IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 502
5354352

	BETWEEN	FUGRO PMS PTY LTD & PAVEMENT SERVICES LTD Applicant
	AND	BRYCE TINKLER Respondent

Member of Authority:	Eleanor Robinson
Representatives	Caroline McLorinan, Counsel for Applicant Mark Ryan, Counsel for Respondent
Investigation Meeting	On the papers
Submissions Received	23 September and 14 October 2011 from Applicant 5 October 2011 from Respondent
Determination:	28 November 2011

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY MATTER

Application for a Compliance Order

[1] On 18 July 2011 a Record of Settlement ("the Settlement") was signed pursuant to s 149 of the Employment Relations Act 2000 ("the Act"). The parties to the Settlement were the Applicant, Fugro PMS Pty Ltd & Pavement Management Services, ("Fugro"), and the Respondent, Mr Bryce Tinkler. The Settlement was signed by Fugro and Mr Tinkler on 1 July 2011. The Settlement was also signed on 18 July 2011 by a Mediator employed by the Department of Labour.

[2] The issue which had been brought before the Authority by Fugro was that Mr Tinkler had not complied with clauses 5 (b) and 5(c) of the Settlement, which state:

> *5 The Employee agrees to pay back to the Employer the amount of $95,153.74 as follows:*
>
> *(b) A loan from the bank for $60,000 within 21 days of the date of this agreement being signed by all parties, including the mediator*

(c) The remainder by regular payments of $160.85 per week for 104 weeks. Payments will commence 15 August, 2011.

[3] The Settlement was certified pursuant to s 149 of the Act by the Mediator. That certification confirmed that before making the agreement, the parties were advised and accepted they understood that the agreed terms:

a. were final, binding and enforceable; and

b. could not be cancelled; and

c. could not be brought before the Authority or the court for review or appeal, except for the purposes of enforcing those terms.

[4] Mr Tinkler claims that he signed the Settlement under duress, and seeks that the Settlement be declared void.

Issues

[5] The preliminary issue for determination is whether the Settlement was signed by Mr Tinkler as a result of duress, and should thereby be declared void.

Background Facts

[6] Mr Tinkler was employed by Fugro as General Manager New Zealand.

[7] Mr John Yeaman, Managing Director of Fugro, stated by way of affidavit evidence that on or about March 2011 Fugro had discovered that large amounts of money were being taken from Fugro's accounts and that there were no expenses claims to support the amounts which had been taken. Fugro consequently undertook an internal audit.

[8] During the process of the internal audit, Mr Yeaman stated that the ability of the Accounts Administrator, Ms Vanessa Taylor, to make payments was removed. However some payments had still been processed, following which Mr Tinkler's ability to make such payments to himself had been removed.

[9] Mr Tinkler was invited by a letter dated 20 June 2011 to attend a disciplinary meeting on 27 June 2011. The letter set out the two allegations which were the reason for the meeting, as being:

1. *It is alleged that you have obtained $95,153.74 in unjustifiable advances and through the compilation of false or invalid expense claims and that this money has gone to yourself for personal gain. As a result, we allege that this was done using falsified documentation which you either prepared or you instructed Vanessa Taylor to prepare. Further we allege that this financial gain was by deception for example using funds from a largely dormant account. …*

2. *It is alleged that you have failed to follow a lawful and reasonable instruction given on 4(5) April 2011 to acquit funds by then approving cheques to yourself without the acquittals required as follows : …*

[10] The letter dated 20 June 2011 informed Mr Tinkler that he was entitled to have a representative with him at the meeting to be held on 27 June 2011, which would be attended by Mr Yeaman and Ms Caroline McLorinan, a lawyer who would be acting as Fugro's representative. The letter further explained that the meeting would be Mr Tinkler's opportunity to provide an explanation and that:

> *You will have an opportunity to comment and provide any documentation you think we need to look at.*
>
> *It is likely that there will be several breaks in this meeting for us to consider information.*
>
> *Should we consider that serious misconduct is established, we will talk to you about that and our proposal of how that will be handled. At that point, you will have an opportunity to comment on our proposal.*

[11] Mr Tinkler attended the meeting on 27 June 2011 without representation. The minutes of the meeting show that at the commencement of the meeting Ms McLorinan had queried the fact that Mr Tinkler had no representation present, and that Mr Tinkler had confirmed that he understood his entitlement to have a representative but that he did not want one present.

[12] The minutes conclude by recording that Ms McLorinan advised Mr Tinkler to obtain legal advice.

[13] Mr Tinkler by way of affidavit evidence claims neither to have seen the minutes nor to have signed them as accurate, prior to their having been filed in the Authority. However Mr Tinkler does not state in the affidavit that the minutes of the meeting are not correct.

[14] There was a further meeting on Tuesday 28 June 2011. The minutes of this meeting record that Mr Tinkler was asked at the commencement of the meeting if he was happy to proceed without representation and that he confirmed that he was happy to do so. Added to the minutes of the meeting are the following notes:

- *Bryce didn't have a lawyer but still wanted one*
- *CM suggested we adjourn until Friday, 8 July 2011 and he could get his lawyer to contact us.*

[15] Mr Tinkler confirmed via his affidavit that it was made clear to him that he should seek legal advice, and that he had made it clear that he did want to obtain legal advice.

[16] By way of affidavit evidence Mr Yeaman stated that following the meeting on 28 June 2011 he had several informal discussions with Mr Tinkler, which Mr Tinkler had instigated, on the subject of the disciplinary situation. Mr Yeaman stated that during these discussions Mr Tinkler had given his thoughts on how he could repay the debt which had been incurred to Fugro.

[17] It is also clear from both Mr Yeaman's and Mr Tinkler's affidavit evidence that Mr Yeaman enquired on more than one occasion as to whether Mr Tinkler had contacted legal counsel. Mr Tinkler stated that on 29 June 2011 he had spoken to an EMA representative but had been informed that the EMA acted only for employers. Mr Tinkler stated that he had spent the remainder of that day trying to source legal representation.

[18] Mr Yeaman stated in his affidavit evidence that he had provided Mr Tinkler with a draft Settlement on 29 June 2011 as he believed that was an option Mr Tinkler had wanted following their several informal discussions on the subject. Mr Tinkler stated that it was Mr Yeaman who had suggested that he resign on the terms as set out in the draft Settlement.

[19] Mr Yeaman stated that the following day, 30 June 2011, he asked Mr Tinkler if he had made a decision concerning the proposed Settlement option, and Mr Tinkler told him that he had discussed it with his wife. Mr Yeaman stated that as Mr Tinkler appeared to be upset, he had suggested that they went for a drive, explaining that he and Mr Tinkler had worked closely together for over 10 years and he considered that they were friends.

[20] Mr Yeaman and Mr Tinkler agree in their respective affidavits that the drive took approximately 20 minutes.

[21] Mr Tinkler states that during the drive Mr Yeaman had informed him that it was a serious matter of fraud and that if Mr Tinkler did not resign and sign the Settlement, the police might be involved. Mr Tinkler stated that Mr Yeaman had explained that this could result in Mr Tinkler being charged and, if convicted, going to prison.

[22] Mr Yeaman denies that he and Mr Tinkler discussed the proposed settlement document on the drive, or that he threatened Mr Tinkler with police action.

[23] The following day, 1 July 2011, Mr Tinkler resigned and the Settlement signed by both parties.

[24] The Record of Settlement was subsequently signed by the mediator on 18 July 2011.

Determination

The Law

[25] Lord Scarman in the case of *Pao On v Lau Yiu Long*[1] defined duress as follows:[2]

> ***Duress,*** *whatever form it takes, is a coercion of the will so as to vitiate consent. … [In] determining whether there was a coercion of the will such as there was no true consent, it is material to inquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it. All these matters are … relevant in determining whether he acted voluntarily or not.*

[26] In subsequent cases, the focus shifted to concentrate more on the quality of the consent in terms of the degree to which consent was impaired, rather than on duress being seen as vitiating consent, as consent would exist in virtually all cases.

[27] In the recent case of *Pharmacy Care Systems Ltd v Attorney-General*[3] the Court of Appeal listed what were referred to as seven "elements" of duress recognised in New Zealand Law:[4]

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[1] [1980] AC 614
[2] Ibid ar pg 635

> *In summary, the elements of duress in New Zealand law today are these: First, there must be a threat or pressure. Secondly, that threat or pressure must be improper. Thirdly, the victim's will must have been overborne by the improper pressure so that his or her free will and judgment have been displaced. Fourthly, the threat or pressure must actually induce the victim's manifestation of assent. .Fifthly, the threat or pressure must be sufficiently grave to justify the assent from the victim, in the sense that it left the victim no reasonable alterative. Sixthly, duress renders the resulting agreement voidable at the instance of the victim. This may be addressed either by raising duress as a defence to an action, or affirmatively, by applying timeously to a court for avoidance of the agreement. Seventhly, the victim may be precluded from avoiding the agreement by affirmation.*

[28] The Court of Appeal also observed in relation to a threat of criminal prosecution that:[5] "*A threat to instigate a criminal prosecution has generally been regarded as an improper means of inducing a party to make an agreement."*

Improper Pressure

[29] There was certainly pressure on Mr Tinkler at the relevant time, given the serious nature of the allegations against Mr Tinkler and the large sums of money involved. This is pressure which is to be found in any disciplinary process when an employee is facing allegations of serious misconduct, and is not of an improper nature.

[30] However Mr Tinkler is claiming improper pressure, specifically Mr Tinkler claims that his agreement to the Settlement was obtained by duress, this being the threat of police action and criminal conviction made by Mr Yeaman during the drive on 30 June 2011. Mr Yeaman's affidavit evidence is an absolute contradiction of this assertion.

[31] Had a threat of a criminal prosecution been made to Mr Tinkler during the drive with Mr Yeaman, this would have been an improper means of inducing Mr Tinkler to agree to the Settlement. There were no witnesses to what was discussed on the drive and therefore what is required in determining this matter is to carry out what the Chief Judge referred to as:[6] "*an examination of all the relevant facts"*.

[32] Mr Tinkler refers to a note made by Mr Yeaman as being supportive of his allegation of a threat having been made by Mr Yeaman. The handwritten note reads:

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[3] Court of Appeal, CA 198/03, 16 August 2004
[4] Ibid at para [98]
[5] Ibid at para [94]

[6] *Marsh v Transportation Auckland Corporation Ltd* [1996] 2 ERNZ 266 at 301

"*Bryce agreed to work with us to get it resolved and I informed him that I would have to turn it over to the police if I didn't get progress.*"

[33] This note forms part of a series of notes dated at various stages of the discussions with Mr Tinkler, which include notes taken at the disciplinary meetings on 27 and 28 June 2011. The note is located at page 2 of the notes, page 1 being dated 1 June. Page 3 of the notes is dated 27 June 2011.

[34] Mr Yeaman stated in his affidavit that at the time the drive with Mr Tinkler took place he was dealing with the issue "*purely as a Company Administration matter*".

[35] I find that the handwritten note does not support Mr Tinkler's allegation of a threat being made on 29 June 2011, since the dating and sequence of the notes indicates that the note in issue was made some four weeks earlier and after the internal investigation, the lengthy and comprehensive disciplinary meetings with Mr Tinkler, the meeting with Ms Taylor, and the informal discussions between Mr Tinkler and Mr Yeaman.

[36] The disciplinary process followed by Fugro adds credence to Mr Yeaman's explanation that by the end of June 2011 Fugro were treating the matter as an internal disciplinary matter rather than involving the police in a criminal prosecution.

[37] It is not disputed by Mr Tinkler that he was encouraged throughout the disciplinary process to obtain legal advice, both at the formal disciplinary meetings by Ms McLorinan, and informally by Mr Yeaman on more than one occasion. I find this to be inconsistent with Mr Yeaman apparently applying improper pressure by means of a threat of police involvement to Mr Tinkler on 30 June 2011, the day following the issuing of the draft Settlement to Mr Tinkler.

[38] Following the signing of the of Settlement by the parties, it was forwarded to the Mediation Service at the Department of Labour and was signed by the mediator on 18 July 2011. The certification of the Record of Settlement by the mediator states:

> *I [name of mediator], Mediator, certif. that:*
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> (a) *I am employed by the Chief Executive of the Department of Labour to provide mediation services under the Employment Relations Act 2000;*
>
> (b) *I hold a current general authority from the Chief Executive to sign, for purposes of section 149 of the Act, agreed terms of settlement;*

(c) *I have been requested by the parties to sign the attached agreed terms of settlement;*

(d) *Before I sign the agreed terms of settlement I explained to them the effect of s 148A and 149(1)& (3);*

(e) *I confirm that the parties have advised me that no minimum entitlements (monies payable under the Minimum Wage Act 1983, or the Holidays Act 2003, as defined in the Employment relations Act 2000) have been foregone in the reaching of this settlement; and*

(f) *I am satisfied that the parties understood the effect of sections 148A, 149(1)&(3) and have affirmed their request that I should sign the agreed terms of settlement.*

I now sign the agreed terms of settlement pursuant to s149 (1) and (3)

Dated at Hamilton this 18h day of July 2011.

[Name of Mediator] Mediator

[39] The certification clearly sets out that prior to the mediator signing the Record of Settlement, she had explained to the parties that the settlement was final and binding except for enforcement purposes. Mr Yeaman confirmed in his affidavit that the mediator had spoken to him and provided this advice.

[40] Mr Tinkler also stated that although the mediator had spoken to him, and he had confirmed to the mediator that he agreed with and understood all the terms of the Settlement, he had made this affirmation to her because the threat made by Mr Yeaman was still an active pressure on him. Mr Tinkler also confirmed that he had not told the mediator about the threat.

[41] The Settlement had been signed by the parties on 1 July 2011; it was not counter-signed by the mediator until 18 July 2011, more than two and a half weeks later. Until that point there had been time for Mr Tinkler to have sought to have had it set aside. I find there to have been sufficient time in this period for Mr Tinkler to have reconsidered his position and taken legal advice.

[42] Further, whilst the pressure that may compel a party to act in a certain way may also silence any protest, I note that Mr Tinkler explains that after the signing of the Settlement on 1 July 2011, Mr Yeaman had called all the Fugro employees together, and announced that Mr Tinkler had resigned, and had as stated by Mr Tinkler *"wished me all the best for my future endeavours"*, which would appear to mitigate against Mr Tinkler's assertion that the threat of police action, if it had been made, was active and subsisting at this time.

[43] Further, correspondence between the parties subsequent to the certification of the Settlement does not support Mr Tinkler having taken any steps to avoid the terms of the Settlement.

[44] An email from Mr Tinkler in response to an emailed enquiry from Mr Yeaman concerning a late repayment under the Settlement terms demonstrates that Mr Tinkler is willing to comply with the Settlement. Dated 11 August 2011 the email reads:

> *Hi John,*
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> *I received your message last night, I have not managed to obtain the funds, due to not been in a financial position to extend my mortgage due to no income. Our house will be relisted on the market next week once I have finished a few items that have been suggested by the real estate agent the will make it more attractive tio a buyer for minimal cost with the prospect off obtaining a better price as well.*
>
> *I have been working franktically to complete, hence slow with communication as I have ot been hearing my phone.*
>
> *I will update you next week on the status.*
>
> *Regards*
> *Bryce*

[45] In all the circumstances I find that the allegation that Mr Tinkler's agreement to the Settlement was obtained by duress not to be valid.

[46] I determine that the Settlement is not void due to duress.

Costs

[47] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority