

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

5357016
[2012] NZERA Auckland 234

BETWEEN KIDICORP Limited
Applicant

A N D REGINA SHARMA
Respondent

Member of Authority: James Crichton

Representatives: Adrienne Rekké, Advocate for Applicant
David Snedden, Counsel for Respondent with Rowen
Sharma

Investigation meeting: On the papers

Submissions Received 22 May 2012 from Applicant
12 June 2012 from Respondent

Date of Determination: 10 July 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Kidicorp) alleges that the respondent (Ms Sharma) has breached the terms of three training bond agreements requiring her to work for two years after the completion of her diploma of teaching course. Kidicorp says that by leaving her employment on 5 January 2011, which was during the bond period, Ms Sharma breached the terms of her agreement and is therefore required to pay to Kidicorp the sum of \$6,596.21 for study costs incurred by Kidicorp pursuant to the training bond agreements.

[2] Ms Sharma initially resisted only part of Kidicorp's contention claiming that the only amount in dispute is the sum of \$1,569.33 in respect of the study fees incurred in Year Two of her course and that the balance of the amount claimed is acknowledged to be owing. However, the respondent subsequently resiled from that

acknowledgment in later correspondence with the Authority specifically a letter dated 10 November 2011.

[3] It seems that, consequent upon the receipt by the applicant of the statement in reply filed on 6 October 2011 making the admission just referred to, Kidicorp subsequently sought to protect the position by entering into a settlement agreement with Ms Sharma to record the terms of that suggested agreement. It was in response to that suggested basis of settlement that Ms Sharma wrote to the Authority by letter dated 10 November 2011.

[4] In that letter, she first rejected the proposed settlement on the basis suggested by Kidicorp and then set out what amounted to a fresh statement in reply to the original statement of problem in which she claimed that no moneys at all were due and owing.

[5] The basis of this revised position was reliant on the study agreement contract dated 10 November 2006 what she described as an “*overarching agreement*”. The single page “*return of service (ROS)*” agreements which followed the overarching study agreement were to be read as subject to the study agreement. It followed, according to Ms Sharma that she was not required to make any reimbursement.

[6] Furthermore, Ms Sharma raises a counterclaim against Kidicorp seeking compensation alleging that Kidicorp both mismanaged the matter and caused Ms Sharma stress.

[7] Kidicorp is a duly incorporated company operating childcare centres throughout New Zealand. On 5 February 2007, ABC Developmental Learning Centres (NZ) Limited (ABC), (the original applicant in these proceedings) amalgamated with Forward Steps Limited (Forward Steps) by purchasing the shares in Forward Steps. Ms Sharma was, at the relevant time, employed by Forward Steps and had been so employed since 26 June 2006. She was at that time in the position of Teacher-in-Training Year One and was already enrolled in stage 1 of the diploma of teaching (early childhood education). On 26 September 2006, Ms Sharma completed that stage one qualification.

[8] At the time that the amalgamation of Forward Steps with ABC took place, all employees employed by Forward Steps continued to be employed by ABC and ABC took over all the contracts entered into by Forward Steps.

[9] On 10 November 2006, Ms Sharma entered into a study agreement contract with Forward Steps. This is the so-called “*overarching agreement*” that Ms Sharma referred to in her second statement in reply.

[10] That study agreement contract between Forward Steps and Ms Sharma provided that Forward Steps would provide financial assistance to Ms Sharma to help her complete her diploma in teaching (early childhood education) by way of a payment of \$2,500 to be applied towards the employee’s course of study in the second year of study and a further and subsequent payment of \$3,500 to be applied towards the employee’s course fees in the third or final year of study.

[11] A further provision required the employee beneficiary of this arrangement to pay back the value of the financial assistance provided if they left the service of Forward Steps within “*24 months of that financial assistance being provided to the employee ...*” in terms of a table that was set out in the agreement to enable calculation of exactly what was owed, depending on when the resignation took effect.

