Determination Number: AA 147/06
File Number: AEA 705/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Siemens Energy Services Limited (Applicant)
AND	Darryl East (Respondent)
REPRESENTATIVES	Mike Clark for Applicant Anne-Marie McInally for Respondent
MEMBER OF AUTHORITY	Alastair Dumbleton
INVESTIGATION MEETING	2 March 2006
DATE OF DETERMINATION	3 May 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant Seimens Energy Services Limited (SES) was the employer of the respondent Mr Darryl East until he resigned, on 20 September 2004, to take up another job. Mr East had been employed by SES and its predecessors for some 12 years and was the foreman of an electricity line construction gang working in the Waihi area when he left. His new employment was in drilling work, for a mining company.

[2] In late 2003 SES had given Mr East an opportunity to up skill by undergoing Glove and Barrier training. Linemen who have had this particular training are able to work on and around power lines without having to cut off the electricity supply to consumers. The training was completed successfully by Mr East and three others in two stages over about seven weeks, with a break in between after six weeks.

[3] About eight months later on 21 September 2004, the day after Mr East had finished his job with SES, the company wrote him a letter signed by the Regional Manager, Mr Rob Reynolds. The letter advised that he was owed $4,548.21 as wages and holiday pay but that he owed $12,000 to SES for the Glove and Barrier training. Mr Reynolds requested Mr East to contact him and make arrangements to pay the balance of $7,451.79.

[4] As Mr East refused to pay anything to SES, the company has applied to the Authority for an order to enforce the debt. The amount now being claimed has increased by $6,000, from $7,451.79 to $13,451.79. This is apparently because SES reconsidered the operation of the contractual arrangements it says it had entered into with Mr East in relation to the Glove and Barrier training and which are relied on as creating the debt he owes the company. Those contractual arrangements, which were in writing signed by SES and Mr East, provided for an advance to him of $18,000 by SES, "*to pay for the glove and barrier training course and to qualify for this training*."

[5] Mr East denies that he owed SES a total of $18,000 upon resigning his job. He says that the written contractual arrangements about this payment were also subject to oral representations as to the circumstances in which SES would require repayment when an employee resigned before two years had elapsed after completion of the training. Mr East says that before he signed the contract Mr Reynolds had represented that the money would only become repayable if he left before two years to go to work for a competitor of SES in the electricity transmission industry. Since he went from SES to a mining job, Mr East claims he is exempt from repayment. Mr East further claims that his consent to the contractual arrangements was induced by duress and the arrangements are therefore voidable.

[6] In a counterclaim Mr East seeks to recover the $4,548.21 in wages and holiday pay he was due at termination but which was set-off by SES against the money the company claims is owed to it, initially $12,000 and latterly $18,000. Mr East alleges that he did not give his consent to that deduction which he contends was therefore unlawful under the Wages Protection Act 1983. He claims to recover the amount deducted plus interest from 20 September 2004.

Contract for the Glove and Barrier training

[7] The written arrangements entered into between SES and Mr East and signed by both in January 2004 were poorly drafted. They are incomplete for their purpose, and they are confusing and contradictory. For example, the written agreement refers to the $18,000 as a "grant" (four times) but also as a "loan" (twice). In normal usage a grant is usually a matter of gift rather than loan. The term "interest free grant" as used in clause 4.1, is an illustration of some of the ambiguity. The agreement at clause 5 also expressly excludes the application of any "bond" to its terms and conditions, but this did not stop Mr Reynolds in his evidence calling (twice) the "grant" a "bond." A bond probably does best describe money that is forfeit but only in certain circumstances, as the $18,000 was to be according to the agreement.

[8] Mr East could be forgiven if the written agreement left him uncertain of his obligations under it. Despite the drafting deficiencies he has, in his claims and in his evidence, not tried to dispute that the basic intention of the agreement was that employees like him would be loaned $18,000 which would be written off over 2 years (at $750 a month) but which could become repayable if the employee left inside that time. The money was not an outright gift but a loan that would cease to be repayable so long as he served SES for two years after completion of his Glove and Barrier training.

[9] It is obvious that the bad drafting of the written agreement led SES to claim, first that Mr East owed $12,000 of the loan, then, several months later, that he owed the full $18,000. The following clauses would have caused confusion;

> *4.2 The balance of this grant* [$18,000] *will automatically decrease by $750 per month over a 24 month period, no additional payments will be required from the employee, unless employee defaults under the terms and conditions of this contract.*

and

> *7.1 Should this Agreement be terminated by the employee, they will be required to repay the grant in full.*

(It was not expressly provided, as it should have been, that a termination of the employment agreement by the employee inside the two years period would constitute default under the training agreement, or that it would constitute a termination of the training agreement. However, that is

not a point taken by Mr East).

[10] When Mr Reynolds read the agreement he obviously thought that for the eight months Mr East had served between the training and his resignation, the original loan of $18,000 had "automatically decreased" by $6,000, as provided by clause 4.2. A few months later however an HR officer of SES took a different view, that clause 7.1 required the $18,000 grant to be repaid "in full."

[11] I find that it would be unjust and inequitable to enforce clause 7.1 in that way, as it must be regarded as a penalty provision. Mr East had served a third of the 24 month period over which the loan was to be written off, but there is nothing to say that even if he had served 23 months and had only one more month to go, SES could not have asked him to repay the full $18,000. To draw back a sum of money that has previously been "automatically' decreasing incrementally is to exact a penalty, in my view. Such a harsh result should only be possible if the wording of the agreement is clear, but clause 7.1 read in conjunction with clause 4.2 leaves the intention far from clear, as both Mr Reynolds and the HR officer obviously found.

[12] Another reason why Mr East should be held by the Authority to be entitled to the eight months ($6,000) rebate from the total loan is because SES I find breached his employment agreement and the Wages Protection Act 1983 when it took from him the wages and holiday pay he was due on termination, but did so without his consent. In defence of that action SES relied on a provision of the applicable collective employment agreement, which permitted deduction where;

> *20.5 …… on ending your employment with the company you consent to the Company deducting any outstanding debts or monies owed to it by you from your final pay, including holiday pay;*

[13] I find that the training agreement itself was not "consent" to SES from Mr East for any deductions from his final pay, as it was not executed contemporaneously with the ending of employment. Neither did he give consent and nor was he asked for consent to any deduction, on ending his employment. SES gave him no notice before his employment ended that it intended to recover the training grant from him. The deduction was illegal. I agree with Ms McInally, in this respect at least it is hardly with "clean hands" that SES has come to the Authority.

[14] The employers obligation to pay wages in full is as described by the Employment Court in *Amaltal Fishing Co Ltd v Morunga* [2002] 1 ERNZ 692. Ms McInally referred the Authority to the following passage in particular, which is apposite;

> *Wages have to be paid in money and not partly in money and partly by discharging debts which seem valid to the employer but the existence or amount of which the employee may wish to dispute or at least to control the timing of their payment having regard to other commitments and needs.*

Misrepresentation

[15] Mr East maintained that before he signed the training agreement, Mr Reynolds had orally represented to him that the loan would not become recoverable unless he was to leave within two years to go and work for a competitor in the same industry as SES. I find as a fact that Mr Reynolds did not say anything like that. I find he said that if an employees resignation was accompanied by "extenuating" circumstances, such as may exist in times of tragedy or emergency, then the CEO of the company could be informed of the situation and asked to consider waiving the balance due on the loan. An example of extenuating circumstances that Mr Reynolds probably

gave at the time, I find, was the sudden death of an employee's spouse which required the employee to leave SES to help run a farm or a family business or to stay home and care for a young family. Mr East agreed that the death of a spouse has been mentioned by Mr Reynolds.

[16] I consider it unlikely that Mr Reynolds made Mr East think that he could simply change jobs on a whim but not have to repay a loan as substantial as $18,000, so long as he did not go to work for SES's opposition. I accept that Mr Reynolds also said that if an employee was made an offer by another employer that was "too good to refuse," the employee could try and negotiate with the new employer to pay the remainder of the grant.

Duress

[17] Ms McInally relied on one Court of Appeal judgment in submitting that Mr East had in the circumstances signed the training agreement under duress, but there is another judgment from that Court (also from 2004 and from two of the same bench) which I consider must be followed with regard to the legal principles that apply.

[18] In *Pharmacy Care Systems Ltd v A-G*, unreported, 16 August 2004, CA 198/03, the Court of Appeal summarised the seven elements of duress required currently in New Zealand law;

1. *There must be a threat or pressure.*

2. *That threat or pressure must be improper.*

3. *The victim's will must have been overborne by the improper pressure so that his or her free will and judgment have been displaced.*

4. *The threat or pressure must actually induce the victim's manifestation of assent.*

5. *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 alternative.*

6. *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.*

7. *The victim may be precluded from avoiding the agreement by affirmation.*

[19] In it's judgment in *NZ Dairy Workers Union Inc. v New Zealand Milk Products Ltd* [2004] 1 ERNZ 376, the Court of Appeal expressly did not determine whether or not there was duress as a result of improper exploitation of inequality in bargaining power, which had been found to have occurred. The judgment also contains no detailed analysis of the legal principles as was given by the Court a few months later in the *Pharmacy Care Systems* case (above).

[20] I can accept that there were some pressures surrounding the employment of Mr East and the renegotiation of the collective agreement, but having observed Mr East I am satisfied that even if there was any degree of impropriety detectable in that pressure he was not forced to enter into the training agreement. He had a natural wish to avoid strings being attached to SES's offer of Glove and Barrier training but I am satisfied he knew before the first phase of training started that he would have to pay back the loan or grant if he left SES within a certain period of time. He made a free choice to take up the training opportunity and it was not until eight months later when he decided to leave SES that he found performance of the agreement inconvenient.

[21] I find that there was no exploitation of Mr East, deliberate or otherwise. This was more a case where SES was simply inept in concluding properly the contractual arrangements it intended for the training. Mr Reynolds greatly understated the circumstances when he said they had been "less than ideal." The training agreement he called an "evolving document" has the appearance of remaining a work in progress even after it was signed.

[22] I am satisfied from the evidence of Mr Reynolds that before the course began he advised Mr East and the others who had been chosen for training that there would be an agreement drawn up which would contain a pay-back clause to cover the early departure from employment of any of the trainees. They agreed to proceed with the training and later, once the agreement had been presented to them for execution, they were under no obligation to continue and complete the training if they did not wish to be bound by the contract. In his evidence Mr East conceded that he had had the option withdrawing at that stage from the training. I note that when Mr East signed the agreement he expressly agreed that it was to operate retrospectively from "the commencement date of the training period."

[23] Mr Reynolds gave evidence of some areas where the employer incurred costs in providing the training in-house, but it is not open to the Authority to review the value itself of the training grant. I note only that Mr East paid nothing to SES and needed to continue working for a moderate period of two years to become discharged from all liability under the agreement.

Determination

[24] As I have found that there was no misrepresentation or duress I therefore find that Mr East remains liable to pay back the $18,000 loan less the $6,000 that was rebated during his eight months service before the employment terminated. The amount outstanding is $12,000.

[25] In its application SES has not claimed interest on the loan, which was in any event described as "interest free" in the training agreement. Unreasonably adding another $6,000 on to the amount in the circumstances may have simply strengthened Mr East's resolve not to pay any of it. For these reasons I make no award of interest on the money Mr East owes SES.

[26] As I have also found that SES unlawfully deducted wages and holiday pay of $4,548.21 (net) from Mr East's final pay, that sum remains owing to him.

[27] Mr East should recover interest on money he has been denied the use of. I award interest on $4,548.21 from 20 September 2004 until the date of this determination at 8%. The amount is $587.16.

[28] Mr East owes more than he is owed. Setting off the difference after crediting interest, the order I make therefore is that Mr East must pay $6,864.63 to SES.

Pay rate upon completion of training

[29] Leave is reserved to Mr East to ask the Authority to investigate and determine whether he was paid correctly after he finished training and became a Live Line Person. This issue was left for the parties to consider, after it was raised by Mr East at the investigation meeting.

Costs

[30] Given the outcome of this case, the parties shall bear their own costs.

A Dumbleton
Member of Employment Relations Authority