

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2024] NZERA 192  
3238859

BETWEEN                      ANDRE BLAMPIED  
Applicant

AND                              ELECTRICITY ASHBURTON  
LIMITED T/A EA NETWORKS  
Respondent

Member of Authority:        David G Beck

Representatives:             Peter Cranney and Emily Griffin, counsel for the Applicant  
Sara Jamieson and Jared Higby, counsel for the Respondent

Investigation Meeting:      19 and 20 December 2023 in Christchurch and 11 March  
2024 by audio visual link

Submissions Received:      11 March 2024 from the Applicant  
11 and 13 March from the Respondent

Date of Determination:      4 April 2024

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]            Andre Blampied was employed by Electricity Ashburton Limited trading as EA Networks (EAN) as an earth rig operator from October 2017 until being summarily dismissed on 12 July 2022. Mr Blampied was a union member (E Tū Incorporated) and subject of an applicable collective employment agreement.

[2] Mr Blampied claims he was unjustifiably dismissed and is seeking reinstatement and compensatory remedies.

[3] EAN contend Mr Blampied's dismissal was a fair and reasonable decision after they had commissioned an independent investigation into an allegation that Mr Blampied made an indirect threat to physically harm a co-worker. Upon receipt of the investigation report, EAN concluded Mr Blampied engaged in an act they viewed as serious misconduct that they assert destroyed the essential duty of trust and confidence they were entitled to place in him.

[4] In contrast, Mr Blampied's union contend even if serious misconduct could be established the sanction of dismissal was not an action that a fair and reasonable employer could have undertaken in all the circumstances as they erroneously failed to consider Mr Blampied's individual circumstances or they were not properly and fairly considered.

[5] The parties attended mediation but the matter remained unresolved.

### **The Authority's investigation**

[6] Pursuant to s 174E of the Employment Relations Act 2000 ("the Act"), I make findings of fact and law and outline conclusions to resolve the disputed issues and make orders but I do not record all evidence.

[7] Mr Blampied, his retired union organiser Ronald Pithie, and workplace union delegate Aofia Fagalima attended the investigation meeting on 19-20 December 2023 as did EAN's former board chair Philip McKendry, current board member Janine Holland, former Chief Executive Roger Sutton, and a co-worker of Mr Blampied who made the complaint. I have chosen pursuant to Schedule 2, s 10(1) of the Act in this determination, to not to publish the names of the complainant worker and worker who was the subject of the alleged threat. They will be referred to throughout as the 'complainant worker' and the 'worker indirectly threatened' (noting Mr Blampied at the outset of the employer investigation conceded he did threaten the worker involved). All the above witnesses provided written briefs of evidence and answered questions on such.

[8] In addition, by teleconference, I heard evidence from the Chief Executive of an Ashburton contracting company who had provided a written statement on a witness credibility issue and a supportive written statement from Mr Blampied's partner was accepted by all parties without question.

[9] Further, at the Authority's direction, on 11 March 2024, Cindy Meadows EAN's current People and Capability Manager, gave oral evidence and responded to questions by an audio-visual link.

[10] At the end of the investigation meetings counsel spoke to written submissions.

### **Issues**

[11] The issues the Authority must determine are:

- (a) Was EAN's independent investigation conducted in a full and fair manner; and
- (b) was the subsequent decision to dismiss Mr Blampied, one that a fair and reasonable employer could have reached in the prevailing circumstances as measured against the standard set by s 103A of the Act and consideration of s 4 of the Act's good faith requirements.
- (c) If Mr Blampied's personal grievance is established what remedies should be awarded considering the claims for:
  - i. Reinstatement.
  - ii. Lost wages.
  - iii. Compensation under s 123(1)(c)(i) of the Act.
- (d) If Mr Blampied is successful in all or any element of his personal grievance claim should the Authority reduce any remedies granted because of any contributory conduct?

- (e) An assessment of the level of costs to be awarded to the successful party.

### **What caused the employment relationship problem?**

[12] EAN, based in Ashburton, is the trading name for Electricity Ashburton Limited, a locally owned, cooperative company that can trace its roots back to 1921. It operates the mid-Canterbury region's electricity and fibre optic network infrastructure and has an allied civil contracting business.

[13] Mr Blampied commenced working for EAN in October 2017 as a full-time earth rig operator. The job involved working in pairs undertaking earth trenching work installing transformers and power poles to support the electricity network throughout the rural Canterbury region. As the work is often conducted on berms a site traffic management supervision (STMS) ticket is required of a team member and Mr Blampied possessed one. As a STMS holder Ms Blampied had occasion to raise health and safety issues with EAN. Up to the time in dispute Mr Blampied worked on the same site, but not closely with, the complainant worker and says they got on well.

[14] In contrast, Mr Blampied says he considered the worker indirectly threatened to be an antagonistic bully and they were never friendly with each other. Mr Blampied says he specifically avoided the indirectly threatened worker after an October 2021 verbal confrontation and they did not work together. Mr Blampied also says he had had since September 2021, an uneasy relationship with Mr Sutton, EAN's then CEO, after raising health and safety issues with him. Mr Blampied also says he harboured wider concerns about bullying behaviour not being well dealt with by EAN. Mr Blampied could best be described as a witness presenting with a confident and robust personality and was described by others as being able to hold strong opinions and not being afraid to express them on work related matters. In answering questions during the investigation Mr Blampied said he was not intimidated by the worker indirectly threatened.

*The 4 May 2022 incident*

[15] Mr Blampied recalled a conversation he had with the complainant worker on the morning of 4 May 2022 as he was commencing work. Mr Blampied during the Authority investigation conceded that after greeting the complainant worker, he engaged in a discussion in which he “stated he would like to physically hurt” the worker indirectly threatened. Mr Blampied claims he had no intent to do harm or carry out his threat, he was just “venting” and he had “never had a physical run in with anyone at work”. Throughout the employer-initiated investigation Mr Blampied maintained when he spoke to the complainant worker, he initially referred to the worker indirectly threatened as a “fuckwit” and that they had history as he had abused Mr Blampied a while back. Mr Blampied maintained he said: “I feel like taking him out in the field and thwacking him”.

[16] In contrast, the complainant worker, who had at the time been working alongside the worker indirectly threatened for about six months and says they had a good working relationship, noted Mr Blampied would on numerous occasions refer to the worker indirectly threatened in derogatory terms.

[17] On the day of the incident, the worker indirectly threatened was on leave and the complainant worker recalled Mr Blampied approaching him around 8am. They said Mr Blampied started to explain why he sometimes did not acknowledge them when the worker indirectly threatened was nearby. The complainant worker says they told Mr Blampied they were not bothered by this and when Mr Blampied proceeded to explain his ‘beef’ with the worker indirectly threatened, the complainant worker tried to shut down the conversation. Then Mr Blampied was alleged to have said: “Well I am going to hurt him one day that bad that he will never work again and I don’t care if I lose my job”. The complainant worker says Mr Blampied’s tone was calm but it disturbed him. Mr Blampied then walked away.

[18] The complainant worker then pondered the matter overnight saying they were concerned that Mr Blampied may enact the threat he had made. Early the next morning after disclosing their concern about the comment to the Health and Safety Manager at work, the complainant worker was directed to Mr Sutton.

[19] Mr Sutton says when he arrived at work on 5 May at around 8am, the complainant worker approached him and after they indicated they wanted a discussion they repaired to Mr Sutton's office at which point the conversation of the previous day with Mr Blampied was related and noted. Mr Sutton's notes say the complainant worker recalled Mr Blampied saying: "One of these days I am going to hurt him so bad he won't be able to work again. Then he walked away".

[20] Despite being advised not to by Mr Sutton, the complainant worker then shortly after their meeting, chose to brief the worker indirectly threatened about what Mr Blampied had said to him the day before. The complainant worker, during the investigation meeting, says they regretted this action and acknowledged this was the wrong thing to do but claimed they did it because they would feel terrible if Mr Blampied acted on the threat made.

[21] I observe, it was objectively less likely that any threat would be carried out immediately and more likely than not, the complainant worker was merely seeking support for his decision to raise the issue with management as he was a non-union member and feeling understandably isolated from any support.

[22] Later in the same day after being directed by Mr Sutton, the complainant worker provided a signed account of the previous day's incident, as follows:

On the 4<sup>th</sup> of May I was standing at the back of the truck cleaning out things when Andre came up to me and said some time does not wave at me cause I am with [the worker indirectly threatened] and he said had a big argument with him a long time ago and one day he is going to hurt him so bad he will never work again and he could not care if he lost his job over this. On 5 May I was passing past Andre in hall was at work and he turned round to me and said your fuck work mate is back today.

[23] Mr Sutton says he obtained legal advice and determined that an independent investigation must proceed into the allegation against Mr Blampied and a letter proposing Mr Blampied's suspension was prepared. Mr Sutton met Mr Blampied at 4 pm on 5 May, to provide the letter. Mr Sutton's notes disclose he entered a conversation about the incident under investigation impliedly relating the nature of the complaint, by stating "I was concerned about the conversation". They then had an exchange in which Mr Sutton indicated he wanted to

suspend him on full pay until an investigation was completed as this was about health and safety. Mr Sutton indicated Mr Blampied ought to seek legal or union advice.

[24] Mr Blampied is recorded in Mr Sutton's notes as indicating, he had done nothing wrong and was the victim of the worker indirectly threatened. Mr Blampied said that the indirectly threatened worker had called him "a lazy lying fuckwit".

[25] The conversation is recorded as ending with Mr Sutton saying "... are you clear you are not coming to work today" and that Mr Blampied was to stay away from the complainant and the indirectly threatened worker. A letter dated 5 May, purported to propose a suspension, seeking Mr Blampied's views before 5pm the following day was given to Mr Blampied. It indicated information on the proposed investigation would also be provided. At this time the complainant worker's statement was not provided.

