

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 284/07  
5075972

BETWEEN Denise Pilbrow  
Applicant  
AND Alexander & Co Ltd  
Respondent

Member of Authority: Dzintra King  
Representatives: Andrew Welch, Counsel for Applicant  
Steve Alexander, Advocate for Respondent  
Investigation Meeting: 11 July 2007  
Determination: 13 September 2007

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The applicant, Ms Denise Pilbrow, says she was unjustifiably dismissed by the respondent, Alexander & Co Ltd. The respondent denies that there was a dismissal asserting that Ms Pilbrow agreed to terminate her employment on 15 November 2006 after a discussion with Mr Alexander, the sole director and owner of the respondent, during which the parties entered into a negotiated settlement.

[2] Although not expressly couched in such terms, Ms Pilbrow appeared to be asserting that the settlement had been entered into unfairly or because of undue influence or duress.

**Background**

[3] Ms Pilbrow was employed on 17 July 2003 as Mr Alexander's PA as well as having responsibility for general office systems and procedures.

[4] Mr Alexander started the company in 2000 with a staff of two. He employed seventeen staff at the time of the termination of Ms Pilbrow's employment. The

respondent employs building surveyors and carries out dispute resolution services. Its work is confidential.

[5] Mr Alexander said Ms Pilbrow had difficulties maintaining good relationships with her fellow employees, one of whom resigned despite prolonged attempts by Mr Alexander to obtain a resolution.

[6] He maintained that Ms Pilbrow had a negative attitude that had a deleterious effect on the atmosphere in the office and that several people had spoken to him about this.

[7] Mr Alexander said that Ms Pilbrow criticised his performance and that during what was ostensibly Ms Pilbrow's performance review in September 2006 she told him that he was not running the company properly. Mr Alexander noted his concerns about the review in a letter he gave to Ms Pilbrow on 7 September. Mr Alexander wrote:

*I have concluded that the performance review was unproductive. Every issue raised was met with defensiveness. Every matter discussed is projected back to me as employer. I had asked, at the time your review was due, for you to fill in one of the standard review forms. As I had not received such a form at the beginning of September 2006, I scheduled the meeting. The written material that you gave me was not a reflective evaluation of your own performance but actually a review of my performance as employer.*

He commented on what Ms Pilbrow had provided, gave her some positive feedback and asked her to give thought to relationship building.

[8] Mr Alexander was contemplating carrying out some restructuring as the company had grown rapidly in the last five years. He felt that Ms Pilbrow resented the changes and seemed to think they were personal when they had to do with the changing needs of the company.

### **The Emails and their Consequences**

[9] Mr Alexander said that from time to time he had to look at Ms Pilbrow's computer for documents or emails. On the last occasion he did this he found a high volume of personal emails, some of which made it clear that she was looking for other employment. One of the emails made derogatory remarks about Mr Alexander. Mr Alexander said finding the emails caused a loss of trust. He was concerned not only about the personal comments but also about the fact that Ms Pilbrow was handling sensitive and valuable information.

[10] Mr Alexander asked to see Ms Pilbrow in his office. He said he presented her with a selection of emails and asked her to read them. Mr Alexander said Ms Pilbrow reacted quite aggressively, said she did not need to read them and then proceeded to say that she was very angry with him, telling him how inadequate he was in a number of ways. She said he was worthless as a manager and a person.

[11] He told her that the emails were a serious matter. They indicated that there was no trust in the relationship and raised issues regarding her use of work time and her negative attitude towards work.

[12] Mr Alexander said he had not fully examined the contents of her computer and he felt that a suspension would be appropriate until that could take place.

[13] At this stage he told Ms Pilbrow that there were other potential options available and asked whether she would like to have a without prejudice discussion. He explained that was a confidential discussion and that the contents of the discussion could not be used by either party in legal proceedings. Ms Pilbrow agreed.

[14] He raised the possibility of resignation and explained that there would be some advantages because there would be no suspension or investigation and that she would get a positive reference and would be able to seek work from a positive position.

[15] She then asked how matters were to be documented if she were to resign. He told her he had a document prepared which he gave to her. She read it and then

picked up a pen and signed it without hesitation before he had a chance to fill in an amount. He then filled in the amount and asked her to initial it.

[16] Ms Pilbrow said this was untrue. However, the initialling of the amount points to Mr Alexander's account being more likely to be accurate.

[17] She then asked to see her employment file. He wondered if she was having second thoughts and asked if she had intended to sign the agreement. She said she had.

[18] Ms Pilbrow's account of the meeting which culminated in her signing a settlement agreement differs in some respects from Mr Alexander's.

[19] Ms Pilbrow said Mr Alexander gave her a yellow plastic pocket containing about 10 to 15 sheets of paper and asked her to read them. She looked only at the top sheet and recognised a personal email to a friend with the words "arsehole boss" highlighted in yellow. She said she felt embarrassed and said that she did not need to read the other emails as she had written them.

[20] Mr Alexander told her that her sending of personal emails was theft from the company.

[21] The company does have an email policy which Ms Pilbrow denied seeing. Whether she had seen it or not, it is commonsense in that as it states "The use of email for personal purposes should be limited to incidental personal purposes for brief periods of time only".

[22] She says Mr Alexander told her that the result of her actions would be immediate suspension followed by a full investigation during which she would be on full pay while her computer could be examined and that it would probably end up with her being dismissed. He said it could be a long drawn out process and would not be good for her looking for future employment.

[23] He offered her a settlement. She asked if she could have the afternoon to seek legal advice before signing anything. He said she could but he would have to suspend her immediately.

[24] Mr Alexander then produced a copy of a settlement agreement. Ms Pilbrow signed it after an amount had been entered and endorsed by both parties.

[25] She said she felt she had no option. She was unsure whether suspension on full pay meant she was still an employee of the company and therefore would not be able to seek other employment during the investigation process as she wouldn't know when she would be available to start work elsewhere. She felt intimidated by his threat of probable dismissal and the difficulty of obtaining other employment.

[26] After Ms Pilbrow signed the agreement she collected her personal items and handed in her keys and left the office.

Duress, Undue Influence,  
Unconscionable Behaviour

[27] As stated in *18 Halsbury's Laws of England* (4th ed) at para 332, undue influence consists in the gaining of an unfair advantage by an unconscientious use of power by a stronger party against a weaker in the form of some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating, and generally, though not always, some personal advantage obtained by the stronger party. It is directed at conduct within a relationship which justifies the conclusion that the disposition or agreement was not the result of a free exercise of the disposer's will. The doctrine is founded on the principle that equity will protect the party who is subject to the influence of another from victimisation.

[28] The test for undue influence is very high.

[29] In Adams v Alliance Textiles [1992] 1 ERNZ 982 at pp.1027-1028 the Full Court stated:

*There is no doubt that difficult and delicate problems may arise in deciding whether threats otherwise lawful can amount to duress in the particular circumstances of a*

*case. It seems that the court would have to take account of a wide range of factors in making such a decision, including (for instance) the nature of the threat; whether such a threat is commonly regarded as a legitimate way of exerting pressure; how coercive the threat is in the particular circumstances in which the party threatened is placed; what alternative remedies he may have, and how effective such remedies would be; the nature of the demand coupled with the threat; the nature of the consequences to the threatened party if he submits to the coercion on the one hand, and if he refuses to submit, on the other; and the identity and status of the parties (for example, businessmen or consumers) and their advisers, if any.*

[30] A settlement compromise can be vitiated should there be duress or undue influence at the time the compromise is entered into. It is a question of fact as to whether or not duress or undue influence existed.

[31] In McHale v Open Polytechnic[1993] 1 ERNZ 186 at p.203 the Court said that in any negotiating situation what a person accepted was in the end driven by many considerations, which varied from person to person. What was required was a close examination of all the surrounding circumstances before a conclusion could confidently be reached whether a contract was made willingly or under irresistible pressure.

[32] What has to be proved is Ms Pilbrow's willing and informed assent to the settlement. This is a mixed question of fact and law.

## **Decision**

[33] Ms Pilbrow is not a young inexperienced person whose will could be easily overborne. She accepted that she had been critical of Mr Alexander, both to his face and behind his back. She was unhappy in her employment and had been actively

looking for other employment. When faced with the evidence of her email criticism of Mr Alexander she responded by becoming angry and critical of him.

[34] I do not think that Mr Alexander saying he would have to suspend Ms Pilbrow was unreasonable in the circumstances. The employment agreement provided for suspension and the parties discussed it.

[35] Mr Welch submitted that the meeting was a disciplinary interview. This was based on the fact that Mr Alexander produced a file note which he had made immediately after the meeting. The note was headed "Disciplinary Interview with Denise Pilbrow". What Mr Alexander did was to prepare for a meeting that could certainly have become a disciplinary meeting had Ms Pilbrow not accepted the settlement offer.

[36] The sole matter that has caused me some concern regarding the circumstances under which the settlement was signed was the lack of independent legal advice. However, Ms Pilbrow was not denied the opportunity to take such advice. The rider was that she would be suspended if she chose to do so.

[37] Ms Pilbrow's statements regarding not understanding the implications of a suspension on pay, which I asked her to clarify, seem disingenuous. Ms Pilbrow had been looking for alternative employment for some time and cannot have been under the misapprehension that if an investigation was commenced she would have to continue as an employee until it was completed.

[38] Ms Pilbrow may well have regretted her decision after giving matters more thought. That is unfortunate but it is not enough to vitiate the agreement.

[39] Had I found that Ms Pilbrow had been unlawfully coerced into signing the agreement and made a determination regarding the dismissal I would have been required to assess the degree of contributory fault. Ms Pilbrow did contribute and that would have resulted in a reduction in any remedies to the extent to which the outcome would in all likelihood not have been dissimilar to the agreement reached.

### **Costs**

[40] If the parties are unable to resolve the issue of costs the respondent should file a memorandum within 28 days of the date of this determination. The applicant should then file a memorandum in reply within 14 days of receipt of the respondent's memorandum.

Dzintra King

Member of the Employment Relations Authority