Determination Number: AA 26/05
File Number: AEA 150/03

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Colin Little (Applicant)
AND	Evergreen Life Ltd (Respondent)
REPRESENTATIVES	Kenneth Nicolson for the applicant Deirdre Watson for the respondent
MEMBER OF AUTHORITY	James Wilson
INVESTIGATION MEETING	16 September 2004
DATE OF DETERMINATION	27 January 2005

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

[1] The applicant, Colin Little, says that he was unjustifiably dismissed from his employment by the respondent, Evergreen Life Ltd (Evergreen), on 5 January 2000. Evergreen, in reply, say that Mr Little was employed on a fixed term contract which expired. Mr Little's statement of problem was lodged with the Authority on 20 February 2003.

Jurisdiction

[2] Mr Little's employment with Evergreen came to an end in January 2000 i.e. before the introduction of the Employment Relations Act 2000. (the ER Act). However at s.248 the ER Act provides:

> ***248 Existing causes of action***
>
> *(1) ….*
>
> *(2) where any cause of action has arisen under any of the provisions repealed by this Act and at that date no proceedings have been initiated in respect of that cause of action under those provisions, those provisions continue to apply to any proceedings commenced in respect of any such cause of action as if this Act had not been passed.*
>
> *(3) ….*

(4) Where any cause of action has arisen before the commencement of this section in relation to the dismissal of an employee, proceedings in the Employment Tribunal in respect of that cause of action, --

(a) if commenced before the close of 30 June 2001, may be other than in accordance with section 113(1); but

(b) if commenced after the 30 June 2001, must be in accordance with section 113(1) and Part 9.

[3] Section 113(1) of the ER Act provides that the only way for an employee who has been dismissed to challenge that dismissal is to bring a case to the Employment Relations Authority as a personal grievance. The combined effects of section 248(4)(b) and section 113(1) is that Mr Little's claim is to be investigated by the Authority in terms of the ER Act but that the Authority must apply the legal principles applicable under the previously applying legislation i.e. the Employment Contracts Act.

Background

[4] Mr Little was employed by Evergreen as Marketing Manager in July 1999. He says that on his first day at Evergreen he found a Collective Employment Contact (CEA) on his desk. He says that he read the contract and signed it that night. He says that the next morning he advised the Managing Director of Evergreen, Mr Lee, that he had signed the contract and waited for Mr Lee to uplift the contract and sign it on behalf of the Company. Although Mr Lee did not sign the contract at that time Mr Little says that he was not concerned because he had been given, and produced for the Authority, a "letter of appointment". This letter of appointment set out Mr Little's conditions of employment and job description. Mr Lee, on the other hand, says that Mr Little did not sign the initial contract but agreed verbally to the terms set out in the letter of appointment.

[5] While there is some dispute between the parties regarding the signing or otherwise of this original contract there is no dispute that the letter of appointment, which formed part of that contract, included the following provision:

PERIOD OF EMPLOYMENT (New Employees only)

1. *This employment is subject to review after 6 month.*
2. *Employment is to commence at 8.00 am on.*
3. *Employment may be terminated in accordance with the Company's Collective Employment Contract.*

[6] Mr Little says that he resigned from a permanent position to take up the position with Evergreen and is adamant that he would not have done so if the new position had not been permanent.
Mr Lee is equally adamant that he had instructed his administration officer to amend the standard employment contract to make it clear that Mr Little's initial period of employment was for only 6 months. Mr Lee insists that the wording of the initial contract given to Mr Little was an error.

[7] Irrespective of whether or not this Contract had been signed by one or both parties, in the absence of any other agreement or Contract Mr Little would have been considered a permanent employee. This would have been the case even if, as claimed by Mr Lee, the wording was an error. As I explained to the parties at the investigation meeting the statement *subject to review after six month(s)* could not be interpreted as rendering Mr Little's employment temporary. Rather such wording implies that the terms of his employment (performance, salary, conditions etc) would be reviewed after six months. However Evergreen argues that subsequent events altered Mr Little's employment status.

[8] On or before 8 October 1999 Mr Little was given a new contract. In his statement of evidence Mr Little says:

> *I was, without any discussion or warning, called to a meeting with Mr Lee who put a new contract on the table in front of me and then told me to "sign that". I said, "but I already have a contract which is not up for review for another three more months". He said "well this is a new contract with new terms and I want it signed now". He began getting agitated and aggressive, thumping the table and he then threatened that if I did not sign the new contract I would not get paid.*
>
> ……
>
> *I felt intimidated by Mr Lee's aggressive attitude and his threats about the non-payment of my salary. I was caught quite unprepared by these demands and did not know what to do especially as it was at such short notice and I had no chance to get advice.*
>
> …..
>
> *At the time of the meeting, I felt very much under pressure from Mr Lee to sign the new contract and Mr Lee would not allow me to read it properly or take it away and have it checked by a legal adviser. He wanted compliance with his demands within five minutes and stood over me until I signed. He was so insistent that I sign there and then and was so aware that I did not want to sign the new terms, that he demanded that I write at the bottom of the document that "I was happy to go along with" the changes and variations, the wording of which he made me change and rewrite over and over until he got the wording to his satisfaction. This of course was not true but I felt I had no alternative considering his belligerent attitude and threats. I was therefore compelled to do what he asked and forced into signing the new letter of appointment.*

Contrary to his written statement, Mr Little agreed, during the course of the investigation meeting, that he had received a copy of this new contract prior to the meeting with Mr Lee (probably the previous day).

[9] Mr Lee's version of these events is somewhat different. He says that Mr Little had not been performing all of his agreed duties and had asked that his job description be reduced. Mr Lee says that there had been two draft contracts neither of which had been signed. He insists that the statement regarding the term of Mr Little's initial contract had been an error and the "new" contract merely corrected this error and incorporated the changes to Mr Little's job description. He categorically denies bullying Mr Little into signing a new contract.

[10] Significantly the contract signed by Evergreen and by Mr Little included an amended statement regarding the term of Mr Little's employment. The new contract said:

> *PERIOD OF EMPLOYMENT (New Employees only)*
>
> 1. *This employment is for a 6 months period only.*
> 2. *Employment is to commence at 8 a.m. on 5 July 1999.*
> 3. *Employment may be terminated in accordance with the Company's Collective Employment Contract.*

[11] Mr Lee's says that over the next few weeks the Company had significant concerns regarding Mr Little's performance, which were drawn to his attention, and in December 1999 he advised Mr Little that his contract would not be renewed when it expired in January 2000.

Discussion

[12] The legal principles which applied under the Employment Contracts Act provided that the parties to any employment contract were free to enter into any agreement they wished so long as such an agreement was not illegal. In other words, irrespective of the initial terms of Mr Little's employment, he and his employer were free to change those terms by agreement. This is what, on its face, the contract signed on 8 October 1999 purports to do. However, Mr Little claims that he was forced to sign that contract by the *harsh and oppressive* tactics of his employer. He argues that that Contract should be of no effect, that he was a permanent employee and was unjustifiably dismissed.

[13] Section 57 of the Employment Contracts Act provided:

> ***57 Harsh and oppressive contracts*** *–(1) Where any party to an employment contract alleges—*
> *(a) That the employment contract, or any part of it, was procured by harsh and oppressive behaviour or by undue influence or by duress; or*
> *(b) That the employment contract, or any part of it, was harsh and oppressive when it was entered into, --*
> *that party may apply to the Court for an order under this section.*
> *(2) An allegation of the type referred to in subsection (1) of this section may be made in proceedings before the Court commenced for that purpose or in the course of other proceedings properly brought before the Court.*
> *(3) The Court may exercise the power contained in subsections (4) and (5) of this section only on the application of a party to the contract and not of its own motion.*
> *(4) Where the Court is satisfied, on the application of a party to an employment contract, that an allegation of the type referred to in subsection (1) of this section is true, the Court may make one or more of the following orders:*
> *(a) An order setting aside the contract (either wholly or in part):*
> *(b) An order directing any party to the employment contract to pay to any other party such sum by way of compensation as the Court thinks fit.*
> *(5) When making any order under this section the Court shall take into account all the circumstances surrounding the creation of the contract or the relevant part thereof.*
> *(6) Any order under this section may be made on such terms and conditions as the Court thinks fit.*

> *(7) Except as provided in this section, the Court shall have no jurisdiction to set aside or modify, or grant relief in respect of, any employment contract under the law relating to unfair or unconscionable bargains.*

[14] In *Adams v Alliance Textiles (NZ) Ltd* [1992] 1 ERNZ 982, 1027, Judge Goddard in the Employment Court said:

> *This [harsh and oppressive behaviour] is a strong term. It calls for evidence of strong tactics. Although we have to construe the Act as enacted and in its context, it is not without interest that, as Mr Toogood pointed out, during the consideration of the Bill by Parliament, amendments to substitute the terms "unreasonable" and "harsh and unconscionable" were defeated. ……The language used in the Act as passed, together with the limitation on the Court's powers contained in subsection (7) more clearly shows a legislative intention that the Court should give full weight to the plain words used. Obviously, something more than undue influence is intended. Substituting equally evocative synonyms seems less than helpful. The behaviour complained of must strike the Court as reprehensible, as morally blameworthy and as meting out intolerable treatment. It will normally have elements of deliberation and of unwarranted severity.*

And in *United Food and Chemical Workers Union v. Talley* [1993] 2 ERNZ 360 the Court of Appeal said:

> *'Harsh' and 'oppressive' are words of ordinary usage, and it is unnecessary to go beyond the dictionaries to find the meaning in this particular context. So in the Shorter Oxford synonyms for 'harsh' are 'repugnant to the feelings; severe, vigorous, cruel, rude, unfeeling'; and for 'oppressive': 'of the nature of oppression; unjustly burdensome, harsh or merciless'; while for 'oppression': exercise of power in a tyrannical manner; cruel treatment of subjects, inferiors etc; the imposition of unjust burdens'. Chambers adds 'overpowering' as another synonym of 'oppressive'.*

[15] Mr Little did not strike me as being a particularly weak personality who could be easily intimidated. He received a copy of the employment contract at least a day before he was asked to sign it and had an opportunity to seek legal advice. If Mr Lee did threaten to stop his salary (and this is disputed) this threat by its nature could not have instantaneous effect. Mr Little could have, at that point, refused to sign the new Contract and still had ample time to seek legal advice before the threat to stop his salary could have any real effect. Even after signing the contract Mr Little could have sought legal advice and taken steps to repudiate the contract. While I have no doubt that Mr Lee did put pressure on Mr Little to sign the new contract, I do not find, in this context, that this pressure amounted to harsh or oppressive behaviour amounting to duress.

Determination

[16] In terms of the legal principles applying at that time the parties were free to enter into whatever employment contract they wished. The contract they signed in October 1999 was expressed to expire six months after the commencement of Mr Little's employment i.e. in January 2000. Mr Little signed this contract and I have found that Mr Lee did not use harsh and oppressive tactics to induce him to sign. Evergreen terminated Mr Little's employment by declining to renew his contract, as they were entitled to do in terms of the law as it stood at that time. Under these circumstances the termination of Mr Little's employment was not unjustified and Mr Little does not have a personal grievance.

Costs

[17] Costs are reserved and the parties are urged to attempt to settle this matter between themselves in the first instance.

James Wilson
Member of Employment Relations Authority