[26] Mr Sutton also says he rang a senior contact in the local police but was told no threshold of concern had been reached to warrant any action from them.

[27] On the morning of 5 May, Mr Fagalima the union workplace E Tū delegate, recalled meeting with Ms Meadows and Mr Sutton, and Ms Meadows telling him that there had been a threat made against a worker and they were going to suspend the person involved pending an investigation. Mr Fagalima when told the complaint had been made to Mr Sutton 'in-person', suggested it needed to be in writing. It is apparent that once this concern was raised, Mr Sutton obtained a written complaint later during 5 May.

[28] Mr Fagalima asked for an extension of time for Mr Blampied to comment on the proposed suspension until the end of 9 May but did not initially provide comment as the union had not been provided with a copy of the complaint letter. In the interim, Mr Blampied was stood down on pay.

[29] On 9 May, Mr Blampied received a letter confirming an independent investigation would proceed; its scope and the identity of the investigator was revealed and counselling offered (no mention was made of the continuing suspension and the written complaint was not disclosed). The letter noted that the alleged comments had caused the two workers involved

distress “and are not supportive of a safe working environment”. It was noted that if the comments were substantiated from the complainant’s recall, then this finding “could amount to serious misconduct and may lead to further disciplinary action up to and including dismissal”. The letter also indicated that once complete in draft, comment on the investigation report would be allowed and then Ms McKendry, EAN’s board chair, would act as the decision-maker and “lead any employment process which may follow his decision”.

[30] In a further email of 11 May, Mr Sutton confirmed the suspension decision, outlined the proposed terms of reference for the investigation and the identity of the independent investigator. This email had the following attachments:

- A 10 May letter to the investigator setting out the terms of reference.
- A copy of an initial signed statement from [the complainant].
- A copy of notes from myself when meeting with [the complainant].
- A copy of your Collective Employment Agreement.
- A copy of EA Networks Bullying and Harassment policy.

[31] The purpose of the investigation was described as “to give those involved a fair opportunity to respond to the allegation and to establish the facts”. The letter concluded that the investigator would soon be in contact to arrange an initial investigation meeting. Mr Fagalima responded, acknowledging the investigation was proceeding, indicated the union lawyer was being consulted and that it appeared a “MASSIVE disservice to Andre here”.

### *The investigation*

[32] Mr Sutton says on legal advice, he engaged an external, experienced employment lawyer to conduct the independent investigation.

[33] The terms of reference for the investigation that were not contested, were basically described in the investigation report as:

.... on 4 May 2022, Andre Blampied made comments to another employee, [the complainant worker], in which Andre threatened to physically hurt [worker indirectly threatened] a fellow employee (the Allegation).

[34] After interviewing Mr Blampied, a preliminary, but what I consider important, contextual issue arose for the investigator. Mr Blampied advanced an explanation for his poor relationship with the worker indirectly threatened. This was that they had in October 2021, a verbal confrontation involving two stages – the first being the worker indirectly threatened had made derogatory remarks about Mr Blampied (witnessed by others) and shortly thereafter, Mr Blampied approached the worker indirectly threatened and after opening their vehicle door, robustly remonstrated with them. Mr Blampied accepted he used abusive language and was angry but says he did not make a physical threat but recalled walking away and slamming the vehicle door. No one witnessed the latter interchange. While Mr Blampied recalled reporting the initial derogatory comments to his immediate manager, he says he did not make a formal complaint.

[35] Mr Blampied initially sought the investigation be widened into the credibility of the worker indirectly threatened, claiming it was known by others that they were aggressive and that selected workers should be interviewed. The investigator's report indicated they were initially reluctant to widen the scope of the investigation believing it would not necessarily assist the issue of a "credibility contest" between Mr Blampied and the worker indirectly threatened. After Mr Blampied contested a statement made by the worker indirectly threatened (indicating they never violently threatened others) the investigator offered to broaden the investigation. However, the investigator proffered a view this would take up more time and suggested the October incident, only be relied on as contextual background information rather than exploring credibility issues in depth. On advice from his union, Mr Blampied accepted this as a way forward.

[36] I pause to comment that the approach pragmatically agreed, did not objectively place Mr Blampied at a particular disadvantage as it was uncontested by him that he had robustly

approached the worker indirectly threatened in October. Mr Blampied confirmed this during the investigation meeting, indicating he was angry and says he recalled saying “don’t you ever fucking speak to me like that again”. The fact Mr Blampied was the subject of earlier derogatory remarks from the worker indirectly threatened was uncontested.

[37] What was not investigated was the wider issue of whether the worker indirectly threatened lacked credibility and/or had a reputation for being aggressive to other workers. In the context of the fact finding about the central allegation of the extent of the indirect threat made by Mr Blampied, I consider the investigator acted appropriately.

[38] I am satisfied that as result of the investigation and interview notes provided therein, that EAN’s decision-maker had sufficient information to contextually inform them of the historically poor relationship between Mr Blampied and the worker he indirectly threatened.

[39] The investigator interviewed eight people: Mr Blampied, the complainant, the worker threatened, Mr Sutton and four other workers with experience of observing the protagonists.

#### *The investigation’s conclusion*

[40] The final investigation report was issued on 29 June 2022. Under a heading “Factual findings/Conclusions” the investigator outlined a preference for the complainant’s recollection of what Mr Blampied said on 4 May 2022, that is: “*I am going hurt him one day that bad that he’ll never work again and I don’t care if I lose my job*”. The investigator proceeded to indicate in terms of the significance of the factual finding:

- 1) That the allegation is substantiated.
- 2) That making a physical threat against a co-worker is potentially conduct of a serious nature.
- 3) That the conduct may potentially breach the Company’s Bullying and Harassment Policy as a single instance which is so significant that it has a detrimental effect on a person’s dignity, safety and wellbeing.

[41] On the third point, earlier in the report the investigator had mused that due to the policy definition of harassment being narrow as the conduct “must be ‘directed towards’ a

person” it was “debatable” whether Mr Blampied’s conduct could meet this requirement. However, the investigator then posited that s 5 of the Harassment Act 1997 definition of “Meaning of act done to a person” may be broader and that “a threat made via a third party can amount to harassment”.

[42] Mr Blampied and his union did not comment on the draft report or at the time, challenge the overall validity or methodology adopted by the independent investigator to arrive at the conclusion reached in their final report. However, in submissions counsel raised the credibility of the investigation report reasoning and the fairness of its finding on the key factual dispute of who’s version of the 4 May 2022 conversation should be preferred and, whether it could be safely relied upon by EAN’s decision-maker. I will return to this point in considering the overall fairness and reasonableness of the decision to dismiss and how that was arrived upon.

### **Issue 1 – was the investigation conducted in a full and fair manner?**

[43] I find the independent investigation was consistent with the terms of reference and conducted in a full, fair, and thorough manner. Mr Blampied and his union had at the time, ample opportunity to comment on the investigation report’s veracity or otherwise, challenge the methodology adopted. In the final analysis the report provided a factual finding on the issue identified and explained how that finding was arrived upon.

### **The decision to dismiss Mr Blampied**

[44] In a letter of 4 July, Mr McKendry indicated he had reviewed the findings of the investigation and found that what the investigator had established “could amount to serious misconduct” .... “because it has been found that you have made a threat to physically hurt a fellow employee” .... “in a serious way that bad that he’ll never work again” and that the threat made had significantly affected both workers involved.

[45] Mr McKendry then suggested threats of physical violence “are unacceptable in our workplace” and that they contravened a statutory obligation to “provide a safe workplace for

all staff”. No mention was made of whether Mr McKendry had concluded the actions of Mr Blampied amounted to harassment.

[46] Mr McKendry then invited comment on his “proposed decision that your conduct amounts to serious misconduct”. After emphasising he would keep an open mind, he indicated: “I would prefer those comments in writing, but if you request a meeting, I will consider that request”. The letter concluded by indicating the next step if the serious misconduct finding did not change, was to “outline my proposed decision as to disciplinary action”.

[47] I observe that Mr McKendry did not make an explicit invite to meet with him as the decision-maker. Mr Blampied’s employment agreement, disciplinary procedure is explicit in indicating a meeting should take place with to allow a worker to address concerns. This provision was met by the convening of an investigation and the investigator meeting with Mr Blampied to record a response to the allegation made. However, the procedure then states:

The Employer having investigated the matters/allegations to its satisfaction will reconvene a meeting with the Employee and make the findings of the investigation known. The Employee will be allowed a reasonable opportunity to make further representations to the Employer.<sup>1</sup>

[48] In the event, Mr Blampied, and his representatives, did not seek a meeting or dispute the fact that the above process had not been followed and chose to make a written response.

[49] In a 6 July emailed response to Mr McKendry from Mr Blampied and Fagalima (composed by the latter), several points were raised including a view that insufficient account had been taken of the October incident between Mr Blampied and the worker indirectly threatened despite Mr Blampied reporting his concerns to management.

[50] Mr Fagalima then stated: “This in no way condones anything that happened afterwards” but then suggested that Mr Blampied was in context, not the only aggressor. Notwithstanding it was indicated that Mr Blampied understood “the seriousness of the charge”.

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<sup>1</sup> *EA Networks and E Tu Incorporated Collective Agreement (1 July 2022 – 30 June 2024)*, Appendix G: Disciplinary procedures, cl 7.

Mr Fagalima then stated, “we don’t agree with the findings we know there are more than one option available, and Andre is 100% willing to make sure of a happy and safe workplace”.

[51] The remainder of the 6 July email detailed mitigating and past contextual factors Mr McKendry should consider. These were in summary:

- Mr Blampied’s clean record with the company and his known commitment to health and safety issues.
- A suggestion that ‘a proper process’ should have involved People and Capability and because the complainant was perceived as being close to Mr Sutton this option had been denied.
- Reference to another situation where a manager had engaged in abusive behaviour and a view that management had history in not dealing with this manager’s prior behaviour and that “systematic” bullying was not being decisively dealt with.
- That Mr Blampied was being singled out unfairly for a one-off incident and not a “pattern” of behaviour.

[52] No request to meet Mr McKendry was advanced.

#### *Proposed dismissal*

[53] In an 8 July response (emailed at 7:39 am) to Mr Blampied and Mr Fagalima, Mr McKendry indicated he had concluded Mr Blampied’s “actions on 4 May 2022 meets the legal definition of serious misconduct”. He continued that “this was a very serious incident involving a threat of physical violence towards a fellow member of staff and that is unacceptable in our workplace”.

[54] Mr McKendry then proposed to summarily terminate Mr Blampied’s employment, reasoning that after considering Mr Blampied’s 6 July email assurances of commitment to a happy and safe workplace; he did “not believe this is the kind of action that we can tolerate in the workplace in any way”. Mr McKendry then indicated before he confirmed any decision, he would consider any “comments to me in writing” by the close of business on 11 July.

[55] I note Mr McKendry again did not at this crucial stage of the process, offer to meet with Mr Blampied and his representatives. On being pressed about this omission during the

investigation, Mr McKendry indicated he had earlier met Mr Blampied at a health and safety meeting and says he had no issues with him.

[56] In an email of 8 July, Mr Fagalima promptly responded to Mr McKendry's proposal to dismiss Mr Blampied. While indicating the union lawyer would soon be involved, Mr Fagalima expressed a view that despite it being deemed serious misconduct, he was surprised how it could lead to a dismissal decision given Mr Blampied's "clean record and exemplary reviews". Mr Fagalima also reiterated a view that disparity was at issue in relation to how it had been perceived a bullying manager had recently not been dismissed. No request to meet was advanced.

[57] On 11 July, following a telephone conversation, Mr Pithie the local union organiser, emailed Mr McKendry setting out "several issues with this case and the threat of dismissal". Mainly, Mr Pithie posited unease about the investigator concluding that although both seemed plausible, they preferred the complainant worker's recall of what had been said on 4 May and the reasoning behind this conclusion (i.e., the assumption that the complainant worker had nothing to gain by making a complaint and Mr Blampied had much to gain by minimising the threat admittedly made).

[58] Mr Pithie further expressed a concern that HR did not get involved and then suggested there was insufficient evidence to conclude the matter on the "balance of probabilities". Mr Pithie indicated Mr Blampied had no previous accusations against him and perhaps the October incident should have been investigated further.

[59] I observe that the latter was a counter intuitive remark as had the October incident been investigated further, it would have likely established an incident where Mr Blampied also acted in a verbally aggressive and objectively reactive manner (a fact he admitted). On firmer ground, Mr Pithie emphasised the threat being indirect and made during a casual conversation where Mr Blampied felt comfortable expressing himself in an unguarded manner in robust language not uncommon in the workplace.

[60] On the latter issue, Mr Fagalima's evidence related several past incidents where robust exchanges had not in his opinion, been dealt with well by EAN including one involving himself.

[61] Ms Holland a board member who chairs the People, Culture and Sustainability sub-committee, expressed an opinion that such a robust culture may have existed in the past and at times was not well dealt with and it was an ongoing challenge to change this culture and encourage reporting of concerns to foster greater transparency.

[62] Mr Pithie concluded his response, by accepting a disciplinary sanction for Mr Blampied was appropriate but one short of dismissal.

### *The final decision*

[63] By way of a letter of 8 July, Mr McKendry briefly acknowledged the submissions made, reiterated his health and safety obligations, said he had considered Mr Blampied's clean record and positive performance reviews but had concluded: "I cannot issue any sanction other than termination with immediate effect".

[64] Mr McKendry explained his reasoning for the dismissal decision as acceptance of the investigator's conclusion that the complainant's recollection of what was said on 4 May 2022 was preferred and that it constituted "a threat to physically hurt a colleague in a way that is serious and debilitating. That kind of conduct is completely unacceptable in our workplace".

[65] In being asked to describe how he arrived at the decision to dismiss, Mr McKendry first impressed that although he was an experienced employer in his own right (a local farming business) and had been a EAN board member since 2004, he had never been involved in either capacity in dismissing a worker. He described it as "new territory" and being heavily reliant on legal advice to navigate what issues he should consider in determining whether the conduct of Mr Blampied reached a threshold of being capable of categorisation as serious misconduct. Mr McKendry disclosed, he was initially briefed by Mr Sutton on process issues when he was deputed the decision-making task.

[66] Thereafter, Mr McKendry says he was not provided with Mr Blampied's personal file and did not request it. When asked did he inquire of EAN's Human Resources department or Mr Sutton about Mr Blampied's employment history, he said, no, he was briefed on historical background matters by the lawyers and says over the years he was made aware by Mr Sutton of workplace culture issues and Mr Blampied's involvement.

[67] It also emerged, despite Mr Sutton claiming he had not taken part in any of the final disciplinary deliberation, that he briefed Ms McKendry about the complainant worker and described him to Mr McKendry as trustworthy and reliable. When asked did Mr Sutton also brief you on Mr Blampied's character, Mr McKendry said no, and that he (Mr Sutton) had also not briefed him about the worker indirectly threatened.

[68] Generally, Mr McKendry says he relied upon the investigation report and the attached witness summaries. In reaching the decision to dismiss Mr Blampied, Mr McKendry says he took the following factors into account:

- The investigation report and its conclusions.
- Legal advice
- Consideration of what were our options.

[69] Mr McKendry says it became clear it was serious misconduct and he had to consider EAN's values and standing in the community. Mr McKendry, who I stress gave sincere and clear evidence, when I pointed out he had not met with Mr Blampied, said "no, it seemed a clear-cut decision".

[70] Despite not meeting Mr Blampied, Mr McKendry says his lack of remorse was at issue, he said we all make mistakes but there was no evidence of remorse which made it more clear-cut. Mr McKendry indicated he could not understand why Mr Blampied had not just approached the indirectly threatened worker to make it clear it was not a serious comment or say sorry and acknowledge his mistake. Mr McKendry, however, was aware from the investigation report, of bad blood between the two of them.

[71] I observe, given the investigation process and warning not to approach the indirectly threatened worker, that Mr McKendry's view above was somewhat unrealistic. I note however, during the investigation and subsequent correspondence, Mr Blampied concentrated on accepting he had made the indirect physical threat but emphasised it was expressed in a less aggressive manner.

[72] After Mr McKendry concluded the matter to be serious misconduct, I asked during the final disciplinary stage, did he consider a lesser penalty. Mr McKendry initially suggested he did consider a lesser punishment but then reiterated his view that threatening to hurt someone so bad, was serious misconduct when it was coupled with no remorse. When asked "did you consider a final written warning?" – Mr McKendry said no, never came up. He then says he took it on "trust" what Mr Blampied's employment record was like but did not check his personal file. I observe that Mr McKendry also did not apprise himself of the content of Mr Blampied's employment agreement's disciplinary process that lists: "Possible outcomes" include: "No further action being taken, letter of expectation. A formal written warning, dismissal with or without notice".<sup>2</sup>

[73] Mr McKendry summed up his approach as relying on legal advice and the investigation report findings including assessing intent but was clear that the decision to categorise it as serious misconduct was his own; he reiterated "it was the making of a threat of physical violence" and, he took it from the investigation report that Mr Blampied was going to assault the indirectly threatened worker.

## **Issue 2 – the decision to dismiss – was it justified?**

[74] Although the Authority does not have unbridled licence to substitute its decision for that of the employer<sup>3</sup> it may reach a different conclusion, provided the conclusion is reached objectively and with regard to all the circumstances at the time the dismissal occurred.<sup>4</sup> The

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<sup>2</sup> Ibid at cl 8.

<sup>3</sup> *X v Auckland District Health Board* [2007] 1 ERNZ 66.

<sup>4</sup> *Air New Zealand v Hudson* [2006] 1 ERNZ 415.

Authority is essentially deciding “whether the decision and conduct of the employer fell within the range of what a fair and reasonable employer could have done in all the circumstances”.<sup>5</sup>

[75] Section 103A(3)(a-d) of the Act elements that the Authority must objectively measure an employer’s actions against are in summary:

- (a) Whether given the resources available to the employer, did they sufficiently investigate the allegations made against the employee.
- (b) Did the employer raise the issues of concern with the employee prior to deciding to dismiss?
- (c) Was the employee afforded a reasonable opportunity to respond to identified concerns.
- (d) Did the employer genuinely consider any explanation provided by the employee before deciding to dismiss; and
- (e) any other contextual factor the Authority regards as appropriate to consider.

[76] Applying the above elements broadly requires the Authority to look at whether EAN’s actions and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred and, I must also have regard to the Act’s good faith provisions and the relevant employment agreement. This requires that I consider various contextual factors, including broadly whether concerns were sufficiently raised by the employer with the employee, whether a full, fair, and thorough investigation was completed and whether a reasonable opportunity to respond to those concerns was given and, whether the employer genuinely considered the employee’s explanations (if any) before the decision to dismiss was made including consideration of alternatives to dismissal.

[77] This is a dismissal that can neatly be divided into process and substantive elements.

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<sup>5</sup> *Angus v Ports of Auckland* [2011] NZEmpC 160, (2011) 9 NZELR 40 at [25].

## *Process*

[78] I find that EAN given its available resources and recourse to legal advice at an early stage, should be held to a reasonably high standard.

[79] As discussed above, I find the independent investigation commissioned by the employer sufficiently or arguably exceeded, the requirement of a full and fair investigation of EAN's concerns. I am satisfied that EAN's decision-maker upon receiving the investigation report's factual finding, then approached the decision-making process in an independent manner. There was identified a clear conflict between the complainant's recollection of how Mr Blampied related the indirect threat to them and Mr Blampied's recollection. While both disclosed a physical threat had been made, one was more menacing in content.

[80] Considering the totality of the evidence, I find the decision maker was reasonably entitled to rely on the investigation report's content and findings on credibility matters that it was more likely than not, that the complainant's recollection of the conversation was accurate as it was reasonably contemporaneous (related the next day after the incident). In addition, the evidence disclosed a significant and ongoing animus between Mr Blampied and the indirectly threatened worker.

[81] In *Whanganui College Board of Trustees v Lewis*, the Court of Appeal has observed:

The ascertainment of facts on which an employer forms a belief that an employee has engaged in serious misconduct is not the same as proving to a Court or Tribunal that the dismissal was justified. The first does not involve any standard of proof, the second does. In ascertaining the facts the employer may be presented with conflicting accounts. He or she, acting reasonably, will be entitled to accept some in preference to others. That does not call for the application of any legal standard of proof. Nor is it usual to impose the application of a legal standard of proof on decisions of a litigant. That is not needed; there is already the standard of reasonableness. But when required to prove that dismissal was justified the employer will need to show that both the course taken to ascertain the facts and the determination that they warranted dismissal were reasonable. That must be shown on the standard of proof of the balance of probabilities flexibly applied according to the gravity of the matter (the dismissal) in the circumstances.<sup>6</sup>

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<sup>6</sup> *Whanganui College Board of Trustees v Lewis* [2000] 1 ERNZ 397 (CA) at [20].

[82] The above guidance allows an employer when wrestling with conflicting accounts, to make a finding of credibility provided the process adopted in getting to this point is as I have positively found here, subject to a standard of reasonableness.

[83] Mr McKendry then engaged in an objectively careful ‘two step’ disciplinary process of first identifying potential serious misconduct and seeking comment and then coming to a potential dismissal decision and seeking comment on such. The process was not rushed and Mr Blampied who was well represented throughout, had ample opportunity for input and to explain his conduct and any mitigating circumstances prior to the dismissal being finalised.

[84] I could criticise Mr McKendry for not apprising himself of the employment agreements disciplinary provisions and being ambiguous on his offer to meet with Mr Blampied. However, had Mr Blampied sought a meeting to address Mr McKendry there is no suggestion that such would have been declined. In the event, Mr Blampied chose not to seek a meeting and forwent an opportunity to expand upon any mitigating factors his union had set out in writing.

[85] A key to the decision as Mr McKendry emphasised in evidence, was his assessment that Mr Blampied offered no explanation and showed no remorse about the threat he made but impliedly continued to justify his threat because of a past verbal slight from the worker indirectly threatened. Mr Blampied also reinforced during the Authority investigation meeting that he had made the previous abusive and impliedly aggressive comment to the worker indirectly threatened. When pressed about how he would interact with the indirectly threatened worker if reinstated, Mr Blampied offered no suggestion he would reconcile and instead indicated he would just ignore them, he said: “I don’t have to work with” them.

[86] I find that EAN has satisfied the requirements of fairness and reasonableness as set out in s 103A(3)(a) – (d).

#### *The substantive decision*

[87] The key issue is whether after accepting the conclusions of the investigation report, could EAN conclude that the indirect physical threat made by Mr Blampied constituted serious

misconduct sufficient to destroy the ongoing relationship of trust and confidence they were entitled to place in Mr Blampied. Was this a fair and reasonable conclusion that EAN could have reached in all the circumstances.

[88] Objectively considered, the making of a physical threat against a co-worker, albeit indirect, is capable of being considered serious misconduct depending upon the contextual circumstances.<sup>7</sup> It was also open to EAN to consider the comments made about the indirectly threatened worker were also constantly undermining of him and the comments amounted to threats of physical harm.<sup>8</sup>

[89] EAN was also entitled to consider the impact of the threat on the complainant worker albeit that the threat was not directed at him. It is not trite to observe that no employer or employee should be expected to put up with threatening behaviour in the workplace.<sup>9</sup> The impression the complainant gave in giving evidence was they were significantly shaken by Mr Blampied's threat. I found this witness to be credible.

[90] Having concluded that EAN has not acted in an unjustified procedural manner, I must apply s 103A(4) of the Act that allows the Authority in considering whether EAN acted fair and reasonably in concluding the conduct of Mr Blampied was serious misconduct, to consider any other factors it thinks appropriate.

[91] In submissions I was invited to consider that there had been insufficient focus upon objectively assessing whether the comments were to be taken as intentional or that Mr Blampied was just 'venting' his anger and if he did not intend it, then that the comments were throwaway or merely bravado. In this regard, Mr McKendry says when assessing the situation in the overall context of the poor relationship between Mr Blampied and the indirectly threatened worker as described in the investigation report, he was of the belief that Mr Blampied intended at some future date to hurt the indirectly threatened worker.

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<sup>7</sup> See discussion in *Brown v Malbec Orchards Ltd* [2023] NZERA 130 at [39].

<sup>8</sup> See *Martinsen v Target International (NZ) Ltd* [2018] NZERA Auckland 395 at [76].

<sup>9</sup> *O'Connor v Dry Dock Co Ltd* [2014] NZERA Auckland 2888 at [37].

[92] I find in all the circumstances, Mr McKendry made a reasonable assumption given Mr Blampied was inexplicably harbouring and dwelling upon a long-time grudge, that the nature of the threat was suggestive of it being a real risk it would be acted upon. In this context, although suggested otherwise in submissions, I do not consider the disputed recollections of the 4 May conversation are material – either version disclosed a threat of serious physical violence specifically directed at someone. The person was someone Mr Blampied had a long-standing enmity towards. It was objectively reasonable in all the circumstances for Mr McKendry to conclude that a threat of violence had been made. If a threat of serious violence is objectively capable of being considered serious misconduct, then it is not lessened by that threat only being defined as a desire to take someone into a field and to “thwack” them. The dictionary definition of which is to “strike forcefully with a sharp blow”.<sup>10</sup>

[93] While in giving evidence Mr McKendry expressed that the making of physical threats was anathema to the values of the organisation and its community standing, I find that not to be an unreasonable stance to take. Mr Blampied’s counsel alluded to this being akin to a ‘zero-tolerance’ approach. I objectively conclude that no documentation supported this premise and EAN did not present the dismissal as being based upon such a zero-tolerance stance.

[94] There were no immediate mitigating circumstances offered by Mr Blampied other than a slight by the indirectly threatened worker made in a conversation that had occurred some eight months earlier. Mr Blampied accepted that he made the threat but throughout the investigation proceedings sought to justify the making of the threat and did not acknowledge the impact of the making of the threat on the complainant worker.

#### *Alternatives to dismissal*

[95] While I observe some concern about Mr McKendry’s lack of knowledge of the employment agreement and a suggestion, he did not consider a final warning I note his evidence that Mr McKendry took legal advice throughout the process including on the parameters of his decision-making and articulated the matters he considered. There is not a specifically defined

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<sup>10</sup> Catherine Soanes, Angus Stevenson, Concise Oxford English Dictionary (Eleventh Edition), Oxford University Press, New York at 1504.

‘obligation’ to exhaustively consider alternatives to dismissal in s 103A of the Act and the employment agreement only posits alternatives as possible outcomes. In the event, I am satisfied that in making the decision, Mr McKendry took a measured and careful approach and objectively was entitled to conclude that an indirect threat of serious physical violence had been made and he set out in writing to Mr Blampied why he considered this constituted serious misconduct.

[96] To complete the application of the statutory justification test, I find 103A(5) of the Act does not prevail as the procedural defects identified, were minor in the context of how the dismissal was effected and they did not objectively result in Mr Blampied being treated unfairly.

[97] In the final analysis, this is not a case where the Authority having concluded that the employer’s independent investigation was full and fair and the subsequent categorisation of Mr Blampied’s threat however expressed, was capable of being deemed serious misconduct, can substitute a lesser sanction to the one that was fair and reasonably open to EAN in all the circumstances. In *X v Chief Executive of the Department of Corrections* the Employment Court referred to:

A comment by the full Court in *Angus* illustrates the point; the Act contemplates there may be more than one fair and reasonable response or other outcome that might justifiably be open to a fair and reasonable employer in the circumstances. If the employer’s decision to dismiss the employee is one of those responses the dismissal must be found to be justified. It follows that, if dismissal was one option open to the Department after conducting a proper investigation into the circumstances of the complaint, its decision ought not to be interfered with merely because the Court might, possibly, think some lesser penalty could have been imposed.<sup>11</sup>

## **Finding**

[98] I find the decision to summarily dismiss Andre Blampied was one that a fair and reasonable employer could have reached in all the prevailing circumstances.

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<sup>11</sup> *X v Chief Executive of the Department of Corrections* [2018] NZEmpC 106 at [71]

[99] Andre Blampied was justifiably dismissed by Electricity Ashburton Networks Limited and is not entitled to consideration of the remedies he seeks.

### **Costs**

[100] Costs are reserved.

[101] The parties are encouraged to resolve any issue of costs between themselves.

[102] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Electricity Ashburton Networks Limited may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of this determination. From the date of service of that memorandum Andre Blampied will then have 14 days to lodge any reply memorandum. Upon request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[103] The parties can expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.<sup>12</sup>

David G Beck  
Member of the Employment Relations Authority

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<sup>12</sup> For further information about the factors considered in assessing costs see: [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)