

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Alicia Gregory (Applicant)  
**AND** Data Management Limited (Respondent)  
**REPRESENTATIVES** Charles F L Godinet, Counsel for Applicant  
Rollo Gillespie, Advocate for Respondent  
**MEMBER OF AUTHORITY** R A Monaghan  
**INVESTIGATION MEETING** 12 November 2004  
**SUBMISSIONS RECEIVED** 19 and 29 November 2004, 24 January 2005  
**DATE OF DETERMINATION** 27 January 2005

**DETERMINATION OF THE AUTHORITY**

**Employment relationship problem**

[1] Alicia Gregory says she was unjustifiably dismissed by her former employer, Data Management Limited (“Data Management”). Ms Gregory was dismissed relatively shortly after the commencement of her employment because her employer did not believe she was capable of carrying out the work required of her position.

[2] Ms Gregory’s statement of problem cited ‘Data Group’ as the employer party, and Ms Gregory’s letter of appointment was written on ‘Data Group’ letterhead. However it was agreed at the investigation meeting that Data Management was the employer and I have proceeded accordingly.

**Background**

[3] Data Management provides receptionist and telephone answering services to other organisations with which it is closely associated. The organisations are concerned with the sale of computer software and the provision of support services for the software. Support services include access to a ‘help desk’, which purchasers with problems or concerns about the operation of their software can approach for assistance.

[4] Ms Gregory responded to an advertisement for the vacant receptionist’s position at Data Management by letter dated 12 November 2003. She was interviewed by Jenny Witchell, who was employed by one of the associated companies, Data Group Limited, as office administration manager. The holder of the receptionist position was to report to Ms Witchell. During the interview Ms Gregory advised that she had suffered a brain haemorrhage in her early teens, which had left her with short term memory lapses. She also advised that she was now ‘fine’.

[5] There was some discussion in the evidence about exactly how Ms Gregory represented her condition to Ms Witchell, but I consider it likely Ms Gregory did tell Ms Witchell she was fine. However to put her statement in its proper context, Ms Gregory had been taken off medication and some years earlier her neurosurgeon had expressed the view that she had made a complete recovery although she was at risk of experiencing conditions such as the short term memory problem which affected her. She was not currently receiving any treatment, and nor had she received treatment in the recent past. She had a genuinely positive view of her state of health.

[6] Ms Witchell did not question her further regarding the detail of her condition. It was common ground that Ms Gregory went on to say that she would need to write things down to help her memory. That was her method of dealing with the problem. It was also common ground that Ms Witchell told Ms Gregory she would receive as much help as she needed. While Ms Gregory did not recall Ms Witchell mentioning the existence of a book called the 'reception bible' in which procedures relevant to the position were written down for reference, I consider it likely the matter was raised in the course of the conversation and particularly in the context of the discussion about writing things down. The intention was that receptionists keep the 'bible' up to date by writing in new procedures or otherwise filling in gaps when they arose.

[7] The receptionist's duties included logging help desk calls, assigning priorities to them and forwarding them to the help desk, although the help desk operators themselves would also log as well as deal with the calls. In addition the duties included answering the telephone, taking messages, meeting and greeting people, and dealing with inwards freight.

[8] Ms Gregory was offered the position and accepted it. She began work on 25 November 2003. The parties' written agreement was contained in a letter also dated 25 November 2003, and included the following provision:

"The term of employment is for a maximum period of three months. On or before that date a formal position review will be conducted and an offer of permanent employment may be made. If an offer of permanent employment is made the terms of this offer may be different from the terms of this Short Term employment offer." (emphasis original)

[9] Ms Gregory's predecessor, Charlene Parkinson, had resigned to take up another position in the group and for the first week of Ms Gregory's employment she sat next to Ms Gregory and was available almost constantly to provide assistance. Thereafter she made herself available whenever she could, but as approachable and willing to help as Ms Parkinson was the reality that she was retraining in her own new position made it inevitable that she was no longer able to provide immediate assistance whenever it was sought.

