Determination Number: AA 288/05
File Number: AEA 737/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Ranburn Rest Home Limited t/a Ranburn Home & Hospital (Applicant)
AND	Tiphany Senora (Respondent)
REPRESENTATIVES	John Turrall, Counsel for the Applicant Nicola Bush, Counsel for the Respondent
MEMBER OF AUTHORITY	R A Monaghan
DATE OF DETERMINATION	28 July 2005

DETERMINATION OF THE AUTHORITY ON APPLICATION FOR INTERIM RELIEF

Employment relationship problem

[1] Ranburn Rest Home Limited ("Ranburn") operates a rest home in Waipu, Northland. It employed Tiphany Senora as a Registered Nurse at the rest home, and says the employment agreement was for a minimum period of three years. Ms Senora has tendered her resignation after some four months. Ranburn wants her to stay in its employ. Accordingly it seeks:

(a) an interim injunction/compliance order restraining Ms Senora from leaving her employment until determination of the substantive application by the Authority or until the parties reach a written settlement; and
(b) costs

[2] The substantive application seeks a compliance order requiring Ms Senora to complete the employment contract for the remaining period of three years, or damages in the event that the compliance order is not granted.

[3] The problem was filed on an ex parte basis on Thursday 21 July 2005. I did not consider a determination made ex parte to be a satisfactory way of addressing the problem, and fortunately it was possible to contact Ms Senora's union to make arrangements to further a resolution of it.

[4] Pursuant to these arrangements:

(a) a mediator made herself available at short notice and mediation went ahead on 22 and 23 July;
(b) since the parties were unable to reach a settlement, they have filed further affidavits and submissions, and this application has been heard on the papers.

The employment agreement

[5] The parties' written employment agreement was signed on 19 April 2005, although Ms Senora had started work on 16 March 2005. The agreement is comprehensive and obviously prepared by a professional advisor. It provides in part as follows:

> "13.2 Termination of Employment
>
> 13.2.1 Except as specified elsewhere in this sub-clause, the employment may be terminated by either the employer or the employee giving the other either two weeks written notice of termination or two weeks written notice of resignation as the case may be, unless a lesser period of time is agreed on in writing by both parties."

[6] Nothing in the sub-clause - or anywhere else in the written employment agreement - provides for a minimum period of employment of three years. Thus Ms Senora gave Ranburn written notice of her resignation in a letter dated 8 July 2005. She said the resignation was effective 22 July 2005. Accordingly on the face of the matter she has complied with the termination provisions in her employment agreement, but there is more to the present problem than that.

[7] Ranburn has difficulty attracting registered nurses to work in Waipu, and in that respect it seeks assistance from Associated International Management Services Limited ("AIMS"). On behalf of its clients, including Ranburn, AIMS often recruits nurses from outside New Zealand, and assists them with obtaining certification as well as New Zealand residency and a work permit. In December 2004 AIMS assisted in the recruitment of Ms Senora, who is a registered nurse and a native of the Philippines.

[8] Ms Senora was already on AIMS' books because she had contacted the organisation over a year earlier, while still in the Philippines. In August 2003 AIMS sent her a document purporting to be an agreement between Ms Senora as 'The Employee' and an employer yet to be identified. I was told this was done in anticipation of a future employer signing the agreement. Ms Senora signed it on 7 August 2003, but the document I have was not signed by Ranburn as the employer.

[9] The document essentially embodies a bond agreement. It records that, in consideration of the employer incurring certain costs of facilitating the employee's move to New Zealand to work for it, the employee agrees to work for three years. If the employee resigns or abandons employment before the end of that period those costs, together with other expenses incurred in recruiting a replacement, become a debt to the employer recoverable immediately and without demand.

[10] Arrangements were made for Ms Senora to come to New Zealand to carry out the training needed to obtain registration as a nurse in New Zealand, which she eventually did in November 2004. Ms Senora completed the training in December 2004, when Ranburn was seeking registered nurses.

[11] Terry Bennett, Ranburn's principal shareholder and director, was sent Ms Senora's CV and discussed the bond agreement with an AIMS representative, Elvira Capa-Smith. Ms Senora denied participating in a conference call during which the bond agreement was said to have been discussed again with her, but Mr Bennett and Ms Capa-Smith were certain it occurred.

[12] Ms Senora also denied receipt of a letter from Mr Bennett dated 14 December 2004, although Ms Capa-Smith deposed that she handed the letter to Ms Senora herself. The letter included the following:

> "This offer of employment is good for a period of three years whilst we have supported your travel cost, tuition cost and board and lodging while undertaking your training in New Zealand to gain Nursing Council of New Zealand registration."

[13] Ranburn drew my attention to that passage in support of its position that Ms Senora's employment was to be for a minimum period of three years. My view is that the wording is a little odd, and arguably falls short of being a clear statement that the offer is made on the basis that Ms Senora agrees to work for Ranburn for a minimum period of three years. Further, the following passage appeared later in the letter: "This offer of employment is for a permanent position with guaranteed minimum hours as stated above and is valid for a period of fifteen months from the above date." I am told the passage was included to indicate the offer of employment would remain open for 15 months, in order to support Ms Senora's applications to the New Zealand Immigration Service ("NZIS"). The wording does not make that clear.

[14] Ms Senora's start date was delayed while she undertook another assignment for AIMS. Meanwhile by letter dated 18 February 2005 AIMS wrote to the NZIS seeking a work permit on behalf of Ms Senora. It said Ms Senora had signed a 'three year contract' with Ranburn. Mr Bennett formally supported the application on behalf of Ranburn, also indicating that the employment was to be for a period of three years. While those documents might reflect the understanding of AIMS and Ranburn respectively as to the term of the employment agreement, they do not determine the central question of whether the agreement between Ranburn and Ms Senora was for a minimum term of three years.

The end of Ms Senora's employment

[15] By letter dated 8 May 2005 Ms Senora gave two weeks' notice of her resignation. In the letter she cited a medical condition which she said had been affected by her employment. She deposed to having had a fall in her early childhood which damaged her upper back. She also said she disclosed this to Mr Bennett, although the matter was not disclosed in the pre-employment medical questionnaire I was shown. Moreover Mr Bennett denied that Ms Senora disclosed her condition to him until a meeting following her resignation in May. Ms Senora went on to depose that she was told Ranburn's lifting procedures would protect her back, but she found that was not the case and the lifting was very difficult. Overall, she said she did not find the work to be what she was hoping it would be.

[16] Following discussions with Mr Bennett and Ms Capa-Smith, Ms Senora withdrew the resignation. She was also moved to the rest home area of Ranburn's operation, to what I understand were to be lighter duties. However she became upset and said she sought unpaid stress leave. She provided a medical certificate saying merely that she was unfit for work. I note she had also sought unpaid leave for the last week in April, and for 6 and 7 May.

[17] By letter dated 8 June 2005 AIMS sought a residence permit on behalf of Ms Senora. The application was made under the skilled migrant category. I do not know whether, or on what terms, it has been granted.

[18] Ms Senora remained unhappy at the rest home and renewed her notice of resignation in her letter of 8 July. She deposed that on or about 5 July she accepted alternative employment, to commence on 1 August 2005.

Determination

[19] Whether this problem is appropriately addressed as involving the issue of an interim injunction restraining Ms Senora from leaving her employment, or a compliance order requiring her to observe part or all of an agreed three-year term of her employment, I will apply the same principles regarding the exercise of the necessary discretion.

1. Arguable question

[20] Ranburn's application assumes that the bond agreement, and possibly discussions associated with it, amounts to an enforceable agreement to the effect that Ms Senora is required to remain in Ranburn's employ for a minimum period of three years. I have some difficulty with that proposition for these reasons:

(a) the written employment agreement makes no reference to any minimum period of employment or to any ancillary document addressing the matter – on the contrary it reads as an ordinary open-ended employment arrangement terminable by notice by either party;
(b) the terms of the bond agreement may amount to a binding agreement to repay monies in specified circumstances, or they may effectively create an option of a three year employment period or making payment of those monies, but I have difficulty in construing them as going further and obliging Ms Senora to remain in Ranburn's employ for three years without the 'option' of repaying the monies.

[21] Inevitably since this is an interim application, I have not been addressed fully on the proper construction of the two agreements, have not heard full evidence on the matter, and there are conflicts in some of the evidence I have. Thus, despite my reservations, I believe the proper construction of the agreements is too important to determine on the basis of the material I have. I find there is an arguable question as to whether Ms Senora's employment agreement required her to work for Ranburn for a minimum period of three years.

2. The balance of convenience

[22] Ms Senora's new employment is about to commence. I have not been addressed on why her start date could not be renegotiated to accommodate at least this interim application. Contrary to counsel's suggestion I do not believe Ms Senora would necessarily be obliged to resign from her new position if I made an interim order that she return to Ranburn at least for a limited period. Accordingly I do not believe there is more than a slight risk that her new position would be jeopardised if I made such an order.

[23] As for Ranburn, it says the only adequate remedy for Ms Senora's breach of agreement is for her to return to work. Ms Senora's making payments in terms of the bond agreement does not suffice.

[24] In support Mr Bennett raised concerns about Ms Senora moving away from Waipu and his being unable to contact her, which may be allayed by the information he now has about her employment plans. He also expressed a concern about Ms Senora's ability to pay at least the $5,600 apparently payable in terms of the bond agreement. Ms Senora says she can pay that.

[25] A more important concern is Ranburn's ability to meet its legal obligations regarding the minimum number of registered nurses on duty. The immediate effect of Ms Senora's departure in a staffing sense is to indicate that another nurse, who sought leave for two weeks commencing 31 July 2005, may be required at work to ensure the legal minima are met. Otherwise, in the affidavits initially filed in support I was addressed so generally on the matter of minimum staffing levels that I was not in a position to assess even in a preliminary way the nature of the risk to Ranburn's operation if Ms Senora does not return.

[26] Moreover in her affidavit in opposition, Carol Gilmour of the New Zealand Nurses' Organisation deposed that the law regarding staffing numbers is currently in a transition phase. I am

told there are currently no minimum staffing requirements associated with the legislation, although some may be introduced. Instead the sector operates under the Standards New Zealand Handbook 'Indicators for Safe Aged-care and Dementia-care for Consumers' SNZ HB 8163:2005, which incorporates reference to a set of applicable Ministry of Health standards. According to the handbook, while there is a recommendation that a registered nurse be on duty at all times in a hospital, that is not the case in a rest home.

[27] Mr Bennett filed a further affidavit that was slightly more helpful but neither he nor Ms Gilmour identified the legislation to which they referred. Time constraints mean I am unable to do so for myself. I do not know who is right regarding the assertions as to the law. However Mr Bennett deposed that Ranburn's hospital facility requires a registered nurse in attendance 24 hours a day. I believe Ms Gilmour would agree with that. The rest home incorporates the dementia unit and I am told there is a list of duties that must be performed by a registered nurse. The duties must be performed over every 24 hour period. Mr Bennett says registered nurses are necessary in the unit too, so these duties can be performed. I doubt there would be any disagreement with that either, rather the question is one of how the nursing cover is arranged.

[28] Mr Bennett says he will have to employ a replacement at a higher rate than that paid to Ms Senora. As he observed, that may eventually sound in damages against Ms Senora. Mr Bennett does not say he anticipates any inability to find a replacement, although obviously there may be some delays.

[29] Overall, the staffing or rostering difficulties created by Ms Senora's departure are no different from those arising on the departure of any resigning registered nurse. Notice periods are intended to address that kind of problem, and Ms Senora did provide notice. Ranburn believed she could not do that, so left it longer than it might otherwise have done to seek a replacement.

[30] There is a further consideration. While I would not wish to facilitate Ms Senora's manipulation of events to her benefit if she is in breach of her employment obligations, she has already sought sick leave after her first resignation in May. She could do so again, especially if she were ordered to work somewhere she clearly no longer wishes to work. Regardless of whether her medical condition was genuine, Ranburn would still be faced with a possible shortage of staff. It would certainly be faced with a reluctant employee. I do not believe that state of affairs should be forced on the parties - leaving aside whether it should ever be - unless it is clear that Ms Senora has breached her obligations. Such a conclusion is not yet available.

[31] The balance of convenience therefore tips in favour of Ms Senora.

3. Specific performance and the adequacy of damages as a remedy

[32] The application for an order requiring Ms Senora to return to work is in the nature of an order for specific performance of the parties' employment agreement. I raised with the parties the relevance of the old common law resistance to ordering the specific performance of employment agreements. Obviously the common law position has been abrogated by the availability of statutory remedies such as orders for reinstatement and compliance orders, as well as some forms of injunctive relief. Nevertheless, the philosophy underlying the common law position may have a bearing on the exercise of the discretion I am being asked to exercise here.

[33] Counsel for Ranburn cited **Butler v Countrywide Finance Limited** [1993] 3 NZLR 623, in particular a passage beginning at line 52 at p 631. In the context of a discussion about specific performance in the sale of goods, Justice Hammond commented on the evolution of civil remedies into a regime requiring a context-specific evaluation of what remedy is most appropriate. He

proposed a number of relevant factors which included: balancing the nature of the rights to be enforced; the relative severity of a remedy on the parties; the effect of a given remedy on a third party; the practicability of enforcement; and the conduct of the parties. Factors such as these seem to me to be relevant also to assessments of the balance of convenience and overall justice.

[34] A case involving an employment relationship was **Turner v Australasian Coal and Shale Employees Federation & Anor** [1984] 55 ALR 635. There, at p 648-649, the Federal Court discussed the 'supposed rule' that specific performance of a contract of employment can never be granted, with reference to the considerations traditionally underpinning it. The Court doubted the continuing relevance of those considerations, and commented that the matter was one of discretion rather than the application of a hard and fast rule.

[35] Counsel for Ms Senora cited **Dallas v Wellington Newspapers Limited** [1998] 2 ERNZ 456, where Chief Judge Goddard referred to a continuing reluctance at common law to require parties to an employment contract to perform it specifically according to its terms (at p 466). However the thrust of his remarks was addressed at the adequacy of damages in some circumstances, while pointing out the wider availability of damages now available. In short, in many situations redress other than specific performance is available. Here, however, Ranburn is saying specific performance is the only form of redress that will remedy its loss.

[36] This analysis brings me squarely back to the adequacy of damages as a factor in assessing whether an injunction should be granted, or a compliance order made. The concerns about that relate primarily to staffing levels at the rest home, which I have already addressed. Ranburn also has a concern at a moral or ethical level, and I now turn to that.

3. Overall justice

[37] Ranburn believes Ms Senora has used her employment with it to obtain the necessary work and residence permits, and having obtained at least one of them is now moving on. That amounts to an allegation of failure on her part to deal with it in good faith. It is not in the interests of justice to allow her to benefit from such a failure, although even at interim level reasonably strong evidence would be needed in order to persuade me to use that ground as a reason to make the orders sought.

[38] All I have on the point is a possible temporal link between Ms Senora's being granted a work permit, and her decisions to resign first in May then in July. She had already sought to resign before the application for residence was made in June, but since I do not know the result of the application I do not know whether there is even a temporal link between that matter and the resignation in July.

[39] For her part, Ms Senora says her decision to resign was prompted by her state of health and unhappiness at Ranburn. Mr Bennett contests the genuineness of that decision. A full hearing might shed further light on the matter, but there is not enough available at present to favour granting the orders sought.

[40] Finally, I have not had an opportunity to discuss with the parties possible dates for a hearing of the substantive issue. However the Authority will be in a position to convene an investigation meeting at a convenient date in August, possibly as early as the week beginning 8 August.

[41] For all of these reasons I decline to grant the orders sought.

Costs

[42] Costs are reserved.

[43] The parties may approach the Authority for a determination of the matter, by the filing of memoranda, if they are unable to reach agreement on it.

R A Monaghan
Member, Employment Relations Authority