

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

**BETWEEN** Darren Glen (Applicant)  
**AND** Modern Teaching Aids (NZ) Limited (Respondent)  
**REPRESENTATIVES** Peter Fagan, Counsel for Applicant  
Alan Cressey, Counsel for Respondent  
**MEMBER OF AUTHORITY** James Crichton  
**INVESTIGATION MEETING** 30 May 2006  
**DATE OF DETERMINATION** 3 August 2006

DETERMINATION OF THE AUTHORITY

***Employment relationship problem***

[1] The applicant (Mr Glen) alleges that he has been unjustifiably dismissed by the respondent, Modern Teaching Aids (NZ) Limited (MTA) and that MTA has “failed to comply” with the Employment Relations Act 2000.

[2] The MTA resists those claims and says by way of response that Mr Glen was dismissed as a consequence of his position becoming redundant.

[3] Mr Glen had worked for MTA since December 2004 as the South Island sales representative based at Christchurch.

[4] Mr Glen was employed on an individual employment agreement. Prior to actually commencing his employment, Mr Glen attended an induction course run by his employers at Sydney. For all practical purposes, his employer was based in Australia.

[5] Mr Glen was remunerated by way of a base salary and a commission payment based on sales.

[6] The employment agreement specifically provides for the employment relationship to be subject to a six month probationary period from the commencement date. Amongst other things, the effect of this probationary period of employment was that the notice period required while the employee was on probation was one week, whereas after the completion of the probationary period of employment, the notice required was one month.

[7] Mr Glen commenced his duties in December 2004 and on that basis, one would have expected his probationary period of employment to expire in June 2005, assuming the terms of that probation were met.

[8] However, Mr Glen put into evidence an unsigned letter dated 3 May 2005 on MTA's letterhead addressed *To Whom it May Concern* and purportedly to be signed by *Paul Creswick, National Sales Manager – Education, Australia and New Zealand*.

[9] Mr Glen says that the letter was written by Mr Creswick, who was his immediate superior, at Mr Glen's request to assist Mr Glen in the purchase of a first home for Mr Glen and his partner, Ms Cecil. The letter was presumably designed to be provided to lenders to confirm Mr Glen's status.

[10] For our purposes, what is most important is that the letter appears to bring Mr Glen's probationary period to an end where it records in the penultimate paragraph –

*Furthermore, this letter certifies that Darren [Mr Glen] has successfully concluded his Employment Probationary Period with the company and is now a permanent fulltime employee.*

[11] The purported author of this document (Mr Creswick) did not give evidence before the Authority, was no longer employed by the company at the time the Authority conducted its investigation and as an Australian citizen, would presumably have had some logistics issues in attending at the Authority's investigation in any event.

[12] Mr Neil Whiston is one of two directors of MTA and he did give evidence before the Authority. He said, amongst other things, that he knew nothing about the purported letter of 3 May 2005 from Mr Creswick, was unaware that Mr Glen was buying a new home, that Mr Creswick had no authority to conclude probationary periods of employment of his own motion, and that as a matter of company policy, probationary periods of employment were never concluded early as this one purportedly had been.

[13] Mr Glen said in his evidence that he had a telephone discussion with Mr Whiston on 20 May 2005 (his partner's birthday as it happened) in which Mr Whiston told Mr Glen that Mr Glen's employment was being terminated with immediate effect. The decision to terminate Mr Glen's employment was explained to him on the basis of a redundancy situation.

[14] There are significant differences between Mr Whiston and Mr Glen about the nature of this discussion, but it is common ground that it was the only "consultation" between the parties before the redundancy of Mr Glen was effected, and in particular, it is common ground that there was no face to face discussion between the parties.

[15] Mr Whiston says in his evidence on that point –

*Due to the geographical distance between Australia and New Zealand, it was not possible for a member of the senior management team to meet with Darren in person to discuss his proposed redundancy. Instead, I telephoned him on 20 May 2005 and left a message for him to return my call, which he did.*

[16] Mr Whiston says that he explained to Mr Glen that the company proposed to disestablish Mr Glen's position because the position had not made any money for the past several years and therefore was uneconomic. Mr Whiston claims that there was discussion about alternatives to redundancy and alleges that those discussions took place with Mr Glen during this telephone discussion.

[17] Mr Whiston also claims that he offered Mr Glen the opportunity to think about things further and offered the opportunity of a face to face meeting, both of which Mr Glen allegedly declined.

[18] Mr Glen, for his part denies that there was any mention of alternatives to redundancy and says that he told Mr Whiston that had he known that his position was at risk, he and his partner would not have embarked upon the purchase of their new home which they had just completed.

[19] There was disputation between the parties as to what Mr Glen's entitlement was in respect to notice, and there are other outstanding claims which I will need to deal with as a consequence of this employment relationship problem being brought before the Authority.

### ***Issues***

[20] The fundamental issue is whether the employer gathered sufficient evidence during a fair process to justify it in reaching the conclusion to terminate Mr Glen's employment on the grounds of redundancy.

[21] There are however subsidiary issues which the Authority needs to deal with. These other issues are:

- (a) The provision of a computer.
- (b) The storage of stock samples.
- (c) The payment of business expenses.
- (d) The storage of the Ford Falcon.
- (e) The provision of a home office.
- (f) The approval of flyers.

[22] Because the *other* issues are not central to the resolution of the employment relationship problem but nonetheless impact on it, I deal with those subsidiary issues first.

### ***The computer***

[23] Mr Glen gave evidence that he was encouraged by Mr Creswick to purchase a home computer and use that computer to assist the development of his sales territory.

[24] Mr Glen's evidence is the cost of this computer was \$1,249.98 and that the computer was only used for work purposes and has not been used since the employment terminated.

[25] Mr Whiston in his evidence said that MTA had a written computer policy which was extensive, that no sales representatives got computers, and that no sales representatives got corporate email addresses either.

[26] Mr Whiston said that any suggestion that Mr Glen should obtain a computer can have been nothing more than a mere suggestion and certainly fell outside the company's normal computer policy.

[27] Mr Glen does not actually make a claim for the reimbursement of the cost of purchasing the computer. While I am certain that Mr Glen gave honest evidence in saying that he was encouraged to purchase a computer by Mr Creswick, I accept Mr Whiston's view that that encouragement does not create legal liability on MTA for the reimbursement of the costs of the computer.

### ***Storage of stock and samples***

[28] Mr Glen's evidence was that prior to the purchase of their new home immediately prior to his termination, he and his partner rented a three bedroom house when they only needed two bedrooms *because one room was used to store company stock, at the respondent's request*. Mr Glen estimated that this cost he and his partner \$40 per week extra for a period of six months.

[29] In his evidence, Mr Whiston indicated that the company sold 8,000 product items and that they had *a constant problem with sales representatives wanting samples*. Mr Whiston went on to say that he would prefer sales representatives to sell from catalogues rather than from samples.

[30] Mr Whiston also observed that all the samples that Mr Glen held on behalf of MTA fitted in the company-supplied van and he was at a loss to know why Mr Glen would need to store some of the samples at his home rather than carry them around in the van for selling purposes.

[31] Mr Glen's answer to this question is that having the van too full of samples made it difficult to make sales.

[32] Again, I am not persuaded that Mr Glen has made out a claim for reimbursement of this additional rental which amounts to \$1,040. The Authority heard no evidence that would support the contention that that expenditure was incurred at the specific request of MTA or was authorised by them.

### ***Payment of business expenses***

[33] Mr Glen gave evidence that there was an outstanding set of business expenses which had not been reimbursed to him from his period of service with MTA.

[34] MTA's evidence was that no claim had been furnished by Mr Glen and accordingly there was nothing for them to pay against.

