

CEC 32/96
C9/96

IN THE EMPLOYMENT COURT
CHRISTCHURCH REGISTRY

IN THE MATTER of an appeal against a
decision of the Employment Tribunal

AND IN THE MATTER of an application to
appeal out of time

BETWEEN Timothy Pain

Appellant

AND the Alliance Group Limited

Respondent

Court: Palmer J

Hearing: Christchurch
24 July 1996

Appearances: Mr J A Westgate, Counsel for the Appellant
Mr N H Soper, Counsel for the Respondent

Judgment: 22 October 1996

JUDGMENT OF PALMER J

Introductory

On 10 February 1995 Mr Timothy Pain was dismissed from his employment as a trimmer in the felling department of the respondent's meat processing plant at Pukeuri, Oamaru. The appellant was dismissed following the respondent's determination that on 9 February 1995 he had, during the course of his employment, threatened to kill a fellow employee also working in the felling department at the plant, that is to say a Mr Glynn O'Hara.

Mr Pain brought grievance proceedings against the respondent contending that his dismissal was unjustifiable, both substantively and because of significant procedural unfairness

inherent in the dismissal process which was followed by the company. During this judgment I shall refer to the respondent as such or as "the Alliance Freezing Company" or simply "the company". Mr Pain sought, if his grievance of alleged unjustifiable dismissal was made out:

- (i) an award of compensation of \$20,000 for the contended humiliation, loss of dignity and injury to his feelings occasioned by his dismissal, pursuant to section 40(1)(c)(i) of the Employment Contracts Act;
- (ii) reinstatement to his former position of employment at the Pukeuri plant;
- (iii) a wage reimbursing award in his favour concerning his lost remuneration from the date of his dismissal until the end of the 1995 killing "season";
- (iv) interest upon the compensation and wage reimbursing awards made in his favour, and
- (v) costs.

The appellant's contended grievance - which the company has contested throughout - was heard by the Employment Tribunal (Mr Ian McAndrew) sitting at Oamaru on 14 and 15 November 1995. In its decision delivered to the parties' counsel - who are also counsel in the present appeal - on 20 February 1996, the Tribunal held that the Alliance Freezing Company had justifiably dismissed Mr Pain on 10 February 1995.

Mr Pain has appealed to this Court contending, upon particularised grounds, that the Tribunal's decision is unsustainable and should be reversed...

The Appellant's Application for Leave to Appeal out of Time

Unfortunately - but I accept for the reasons wholly explained by Mr Pain in his affidavit filed in support of his application for leave to appeal out of time - Mr Westgate, through inadvertence, failed to file the appellant's notice of appeal within the prescribed 28 day period within which an appellant may appeal as of right to this Court wholly or in part against a

decision of the Employment Tribunal. Counsel in fact filed the notice of appeal on 22 March 1996, which was two days out of time.

Upon hearing Mr Westgate and Mr Soper concerning this "out of time" situation, I confirmed to them at the commencement of the present hearing that I would grant leave for the appeal to be brought out of time, but would subsequently give my reasons for doing so. It will suffice for me to simply now confirm my acceptance that the situation arose through a temporary oversight by counsel and through no culpable fault of the appellant. Having regard to the overall justice of the case and the timely instructions which counsel had in fact received from Mr Pain to appeal, coupled with the fact the notice of appeal was regrettably only two days outside the prescribed period for filing, the leave sought by the appellant should in my view be justly granted. I accordingly validate the notice of appeal in a temporal sense, which was filed herein on 22 March 1996.

The ordered grant of leave will not avail Mr Pain, however, because I now confirm in this introductory phase of my judgment that I have firmly concluded that Mr Pain's appeal must, upon my consideration of it "upon the merits", be wholly dismissed. In due course I shall formally so proceed.

The Appeal

Notwithstanding Mr Pain's particularised nine grounds of appeal, the gravamen of his appeal is that:

- (i) the company could not, following the investigative and hearing process which was undertaken, honestly and reasonably conclude to a standard of probability upon the evidence/information available to it, that Mr Pain had threatened to kill Mr O'Hara on 9 February 1995;
- (ii) the investigative process and the hearing process concerning Mr O'Hara's complaint was vitiated by procedural unfairness to the contended extent that the appellant's dismissal was thereby rendered unjustifiable, and

- (iii) the Employment Tribunal was fundamentally in error upon its concluded view that Mr Pain had not been treated in an objectionably quite disparate way from his alleged co-offender in the threatening to kill complaint, that is to say Mr Mareta-Ria.

My "Overview" of the Tribunal Hearing

The transcript of the Tribunal hearing extends to 532 pages, independently of the extensive briefs of evidence of 11 of the 15 witnesses called, comprising that of Mr Pain himself and 10 of the witnesses who were called by the respondent. A significant body of documentary exhibits was produced. The hearing extended over two full days. Full opening and closing submissions were made by counsel for the parties.

In my view the issues at the hearing were very fully explored and, as the Tribunal appropriately acknowledged in its decision at p 17, it "had the benefit of extensive submissions from counsel for the applicant [Mr Pain] and for the respondent".

The Tribunal's decision impresses me as a thoughtful, well-structured and extensive decision reflecting the advantage derived by the Adjudicator of presiding at a hearing where the issues were dealt with at length during the evidence, and where counsel for the parties in their closing arguments very carefully and fully addressed the evidence and appropriately spoke to the legal issues.

I have enjoyed the same advantages during the present appeal. I am grateful to counsel for the obvious care which they have each taken in their submitted arguments.

In advance of the present hearing I was able to closely consider the transcript in its entirety, together with the briefs of evidence, the documentary exhibits, counsel's typed arguments before the Tribunal, and the submitted outlines of their arguments furnished to this Court prior to the appeal. Most unfortunately, my subsequent ongoing commitment to other hearings and/or the preparation of judgments in unrelated cases has prevented me from delivering my reserved judgment at an earlier date. I regret this situation.

The Issues and their Background

I shall draw extensively in my judgment from the decision of the Tribunal which, I conclude, admirably and accurately summarises the evidence relevant to this subject heading. I shall cite pp 2-17 (inclusive) of the Tribunal's decision, commencing with its introductory treatment of the facts. I preface doing so by expressly identifying the employment positions and/or role in the meatworkers union of the differing witnesses referred to in the Tribunal's decision. This is necessary for an informed understanding of aspects of the decision.