[10] Ms Parkinson gave evidence that her method of training Ms Gregory in her telephone duties was to answer the telephone herself to show Ms Gregory what to do, then let Ms Gregory take over until she was confident Ms Gregory could handle calls on her own. During the first week, she did not see any problems with Ms Gregory's receiving and logging calls.

[11] Another daily task was to deal with inwards goods. The requirement was to note what had been received, stamp the associated invoice, and advise the person expecting the goods of their arrival. Ms Parkinson found that Ms Gregory would forget the procedure and she would have to repeat it over and over. A second problem concerned the accuracy of telephone messages Ms Gregory took. There was a difficulty with messages being sent to the wrong people, and wrong contact phone numbers being provided. Ms Parkinson would suggest that Ms Gregory write down information and procedures, and as far as she was aware Ms Gregory did that.

[12] Indeed Ms Gregory said in evidence that she keeps a notebook of her own for that purpose and that she used it for everything. She also said that the reason for her frequent questioning of people like Ms Parkinson was that she would ask about things she had not written down, or where there was a variation on something she had written down but was unsure of how to deal with it. However Ms Parkinson was clear that Ms Gregory kept asking the same questions and I accept her evidence.

[13] Brian Schache, the client services manager at AdvanceRetail Technology Limited (“AdvanceRetail”), an associated company which received services from Data Management, gave evidence of his experience of working with Ms Gregory. He, too, struck me as being approachable and willing to help when he could, and I did not understand that to have been disputed. AdvanceRetail provides a help desk for clients who have purchased its software, and Ms Gregory’s duties included logging those help desk calls.

[14] Mr Schache found that problems arose with incomplete or wrong information being loaded into the call logs, and wrong priorities being assigned to the calls. One particular problem he pointed to was the failure to correctly prioritise and deal with repeat calls concerning the same job. These were to be given a 2A priority, and the receptionist was to notify Mr Schache and the help desk supervisor of the call. This did not happen. Mr Schache said in evidence he went through the call logging requirements with Ms Gregory a number of times. Ms Gregory acknowledged having frequent discussions with Mr Schache, and that she had notes from Ms Parkinson and the help desk on the prioritising of calls.

[15] Mr Schache also said he experienced problems with ordinary message taking. There were a number of occasions when clients called him asking why he had not returned their call. He had not received a message and, on checking with Ms Gregory would find she did not remember if the client had left a message.

[16] At first Mr Schache acknowledged that Ms Gregory was still learning the job, but after some weeks when the problems became repeated he approached Ms Witchell and the group’s executive director Rollo Gillespie.

[17] Mr Gillespie himself was experiencing difficulties with inaccurate telephone messages. He also said that almost all of the staff were reporting the same kinds of problems with Ms Gregory. He believed the problems were not of a kind that could be cured.

[18] On 16 January 2004 he arranged to meet with Ms Gregory to discuss the problems.

[19] During the 16 January meeting Mr Gillespie referred to her memory problems and told Ms Gregory that a number of staff members had expressed concern about her ‘learning difficulties’. He asked her if there were any current assessments of her mental functions and she said there were none as there had not been a problem. He told her he had serious doubts about her ability to do the job to the employer’s satisfaction, while Ms Gregory expressed confidence that she could master the requirements in the three months apparently available to her. She asked for details of the concerns and was told she had directed some phone calls to the wrong place and had taken down an incorrect phone number on one important message. She said in evidence she was not told of the concerns about her logging of help desk calls.

[20] It was common ground that Mr Gillespie also advised he had recently contacted a former employer, who had confirmed Ms Gregory had serious memory issues, and that Ms Gregory should think about her suitability for the position. He suggested another meeting the following week.