[12] Pursuant to that study agreement contract, Ms Sharma received \$2,500 on 21 November 2006 as a contribution to her Stage Two course fees but that amount was subsequently reduced by the sum of \$930.67 when Forward Steps received an incentive grant that it was able to pass on to Ms Sharma. This reduced the cost of the total fees incurred by Forward Steps in respect of Ms Sharma’s Stage Two course fees to the sum of \$1,569.33.

[13] Then, on 2 April 2007, Ms Sharma entered into an employment agreement and a Return of Service agreement with ABC. This naturally followed on from ABC’s merger with Forward Steps. The Return of Service agreement entered into between ABC and Ms Sharma on 2 April 2007 referred exclusively to Ms Sharma’s practicum and provided simply that ABC would incur the cost of the practicum, that Ms Sharma would provide a Return of Service of two years to ABC from the completion of the course, and that if she failed to do that, she would be required to pay ABC all practicum costs. The final provision in the Return of Service agreement makes clear that the agreement operates alongside and does not affect any other existing Return of Service agreements “*(for example any in relation to study fees)*”.

[14] In the period from 8 to 26 October 2007, Ms Sharma worked her practicum and was paid \$2,040 for that period.

[15] On 23 January 2008, Ms Sharma completed Stage Two of her diploma course and on 18 March in the same year, she entered into a second Return of Service agreement in similar terms to the earlier one. The second Return of Service agreement provided that ABC would incur the costs of practicum and study fees, that Ms Sharma was required to provide a Return of Service of two years to ABC on the completion of the course and that if she failed to do that she would be required to pay the employer all practicum costs and study fees paid on her behalf by ABC.

[16] In pursuance of that agreement on 7 April 2008, ABC paid to Ms Sharma the full course fees for Stage Three in the sum of \$3,525. Another incentive grant was received from the Ministry of Education and this was credited to Ms Sharma's account thus reducing the total amount to be recovered to \$2202.67.

[17] In the period between 8 and 26 September 2008, Ms Sharma participated in a practicum as part of her course of study and was paid gross wages by ABC for that period in the sum of \$2,160.

[18] Ms Sharma completed her course and was provisionally registered with the New Zealand Teachers' Council on and from 22 February 2010, whereupon she received a pay rise recognising her status as a provisionally registered teacher. Ms Sharma resigned her position effective 5 January 2011 having failed to complete two years return of service from the completion of her course. Ms Sharma's final pay was withheld to reduce the total debt outstanding but Kidicorp still claims reimbursement of a net sum of \$5,665.54 being comprised of the following sums:

Study fees (Year Two):	\$1,569.33
Study fees (Year Three):	\$2,202.67
Practicum costs 2007:	\$2,040.00
Practicum costs 2008:	\$2,160.00

Issues

[19] The principal issue in this matter is whether Kidicorp is entitled to recover the sum of \$6,596.21 from Ms Sharma, some lesser amount or nothing at all. A subsidiary question, depending on the answer to the first question, is whether the counterclaim lies.

[20] For the sake of completeness, the Authority notes that at around the time the statement in reply was filed in this matter, there was a further change in the structure of the applicant in that, on 23 September 2011, Kidicorp Limited purchased ABC. That purchase included all the assets and liabilities of ABC. While the proceedings were filed in the name of ABC, it is appropriate to reflect the change in circumstances in the entitling of the matter.

What do the relevant agreements mean?

[21] Ms Sharma commenced her employment with Forward Steps pursuant to an employment agreement dated 23 June 2006. As is common with such agreements, it expresses itself to be the “*entire*” agreement between the parties.

[22] Notwithstanding that, Ms Sharma then executed a deed with Forward Steps dated 10 November 2006 which is described as a study agreement contract. That is the document Ms Sharma describes as the “*overarching agreement*” between the parties and it is on the provision of that agreement that Ms Sharma relies.

[23] On 2 April 2007, Ms Sharma entered into the first Return of Service agreement and on 18 March 2008 she entered into the second Return of Service agreement.

[24] The relationship between these documents needs to be considered. In that consideration, the Authority has been assisted in some part by the decision of His Honour Chief Judge Colgan in *ABC Ltd v. Plasmeyer* [2011] NZEmpC 15 where the Court considered documentation in similar terms (as to the Return of Service documents, in any event). While in that case the employment agreement was different and there was no study agreement contract, the Chief Judge’s decision is a helpful and clear analysis of the correct interpretation of the Return of Service agreement.

[25] The Authority is satisfied that, notwithstanding the several provisions in the applicable employment agreement referring to it being the “*entire*” agreement between the parties, the subsequent execution of the study agreement contract as a deed was a binding agreement between the parties. By virtue of its execution as a deed, it was signed with the extra formality required of such a document. There is nothing to suggest it was entered into oppressively or with any want of form; indeed, both parties rely on its terms.

[26] The Return of Service agreements are, as the Chief Judge remarks in *Plasmeyer*, neither in the form of either a contract or agreement but His Honour concludes that a document in exactly similar terms to the one in the present case was binding all the same, and in particular not inconsistent with the terms of the employment agreement. Although the employment agreement in the present case is in different terms, the Authority is satisfied that it is materially similar to the one in *Plasmeyer*.

[27] Of even more import is His Honour's conclusion that the phrase "*from the completion of the course*" means "*course of study or training ... that she is undertaking*". For our purposes, that means that the interpretation that ABC urges on the Authority, namely the conclusion that time runs from the conclusion of the course of study, is to be preferred to Ms Sharma's view which is that time runs from the date the part-payment is made.

Is Ms Sharma indebted to Kidicorp?

[28] The study agreement contract between Forward Steps and Ms Sharma is described and executed as a deed. It is the document which Ms Sharma says is the "*overarching agreement*" determining this situation. On examination, the document provides for the total range of circumstances that might apply as between employer and employee but for our purposes, the only issue of relevance is the interpretation of the provision styled "*covenants – employee 7*". That provision is in the following terms:

7. *The employee further agrees and acknowledges that they will reimburse Forward Steps for the value of any financial assistance provided, if they leave Forward Steps' employment within 24 months of that financial assistance being provided to the employee, in accordance with the table below."*

[29] Dealing first with the words just referred to, it will be evident that this provision generally imposes an obligation on the employee (Ms Sharma) to reimburse the employer (originally Forward Steps but now Kidicorp) for the value of any financial assistance the employee received if they leave the employment within 24 months of the financial assistance **being provided and in accordance with the table below**. Ms Sharma's interpretation of what this clause means relies on only part of the words highlighted above. She relies on the 24 months running from the point at

which the financial assistance was paid and overlooks the fact that the clause refers to a table which the Authority will refer to shortly.

[30] Dealing with Ms Sharma's argument first though, if the 24 months runs only from the point at which the reimbursement was provided, and it is common ground that the reimbursement is provided on a piecemeal basis as each part of the course is concluded, then Ms Sharma is correct in her interpretation because the early part of the reimbursing programme would, of necessity, have fallen within the terms of the three years. For example, Ms Sharma received the sum of \$2,500 on 21 November 2006, being the reimbursement for the fees associated with her Stage Two course. The amount that Ms Sharma owed from that process was actually reduced by the sum of \$930.67 because she was entitled to be credited with a Ministry of Education incentive grant amount of that magnitude and so the total sum due and owing by Ms Sharma in terms of a contingent debt was \$1,569.33. In effect then, that sum became due and owing on 21 November 2006 and on Ms Sharma's argument would have been extinguished two years after that, say on 21 November 2008. Given that Ms Sharma did not resign until 5 January 2011, her argument is that that first claim is well outside the period in question.

[31] Similarly, wages were paid by ABC to Ms Sharma for her 2007 practicum due in October 2007. That amount was \$2,040. On Ms Sharma's argument (and ignoring for the moment that this amount is the first amount that is subject to a separate agreement, namely the Return of Service agreement dated 2 April 2007), Ms Sharma would have extinguished that contingent debt by continuing to work for ABC down to 26 October 2009. Similar logic applies *mutatis mutandis* in relation to the course fees for Stage Three paid on 7 April 2008 in the sum of \$3,525, a contingent debt which would have been extinguished by 7 April 2010 and finally the payment to Ms Sharma of her 2008 practicum of \$2,160 would have been extinguished by 26 September 2010.

[32] As the Authority has noted above, the flaws in this argument are twofold. The first is that it overlooks the table that is included at the end of "*covenants – employee 7*" in the study agreement contract and, in respect of the payments from her first practicum in 2007 onwards, it overlooks the provisions of the two Return of Service agreements which Ms Sharma signed in good faith. Of course, Ms Sharma maintains that the "*overarching*" nature of the study agreement contract that she entered into

with Forward Steps ought to take precedence over the terms and conditions in the two Return of Service agreements which post-date it, but that argument only has force or effect if Ms Sharma is correctly construing the relevant clause in the study agreement contract.

[33] In the Authority's view, "*covenants – employee 7*" must be read in its totality and in particular the reliance that Ms Sharma places on a portion of the first sentence in the clause is misplaced. Interpreting matters as she does, rather overlooks the continuation of the wording of the clause, the key provision of which is as follows:

The employee agrees that on receiving confirmation of gaining a diploma ... in teaching early childhood they are required to be employed at Forward Steps for the following periods of time ... "

[34] There then follows a very brief and straightforward graph which shows that if two years' grants have been taken, then the required employed period is also two years. It follows that, in the Authority's opinion, Ms Sharma is quite mistaken when she argues that the 24 months is to run from the point at which the money was paid over. Plainly, the clause, read in its totality, requires that the two years only runs from the point of gaining the qualification. That interpretation of matters is supported by the earlier provision in clause 6 under the same general head which provides that where an employee fails to complete the course for any reason, then they must reimburse the employer for the costs the employer has incurred.

[35] These provisions, read together, make clear that the commonsense position is that Kidicorp is funding students to assist them in gaining qualification because the gaining of that qualification enhances the value of Kidicorp's business. Kidicorp gains nothing by having an unqualified staff member on its payroll who it has funded unsuccessfully; nor does it benefit from having a student successfully complete the course at the employer's cost and then leave and so not be able to add value to its business.

[36] For reasons already enunciated, the Authority concludes that the correct interpretation of the "*overarching agreement*" which Ms Sharma refers to, does not avail her. To the contrary, the Authority is satisfied that time runs from the end of the course or provisional certification of the teacher, not from the receipt of various interim part-payments. This conclusion is consistent with the finding of the Court in *Plasmeyer*.

[37] Moreover, reference to the Return of Service agreements simply produces the same result. The two Return of Service agreements executed by Ms Sharma are each of them in exactly similar terms to the document interpreted by the Employment Court in *Plasmeyer* and must be accorded a similar meaning to that obtained from considering the meaning of the study agreement contract, namely that time runs from the completion of the qualification and not from the point at which payments on account are received.

Determination

[38] It follows from the foregoing conclusions that the Authority is satisfied that Ms Sharma must pay to Kidicorp the sum of \$5,665.54 being the amount claimed by Kidicorp for a breach of the contract between those parties.

[39] The Authority is satisfied that time runs from the point at which the qualification is obtained or granted. On that footing, Ms Sharma resigned her position before she had completed two years' service since obtaining provisional registration and so is liable to pay the sum identified to Kidicorp to remedy the breach of the contract.

[40] It also follows from the foregoing analysis that Ms Sharma cannot expect relief by way of her counterclaim. Kidicorp and their predecessors in title have done nothing more than pursue their legal rights.

Costs

[41] Costs are reserved.

James Crichton
Member of the Employment Relations Authority