Mr Michael Turnock, Mr Frank McErlane and Mr Neil Rayne are each employed in differing capacities in the felling department at the Pukeuri plant; Mr Robbie Ross is the union delegate for the felling department; Mr Stanley Jory is the full-time meatworkers union's branch secretary at the plant, and Mr David McLean is a slaughterman at the plant and also the president of the meatworkers union at the Pukeuri plant. Mr Dave Thompson is an assistant foreman who is also the supervisor in the area within the felling department where the threat to kill was allegedly made on 9 February 1995, while Mr Peter Ward is the senior supervisor with responsibility over the plant's felling department. Mr Charlie Horn is the plant personnel manager, and Mr William Stevenson, the assistant manager at the Pukeuri plant.

I now relevantly cite pp 2-17 (inclusive) of the Tribunal's decision, namely:

FACTS OF THE CASE

The Alliance Pukeuri plant at Oamaru is a substantial meat processing plant employing about 1,000 employees at the peak of the season. The season generally runs from November through until July. In addition to its main business of processing meat for human consumption, the plant produces some inedible products, and the fellmongery, tannery and pelts departments of the plant -- the area where this case is set -- are a part of that part of the operation. Specifically, the incident that led to Mr Pain's dismissal occurred in the paint table area of the fellmongery or felling department. The layout of that area is illustrated in the accompanying diagram [shown at p 3 of the Tribunal's decision]. The essential operation of the area is that sheep skins are loaded onto the wet belt by the door and carried by belt into the department where they are put in the hydro machines for drying. The dried skins are removed from the hydros and put on the dry belt. They are subsequently transferred to the paint tables where they are trimmed of fat and so on manually by knife and thereafter painted with a substance designed to cause the wool to fall out.

The evidence was that the area was a noisy one with the noise of the work and the machines compounded by the apparently fairly constant playing of a stereo radio. It was also common

ground that there was regularly a good deal of horseplay in the area. Around the paint tables this took the form, perhaps amongst others, of throwing fat at one another. Most of the employees that worked in the area had nicknames, and there was a good deal of verbal needling and teasing one to another as well. Sometimes there were heated verbal exchanges and occasionally physical altercations. It was common ground that the verbal and physical taunting was usually good natured and within undefined but known bounds, and essentially accepted by supervision. Supervision did not view hostile verbal or physical exchanges as acceptable behaviour.

Mr Pain's record

Mr Pain started work at the plant in March 1988 as a labourer in the felling department. He remained in the department throughout his employment with the respondent, though he was appointed after several seasons to a position at the paint tables and eventually to the position of trimmer, a position which he occupied at the time of this dismissal. At the time of his dismissal, Mr Pain was a party to a collective employment contract negotiated by the Meat Workers Union as his bargaining agent. It is accepted that the conditions of his employment are set out in that collective contract, and in the Plant Handbook issued to employees. The handbook includes a Code of Conduct which specifies offences subject to dismissal to include:

9. Threatening, intimidating, coercing, interfering with or sexually harassing other employees.

Mr Pain's employment record was put in evidence. There was no evidence that he was not a competent worker, but there were behavioural problems reflected in the record. Mr Pain received a warning in 1990 for refusing to carry out the instruction of a supervisor. He received a "final warning for fighting" and a suspension of about one month in December 1992. Mr Pain testified to his understanding that each of these two warnings expired two years after issuance. There were no other incident reports in Mr Pain's personnel documents other than those dealing with the matter in early 1995 leading to his dismissal. However, Mr Ross testified to having had to intercede with Mr Pain in December 1994 and again in January 1995 to avoid Mr Pain's becoming involved in physical altercations with fellow employees. And a number of respondent witnesses testified to the general effect that Mr Pain was not popular with most of his fellow workers in the area of the paint tables, that he verbally abused some fellow employees and carried verbal and physical teasing "too far" and beyond the spirit of good natured fun engaged in by most of the workers. And specifically, it was the evidence of witnesses for the respondent that, as the leader of a trio that included Mr Mareta-Ria and "a skinhead," one Mr Paul Mills, Mr Pain targeted and tormented particular employees who were considered vulnerable for one reason or another, and that the last of these unfortunates was Mr O'Hara. In giving their evidence, Mr Pain and Mr Mareta-Ria conceded that they engaged in the robust give-and-take that characterised relationships in the department, but denied that they went further than others, denied that there was any appreciable malice in their attitudes or actions, and denied any particular attention to Mr O'Hara beyond what he received from others.

It was common ground that Mr O'Hara did not fit entirely comfortably in the department atmosphere and that he was perhaps a bit slow at the work. His nickname was "Dippy" and he apparently received quite a bit of teasing from various of his fellow workers. He was under added pressure in that he was employed as a labourer and was seeking to "promote" to a position under the meat workers contract. Again it was the evidence of witnesses for the respondent that Mr Pain and his associates went beyond the limits adhered to by others in their treatment of Mr O'Hara.

Mr O'Hara said in his evidence that harassment by Mr Pain, and to a lesser extent Messrs Mareta-Ria and Mills, had escalated about a week before Mr Pain's dismissal and that he was continually being hit in the face with lumps of sheep fat thrown by the three. He said that he confronted Mr Pain about the matter, and Mr Pain spat in his face. On February 7, 1995 Mr O'Hara complained to Mr Ross about general harassment by Messrs Pain and Mareta-Ria and specifically about Mr Pain spitting at him. The union was apparently the customary first point of contact for difficulties that arose between employees. Mr Ross raised the matter with a Mr Owen Lovett, the supervisor (under Mr Ward as senior supervisor) with immediate responsibility for the paint tables area, but nothing concrete was done about the matter. Mr Ross testified that the tension in the area of the paint tables was becoming a major problem and that, even prior to the events of February 9, the union, through Mr Jory and himself, had resolved that something needed to be done about it. They spoke to one of the workers on the paint tables about the situation in the union office. And they spoke with Mr Ward on February 8 generally about the need to address the tension in the paint tables area and specifically about the intimidation of Mr O'Hara by Mr Pain and Mr Mareta-Ria. Mr Ward said that he would speak to the individuals involved, specifically Messrs Pain, Mareta-Ria, Mills and O'Hara, and attempt to address the problem.

February 9, 1995

The incident leading to Mr Pain's dismissal occurred during the early evening of February 9, 1995, but there was also an earlier incident on the morning of that day. Mr Pain was employed during the regular work day as a trimmer on the paint tables. The day started about 7.45 am and finished about 4.30 pm. Mr Ward and more immediately Mr Lovett were in supervision over the area. However, Mr Pain was also a member of the permanent overtime gang in the department and this gang regularly worked until about 6.00 pm. On the evening in question, during the overtime part of their day when the incident leading to dismissal occurred, Mr Pain and Mr Mareta-Ria were assigned to work outside throwing skins from a delivery truck onto the belt that carried them to the hydro dryers. On this particular overtime shift, Mr Thompson, who normally worked in another area during the regular shift, was the supervisor in charge of the paint tables area, Mr Ward and Mr Lovett having gone home for the day.

The incident on the morning of February 9 involved Messrs Pain and Mareta-Ria and Mr Turnock. A dispute arose in which Messrs Pain and Mareta-Ria claim to have become upset at the way in which Mr Turnock was placing skins from the hydro onto the dry belt and, in reaction, they kept turning the belt off and stopping the operation. This, in turn, upset Mr Turnock, as it had, he testified, on previous occasions. The workers are paid on production. On the morning of February 9, tension broke out. Mr Ross became involved and a meeting was arranged at which Mr Ward, with Mr Lovett and Mr Ross in attendance, told Mr Pain and Mr Mareta-Ria both that they ought not to be stopping the belt and that a more cooperative attitude was required. Mr Turnock was also spoken to about loading the skins correctly onto the dry belt. Mr Ward said in his evidence that Mr Pain was "told to behave himself and that he had been warned." Mr Ross, in his evidence, said that he thought during the meeting that Mr Ward was not adequately addressing Mr Pain's threatening and intimidating behaviour and that, accordingly, he had himself told Mr Pain that "if he did not stop threatening and intimidating people in the workplace, he would be found unsuitable and would be taken out of the contract."

During the overtime work on the evening of February 9, Mr O'Hara believed that he overheard Mr Pain say something about the car that he (Mr O'Hara) had purchased just that day. He said in his evidence that he was worried that Mr Pain and Mr Mareta-Ria might do damage to his car that was in the parking lot while they were assigned to work outside unloading the truck. He asked Mr Thompson to check on them. Mr Thompson did so and

confirmed that they were working the truck as they were supposed to be doing. In his brief of evidence, Mr O'Hara gave this account of the incident that ultimately led to Mr Pain's dismissal and of his reaction that evening:

When Tim [Pain] and Hoki [Mr Mareta-Ria] had finished unloading the truck they came inside. I was standing by the dry belt when Tim walked towards me. He had his knife in his hand. I don't know why he had a knife at that time.

Tim walked right up to me and said "We are going to get you. We are going to kill you and we will get you". He said they will get me out on the street, not at the works.

He held the knife at my stomach and ran it passed my stomach as he was saying those words. He then walked off.

I was shocked but I tried to show that I was not frightened at the time. I continued to work after that but I kept thinking about the threat. After work I talked to another worker. He suggested that I should complain to the Police or to Noel Jory, the Union Secretary.

I went up to the changing rooms and I sat down. I broke down. I started crying and became emotionally upset. I was so scared I thought that Pain would be out on the road waiting for me.

Other workers came into the changing room and asked me what was wrong. I told them about it and they said I should complain. They said I had their support.

That night after I safely got out of the building I went and saw a policeman I know and he advised me to make a formal complaint the next day.

Mr O'Hara did not mention the matter to the supervisor Mr Thompson. He offered several reasons for this at various points, but they were not necessarily contradictory. I understood his principal explanation to be essentially that he was in a state of confusion and near panic immediately following the incident.

In his brief of evidence, Mr Pain said only this of a factual nature about the incident:

On the evening of 9 February 1995, when I left work I wasn't aware that there was any problem at all between myself and Glynn O'Hara and David Mareta-Ria. There had been some "ribbing" and some chicken calling and a few other silly things going on, but there certainly weren't any threats made by me to Glynn O'Hara.

In his oral evidence, Mr Pain acknowledged that he had spoken to Mr O'Hara, but said that he told him only to get out of his way as he was passing. His position was that no threatening incident of the nature complain of by Mr O'Hara had occurred on the night

February 10, 1995

The following morning Mr O'Hara spoke to Mr Jory briefly in the locker room and told him that he wanted to see him at some stage about a problem. Mr Jory and Mr Ross both heard reports from other workers to the effect that there had been an incident the previous evening in which Mr Pain had threatened to kill Mr O'Hara. Mr Jory arranged with Mr Ward for

Mr O'Hara and Mr Ross to come to the union office where he interviewed Mr O'Hara. Mr McLean was also present. Mr Jory took notes of the interview and these were typed up and signed by Mr O'Hara as testimony to their accuracy. Mr Jory and Mr Ross both said in their oral evidence that Mr O'Hara was visibly upset during this interview. They also said that they believed what he was telling them.

Following this meeting, Mr O'Hara returned to the department and he told Mr Ward about the incident. Thereafter he apparently spent some time at the plant medical centre. The union officials meanwhile determined that, while the union is inclined to handle internally differences between members, the matter was of such seriousness that it had to be referred to the company for investigation. Mr Jory's brief of evidence provides a useful account of what transpired next:

Because of the seriousness of the allegations made, it was decided that it was appropriate for the matter to be referred to the company for investigation. I spoke with Peter Ward (Foreman) and explained to him that something would have to be done or someone would get hurt. A meeting was then arranged between the Union and the company management about how to deal with the complaint. At the meeting were myself, Robbie Ross and David [McLean] for the Union and Bill Stevenson (Assistant Plant Manager), Charlie Horn (Personnel Manager) and Peter Ward on behalf of the company. After some discussion it was decided that an Investigating Committee should be formed to interview the paint table workers and obtain their comments as to the allegations that Glynn O'Hara had made against Tim Pain and David Mareta-Ria, Charlie Horn, Peter Ward and Robbie Ross were appointed to the Investigation Committee.

Robbie Ross was part of the committee as the departmental Union delegate and as such was the representative of the men being interviewed as well as both Tim Pain and David Mareta-Ria.

Mr Pain and Mr Mareta-Ria were not advised by either the union or management that the investigation was being undertaken until they were themselves called to interview about mid-afternoon. They were aware that fellow workers were being taken away one at a time and, in Mr Pain's evidence, he got the impression from their remarks when they returned that he and Mr Mareta-Ria were at the centre of whatever was going on. However, he testified, he had no idea that it involved Mr O'Hara or that Mr O'Hara had made a complaint about him.

Once the decision had been made to set up the investigation committee, Messrs Stevenson, McLean and Jory called the police to see if they had any comment on the procedures that were being put in train. The police apparently had nothing substantial to offer at that point. Mr Stevenson testified that he then visited Mr O'Hara at the medical centre where Mr O'Hara reiterated adamantly that Mr Pain had threatened to kill him, and there was a discussion regarding whether Mr O'Hara wished to refer the matter to the police.

Mr Horn's brief of evidence details the approach taken by the investigation committee:

The Investigation Committee decided that we would interview all persons who worked in the relevant area and could: -

- (a) comment on Glynn O'Hara's complaint; or
- (b) comment as to whether they heard or saw anything the previous evening;

It was decided that all the workers would be interviewed as there was a concern that some people would not be keen to come forward if others were not spoken to.

The interviews were arranged so that each interviewee could return to the work place to take over the job of the next person to be spoken to. We simply called them into the investigation room as and when we required to speak to them.

I kept brief summary notes of the interviews. Each interview began with the words "*There was an apparent incident last night involving Glynn O'Hara, Tim Pain and David Mareta-Ria.*" The following questions were then asked: -

1. Can you give an account of what happened?
2. Have you witnessed any incidents of harassment or intimidation by Tim Pain and David Mareta-Ria?
3. Is there anything else you would like to add?

I simply recorded any relevant comments that each person made. Each interview would not have lasted more than 5 mins.

Some of the people we spoke to said that they saw or heard nothing and had nothing to say.

Mr Mareta-Ria and Mr Pain were interviewed after the others and were asked very similar questions. They were each given details of Mr O'Hara's allegation and of the matters raised by the other witnesses.

Mr Mareta-Ria denied the threatening allegation. He denied that anything was said at all to Glynn O'Hara by himself or Mr Pain. He said he didn't speak to Glynn at all that day. He said that he called Mr O'Hara "*dippy*" but that he had never spat at him. In relation to the previous evening he said *I came from the truck to the cupboard to get the knife from number 1*". "*I came back to the hydros, past Glynn O'Hara, when getting the knife returned the long way to put the knife back*".

At Mr Pain's interview I advised him as to the nature of Mr O'Hara's accusation and specifically of the alleged threat to kill. Mr Pain denied that he had threatened Mr O'Hara. I also advised Mr Pain of what the other persons had said to the investigating committee. I asked Mr Pain to give a full account of what had happened last night.

Mr Pain said that he was out on a truck all night until the last 10 minutes. He said he talked to Mark Gillespie and asked the time and commented about the size of the skins. He said that upon leaving the truck he had told Glynn O'Hara to get out of the way while he put the knives (a knife, steel and gloves) away. He said he came back past Glynn O'Hara.

I asked him if he had spat on Glynn O'Hara.
He said that he had not.

I asked him if he had thrown any fat at Glynn O'Hara. He said no.

I asked him if he had said anything to Glynn O'Hara about his car. He said that he had not.

I asked him if he had abused or threatened Glynn O'Hara in any way. He said that he had spat at the ground beside O'Hara but that he had never threatened him. He said the only thing that was said was to move out of the way.

I asked him if he had talked to anyone on the way back in from the truck. He said he had talked to Neville [Steel] on the Hydro. He said he had told O'Hara to spread the skins out and to get out of the way. He said he never saw David Mareta-Ria talk to Glynn O'Hara.

I then advised Mr Pain that a number of the people we had spoken to had said that he had threatened others in the workplace. I advised that the allegations made against him, particularly that of threatening to kill, were very serious.

The interview with Mr Pain would have lasted 10-12 minutes.

Following the interviews, the Investigation Committee met with Bill Stevenson (Assistant Plant Manager), Noel Jory and David [McLean] (Union President). I repeated to the meeting everything that had taken place in the interviews and gave a summary from my notes of what each person had said. All persons present at the meeting were of the opinion that the accusations against Pain and Mareta-Ria were serious and, in light of the comments provided to the Investigation Committee, appeared to have foundation.

As was the usual and standard procedure in matters of this type, Mr Pain and Mr Mareta-Ria were suspended pending resolution of the complaint.

The suspensions of Mr Mareta-Ria and Mr Pain took effect at the end of their interviews. Mr Horn's notes compiled during the interviews were entered into and examined in evidence and were the subject of central submissions by Mr Westgate on behalf of Mr Pain. They read in pertinent parts as follows:

F. McErlane Seen T. Pain spitting on G. O'Hara . . . continual verbal abuse & intimidation towards G. O'Hara . . . Last night didn't see or hear anything.

M. Gillespie Didn't see or hear anything last night and glad that he didn't . . . Has witnessed verbal abuse, harassment & intimidation.

R. Sinnamon Out of shower saw Glynn and said to him "See you tomorrow" . . . Glynn replied "You probably won't" and broke down in tears -- R.S. asked what's wrong . . . Reply "Those cunts out there. R.S. didn't see anything apart from this on the night. T. Pain is the ring leader.
He has seen Pain spitting in O'Hara's face. It's getting out of hand.
Someone is going to get seriously hurt . . . Not scared of him at work, its what he could do later.

R. Senior When Tim came in after loading off the truck, he picked up a knife and flicked it.

M. Turnock Tim Pain and Dave Mareta came in off the truck and was standing by No. 1 paint table - gave G O'Hara a chicken call and said something about a car. Tim Pain was goading Glynn O'Hara - M.T. keen to

hear the rest of the conversation. T. Pain said to Glynn O'Hara "If I see you down the street I'll fucking kill you."

T.P. & D.M. talking and laughing about incident upstairs.

Was going to say to Tim to keep it outside work but thought better of it.

T.P. main instigator of trouble. When T.P. phoned [sic; corrected by Mr Horn in oral evidence to "spoke to"] he didn't have knife in hand. D. Mareta wasn't part of the verbal at this stage.

N. Steel I was pulling out of No. 7 hydros . . . Glynn said "They threatened to do something to my car." "Tim and Hoki are threatening me." "If they see me out on the street, they'll punch my lights and they'll kill me on the street." D. Mareta is led by T. Pain.

N.S. wasn't 8 feet away when he saw T.P. spit on G O'Hara. Tension at the paint table is rife.

P. Keen Didn't see or hear anything.

N. Ravne Its only the tip of the iceberg. This has been going on a long time. D. Mareta had knife. Tim didn't. Saw Tim talking to Glynn. D Mareta walked past with knife in hand and said something to Glynn. Vaguely saw spitting incident. Continued intimidation by T. Pain. Mareta backs him up. The two don't know when to stop.

Interview with D. Mareta-Rja

suspended without pay

I was feeding the skins from the truck. Got knife to cut up socks. Glynn was spreading by the dry belt. Glynn was the opposite side to T. Pain

- I didn't say anything to Glynn
- Tim didn't say anything
- Nothing said by both to Glynn O'Hara
- No gestures with the knife

I didn't speak to Glynn all that day.

I came from the truck to the cupboard to get the knife from . . . came back to the hydros - came past Glynn O'Hara. When getting the knife returned the long way to put knife back.

I never spat at Glynn O'Hara.

Tim Pain never spat at Glynn O'Hara

Only called him "Dippy"

Nothing was happening cause Dave was there.

Interview with Tim Pain

suspended without pay

Out on the truck all night until the last 10 minutes. Talked to Mark Gillespie . . . asked the time & commented about the size of the skins. Told Glynn O'Hara to get out of the way while I put knives away (knife, steel & glove) Came back past Glynn to where Dave Thompson was

- Didn't say anything about a car
- Didn't throw anything at him
- Didn't abuse him
- Spat at the ground & never threatened Glynn

Only thing that was said was move out of the way

- Discussed at the changing rooms - "What was Dippy doing here"

Talked to Neville on hydro. Told O'Hara to spread skins out on the way back after putting knives back. Never saw D. Mareta talk to Glynn O'Hara.

In his oral evidence, Mr Turnock confirmed his statements to the investigating committee. He said that he was working directly opposite Mr O'Hara across the dry belt at the time of the incident, loading skins onto the belt from the hydro. He said that he was facing Mr O'Hara, that the hydros were turned off and he could hear what was said even though the words were not spoken loudly. Mr McErlane also testified in a manner reiterative of his statements to the committee as reflected in Mr Horn's notes.

Mr Rayne's evidence was somewhat at odds with his statements to the investigation committee, at least as reflected in Mr Horn's notes. He said at hearing that he was working about eight yards away from Mr O'Hara, that he saw Mr Pain walk up to Mr O'Hara, that Mr Pain was talking to Mr O'Hara "and it looked like intimidation. O'Hara looked shocked. I couldn't hear what was being said." Mr Rayne said at hearing that Mr Pain had a knife in his hand, though he did not see either Mr Pain or Mr Mareta-Ria point a knife at Mr O'Hara.

Mr Thompson told the hearing that he was standing six or eight feet from Mr O'Hara and separated from him by a pillar, that he was looking at the belt with his back to the paint tables and was not looking in the direction of Messrs O'Hara, Pain and Mareta-Ria, that he neither saw nor heard anything of the incident, that he was asked separately by Mr Jory and Mr Stevenson what he knew and that he told them both that he neither saw nor heard anything of the incident, and he confirmed that neither Mr O'Hara nor anyone else had brought it up to him on the night. As a general orientation, witnesses for the respondent placed the relevant persons at the time of the incident approximately as portrayed in the diagram [shown at p 13 of the Tribunal's decision].

After hearing from the investigation committee, Mr Stevenson determined in discussion with Mr Ward and Mr Horn that Mr Pain and Mr Mareta-Ria should be reinterviewed by company management. Mr Pain and Mr Mareta-Ria met first with the union officials, Messrs Jory, McLean and Ross.

It was the evidence of Messrs Jory, McLean and Ross that they reviewed the incident with Mr Pain and Mr Mareta-Ria, emphasised the seriousness of the allegations, and advised that the union's function was to defend their interests in terms of the contract and to advise them in relation to the procedures. They testified that Mr Pain maintained to them that he had not made the threat to Mr O'Hara and that, as his representatives in the meetings with management that followed, Mr Jory and Mr McLean had adopted and stated as Mr Pain's defence that the threat had not been made.

Mr Pain, Mr Mareta-Ria and the union representatives then met again with the management representatives, Messrs Stevenson, Ward and Horn. According to the evidence of witnesses for the respondent, including the union representatives, Mr Pain was again presented with the allegation that he had intimidated and threatened to kill Mr O'Hara, he was advised of what the witnesses interviewed had said, including the facts that some eight people had been spoken to and one had said that he witnessed and overheard the threat to kill. The evidence was that Mr Pain denied making the threat, but had little to say beyond that in relation to his actions towards Mr O'Hara. Mr Stevenson had then said that the allegations were regarded as serious and that they could lead to dismissal. There was discussion of the plant Code of Conduct and reference to Rule 9. Mr Pain was asked again if he had any further explanation, but he had nothing further to say.

There was an adjournment while the management representatives reviewed their position. Mr Pain and Mr Mareta-Ria again spent the time with the three union representatives. Again it was the evidence of the union representatives that they stressed to Mr Pain the seriousness

of the allegations and urged that if there was anything that he could add by way of explanation, he should mention it to management.

Mr Stevenson testified that he reviewed the situation with Mr Horn and Mr Ward during this adjournment and, in consideration of what had been told to the investigating committee, and what he had heard from Mr O'Hara, Mr Pain and Mr Mareta-Ria, he concluded that Mr O'Hara's allegation was true, that Mr Pain had threatened to kill Mr O'Hara, that that was a breach of Rule 9 of the Company Code of Conduct amounting to serious misconduct, and that "the only possible outcome was Mr Pain's dismissal."

Mr Pain and the union representatives were again called back into Mr Stevenson's office. In the evidence of witnesses for the respondent, Mr Stevenson put to Mr Pain that he believed on the basis of the investigation that Mr Pain had made the threat complained of, that the company considered the matter serious, and that if Mr Pain had anything further to say he should say it now. Mr Pain said that he had nothing further to say. Mr Stevenson then advised Mr Pain that he was in serious breach of Rule 9, that the company could not tolerate such intimidation and threats towards other employees, that the only appropriate course of action was dismissal, and that he was summarily dismissed. Mr Pain then left with the union representatives. Following a similar process, Mr Mareta-Ria was determined by management to have participated essentially as an accessory to Mr Pain's threat to kill Mr O'Hara and he was suspended without pay for two months.

In his evidence, Mr Pain also traversed the investigation and the subsequent meetings from his perspective. So too did Mr Mareta-Ria with somewhat less apparent certainty. Mr Pain emphasised several points in his evidence. He said first that he was called to Mr Ward's office for what turned out to be his interview with the investigation committee at about 3.00 pm. He said that he was not told why he was being taken to Mr Ward's office. This was not disputed by witnesses for the respondent. He said that he was not aware during his interview and was not made aware then or until after his dismissal that Mr O'Hara had signed what amounted to a written statement, and he was never offered a copy of the statement. Again this was not directly controverted by any of the respondent witnesses.

Mr Pain said that at the investigation committee interview and consistently thereafter, he was told that there were eight witnesses "supporting the allegations against me" which he took to mean that there were eight witnesses supporting the allegation that he had threatened to kill Mr O'Hara. Witnesses for the respondent unanimously denied that it had been said or implied to Mr Pain that eight witnesses had seen or overhea[r]d the alleged threat to kill. What was said, they testified, was that eight witnesses had been heard from, that they had testified generally to intimidation by Messrs Pain and Mareta-Ria, and that one of them (in addition to Mr O'Hara) heard Mr Pain threaten to kill Mr O'Hara. Mr Pain said that he had not been told who the witnesses were, or what specifically they had seen, heard or said, and that he had not been advised until after his dismissal that notes of the witness interviews had been taken, nor had he been allowed to see such notes or been provided a copy of same. Witnesses for the respondent acknowledged that Mr Pain had not seen or been provided copies of Mr Horn's notes of the investigation committee interviews and that witnesses had not been specifically identified to him. It was the position of witnesses for the respondent that the allegations of intimidation and of the threat to kill that were supported by witness statements had been put to Mr Pain along with other facts that the witnesses had spoken about, that in any event Mr Ross had been Mr Pain's representative on the investigation committee and heard everything that the witnesses said, and that neither Mr Pain nor any of the union officials representing him had asked to see statements or notes at any point during the day.

