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THE ADVOCATE

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Client Services:

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Balking at Bonds

Employers often enter into bond arrangements with employees, particularly in circumstances where the employer has met the cost of the employee's training. A bond arrangement does not prevent an employee from terminating employment, rather it requires the employee to reimburse the employer for the cost of the training or other expense incurred if the employee leaves within a specified timeframe.

The enforceability of bond arrangements came into question in the recent case ***CTC Aviation (NZ) Ltd v. Sinton*** [2014] NZERA Auckland 45.

Sinton was employed by CTC Aviation ("*CTC*") as a flight instructor in May 2012. He entered into bond arrangements relating to both relocation costs and training costs which had been paid by his employer. When he left his employment within the bonding period, he disputed that he had to pay back the amounts owing:

"[2] Mr Sinton disputes the amount claimed as training bonds and asserts he is only required to repay actual and reasonable training costs. He claims CTC is attempting to enrich itself unjustly by seeking the repayment of training costs from him in excess of its actual costs of providing the training. Alternatively, Mr Sinton says that CTC, in seeking to recover training costs in these circumstances, is putting a premium on employment that is prohibited by s 12A of the Wages Protection Act 1983.

[3] Mr Sinton does not question the legitimacy of CTC's relocation bond but claims it should be set aside because he entered into an employment agreement with CTC in reliance on an innocent or fraudulent misrepresentation. Alternatively he seeks damages for the misrepresentation."

The training bonds were drafted so as to require a pro-rata repayment of costs, based on the length of employment following completion of the training, while the relocation bonus provided similar repayment but based on the length of employment following commencement. When Sinton left CTC, the company claimed he owed $2,712 for the relocation bond (the full amount was $5,000) and $1,008 and $2,015 for the two training bonds (the combined total amount for training had been $12,100).

The Employment Relations Authority had to determine whether:

a. the relocation agreement and training bonds entered into by Mr Sinton were enforceable; or
b. Mr Sinton was induced into entering the relocation bond by CTC's misrepresentations, either innocent or fraudulent; or
c. there was any lawful justification for Mr Sinton refusing to repay the outstanding portion of the training bonds.

The Relocation Bond

Sinton argued that in relation to the relocation bond repayment, CTC had misrepresented the job when it originally advertised it and in subsequent discussions. He claimed that he was under the impression that he would be undertaking mainly multi-engine instruction but that the employment did not eventuate that way. Had he been able to prove misrepresentation then the relocation bond could have been cancelled under the Contractual Remedies Act 1979.

The Employment Relations Authority said:

"[23] The relocation agreement is a contractual agreement between CTC and Mr Sinton, the express terms of which are clear and unequivocal. It satisfies the elements necessary for a binding and enforceable contract. Mr Sinton's claim not to be bound by it is based solely on his assertion of misrepresentation. He says he was induced to enter into employment with CTC by misrepresentations made by the company over the nature of the employment he would be undertaking."

Having considered the evidence, the Authority found:

"[34] I am not persuaded Mr Calvert misrepresented in discussions with Mr Sinton the nature of the work he would be undertaking if successful in his application for the position. Mr Sinton acknowledged in the investigation meeting that Mr Calvert had not given him a guarantee he would be doing mainly multi-engine instruction. He conceded that was an inference he had drawn from Mr Calvert's reference to a typical multi-engine instructor's duties in response to his query. I find it was not reasonable to infer from Mr Calvert's words that he would be undertaking mainly multi-engine instruction from the time of completion of his two training courses.

Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Neil McPhail**, **Raewyn Gibson**, or **Peter Zwart**.

Contact Details:

Ground Floor
71 Cambridge Terrace
PO Box 892, Christchurch
Tel (03) 365 2345
Fax (03) 365 2347
www.mgz.co.nz

Neil McPhail
Email neil@mgz.co.nz
Mobile 0274 387 803

Raewyn Gibson
Email raewyn@mgz.co.nz
Mobile 0274 387 802

Peter Zwart
Email peter@mgz.co.nz
Mobile 0274 367 757

[35] Nor am I persuaded that the inclusion of an Example Role Description in an information pack relating to a Grade 2 Flying Instructor position constitutes a representation that successful applicants would spend a significant portion of their time on multi-engine instruction. The specified purpose of the information pack was to assist applicants for Instructor positions to prepare for their interviews. There is no reference to multi-engine instruction in the information pack. The sample role description does not purport to be anything but an example of a role description, not the only role description, for the advertised Instructor position."

The Authority also considered the letter of offer and the employment agreement, before concluding:

"[44] For all the above reasons I dismiss Mr Sinton's allegation that CTC misrepresented the nature of his employment following the successful completion of the training he was required to undertake."

The Training Bonds:

Mr Sinton's first argument about the training bond was based on a claim of "*unjust enrichments*". The Employment Relations Authority referred to a number of cases on this issue:

"[49] In New Zealand Fire Service Commission v Warner Colgan CJ's discussion of unjust enrichment included the following:

"There are three principal elements of the unjust enrichment cause of action. They are, first, proof of the recipient's enrichment by receipt of a benefit. Secondly, there must be a corresponding deprivation to the donor. Thirdly, there must be an absence of any juristic reason for the enrichment. Absence of juristic reason may include a mistake. "

[50] CTC's submissions referred to Foai v Air New Zealand Limited in which Ford J discussed the concept of unjust enrichment (in that instance in the context of an attempt to recover overpaid wages) against a background of leading cases and legal commentary. The judge cited the following passage from Goff & Jones: The Law of Unjust Enrichment:

> *"English law provides that a claimant will be entitled to restitution if he can show that a defendant was enriched at his expense, and that the circumstances are such that the law regards this enrichment as unjust. For example, a claimant will have a prima facie right to restitution where he has transferred a benefit to a defendant by mistake, under duress, or for a basis that fails. "*

The Authority examined whether in fact there was mistake or duress:

"[53] Mr Sinton was unable to provide evidence that he had queried or raised any objection to entering into training bonds at the time of accepting employment with CTC. He did not accept employment under duress or as a result of mistake but did so freely and after taking advice. There was no evidence he had objected to the amount of either training bond when he entered into them, or once he had completed the training. The evidence points to his first raising the issue after his resignation when Mr Calvert informed him he should discuss the outstanding bond amounts with [the Chief Financial Officer]."

The Authority therefore found that there was no basis for Sinton's claim that CTC would be unjustly enriched if he was required to pay the outstanding portions of his training bonds.

Premium for Employment

Sinton also argued that s.12A of the Wages Protection Act 1983 prevented CTC from recovering the outstanding bond amounts. S.12A reads:

*"[12A **No premium to be charged for employment***
(1) No employer shall seek or receive any premium in respect of the employment of any person, whether the premium is sought or received from the person employed or proposed to be employed or from any other person. "

The Authority examined some previous Employment Court cases:

"[60] The Employment Court has described a premium "(i)n the normal understanding of the term" as importing "some consideration paid or demanded as the price of a contract. The court gives historical context to s 12A in Mehta v Elliott (Labour Inspector)as having its genesis in shop and office legislation aimed at preventing the exploitation of young women entering hairdressing. It had been common for premiums to be paid by the parents for their daughters' tuition where none was provided. Colgan CJ also notes that:

> *"Section 12A does not only impose restriction upon persons seeking the payment of a premium for employment. Its countervailing purpose is to provide a benefit to vulnerable potential employees to relieve them of the pressures of such demands. Section 12A acts both as a prohibition upon persons connected with (or being) a prospective employer and for the benefit of a prospective employee. "*

However the Authority found that s.12A did not apply:

"[63] I find the training bonds Mr Sinton entered into cannot be equated to a premium on employment and I reject his argument that he is not required to repay the outstanding amounts."

Sinton was ordered to pay the amounts due, plus interest.

This case will give some comfort to employers who regularly bond employees in relation to training. Key issues arising from the case include that employers should be very clear in their pre-contractual dealings as to the nature of the bond(s) and ensure that the employee has the opportunity to seek independent advice before entering into such arrangements. These are, in any event, standard requirements for good faith bargaining for individual employment agreements.

If you have any queries regarding bonding arrangements, you should contact us for assistance.