IN THE EMPLOYMENT COURT
AUCKLAND

[2011] NZEmpC 15
ARC 50/10

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	ABC DEVELOPMENTAL LEARNING CENTRES (NZ) LIMITED Plaintiff
AND	DONNA PLASMEYER Defendant

Hearing: 14 February 2011
(Heard at Auckland)

Counsel: Jo Douglas, counsel for plaintiff
Steven Zindel, counsel for defendant

Judgment: 23 February 2011

JUDGMENT OF CHIEF JUDGE G L COLGAN

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[1] Although not so categorised in the Employment Relations Authority, this is essentially a breach of contract case. The plaintiff, ABC Developmental Learning Centres (NZ) Limited (ABC), says that the defendant has breached their employment agreement by failing or refusing to repay a training costs' bond, having not worked for the minimum specified period after completion of the training. Although this challenge involves a relatively modest sum of money, it is a question of principle and of broader application for ABC.

[2] The plaintiff has elected not to challenge the Authority's determination by hearing de novo. It is, therefore, only those conclusions of the Authority identified by the plaintiff in its pleadings that are in issue. The defendant has not cross-challenged the determination as was her entitlement. In these circumstances, the

defendant cannot re-litigate or add, as fresh causes of action, issues other than those identified by ABC on its challenge. The issues for decision on the pleadings are confined to whether the parties' employment agreement was breached by Donna Plasmeyer and, if so, the remedy for breach. The Authority appears to have found Mrs Plasmeyer to have been in breach although, in other respects, it appears also to have upheld some of her arguments of no liability. It is unclear from its determination the basis in law by which the Authority ordered Mrs Plasmeyer to make repayment of some of the costs to ABC of her training requirements. In these circumstances it is appropriate to revisit questions of liability in addition to remedies.

[3] Unfortunately it was only when the case opened that Mr Zindel, who had filed an unsigned witness statement by the defendant as late as the last working day before the hearing, advised that Mrs Plasmeyer would not be present at court. In these circumstances counsel accepted that her case would have to be conducted on the basis of cross examination of the plaintiff's witnesses, the common bundle of documents and on submissions.

[4] The plaintiff operates a large number of early childhood education centres. Before Mrs Plasmeyer began work for ABC on 5 February 2006, she had already begun a three year Open Polytechnic Diploma of Teaching course which would have had direct relevance to her position at ABC. Mrs Plasmeyer had worked for previous owners of the childcare centre in Morrinsville, including after she began her part-time diploma studies. A part of Mrs Plasmeyer's course was to undertake what were called practica which required her to be absent from work for significant periods of time on several occasions over the three years of her course of study.

[5] On 20 June 2007 Mrs Plasmeyer and ABC entered into a new employment agreement. At the same time ABC says that they agreed to meet the defendant's costs of practica attendance in return for her returning to and continuing to work for it for a period of two years after completion of her course. The date of the commencement of that two year period is controversial. Not so, however, is the cost of wages paid to Mrs Plasmeyer during the practica, being $6,843.98. The defendant continued to work at ABC's Morrinsville centre. She was paid wages for the periods

of three separate practica which were held between late June 2007 and early May 2008. The periods of absence over those three practica totalled about 15 weeks.

[6] Mrs Plasmeyer resigned from her employment with ABC on 10 July 2008 but had yet to be awarded her Diploma of Teaching course. ABC claims the full amount of the wages paid to the defendant during her attendance at practica.

[7] The Employment Relations Authority investigated ABC's claims on the papers and, in a determination[1] issued on 28 April 2010, found Mrs Plasmeyer liable to repay one-half of the sum claimed, being $3,421.99. This was on the basis that "ABC has had the benefit of Mrs Plasmeyer's enhanced training and skill for half of the bond period, offsetting half of the practicum costs."

[8] ABC says that the Authority was in error because the period of two years' bonded employment did not ever commence and would not have commenced until Mrs Plasmeyer gained her Diploma of Teaching qualification. ABC also says the Authority erred in concluding that the wages paid to Mrs Plasmeyer were all that was contemplated by the parties' agreement would be repaid to it. In the event, it was only wages paid that were and still are now claimed but, as a matter of interpretation of a standard agreement that it has with other employees, ABC wishes to confirm that such recoverable costs are not confined to wages.

[9] At the heart of this case are the applicable employment agreement and, particularly, what is known as the "Return of Service Agreement". The relevant contents of these are set out later in this judgment.

The issues

[10] These can be summarised as follows. First, it is necessary to determine the legal status of what is known as the "Return of Service Agreement" upon which the plaintiff relies in support of its assertion of breach of contract. Next, the disputed meanings of phrases within the Return of Service Agreement must be decided. Finally, it is necessary to determine whether, even if these first two issues are

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decided in favour of the plaintiff, the Court should nevertheless exercise its equity and good conscience jurisdiction under s 189 of the Employment Relations Act 2000 (the Act) and decline to find any liability or to award any reimbursement by the defendant to the plaintiff even if there is such liability.

Decision

[11] Although unconventional in its structure and method of presentation to the defendant, I conclude that the document known as the "Return of Service Agreement" included terms and conditions of Mrs Plasmeyer's employment. It was referred to in, and indeed attached to, the letter from ABC to Mrs Plasmeyer dated 23 March 2007 inviting her to consider and sign a new employment agreement arising out of the change of ownership of the Morrinsville centre and, by agreement, Mrs Plasmeyer's transfer from her previous employer to ABC. The covering letter of 23 March 2007 also enclosed a standard form of individual employment agreement for ABC staff. The letter provided, however, that where Mrs Plasmeyer then enjoyed superior terms and conditions in her employment to that time, these would continue. A number of terms and conditions in the new employment agreement with ABC improved those which she had previously enjoyed with the centre's former owner.

[12] The covering letter of 23 March 2007 included references to "Full payment of fees and practicums for eligible employees studying toward an approved Diploma in early Childhood Education, or upgrading to a Degree." Also referred to in relation to the terms and conditions was the following advice: "…we are not aware of any other childcare provider who intends to provide free study …". The letter of 23 March 2007 provided for Mrs Plasmeyer's signature signalling her acceptance of the terms and conditions of employment and she was asked then to return both the duplicate of the letter dated 23 March and the Return of Service Agreement. Mrs Plasmeyer did so, albeit in mid June 2007.

[13] The Return of Service Agreement was, despite its name, not in the form of a contract or agreement. Rather, it purported to 'certify' Mrs Plasmeyer's agreement to a number of benefits and obligations. These included:

1. My employer will incur the cost of practicum.

2. I am required to provide a Return of Service of two years to my employer, from the completion of the course.

3. If I fail to complete the two years of Return of Service, I will be required to pay my employer all practicum costs.

4. This Agreement operates along side and does not affect any other existing return of service agreement that I may have with my employer (for example any in relation to study fees).

[14] The Return of Service Agreement was not inconsistent with any of the provisions contained within the "Employment Agreement Standard Terms and Conditions of Employment April 2007" which was what was intended to govern substantially the employment relationship of the parties. In making this assessment of compatibility, it is necessary to address a number of express terms of that agreement identified by Mr Zindel as being inimical to the Return of Service Agreement being of contractual effect.

[15] The first is cl 2(a) of the employment agreement which provides:

> This Agreement sets out the terms and conditions on which the Company offers you employment. This Agreement, together with your Letter of Offer, represents the entire agreement between you and the Company and [supersedes] any previous understandings or agreements that may have been agreed upon between you and the Company, or any previous employer.

[16] This is yet another case in which it is puzzling why employers include such provisions in circumstances where it is, in most cases, impossible to fulfil such expectations. In this case, however, the bold "entire agreement" assertion in cl 2(a) is contradicted by the express acknowledgement of the employer that prior terms and conditions that were particularly beneficial to Mrs Plasmeyer would continue to apply. These were not contained in the agreement. But I am satisfied that the contemporaneous Return of Service Agreement was intended to be, and was in law, a part of the employment agreement offered to Mrs Plasmeyer in April 2007 and accepted by her in June 2007.

[17] Next, the defendant says that cl 43(b) of the standard individual employment agreement deals comprehensively with the question of such bonds and the Return of Service Agreement was inconsistent with it. Clause 43(b) provides:

> The company will pay your normal wages while absent from work completing Teacher in Training practicums required by the training provider in the course of completing your early childhood teaching qualification. The eligibility criteria for employees to access this assistance, together with the conditions associated with this provision, will be developed by the Company and may be subsequently varied by the Company from time to time.

[18] I conclude that the Return of Service Agreement was the statement of eligibility criteria foreshadowed by cl 43(b) despite having been presented to Mrs Plasmeyer at the same time as other proposed terms and conditions of employment. So I have concluded that the contents of the Return of Service Agreement were terms and conditions of Mrs Plasmeyer's employment at ABC.

[19] The next issue is to determine disputed meanings of phrases within that part of the employment agreement. The first is the phrase "the cost of practicum" which the employer agreed to incur. The Authority appears to have interpreted this phrase to mean the costs incurred by the employer offset by the benefits to the employer of the practica or the training generally. Such an interpretation would account for the Authority giving monetary credit to Mrs Plasmeyer for the work performed by her after practica. Mrs Plasmeyer has also advanced an argument that the phrase was intended to mean disbursements such as a contribution to the cost of travel to practica and the like but did not include her wages paid by ABC to her for the period of the practica.

[20] In the context of the circumstances in which the agreement was entered into and in light of the other relevant provisions in the employment agreement, I conclude that the parties intended the phrase to include the wages paid to Mrs Plasmeyer by ABC during the periods of her practicum. Previously, she had taken unpaid leave to attend practica. That alternative continued to be available to her when she was employed by ABC but the employer also offered, as an enhanced term or condition of employment, the opportunity to continue to be paid during those periods. Because it had to arrange for alternative staff at a cost to it during such periods when it continued to pay Mrs Plasmeyer, her wages were a "cost" to ABC. This is reinforced by the fact that there was no other "cost" to ABC from her participation in practica, for example travel costs or even the broader fees for her Diploma course that the defendant paid herself.

[21] I conclude that the phrase "the cost of practicum" meant the cost to ABC of Mrs Plasmeyer's attendance on pay but for which the employer obtained no wage-work bargain benefit. This included the wages paid to the defendant for those periods. Contrary to the Authority's apparent conclusion, there was no agreed element of credit reflecting the benefits to ABC of Mrs Plasmeyer's on-going experience and training arising out of her course of study as the Authority appears to have inferred in reducing the amount of wage reimbursement by one half. "Cost" meant cost, and not the residual cost after a cost/benefit analysis.

[22] Next is the reference to the phrase "from the completion of the course". The Authority appears to have accepted Mrs Plasmeyer's argument that this referred to the completion of a practicum or practica. Again in the context of all relevant events and of the other relevant parts of the employment agreement, I conclude that the meaning of the phrase is clear. It refers to Mrs Plasmeyer's course of study or training, the Open Polytechnic Diploma in Early Childhood Education that she was undertaking. Practica were only an element of this course and occurred on several occasions spread over its three years. The phrase refers to "the course" as distinct from the reference in the Return of Service Agreement to "practicum" so that it is clear that different meanings were intended for the two different words or phrases.

[23] It follows that the Return of Service Agreement provided that in return for paying Mrs Plasmeyer's wages during practica, she would either work for the period of two years after attaining the Diploma qualification or, if she did not, that the defendant would repay to the plaintiff the wages paid to her by it during practica periods when she was absent. There is no issue in this case with any other practica costs.

[24] For the foregoing reasons I accept the plaintiff's interpretation of these words and phrases in the employment agreement and respectfully disagree with the Authority's conclusions otherwise.

[25] There is no argument that Mrs Plasmeyer resigned before, albeit shortly before, attaining her Diploma qualification so that she did not work for any part of the two year period to which she had agreed to bind herself. Nor is there any dispute

that the cost to the plaintiff of the wages paid during practicum periods is $6,843.98, none of which has been repaid by Mrs Plasmeyer to the plaintiff except for about $400 which the employer deducted from the defendant's final pay. Although not determinative of the issue of liability, it is noteworthy that Mrs Plasmeyer appears to have accepted this deduction in the sense that no cross-challenge has been lodged by her. Indeed, it appears she did not reclaim this sum in the Authority either.

[26] The final issue for determination is whether, irrespective of the findings above, the Court should nevertheless exercise its jurisdiction under s 189 of the Act and, in equity and good conscience, either reduce the amount of Mrs Plasmeyer's liability or extinguish it entirely. Given my finding that the provisions of the Return of Service Agreement were terms and conditions of Mrs Plasmeyer's employment, it is not open to the Court to determine the matter other than contractually because of the proviso to s 189(1) that to do so would be inconsistent with the particular individual employment agreement.

[27] In these circumstances, the plaintiff is entitled to judgment against the defendant for $6,843.98. The challenge succeeds, the Authority's determination is set aside pursuant to s 183(2) of the Act, and this judgment stands in its place.

[28] There is at least a hint in the papers before the Court that Mrs Plasmeyer's financial circumstances may be such that she is unable to pay this full amount to the plaintiff immediately. However, the possibility of periodic payments does not appear to have been explored between the parties but, if that is the position, I encourage them to do so.

[29] As to costs, the plaintiff, having been entirely successful, would be entitled to a contribution to its costs in both the Authority and in this Court. I am not aware of any award that the Authority has made in the proceedings before it and, on this challenge, Mrs Plasmeyer has been legally aided.

[30] If the plaintiff seeks costs, that application should be made by written memorandum filed with the Court and served within the period of six weeks of the

date of this judgment. Mrs Plasmeyer may then have the following period of four weeks within which to reply by memorandum.

GL Colgan
Chief Judge

Judgment signed at 9 am on Wednesday 23 February 2011