Mr Pain, in his brief of evidence, indicated that he and Mr Mareta-Ria had overheard Mr Mills threaten Mr O'Hara on the afternoon of February 8, 1995. In his oral evidence, Mr Pain at one point recalled this threat as being made on February 9, 1995, but during the regular work day, not during the overtime portion of the day. Mr Mills did not work on the overtime gang on February 9. In his evidence, Mr Pain said that he told Mr Horn on February 14, following the dismissal, that it was Mr Mills that threatened Mr O'Hara. Mr Mareta-Ria also testified that Mr Mills was the one who threatened Mr O'Hara. Mr Mareta-Ria's further evidence, however, was that he had advised the investigation committee and the union officials and the management representatives with whom he spoke on February 10, 1995 that it was Mr Mills, not Mr Pain or himself, who had threatened to kill Mr O'Hara. Management witnesses for the respondent denied that Mr Mareta-Ria or Mr Pain had offered that explanation or mentioned a threat by Mr Mills at any point during the interviews and meetings of February 10. Mr McLean testified under cross-examination that Mr Pain or Mr Mareta-Ria had, during one of the afternoon interludes, ventured to them that Mr Mills was the one who had threatened to kill Mr O'Hara, but that, when pressed on the point, "they backed off and did not wish to pursue that as a defence".

Beyond these points of contention, Mr Pain's account of his interview with the investigation committee and his meetings with the union and management officials largely mirrored the accounts presented by respondent witnesses. He said, in essence, that the allegations were put to him, albeit without the specificity of notes, and that he denied them. He said in his evidence that if he had been given access to Mr O'Hara's statement and to Mr Horn's notes of what the witnesses had said, and particularly if he had been given some time to review these documents, he would have been able to point out the inconsistencies therein and to, in effect, offer more of a defence.

There were various estimates of the time that elapsed between Mr Pain's interview with the investigation committee and his dismissal by Mr Stevenson. I accept that he was called to the interview about 5.00 pm, and that the dismissal took place about 4.30 pm.

Mr McLean and Mr Jory said in their evidence that they spoke to Mr Pain following his dismissal. He was advised, they said, that he had the right to file a grievance if he thought the dismissal was unfair, but that because of the seriousness of the matter, he could expect to hear from the police and that he should wait to talk to the police before invoking any procedures. Mr Ross accompanied Mr Pain while he retrieved his personal effects, and he was then escorted off the plant. Mr Jory subsequently wrote to the company seeking reasons for the dismissal in writing per the contract, and the response was forwarded to Mr Pain. On February 14, 1995 Mr Pain collected his final pay from Mr Horn at this office. Mr Jory testified that Mr Pain telephoned the union office on March 2, 1995 to inquire as to what the union was doing on the case. Mr Jory advised Mr Pain that he did not believe that there was anything that the union could do for him at the time, but that if there was something that he felt should be done, he should set it out in writing and forward it to Mr Jory.

Mr Pain subsequently contacted counsel and filed the present proceedings. A police prosecution did arise from the alleged threat to kill Mr O'Hara. Only a charge based on Mr Pain having spat at Mr O'Hara was found proved and on that count Mr Pain was convicted and discharged.

With an informed appreciation of Mr Westgate's submitted argument as to why, in his contention, Mr Pain's dismissal was vitiated by alleged procedural unfairness in the process followed by the company, and why the respondent allegedly dealt with Mr Pain in an

unjustifiably disparate way contrasted with Mr Mareta-Ria (pp 17 and 18 of the Tribunal's decision refers), the Tribunal then addressed the relevant law. The Tribunal developed at some considerable length in its decision the principled approach which the respondent was obliged to correctly implement in the disciplinary process it undertook, and which culminated in Mr Pain's dismissal.

The Adjudicator cited and drew upon material expositions of principle expressed in *Wellington Road Transport etc IUOW v Fletcher Construction Co Ltd* [1983] ACJ 653 (usually known as the *Hepi* case); *Northern Distribution Union v BP Oil NZ Ltd* [1992] 3 ERNZ 483 (CA); *Airline Stewards and Hostesses of NZ IUW v Air New Zealand Ltd* [1990] 3 NZLR 549 (CA); *Reed v Air New Zealand Ltd* [1991] 3 ERNZ 139; *Click Clack International Ltd v James* [1994] 1 ERNZ 15, and *NZ (with exceptions) Food Processing etc IUOW v Unilever NZ Ltd* [1990] 1 NZILR 35.

The Tribunal completed its exposition of relevant legal principle by materially remarking at pp 21 and 22 of its decision that:

There are a number of by now well known procedural requirements on an employer in moving towards the prospective dismissal of an employee that are critical to establishing that "the decision to dismiss was one that a reasonable and fair employer would have taken in the particular circumstances." These requirements reflect the obligation on an employer to make proper inquiries, including extending to the employee prospectively facing discipline a real opportunity to be heard. Perhaps most often cited in this respect, as it was in the instant case, is the judgment of the Labour Court in *NZ (with exceptions) Food Processing etc IUOW v Unilever New Zealand Ltd* [1990] 1 NZILR 35, which included the following statement of the minimum procedural requirements at pp. 45-46:

It is well settled by many judgments of this Court and, before it, of the Arbitration Court, that a dismissal which is substantively justified will be vitiated if, in the process, the minimum standards of fair and reasonable dealing are ignored or neglected . . . A moment's reflection shows that this does not involve any injustice for or harshness towards employers. Take the case of an employment [contract] or award which provides a procedure or code which is to be followed if disciplinary action, including dismissal, is contemplated. It is then a term or condition of the employment that the worker will not be dismissed without the established procedure being first followed. A good and conscientious employer will follow it. Where there is no agreed procedure, the law implies into the employment relationship a requirement to follow a procedure which is, in the circumstances, fair and reasonable. Again, a good and conscientious employer will follow such a procedure. What that procedure should be in any particular case is a question of fact and degree depending on the circumstance of the case, the kind and length of the employment, its history

and the nature of the allegation of misconduct relied on including the gravity of the consequences which may flow from it, if established.

The minimum requirements can be said to be:

1. notice to the worker of the specific allegation of misconduct to which the worker must answer and of the likely consequences if the allegation is established;
2. an opportunity, which must be a real as opposed to a nominal one, for the worker to attempt to refute the allegation or to explain or mitigate his or her conduct; and
3. an unbiased consideration of the worker's explanation in the sense that that consideration must be free from pre-determination and uninfluenced by irrelevant considerations.

Failure to observe any one of these requirements will generally render the disciplinary action unjustified. That is not to say that the employer's conduct of the disciplinary process is to be put under a microscope and subjected to pedantic scrutiny, nor that unreasonably stringent procedural requirements are to be imposed. Slight or immaterial deviations from the ideal are not to be visited with consequences for the employer wholly out of proportion to the gravity, viewed in real terms, of the departure from procedural perfection. What is looked at is substantial fairness and substantial reasonableness according to the standards of a fair-minded but not over-indulgent person.

Given the comprehensive nature of the procedural submissions made by Mr Westgate, I think that it is not inappropriate to have cited these various authorities at the length that I have. Their application to the instant case can, in fact, be drawn somewhat more succinctly.

The Tribunal then held - quite unremarkably in my view - that threatening to kill a fellow employee was grave misconduct justifying immediate dismissal. The Adjudicator recognised, in reliance upon *Read v Air New Zealand Ltd* (supra), that if he held that:

- (i) a fair disciplinary process had been followed by the Alliance Freezing Company, culminating in the respondent concluding, through Mr Stevenson, that Mr Pain had threatened to kill Mr O'Hara on 9 February, and
- (ii) this concluded view was, upon the evidence available to the company, a view which it honestly reached to a standard of probability upon reasonable grounds,

then it was not for the Employment Tribunal to substitute its own judgment as to what penalty should or should not actually have been imposed, unless the Tribunal concluded that Mr Pain

had been dealt with in an unjustifiably disparate way contrasted with his alleged co-offender, Mr Mareta-Ria.

The Tribunal then addressed the extensive argument which had been advanced by Mr Westgate as to how and why, in counsel's submitted view, Mr Pain's dismissal was vitiated by alleged procedural unfairness inherent in the disciplinary process followed by the company. Notwithstanding my acute recognition that Mr Westgate now contends in the present appeal that the Tribunal could not in this immediate setting appropriately reach the concluded views that it did, I hold that the Tribunal's approach and its conclusions were both thoughtful and correct.

I now turn to the Adjudicator's consideration of issues of procedural fairness at pp 23-25, concluding with his "DECISION" at p 25, namely:

The principle thrust of Mr Westgate's submissions was to the effect that, because of the procedural flaws itemised above, the investigation was so unfair as to preclude the employer in law from reasonably arriving at the conclusion that Mr Pain had in fact made the threat to kill Mr O'Hara. Mr Westgate submitted that the employer had not carried out "reasonable inquiries which left him on the balance of probabilities with grounds for believing . . . that the employee was at fault," as required under Airlines Stewards and Hostesses, in part because, it was submitted, the minimum requirements set out in Unilever had not been met. For the reasons expressed below, I do not accept these procedural submissions, either in general or particular.

Mr O'Hara's complaint was subject to a several part investigation. First the union took his statement, and union officials, concluding that the matter was beyond a routine difference between two members, referred the matter to management. A bipartite investigation committee was established, as had occurred in analogous situations in the past. The investigation committee focused particularly on the alleged threat to kill Mr O'Hara, but its inquiries also ranged more widely to what has to be seen as reasonably relevant background. While it might be accepted that any misconduct on Mr Pain's part up to and including his difference of opinion with Mr Turnock on the morning of February 9 had already been dealt with, and while it might be argued that such earlier conduct could not form the basis for new disciplinary action, there is no unfairness in canvassing that background in an effort to make sense of, or bring perspective to, the latest events. Indeed, an employer's investigation might well be found wanting under circumstances such as these if such background factors were not explored.

The investigation committee heard from its witnesses, including Mr Pain, and reported to senior management. The evidence received at that level was inconclusive on the matter of the knife. It is clear by their own evidence, that both Mr Pain and Mr Mareta-Ria had handled knives after coming inside after unloading the truck. Witnesses claimed to have seen each of them with a knife, but there was only conflicting evidence about who, if anyone, presented a knife in a menacing fashion to Mr O'Hara. Management reasonably elected to take that count no further. There was some witness evidence on the question of whether Mr Pain made the verbal threat to Mr O'Hara, but to some extent it did, as Mr Westgate suggested, come down to one man's word against the other's. Under these circumstances, management was

reasonably entitled to take account of other evidence before it. This included the background, quite widely reported by those interviewed, and otherwise known to those involved in the process, of Messrs Pain's and Märeta-Ria's targeting of Mr O'Hara for aggravation and of their going beyond what other employees considered acceptable bounds of teasing behaviour. It also included the perceptions of fellow employees and of union and management officials that Mr O'Hara was genuinely and deeply distressed on the night of February 9 and the morning of February 10. Mr Stevenson, in consultation with Mr Ward and Mr Horn, viewed these factors as indicating, in conjunction with the weight of the direct evidence, that Mr O'Hara's complaint was genuine.

While the evidence did not present a perfectly clear picture, that is not at all unusual. Employers investigating matters that may lead to discipline are often confronted, despite reasonably extensive inquiries, with a body of evidence characterised by less than absolute clarity. That this is so has been recognised by the Courts in defining the extent of inquiry and standard of proof that employers are required to meet before imposing major discipline. I conclude that Mr Stevenson was well within his rights to conclude on the weight of the evidence before him that the threat had been made. Mr Westgate argued that because inconsistencies remained, there should have been further investigation. In doing so, he argues, in essence, for a fuller evidentiary trial and a higher standard of proof than the Court has imposed on employers under Airline Stewards and Hostesses.

Mr Westgate further argued that Mr Pain was denied the minimum requirements to specificity of allegations and opportunity to refute or explain set out in Unilever. He relied heavily, in making this submission, on his contention that the employer was obliged to provide Mr Pain or his representative with copies of the complaint by Mr O'Hara and the statements of the witnesses.

It seems to me that Mr Pain was presented quite specifically with the allegations against him on a number of occasions, the first being at the investigation committee stage. He was told of the allegation that he had threatened to kill Mr O'Hara. He was asked for his response. An explanation was open to him at that and several subsequent points as detailed in the factual record presented earlier. His response was to deny the allegation.

I think that Mr Westgate's submissions in these regards fail on three counts. First, his heavy reliance on Mr Pain's entitlement to see and have copies of the statements of Mr O'Hara and the others has no foundation that I am aware of in the authorities, including in those cited for the applicant. Mr Pain might well have been able to point out some inconsistencies in the evidence. But they were already known to management and the union, and I have already concluded that management was reasonably entitled to reach the conclusion that it did on the weight of the evidence - both primary and background evidence - before it. To reiterate the point, provided that the allegations were specified to Mr Pain, as I have concluded that they were, there is no requirement that primary evidential materials, in this case the complainant and witness statements, have to be made available to the employee as a part of the pre-disciplinary investigation.

Second, without revisiting all of the factual particulars, I have concluded that Mr Pain had a number of real opportunities to respond to the allegations, and in this challenged respect as well, I conclude that the minimum requirements set out in Unilever were met.

Third, while the Court set out in Unilever the minimum procedural requirements that set the framework for a fair and reasonable procedure, it is well to recognise that those guidelines were promulgated for circumstances where "there is no agreed procedure," and that the Court in Unilever accepted, as least in the unionised setting of that case, that an employer meets its obligations to the employee by following the established contractual procedure accepted by

the parties in the workplace. In the present case, the established contractual procedure was followed, with the full involvement of Mr Pain's authorised representative. And, in any event, that procedure exceeded the implied minimum requirements set out in Unilever. On both counts the procedure has to be accepted as fair.

There remains the matter of the claimed disparity of treatment in the cases of Mr Pain and Mr Mareta-Ria. An employer is obliged to deal with employees in a disciplinary setting in a fair and equitable way, but not necessarily in an identical way. Mr Westgate argued that Mr O'Hara implicated Mr Mareta-Ria equally with Mr Pain, principally in that he reported Mr Pain as having said to him that "we" (which he took to mean Mr Pain and Mr Mareta-Ria) would kill him. The respondent's position at hearing was that, on reviewing all of the relevant evidence, management had concluded that the extent of culpability was different. On the evidence brought to bear in these proceedings, that seems to me a conclusion reasonably open to the employer. On the basis of the evidence, the decision was made that different levels of discipline, albeit both severe, were appropriate. On the evidence before me, that is a reasonable conclusion reasonably arrived at. It represents no unfairness to Mr Pain.

DECISION

For the reasons set out above, I conclude that the employer in the instant case carried out reasonable inquiries which left Mr Stevenson on the balance of probabilities with reasonable grounds for believing that Mr Pain had verbally threatened to kill Mr O'Hara. I conclude that Mr Stevenson did so believe, and that the decision to dismiss Mr Pain was a reasonable and fair decision under the circumstances. Having so concluded, I find the dismissal to have been justified, and dismiss the claim.

The Submitted Arguments of Counsel

Mr Westgate and Mr Soper respectively spoke to typed submissions upon which both enlarged. Before I prepared my judgment herein I carefully considered counsel's opposing arguments in their entirety. My consideration extended, of course, to the authorities referred to by counsel, additionally to those cited and drawn upon by the Tribunal.

Despite the depth of Mr Westgate's argument to which Mr Soper fully responded, I accept the fundamental submission of Mr Soper that in the present case "the Tribunal got it right". Mr Westgate, in his determined and wide-ranging argument, has not persuaded me otherwise.

Mr Westgate has argued in support of Mr Pain's grounds of appeal that:

- (i) the Tribunal inappropriately, and in an insufficiently discriminating way, placed far too much reliance, as, he submitted, did the respondent in its disciplinary process,

upon background events which were only marginally relevant to the primary issue, that is to say the contested threat to kill, and

- (ii) in the result both the Tribunal and the company -
 - (a) allowed the "background events" to bolster up Mr O'Hara's complaint that Mr Pain had threatened to kill him, notwithstanding that the background events, counsel submitted, were clearly extraneous to the primary issue, that is to say the contested threat to kill, and
 - (b) this contended "bolstering up" approach highly influentially predisposed the company to unreasonably conclude upon the information before it that the threat to kill had occurred, and the Tribunal to incorrectly hold that the respondent could - to a standard of probability - honestly and reasonably conclude, in the material circumstances of the case, that Mr Pain had threatened to kill Mr O'Hara.

Mr Soper fully, and persuasively in my view, responded to Mr Westgate's argument in this immediate setting which I have only briefly summarised. Mr Westgate acknowledged that the threatening to kill complaint could not be considered, as it were, in an evidentiary vacuum in the disciplinary process undertaken by the respondent. Having so acknowledged however, Mr Westgate strongly submitted that the company, and then subsequently the Employment Tribunal, had inappropriately/too heavily relied upon the information concerning background events to bolster up the quite specific complaint of threatening to kill which counsel contended was simply not made out to a standard of probability.

In short - and without wishing to be unduly repetitive - Mr Westgate submitted that the company could not honestly and reasonably conclude to the requisite standard that the threat to kill was proven against Mr Pain because relevant "evidence" germane to this particular complaint was simply too insubstantial to reasonably justify such a conclusion. Mr Westgate further submitted that the Tribunal should have been compelled to this immediate view, and in concluding to the contrary inappropriately followed the flawed reasoning process adopted by the company.

I am quite unpersuaded by Mr Westgate's submitted argument in this particular setting. To the contrary I now approvingly endorse the approach taken by the Tribunal in its considered treatment of these particular issues.

I next expressly refer to Mr Westgate's submitted argument concerning the contended objectionable disparate treatment of Mr Pain, contrasted with Mr Mareta-Ria. This is addressed in paragraph 2.7 of counsel's synopsis of argument. I consider Mr Soper's response to these particular submissions, supportively of the Tribunal's approach is compelling (pp 15-17 of Mr Soper's summary of argument refers).

Without any intended discourtesy to counsel I shall not traverse further aspects of their differing arguments which I have both closely considered and found, I now re-emphasise, of very considerable assistance.

My Concluded Views

I now simply reiterate my concluded view that the Tribunal's decision cogently and correctly addressed the issues which this case materially concerned. I wholly agree with the Tribunal's decision, despite all that Mr Westgate has urged upon the Court in support of Mr Pain's appeal.

In my view the appeal must be dismissed because it is devoid of merit. Mr Pain's appeal is accordingly now formally dismissed.

Costs

I now order that Mr Soper shall forthwith file a memorandum concerning costs and expenses regarding this particular appeal which the respondent has successfully resisted. I direct that counsel shall copy his memorandum to Mr Westgate. Mr Westgate, I further order, shall submit a memorandum in reply upon the appellant's behalf to this Court within 14 days of

receiving a copy of Mr Soper's memorandum. Mr Westgate shall, of course, copy his memorandum in reply to Mr Soper.

Final Remarks

I simply now re-emphasise my regret that the demands of other unrelated work has prevented the earlier delivery of this judgment.

A handwritten signature in black ink, appearing to read "Robert J. Soper". The signature is written in a cursive style with a large initial "R" and a distinct "S". There is a horizontal line drawn below the signature.