



A-Z OF EMPLOYING

Undue Influence Duress

Our guide for Employers and Managers

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Undue Influence Duress

Our guide for Employers and Managers

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Overview

1. If undue influence is proven in a contractual situation, the common law provides the party who has been unduly influenced with a remedy.
2. If duress is proven in a contractual situation the common law provides the party who has been subjected to duress with a remedy.
3. The Employment Relations Act 2000 provides remedies for undue influence and duress in employment relationships.
4. Under the Act the doctrine of undue influence is applicable to all employment relationships and is concerned with the freedom of association.
5. Under the Act the doctrine of duress is restricted to employment relationships between employers and employees and is concerned with unconscionable bargains that prohibit an employee's participation in any group that exists to further the employment interests of those who belong to it.

Introduction

Undue influence and duress are two terms that have significance outside employment law; both are equitable remedies that allow one party to escape from a contract.

Both the Employment Relations Authority and Employment Court have jurisdiction to consider these two remedies, in the appropriate case, in relation to employment relationship problems even where the Employment Relations Act 2000 does not prescribe so. Having said that, the Employment Relations Act 2000 deals expressly with undue influence and duress in particular circumstances.

Where the Act deals with the notion of undue influence, it is linked with the freedom of association and its protection of access to unions. On the other hand, where the Act deals with the notion of duress, it is linked with unconscionable terms of contract (agreement) that restricts an employee's participation in any group that exists to further the employment interests of those who belong to it.

Under the Act, conduct that constitutes undue influence also constitutes duress, but not vice versa.

The objects section (section 3) of the Employment Relations Act 2000 lists two ways in which the objectives of the Act will be met which are especially relevant to the closely linked concepts of duress and undue influence:

- ▶ The inherent inequality of bargaining power in employment relationships will be acknowledged and addressed;
- ▶ The integrity of individual choice will be protected.

While the Act restored unions to prominence in respect of collective bargaining, it did not return New Zealand to compulsory unionism. In this sense it continues one of the central principles of the Employment Contracts Act 1991, and echoes the New Zealand Bill of Rights Act 1990. The concept of undue influence is closely connected with the freedom of association so the term is iterated throughout the Act where it seeks to protect that freedom.

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Duress and undue influence are not the same but they are very closely linked. The provisions that deal with undue influence offer a broad protection on a macro level; in contrast, the provisions that deal with duress offer a protection against the infringement of individual rights on a micro level.

This **A-Z Guide** will provide you with an explanation of what each of the terms means, and outline their place in the scheme of the Act.

Undue Influence

The Employment Relations Act 2000

Part 3

The term undue influence first appears in Part 3 of the Employment Relations Act 2000. This part of the Act deals with the freedom of association. In Part 3 the object of the Act is achieved by the promotion of good faith behaviour in employment relationships and the promotion of collective bargaining. Part 3 protects and promotes the freedom of association; however this protection and promotion is clearly limited to union membership. The Employment Relations Authority may impose a penalty, payable to the Crown, for the exertion of undue influence in respect of union membership only; no penalty may be ordered in respect of any other organisation that represents employees' collective interests.

The provisions of the Act that deal with undue influence are discussed section by section. It is relevant to note at the outset that the Act makes use of the term undue influence but does not provide a definition of it.

Definition

Undue influence is not defined in the Employment Relations Act 2000. In a decision of the Privy Council, on appeal from New Zealand, the meaning of undue influence was discussed. While the contract in question in this case was not an employment contract, the decision may yet be approved by the Employment Court and/or Court of Appeal in respect to employment agreements.

In *R v A-G for England and Wales* [2004] 2 NZLR 577 (PC), their Lordships stated that:

Like duress at common law, undue influence is based upon the principle that a transaction to which consent has been obtained by unacceptable means should not be allowed to stand. In particular, undue influence has concentrated upon the unfair exploitation by one party of a relationship which gives that person ascendancy or influence over the other.

Certain relationships...give rise to a presumption that one party had influence over the other. That does not of course in itself involve a presumption that he unfairly exploited his influence. But if the transaction is one which cannot reasonably be explained by the relationship, that will be prima facie evidence of undue influence. Even if the relationship does not fall into one of the established categories, the evidence may show that one party did in fact have influence over the other. In such a case, the nature of the transaction may likewise give rise to a prima facie inference that it was obtained by undue influence.

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This view reflects the view of the Court of Appeal in *Eketone v Alliance Textiles (NZ) Limited* [1993] 2 ERNZ 783 (CA), decided under the Employment Contracts Act 1991 where it was stated:

..."undue influence" appears to me to have the same meaning in both sections, namely its ordinary meaning: unconscionable exercise of influence rendering a contract liable to be set aside.

As between employer and employee there is no presumption of undue influence; but the background of that relationship, wherein the employee is often but by no means always in an inferior bargaining position, falls to be considered in deciding in any given case whether pressure brought to bear by the employer has crossed the line into unconscionability.

Undue influence is a concept well known in the law, somewhat flexible of meaning according to the context. It aptly focuses upon improper exploitation of inequality between people in their dealings which equity and conscience will not condone. I see no reason to give it any different meaning in the Employment Contracts Act.

It cannot be doubted that certain employees are vulnerable to influence from strong employers and might readily submit to influence exerted directly or in subtle ways. It is important to ensure that in such cases their freedom to choose is assured and is not interfered with by undue influence. That is best done by dealing with particular circumstances as they arise when the true nature of the relationship can be assessed in conjunction with particular conduct said to deny the freedom to choose. This is a more sensitive instrument for achieving the proper balance between the competing rights than the imposition of a legal presumption of undue influence in all cases.

Section 7(b)

Section 7(b) establishes that it is an object of the Act that no person may, in relation to employment issues, confer any preference or apply any undue influence, directly or indirectly, on another person because the other person is or is not, a member of a union.

Section 11

This section sets out the circumstances in which undue influence is prohibited. It states that a person must not exert undue influence, directly or indirectly, on another person with the intention of inducing the other person:

- ▶ To become or remain a member of a union or a particular union; or
- ▶ To cease to be a member of a union or a particular union; or
- ▶ Not to become a member of a union or a particular union; or
- ▶ In the case of an individual who is authorised to act on behalf of employees, not to act on their behalf or to cease to act on their behalf; or
- ▶ To resign from or leave any employment on account of the fact that another person is or, as the case may be, is not a member a member of a union or a particular union.

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Section 68(2)(c)

Section 68 itself deals with unfair bargaining for individual employment agreements. See below, under the heading Other Terms, for a discussion of what unfair means.

Bargaining for an individual employment agreement is unfair if, amongst other things, one party to the agreement, or that person's representative, knows or ought to know because it can reasonably be inferred from the facts or circumstances at the time of bargaining for or entering into the agreement, that the other party is being induced to enter into the agreement by oppressive means, undue influence, or duress.

Commentary

Section 68 appears in Part 6 of the Act which sets out provisions dealing with individual employees' terms and conditions of employment.

One of the stated objectives of this part of the Act is to require that new employees, whose terms and conditions of employment are not determined with reference to a collective agreement, be given sufficient information and an adequate opportunity to seek advice before entering into an individual employment agreement. The objects section also states that good faith behaviour in this context provides a protection against unfair bargaining.

Refer to the **A-Z Guides on Bargaining, Communication during Bargaining, Good Faith, and Individual Employment Agreements** for supplementary information about the obligations imposed by this section.

Section 110(1)(c)

Section 110(1)(c) states that for the purposes of section 103(1)(f) which is raising a personal grievance for duress with regards to union membership, an employee is subject to duress in that employee's employment if that employee's employer (or a representative of the employer) directly or indirectly exerts undue influence on that employee, or offers, or threatens to withhold or does withhold, any incentive for advantage to or from that employee, or threatens to or does impose any disadvantage on that employee, with intent to induce that employee:

- ▶ To become or remain a member of, a union or a particular union, or employees organisation or particular employees organisation; or
- ▶ To cease to be a member of, a union or a particular union, or employees organisation or particular employees organisation; or
- ▶ Not to become a member of, a union or a particular union, or employees organisation or particular employees organisation; or
- ▶ In the case of an individual who is authorised to act on behalf of employees, not to act on their behalf or to cease to act on their behalf; or
- ▶ To resign from or leave any employment on account of the fact that another person is or, as the case may be, is not a member of, a union or a particular union, or an employees association or particular employees association; or
- ▶ To participate in the formation of a union or employees organisation; or
- ▶ Not to participate in the formation of a union or employees organisation.

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Commentary

This section appears in the part of the Act that deals with personal grievances, disputes, and enforcement.

In contrast to a dispute, only an individual may claim to have a personal grievance; it is not a collective cause of action. Section 103(1)(f) provides that an employee may have a personal grievance because of a claim that the employee has been subject to duress in the employee's employment.

Section 110 sets out what constitutes duress. Duress, at the individual level, protects against undue influence. In this section undue influence is prohibited in respect of unions and employee organisations; the protection of the freedom of association is wider but only insofar as an individual employee who claims by way of a personal grievance that that freedom has been encroached.

Case law

The decision of the Employment Relations Authority in *More v Commercial Helicopters Limited t/a Mountain Air* (Unreported) [AA 119/03; 29 April 2003; A Dumbleton] dealt with a claim of breach of good faith that may also have been an attempt to exert undue influence.

In that case the declarations and penalties that had been sought were denied because of the passage of time; however the Authority concluded that the argument made in support of a finding that Mountain Air had breached its duty of good faith, based on the employer's comments after collective bargaining had been initiated, was reasonably strong. It did not ultimately answer whether or not the comments could have constituted undue influence, but it showed that the duty of good faith may also provide some protection against undue influence.

Consequences of undue influence

Section 11 is a penalty provision; a breach of this provision can be liable for a penalty imposed by the Employment Relations Authority. In the life of the Act so far, no penalty has been imposed pursuant to this section.

The claim of undue influence is unlikely to be a solitary claim in any case brought before the Authority for determination. In the case of *More* (above) the claim of undue influence was secondary to the claim of a breach of good faith; no penalty was sought for the former, only for the latter.

Section 32, which provides for good faith in bargaining for collective agreements, is not a penalty provision so the claim was reframed (too late for it to be of any consequence) into a claim of breach of the implied term of mutual trust and confidence; the breach of an employment agreement is liable to a penalty under section 134.

A claim by an individual person of unfair bargaining for an employment agreement under section 68(2)(c) that that person has been induced to enter into the agreement by undue influence, may result in remedies for unfair bargaining.

Section 69 provides remedies for unfair bargaining such that where a party to an individual employment agreement is found to have unfairly bargained under section 86, the Authority may:

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- ▶ Make an order that the party pay to the other party a sum as compensation; and/or
- ▶ Subject to the parties attempting in good faith to resolve the problem themselves, make an order varying or cancelling the agreement; and/or
- ▶ Make such other order that it thinks in the circumstances.

A personal grievance based on a claim of duress under section 110(1)(c) and pursuant to 103(1)(f) that the individual employee has been subjected to undue influence, may result in remedies for that personal grievance under section 123.

Refer to the **A-Z Guide on Personal Grievances** for information about remedies for personal grievances.

Duress

The Employment Relations Act 2000

Part 6

The term duress first appears in Part 6 of the Employment Relations Act 2000, in section 68 which provides for unfair bargaining in individual employment agreements. The object of the Act is to build productive employment relationships.

In Part 6 the object of the Act is achieved by the promotion of good faith behaviour in employment relationships and the acknowledgement and the addressing of the inherent inequality of bargaining power in employment relationships. Part 6 specifies the rules for determining the terms and conditions of an employee's employment so that the inherent inequality of bargaining power in employment relationships cannot be exploited.

Duress, in contrast with undue influence, is concerned with bargains (employment agreements) which expressly restrict employees' access to groups, associations, societies, or collections of employees; any bargain which does this is voidable. The reason that such a bargain is voidable is that it affects an employee's ability to seek independent advice before entering into a bargain which may contain other onerous (and unconscionable) terms.

The provisions of the Act that deal with duress are discussed section by section. It is relevant to note at the outset that the Act makes use of the term duress but does not provide a definition of it.

Definition

Duress is not defined in the Employment Relations Act 2000.

In *R v Her Majesty's Attorney General from England and Wales* (cited above) their Lordships approved of the definition of duress provided by Lord Scarman in *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 AC 366.

In the *Tankships* case Lord Scarman had said that there were two elements in the wrong of duress: one was pressure amounting to compulsion of the will of the victim, and the second was the

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illegitimacy of that pressure. His Lordship also said that the legitimacy of the pressure must be examined from two aspects: first, the nature of the pressure, and second, the nature of the demand which the pressure is applied to support.

In *R*, their Lordships noted that, generally speaking, the threat of any form of unlawful action would be regarded as illegitimate pressure; however, the fact that a threat is lawful does not necessarily make the pressure legitimate. They cited Lord Atkin in *Thorne v Motor Trade Association* [1937] AC 797:

The ordinary blackmailer normally threatens to do what he has a perfect right to do - namely, communicate some compromising conduct to a person whose knowledge is likely to affect the person threatened...What he has to justify is not the threat, but the demand of money.

In *R*, R had been a soldier in the SAS. He had been required to sign a confidentiality agreement with the Ministry of Defence under which he contracted not to publish any details of his work as an SAS officer, and in particular, any details about his involvement in the 1991 Gulf War.

R was told that if he did not sign the agreement he would be returned to the unit from which he had joined the SAS; this would involve exclusion from the social life of the exclusive regiment and loss of its higher rates of pay. R was not able to obtain legal advice on the agreement; nor was he able to retain a copy of it owing to its classification as “confidential”.

Later, after he had left the United Kingdom Special Forces, R sought to publish his own account of contentious events that had occurred during the Gulf War. The Ministry of Defence commenced proceedings in New Zealand seeking to restrain the publication of R’s account. In defence, R pleaded that he had signed the confidentiality agreement under military orders and (among other claims) that it had been obtained by duress or undue influence.

The Privy Council upheld the New Zealand Court of Appeal’s decision finding against the claims of duress and undue influence.

The majority held that R had not been subjected to duress; the threat to return R to his former unit was lawful, the Ministry of Defence had been legitimately concerned by the increasing number of unauthorised disclosures by former SAS personnel which were undermining the effectiveness of the regiment, and R was not ordered in the sense of a command which created an obligation to obey under military law.

The majority held that R had not been unduly influenced; the nature of the transaction did not give rise to an inference that it was obtained by an unfair exploitation of the relationship between R and his commanding officer, R signed the confidentiality agreement because he wished to continue to be a member of the SAS, and the decision R made to sign the agreement was one which he could have made without a lawyer’s advice.

Section 68(2)(c)

Bargaining for an individual employment agreement is unfair if, amongst other things, one party to the agreement, or that person’s representative, knows or ought to know because it can reasonably be inferred from the facts or circumstances at the time of bargaining for or entering into the

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agreement, that the other party is being induced to enter into the agreement by oppressive means, undue influence, or **duress**.

Section 103(1)(f)

An employee may have a personal grievance against that employee's employer because of a claim that the employee has been subject to duress in the employee's employment in relation to membership or non-membership of a union or employees organisation.

Section 110

An employee is subject to duress in that employee's employment for the purposes of section 103(1)(f) if that employee's employer or a representative of that employer directly or indirectly:

- ▶ Makes membership of a union or employees organisation or of a particular union or employees organisation a condition to be fulfilled if that employee wishes to retain that employee's employment; or
- ▶ Makes non-membership of a union or employees organisation or of a particular union or employees organisation a condition to be fulfilled if that employee wishes to retain that employee's employment; or
- ▶ Exerts undue influence on that employee as per section 110(1)(c) as noted above.

Commentary

Further to the discussion above under section 110(1)(c): For the purpose of a personal grievance claim based on duress, the conduct complained of may also constitute undue influence but need not necessarily constitute such.

Duress in this part of the Act also protects both voluntary union membership and against the prohibition on preference, two concepts that underpin the Act's object to guarantee the freedom of association.

Case law

Very few cases concerning duress have arisen under the Employment Relations Act 2000.

In December 2002 the Employment Relations Authority determined that a customs officer was contractually bound to attend "pay-back" days for training purposes, and therefore that he had not been subjected to duress or threats that his career prospects would be limited if he did not attend those days. It determined:

Instead I accept that his team leader had merely sought to give him constructive advice for his own good, and not to intimidate him or coerce him into altering his behaviour. It was natural for some in management to have shown their disapproval for his opposition to attendance on pay-back days, but that is a quite different thing from actively seeking to act in a way that was unfair, unreasonable or in any other way a breach of the employment

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agreement, with the intention of forcing him to give up his opposition to the days; Masoe v Chief Executive of New Zealand Customs Service: AA 364/02; 18 December 2002; A Dumbleton.

Consequences of duress

A claim by an employee of unfair bargaining for an employment agreement under section 68(2)(c) that he or she was induced to enter into that agreement by duress, may result in remedies for unfair bargaining.

Section 69 provides that where a party to an individual employment agreement is found to have unfairly bargained under section 68, the Authority may:

- ▶ Make an order that the party pay to the other party a sum as compensation; and/or
- ▶ Subject to the parties attempting in good faith to resolve the problem themselves, make an order varying or cancelling the agreement; and/or
- ▶ Make such other order that it thinks in the circumstances.

A personal grievance based on a claim of duress under section 110 and pursuant to 103(1)(f) may result in remedies for that personal grievance under section 123.

Refer to the **A-Z Guide on Personal Grievances** for information about remedies for personal grievances.

Other Terms

Oppressive

The Employment Relations Act 2000 does not define oppressive conduct. The term appears in section 68 only, which deals with conduct which constitutes unfair bargaining for an individual employment agreement.

It states that bargaining for an individual employment agreement is unfair if, amongst other things, one party to the agreement, or that person's representative, knows or ought to know because it can reasonably be inferred from the facts or circumstances at the time of bargaining for or entering into the agreement, that the other party is being induced to enter into the agreement by **oppressive** means, undue influence, or duress.

Section 57 of the Employment Contracts Act 1991 had provided relief where it could be shown either, that an employment contract had been procured by harsh and oppressive behaviour or, that the employment contract was harsh and oppressive when it was entered into.

A considerable amount of case law developed under section 57. For the purpose of deciding what "oppressive" under section 68 of the Employment Relations Act 2000 may mean, the judgment of Hardie Boys J in *United Food and Chemical Workers Union v Talley* [1993] 2 ERNZ 360 may be instructive:

"Harsh" and "oppressive" are words of ordinary usage, and it is unnecessary to go beyond the dictionaries to find their meaning in this particular context. So in the Shorter Oxford synonyms for "harsh" are: "repugnant to the feelings; severe, vigorous, cruel, rude,

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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”.

Unfair

The Employment Relations Act 2000 does not define “unfair” in the context of bargaining for an individual employment agreement.

It states that bargaining for an individual employment agreement is unfair if one party to the agreement, or that party’s representative, knows or ought to know because it can be reasonably inferred from the facts or circumstances at the time of bargaining for or entering into the agreement, that the other party:

- ▶ Is unable to understand adequately the provisions or implications of the agreement by reason of diminished capacity; or
- ▶ Reasonably relies on the skill, care, or advice of the party or party’s representative; or
- ▶ Is induced to enter in to the agreement by oppressive means, undue influence, or duress; or
- ▶ Is a person to whom section 64 applies [new employee where no collective agreement applies] and who did not have the information or opportunity to seek advice on the intended employment agreement as required by that section.

Part of this section deals with unfair bargaining where one of the parties has diminished capacity, and echoes contract law’s concern with capacity, in the legal sense, to contract. The other part of this section deals with unconscionable bargains that should not be upheld, not because the terms of those are unfair, but because they should not have been entered into in those circumstances.

Preference

Section 9 of the Employment Relations Act 2000 prohibits a contract, agreement, or other arrangement between persons that confers on a person, because that person is or is not a member of any union or a particular union, any preference in obtaining or retaining employment, or any preference in relation to terms or conditions of employment or fringe benefits or opportunities for training, promotion, or transfer.

This prohibition on preference appears in Part 3 of the Act that establishes that employees have the freedom to choose whether or not be associated with any union.

Conclusion

While the terms “undue influence” and “duress” appear contiguously throughout the Employment Relations Act 2000, they are not the same.

Undue influence appears in the Act, first as a penalty provision against a breach of the freedom of association guaranteed by the Act, and then as a feature of unfair bargaining and duress where an

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individual's freedom of association has been inhibited by the actions of the other party to the employment relationship.

The concern of those provisions dealing with undue influence, particularly section 11, is the protection of the freedom of association in respect of union membership, both inside and outside employment agreements.

Duress, on the other hand, appears in the Act as a component of unfair bargaining for individual employment agreements and as a ground for finding that an employee has a personal grievance. Included in conduct that constitutes duress is conduct that constitutes undue influence. The concern of the provisions dealing with duress is the protection against disadvantage in employment or dismissal from employment based on membership of any union or employees association. The remedial response to a finding of undue influence or duress will be dictated by the section pursuant to which the remedy is sought.

Remember:

- ▶ Always call AdviceLine to check you have the latest guide (refer to the publication date below).
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- ▶ Use our AdviceLine employment advisors as a sounding board to test your views.
- ▶ Get one of our consultants to draft an agreement template that's tailor-made for your business.
- ▶ Visit our website www.businesscentral.org.nz regularly.
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