

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 97
5312318

BETWEEN ABC DEVELOPMENTAL
 LEARNING CENTRES (NZ)
 LIMITED
 Applicant

A N D REBECCA O'MEARA
 Respondent

Member of Authority: M B Loftus

Representatives: Jo Douglas, Counsel for Applicant
 Erin Gray, Counsel for Respondent

Investigation meeting: 27 October 2010 at Queenstown

Submissions Received 15 November 2010 from Applicant
 29 November 2010 from Respondent

Date of Determination: 21 May 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, ABC Developmental Learning Centres (NZ) Limited (ABC) contends that the respondent, Ms Rebecca O'Meara, is in breach of her employment agreement having failed to fulfil her obligations under an arrangement known as a Return of Service (ROS) Agreement. It was initially claimed that as a result she owed ABC the sum of \$12,123.24.

[2] Ms O'Meara conceded the validity of a portion of the claim but disputed part of it on the grounds that ABC had misinterpreted the ROS Agreement. She said the amount owing was \$6,170.25 and that this has been more than paid through a sum she subsequently forwarded and monies ABC withheld (improperly according to

Ms O'Meara) from her final pay. Ms O'Meara made further concessions during the investigation meeting, as did ABC.

Acknowledgement

[3] Unfortunately a considerable period of time has passed since the investigation meeting. The situation has arisen as a result of the file being inaccessible for a considerable time due to Christchurch's earthquakes, compounded by workload issues. I appreciate the parties patience and regret any inconvenience suffered.

Background

[4] Ms O'Meara commenced employment with ABC as an unqualified teacher at its Queenstown centre on 5 June 2007. From commencement she had a desire to address her "unqualified" status and become a qualified early childhood teacher. She says she was encouraged to do so by the then Area Manager for the Lower South Island, Ms Davina Jones, who advised that ABC would pay for the required training.

[5] Ms O'Meara therefore investigated her options and in December asked that ABC support her study toward a graduate diploma in Early Childhood Education at Auckland University. At the time, and this was recognised in Ms O'Meara's letter of request, ABC's policy envisaged study through the New Zealand College of Early Childhood Education in Christchurch. Ms O'Meara noted that it would take her two years to complete her diploma in Christchurch but that it could be done in one at Auckland University as a result of the University's recognising qualifications she already held. The letter closes with the statement *I feel by signing on for two further years with ABC once qualified, I will be extremely valuable for the centre here in Queenstown and for ABC in the long term.*

[6] ABC claims that this last phrase confirms Ms O'Meara was, even at this initial point, aware of the ROS agreement and the bonding requirements there-of.

[7] ABC agreed to the request though there was some delay in finalising the arrangement due to issues over the required paperwork and the rate of pay that would apply to Ms O'Meara. Using her then applicable maiden name, Ms O'Meara signed the ROS Agreement on 1 February 2008. The agreement reads:

Return of Service Agreement

This certifies that I agree to the following:

1. *My employer will incur the costs of practicum and study fees.*
2. *I am required to provide a Return of Service of two years to my employer, from the completion of the course.*
3. *If I fail to complete the two years of Return of Service, I will be required to pay my employer all practicum costs and study fees paid.*
4. *This Agreement operates along side and does not affect any other existing return of service agreement that I may have with my employer.*

[8] The meaning of *study fees* is obvious. The phrase *practicum* refers to a course requirement that Ms O'Meara undertake work experience at other early learning centres.

[9] Ms O'Meara completed the course, though when is in dispute. She claims completion occurred when she finished and passed the final practicum on 27 February 2009. ABC claims that she did not complete the qualification until 20 April. This date is identified as Ms O'Meara was not registered as a teacher until 14 April and did not advise ABC of her new status until 17 April. Her advice could not then be acted upon till the next working day – the 20th. ABC adds that qualification could have occurred no earlier than 6 March. That was the day on which Ms O'Meara was recorded as being eligible to graduate by the University.

[10] In the interim an issue had arisen over the payment of Ms O'Meara's wages whilst attending block study weeks. Ms O'Meara was not paid for the last of these, though she had for previous attendances. She raised this with ABC who replied staff were not entitled to payment for block study. Ms O'Meara responded by advising that notwithstanding the policy Ms Jones had given an undertaking that these periods would be paid. After some discussion and correspondence ABC conceded Ms Jones had agreed that ABC would make these payments, albeit without authority or Head Office knowledge.

[11] That led to an amendment of the ROS Agreement with the words *and block courses* being added to para.3 of the Agreement and this appears on a new version signed by Ms O'Meara on 30 September 2008. She, however, claims that the words were added after she had signed and without her knowledge or agreement. ABC

claims that the amendment was made after a discussion between Ms O'Meara and Ms Sharon Harris-Scoble, the Human Resources Manager, at which Ms Harris-Scoble claims to have emphasised that Ms Jones acted inappropriately before conceding payment provided those amounts were also recognised within the ROS agreement. Ms Harris-Scoble claims that this amendment was the only reason why Ms O'Meara was asked to sign another agreement.

