term self defence was not in a strictly legal sense. Ms Campbell said that Ms Winskill decided that Mr Eade's actions were taken as a result of the offender's actions and not with any malicious intent.

- It was entirely unnecessary for Mr Eade to strike the offender with a closed fist and she did not consider it was necessary to restrain him or strike him in order to restrain him and that Mr Eade's actions were completely disproportionate to the threat posed by the offender.
- There were other options available that did not involve violence.
- Mr Eade did have a right to defend himself but that it was only after the invitation to X to come to Mr Eade that any weapons were employed and that the appropriate action would have been to remove himself and the other offenders from the area. Mr Eade's actions escalated an already difficult situation and his role was to de-escalate and diffuse the situation.
- The MTS course teaches that the role of a probation officer is to identify, defuse and if not able to, evade. Restraint is not taught.
- The standards of behaviour for CPS staff have to be higher than those found elsewhere. Given Mr Eade's knowledge that X was on the register and had a mental health problem then he should have proceeded in a more cautious fashion.
- Mr Eade felt strongly that his actions were appropriate and therefore more training was needed to ensure clarity on what behaviour is and isn't acceptable to prevent a similar situation in the future.

[62] Ms Campbell attached to her letter copies of the reports she had obtained from the instructor Ms Smyth had spoken to and from the director of Contact Self Defence. The instructor said that he made it clear to Ms Smyth that anything discussed was not the view of Contact Self Defence and if an official opinion was sought it must be through the Company Director.

[63] Ms Campbell also said in her letter that she thought that Mr Eade accepting his actions were appropriate would create more risk to staff than her decision about his actions being serious misconduct. She confirmed that it is reasonable for all staff to defend themselves as long as they do so in a manner proportionate to the threat.

[64] Ms Campbell concluded that she had decided to uphold her preliminary view that Mr Eade had committed serious misconduct and wanted Mr Eade to have an opportunity to comment on the recommendation that a final written warning would be an appropriate sanction. She proposed a further meeting on 21 November 2005 if required to discuss the matter.

[65] Mr Shaw advised Ms Campbell that he was not at that time able to take instructions from Mr Eade and so was not in a position to either meet on 21 November or make written submission by that date.

[66] Ms Campbell extended the time for meeting or making of submission to 2 December 2005.

[67] Mr Shaw then made further submissions on Mr Eade's behalf by way of letter dated 1 December 2005. Most of the submissions were that Mr Eade acted in self defence and that the use of force by him was entirely reasonable and proportionate to the threat and actual harm Mr Eade suffered. There was also reference to the fact that X had been charged and imprisoned but no charges had been laid by the police against Mr Eade. Mr Shaw said in his submission that the self defence does not mitigate an assault but provides a complete defence. He said that Mr Eade had not attended the MTS training because of his extensive workload. He referred Ms Campbell to the Employment Court judgement of *Pilkington (New Zealand) Limited v Sangha* [1999] 2 ERNZ 263. He said that Mr Eade's actions do not constitute serious misconduct and that a final written warning is unjustified, unreasonable and inappropriate in the circumstances.

***12 December letter containing decision***

[68] Ms Campbell considered the submission. She then wrote to Mr Shaw on 12 December 2005 and said that she had considered Mr Shaw's submission and was of the view that Mr Eade's conduct was serious misconduct but not deserving of a final written warning. She said in her letter that she did not accept Mr Eade's action in punching X was acceptable and she had decided to issue him with a written warning to remain in force for 12 months. Ms Campbell did not accept that Mr Eade was unable to do the MTS training because of an extensive workload. Ms Campbell said that she makes it a priority for probation officers in small or rural service centres to do the training.

***Was the length of the investigation too long?***

[69] The process overall has to be considered against the good employer obligations CPS has and the need for any investigation to be thorough and fair. I do not consider that the investigation process in its entirety was too long in all the circumstances. There were also some issues of complexity in Mr Shaw's submissions for Ms Campbell to consider and she cannot be criticised for taking time to do so before making a decision. I accept that the investigation put Mr Eade under considerable stress, but the investigation was necessary and in my view fair.

***Would a fair and reasonable employer have given Mr Eade a written warning in the circumstances?***

[70] Violence or threats of violence against offenders in the workplace is serious misconduct in the code of conduct. Mr Eade was honest about his conduct. He admitted from the time of the incident that he punched X in the head with a closed fist. He says that he did so in circumstances where he was defending himself from being hit by X with a stone and that he punched X with no conscious thought as to what he was doing as a reaction to pain and danger.

[71] In *Pilkington* the Court held that the respondent, Mr Sangha, had acted in the same way as any reasonable person in the circumstances of an unprovoked and serious assault would have done. Mr Sangha suffered two broken teeth in the attack and bled heavily. His thumb was split and face and knuckles grazed. He was certified unfit for work for five days. He had tried to hit his attacker but his attempts did not actually connect. He was summarily dismissed. The Court held that a reasonable employer could not have properly reached a conclusion that the respondent be summarily dismissed. The Court found the idea that the respondent had contributed to the dismissal in *Pilkington* untenable and said that his actions before the assault were conciliatory, innocent and not in the least culpable.

[72] Section 48 of the Crimes Act 1961 provides in terms of self-defence and defence of another –

*Every one is justified in using, in the defence of himself or another, such force as, in the circumstances as he believes them to be, it is reasonable to use.*

[73] In *Pilkington* the physical attack on the respondent was unexpected. Mr Kahu, when interviewed by Ms Winskill, states that he knew there was going to be a scuffle and that he *was preparing to help Colin and I did*. I am of the view that it was open to Ms Campbell to conclude that it was inevitable that a confrontation of one kind or another would occur. Mr Eade asked an agitated offender to come to him. X started to throw rocks. X was on a register with CPS with mental health issues.

[74] It was open to Ms Campbell to conclude that the situation could have been handled in a different way, for example, by Mr Eade and Mr Kahu retreating and removing the other offenders and calling the police. Ms Winskill said in her report that it was regrettable that the situation got as far as it did. In that way, I am of the view that this case is distinguishable on its facts from *Pilkington* because there was inevitability that there would be a confrontation of some kind and an opportunity for the matter to be dealt with differently to avoid such a confrontation.

[75] Ms Campbell in making her decision had to consider whether Mr Eade had acted in self defence in punching X. Ms Winskill clarified that the conclusion in her report with respect to self defence was that Mr Eade did not maliciously punch X. She had not turned her mind to the detailed legal analysis of self defence presented to Ms Campbell.

[76] Ms Campbell concluded that the punch was not proportionate or a reasonable response to the threat Mr Eade was under although she agreed with Ms Winskill that Mr Eade had not acted with malicious intent. Ms Campbell concluded that Mr Eade could have moved away or moved to seize X's arm or have asked Mr Kahu to do the same. A fair and reasonable employer would have had to balance this with the realities of the situation where X was slamming a large stone into Mr Eade's leg.

[77] The difficult question in this case is whether a fair and reasonable employer would have concluded that Mr Eade acted in self defence and therefore, as Mr Shaw submits, there was no misconduct by him during the incident. In considering the matter objectively I find that a fair and reasonable employer would have concluded there were other options that Mr Eade could have taken before the matter escalated to restraint, injury to Mr Eade, a punch to X's head and charges against X for assault and then X's imprisonment.

[78] The defence of self defence may not be available if there is a way of avoiding an incident instead of using violence. There were other offenders to consider and it was important with them looking on for Mr Eade to set a good and positive example. There was a risk that the other offenders could become involved in any confrontation. It was reasonable to expect a probation officer to consider other options or alternatives that existed and there did not appear to be a clear and decisive plan of action with respect to X. It is clear to me that in making her decision Ms Campbell considered the restraining and subsequent punch as something that could have been avoided.

[79] Ms Campbell could not recall a situation where it had been necessary for a probation officer to restrain an offender. Mr McKenzie who has been a department employee for 25 years, much of it on the front line, said he had had to deal with a number of violent offenders, some with chisels which could have been used as weapons, and many agitated. He said he had never found himself in a situation where he had to restrain or assault an offender and had always been able to de-escalate a situation. Mr Shaw said in his submission on 1 December to CPS that *our client feels even more strongly now that his actions were appropriate.*

[80] I find that a fair and reasonable employer would conclude in the circumstances of this case that the incident with X did not need to have progressed to the stage that it did. A fair and reasonable employer would conclude that the punch was a reaction by Mr Eade to being hit with a stone and there were mitigating circumstances with respect to the punch. Probation officers are expected to maintain high standards of conduct as set out in the Code of Conduct.

[81] Notwithstanding Mr Shaw's submission that there can be a defence of self defence from a person acting in the agony of the moment, I do not find that a fair and reasonable employer would have concluded, in circumstances where X was being held down by two people, that the action of

punching was an appropriate or a reasonable response because other options existed. I find that a fair and reasonable employer would have concluded that there was misconduct on the part of Mr Eade but that the extent of the misconduct, even though it was described as serious misconduct, meant that a dismissal or final written warning was not appropriate.

[82] There was concern from Mr Eade and other probation officers that they may not as a result of the decision, with respect to Mr Eade, be able to defend themselves. This was clarified by Ms Campbell in her evidence. She confirmed that there may be a number of circumstances in which an employee may have no option other than physical violence to defend herself or himself from an attack. She did not believe that the situation involving Mr Eade called for that violence.

[83] Mr Eade says that there has been disparity in his treatment and the treatment of Mr Kahu. Mr Kahu did not receive any penalty. I am satisfied that there were different circumstances with Mr Kahu. Mr Kahu essentially supported Mr Eade but did not take the lead and did not punch X. The decision by CPS to issue Mr Eade with a written warning is not unjustifiable on the basis that Mr Eade was disparately treated.

### ***Determination***

[84] I do not find that Mr Eade has a personal grievance in terms of the process, special leave, and length of his suspension or investigation. I find that the investigation was full and fair.

[85] I find that the decision to issue Mr Eade with a written warning was within the range of reasonable responses to the employer where there were significant mitigating factors. Mr Eade does not have a personal grievance that the issuing of the written warning was unjustified.

### ***Costs***

I reserve the issue of costs.

Helen Doyle  
Member of Employment Relations Authority