[35] Mr Glen said that he had only recently found the relevant documentation, some 11 months after the claim ought to have been filed in the normal course of events, and as soon as he had found it he had forwarded the material on to MTA.

[36] MTA's Mr Neil Whiston very honourably indicated at the hearing that the claim would be dealt with promptly, notwithstanding that it was outside of the budgetary period and no money had been accrued for this unpaid expense.

### ***Storage of Ford Falcon***

[37] Mr Glen maintained that he had been asked to store a Ford Falcon company vehicle which belonged to an associated company of MTA.

[38] It seems that Mr Glen was asked by MTA if he could store the vehicle and he had agreed. It is common ground that there was no complaint about the storage of the vehicle until after the employment relationship was terminated.

[39] Mr Glen's evidence is that he did in fact agree to store the vehicle, but he understood it was only for two days and in actual fact it ended up being more like three weeks.

[40] Mr Glen says that while it is true that he made no complaint while the employment relationship continued, the presence of this additional vehicle was a significant nuisance (his partner says that it *caused havoc with our other domestic vehicles in the morning and evenings ...*) but that while the employment relationship continued, he was *putting his best foot forward to be a good employee*.

[41] I am satisfied that MTA made a request to Mr Glen that he store a company vehicle, I am satisfied that Mr Glen accepted that obligation and that he did not raise any objection to it while the employment relationship continued. I am also satisfied there was no agreement that MTA would pay Mr Glen to store the vehicle and I am not minded to impose an arbitrary rental in the absence of any agreement by the parties.

### ***The provision of a home office***

[42] Mr Glen says that when he purchased his first house property with his partner, they purchased a home with an office in it *because my job with the respondent caused me to work from home for long periods*.

[43] Mr Whiston for MTA expressed some surprise about this evidence. Mr Whiston told me that there was no requirement for Mr Glen to work from home, that the position Mr Glen had been appointed to was field-based, and that the notion of a field sales representative spending *long periods* at home seemed to him to be a contradiction in terms.

[44] I accept Mr Whiston's evidence on this matter. I find no evidence whatever to suggest that Mr Glen had any reasonable basis for feeling that he was required to have a home office. Indeed, all the evidence suggests the reverse.

### ***Provision of flyers***

[45] Mr Glen says that his partner had prepared flyers for him to assist him in selling MTA's products. He says that these flyers were approved by Mr Creswick of MTA. The evidence I heard suggested that Mr Creswick was supportive of this initiative and, according to Ms Cecil, thought there might be additional work that would spin off from the production of these flyers.

[46] Mr Whiston was clearly not happy about Mr Creswick's involvement in this matter. He said in answer to a question from me *I don't discount the possibility that it could have happened [he means Mr Creswick approving the flyers] but I am not happy about it*.

[47] Mr Whiston had said earlier in his evidence that MTA had a flyer budget of \$1 million across the company and he said it was very important that MTA controlled its corporate message. It was for this reason that Mr Whiston said that he would never want sales representatives to produce their own material and he confirmed that he had no knowledge of this approval by Mr Creswick.

### ***The justification for the dismissal***

[48] All dismissals, whatever their genesis, have both a procedural and a substantive aspect. Even in a redundancy situation such as this one, it would not be enough to ground a lawful termination for the decision to be substantively justified only; unless the process which underpins the decision is itself fair and equitable, the substantive decision which flows from the process is itself at risk.

[49] In *Phipps v NZ Fishing Industry Board* 1 ERNZ 195, Chief Judge Goddard indicates that the approach that ought to be taken in redundancy matters is to pose the question whether, on the evidence that the employer put together during a fair inquiry, the employer was justified in reaching the conclusion that it did.

[50] At page 208/29, the Chief Judge says this –

*No genuine reasons can be formed about either redundancy or misconduct in the absence of input from the employee concerned, or at least a reasonable opportunity in which to contribute it. The employee's representations may well show that there is, on a better view of her or his functions, no redundancy at all or that there are alternatives to dismissal. A failure to inquire or consult is fatal to justification.*

[51] The present case turns fundamentally on the question of consultation. It is common ground that the only possible point at which Mr Glen had any prospect of having input into his potential redundancy was the telephone discussion between Mr Glen and Mr Whiston on 20 May 2005. As I have already indicated, the parties have different recollections of this conversation, but I must say on balance that I prefer Mr Glen's recollection to Mr Whiston's.

[52] Mr Glen gave quite graphic evidence about the nature of this conversation when I asked him to describe it to me at the investigation meeting. The first point, and one which I think is important, is that he had very little relationship with Mr Whiston. His recollection was that they had had two or three previous conversations during the five months or so that he was employed by MTA; principally, Mr Glen dealt with Mr Creswick who was his immediate manager. It follows that Mr Glen had very limited opportunity to develop any rapport with Mr Whiston in this very important discussion.

[53] Mr Glen says the conversation was very short, three to five minutes in duration. He said Mr Whiston told him that he had a bit of bad news for him and that his position was redundant.

[54] Mr Glen asked Mr Whiston what the timeframe was and Mr Whiston said it was *effective immediately*. Mr Glen said that Mr Whiston told him to go home and pack up the stock. Mr Glen said that he had just completed the purchase of his first home with his partner and Mr Whiston said *that's unfortunate*.

[55] Mr Whiston said that it was a business decision and that the South Island was *not performing*. Mr Glen asked if there was anything else he could do and Mr Whiston said there is nothing else that Mr Glen could do.

[56] Mr Glen said that there was no proposal by Mr Whiston of a face to face discussion, no suggestion that the decision was provisional or subject to some consultative process or contingent on other events happening.

[57] Mr Whiston accepted that he had had limited contact with Mr Glen and accepted that he would not ring Mr Glen *as a norm*. He accepted that this telephone call was MTA's only consultation with Mr Glen and accepted that it was a short conversation.

[58] Mr Whiston did not remember talking to Mr Glen about packing up stock, claimed to remember talking about options and said that he did not know that Mr Glen and his partner had just bought their first home and was *shocked* by that intelligence.

[59] Mr Whiston claimed that Mr Glen became upset and angry and *was quite forceful that there was no point in further discussion*. Crucially, Mr Whiston claimed that the reason he did not engage further with Mr Glen was that Mr Glen told him not to.

[60] As I have already indicated, I prefer Mr Glen's recollection of this conversation to Mr Whiston's. The short point is that, even if I were to prefer Mr Whiston's recollection to Mr Glen's recollection, I would still have no difficulty in reaching the conclusion that the measure of consultation engaged with by MTA with Mr Glen was so inadequate as to make the employer's decision to terminate for redundancy unfair.

[61] In my opinion, this conclusion stands even without the additional problem for MTA of the appearance of pre-determination in their fundamental decision making. Mr Whiston gave evidence that a decision had been taken by the Board to make a number of positions in the wider organisation redundant to *ensure the ongoing viability of the business*.

[62] The way that that particular decision is expressed or explained is important. During his oral evidence, Mr Whiston said that the Board had made the decision to make Mr Glen redundant at a May Board meeting. Mr Glen relies on that expression as evidencing pre-determination in that the decision had allegedly already been taken before Mr Whiston *consulted* with Mr Glen.

[63] However, I think it more significant that the result of the *consultation* between Mr Glen and Mr Whiston was that there was no change in MTA's position. Unchallenged evidence from another of MTA's witnesses, Ms Chell, was that she had been told by Mr Whiston immediately after Mr Whiston had spoken to Mr Glen, that Mr Glen had been made redundant.

[64] Further, Mr Whiston's own evidence, in the context of the brevity of the 20 May conversation, says that the reason that the conversation was so brief was *because the range of options were non-existent due to Darren [Mr Glen] being the sole South Island employee, and our New Zealand operation being very small*.

[65] In my opinion, the *consultation* adopted by MTA did not in any sense comply with the legal requirements of consultation as for instance that concept is defined in *Communications etc Workers Union v Telecom New Zealand Ltd* [1993] 2 ERNZ, 429.

[66] I am influenced in reaching this decision by two other points which I now refer to. The first is the effect of section 4 (4)(c) of the Employment Relations Act 2000. This subsection creates an obligation on the parties to adopt good faith behaviour in *making employees redundant*.

[67] In my opinion peremptory *consultation* of the sort evidenced in the instant case, even on Mr Whiston's evidence cannot comply with the good faith obligation.

[68] Even if I were to accept Mr Whiston's view of the *consultation* discussion (and I have already indicated a preference for Mr Glen's view) and in particular accept there is no practical basis on which Mr Glen could be redeployed, in my view an employer acting in good faith would have been prepared to be flexible as to matters such as notice, the provision of some latitude in respect to the handover of the employer's products, and some greater sensitivity in respect to the revelation that Mr Glen had just purchased his first home.

[69] Furthermore, it seems to me clear law that, once the necessity for redundancy has been established *a just employer... will implement the redundancy decisions in a fair and sensitive manner*: Step 5 of the seven step statutory scheme on personal grievances as they apply to redundancy *Aoraki Corporation Ltd v McGavin* [1998] 1 ERNZ 601 (CA 2/97).

### ***The probationary period of employment***

[70] The issue here is whether the letter on MTA letterhead dated 3 May 2005 and purportedly prepared by Paul Creswick, National Sales Manager, MTA has the effect of bringing Mr Glen's

probationary period of employment to a conclusion. Mr Whiston for MTA said that he knew nothing of it and that probationary periods of employment were never concluded before the end of the six month period.

[71] MTA made a number of allegations to the effect that Mr Glen had somehow connived at the production of this document for his own purposes.

[72] Mr Glen never denied that he had asked Mr Creswick for a document of this kind which he could give to his bankers to encourage them to advance money to him and his partner in order that they could buy their first home together. MTA produced the email from Mr Glen to Mr Creswick making just that request.

[73] That is a perfectly proper request for an employee to make and one which numerous employees over the years will have made to their employer in not dissimilar circumstances. It was available to Mr Creswick to politely decline that request, to say that the probationary period was not yet at an end and thus to indicate that he was not able to assist.

[74] MTA encourage me to treat this letter as suspicious and mysterious. They point out that there was no copy of this letter on any of their files; nor was it stored on Mr Creswick's work computer.

[75] However, MTA were able eventually to access an electronic copy of the letter in their system which rather gives the lie to their assertion that Mr Glen somehow managed to produce this letter for himself without any intervention from Mr Creswick.

[76] MTA point out that the letter is not signed by Mr Creswick and so it would be available to conclude that Mr Glen had in fact produced it on company letterhead for his own purposes.

[77] But there is simply no evidence of that. The fact the letter exists and is able to be recovered (albeit with difficulty) from the employer's files seems to give the lie to any suggestion that Mr Glen managed to produce this document without any intervention from Mr Creswick. The fact that Mr Creswick did not sign the letter is explicable by the fact that Mr Creswick and Mr Glen live in different countries and if the letter was emailed to Mr Glen a signature becomes more difficult.

[78] In any event, I conclude that there is no evidence whatever that the letter was produced without Mr Creswick's involvement. I reach that conclusion because the letter has been found in MTA's system and because MTA themselves have produced Mr Glen's email to Mr Creswick asking for the letter. If Mr Creswick had turned the request down, presumably MTA would have found that as well. Mr Creswick would have had nothing to hide from his employer in turning the request down and so one could reasonably surmise that he would have left a paper trail.

[79] Further, there is not a shred of evidence that Mr Glen has behaved improperly in relation to this letter. I absolutely reject the suggestion (as I did at the investigation meeting) that Mr Glen has demonstrated a willingness to behave unethically in relation to this letter.

[80] That leaves us with the question of the evidentiary status of the letter. MTA urge on me the proposition that I should discount the letter because of its doubtful parentage. I do not accept that it has doubtful parentage. In my view, the evidence supports the view that the letter was produced at Mr Glen's request but that it was produced by Mr Creswick in response to that request from Mr Glen.

[81] MTA say that the letter is hearsay because Mr Creswick is not available to the Authority to give evidence as to its content. I have considered whether the Evidence Amendment Act (No.2) 1980 assists me in this regard. Section 3 of the statute contemplates the admissibility of documentary hearsay evidence in circumstances where the maker of the statement had personal

knowledge of a fact or opinion which would be admissible by direct evidence and undue delay or expense would be caused by obtaining this evidence.

[82] That section seems to me to bear directly on the issue in the instant case. Mr Creswick would have personal knowledge of the issues traversed in the letter and, were it practicable to have him give evidence before the Authority, his direct evidence would be admissible in this proceeding.

[83] Furthermore, the Authority's wide powers, as expressed in its equity and good conscience jurisdiction, give me the opportunity to let this document in, if I think it assists me in the investigation of Mr Glen's employment relationship problem.

[84] I have reached the conclusion that it is more rather than less likely that the document in question does originate with Mr Creswick and that it is reasonable of Mr Glen, having asked for such a letter from his immediate superior and obtained it, to believe that that letter represented the view of his employer.

[85] MTA's submissions make much of the contention that Mr Glen knew or ought to have known that the letter could not possibly represent MTA's position. How was Mr Glen to know this? He had no knowledge in any detailed sense of the company's hierarchy and indeed he worked in another country from the country in which his employer's hierarchy actually existed.

[86] In my opinion, Mr Glen was entitled to treat the letter as authority for the proposition that he had completed his probationary period of employment: doctrine of undisclosed principal applied.

[87] It follows from the foregoing discussion that I am satisfied on the balance of probabilities that Mr Glen reasonably believed that his probationary period had come to an end as a consequence of an executive decision by Mr Creswick, that Mr Creswick's decision in that regard, while apparently contested by one of his directors, Mr Whiston, is in fact binding on MTA and so the notice period that applies to Mr Glen is not one week, but one month.

### ***Determination***

[88] I have found that Mr Glen does have a personal grievance by reason of suffering an unjustifiable dismissal at the hands of his employer, MTA. He is entitled to compensation for the wrong that has been done to him but as MTA's counsel correctly points out in its submissions, he is not entitled to compensation for a loss he has not suffered. The only compensation I can award is for the breach of a proper process; the loss of the job itself is not compensatable.

[89] By virtue of the fact that I have found that Mr Glen has suffered a personal grievance, I need to consider whether Mr Glen's actions have contributed in any way to that grievance occurring. I have considered the circumstances and reached the conclusion that no contribution can be sheeted home to Mr Glen.

[90] Mr Glen alleges a breach of the employment agreement by MTA which he says *is worthy of condemnation* by way of a penalty. I do not agree. While I think that the employer has handled the redundancy situation badly, I do not think the employer's actions are sufficiently extreme as to justify consideration of a penalty.

[91] I am not persuaded that Mr Glen has any additional entitlement in regard to the various subsidiary issues I dealt with earlier.

[92] I make the following orders –

- (a) Compensation under section 123(1)(c)(ii) in the sum of \$3,000.
- (b) Payment of the short paid notice period in the sum of \$2,812.50 gross pursuant to section 131 of the Act.
- (c) Reimbursement of lost wages in the sum of \$2,537.54 gross.

***Costs***

[93] Costs are reserved.

James Crichton  
Member of Employment Relations Authority