Determination Number: AA 234/06
File Number: 5030491

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Kindercare Learning Centres Limited (Applicant)
AND	Pauline Stratful (Respondent)
REPRESENTATIVES	John Armstrong for Applicant Mark Ryan for Respondent
MEMBER OF AUTHORITY	Robin Arthur
INVESTIGATION MEETING	29 June 2006
DATE OF DETERMINATION	7 July 2006

DETERMINATION OF THE AUTHORITY

[1] This matter concerns whether obligations to repay what is often called a "training bond" survive the termination of the employment relationship. Such a "bond" arises from arrangements whereby an employer pays costs of work-related education in return for the worker agreeing to remain in the job for a certain period or some arrangement to 'work off' or repay the money advanced by the employer.

[2] Here the applicant ("**Kindercare**") seeks an order requiring the respondent ("**Ms Stratful**") to pay it an amount equivalent to the balance of fees Kindercare paid for her during a three-year course in early childhood education she did through 1999, 2000 and 2001. The balance is calculated after allowing for agreed reductions for work done for Kindercare in 2002 and 2003.

[3] Kindercare relies on the terms of an employment agreement and later "training subsidy" agreements signed by Ms Stratful in 2001.

[4] From 12 April 1999 until 3 October 2003 Ms Stratful worked as a caregiver in two Kindercare centres.

[5] Her 2001 employment agreement provided for either gradual repayment of Kindercare's contribution to her course costs through a mechanism of credit for each hour of service or, if she left the job, reimbursement to Kindercare of any outstanding amount ("**the reimbursement clause**").

[6] Ms Stratful says the reimbursement clause is unenforceable because it amounts to a restraint of trade, is harsh and oppressive and Kindercare did not disclose its ownership connections with the education provider to whom her course fees were paid. Kindercare's shareholders at the time, Mr Wendelborn and his wife, Glenda Wendelborn, were also the shareholders of New Zealand Tertiary College ("**NZTC**"), the private training establishment at which Ms Stratful undertook her studies.

[7] Further Ms Straftul considers that Kindercare should not be allowed to enforce the reimbursement clause because of the circumstances in which the employment relationship ended. Those circumstances were the subject of a full and final agreement between the

parties on 12 February 2004 ("**the settlement agreement**"), certified by a mediator under s149 of the Employment Relations Act 2000 ("**the Act**"). However that agreement expressly excluded the issue now before the Authority of whether any reimbursement for course fees was owed by Ms Stratful to Kindercare.

[8] Kindercare sought summary judgment of the District Court on the amount said to be owed by Ms Stratful. By oral judgment on 4 July 2005 his Honour Judge McElrea stayed proceedings in the District Court while the matter was litigated in the employment jurisdiction.

[9] By prior arrangement with counsel I had the benefit of written opening submissions and an agreed statement of facts before the investigation meeting. Witness statements were provided by Kindercare director Allan Wendelborn and Ms Stratful. At the meeting Mr Wendelborn and Ms Stratful answered questions and I discussed the legal issues with counsel. Mr Ryan also subsequently provided a copy of a House of Lords decision said to be relevant to one issue but I did not require further submissions from either party on the point raised.

Employment Agreement

[10] The employment agreement – described as an "earn as you learn" agreement and made on 15 February 2001 – provided for Kindercare to pay Ms Stratful's fees for a teaching diploma course. She had already completed two years of a lower-level certificate course for which the applicant also paid the course fees. These earlier amounts paid by Kindercare in 1999 and 2000 were included in the total contribution to course costs recorded in the 2001 employment agreement. The agreement includes an acknowledgement by Ms Stratful that the amount paid by Kindercare, including previous amounts paid, "*is the amount of my commitment to Kindercare"*.

[11] The agreement included the reimbursement clause in the form of a statement accepted over Ms Stratful's signature: *"I acknowledge that should I leave, or be required to leave Kindercare's employment for <u>any</u> reason, I will reimburse Kindercare any outstanding amount.* [emphasis in original]

[12] Two later training subsidy agreements – signed on 10 May 2001 and 29 November 2001 – each provided for a further payment of $1560 described as course fees during a three week "practicum", that is work experience in an early childhood education centre required during the diploma course. Both agreements include an acknowledgement by Ms Stratful that the amounts paid by Kindercare "*is the amount of my liability to Kindercare*". They also include the statement above Ms Stratful's signature: *"I acknowledge that should I leave Kindercare's employment, I will reimburse Kindercare any outstanding amount"*.

[13] Mr Ryan protested that the May 2001 agreement was not disclosed and added to Kindercare's claim until the day of the investigation meeting. Mr Armstrong accepted that Kindercare had not included the amount in that agreement in the balance for which it had earlier made demand of from Ms Stratful. However I accept his submission that the issue is whether the agreements are enforceable, so that if the employment agreement and November subsidy agreement are enforceable so too is the May subsidy agreement. Ms Stratful does not dispute she had the benefit of $1560 provided under the May 2001 agreement.

Reductions and the balance at issue

[14] The employment and training subsidy agreements include a formula or mechanism for Ms Stratful to reduce her commitment or liability to Kindercare by service once her course is satisfactorily completed. For each completed 100 hours of paid employment, the amount owed to Kindercare was to be reduced by $70. In effect her debt was to be reduced by 70 cents for every hour worked.

[15] The agreements included a calculation of how long Ms Stratful would have to work to pay off Kindercare's contribution to her costs. For the amount of $9445 contributed under the employment agreement, it was 13,492 hours. For the amount of $1560 contributed under the

November 2001 agreement, it was 2200 hours. For the amount of $1560 contributed under the May 2001 agreement, it was 2228 hours. Although the latter two amounts are the same, the calculations of hours required differ because one rounded up a sum and another took it to two decimal points.

[16] Although the parties' estimates varied, both agreed that it would take many years to work off the total contribution at the agreed rate. My own approximate calculation (allowing for annual leave, public holidays and sick leave and based on working 40 hours a week for 45 weeks a year giving total annual work hours of 1800) was that it would take just under 10 years to repay the total contribution at the agreed reduction rate.

[17] The parties agree that after completing the diploma course Ms Stratful provided Kindercare with 2780 hours of service and was credited a reduction of $1946 from the amount owed on the bond. Kindercare says it is owed a balance of $9059 under the employment agreement and the November 2001 training agreement and a further $1560 under the May 2001 agreement.

Termination of employment

[18] In October 2003 the employment relationship between the parties ended. This was the subject of the settlement agreement. The mediator's certificate confirms that the parties accepted the terms of settlement were final and binding and not able to be brought before the Authority for action, appeal or review except for the purposes of enforcement.

[19] Although the terms of the agreement were confidential, the circumstances of this employment relationship problem require that I reveal two terms:

> *2) This is a full and final settlement of all employment related matters between the parties with the exception of the outstanding issues pertaining to the Earn as You Learn agreement between the parties. …*
>
> *4) The parties agree that Ms Pauline Stratful did choose, after approximately five years employment, to resign from Kindercare Learning Centres in order to explore other development opportunities. …*

Applicant's arguments

[20] Mr Wendelborn said Kindercare had pursued Ms Stratful for the money because it believed she had a legal and moral obligation to repay the balance of the course costs. Other staff who left Kindercare's employment, including some who were dismissed, had repaid amounts owed.

[21] I am aware from one document provided in evidence that the present matter is likely to be of wider financial significance to Kindercare. That document lists at least 40 other Kindercare staff as having course fees paid for them under 'earn as you learn' agreements around the same time as Ms Stratful. It describes those staff as "bonded employees".

[22] Kindercare says it is entitled to the benefit of the bargain recorded in Ms Stratful's employment agreement. It says the reason for her departure is irrelevant as the employment agreement makes it plain that reimbursement of any outstanding amount is required when the employee leaves for any reason. Further, the terms of the settlement agreement are such that she cannot rely on an allegation of dismissal to justify not paying the outstanding amount.

[23] I accept the applicant's argument on the effect of the settlement agreement. Ms Stratful agreed – on a full, final and binding basis – that she chose to resign. Any prospective employer checking with Kindercare on her employment history would, under the terms of the settlement agreement, have to be told the same thing. Ms Stratful is not now entitled to argue something different to support her argument that she should not have to pay the balance of her bond.

Respondent's arguments

Restraint of trade

[24] The respondent's initial argument was that the reimbursement clause amounted to a penalty clause which Kindercare was estopped from enforcing because it had initiated breach of the term. By the time of the investigation meeting that argument was abandoned for a new one – that the reimbursement clause operated as a restraint of trade.

[25] I reject Mr Ryan's argument that the reimbursement clause acted as an unenforceable form of bondage and an action interfering with free market conditions.

[26] I prefer Kindercare's submission that the reimbursement clause neither restrained Ms Stratful from leaving her job nor purported to prevent her carrying on her chosen occupation after the parties' employment relationship ended. It did not prevent her from working elsewhere in early childhood education or competing with Kindercare in any way.

[27] Rather than being restrained from working in her chosen career, Ms Stratful's evidence was that she got a new job in a kindergarten a week after leaving Kindercare. Since then she has worked in two daycare centres. For the last year she has worked as the head teacher of a kindergarten.

[28] The respondent's argument might be suggesting that – by analogy with the law on restraints – the reimbursement clause could not survive termination of the employment relationship by the employer. That is because termination by the employer would amount to a repudiation of the contract and, if the employee treats the contract as cancelled, the employer could not then rely on the contract's terms, particularly if the termination was a dismissal that was unjustified. Although this is not yet settled law in the area of restraints,[1] and even if applicable here, it would require a repudiatory breach by Kindercare to release from Ms Stratful from her obligations under the employment agreement, including the reimbursement clause. Again I do not accept any repudiatory breach happened here because it relies on rekindling the analysis that the termination of the employment was a dismissal and not a resignation – which is contrary to the position accepted by the parties in the settlement agreement.

Oppressive terms

[29] The real thrust of the respondent's argument on restraints amounted to the suggestion that Ms Stratful could not afford to leave the job.

[30] Mr Ryan relied on an earlier employment contract and training subsidy agreement, both signed in 1999, to argue that Employment Contracts Act 1991 provisions and case law regarding harsh and oppressive terms should apply to this case.

[31] However Kindercare seeks to enforce the terms of employment and training subsidy agreements made in 2001 which superceded the earlier agreements. The Employment Relations Act 2000 applies.

[32] Even if that earlier case law applied as Mr Ryan suggested, it would not assist Ms Stratful. A Court of Appeal decision he cited[2] considered the meaning of the word "oppressive" – including, in a useful comparision here, in the Credit Contracts Act 1981. In that Act "oppressive" means, inter alia, "unjustly burdensome" or "in contravention of reasonable standards of commercial practice".

[33] Ms Stratful was not charged any interest on Kindercare's money spent on her course

[1] See *Grey Advertising (NZ) Limited v Marinkovich* [1999] 2 ERNZ 844, 858
[2] *Tucker Wool Processors Limited v Harrison* [1999] 1 ERNZ 894

fees, either while she completed her studies or once reductions on the amount owed began once she had finished the diploma course.

[34] Mr Wendelborn told me that students on the course undertaken by Ms Stratful could apply for student loans. If she had taken a student loan, she would have been obliged to begin repaying interest and principal on her earnings after the course finished. If she had taken a personal bank loan, she would have paid interest throughout.

[35] Ms Stratful has emphasised how long it would take to repay the full amount through gradual reductions for hours of service completed. She overlooks 'the other side of the coin' – that Kindercare was prepared to provide her with what amounted to an extended interest-free loan for the cost of her studies for as long as it took for her to repay it. Further there is no suggestion that she was not free to pay off the bond at a faster rate by making voluntary payments or get a loan from elsewhere to pay off the whole amount.

[36] For that reason I do not accept that this term of her agreement was oppressive. It was neither unjustly burdensome. Rather than contravening reasonable commercial practice, it was considerably more favourable.

[37] Similarly I do not accept Ms Stratful's claim that she did not have a chance to get independent advice on the agreements and was hurried into signing them. In answers to questions at the investigation meeting Ms Stratful described having the content of the 2001 employment agreement explained to her by a Kindercare manager and discussing the amounts of contributions to course costs and the hours that she would need to work to pay that off. She accepted that she read the agreement which includes a note at the top on the worker's entitlement to seek independent advice and a statement at its foot that Ms Stratful had the opportunity to seek independent advice on the agreement.

Connection between Kindercare and NZTC

[38] Mr Ryan suggested that Kindercare breached an implied term of Ms Stratful's employment agreement by not disclosing to her the common shareholding in Kindercare and NZTC. He argued that the existence of such an obligation – part of the wider mutual obligations of trust, confidence and fair dealing – was supported by the House of Lords decision in *Scally v Southern Health & Social Services Board*[3]. *Scally* confirmed an employer's obligation to tell employees of the availability of an individual benefit provided under the terms of a collective agreement if they might otherwise be unaware of the benefit – in that case a superannuation entitlement. It is not a principle applicable to the facts here. Ms Stratful was not denied knowledge of a benefit available to her.

[39] Further, when the Employment Court in considering the application of *Scally* has cautioned that implied terms must not be "too widely drawn" but rather tailored to narrowly defined circumstances.[4] Accordingly I do not accept that it was an implied term of Kindercare's employment agreement with Ms Stratful, to tell her about its shareholder connections with NZTC. Rather its obligation was a statutory one – that of good faith under s4 of the Act. And there is no evidence that suggests Kindercare misled or deceived Ms Stratful about the nature of its relationship with NZTC.

[40] Kindercare's owners set up NZTC – a private training establishment registered by the Qualifications Authority ("**NZQA**") – to provide early childhood education. NZTC is subject to auditing to meet the requirements of the Ministry of Education, Tertiary Education Commission and NZQA. It presently has more than 500 students enrolled, some of whom also work for Kindercare and some of whom work for other early childhood education providers. It is accredited to provide certificate and diploma courses recognised by NZQA.

[41] Mr Wendelborn's evidence was that Kindercare initially set up NZTC because of a shortage of qualified early childhood education staff for its own centres. The connection

[3] [1991] 4 All ER 563
[4] *Rankin v AG* [2001] 1 ERNZ 476, 517-8

between what he described as "sister companies" was not secret.

[42] Although not formally disclosed to her, I consider it unlikely that Ms Stratful was not in fact already aware of the close connection between Kindercare and NZTC from her two years of study at NZTC nightclasses before she signed the 2001 employment agreement. Even if she was not, she has not established that there was anything untoward in the connection or that it was kept from her in a way that is relevant to her obligations to Kindercare.

[43] Neither do I find anything untoward in the employment agreement providing for the training to be undertaken at NZTC. There was no evidence that Ms Stratful could not have undertaken her training at another provider or would not have received assistance with her course costs if she did so. Rather Mr Wendelborn's evidence was that Kindercare did employ staff who were training at institutions other than NZTC.

[44] Neither did Ms Stratful's evidence suggest that her training at NZTC was sub-standard, not recognised by other employers, or more expensive or of less value to her than if she had undertaken it elsewhere. She accepted that she had "*most definitely*" benefited from having the diploma qualification from NZTC and that this had helped her get more senior (and presumably better paid) jobs since leaving Kindercare. With the diploma and her work experience she has since also fulfilled the requirements for full registration with the Teaching Council and has plans to undertake further tertiary studies for at bachelor level.

[45] Although this point was not raised by either party, I discussed with counsel whether the Wages Protection Act 1983 s12A provisions against premiums for employment might apply. However I am satisfied that the linking of the employment agreement with training to be provided by NZTC did not amount to a premium for the job, particulary as no direct financial advantage accrued to Kindercare and there was no suggestion that the fees of the 'sister' entity of NZTC were higher than other providers.

Determination

[46] For the above reasons, I find that the agreements between Kindercare and Ms Stratful are enforceable. Ms Stratful has what was described as a "*commitment*" in her employment agreement and a "*liability*" in the training subsidy agreements for the amounts paid as course fees for her by Kindercare. She agreed to pay any outstanding amount on leaving Kindercare's employment. She is obliged to pay that amount.

[47] Kindercare is entitled to the compliance order sought under s137 of the Act. **Accordingly I order Ms Stratful to pay to Kindercare within 56 days of this determination, the sum of $9059 outstanding for contributions made under the employment agreement and the November 2001 training subsidy agreement and a further sum of $1560 for the contribution made under the May 2001 training subsidy agreement.**

[48] Kindercare, in submissions for the investigation meeting, added an additional claim for interest on the amounts owed. It seeks interest from the date of the settlement agreement. The Authority has a discretionary power to award interest under clause 11 of Schedule 2 of the Act. I decline to exercise that power in Kindercare's favour at this stage for three reasons. Firstly, Kindercare's application for interest appears to have been an afterthought. Secondly, under the terms of the employment agreement, Kindercare was not receiving interest on the money and would not have been if Ms Stratful was still employed, so the loss, if any, is limited. Thirdly, the settlement agreement accepted whether there was an obligation remained in question, and that question has not been resolved until this determination. The position would be different if Kindercare has to apply for further compliance orders in respect of this determination.

Costs

[49] The parties are invited to resolve any issue as to costs between themselves. Counsel are

familiar with the modest level of costs generally awarded in matters of this type where witness statements and opening submissions were provided in advance and the investigation meeting itself took less than half a day. If the parties are unable to resolve the issue of costs, Kindercare may apply to the Authority for a determination on costs and Ms Stratful will be given an opportunity to respond before costs are decided.

Robin Arthur
Member of Employment Relations Authority