

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 166
5423136

BETWEEN MICHAEL RILEY
Applicant

A N D COMMIT SERVICES
LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Helen White, Counsel for Applicant
Gretchen Stone, Counsel for Respondent

Investigation Meeting: 9 April 2014 at Auckland

Date of Determination: 2 May 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Riley) alleges that he was unjustifiably dismissed from his employment while the respondent (Commit) resists that contention.

[2] Mr Riley was employed as a Project Manager with Commit in terms of an individual employment agreement signed by the parties in June 2012, having been employed in that role since 16 July 2012. The essence of Mr Riley's role was to project manage the installation of data cabling for clients of Commit. He did that by engaging and supervising contractors who provided the physical services.

[3] During the first quarter of 2013, Commit discussed internally the prospect of ceasing to use a contractor styled Multimedia Communications and that decision was

conveyed by Commit to its staff on 20 March 2013. Coincidentally, Mr Riley had previously been employed by Multimedia Communications.

[4] By May of 2013, Mr Riley was engaged in the management of an installation for the Auckland District Health Board's Point Chevalier Maori Health Unit. The Auckland District Health Board (the Board), was one of Commit's largest clients. Gavin Hamlin was another senior employee of Commit and amongst other things, was the account manager for all of the Board's work.

[5] Before 21 May 2013, Mr Riley had made arrangements for Multimedia Communications to be the contractor for the Board's Point Chevalier Maori Health Unit. However, on 21 May 2013, Mr Riley received an email from Mr Hamlin indicating that the contractor for the Maori Health Unit would be Comserve and not Multimedia Communications.

[6] Mr Riley responded to this advice by seeking a meeting and that meeting took place at Commit's offices on 22 May 2013. It is common ground that Mr Riley became upset with Mr Hamlin and within a short time of the meeting commencing, Mr Riley had told Mr Hamlin that he would "*punch him in the head*", or words to that effect.

[7] Forthwith on that threat being made, Mr Hamlin left the meeting, leaving Mr Riley and Mr Gleye together. Mr Gleye is Commit's Managing Director. He sought to calm Mr Riley down.

[8] Mr Riley left the workplace after the meeting and early that evening, Mr Gleye emailed Mr Riley seeking to make contact to progress the matter.

[9] There was a subsequent meeting between Mr Gleye and Mr Riley at 9am on the following day, 23 May 2013. During the course of that meeting, there was a discussion about the involvement of another company, a competitor called NZ Data, and the fact that apparently a salesperson from NZ Data had contacted the Board, presumably seeking its work, the previous day.

[10] Although this is disputed by Mr Riley, Mr Gleye maintained in his evidence to the Authority that Mr Riley had confirmed during the 23 May 2013 meeting that he (Mr Riley) had spoken with a salesperson from NZ Data after he had left Commit's

workplace the previous day, and that he had told the NZ Data employee about the argument and that it involved the Board.

[11] As a matter of fact, there was a telephone discussion between Mr Riley and an employee of NZ Data called Logo Lesatele at 10.40am on 22 May 2013. Mr Riley and Mr Lesatele were friends having both previously worked for Multimedia Communications.

[12] An email message from Mr Lesatele to the Board was sent that same day at 10.47am.

[13] Mr Riley denies telling Mr Gleye that he had told Mr Lesatele about the client involved in the argument the previous day although he acknowledges speaking to Mr Lesatele but he says, only to cancel a catch up for a coffee, because he was so upset by the argument at work earlier that same day. Notwithstanding that, Mr Riley says that as soon as he admitted that he had spoken with Mr Lesatele, Mr Gleye summarily dismissed him.

[14] Conversely, Mr Gleye's evidence is that it was the admission by Mr Riley (which Mr Riley denies having made) that Mr Riley had told Mr Lesatele which client the argument was about that was the final straw and encouraged him to tell Mr Riley that he was dismissed with immediate effect.

[15] At some point towards the end of the meeting between Mr Riley and Mr Gleye on 23 May 2013, Mr Riley tabled a letter of resignation which it is common ground Mr Gleye did not accept.

[16] Shortly after the dismissal, however activated, Mr Riley sought from Mr Gleye a written statement of the reasons for the dismissal and an email was provided by Mr Gleye at 10.36am on 23 May 2013 which referred generally to the verbal confrontation with Mr Hamlin, the threat to physically assault him, an allegation that Mr Riley had told Mr Gleye that he did not answer to him (Mr Gleye), an allegation that Mr Riley had refused to apologise to Mr Hamlin, and the contention that Mr Riley had disclosed confidential information to Mr Lesatele.

[17] A personal grievance was raised by the filing of the Statement of Problem on 4 June 2013 which, amongst other things, sought interim reinstatement. That latter claim has been withdrawn and is no longer pursued by Mr Riley.

Issues

[18] This is a case where there are significant factual differences between the parties and because of that it will be convenient if I consider the following questions:

- (a) What happened prior to the 22 May 2013 meeting;
- (b) What happened at the 22 May 2013 meeting;
- (c) What happened at the 23 May 2013 meeting;
- (d) Has Mr Riley made out his claim of unjustified dismissal;
- (e) Has Mr Riley contributed to the circumstances giving rise to his dismissal?

What happened before the 22 May 2013 meeting?

[19] It is common ground that Mr Gleye had determined for proper business purposes that there should be a change of contractor from Multimedia Communication whose service had been falling off over time. It is also accepted that Commit made the decision available to all staff (including Mr Riley) on 20 March 2013.

[20] Notwithstanding that, Mr Riley maintained in his evidence to the Authority that he had obtained Mr Gleye's consent to use Multimedia Communications as the contractor for the Maori Health Unit and he told me at the investigation meeting that Mr Gleye had personally signed off that decision. But Mr Gleye rejected that evidence completely, maintaining first that he did not do what Mr Riley claimed that he did and secondly that there was no basis on which he would ever be involved in that level of detail in the business. Mr Riley spoke of having Mr Gleye commit to a works order or purchase order for the Maori Health project using Multimedia Communications but Mr Gleye said that was simply not what happened and that he would never be involved in that kind of detailed decision-making.

[21] So while it is disputed that Mr Riley had any consent from Mr Gleye to proceed with the Maori Health project using Multimedia Communications as the contractor, it is nonetheless plain on the evidence that whether approved or not, Mr Riley was operating on the basis that the work would be performed by Multimedia

Communications under his supervision, notwithstanding the earlier decision made by Mr Gleye to dispense with Multimedia Communications as a contractor.

[22] Despite Mr Riley's efforts to persuade me that he had Mr Gleye's sign off on persevering with Multimedia Communications for this particular job, I have to say I prefer Mr Gleye's evidence. I cannot imagine why he would have agreed to continuing with Multimedia Communications for this job so soon after making a general announcement that that contractor was not going to be Multimedia Communications.

[23] I think on the balance of probabilities it is more likely than not that Mr Gleye's evidence is correct; not only does he say that he did not consent to Multimedia Communications doing the job, but also, and perhaps more importantly, he said that there were no circumstances in which he would be involved in the level of detail contemplated by Mr Riley's evidence.

[24] Accordingly, I am not persuaded by Mr Riley's evidence that he, as it were, had permission to use Multimedia Communications and again I am forced to conclude that Mr Gleye's suggestion that Mr Riley was struggling to make the change from his old employer has some force and effect. Mr Gleye told the Authority that, put simply, Mr Riley liked Multimedia Communications and did not like its replacement, ComServe.

[25] Mr Riley disputed that conclusion in his evidence, but it is difficult not to find some support for Mr Gleye's view in what looks like Mr Riley's dogged persistence in using Multimedia Communications for the Maori Health project when, just two months before, Mr Gleye had made the decision to stop using Multimedia Communications.

[26] In any event, those conclusions are not central to the Authority's findings but are nonetheless relevant because of the context. On the one hand, we have Commit as a company determining not to use Multimedia Communications and within two months of that decision being communicated to staff, we have a particular contract where Mr Riley is proposing to use precisely that contractor to deliver services on behalf of his employer.

[27] Then, we have Mr Hamlin's involvement. As I have already noted, Mr Hamlin was the account manager for the Board. As a large client, the Board had a

significant number of different sites and a significant number of different jobs which Commit was working on at any one time. The Maori Health Unit was simply a small part of a total picture.

[28] In that context then, when Mr Hamlin sent an email to Mr Riley on 21 May 2013 indicating that the Maori Health project would be undertaken by Conserve, Mr Riley reacted by seeking an urgent meeting to discuss matters. At its heart, the dispute between Mr Riley and Mr Hamlin revolved around the age-old question of who was in charge of who. Mr Riley maintained in his evidence to the Authority that he reported to Mr Gleye and not to Mr Hamlin and that he had never been told anything different.

[29] Conversely, Mr Gleye told me in the investigation meeting that he had had a conversation with Mr Riley in which he made it abundantly clear, or so he claims, that Mr Hamlin was in charge of the interface between Commit and the Board and that therefore Mr Riley must do as Mr Hamlin directs.

[30] Both parties acknowledge that, whatever the truth about the disputed verbal communication between Mr Gleye and Mr Riley, there was nothing in writing to suggest that Mr Riley was responsible to Mr Hamlin in respect of work for the Board; that is, no organisational structure chart evidencing this chain of command, and no other documentary material making it plain.

[31] Mr Gleye seemed to be saying that Mr Hamlin was only to give directions to Mr Riley in respect of work for the Board and that in all other respects, Mr Riley would continue to report to Mr Gleye.

[32] Interestingly enough, when I spoke to Mr Hamlin during the investigation meeting, he first of all told me that he did not have authority to direct Mr Riley and then agreed with me that the nature of his email of 21 May 2013 was in fact a direction. After that exchange, Mr Gleye seemed to accept that whatever else was true, Commit had not made clear to either Mr Riley or, arguably, Mr Hamlin as to who was in charge. Certainly, I do not accept Commit's submissions which proceed on the footing that Mr Riley reported to Mr Hamlin. References to Mr Hamlin as Mr Riley's "*manager*" go far too far in my judgment; all I understood Mr Gleye's evidence to be on this point was that, for the purposes of the Board's work, Mr Hamlin as the account manager was to have the final say.

[33] If that is the case, I would have expected Mr Hamlin to have adopted a more collaborative approach to engaging with Mr Riley who, by all accounts, was an effective and able project manager. Simply sending a six line email to a colleague fundamentally changing arrangements that were already in place, does not make good management sense.

[34] That of course is not to justify Mr Riley's subsequent outburst. That matter is the subject of the next section of this determination.

What happened at the 22 May 2013 meeting?

[35] The 22 May 2013 meeting was initiated by Mr Riley. He did that because of the telephone call and the subsequent email that he had received from Mr Hamlin, the thrust of which was that the Maori Health Unit job would be undertaken using ComServe as the contractor and not Multi Media Communications. Mr Hamlin told me in his evidence that he had spoken with the operational manager at the Board responsible for the project and agreed with him that the Maori Health Unit job was an appropriate job for ComServe to perform. It was also necessary for Mr Hamlin to get the Board's agreement to pushing back the start date for the job in order to meet the new contractor's requirements.

[36] I am satisfied on the evidence before the Authority that Mr Hamlin knew that Mr Riley had made arrangements for the Maori Health Unit job to be physically performed by Multi Media Communications and that he knew, when he engaged with the Board's representative, that he was making a change to those arrangements. I reach this conclusion simply because of the language used by Mr Hamlin in the brief of evidence that he filed in the Authority. In that evidence, Mr Hamlin says first that, contrary to what Mr Riley had claimed in his evidence, it was Mr Gleye who made the decision that ComServe would perform the Maori Health Unit contract. It will be remember that Mr Riley claimed he had Mr Gleye's permission to use Multi Media Communications for the job.

[37] More importantly though, Mr Hamlin's evidence is quite explicit that he knew that the arrangements that had been made by Mr Riley were for the use of Multi Media Communications and accordingly, he knew that by proposing to make this the first job for ComServe, he was changing arrangements already made by his colleague Mr Riley.

[38] In Mr Hamlin's brief of evidence, he refers to using ComServe as a change, not once but four times.

[39] That being the position a brief email sent by Mr Hamlin to Mr Riley in which he simply confirms his earlier telephone advice that ComServe are to perform the work and then goes on to say that he has an agreement on that change with the Board and an agreement to change the start date, it must be seen, at best, a lack of professional courtesy to a colleague. The effect of the email was to simply unravel arrangements Mr Riley had already made, arrangements that he was responsible for, and which were well within the terms of his role at Commit.

[40] Moreover, as I have already made clear, I am not satisfied that Mr Gleye ever made clear to Mr Riley that in relation to the contract with the Board, Mr Hamlin was to have the last word. If that had been made clear to Mr Riley, it is arguable that his outburst at the meeting on 22 May 2013 may not have happened.

[41] But this was a situation where Mr Riley had made arrangements which he says suited the client (and there was no evidence before the Authority to suggest that that was not the case) and which Mr Hamlin unilaterally changed without any involvement from Mr Riley and then told Mr Riley that was what had happened and that the client agreed.

[42] Matters became further complicated because Mr Riley became convinced, after talking to the client, that contrary to the implication in the communications that he was receiving from his colleagues, the initiative for the change did not come from the client, but from Mr Hamlin. To be fair to Mr Hamlin, his email to Mr Riley which seems to have initiated the request for the 22 May 2013 meeting, says that the client and Mr Hamlin *have agreed* that ComServe will do the job. But according to Mr Riley, in Mr Hamlin's earlier telephone communication, Mr Hamlin had said he had proposed the change.

[43] In any event, within 15 minutes of that email being sent, Mr Gleye sent an email to both of his subordinates in which he stated that the decision about which contractor to use was his to make, but that the change was being *dictated by the customer*. But that is not consistent with Mr Hamlin's evidence where it is apparent that he spoke to the Board and secured their agreement to change contractors. The initiative came from Mr Hamlin and not from the Board.

[44] It is fair to note, though, that Mr Gleye had made the decision that Multi Media Communications were to be dropped as a contractor in favour of ComServe. And, as I have already noted, I am satisfied that Mr Riley knew that was Commit's decision because it had been conveyed to him at the same time as it was conveyed to other staff. That leaves open the imponderable question of why Mr Riley went ahead to organise the job using Multi Media Communications when he knew that Commit had made an executive decision to change contractors. I have already rejected Mr Riley's explanation of that decision of his to proceed with the job using Multi Media Communications with the claimed blessing of Mr Gleye, as inherently improbable.

[45] In any event, whatever the basis of Mr Riley proceeding to set the job up using the wrong contractor, his evidence to the Authority that if there was to be a change, Mr Hamlin ought to have discussed the matter with him rather than simply told him there had been a change is, I am satisfied, both appropriate management behaviour as well as being the commonsense approach. For Mr Hamlin to simply send an email to a management colleague effectively unravelling arrangements already made by the colleague, especially in circumstances where I am satisfied that Mr Riley did not understand that he was to defer to Mr Hamlin in relation to the Board's work, is simply asking for trouble.

[46] That is not to say that I accept that Mr Riley was entitled to behave as he did in the 22 May 2013 meeting, but I am satisfied that he was entitled to be cross about the way that Mr Hamlin had behaved. There is some common ground about what happened at the 22 May 2013 meeting. All of the protagonists told me that Mr Riley was very excitable at the beginning of the meeting and I am satisfied that Mr Riley indicated early on in the meeting that the client Board wanted to use Multi Media Communications and Mr Hamlin quarrelled with that contention whereupon Mr Riley called Mr Hamlin a liar. The exchange then became even more heated and Mr Riley threatened to knock Mr Hamlin's block off, or words to that effect.

[47] Mr Riley's evidence is that Mr Hamlin laughed at him or mocked him, but that is denied by Mr Hamlin and also not supported by Mr Gleye. However, Mr Gleye did refer to a mannerism of Mr Hamlin's in which the latter blew through his nose which may well have made the equivalent of a sighing noise.

[48] But whatever noise or mannerism Mr Hamlin may have contributed to the meeting, the impetus for Mr Riley's evident distress was, I am satisfied, the

unravelling of the arrangements that he had made and what Mr Riley saw as the attempt to portray that unravelling as at the behest of the client rather than at the behest of Commit itself.

[49] Because Mr Riley had spoken to the officer at the Board responsible for the project after Mr Hamlin had spoken to the same officer, Mr Riley was able to form a view about how the change had been initiated and contrary to the claim made by both Mr Gleye and Mr Hamlin, Mr Riley was satisfied that the change was initiated by Mr Hamlin and not be the Board.

[50] Mr Riley maintained in his evidence that, while the email to him from Mr Hamlin refers in effect to a joint decision by Mr Hamlin and the Board to change contractors, when Mr Hamlin telephoned Mr Riley prior to sending the email Mr Hamlin maintained that the change was made at the Board's request. That view of matters was perpetuated by Mr Gleye's email where he said that the change was being *dictated by the customer*.

[51] In any event, once the physical threat was made to Mr Hamlin, Mr Hamlin left the meeting and it is common ground that Mr Gleye and Mr Riley remained talking together about the issues.

[52] Mr Gleye told me during the investigation meeting that he had suspended Mr Riley on full pay at the end of that meeting, but Mr Riley, in his evidence, was oblivious of that decision if in fact it was taken, and the suggestion that Mr Riley was suspended on 22 May is completely inconsistent with his return to the workplace the following morning. I discount the suggestion that Mr Gleye suspended Mr Riley on 22 May, in consequence.

[53] It is common ground that at the end of this meeting which took place in the morning of 22 May 2013, Mr Riley went home for the rest of the day whether at his initiative or the employer's, is not clear, but nothing turns on that.

[54] Once away from the workplace, it is clear that Mr Riley telephoned a friend who worked for a competitor called NZ Data and Mr Riley's evidence is that in that telephone call, he cancelled a pre-arranged catch-up with his friend Logo Lesatele. Mr Lesatele gave evidence to me at the investigation meeting in which he confirmed the telephone call cancelling the earlier commitment. The Authority has also been

provided with telephone records which confirm that the call was made at 10.40am and lasted a little over 3 minutes.

What happened at the 23 May 2013 meeting?

[55] Overnight, there was an electronic exchange between Mr Gleye and Mr Riley the burden of which was to arrange a meeting between the two men on the morning of 23 May 2013. Also overnight, Mr Riley prepared a letter of resignation. His evidence is that he did that because of his frustration at Mr Hamlin's behaviour.

[56] At around 9am on the morning of 23 May 2013, Mr Gleye and Mr Riley met. Mr Riley's evidence is that this was the occasion when Mr Gleye suspended him on full pay. I have already noted that Mr Gleye claimed to have done that at the meeting the previous day, which I think is inherently unlikely given that, by common consent, Mr Riley turned up at work on 23 May 2013 without any suggestion from Commit that he ought not to be there given he was allegedly suspended. Accordingly, I conclude that if there was a suspension, it happened on 23 May 2013 and not on 22 May 2013.

[57] There was a discussion between Mr Gleye and Mr Riley and again the terms of that discussion are not agreed. For our purposes, it suffices to observe that by the end of that discussion, Mr Riley had been dismissed for serious misconduct, and attempted to have his letter of resignation considered by the employer, without success, and had subsequently been provided with an email from Mr Gleye setting out the various bases of the conclusion that Mr Riley had committed serious misconduct.

[58] Mr Gleye's evidence is that it was the revelation that Mr Riley had disclosed to Mr Lesatele the nature of the argument Mr Riley had had the previous day which resulted in Mr Gleye dismissing Mr Riley. In particular, Mr Gleye relied on his claim that Mr Riley had confirmed to him in the 23 May 2013 meeting, that he had told Mr Lesatele which customer (the Auckland District Health Board) was involved in the argument the previous day.

[59] While Mr Gleye maintains that that was the tipping point which caused him to dismiss Mr Riley, Mr Riley stoutly maintained through his evidence to me that he neither disclosed to Mr Lesatele the details of the argument the previous day, nor told Mr Gleye that he had done so.

[60] I observe at this point that Mr Riley's evidence is consistent with the evidence of Mr Lesatele who told me that he had had a telephone discussion with Mr Riley the previous day at about 10.40am, that that discussion was simply to cancel a catch up date because Mr Riley was too upset and that Mr Riley did not disclose any details of the client involved in the upset.

[61] Mr Lesatele also confirmed that he and Mr Riley were friends, had been friends for years, having previously worked together in the same entity, but that as an employee of a competitor, Mr Lesatele had obligations to seek new business for his employer and it was in that context that he had approached the Board seeking to meet with it to discuss what Mr Lesatele's employer could offer.

[62] It is common ground that Mr Lesatele sent an email message to the officer of the Board that dealt with Commit's personnel (including Mr Riley) at 10.47am on 22 May 2013. This would have been almost directly after Mr Lesatele and Mr Riley had their telephone conversation. That telephone conversation commenced at 10.40am and lasted approximately three minutes.

[63] Mr Gleye told me that when he commenced the meeting with Mr Riley on 23 May 2013, he had been advised by the Board that they had had an approach from NZ Data, the employer of Mr Lesatele and accordingly, he was on notice that there was a possible breach of Mr Riley's obligation to treat Commit's business confidentially, if Mr Riley had had contact with Mr Lesatele.

[64] While it is common ground that Mr Riley told Mr Gleye that he had had contact with Mr Lesatele, Mr Riley does not concede that he told Mr Lesatele anything improper and in particular he denies absolutely telling Mr Lesatele that the argument that Mr Riley was involved with the previous day at work, was an argument involving the Auckland District Health Board.

[65] Given that Mr Lesatele was adamant in his evidence to me that he had not been told by Mr Riley that the Board was involved in the argument Mr Riley had had at work, and given my assessment of Mr Lesatele's demeanour in giving that evidence, I have to conclude that Mr Riley's evidence on what he told Mr Gleye in the 23 May 2013 is to be preferred over Mr Gleye's evidence. While there is an odd coincidence between the timing of the telephone discussion between Mr Riley and Mr Lesatele and Mr Lesatele's email to the Board, both Mr Riley and Mr Lesatele

maintain that Mr Riley did not disclose to Mr Lesatele that the Board was the subject matter of the argument that Mr Riley had been involved with the previous day and on that basis, I conclude that the weight of evidence supports Mr Riley's recollection of these events.

[66] I think it more likely than not that Mr Gleye, having established that Mr Riley had had contact with Mr Lesatele was sufficiently incensed by that mere fact of contact to act then without receiving the confirmation which he claimed to have received that Mr Riley confirmed that he had told Mr Lesatele that the Board was involved.

[67] Certainly, even on Mr Gleye's evidence he was incensed at the time that he made the decision to dismiss Mr Riley and it is apparent on the evidence of both men, that Mr Riley had no opportunity whatever to address Mr Gleye's concerns and was simply summarily dismissed, and summarily dismissed in the heat of the moment.

[68] I questioned Mr Gleye carefully about this aspect when he was giving his evidence. In relation to Mr Lesatele, Mr Gleye had this to say in answer to my questions:

(Questioning Mr Riley) When was the last time you spoke to him (Mr Lesatele) Mike (Mr Riley) said yesterday. Did you discuss the situation with Logo (Mr Lesatele)? Mike said yes. Did you disclose which customer was involved? Mike said yes. Then I said Mike you're fired. Then he passed me his resignation which I refused to accept. I was incensed.

[69] Having been dismissed in that abrupt and summary fashion, Mr Riley sought a written statement of why he had been dismissed and as I have already noted, he received that in short order from Mr Gleye via email. That email is in the following terms:

*Mike
As you have requested, I provide the basis for your termination for serious misconduct. Yesterday morning we met with Gavin (Mr Hamlin) where you continually swore, make accusations unbecoming of an employee, you threatened to physically assault him and I had to intervene. You advised me you did not consider me your boss and would not take direction from me. You stated you had no intention of apologising which has caused an untenable situation. Furthermore you have admitted to calling a competitor (Logo at NZ Data) (Mr Lesatele) yesterday following this altercation and*

disclosing confidential information with regards to one of our premium customers.

[70] While that email tends to support Mr Gleye's recollection of events at least to the extent of justifying the termination by reference to the alleged disclosure by Mr Riley that he had told Mr Lesatele about the dispute involving the Board, it also contains other allegations which Mr Riley denies as well. Mr Riley denies ever refusing to take direction from Mr Gleye (only refusing to take direction from Mr Hamlin who he had never been told (he says) was his boss) and Mr Riley also denies refusing to apologise, saying that he was never asked to apologise to Mr Hamlin.

[71] While I have concluded that Mr Riley's recollection of the 23 May 2013 meeting is to be preferred over that of Mr Gleye, particularly in regard to precisely what the tipping point was for Mr Gleye determining that Mr Riley was to be dismissed, nothing turns on those conclusions. Even if Mr Gleye is correct that the dismissal was indeed because Mr Riley had made an admission that he had disclosed to Mr Lesatele that the Auckland District Health Board was involved, that still does not provide any justification for Mr Gleye to do what he did.

[72] I am satisfied that even if Mr Gleye's recollection of these events is preferred, and I have indicated that I do not prefer Mr Gleye's recollection of these events, his summary and abrupt dismissal of Mr Riley cannot stand scrutiny. Mr Riley ought to have been given an opportunity to be heard, to provide an explanation for the conduct complained of and to have input into the question of penalty. This process was so truncated as to be unfair, and as I have already indicated, so activated by Mr Gleye's loss of self-control that the dispassionate weighing of the evidence which employment law requires of an employer, was, by definition, absent.

Has Mr Riley proved his unjustified dismissal claim?

[73] I am satisfied that Mr Riley has been unjustifiably dismissed from his employment because the decision was made in the heat of the moment by the Managing Director of his employer who, on his own evidence made the decision when he was *incensed*. That is and must be the very antithesis of the obligation of an employer in considering whether first there is sufficient evidence to enable a

conclusion of serious misconduct to be reached and second to conclude that the only sanction appropriate in the circumstances was summary dismissal.

[74] Not only was this process activated by an absence of dispassionate consideration but it was so swift as to effectively telescope the evaluation of whether there had been serious misconduct with the consideration of what penalty ought to apply given serious misconduct was established. Moreover, there was no opportunity whatever for Mr Riley to engage with the employer and provide whatever comments or explanations he might have felt would assist the employer in a consideration of the matter. This was so not only in respect to the conclusion that serious misconduct had been found but also in respect to the conclusion that the only appropriate response was summary dismissal. In the end, Mr Riley was precluded by the inadequate process from having any input into either of those aspects.

[75] I have no hesitation in concluding that this dismissal was unsafe for the reasons I have identified and that in consequence, Mr Riley has a personal grievance for unjustified dismissal.

Has Mr Riley contributed to the circumstances giving rise to his dismissal?

[76] Having concluded that Mr Riley has suffered a personal grievance by reason of having been unjustifiably dismissed from his employment, s.124 of the Employment Relations Act 2000 (the Act) requires me to consider whether Mr Riley has contributed in any way to the circumstances giving rise to his dismissal. I conclude that Mr Riley had indeed contributed to the circumstances giving rise to his dismissal.

[77] The first point to make is that while I have concluded that Commit Services Limited have unjustifiably dismissed Mr Riley because of the gross inadequacies of their process, that conclusion should not be read to mean that I accept that Mr Riley's behaviour in initiating the process which led inexorably to his dismissal is in any way appropriate conduct for a senior employee in a position of trust.

[78] It is apparent on the facts that Mr Riley behaved disgracefully in the meeting that he had with Mr Hamlin and Mr Gleye on 22 May 2013 when, no doubt in the heat of the moment, Mr Riley threatened to assault Mr Hamlin by knocking his block off or some words to that effect. That is a serious threat to make to another person and despite the provocation which included the inadequate communication of who made

the ultimate decisions about this particular client and the inadequacies in Mr Hamlin's change of the arrangements already made by Mr Riley, none of those provocations can justify a threat of physical violence directed at a colleague.

[79] Mr Gleye referred in his evidence to the fact that Mr Riley was proficient at Karate and that, given Mr Riley's agitation, he (Mr Gleye) was in genuine fear of the prospect of Mr Hamlin being injured by Mr Riley.

[80] Mercifully, that eventuality never arose but the fact of the threat made to a colleague in a senior management position is simply unconscionable behaviour.

[81] No doubt Mr Riley was entitled to be irritated by Mr Hamlin's inadequate attempts to engage appropriately with him to change the contractor for the Maori Health Unit and was also irritated no doubt by the confusion about who ultimately made the final decision on the matter given my finding that Mr Riley was never advised that he was to report to Mr Hamlin for the purposes of this particular client. But none of that justifies the threat of physical violence or even the intemperate language and evident hostility that is apparent from all the versions of the 22 May 2013 meeting.

[82] It seems to me clear that had Mr Riley not made the threat to physically assault Mr Hamlin, Commit would have been able to address the relationships between these senior folk in a collaborative way, reach an appropriate conclusion, and none of the subsequent events, including the termination of the employment relationship of Mr Riley, would have followed.

[83] Indeed, I am satisfied on the evidence that the threat to physically assault Mr Hamlin, made by Mr Riley, was causative of the chain of events which led inevitably to Mr Riley's dismissal and as a consequence, I am satisfied that the proper course is to conclude that Mr Riley's contribution to the circumstances giving rise to his personal grievance was 100%.

Determination

[84] For reasons earlier advanced, I am satisfied that Mr Riley has suffered a personal grievance by reason of having been unjustifiably dismissed from his employment by Commit Services Limited but because I consider that his contribution

to the circumstances giving rise to that unjustified dismissal ought to be set at 100%, he is not entitled to any remedies.

Costs

[85] Costs are reserved. Given my finding on the substantive matter, where in essence both parties could be seen to have been partially successful, the parties are urged to seek to resolve costs on their own terms.

[86] If that should not prove possible, the initiating party is to file and serve submissions and the responding party is to have 14 days from their receipt of the initiating party's submissions, to file and serve submissions of their own. No submissions in reply will be considered.

James Crichton
Member of the Employment Relations Authority