

[5] Mr Elliott had consulted a recruitment agency to find Ms Felices and paid them a fee of three weeks salary as well as the costs of bringing Ms Felices from the Philippines to New Zealand. Mr Elliott was also obligated to repatriate Ms Felices at the end of her two year engagement.

[6] Because Ms Felices required a work permit from the Immigration Division of the Department of Labour in order for her to fulfil her obligations to Mr Elliott, her employment with Mr Elliott and her residence in New Zealand is governed by our immigration law as well as the relevant employment law.

[7] Ms Felices commenced work with Mr Elliott on 6 October 2008, having already executed an individual employment agreement for a fixed term ending on 31 August 2010. That agreement prescribes the hours of work, the fact that the position is live-in, and by an attached job description, identifies the duties of the position. In addition, a covering letter dated 9 March 2008 from Mr Elliott forwarded to Ms Felices by email provided the highlights of the offer of employment.

[8] Mr Elliott's evidence is that he was very satisfied with Ms Felices's work as his live-in carer and that at no stage, until the very end of the relationship, did she raise any issue with him. Mr Elliott told me that five weeks into the relationship, which would be about mid November 2008, he thought there was something *off* about Ms Felices; he wondered if she had family problems or was homesick. Mr Elliott said that he asked Ms Felices if she was okay and she said that everything was fine. There was no suggestion whatever from Ms Felices that there was any difficulty with her employment or, indeed, with anything else.

[9] Matters came to a head in December 2008. There is some discrepancy about the actual dates but nothing turns on that. The precipitating event seems to have been an argument between Ms Felices and Mr Elliott's other resident live-in carer, Caroline. Ms Felices said in her oral testimony at the Authority's investigation meeting that Caroline had abused her verbally, calling her a stupid Asian or words to that effect. The upshot of that was that Ms Felices *felt threatened by Caroline*.

[10] Ms Felices told me that she *did not feel safe around the house* as a consequence of this altercation and this seems to be particularly because of her anxiety about the use of marijuana in the house. She said in her evidence:

I am so against about (sic) it (meaning marijuana) but I don't have the courage to say anything about it, because I am living and working for him.

[11] Ms Felices asked Mr Elliott to find a solution to the problem and she proposed that she find alternative accommodation but continue to otherwise fulfil her obligations under the employment agreement.

[12] It is common ground that Mr Elliott agreed to consider the problem, but as he told me in evidence, the notion that a live-in carer could cease living-in was not something he could contemplate. The whole point of the employment relationship was that it was on a live-in basis. Living-in was a fundamental term of the agreement and I agree with Mr Elliott that the idea that a fundamental term can be varied unilaterally as Ms Felices appeared to be suggesting is simply not tenable.

[13] Furthermore, Mr Elliott's recollection of what Ms Felices actually proposed was that she *not complete the contract in its entirety*. Mr Elliott indicated in his evidence that Ms Felices stated that quite clearly.

[14] It is clear to me the parties had real difficulty in communicating, perhaps in part because of the language barrier. The short point is that I have formed the conclusion that what Ms Felices was proposing was that she continue to serve Mr Elliott but not on a live-in basis and as I indicated above, as living-in was a fundamental term of the engagement, I cannot see that as being in any way a practical solution.

[15] In any event, what happened next was that Mr Elliott, acting no doubt with the best of intentions, arranged for Ms Felices to be repatriated to the Philippines by purchasing the appropriate air ticket and getting the appropriate arrangements in place. He did this because of his understanding that, in the absence of any approved employer under the New Zealand immigration rules, Ms Felices had no right or authority to remain in this country.

[16] When Mr Elliott then told Ms Felices that that was what he had done, she became tearful and distressed because she had wanted to remain in New Zealand so that she could fulfil her family obligations by sending money home to the Philippines. Ms Felices had been supported by her elder sibling who had paid for her education and now it was her obligation to fund her younger brother's education, but she was unable to do that without continuing employment.

[17] In the result, Ms Felices refused to leave the country, sought advice and was properly directed to the Immigration Service of the Department of Labour who processed her application for a change to the conditions of her work permit so that she could work elsewhere in New Zealand. That process took roughly three months from the application made on 17 December 2008 to its approval which was notified to Ms Felices under letter dated 13 March 2009. In that period she had no income, no access to a benefit and her brother, who she was supporting in the Philippines, was forced to leave his educational establishment because she could no longer support him either.

Hours of work

[18] A subset of the dispute between the parties is Ms Felices' argument that she was somehow required to work virtually continuously and that Mr Elliott could not identify for her the times that she was not expected to be on duty or at least on call.

[19] That is a baffling argument because the employment agreement is absolutely clear that essentially this is a split shift kind of arrangement where the carers are required to be on duty for a span of hours in the morning and then a span of hours in the evening, but with the afternoons free. Furthermore, Mr Elliott in his oral evidence before the Authority made it clear that really the only inviolable rule was the morning period when he needed the carers to assist him to get ready for the day, but that for the rest of the day, provided one of them was available (and there were two live-in carers) there was no requirement at all for them both to always be there.

[20] It follows that I am absolutely clear that Ms Felices is quite mistaken in her conviction that she was required to work in effect all hours. That is not what the employment agreement says and Mr Elliott's gloss on the employment agreement's provision make arrangements even more flexible.

[21] Really it seems that again, it is a matter of communication having failed rather than there being any breach of duty by the employer.

The parties' losses

[22] Each of the parties to this employment relationship have suffered loss. Ms Felices has lost the opportunity to continue a two year contract and support her brother and she has effectively lived on next to nothing for three months from the

point at which the relationship with Mr Elliott ended and the amendment to her work permit three months later. She seeks three weeks' money in lieu of notice, the value of the repatriation obligation which Mr Elliott has an obligation to provide together with costs associated with obtaining the variation to her work permit and representation costs. On the basis that she was unjustifiably dismissed, she also seeks compensation under s.123(1)(c)(i) of the Employment Relations Act 2000.

[23] Conversely, Mr Elliott incurred a return airfare cost of \$2,800, half of which in effect was used by Ms Felices in coming to New Zealand and half of which has not as yet been used and may still be capable of being reclaimed from the airline, together with his agency recruiting fee and he, of course, does not have the caregiver that he contracted for. Nor has he been able to replace Ms Felices with somebody else so the vacancy left by her sudden departure continues.

Conclusions

[24] I am not satisfied that Ms Felices was unjustifiably dismissed. Indeed, I am not satisfied that she was dismissed at all. The factual position disclosed by the evidence (particularly her own evidence) is that she abandoned her employment by telling her employer that she was unable to continue living-in, a fundamental term of the employment agreement. There can, in my judgement, be no sense in which a live-in carer does not live-in.

[25] Conversely, Mr Elliott incurred a return airfare cost of \$2,800, to return Ms Felices to the Phillipines right on Christmas. This airfare was not used and may be able to be refunded in whole or in part. Further Mr Elliott incurred costs in the agency recruiting fee, and, of course, he does not have the caregiver that he contracted for. Nor has he been able to replace Ms Felices with somebody else so the vacancy left by her sudden departure continues.

[26] Mr Elliott acknowledges that he may be liable to pay Ms Felices' wages, but that can only be if the employment relationship was severed by him rather than by her, and I must say that my conclusion is that the relationship was brought to an end by her refusal to contemplate living-in rather than by any action by Mr Elliott. He did what he thought was the right thing to do, namely getting Ms Felices a ticket to travel back to her homeland on the basis that she was no longer able to remain in New Zealand. But I find that it was not a situation where he sought to impose that result on

her but rather him simply trying to follow what he understood to be his legal obligations, given that as he understood it, Ms Felices was no longer entitled to be in the country after the termination of the employment relationship between the two of them.

[27] However, it seems to me that Mr Elliott does have some obligation to Ms Felices. She, after all, would not be here were it not for his offer of employment and I think the proper course of action is for him to pay to her the value of the remainder of the airline ticket which he purchased in her name for her to return to the Philippines and for Mr Elliott to also pay to Ms Felices a contribution to the costs of her obtaining a variation to her work permit and to her representation.

[28] Mr Elliott thought that the airline was withholding its refund because the Immigration Division of the Department of Labour had some influence in the matter. I have spoken to the relevant immigration official who assures me there is no such influence.

Determination

[29] I make the following orders.

[30] Mr Elliott will use his best endeavours to obtain a refund of the airfare and in any event he will pay to Ms Felices the sum of \$1000 as a contribution to her airfare from New Zealand to the Phillipines. In addition, Mr Elliott will pay to Ms Felices the sum of \$500 as a contribution to her out of pocket expenses in applying for a variation to her work permit and the cost of her representation.

Costs

[31] Costs, insofar as they relevant, have been dealt with in the body of the determination.

Final note

[32] I observe that this is not the first occasion that I have heard a claim from a foreign national against a New Zealand employer where the fundamental difficulty seems to be the inability of the parties to adequately communicate with each other.

[33] It is not necessarily the fault of the New Zealand employer that these problems persist. In the present case, I am satisfied that Mr Elliott has not breached his obligations to be and act as a good employer, and has tried to act in good faith throughout.

[34] Ms Felices, for her part, has I think also endeavoured to fulfil her obligations loyally and faithfully, but her fundamental misunderstanding of the nature of the employment she was undertaking has created difficulty for her as has her problems with a co-worker which she has not shared with her employer.

[35] It would certainly be of assistance to the New Zealand economy, to New Zealand employers who employ overseas nationals, and to the overseas nationals who come to work in this country if there could be a better understanding of the nature of the employment offered before it is undertaken and the obligations that each party has of the other in the New Zealand employment context.

[36] In this particular case, I think Ms Felices had a notion that she was going to be working in a reasonably structured environment where there would be strict clocking-in and clocking-out in effect. Of course nothing could be further from the truth. This was a flexible live-in arrangement effectively operating on a split shift basis with each afternoon free and no real obligation to always be available at night either. All of that seems to have escaped Ms Felices notwithstanding the clarity of the employment agreement.

James Crichton
Member of the Employment Relations Authority