[21] Mr Gillespie met with Ms Gregory again on 27 January. The conversation was essentially the same. Mr Gillespie expressed concern about Ms Gregory's memory problems and her ability to do the job, while Ms Gregory was confident she was able to carry out the necessary duties. Mr Gillespie took the view that training would not solve the difficulties being experienced, and was looking for any other way to address them. He was unable to find one. Because he took the view that Ms Gregory was reluctant to accept there were problems with her memory, he asked if he could speak with one of her parents in an attempt to convey the seriousness of the matter.

[22] Ms Gregory consented to Mr Gillespie speaking to her father. As a result Mr Gillespie met with Mr Gregory on 29 January. He asked Mr Gregory, too, whether there was any medical information that might help. He told Mr Gregory of Ms Gregory's difficulties in recording information accurately enough for the organisation's needs, and said he did not believe she was capable of doing the work required. At the same time he was complimentary about Ms Gregory's interpersonal skills and suggested other occupations that might be more suitable for her.

[23] It was common ground that Mr Gillespie indicated he would not be offering employment to Ms Gregory after the end of her three month term. He suggested that, since Ms Gregory would not be returning after that term, it might be best if she left immediately. Mr Gregory said he saw no point in arguing about the matter, so told Mr Gillespie either on 29 or 30 January that Ms Gregory would leave immediately provided she was not out of pocket.

[24] Ms Gregory was paid out the balance of the three month term and did not return.

### **Determination**

[25] I understand Data Management is now aware that short term arrangements like the one in its agreement with Ms Gregory are not available under s 66 of the Employment Relations Act 2000. More specifically, while the section permits fixed term agreements - as this one purports to be - employers must have genuine reasons for specifying that an agreement end at the close of a specified date or period in the way the employer did here. Section 66(3)(b) says that establishing the suitability of an employee for ongoing employment - which appeared to have been the purpose of the short term arrangement here - is not a genuine reason.

[26] If, as seemed to have been suggested in Mr Gillespie's submissions, the position was for a short term because changes to the reception function itself were being considered, that was not the tenor of the evidence provided prior to the receipt of the submissions. Even if it was contemplated that the position would disappear or be restructured, hence the short term nature of the arrangement, there was no evidence that matter was raised with Ms Gregory at the time of her appointment. Section 66(2)(b) obliges an employer, prior to the agreement to enter into a short term arrangement, to advise an employee of when and how the employment will end, and why.

[27] All of this means it is not open to the company to rely on the agreement, and its having paid Ms Gregory up to the end of the three month period, as justification for the termination of Ms Gregory's employment.

[28] Nor was it open to Mr Gillespie to rely on Mr Gregory's involvement in the way he did, although I accept Mr Gillespie's actions were well-intentioned and based on his personal experience of having a daughter with a condition that has affected her employment.

[29] The circumstances mean also that I do not believe there was an agreed termination of Ms Gregory's employment. Mr Gillespie decided in January that he would not be offering Ms Gregory a permanent position at the end of her three months of employment. Since the fixed term nature of

the agreement offended against s 66 of the Employment Relations Act, and I consider it likely there was at that time a permanent position available provided Ms Gregory performed satisfactorily, the legal effect of the decision Mr Gillespie made in January was that Ms Gregory would be dismissed at the end of the three month period. The reason for the decision was that, by virtue of her condition, Ms Gregory was unable to perform her duties to an adequate standard.

[30] I accept Mr Gillespie tried to test that conclusion by seeking further medical information. However when none was available, he adhered to his own conclusion about Ms Gregory's condition and in effect to the intention to dismiss.

[31] Once this intention had been conveyed there was an agreement about the way in which the dismissal would take effect – namely that Ms Gregory would not return to work and would receive payment for the balance of the three month period. However there was no suggestion that the agreement was reached as a settlement of any rights Ms Gregory might have in association with the termination of her employment.

[32] I turn to the justification for the dismissal. If the fixed term arrangement was a misconceived attempt to embark on a trial period, Mr Gillespie should at least have approached the matter as if Ms Gregory were employed under a three month trial period. The leading case on the termination of employment during or at the end of a trial period is **Nelson Air Limited v NZ Air Line Pilots Association** [1994] 2 ERNZ 665 (CA). In summary, the employer is obliged to point out shortcomings and advise on improvements during the period, and to warn of the likely consequences if no improvement is made. Employees must be given an opportunity to correct any shortcomings. Similar principles apply to the dismissal of permanent employees on the ground of poor performance, and any differences do not affect the outcome here.

[33] Mr Gillespie did not see the problem with Ms Gregory's employment as being capable of being dealt with in that way, because despite the lack of medical evidence he saw the problem as having been caused by her medical condition and not amenable to correction by further training. However I believe that led him into error. Thus he put to Ms Gregory that there had been problems with her taking of telephone messages but did not make clear how extensive they were, that there were other equally extensive and fundamental problems, or that improvement was required if her employment were to be continued. He may have wished to spare her feelings by not letting her know of the exact extent of the concerns, but the law obliges an employer to make those matters clear if a dismissal is contemplated.

[34] Finally, Mr Gillespie did not give Ms Gregory an opportunity to improve in the specified areas, in the knowledge that any failure to improve would lead to the termination of her employment. Even if his view of the nature of her difficulties was correct, and I make no finding that it was, such an approach is not consistent with an employer's legal obligations. Mr Gillespie meant well in his approach, but he should have sought advice.

[35] These are fundamental procedural flaws which vitiate the dismissal. I therefore conclude it was unjustified and that Ms Gregory has a personal grievance.

## **Remedies**

[36] Despite the above finding I consider it unlikely that Ms Gregory could have improved her performance to the point where her employment could continue. I say this because during her discussions with Mr Gillespie in January she had not accepted there were any problems with her performance that could not be rectified provided she had assistance. Moreover it is doubtful if she accepted there were real problems at all. For example when it was put to her at the investigation

meeting that she had made mistakes with telephone messages, she simply said the errors had been rectified and there was not a problem. However the rectification did not cure the problem caused by the mistakes occurring in the first place, and the problem was ongoing.

[37] Ms Gregory did not appear to accept there were problems with her performance in the face of the evidence of Ms Parkinson and Mr Schache either. Both were credible witnesses and, despite some evident frustrations, were kindly disposed. I have accepted their evidence, from which it was apparent that there were serious problems with Ms Gregory's performance. In the face of their evidence Ms Gregory tended either to have no recollection of the matters they raised, or to say again that any mistakes she made had been corrected.

[38] Ms Gregory sought to emphasise her view that she was not provided with adequate training and support. I do not accept that. She received personal support and assistance and had the benefit not only of the 'bible' but of the notes she took herself. When I asked what other training would have assisted she replied that she was fine with telephone messages but would have benefited from Ms Parkinson and Ms Witchell spending more time going over things with her. However I do not accept she was fine with telephone messages, and I have accepted her questions were repetitious despite the availability to her of her own notes if she sought to refer to them. Ms Gregory also said she needed someone with her almost constantly. I do not believe the employer of a person in a position like Ms Gregory's is obliged to provide such a high level of support and training when it is a relatively small business with limited staffing resources available for such a task, and when the employee has presented herself as able to do the job.

[39] For these reasons I do not believe Ms Gregory's employment could have continued even if Data Management's procedures had been flawless. Accordingly any ongoing loss of remuneration is not attributable to her personal grievance and I decline to make an award reimbursing her for lost remuneration.

[40] Ms Gregory is, however, entitled to compensation for any injury to her feelings flowing from her personal grievance. Her evidence was that she was humiliated and embarrassed by her treatment, and the way in which her father became involved led her to feel she had been treated like a baby. Overall she suffered a blow to her confidence, which new employment is now helping her to regain, although any compensation for the effect of that blow is reduced to take account of her actual standard of performance.

[41] I therefore order Data management to pay Ms Gregory \$4,000 as compensation for the injury to her feelings.

### **Costs**

[42] Costs are reserved.

[43] The parties are invited to agree on the matter themselves.

**R A Monaghan**  
**Member, Employment Relations Authority**