[12] Completion of the course led to both promotion to qualified teacher and a significant pay rise for Ms O'Meara. As said earlier, these took effect on 20 April 2009 and ABC consider the same date applied to the commencement of the service period required by the ROS agreement. Ms O'Meara would therefore remain until at least 19 April 2011.

[13] She did not, and in April advised that she intended to resign with effect 30 April 2010. ABC responded with a letter dated 20 April 2010. It reads:

Dear Rebecca

As you are aware, you entered into a Return of Service agreement with the Company for paid practicums, fees and block weeks. As you have resigned, you are required to repay all costs paid by the company towards your practicums, fees and block weeks by 30 April 2010 in full. Please find enclosed an invoice detailing the amount.

If the full amount is not received legal action will commence to secure the balance owed. No negotiation will be entered in to for part or ongoing payments.

...

Please feel free to contact me on ... if you have any further questions.

Kind Regards

*Steven Bennett
Human Resources Advisor
ABC Learning Centres*

[14] Ms O'Meara replied on 22 April. Included therein is a view that:

Clause 3 of the ROS agreement states that "I will be required to pay my employer all practicum costs and study fees paid". There is no mention in this of being required to repay wages, only such fees incurred by ABC for my practicum and study. Accordingly I do not accept that any wages paid to me by ABC over this period are repayable.

[15] Ms O'Meara then goes on to refer to the effect of Ministry of Education subsidies and the view her status as a final year student benefited ABC in respect thereof. ABC disputes this and therefore rejected the resulting suggestion that the debt be reduced in proportion to the time already served. She also points out that the ROS agreement has no provision regarding the timing of the payments and puts up a proposal for payment over time before commenting on the provisions of her employment agreement as they relate to employment relationship problems.

[16] ABC replied on 26 April. The letter reads:

Your letter dated 22 April 2010 refers.

The terms of your Return of Service Agreements are very clear.

- *ABC committed to paying paid practicums, study fees and block weeks. ABC met in full this commitment.*
- *You in turn committed to work for two years following completion of your study and becoming a provisionally registered teacher. You are currently meeting this commitment.*

You are correct in that you could have chosen a number of different avenues to undertake your training. You refer to StudyLink for example. You chose a Return of Service with ABC because after completing the two years work as a provisionally registered teacher, and, provided you completed the two years work, you would be free of all study debt without having to repay anything. No other scheme offers this.

You became a provisionally registered teacher effective 20 April 2009. You are therefore free to resign from ABC effective 19 April 2011.

If you do not work the two years following becoming a registered teacher you breach your commitment to your colleagues, your Centre and to ABC. You already agreed in your Return of Service that should you do this, you would refund all monies paid in respect of fees, paid block weeks and paid practicums.

Should you continue with your decision to resign effective Friday 30 April 2010, then meet your agreement to refund the monies, and pay \$18,638.25 on or before Friday.

If the full amount is not received legal action will commence to secure the balance owed. No negotiation will be entered in to for part or ongoing payments. The Company is entitled to take whatever means it believes appropriate. This will include Baycorp, Employment Court and High Court, and will also include advising the teachers Council with recommendations.

*Yours sincerely
Sharon Harris-Scoble
Human Resources Manager*

[17] Ms O'Meara responded with a further letter dated 29 April 2010. In that letter she offered to pay the amount that she, at that time, considered owing; namely \$6,170.25. She reduced that by the amount of wages then outstanding and paid the residual amount - \$4,789.76.

[18] The residue sought by ABC related to wages Ms O'Meara received whilst absent on practicums (\$9,930.00) and while attending block courses (\$2,532.00). This amount is reduced slightly by subsequent reconciliations in respect to the amounts withheld from Ms O'Meara's outstanding pay, which allegedly left \$12,123.34 owing. That sum has been amended further after various concessions the parties made during the investigation meeting. It now stands at \$11,987.67.

[19] The parties also canvassed issues about the ease with which Ms O'Meara could be replaced and that of whether or not her status as a qualified trainee or teacher could be used to assist ABC in respect to state funding though these issues do not impact on those I must decide and will not be discussed further.

Issues

[20] It is not disputed that Ms O'Meara is in breach of the ROS agreement and that something is due to ABC. It is the amount that is disputed. The issues canvassed at the investigation meeting were:

- a. Whether Ms O'Meara need reimburse ABC for wages received while on practicums (see paragraph 21 below);
- b. Whether Ms O'Meara need reimburse ABC for wages received while attending block study weeks (paragraphs 22 to 24 below);
- c. If the answer to either (a) or (b) is yes, should the amount payable be gross or net (paragraphs 25 to 29 below);
- d. Whether or not Ms O'Meara should reimburse ABC for the tuition fees (paragraph 30);
- e. Whether or not Ms O'Meara should reimburse the GST component of the tuition fees (also paragraph 30);

- f. Should the amounts payable be reduced as a result of Ms O'Meara having served a portion of the two years required of her (paragraphs 31 to 32);
- g. If the answer to (f) is yes, what is the applicable period (paragraph 33);
and
- h. Did ABC improperly deduct \$344 from Ms O'Meara's final pay (paragraph 34).

Determination

[21] The first issue is whether or not Ms O'Meara should reimburse ABC for wages received while on practicums. This was resolved during the investigation meeting with Ms O'Meara conceding the answer is *yes*.

[22] The second issue is whether or not Ms O'Meara should reimburse ABC for wages she received while attending block study weeks. Ms O'Meara argues that the answer is *no* given the agreement with Ms Jones (see 10 above). That, however, leaves the revised ROS and the inclusion of the phrase *and block courses* (11 above).

[23] ABC claims that the phrase was added after a discussion between Ms O'Meara and Ms Harris-Scoble during which the two renegotiated the terms of the ROS agreement. Indeed, ABC contends that the inclusion of this requirement was the only reason for revising the ROS at that time (30 September). Ms O'Meara denies the claim. She states she has no recollection of such an agreement and claims that the phrase was added after she signed the new agreement.

[24] In deciding this issue I note answers given by Ms O'Meara when responding to questions posed by Ms Douglas. Ms O'Meara stated that she could not recall agreeing an amended ROS. That falls short of a denial and was undermined by her next answer. She accepted that she had expected a change in the ROS and thought it odd it was not there. The evidence indicates only one possible change - inclusion of block course wages. In the circumstances I conclude that, as alleged, Ms O'Meara agreed to include a requirement that she repay the block course wages should she not complete the required service.

[25] The conclusion Ms O'Meara must repay monies earned while attending block courses and practicums raises the issue of how much. This arises as the monies were originally paid as wages. Obviously Ms O'Meara did not receive the full amount as a portion went to the Inland Revenue as PAYE.

[26] Ms O'Meara contends that she should only pay the net amount and cites fairness in support of her position. It is, in her view, only fair that she repay the net amount as that was the amount she received. Unfortunately for Ms O'Meara this is not about fairness – it is about the application of an agreement she freely entered into for reasons she saw as advantageous at the time.

[27] The ROS agreement provides for the recompense of costs incurred by ABC should Ms O'Meara not complete the required period of service. That that was the purpose of the agreement was accepted by Ms O'Meara when answering questions posed by Ms Douglas. Wage costs, as incurred by ABC, were gross – not net. The agreement would therefore appear to require repayment of the gross amount.

[28] In any event I must conclude that Ms O'Meara did receive the gross amount. The obligation to pay tax is that of the recipient, not the payee (see s.BB2(1) of the Income Tax Act 2007). It was therefore Ms O'Meara who paid the Inland Revenue (albeit through the offices of ABC who deducted the amount as PAYE) once she had received the gross amount. Here, and as an aside, I note counsel's argument about an IRD ruling on the question of net versus gross. It is, in my view, ancillary to the issue I must decide, as it appears to address the issue of what the responsible taxpayer can later claim from IRD.

[29] Having considered the issues discussed above, I conclude that it is gross wages that are to be reimbursed.

[30] The fourth question is whether or not Ms O'Meara should reimburse ABC for the tuition fees. Again this has been resolved as a result of Ms O'Meara's concession that the answer is *yes*. Similarly the fifth issue has also been resolved with ABC withdrawing its claim in respect to the GST component.

[31] The sixth issue is whether or not the amounts payable should be reduced as a result of Ms O'Meara having provided a portion of the required service. As was said in 27 above, the purpose of the ROS agreement was to reimburse ABC's costs should Ms O'Meara not complete the required two years service in full. She accepted that to

be the case and the agreement says costs – not part costs. There is absolutely no evidence that the concept of partial payment (pro-rating) was discussed, contemplated or intended.

[32] In any event I note that both Counsel referred to previous decisions of the Authority. One of those has now been reviewed by the Employment Court. To me the Court, in a decision which involves a clause identical to that I am now considering, resolves the issue (see *ABC Developmental Learning Centres (NZ) Ltd v Plasmeyer* [2011] NZmpC15). The amount is to be repaid in full.

[33] The conclusion that the debt should not be reduced on a pro-rated basis, means the issue of when the two year period commenced need not be addressed.

[34] The eighth and final issue is whether or not ABC improperly deducted \$344 from Ms O’Meara’s final pay. Clause 23 of her employment agreement provides that she has agreed that any monies owed may be deducted from any monies owing. Any *monies owing* must include the final pay and the above conclusions clearly show that monies were owing. The agreement allows their deduction.

Conclusion and Orders

[35] The conclusions above mean that ABC has established that it is owed the amount sought which, after amendment is made for concessions made by both parties during the investigation meeting, is \$11,987.67.

[36] Ms O’Meara is therefore ordered to pay ABC Developmental Learning Centres (NZ) Limited the sum of \$11,987.67 (Eleven thousand, nine hundred and eighty seven dollars and sixty seven cents).

[37] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority