IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2014] NZERA Auckland 45
5424222

	BETWEEN	CTC AVIATION (NZ) LIMITED Applicant
	AND	RICHARD SINTON Respondent

Member of Authority:	Trish MacKinnon
Representatives:	Erin Burke, Counsel for the Applicant Richard McCabe, Counsel for the Respondent
Investigation Meeting:	5 November 2013 at Hamilton
Submissions received:	5 and 11 November 2013 from the Applicant 5 November 2013 from the Respondent
Determination:	11 February 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] CTC Aviation Training (NZ) Limited (CTC) employed Mr Sinton as a Flight Instructor between May 2012 and April 2013. It says when Mr Sinton left its employment he owed the sum of $5,735 in outstanding training and relocation bond amounts. CTC seeks an order from the Authority for payment in full by Mr Sinton of the outstanding bond amounts. It also seeks full client/solicitor costs from Mr Sinton on the basis that its claims are based on a binding and enforceable contract and litigation should not have been necessary to recover the amounts owing. CTC seeks interest on the outstanding amounts.

[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.

[4] The parties have attempted, unsuccessfully, to resolve the matter through negotiation and mediation.

Background

[5] Mr Sinton was offered employment as a Flight Instructor with CTC by letter dated 7 May 2012 following an interview in Perth, Australia, in April 2012. The interview was conducted by the then Managing Director, Ian Calvert. An individual employment agreement accompanied the letter of offer. On 10 May 2012, after some email correspondence between Mr Sinton and CTC, Mr Sinton signed the offer of employment letter, which included acceptance of the relocation payment conditions. He relocated from Perth to Hamilton on or around 18 May 2012 and commenced his employment soon after, signing his employment agreement on 22 May 2012.

[6] Mr Sinton signed two training bonds on 31 May 2012. Both were headed *Agreement for Refund of Training and Examination Costs*. Each bond stated that the purpose was to allow the employee to undertake agreed training and examination that was of direct benefit to the company and the employee. The company was prepared to fund the costs of training and examination, subject to the employee's commitment to refund to the company a portion of the costs, in the event of his employment terminating for any reason within a given timeframe.

[7] Each bond contained a termination of employment clause. This provided that, if the employee's employment ceased during the refund period for any reason other than redundancy, the employee would repay the company a proportion of the training bond according to a set repayment schedule. The schedule provided for a pro rata basis of repayment depending on the length of employment following the commencement of the refund period. For example, if Mr Sinton had resigned within

one month of completing the training course he would have been liable to repay 100% of the training bond. If, however, he had resigned between ten and eleven months after completion of the course, he would have been liable for only 9% of the amount of the training bond.

[8] One bond was for the training costs and examination fees in respect of JAA Class Rating Instructor (CRI). The refund period was 11 months starting on 6 August 2012 and terminating on 6 July 2013. The amount of the training bond was $5,600. The other bond was for an Instrument Rating TEA IR DA42 training course. The refund period for this course was 13 months commencing 6 August 2012 and terminating on 5 September 2013. The amount of the training bond was $6,500.

[9] Each bond contained a declaration that the employee had read, understood and accepted the conditions set out in the agreement.

[10] Mr Sinton duly undertook and completed the training courses. In October 2012 he emailed the Chief Flying Instructor at CTC, Greg Hagarty, to inform him that information on the website of the United Kingdom Civil Aviation Authority (UK CAA) led him to believe he could not expect to receive his licences until 15 November 2012 at the earliest.

[11] Mr Sinton noted that he had tried calling the UK CAA but had been unable to obtain any further information. By the time he got his licences back from the UK CAA, one would no longer be current. He also noted that another would lose currency in two weeks' time. Mr Sinton asked Mr Hagarty if it would be possible for him to start doing some instructing on the international team one or two days a week to help keep himself current and to build his multi engine instruction experience.

[12] On 24 October 2012 Mr Sinton emailed Ian Calvert, who was then the Managing Director of CTC, requesting a meeting within the next two days to discuss his role in the company. He noted that he had been a qualified multi instructor for almost three months and had completed only three multi instructor flights. Mr Sinton referred to the length of time it was taking for his qualifications to be sorted out, and alerted Mr Calvert to the problem he had with his IFR and Multi becoming "*uncurrent*". He said he had emailed and spoken to Mr Hagarty about this issue but the situation had not changed. Mr Sinton ended his email by informing Mr Calvert that six weeks earlier he had turned down an interview with a major airline because he

had committed to CTC. However, if the situation did not change, he would have no option but to contact that airline for an interview.

[13] Mr Calvert responded the same day, noting that he was currently in China and not able to meet that week. He asked Mr Sinton to contact Mr Hagarty again to discuss the matter and said he would follow up on it on his return to New Zealand. He noted that, in Mr Sinton's interview for the CTC position, he had expressed a desire to remain in instruction for some two to three years, and his comments now led Mr Calvert to believe that had not been Mr Sinton's intention. It seemed that Mr Sinton's intention was to come to CTC for quick progression into an airline. He asked Mr Sinton to discuss that with Mr Hagarty to help CTC to get "*a true picture of your motivation and intentions"*.

[14] Mr Sinton's response was that he would talk with Mr Hagarty about the matter. He confirmed his wish to stay instructing for some years, noting that was the reason he had bought a house in Cambridge and rejected the interview with the airline. Mr Sinton said this was based on him doing multi and IF instruction while working for CTC. All he wished to achieve at that stage was to do some multi instruction while waiting for his paperwork to come through from the UK and he wished to explore whether they could sort something out to their mutual benefit.

[15] On 15 December 2012 Mr Sinton emailed Mr Hagarty stating that in the last five months he had done only six Multi and/or IF flights. He noted that other employees who joined the company at the same time as him, or after him, had averaged around 20 hours per week Multi and/or IF flying. Mr Sinton referred to his discussions with Mr Hagarty, including the emails he had written to him and to Mr Calvert in October that year. He said the arrangement was that he would do flights in the Multi engine team on a weekly basis, but that had not eventuated and since October he had done only three Multi or IF flights.

[16] Mr Sinton made clear that he was no longer happy with being placed on his current roster on a full time basis and asked if he could transfer to a different roster that would give him the opportunity to do more multi instruction. Mr Sinton said he had helped the company out with no benefit to himself for four to five months but was no longer happy with the situation and wished to be transferred to the other roster within seven days.

[17] Mr Sinton resigned his employment in March 2013 on one month's notice. His employment agreement required him to give three months' notice of termination but he requested to be released, without penalty, after one month's notice so that he could take up a position elsewhere. CTC agreed to this and waived the financial penalty for the reduced notice period contained in his individual employment agreement.

[18] Mr Sinton was asked to repay the pro rata amounts of his bonds. These were $2,712 for the relocation bond (the full amount of which had been $5,000) and $1,008 and $2,015 respectively for the two training bonds as at his final day of employment on 19 April 2013.

The Authority's investigation

[19] Evidence for CTC was provided by former Managing Director, Mr Calvert; Chief Financial Officer, Julian So, (who was also Acting Managing Director at the time of the investigation meeting); and Chief Flying Instructor and Deputy Head of Training, Greg Hagarty. Mr Calvert, who was the Managing Director throughout Mr Sinton's employment, was unable to attend the investigation meeting and provided evidence by affidavit. In considering his evidence I have taken into account the inability to test it in the investigation meeting.

[20] Richard Sinton and Judith Scott gave evidence for Mr Sinton. In reaching my decision I have considered all the evidence and submissions of the parties. In accordance with s. 174 (b) of the Employment Relations Act 2000 (the Act), however, I have not necessarily referred to all such information in this determination.

Issues

[21] The issues for the Authority to determine are whether:

a. the relocation agreement and training bonds entered into by Mr Sinton are enforceable; or

b. Mr Sinton was induced into entering the relocation bond by CTC's misrepresentations, either innocent or fraudulent; or

c. there is any lawful justification for Mr Sinton refusing to repay the outstanding portion of the training bonds.

The relocation agreement – is Mr Sinton bound by it?

[22] When Mr Sinton signed his agreement to CTC's letter of offer of employment he accepted that, if he did not complete two full years of employment with the company, he would be required to repay on a pro rata basis the relocation expenses for which CTC had reimbursed him. Under the terms of the agreement he initially paid the costs of relocation and claimed reimbursement from his employer. If he had remained in CTC's employment for two years, he would not have been required to repay any part of the relocation costs for which he had been reimbursed.

[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.

[24] Mr Sinton relies on sections 6, 7 and 9 of the Contractual Remedies Act 1979 as justification for cancellation of the relocation contract or, alternatively, for the damages to be awarded to him in the sum for which CTC seeks repayment of the pro rata relocation amount.

[25] Mr Sinton's claim that CTC misrepresented the position he applied for is based on three factors. These were the advertisement he responded to in applying for a position with CTC; his discussions with Mr Calvert in April 2012 about the duties for the position; and a job description included in the information pack provided by CTC.

The Advertisement

[26] The advertisement Mr Sinton responded to was for Grade 2 Flight Instructors to join CTC's team in Hamilton. It highlighted the following four points about the position:

a. Relocation Package

b. Bonus Scheme

c. Immediate upgrade to Multi-Engine Instructor Rating

d. Technically enhanced aircraft and simulators

[27] Mr Sinton says he understood from the third point in the advertisement that he would be undertaking mainly multi-engine instruction. Mr Calvert says the third bullet point referred only to an upgrade in rating, and could not be construed as a representation of the duties successful applicants would undertake.

Discussions between Mr Sinton and Mr Calvert

[28] Mr Sinton says he understood from his discussions with Mr Calvert when he was interviewed for the position that he would be employed mainly on multi-engine flight instruction once he had successfully completed the requisite training. He says it was Mr Calvert's representations to him concerning multi-engine flying that induced him to accept employment with CTC. He had completed the training courses by 7 August 2012. However, he continued to undertake mainly single-engine flight instruction.

[29] He says he asked Mr Calvert specifically about multi-engine flying and was told typical multi instructors would spend approximately half their time on multi-engine instruction. The balance of their time was spent on a combination of ground work, simulator sessions and single engine instruction.

[30] Mr Calvert's evidence confirms Mr Sinton inquired into multi-engine instruction during the interview. He says he informed Mr Sinton that instructors had to be prepared to participate in both single-engine and multi-engine instructor duties in accordance with the requirements of the business.

[31] Mr Calvert says there was never any guarantee or promise made to Mr Sinton about the number of hours of multi-engine flight instruction he would be undertaking. He says the discussion about a typical multi-engine instructor's duties referred to what a fully trained and qualified instructor could eventually expect, not what they could expect from the outset.

The role description

[32] Mr Sinton also claims the multi-engine instructor job description he was provided before his initial interview added to his view that the position with CTC entailed multi-engine flying. The job description was included in an information pack and was headed "*Example Role Description*" with "*MEIR Instructor (Flight)*" underneath the heading.

Did CTC misrepresent the position it offered Mr Sinton?

[33] The advertisement to which Mr Sinton responded was not specifically for multi-engine instructors, but for flight instructors. Mr Sinton argues that the upgrade to multi-engine instruction rating referred to in the advertisement implies a promise of work in multi-engine instruction. I do not accept this, nor do I accept it implies work will be provided in, or mainly in, that area. It is reasonable to infer that CTC wanted successful applicants to upgrade their ratings so they were able to undertake multi-engine instruction. That falls well short of constituting a representation or promise of work mainly in that area, or even that of any work in that area.

[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.

[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.

[36] Even if I were persuaded that Mr Calvert had informed Mr Sinton he would be undertaking mainly multi-engine flight instruction, which I am not, I would find he had not made misrepresentations to Mr Sinton. I would find he had stated an intention that, once Mr Sinton had successfully completed the requisite training courses, he would undertake such multi-engine flight instruction.

[37] Unless that statement of intention was untrue at the time it was made, it would not constitute a misrepresentation of circumstances[1]. There is no evidence that, if Mr Calvert had stated or implied such an intention, he was misrepresenting his or CTC's intention at the time. There is, however, evidence of a supervening event, unknown at the time of Mr Sinton's interviews for the Flight Instructor's position, which effectively prevented any such intention from being realized.

[38] That event arose from the phasing out of the previous European civil aviation authority, the Joint Aviation Authorities (JAA), and its replacement by the European Airline Safety Association (EASA). Large numbers of pilots, including Mr Sinton, had applied to the United Kingdom Civil Aviation Authority (UK CAA) to have their authority transferred from JAA to EASA. The resulting delay in the documentation being provided was outside CTC's control. Without the documentation Mr Sinton was unable to teach multi-engine flying to the European division of CTC in which he had been placed. That team comprised approximately 70% of CTC's students.

[39] Mr McCabe submitted that CTC should have transferred Mr Sinton from its European division to the multi-engine instruction team of its International division (ICAO) in which he could have undertaken multi-engine instruction on his existing JAA authority. It was Mr Hagarty's and Mr Calvert's evidence that there was no vacancy in that team. Transferring Mr Sinton into it would effectively have resulted in an existing team member being made redundant. As the expectation was that Mr Sinton's documentation would come through shortly, it was preferable for him to remain in his current team in the European division.

[40] Mr Sinton acknowledged that the responsibility for obtaining the documentation from the UK CAA lay with him. He claimed, however, that CTC did little to help him and could have done more. I prefer CTC's evidence that the company was proactive in assisting Mr Sinton as much as it could. It did this, for

[1] Burrows, Finn & Todd *Law of Contract in New Zealand* (3rd ed, Lexis Nexis, Wellington, 2007), 304

example, by Mr Hagarty arranging for Mr Sinton's flight logs to be couriered to the UK CAA to expedite the documentation transfer. As the authorisations were personal to individuals, the UK CAA normally dealt directly with the holder for privacy reasons.

[41] I also note there are at least two other relevant factors in Mr Sinton's consideration of whether to accept CTC's offer of employment. One is the letter offering him the position of Flight Instructor. It informed Mr Sinton he would be assigned to one of the flying teams when he started, noting that currently there was one multi-engine team and two single-engine teams. Mr Sinton might be asked to operate within other teams "*based on the needs of the business*". The letter told him he needed to be aware that gaining his multi-engine instructor qualifications did not preclude him from operating single-engine aircraft.

[42] The second factor is the employment agreement attached to the letter of offer. This contains no reference to, or guarantee of, multi-engine instructor duties. The position specified in the first schedule is that of Flight Instructor, and the duties specified in the second schedule make no specific reference to multi-engine instruction.

[43] There is evidence of Mr Sinton engaging in some email correspondence over the letter of offer before accepting it on 12 May 2013. He raised a query over the provision for a 90 day trial, and over the commencement date for his employment. There is no evidence of his raising any concern that both the letter of offer and the employment agreement omitted references to the significant multi-engine instruction duties he claims CTC represented that he would be undertaking.

[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.

Is Mr Sinton bound by the training bonds?

Unjust enrichment

[45] Mr Sinton says he is only required to pay the outstanding pro rata portion of the actual and reasonable costs of the training. Mr Sinton provided his estimates of

the cost to his employer of each of the training courses he had completed. These were significantly less than the training bond amounts.

[46] In addition to rejecting the applicability of the principle of unjust enrichment, CTC disputes Mr Sinton's estimates, saying they bear no relation to the actual costs of the training, having omitted significant factors. It was Mr So's evidence that the actual costs of training Mr Sinton were more, rather than less, than the bond amounts.

[47] I note here that before the investigation meeting Mr Sinton had sought an order from the Authority that CTC provide a breakdown of the actual and reasonable on-the-job training costs it incurred in providing training into particular areas of aviation instruction for which he had been bonded. CTC had maintained that the actual and reasonable costs were not relevant evidence as to the enforceability of the training bonds and that the breakdown of the training costs was commercially sensitive information.

[48] Both parties made submissions to the Authority on the matter which I considered before issuing a Minute on 18 September 2013 notifying that I would not order CTC to provide the information sought by Mr Sinton. I did not view that information as either relevant or necessary for a determination of the matter before the Authority. I remain of that view.

[49] In *New Zealand Fire Service Commission v Warner*[2] 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*[3] 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

[2] [2010] ERNZ 290 at [19]
[3] [2012] NZEmpC 57

commentary. The judge cited the following passage from *Goff & Jones: The Law of Unjust Enrichment*[4]:

> *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.*

[51] Mr Sinton claims that CTC would be unjustly enriched if he were to repay the pro rata bond amounts outstanding at the termination of his employment. In rejecting that claim I refer back to the agreements entered into by the parties and the context in which they were made. I leave aside the issue that the situations referred to in the text and cases above entail the recovery of monies already paid, in contrast to the current situation where Mr Sinton is attempting to avert payment.

[52] Mr Sinton accepted employment on the basis that he would be required to undertake training for which he would be bonded. He confirmed he had taken advice on the offer of employment and employment agreement before accepting CTC's offer. That advice was obtained from Ms Scott who gave evidence of her expertise in both employment law and aviation matters.

[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 Mr So.

[54] The training bonds are simply and clearly expressed to be for specific periods, with the percentage of the total to be repaid abating every month Mr Sinton remained in employment with CTC following completion of the training. Neither bond contains any wording to support Mr Sinton's view that he would be required to repay only a proportion of the actual and reasonable costs of his training in the event he did not complete the full bonding period.

---

[4] Charles Mitchell, Paul Mitchell and Stephen Watterson (eds) *Goff & Jones: The Law of Unjust Enrichment* (8th ed, Sweet & Maxwell, London, 2011) at [2.01]

[55] CTC gave evidence of training bonds being widely used in the aviation industry with their purpose being to recognise and protect the investment the employer makes in providing costly training. The employee benefits from the training while the bonds ensure the employee will commit to remaining with the employer for sufficient time to enable it to benefit from its investment.

[56] Mr Sinton acknowledged under questioning that training bonds are common in the aviation industry. He also confirmed he has, without objection, entered into bond arrangements for training he has undertaken in his current employment. He says he had no means of quantifying the cost of the training he received from CTC until he had undertaken it, but did not explain why he waited to query the costs until he had resigned his employment. His timing for doing so suggests Mr Sinton was motivated more by his resentment at not being offered more multi-instruction duties than by a genuine belief that his employer was attempting to unjustly enrich itself at his expense.

[57] Support for that view comes from two further acknowledgements made by Mr Sinton in the investigation meeting. One was that, if he had been provided with more multi-engine flying instruction duties following his successful completion of the training courses, he probably would not have challenged the bond amounts. The other was that his objection to repayment of the bonds was based on his scant use of the training during his employment with CTC, rather than on the amounts of the bonds. These acknowledgements are in contrast with Mr Sinton's written evidence in which his assertion not to be bound by the training bonds was based on his claim that the value of the training was arbitrarily set by CTC and did not reflect its actual cost.

[58] I find no basis for Mr Sinton's claim CTC would be unjustly enriched if he were required to repay the outstanding portions of his training bonds.

Premium for employment

[59] Mr Sinton's argument in the alternative is that CTC is barred by s. 12A of the Wages Protection Act 1983 from recovering the outstanding bond amounts. The first clause of that section provides :

> **[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.

[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*"[5]. The court gives historical context to s. 12A in *Mehta v Elliott (Labour Inspector)*[6] 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.*

[61] I do not find s. 12A relevant to Mr Sinton's situation. He freely accepted employment with CTC that was conditional on his undertaking training courses for which he would be bonded. The training benefited Mr Sinton while CTC received no direct financial gain from it. CTC's gain was the commitment by Mr Sinton to remain with CTC for the bonded period during which it would have been able to benefit from his enhanced skills. In the event, it received little benefit from the training it provided Mr Sinton due to his EASA documentation issues. These were not of CTC's making and were beyond its control.

[62] CTC incurred the cost of providing the training, including the payment of Mr Sinton's salary while he was non-productive during training, instructors' time and operational costs. Had he remained in its employment for the length of the bond periods (11 months and 13 months respectively) following completion of training, he would not have been required to contribute at all to the cost of the training he had received.

[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.

---

[5] *Sears v AG* [1994] 2 ERNZ, 39 at 61
[6] [2003] 1 ERNZ 451 at 464 ff

Conclusion

[64] For the reasons given above I find the relocation bond and the two training bonds entered into by Mr Sinton with CTC to be binding and enforceable.

Orders

[65] I order Richard Sinton to pay to CTC Aviation (NZ) Limited the amount of $5,735.00, being the outstanding amounts of the relocation and training bonds at the date of termination of his employment. Interest is appropriate and I order Mr Sinton to pay interest at the rate of 5% per annum on the sum of $5,735.00 from 19 April 2013 to the date of payment.

Costs

[66] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority