Determination Number: AA 95/06
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 G Turrall, Counsel for Applicant Nicola Bush, Counsel for Respondent
MEMBER OF AUTHORITY	R A Monaghan
INVESTIGATION MEETING	21 October 2005
SUBMISSIONS RECEIVED	11, 18 and 29 November 2005
DATE OF DETERMINATION	29 March 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Ranburn Rest Home Limited ("Ranburn") says it employed Tiphany Senora for an agreed minimum term of three years, which Ms Senora breached by resigning a little less than four months after her employment commenced. Ranburn seeks damages in respect of that breach.

[2] The damages were quantified as follows:

(a) $5,600 in respect of Ms Senora's airfare, board and lodgings and tuition fees, in accordance with an agreement that Ms Senora would repay those monies;
(b) $1,808.00 being the fee for recruiting Ms Senora;
(c) $9,495.00 being the expenses incurred in finding a replacement for Ms Senora;
(d) $259.46 being the cost of additional advertising for a replacement for Ms Senora; and
(e) $800.00 in respect of time spent on the matter by Terry Bennett, Ranburn's principal shareholder and director.

[3] Alternatively, and in the event that the Authority determines the parties' employment agreement was not for an agreed minimum term of three years, Ranburn seeks:

(a) rectification of the agreement by the insertion of a suggested form of words reflecting the parties' agreement that their employment relationship was for a minimum term of three years; or
(b) relief under the Contractual Mistakes Act 1977, in that Ranburn was influenced to enter into the agreement by a mistaken belief that it was for a minimum term of three years.

[4] Finally, Ranburn seeks a penalty for Ms Senora's breach of her obligation to deal with it in good faith. It believes she used its offer of employment to gain New Zealand work and residence permits, and did not intend to continue working for it once she had obtained them.

[5] Shortly after Ms Senora's resignation Ranburn sought interim relief requiring her to continue her employment pending a determination of this substantive application, or until the parties reached a settlement. That application was the subject of a determination of the Authority in **Ranburn Rest Home Limited t/as Ranburn Home and Hospital v Senora** (AA288/05, 28 July 2005) ("the July 2005 determination"). The interim relief was declined and this determination addresses the substantive application.

[6] Ms Senora has counterclaimed, saying Ranburn breached either s 63A(2) of the Employment Relations Act 2000, or its predecessor s 64 (now repealed). Penalties are sought. The breaches arise out of Ranburn's alleged failure to advise Ms Senora of her entitlements regarding advice about:

(a) documents Ms Senora signed before arriving in New Zealand, in the event that those documents are part of her employment agreement; and
(b) the individual employment agreement which Ms Senora signed.

The claim for damages for breach of a minimum term agreement

[7] As recorded in the July 2005 determination, nothing in the parties' written employment agreement provides for a minimum term of employment of three years. Ms Senora's resignation appeared to have complied with the express provision for termination contained in clause 13 of the agreement. As also recorded, Ranburn relied on evidence including what I described as a bond agreement dated 7 August 2003, as well as a letter dated 14 December 2004, in support of its position that there was at least an intention to enter into an agreed minimum term of employment. Ranburn also relied on discussions in December 2004 in submitting the intention was mutual and a minimum term was agreed.

[8] For the purposes of this determination, I repeat the background to the parties' association:

> [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." (the July 2005 determination)

[9] The August 2003 document read in part as follows:

> "BACKGROUND
> A. …
> B. The Employer has offered or is in the process of offering the Employee employment on terms and conditions contained in a separate employment agreement
> C. The Employer has offered to pay for certain costs necessary for the Employee to be able to immigrate to New Zealand and work for the Employer.
> D. In consideration of incurring these costs the Employer has sought and the Employee has agreed to work for the Employer for a minimum period of time.
> E. The Employer and Employee further agree that if the Employee does not work for the minimum period then the Employee will repay to the Employer certain of the monies paid by the Employer.

NOW THEREFORE IT IS AGREED

1. The Employer agrees to pay the following costs of the Employee:

[various costs including tuition, airfare and board and lodging set out]

2. In consideration of the Employer paying the costs set out in clause 1 above the Employee undertakes to remain in the employment of the employer for a period of three years from the date of commencement of employment.

3. Should the Employee terminate her employment with the Employer (either through resignation or abandonment) within the agreed minimum period, the Employee shall be liable to reimburse to the Employer all of the costs paid by the Employer as set out in paragraph 1 above together with all other costs incurred by the Employer in recruiting a replacement nurse, together with an additional increment of 10% thereon. Any such sum then due by the Employee to the Employer shall be a debt recoverable by the Employer immediately and without demand."

[10] There was no suggestion Ranburn ever became a party to that document, but the information in it provides a basis for Ms Senora's subsequent understanding of her obligations regarding her commitment to work for Ranburn. Similarly, AIMS and Ms Senora (as 'the Candidate') subsequently entered into another agreement dated 19 November 2004, executed by both of them as parties, entitled 'AIMS Recruitment Terms and Conditions'. I construe the document overall as setting out the terms and conditions on which AIMS would assist Ms Senora to obtain employment.

[11] Clause 4 of the 19 November agreement obliged the candidate to pay to AIMS a fee in the sum referred to in Schedule 1 of the agreement.[1] The fee amounted to another bond arrangement, as between AIMS and Ms Senora. It incorporated an interest free loan, repayable to AIMS if the candidate left employment with an employer referred by AIMS before the end of three years' employment.[2] Schedule 1 went on to set out the 'expenses covered by loan' as follows:

"Tuition cost	$3,200.00
Airfare	$1,800.00
Board and Lodging	$ 600.00
Total	$5,600.00

[12] On 15 December 2004 AIMS invoiced Ranburn for the $5,600 'loan' in respect of Ms Senora, plus the same amount in respect of another candidate. Ranburn paid on the invoice, and seeks to recover Ms Senora's share from her. Ms Senora accepts she owes Ranburn $5,600.

[13] Finally I refer again to the letter from Ranburn to Ms Senora dated 14 December 2004. It read in part:

> "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."

[14] I accept the letter was handed to Ms Senora. I also accept there were supplementary oral discussions at least between AIMS and Ms Senora concerning the general expectation that Ms Senora work for an employer for at least three years, but that is not the end of the matter.

[15] First, the way in which this problem has been progressed and argued indicates it is time to reassert the application of the common law prohibition on servile incidents of employment. A full Employment Court referred to the prohibition as follows in **Gibbs & Ors v Crest Commercial Cleaning Limited** (18 July 2005, Colgan CJ, Travis and Couch JJ, CC 10/05):

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[1] Clause 4.1
[2] Clause 4.4

> "[106] … It is a long standing principle of employment law that no person may be compelled to engage and continue in an employment relationship with another. Where that involved compulsion of an employee, it once took the form of slavery or servitude.
>
> [107] That was put more pithily in the language of the era by Lord Atkin as long ago as in **Nokes v Doncaster Amalgamated Collieries Limited** (1940) AC 1014, 1026, thus:
>
> > … I confess it appears to be astonishing that apart from overriding questions of public welfare, power should be given to a court or anyone else to transfer a man without his knowledge and possibly against his will from the service of one person to the service of another. I had fancied that ingrained in the personal status of a citizen under our laws was the right to choose for himself whom he would serve: and that this right of choice constituted the main difference between a servant and a serf."

[16] Ironically, **Gibbs** itself concerned a statutory departure from the above principle, and there are other examples of such departures. Here there is no applicable statutory departure. Nevertheless the evidence on behalf of Ranburn made it quite clear that it approached the employment relationship primarily on the basis that it would be open to it to compel Ms Senora to work the entire three year period.

[17] Second, and particularly as far as Ms Senora's liability in damages is concerned, there is the difficulty arising from the lack of any mention in the written employment agreement of any minimum term. I refer in addition to clause 20 of the agreement, which allows for the variation of any provision in it but goes on to say: "Any such variation shall be recorded in writing."

[18] I do not construe the letter of 14 December 2004 as filling that silence, or amounting to a written variation under clause 20.

[19] If the passage quoted at [13] above had read simply: "This offer of employment is good for a period of three years", and there was evidence Ms Senora agreed without more to work for Ranburn for a minimum period of three years, it could be argued that a minimum term of employment was included in the parties' employment agreement.

[20] However that was not the evidence. The relevant sentence in the 14 December letter went on to refer to Ranburn's 'support' of the expenses it then listed. From Ms Senora's point of view, she had been presented with two documents referring to a requirement that she work for an employer for three years coupled with an obligation to make certain repayments in respect of those expenses if she did not do so.[3] Then - even if this was unintentional from Ranburn's point of view - the 14 December letter reinforced the notion that any minimum term of employment was coupled with an obligation to make a repayment if employment ended early. In other words, it ran the two matters together, so there was no clear distinction between a possible stand-alone minimum term of employment and an arrangement that was no more than a bond arrangement.

[21] Ranburn did not formally interview Ms Senora prior to entry into the employment relationship. Instead it relied on AIMS to conduct most of the recruitment process. In turn, the process was largely concerned with checking nurses' qualifications and arranging the necessary certification and permission to work in New Zealand. Indeed there was a conflict in the evidence about whether there was any direct contact between Ranburn and Ms Senora at all before her employment began. Ranburn says there was a telephone conference on or about 14 December 2004, in which Ms Senora participated, but Ms Senora denied such participation.

[22] However even if I accept Ranburn's assertions that it discussed a three year minimum term of employment with Ms Senora in December 2004, for the above reasons I am not satisfied there was a

[3] Namely the August 2003 and November 2004 documents

meeting of the minds to the effect that there was an agreed minimum term of employment regardless of any bond arrangement that might apply. While I accept Ms Senora understood she was expected to work for Ranburn for at least three years, she was also entitled to conclude she could leave earlier but would have to repay the 'loan' if she did.

[23] Accordingly, beyond the obligation to repay $5,600 which she has accepted, Ms Senora was not obliged to remain in Ranburn's employ for at least three years and has no further liability in damages for her failure to do so. For completeness, while I consider it a stretch to say Ms Senora's obligations concerning the repayment relate to or arise out of the employment relationship, I order Ms Senora to pay to Ranburn the sum of $5,600 if she has not already done so.

Rectification

[24] Counsel for Ranburn submitted that rectification was available in respect of the absence from the written employment agreement of provision for a minimum term of three years. I understood the submission to have been made in the alternative, if I did not construe the employment agreement as including the three year minimum term. Thus it was submitted, in reliance on the remedy, a provision such as the following could be inserted:

> "The provisions contained in clause 13.2 shall not apply until after 16 March 2008 and thereafter this contract may be terminated in accordance with Clause 13.2"

[25] In support, counsel said the remedy of rectification:

(a) permits a court (or the Authority) to order that a written document be rectified to reflect the true intention of the parties;
(b) requires the establishment of a common intention; and
(c) requires that the common intention continue unchanged down to the time when the document was created.

[26] I have already found there was no mutual intention to enter into a stand-alone minimum three year term of employment. Accordingly the remedy of rectification does not assist Ranburn.

Relief under the Contractual Mistakes Act 1977

[27] Relief has also been sought under the Contractual Mistakes Act 1977. Section 6 (1) of the Act provides for relief to a party to a contract (or employment agreement), -

> (a) If in entering into that contract –
>
> (i) That party was influenced in its decision to enter into the contract by a mistake that was material to him, and the existence of the mistake was known to the other party …or
> (ii) …
> (iii) …; and
>
> (b) The mistake … resulted at the time of the contract –
>
> (i) In a substantially unequal exchange of values; or
> (ii) In the conferment of a benefit, or in the imposition or inclusion of an obligation, which was, in all the circumstances, a benefit or obligation substantially disproportionate to the consideration therefore; and
> (c) …"

[28] Section 6(2) of the Act provides:

"For the purposes of an application for relief under section 7 of this Act in respect of any contract, -
(a) A mistake, in relation to that contract, does not include a mistake in its interpretation:
(b) …"

[29] Counsel for Ranburn submitted that Ranburn was influenced in its decision to enter into the employment agreement by a material mistake, the existence of which was known to Ms Senora at the time the contract was entered into. The mistake was said to be to the effect that the parties were entering into an employment agreement that would continue for at least three years. Counsel submitted that Ms Senora knew of Ranburn's expectation.

[30] The submission is correct up to a point, but it does not take into account the additional factor that Ms Senora thought she could leave early if she provided the requisite notice and repaid the 'loan'. That view was open to her. I do not accept that she knew Ranburn believed she could not leave early at all.

[31] Relief under the Contractual Mistakes Act is therefore declined.

Penalty for breach of good faith

[32] Since this matter was raised in submissions, and within the requisite time limit, I will address it. Section 4A of the Employment Relations Act provides for penalties for the failure to comply with the duty of good faith. The relevant provision here is s 4A(a), which refers to failures that are deliberate, serious and sustained. Unfortunately s 4A does not say whether applications for such penalties are within the jurisdiction of the Authority or the Employment Court,[4] and there was no argument on the point. If the Authority has jurisdiction, I would accept there is a breach of s 4A(a) if an employee enters into an employment agreement knowing it is critical to the employer that the relationship continue for a minimum specified period, yet having no intention of remaining in that employment and seeking to use the agreement to obtain some other benefit – such as permission to live and work in New Zealand.

[33] The traditional standard of proof required to establish liability to penalties was that of beyond reasonable doubt. If that standard is to be departed from, then the evidence must nevertheless be convincing.

[34] Here there was no direct evidence that, from the outset, Ms Senora had no intention of remaining at Ranburn. Instead the brevity of her employment, the circumstances in which it ended, and the contemporaneity of certain applications to the New Zealand Immigration Service ("NZIS") were relied on.

[35] Regarding her immigration status, Ms Senora had obtained a visitor's visa well before her employment began and without any reliance on Ranburn. By letter dated 18 February 2005 AIMS applied for a work permit on her behalf. The application included reference to 'a three year contract with her employer, Ranburn Rest Home Limited.' Ranburn had earlier filed a document in support of the application. The permit was granted. By letter dated 8 June 2005 AIMS applied on Ms Senora's behalf for a residency permit under the skilled migrant category, referring to the employment with Ranburn but not to the expected term of it. The information in the 8 June application indicates Ms Senora is highly qualified and experienced in an occupation where skills are in short supply. If the information is correct regarding Ms Senora's eligibility for points under the skilled migrant category, then although her employment with Ranburn contributed significantly to the total the points far exceeded the required threshold.

[4] refer to s 133, 161(m)(ii) and 187(1)(b)

[36] Before then, and by letter dated 9 May 2005, Ms Senora sought to tender her resignation for health reasons. She said she had a problem with her back, which was exacerbated by the kind of work she was doing at Ranburn, and said in the 9 May letter she had informed Ranburn of this at the start of her employment. In evidence she said she had asked the AIMS representative, Elvira Capa-Smith, to bring this up on her behalf. However she had not disclosed the condition on the pre-employment medical questionnaire she completed on 19 April 2005. She ticked the answer 'no' to a question about whether she had ever suffered repetitive injury strain or pain. She also neglected to complete two questions addressing whether she had any injury, illness or other condition that may affect her ability to carry out her duties. Apparently no-one asked her to complete them. I have not been asked to pursue any issue arising out of the disclosure of Ms Senora's medical condition, other than as a reflection of her credibility.

[37] There is not enough evidence to persuade me Ms Senora deliberately set out to use her employment with Ranburn to do no more than obtain work and residence permits. I consider it more likely that she found quite soon that she did not like working at Ranburn and did not want to stay. Even if the purported resignation for health reasons was spurious, that does not necessarily mean she acted in bad faith in entering into the employment relationship.

[38] I am not persuaded there was a breach of good faith on Ms Senora's part, and decline to order payment of a penalty.

The counter claim for penalties

[39] The documents relied on as part of Ms Senora's employment agreement were the written agreement itself, read together with the letter dated 14 December 2004. I do not need to address the documents amounting to bond arrangements they were not relied on as part of the employment agreement.

[40] The Employment Relations Amendment Act (No 2) 2004 came into force on 1 December 2004. It repealed s 64 of the Employment Relations Act and replaced s 64 with a new s 63A. Since the parties' employment agreement had not been completed by 1 December 2004, s 63A applies here. The section includes provision for liability to a penalty imposed by the Authority.[5] Overall it applies to bargaining for individual terms and conditions of employment, and requires employers to:

> "(2) … do at least the following things:
>
> (a) provide to the employee a copy of the intended agreement … under discussion; and
> (b) advise the employee that he or she is entitled to seek independent advice about the intended agreement …; and
> (c) give the employee a reasonable opportunity to seek that advice; and
> (d) consider any issues the employee raises and respond to them."

[41] Ranburn submitted that Ms Senora received advice through AIMS and Ms Capa-Smith. However the agreement between Ms Senora and AIMS related only to attempts to find work for Ms Senora. It did not extend to an authority to AIMS to represent Ms Senora in matters arising out of her rights as an employee and based in employment law. Moreover Ms Capa-Smith was also acting on behalf of Ranburn as its recruiter. She was not an independent advisor. I do not accept that any advice she provided was advice of the kind contemplated by s 63A.

[42] Accordingly I find Ranburn was in breach of s 63A(2)(b)(c) and (d).

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[5] s 63A(3)

[43] In all of the circumstances, however, I do not consider it in the interests of justice to order Ranburn to pay a penalty, and decline to make such an order.

Summary of orders

[44] Ms Senora is ordered to pay to Ranburn the sum of $5,600.

Costs

[45] Costs are reserved.

[46] The parties are invited to agree on the matter themselves. If they seek a determination from the Authority they are to file and serve memoranda on the matter within 28 days of the date of this determination.

R A Monaghan
Member, Employment Relations Authority