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July 23, 2013

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Re: **Monrose v. Double Diamond Acres Limited**
HRTO File Number: 2010-05922-I

Please find enclosed a decision of the Tribunal in this matter, dated July 23, 2013.

HUMAN RIGHTS TRIBUNAL OF ONTARIO

BETWEEN:

Adrian Monrose

Applicant

-and-

Double Diamond Acres Limited and Jeffrey Carreiro

Respondents

DECISION

Adjudicator:	David Muir
Decision Date:	July 23, 2013
File Number:	2010-05922-I
Citation:	2013 HRTO 1273
Indexed as:	**Monrose v. Double Diamond Acres Limited**

APPEARANCES

Adrian Monrose, Applicant	)	Shane Martinez, Counsel
Double Diamond Acres Limited and Jeffrey Carreiro, Respondents	)	James K. Ball, Counsel

INTRODUCTION

[1] This is an Application filed under section 34 of Part IV of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*"), alleging discrimination in employment on the basis of ancestry, colour, ethnic origin, place of origin, race and reprisal.

[2] The applicant began his employment with the organizational respondent under the Seasonal Agricultural Workers Program (the "SAWP") on or about January 9, 2009. Pursuant to his employment agreement the applicant was to have been employed from January 9 to September 1, 2009, or until the completion of the work for which the applicant had been hired, whichever came sooner. The applicant had been employed by the organizational respondent ("Double Diamond") the year prior. The applicant was terminated from his employment in June 2009 and consequently repatriated to his home country. Unless otherwise indicated all of the events described below occurred in 2009.

[3] In his Application the applicant alleges that he was terminated from his employment for discriminatory reasons and/or in reprisal for his having raised a human rights concern with his employer. He alleges as well that on two occasions in late May, he and his co-workers were referred to as monkeys by persons in authority, the personal respondent as well as Benji Mastronardi, an owner of the employer. It was these alleged racial taunts that the applicant complained about to Mastronardi in late May and which he alleges led to his dismissal on or about June 8. The applicant alleges that the manner in which he was removed from the worksite was discriminatory as well.

[4] The respondents provided detailed Responses to the Application. The respondents alleged that the applicant was dismissed from his employment because he was prone to violence. The respondents allege that on May 21 the applicant was extremely agitated and gave "loud voice to a litany of complaints" about Double Diamond including that they had still not paid the workers 25% of their wages from the 2008 season. The respondents allege that the applicant pushed the respondent Carreiro "with force sufficient to almost knock him over" and that the applicant had to be

restrained by a co-worker. The applicant is alleged to have made a threat to the respondent Carreiro when told that he would not be assigned Saturday work on May 29. The respondents also denied that the applicant or his co-workers were referred to as monkeys at any time.

[5] A hearing was held on March 20 and 21, 2013 in Windsor. I heard the evidence of the applicant as well as that of Dr. Tanya Basok, who was called as an expert witness to speak to the circumstances of migrant workers under the SAWP. I also heard the evidence of the individual respondent and Benji Mastronardi, an owner of Double Diamond, Arnold Verweij, an employee, as well as Gregory Aldonzo, a co-worker who remains employed by Double Diamond. A court reporter transcribed the evidence on the understanding that a transcript would be produced at the expense of the respondents. The transcript was reviewed before these reasons were released.

[6] For the reasons that follow I find that this Application is allowed in part. I find that a factor in the decision to terminate the applicant's employment was that he complained about the monkey comment, which I find was made to him by the respondent Carreiro. I also find that Mastronardi did refer to the applicant and co-workers as monkeys on May 20. I also find that the conclusion that the applicant was prone to violence was baseless and that his termination was more likely in response to his having raised concerns about being referred to as a monkey on May 20 and 21.

THE LEGAL FRAMEWORK

[7] The burden of proving that a prohibited ground was a factor in a respondent's decision or action lies on an applicant. An applicant must establish a connection between the disadvantage and the ground on a balance of probabilities. In considering the onus on the parties in a proceeding such as this, I have found the following discussion in *Whale v. Keele North Recycling*, 2011 HRTO 1724, helpful:

> Demonstrative evidence of discrimination is not necessary to establish a breach of the *Code*. Nor does an applicant need to have a witness to discriminatory conduct. The applicant may rely on circumstantial evidence,

> which may include evidence concerning any relevant circumstances, including evidence of actions or omissions on the part of the respondent, that raise inferences that a *Code* provision has been breached. The inference drawn need not be inconsistent with any other rational explanation to support such an inference. Rather, it must be reasonable and more probable than not, based on all the evidence, and more probable than the explanation offered by the respondent. Evidence must always be sufficiently clear, convincing and cogent to satisfy the "balance of probabilities" test stated by the Supreme Court of Canada in *F.H. v. McDougall*,), 2008 SCC 53. In that case, the Supreme Court reaffirmed the nature of the civil standard of proof, and discussed the difficulties inherent in a determination as to whether the testimony of one party is more reliable than that of another. The Court ruled that, where proof is on a balance of probabilities, the trier of fact must not consider the witness's evidence in isolation, but should consider the totality of the evidence.
>
> The following factors assist in the assessment of reliability and credibility and the application of the 'preponderance of the probabilities' test:
>
> - the internal consistency or inconsistency of evidence
> - the witness's ability and/or capacity to apprehend and recollect
> - the witness's opportunity and/or inclination to tailor evidence
> - the witness's opportunity and/or inclination to embellish evidence
> - the existence of corroborative and/or confirmatory evidence
> - the motives of the witnesses and/or their relationship with the parties
> - the failure to call or produce material evidence
>
> *See Loomba v. Home Depot Canada*, 2010 HRTO 1434.

[8] The applicant also alleges that his termination was a reprisal for his having complained about being called a monkey. The reprisal section of the *Code* only applies to actions that are intended as a reprisal for asserting one's human rights. See *Noble v. York University*, 2010 HRTO 878 at para. 31.

[9] There are significant credibility issues which arose in the respondents' case, most significantly in several material contradictions between the respondents' initial

position as represented in their Responses and subsequent materials and the evidence tendered at the hearing. Similarly there were significant conflicts in the evidence at the hearing as between several of the respondents' witnesses. The assessment of the credibility of the witnesses in this case is central to the resolution of the dispute. In considering the credibility of the evidence tendered by the parties I also considered the following statement of the law from *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) at p. 356-57:

> ...the validity of evidence does not depend in the final analysis on the circumstance that it remains uncontradicted or the circumstance that the Judge may have remarked favourably or unfavourably on the evidence or the demeanour of a witness; these things are elements in testing the evidence but they are subject to whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time...
>
> If a trial judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility...A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.
>
> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of

> truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may be easily self-direction of a dangerous kind.

The credibility issues will be canvassed more completely below.

EVIDENCE AND ANALYSIS

[10] Dr. Basok gave evidence for the applicant as an expert witness. Dr. Basok has done extensive research on Mexican migrant workers in Canada for over 20 years. There was no substantial challenge to her expertize. The respondents did object to her evidence being admitted at all, however. I heard submissions on the objection at the outset of the hearing and for brief oral reasons allowed the applicant to call this evidence as background and context in which the individuals involved in this dispute operated.

[11] I accept the evidence of Dr. Basok that migrant workers are exceptionally vulnerable workers and will have difficulty vindicating their rights in the workplace and elsewhere as a consequence of their unique vulnerability. I also accept her evidence that as a consequence of their unique vulnerability migrant workers rarely seek to vindicate what rights they have for fear of repatriation or not being asked to return in subsequent years. I also accept Dr. Basok's evidence that the consular and liaison officials from the supplying countries tend to be more interested in preserving the program for the workers in their countries than in vindicating the rights of individual workers. Dr. Basok made no comment on the particular circumstances of this case.

[12] The broad narrative of this dispute is straightforward. The applicant had been employed by the organizational respondent in the 2008 season. He was a good worker and was identified by name as someone the respondent employer wanted back for the following season beginning in January 2009. The applicant enjoyed the work and was happy to return. According to the applicant, with one exception which will be canvassed briefly below, there were no significant unresolved issues in the workplace until late May

when an event arose that culminated in his dismissal from employment and consequent repatriation to St. Lucia on June 8, some four months prior to his anticipated return home in September.

[13] Although in his Application the applicant alleges that he was subject to bullying and harassment in 2008, the evidence I heard was confined to an allegation that the respondent Carreiro told him to shut up to which the applicant responded that Carreiro should shut up. I make no finding with respect to this incident and find that it is unconnected to anything that happened later between any of the individuals involved.

The first monkey comment

[14] The applicant testified that on May 20 Mastronardi referred to the applicant and his co-workers as monkeys. In particular the applicant testified that a little before Noon that day Mastronardi was in the greenhouse and apparently observed a lot of tomatoes on the ground. The applicant testified that he shouted "You're like monkeys on a branch" and then left the greenhouse. The applicant testified that there were a number of other workers present who would have heard the comment, including the respondent Carreiro, as well as Gregory Aldonzo who gave evidence. Mr. Aldonzo testified he was working on the cluster side of the greenhouse and the applicant was working the beefsteak side. The greenhouse in which they worked was a large structure and as the workers moved around their work areas they could be a considerable distance from each other. He did testify that he heard later that Mastronardi had been in the greenhouse and became upset about too many tomatoes being wasted.

[15] Mr. Mastronardi did not give *vive voce* evidence-in-chief, instead relying on a will-say as his evidence-in-chief. His will-say evidence denying this allegation was not challenged in cross-examination. In response to a number of questions from me about this issue, Mr. Mastronardi denied making the offending comments. He also denied being in the greenhouse that day or becoming upset about wasted tomatoes. Mr. Carreiro denied hearing Mastronardi make the alleged comment at any time.

The Chair Incident and the remittance issue

[16] The following day a further incident occurred which is central to the respondents' case and a material, but not the only, reason for the respondent employer's decision to end the applicant's employment. The parties have referred to this as the chair incident. However a key issue going primarily to the credibility of the respondents' witnesses relates to the role the remittances issue played in the chair incident.

[17] As part of the SAWP program, 25% of a workers wages are deducted for remittance to them at a later date. It is agreed that the applicant and his co-workers should have received these monies for the 2008 season upon their return to St. Lucia in September 2008. When the St. Lucian workers arrived back in Canada in January 2009, the remittances from the prior year had still not been paid to them.

[18] The applicant testified that he raised this issue with the respondents in January and February 2009. The applicant testified that he first spoke with the respondent Carreiro about this issue in January. He testified that Carreiro said he would speak to Mastronardi about it. The applicant testified that he also spoke with Mastronardi and Carreiro about the issue in February. The applicant testified that he always understood that the problem was not with the organizational respondent but with the Liaison Office but he raised it with the respondents because he felt that his employer could put in a word for the workers and get the issue resolved. The applicant testified that he received his remittance in late February and documentation to that effect was tendered in evidence. The applicant testified that as far as he was concerned the issue was resolved for him as of late February and he never raised it again. There is no dispute that the applicant received these remittance funds in February 2009.

[19] The fact that the applicant had received the remittances before the end of February did not figure in the respondents' Responses to the Application. Apparently the respondents were unaware or had forgotten that the workers were paid their remittances in February until just prior to the hearing when a letter from the Liaison Office to the applicant dated February 26, 2009 confirming payment of the 2008

remittances surfaced. The respondents' pleadings did not reflect this fact and included the assertion that the applicant's concern about this issue was a significant source of concern expressed during the chair incident. At the hearing this resulted in significant differences between the evidence of Carreiro and his will-say and the Responses filed by both respondents; as well as significant conflicts between the evidence of Carreiro and Mastronardi.

[20] In their Responses the respondents both allege that the issue of the 25% hold back remained an issue for the applicant on May 21, the day of the chair incident. The respondents claimed in their Responses and the will-says of Carreiro and Mastronardi that during the chair incident the applicant gave loud voice to a litany of complaints "... he complained that the employer had yet to remit the 25% wage holdback for the 2008 season". The respondents also claimed that Carreiro subsequently advised Mastronardi on or about May 21, 2009, that the applicant had created a scene complaining about, amongst other things, that the organization respondent still had their money from the previous year.

[21] Mr. Carreiro, despite his Response and will-say, testified that that there were two occasions when the remittance issue came up; once in January or February, and then again on May 21 in the context of the chair incident. As indicated, the Responses of both respondents and the will-says of Carreiro and Mastronardi assert that on May 21 the applicant was complaining about, amongst other things, that the organizational respondent held back their remittances and earned interest on their money. In support of this new version of events Carreiro relied on and adopted as the more accurate description of his interactions with the applicant on this issue the following information apparently transcribed in an interview in preparation of the Responses to the Application in October 2010:

> "In the very first three months of 2009 Adrian had stopped me my way past his work zone. He accused the employer of not remitting the 25% holdback from the worker's pay to the East Caribbean Office. He stated that if the matter was not straightened out, Monrose would start a walk out. No St Lucian would work until the monetary issue had been

straightened out. I told him that the employer sends 25% of every pay to that Office. He told me that was a lie and that the employer was making interest off the workers' money.

"Adrian said that he called the East Caribbean Office and was told that the employer was not effecting the remittances to that Office. I called the East Caribbean Office personally and was told that the 25% remittances were on their way to being distributed. I was told that Adrian was not informed by that Office that the employer had retained the money for itself.

Re May 21, 2009 (the chair incident)

"On May 21, 2009 at the shift startup, I was assigning Gregory his daily tasks. All of a sudden I hear Adrian screaming that he hates this farm. 'This farm thinks we are a bunch of dummies. They can't buy us big chairs. They think we are all a bunch of little boys like him'."

"I stopped talking to Gregory to hear Adrian scream to me, 'The chairs in the bunkhouse are junk and I am sick of this farm not giving a fuck about us St. Lucians'. He also said 'You guys keep the 25% savings and you do not give it to us [until] the following year while you collect interest. We are not fucking dummies, we know our rights'."

[22] Although there is no reference to it in the October 2010 statement, Responses or will-says, Mr. Carreiro also testified that he told Mastronardi about the threatened walkout in January. He confirmed this on four occasions. When asked a fifth time he appeared to revise his answer. He testified that he told Mastronardi that because the workers had not received their remittances the workers might "take action" but not that they would walk out. He then testified as follows:

A. And Benji, I was not telling Benji -- I told Benji that the 25 -- I never told him about the walkout. I told Benji that the 25 percent still was not given to the workers and there's a possibility that these guys might take action.

Q. You told Benji that Adrian threatened a walkout?

A. No, I told you that there could be, if these guys don't get money, there might be, these guys might do something. I don't know.

Q. Did you tell Benji that Adrian threatened a work stoppage?

A. No, I just told Benji that things was not allowed to, we were not, or, sorry -- sorry, Jesus Christ, I just lost my train of thought.

> MR. BALL: You were telling him what you told Benji.
>
> A. Yes I told Benji basically that these guys did not get their 2008 and they were all very mad, because they were supposed to get it when they came home and they had still not yet received it and they had came (sic) here already 2009 and they've been here for, say, three weeks and they still not get it and they were supposed to get it back home.

Later Mr. Carreiro claimed to have told Mastronardi that the remittance issue "could cause problems". He also claims to have called the Liaison Office and resolved the issue when he first heard about it in January or February. He also testified that Mastronardi got involved as well and called the Liaison Office although this is not reflected in the new information above. It is not at all clear from Carreiro's evidence why both he and Mastronardi would have gotten involved if Carreiro dealt with the issue as he claimed in January or February. This evidence is also not at all consistent with the will-says of either Carreiro or Mastronardi in which it is claimed that Mastronardi intervened and contacted the Liaison Office in May when he learned about the concern for the first time and then Carreiro only learns of this intervention and resolution of the problem at some later unspecified time. Mr. Mastronardi makes no reference to being told about a threatened walkout or that there was a concern about the remittance issue in January or February 2009. As discussed below Mastronardi testified that he heard about this issue several months later. Mr. Carreiro could not explain these conflicts in the evidence.

[23] Mr. Carreiro testified when asked how this information about a threatened walkout did not get into the Responses or will-say speculated that what he claims were two separate incidents of the applicant complaining about the remittance issue were conflated into one by Mr. Nash who transcribed the information above. To be clear the second incident would be his claim that at the time of the chair incident the applicant was complaining about the employer earning interest on remittances being held back. I also note again the significant confusion in Carreiro's evidence about his telling Mastronardi about the threatened work stoppage, or not. The conflicts in the respondents' evidence will be canvassed further in the narrative of events below.

[24] As regards the so-called chair incident itself, Carreiro gave little evidence at the hearing and relied largely on his will-say. In his will-say Carreiro indicates that the applicant was in an agitated state and had a number of complaints about the employer's treatment of the workers. One of the issues was that a chair had broken underneath him. Carreiro indicates that he asked the applicant if he was injured and the applicant responded in the negative. Carreiro's evidence was that he attempted to have the applicant speak to him in private but he insisted in giving voice to his complaints where the other workers could hear. Carreiro ordered the applicant to punch out and return to the bunkhouse but the applicant refused and in apparent response the applicant "proceeded to lay his on hand on Carreiro and shoved at the chest almost knocking him off of his feet." Carreiro's evidence was that as he regained his footing he observed the applicant being physically restrained by Aldonzo. The will-say goes on to note that Carreiro is 5'3" and weighs 165 lbs. and to his mind the applicant was then a large man standing well over 6' and by estimation a good 250 lbs.

[25] The applicant gave a very different description of the chair incident. He testified that he was in a good mood that morning. The applicant testified that Carreiro told the workers that he wanted to meet with them about the respondents' concern with the number of tomatoes being wasted. According to the applicant, Carreiro told them that this should not happen again and go pick up the tomatoes and throw them in the garbage. The applicant testified that after this meeting he took Carreiro aside and told him that he had fallen from a chair when it broke. The applicant testified that Carreiro shouted at him "Well go to the fucking hospital" and then he brushed "his chest at me". The applicant testified that in response he raised his voice and he pushed Carreiro away. The applicant testified that Carreiro then said "that's why Benji calls you guys monkeys". The applicant testified that he was told to return to the bunkhouse but refused to do so. He described how Carreiro repeated the order and took his punch card and punched him out. He testified that he continued to work despite these orders and Carreiro said to him "if you cause any problems for me I'm going to pay to kill you". The applicant testified that several other workers were present, including Gregory

Aldonzo, who intervened in the dispute. The applicant testified that he stands 5'11" and weighs 220 lbs.

[26] Mr. Aldonzo essentially repudiated his will-say. With respect to the chair incident, he denied that the respondent's assertions that the applicant was in an agitated state and "ranting and raving" and testified that the applicant was fine. He also testified contrary to the Responses and other will-says of the respondent that the applicant was present in the greenhouse before Carreiro arrived. He also specifically denied hearing the applicant complain about the remittance issue. Mr. Aldonzo testified that he witnessed the argument between the applicant and Carreiro but did not know what it was about. He knew they were arguing but could not hear what they were saying. He did not confirm the allegation of the respondent that the applicant pushed Carreiro with force nor did he restrain the applicant as has been alleged. He testified that he observed the argument becoming heated and he stepped between the two men to avoid the possibility of the confrontation escalating. He testified that he did not hear the alleged monkey comment by Carreiro or the alleged threat.

[27] Mr. Carreiro did not speak about the alleged threat to have the applicant killed or the monkey comment in his evidence in chief, relying instead on his will-say, in which he denies making the comments. He was not asked about this allegation in cross-examination.

[28] The applicant testified that he and Carreiro spoke about this incident later the same day. The applicant testified that Carreiro told him not to tell Mastronardi about what had occurred; in particular, he should not mention the monkey comment. He testified that they shook hands and Carreiro said let bygones be bygones.

[29] Mr. Carreiro's evidence about this discussion was that the applicant approached him and "in his way" apologized for pushing him. He also states that the two men agreed not to raise the push or shove with Mastronardi. Carreiro testified that he told the applicant that they should not tell Mastronardi about the shoving incident because it would be cause for firing if Mastronardi learned of it. In cross he testified that he spoke

about the possibility of a criminal charge for assault but denied that this was a threat. The applicant testified that the potential consequences of his shoving Carreiro were not discussed.

The May 22 Meeting

[30] It is agreed that there was a meeting on May 22 between Mastronardi, Carreiro and the applicant. The purpose of the meeting was apparently to discuss what was then understood by Mastronardi to have been a shouting incident the day before.

[31] Despite the new version of what he says was an important source of the applicant's complaints, Carreiro stood by his will-say wherein he told Mastronardi sometime on May 21, 2009 that the issue was the failure of the employer to make the remittances from 2008. He was asked to confirm this on several occasions and although he repeatedly asserted that the two separate complaints by the applicant were conflated in the Responses and will-say, in the end he did not attempt to change his will-say to reflect his providing Mastronardi with an inaccurate characterization of the applicant's concern and had no explanation for why he would instead tell him that it was about an issue that everyone would have known had been resolved three months previously.

[32] Mr. Mastronardi maintained the position that he was informed by Carreiro that a significant concern of the applicant on May 21 was the fact that the workers had still not received their remittances from the prior year. When asked to confirm in cross whether this was what Carreiro had told him on May 21, Mastronardi replied, "That is exactly what he (Carreiro) told me". Moreover Mastronardi testified that the very same day he contacted the Liaison Office and was told that while the employer had made the remittances required, the Liaison Office had not yet distributed them. He further testified that he thinks that he spoke with "Charmaine" the assistant of "Egbert" the Liaison Officer at the time. Mr. Mastronardi testified that he believes that Charmaine told him that the cheques were being sent out that week or next.

[33] Mr. Mastronardi also testified in cross that when he met with the applicant and Carreiro the same day, he asked the applicant what the problem was and the applicant responded that it was the fact that the employer had still not paid them the 25% remittance from 2008. He further testified in cross that he would have told the applicant about his conversation with the Liaison Office and that the cheques were on their way. Later in his evidence Mastronardi testified that when he later spoke with Aldonzo about the alleged shoving incident on or about June 1, 2009, Aldonzo had confirmed that the source of the argument during the chair incident was the remittance issue. He also testified that Aldonzo also was concerned because he had not got his money from the prior year.

[34] The applicant testified that at the May 21 meeting with Mastronardi and Carreiro there was discussion of what was said to be his yelling in the greenhouse the previous day. He testified that he was asked by Mastronardi if there were any problems to which the applicant replied that he was angry. He testified that he was told that he should not be yelling in the greenhouse. According to the applicant there was no discussion of the remittance issue.

Saturday Work and the applicant's alleged threat

[35] This is where matters might have remained but later the fact that the applicant pushed or shoved Carreiro did come to Mastronardi's attention. The applicant testified that shortly after the meeting with Carreiro and Mastronardi on May 21 he heard rumours that he would not be returning the following year. He became dispirited and testified that he may have let his productivity slip. He testified that on Friday, May 29, he was told by Carreiro that he would not be assigned to work that Saturday. It is not disputed that Saturday work was assigned, when available, to workers who had met their work quotas for the week. Given that his production had slipped the applicant concedes now that it is possible that he was not entitled to Saturday work as a result.

[36] Nonetheless, the applicant perceived the decision to not assign him Saturday work as a possible retaliation by Carreiro for the May 21 incident. The applicant

testified that he approached Mastronardi and told him about his concerns with not being assigned Saturday work, and about his version of what had occurred on May 21 between him and Carreiro, including the statement by Carreiro that Mastronardi called the workers monkeys and the threat by Carreiro. He testified that Mastronardi appeared to be startled by what the applicant was telling him and said "Jeff [Carreiro] told you that"?

[37] The respondents deny that such a discussion ever took place. The respondents allege that when the applicant was told that he would not be assigned work on May 29 he responded with a threat. Carreiro in his Response and will-say and in his evidence stated that the applicant said to him something to the effect that he should wait to see what the applicant would do to him when Aldonzo was not around. The applicant testified that he said nothing in response and denied making this threat.

[38] Mr. Mastronardi and the respondent Carreiro both stated in their will-says that after the applicant's threat allegedly made on May 29, Carreiro went to Mastronardi and told him about the alleged push or shove by the applicant on May 21 for the first time as well as the alleged threat.

[39] In his will-say Mastronardi stated that it was this threat that caused him to meet with the applicant again likely on Monday, June 1, during which the applicant admitted to the shoving incident and also "satisfied himself whether rightly or wrongly that [the applicant] had made the May 29 threat against Carreiro." He testified at the hearing that the applicant admitted to making the threat. The applicant testified that this meeting did not take place and he had no contact with Mastronardi between May 22 and his departure from the workplace on June 8. Mastronardi also testified that he spoke with Aldonzo about the chair incident as discussed above in relation to the push or shove at which time the remittance issue was raised.

The applicant's dismissal and departure

[40] There was no evidence from the respondents about when the decision to dismiss the applicant was made, but in his will-say Mastronardi indicated that the travel arrangements were "firmed up" on June 5 for a June 9, 2009 departure from Canada. As indicated the decision is said to have been made because of the applicant's alleged propensity for violence.

[41] It is agreed that Arnold Verweij with Gregory Aldonzo delivered the message to the applicant on June 8, 2009. The witnesses contradict each other about how the instruction was delivered. Carreiro testified that he told Verweij to deliver the message, while Verweij and Mastronardi stated that it was Mastronardi who instructed Verweij to carry out the dismissal. Mr. Aldonzo testified that he was told to attend to the removal of the applicant by Carreiro.

[42] The applicant gave evidence about the manner in which he was treated during his removal. The applicant testified that he was approached by Verweij accompanied by Aldonzo. Verweij said to the applicant you and Carreiro cannot be together and you do not work here anymore. The applicant testified that he was upset and contacted the "working program" and spoke to a lady about what rights he had in the situation. She asked him who he was with and she asked to speak to Verweij. The applicant testified that Verweij called the police, who arrived and advised the applicant that he would have to leave but gave him more time to gather his belongings than the respondents had given him. The applicant testified that he saw Mastronardi nearby and heard him say "what the fuck is he still doing here." Mr. Mastronardi denied being near the bunkhouse and making any comment about the applicant still being there.

[43] Mr. Verweij testified that it was the applicant who insisted the police be called and he was just complying with the applicant's request. Mr. Aldonzo testified that Verweij called the police and it was his impression that this was done by Verweij to speed the departure of the applicant.

[44] What is not disputed is that a trip to Pearson International Airport that might have taken three or four hours ended up taking 18 as the applicant was advised late morning on June 8 of his departure for a flight the following morning. Because of the relative haste in his departure the applicant left a number of personal belongings behind. The respondents did not take any steps to return his personal belongings to him.

ANALYSIS

[45] It is clear from the narrative above that there are significant issues of inconsistency within the respondents' evidence. In particular there is the late amendment to the will-say of Carreiro with respect to the nature of the applicant's concern with the remittances and when this information was made known to Mastronardi. Mr. Carreiro had no coherent explanation for what he claims are inaccuracies in his Response to the Application or his will-say which contained essentially the same alleged misstatements. Although Mr. Carreiro characterized it as an inaccuracy in the will-say it is not entirely clear that this is the case. I also note that while it was said that the will-say was inaccurate on this point, Carreiro was careful not to change his will-say evidence about what he told Mastronardi the issue was on May 21. The confusion with respect to what he told Mastronardi and when he told him is profound and casts significant doubt over the entirety of the respondents' case on the key points of dispute. For the reasons that follow I prefer the evidence of the applicant over that of the Carreiro and Mastronardi.

[46] As discussed, the respondents initially claimed in their Responses that the applicant's source of concern in May was the non-payment of the remittance from the prior season. Mr. Carreiro testified that his Response and will-say were not accurate that in fact the dispute in May 2009 was about interest on the remittances that were held back and claimed that the information from the October 2010 interview is more accurate. To add to the confusion it appeared at one stage that he was suggesting that the issue was interest earned on remittances from 2009. Despite this evidence he adopted a will-say which indicates that notwithstanding this alleged true state of affairs in May he told Mastronardi that the issue was with the non-payment of the remittances.

He then testified that he also told Mastronardi about the issue in January or February as well. He then appeared to change that answer. His evidence about whether or not he told Mastronardi about an alleged threat of a walkout was confused as well, as discussed above. In the end it is not clear what he told Mastronardi in either of January or May.

[47] Mr. Mastronardi on the other hand was clear that the remittance issue came to his attention when he was informed by Carreiro on May 21 of a shouting match between him and the applicant the day before. He was clear the issue was the remittances from 2008 not being received by the end of May. He gave detailed evidence of his taking charge of the issue and its resolution. He also testified that he confirmed with the applicant that this was the issue.

[48] In my view it is reasonably clear that Carreiro did not tell Mastronardi that a significant source of the applicant's concern in May was the remittance issue and similarly Mastronardi would not have discussed the problem with the applicant on May 22 or Aldonzo on June 1. Mr. Mastronardi's testimony on these points cannot be accepted as all of the surrounding circumstances clearly indicated that this issue had been resolved months earlier.

[49] In my view the evidence of Carreiro cannot be accepted in any respect on the material points of dispute. Although it is possible that his Response and will-say were drafted in error, he could not explain why he did not catch the error in either his Response or in his will-say. More significant is the failure of Carreiro to offer any explanation whatever for his failure to tell Mr. Mastronardi what he now alleges was the true reason for the applicant's upset on May 21. Moreover on Carreiro's version of events he, the applicant and Mastronardi are discussing an issue on May 22 that he and the applicant would have known had been resolved three months prior. I also note that the respondent Carreiro claims to have made the call to the Liaison Office in response to the applicant's complaints in January and February, although he became somewhat confused later in his evidence testifying in cross that "we, he" called them, contradicting to some degree the email above where he claims that he called. In any event is not at

all clear why both he and Mastronardi would have called and why if Carreiro made the contact why he stood by his will-say which indicates that Mastronardi made the contact and he learned about it after the fact.

[50] Carreiro contradicted Mr. Mastronardi on another point when he testified that he, on instructions from Mastronardi, directed Adrian Verwiej and Aldonzo to supervise the applicant's departure. This contradicted the evidence of Mastronardi and Verweij, both of whom testified that it was Mastronardi who gave the instruction.

[51] The evidence of the respondents was inconsistent on another point as well which I have considered in assessing the overall credibility of their witnesses. The respondents claimed that there was a zero tolerance for violence in the workplace. Mr. Mastronardi agreed with this assertion. At the same time he conceded that there was no documentation of any alleged acts of violence and a threat of violence. When asked further about that he testified that when there had been fights in the workplace in the past "we never used to document it because "it wasn't, didn't seem to be, a huge thing."

[52] It is also clear that Mastronardi had a very inaccurate recollection of events in late May and June. As indicated above it is very unlikely that Carreiro told him in May that the applicant's issue was the failure to pay the remittances from the prior year. Given that, his detailed evidence in cross-examination about the conversations he had with the Liaison Office allegedly on May 21, the applicant on May 22, and Aldonzo on June 1 is problematic. The conversations with the Liaison Office and the applicant could not have been as described as the issue allegedly being addressed had been resolved at the latest in February, three months previously. If he had made a call to the Liaison Office in late May he would have been told that the remittances had been made months prior, or if he had asked the applicant on May 22 what the problem was he would not have been told it was the remittance issue. Accordingly, I find that these conversations did not take place or at least they did not take place in May or June 2009. More problematic is his evidence of the alleged conversation with Aldonzo on June 1 where Aldonzo in addition to allegedly confirming the respondents' version of the chair incident is also is said to have confirmed to him that he had not yet received his

remittance from the prior year. In my view this latter conversation did not happen on June 1 and likely did not happen at all.

[53] Even if I were to accept that Mastronardi is merely misremembering when he became involved in the remittance issue, and it is entirely possible that it was in January or February 2009 after the applicant approached Carreiro, and then both Carreiro and Mastronardi, his evidence with respect to this issue is so completely intertwined with his and the respondents' evidence with respect to the alleged push of Carreiro and threat of further violence that I find myself unable to accept the veracity of Mastronardi's evidence on these issues. I also find that Mastronardi has attempted to embellish the narrative of the respondents' version of events by fabricating a conversation with Aldonzo on June 1 that likely did not take place. In the end I am left with very little reliable evidence from the respondents on several of the key issues.

[54] In contrast the applicant's evidence was largely internally consistent. He did make a number of albeit minor amendments to his will-say. On the other hand the applicant readily admitted to facts that were not helpful to his case, most notably admitting to shoving the respondent Carreiro and shouting at him on more than one occasion.

[55] Of some concern is the lack of corroborating evidence of either monkey comment although several individuals might have heard them and arrangements had been made to have a witness testify by telephone from St. Lucia to speak to this issue. In considering whether I should draw an adverse inference as urged on me by the respondents I have taken into account the uncontroversial proposition advanced by Ms. Basok, that these workers are in a uniquely vulnerable position. I accept the evidence of the applicant that the potential witnesses were reluctant to come forward for fear of the consequences. This is not a finding that the respondents would have reprised against anyone who did come forward, but recognition that such fears would not be surprising in this group of workers. I decline to draw any inference from the failure of the applicant to produce any corroborating witnesses.

[56] I also note that while Aldonzo did not support much of the respondents' allegations about the applicant's behaviour in the so-called chair or shoving incident on May 21, he also did not confirm the use of the term monkey on either May 20 or 21. It is possible that he simply did not hear it said because he was out of earshot.

[57] For these reasons I generally have accepted the evidence of the applicant over that of Carreiro in particular and for the most part the evidence of Mastronardi.

[58] As regards a central point of disagreement between the applicant and the respondent I find that the applicant has met his burden of establishing that Mastronardi referred to the applicant and his co-workers as monkeys on May 20. Despite Mastronardi's denial the preponderance of the evidence leads me to conclude that it is more likely than not that this comment was made. To begin with, as discussed earlier, the evidence of the applicant was generally more credible than that of the respondents. Mr. Mastronardi's evidence, although more coherent than that of Carreiro, was significantly at odds with what in fact was going on in the background of this dispute. Moreover Mastronardi's linking of his evidence with respect to the remittance issue to his investigation of the altercation between Carreiro and the applicant casts further doubt on the reliability of his evidence. I have also considered that Aldonzo confirmed that there had been some issue in the greenhouse that day involving Mastronardi, who in response to my questions denied that he had any issues with the work or that he had been in the greenhouse that day. On balance I find the evidence of the applicant must be preferred on this point and that in fact the remark was made by Mastronardi, an owner of the organizational respondent.

[59] I also accept the applicant's version of events in his altercation with Carreiro on May 21. I accept his allegation that Carreiro was dismissive of his concerns about the chair and the fact that it apparently collapsed underneath him. I also accept his evidence that Carreiro said to him "that's why Benji calls you guys monkeys" and approached him in an aggressive manner which caused the applicant to push or shove him away.

[60] I find that when the applicant was told by Carreiro on May 29 that he would not be working the following Saturday he did not make the alleged threat. I also find that the applicant then approached Mastronardi to raise his concerns and did raise the monkey remark and the threat by Carreiro with Mastronardi. He also admitted to Mastronardi that he pushed or shoved Carreiro during the argument on May 21.

[61] I find that that this decision to end the applicant's employment was made sometime after May 29 and after the applicant complained to Mastronardi about the monkey comment and his not getting Saturday work. In light of my conclusions above that the evidence of the applicant must be preferred over that of the respondents, most particularly the evidence of Carreiro, there is no other explanation for the applicant's dismissal. The stated reason, a propensity for violence based on a threat that was not made and a push or shove that was provoked by a racially-charged comment, is on the facts I have found, baseless. In all of the circumstances the only reasonable conclusion to come to is that the applicant's termination from employment and consequent repatriation was the respondents' direct and only response to his human rights complaint about the monkey comment.

[62] I also accept the applicant's submission that in referring to the applicant and his co-workers as monkeys the respondents discriminated against the applicant on the basis of race, colour, ancestry, ethnic origin and place of origin. As suggested by the applicant there are some kinds of name calling that are so egregious that one incident may be sufficient to establish a violation of the *Code*. See *B.C. v. London Police Services Board*, 2011 HRTO 1644. I find that the use of the term monkey to describe a Black man in the demeaning manner the term was used in this case is clearly discriminatory.

[63] As regards the applicant's claim that the manner of his termination from employment was discriminatory, I make no finding in that regard. It would not have been pleasant for the applicant to be hustled out of the workplace and forced to leave personal belongings behind, but there is no substantial evidence that while perhaps not fair, the applicant's treatment was based in whole or in part on any of the enumerated

grounds claimed. However, the manner in which he was hustled off the work site is something that can be considered in damages being a consequence of the discriminatory termination in reprisal for his complaints.

REMEDIES

[64] The remedial provisions of the *Code* are set out in section 45.2 (1) which provides as follows:

> On an application under section 34, the Tribunal may make one or more of the following orders if the Tribunal determines that a party to the application has infringed a right under Part I of another party to the application:
>
> 1. An order directing the party who infringed the right to pay monetary compensation to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect.
>
> 2. An order directing the party who infringed the right to make restitution to the party whose right was infringed, other than through monetary compensation, for loss arising out of the infringement, including restitution for injury to dignity, feelings and self-respect.
>
> 3. An order directing any party to the application to do anything that, in the opinion of the

Damages for Lost Wages

[65] The applicant claimed $5,500 in lost wages. The respondents did not dispute the figures articulated by the applicant taking the position on the remedial requests that the Application was without merit and should be dismissed.

[66] The evidence of the applicant that he would have earned $5,500 had he been allowed to complete the contract for which he had been hired was not challenged and I accept it. The applicant is entitled to lost wages in the amount of $5,500 less statutory deductions required by law.

Damages for Non-Pecuniary Loss

[67] In assessing the appropriate compensation for injury to dignity, feelings and self-respect, there are two main considerations: the objective seriousness of the conduct and the effect on the particular applicant who experienced discrimination. See *Arunachalam v. Best Buy Canada*, 2010 HRTO 1880. In *Arunachalam*, the Tribunal reviewed at paras. 52-54 the development of its approach to the assessment of damages:

> The Tribunal's jurisprudence over the two years since the new damages provision took effect has primarily applied two criteria in making the global evaluation of the appropriate damages for injury to dignity, feelings and self-respect: the objective seriousness of the conduct and the effect on the particular applicant who experienced discrimination: see, in particular, *Seguin v. Great Blue Heron Charity Casino*, 2009 HRTO 940 (CanLII), at para. 16.
>
> The first criterion recognizes that injury to dignity, feelings, and self respect is generally more serious depending, objectively, upon what occurred. For example, dismissal from employment for discriminatory reasons usually affects dignity more than a comment made on one occasion. Losing long-term employment because of discrimination is typically more harmful than losing a new job. The more prolonged, hurtful, and serious harassing comments are, the greater the injury to dignity, feelings and self-respect.
>
> The second criterion recognizes the applicant's particular experience in response to the discrimination. Damages will be generally at the high end of the relevant range when the applicant has experienced particular emotional difficulties as a result of the event, and when his or her particular circumstances make the effects particularly serious. Some of the relevant considerations in relation to this factor are discussed in *Sanford v. Koop*, 2005 HRTO 53 (CanLII) at paras. 34-38.

[68] The considerations discussed in *Sanford v. Koop* are:

- Humiliation experienced by the complainant
- Hurt feelings experienced by the complainant
- A complainant's loss of self-respect

- A complainant's loss of dignity
- A complainant's loss of self-esteem
- A complainant's loss of confidence
- The experience of victimization
- Vulnerability of the complainant
- The seriousness, frequency and duration of the offensive treatment.

[69] The applicant is entitled to compensation for the intangible losses he has experienced including losses to his dignity, feelings and self-respect. The applicant seeks $30,000, including damages for injury to dignity, feelings and self-respect and damages for the reprisal which had the consequence that he lost his employment and was repatriated to his country.

[70] I find that the applicant is entitled to $3,000 in general damages for damages to his feelings, dignity and self-respect for the discriminatory treatment he experienced in this workplace in relation to the monkey comments by Carreiro and Mastronardi. Amongst the factors that I have considered in making this assessment was the applicant's evidence of how it affected him to be referred to as a monkey by a supervisor and an owner of the company. I have also considered the context in which these incidents occurred, a greenhouse operation in front of a number of other racialized migrant workers and I accept the applicant's testimony that the first incident where Mastronardi referred to the applicant and his colleagues as monkeys was much discussed in the bunkhouse that night. In light of s. 46.3 of the *Code*, which establishes vicarious liability of organizations for discriminatory acts by their officers, employees, officials and agents, and in light of the supervisory and senior role of both Carreiro and Mastronardi, in my view it is appropriate to hold Double Diamond Acres Limited liable for this award.

[71] I also find that the applicant is entitled to a further $15,000 in damages for losses associated consequent to the violation of his right to be free from reprisal. In this regard I have considered that the respondents' response to his complaint was not to investigate his concerns but to terminate his employment. In this regard I have accepted Ms. Basok's evidence of the unique vulnerability of migrant workers and their understandable reluctance to stand up for their rights. The applicant did so in this case and paid a significant price for his having done so. On this point I note that by definition a reprisal is a deliberate act – in my view deliberate acts of discrimination, in contrast to inadvertent conduct found to be discriminatory, will often inflict greater damages. The loss of a job that the applicant reasonably would have expected to continue until September 2009 had a significant and material impact on the applicant. He testified that he could not find work in St. Lucia for some period of time. He also had reason to fear that because of his early termination he might never be able to return to this country under the SAWP. In my view, considering the deliberate nature of the act and the immediate and objective consequences for the applicant, the humiliation of being removed from the workplace and returned to St. Lucia all justify the award I have made. For the same reasons as I note above, I would hold Double Diamond Acres Limited liable for this award.

Orders for Future Compliance

[72] The applicant seeks an Order for respondents to implement a human rights policy with a complaints process approved by the Ontario Human Rights Commission. I find that it would be appropriate to Order that within 120 days of the date of this Decision the respondent Double Diamond develop a comprehensive human rights and anti-discrimination policy with the assistance of an expert in human rights law. This policy when it is developed will be provided to the applicant forthwith. The policy will include a complaints mechanism and will be posted in the workplace in a location where it will come to the notice of the greenhouse workers. In coming to this conclusion I note the Double Diamond does not currently have such a policy and that Mastronardi conceded that it would be a good thing for the employer to develop one.

[73] The applicant also sought an order requiring Carreiro and Mastronardi attend training conducted by an expert in human rights. In the circumstances I find that it would be appropriate that all employees and managers of the respondent Double Diamond with any supervisory responsibilities with respect to any worker in its employ take the online Human Rights Training known as Human Rights 101 within 120 days of the date of this Decision and provide written confirmation of its completion to the applicant.

ORDERS

[74] The Tribunal makes the following Orders:

a. The respondent Double Diamond will pay to the applicant his lost wages he would have earned for a period of 12 weeks from June 8, 2009 to the end of his contract in the amount of $5,500 less any statutory deductions required by law.

b. The applicant is further entitled to pre-judgement interest on the award of lost wages in (a) above in accordance with the *Courts of Justice Act*, R.S.O. 1990, c. C.43, calculated from July 15, 2009, roughly the mid-point of the period during which he would have been employed.

c. The respondent Double Diamond will pay to the applicant the sum of $18,000 in damages inclusive of interest for non-pecuniary losses arising from the violations of his rights under the *Code*.

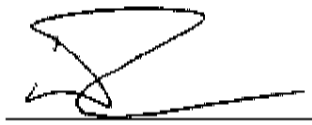
d. The respondent Double Diamond Acres shall within 120 days of the date of this Decision develop with the assistance of an expert in human rights law a comprehensive human rights and anti-discrimination policy. The policy will include a complaints mechanism and will be posted in the workplace in a location where it will come to the notice of the greenhouse workers. This policy will be provided to applicant forthwith.

e. The respondent Double Diamond Acres will ensure that all of its employees with any supervisory responsibilities with respect to any worker in its employ complete the online Human Rights Training known as Human Rights 101 within a reasonable period of time. The respondent Double Diamond Acres will provide written confirmation

that this Order has been complied with within 120 days of the date of this Decision.

f. The applicant is entitled to post-judgement interest in accordance with the *Courts of Justice Act* on any amounts awarded to the applicant and still owing to the applicant 30 days after the date of this Decision.

Dated at Toronto, this 23rd day of July, 2013.



David Muir
Vice-chair