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Why do you need to understand the legal concept of 'repudiation'?

Because this concept has a very important impact on your employment contracts. So, read on...

There are a number of issues that employers should keep in mind when preparing or altering contracts of employment, and in taking steps to change or end existing employment relationships. Recent cases have highlighted the impact that the legal concept of 'repudiation' can have on the troubled events surrounding many terminations of employment.

'Repudiation' is what happens when one party to a contract (including an employment contract) does something that indicates that it no longer intends to be bound by that contract. If the other party 'accepts' that repudiation:

- the contract comes to an end,
- the parties are no longer bound by the contract, and
- the injured party can sue for damages for breach of the contract.

Two recent cases show that – if an employer does not understand how this concept works - repudiation sometimes has unexpected and undesirable results.

What happens when an employer tries to change the terms of a contract without the employee's consent?

In *Visscher v The Honourable President Justice Giudice* [2009] HCA 34 (2 September 2009), the High Court held that an employer had, for three years, employed an employee on contractual terms different to those that the employer thought applied. Timothy Visscher was a naval officer employed by Teekay Shipping (Australia). He commenced employment on a casual basis in March 2000, and then on a permanent basis as a Third Mate (despite being qualified to perform higher duties). In September 2001, Visscher was promoted to the position of Chief Officer (or First Mate) in accordance with the terms of a certified agreement that then applied to the employer.

Visscher's promotion became the subject of a dispute with the relevant Union before the Australian Industrial Relations Commission (AIRC). The Union wanted job vacancies to be held open so that certain permanent staff members in the role of Deck Officers could gain the necessary qualifications to become eligible for permanent First Mate positions. As a result of the industrial dispute and comments made by the AIRC, the employer notified Visscher on 20 September 2001 that his promotion had been rescinded. Visscher claimed that he had not accepted the rescission. Following these events, a new certified agreement was negotiated, reflecting (amongst other things) the Union's wish to keep positions open until permanent employees could complete the requirements to enable promotion.

From September 2001, Visscher carried out the duties of a Chief Officer, and was paid a higher duties allowance – in other

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words, his remuneration was the same as that of a Chief Officer. Yet at no time did the employer's records list Visscher as holding the position of Chief Officer. He was offered a promotion to Second Mate in July 2002, but rebuffed this on the basis that he was already a Chief Officer.

The situation came to a head in early 2004 when the employer informed Visscher that he was required to work as Second Mate from then on. Visscher informed the employer that he viewed this action as a demotion amounting to a constructive dismissal.

Visscher lodged an unfair dismissal claim with the AIRC. His claim was unsuccessful three times: initially before a single member of the AIRC, then before a Full Bench of the AIRC, and on a third occasion before the Full Court of the Federal Court. Visscher appealed to the High Court.

The majority of the High Court found that the employer's notice rescinding the promotion in September 2001 was a clear indication that the employer did not want to be bound by the terms of the contract that appointed Visscher as a Chief Officer. This made the notice a 'repudiation' of that contract; but did not of itself end the contract. For the contract to be terminated as a result of the repudiation, it was necessary for Visscher to accept that repudiation. Or, put another way, it was essential that Visscher accept that his promotion to Chief Officer had been withdrawn before the contract could be viewed as having ended.

Both the AIRC and the Federal Court had mistakenly made their decisions on the basis that the employer had unilaterally rescinded Visscher's promotion, and had not examined the factual question of whether Visscher accepted the repudiation at some point; or whether, on the contrary, the employer had resiled from its repudiation and withdrawn the demotion. The decisions of the Federal Court and the AIRC were quashed, and the matter was remitted to the AIRC to reconsider these issues.

Food for thought:

Employers should proceed with caution when altering the conditions of an employee's employment.

Visscher shows that a unilateral variation by an employer of the terms of an employee's employment will not, in and of itself, end a contract of employment. Agreement needs to be sought from an employee if the employer wants terms and conditions of employment to be changed. Otherwise, obligations, such as payment of wages at a higher rate, continue.

How can an employer accidentally invalidate terms of the employment contract?

In *Northern Tablelands Insurance Brokers Pty Ltd v Howell [2009]* NSWSC 426 (22 May 2009), the NSW Supreme Court refused to allow an injunction that would have prevented an ex-employee from acting in breach of post-employment restraints, because the employer had repudiated the employment contract.

Mr Howell had been employed as an account executive with Northern Tablelands Insurance Brokers in Armidale since 2001. In his 2005 employment contract, Howell agreed to a post-employment restraint clause. The restraint would prevent him from soliciting away clients, customers, suppliers (with whom he had contact during the last 12 months of his employment) or employees of Northern Tablelands or any of its group companies, 'for a period of 12, 24 or 36 months'. The contract provided that either party could terminate the contract at any time by providing written notice.

On 10 February 2009, in a meeting, Northern Tablelands offered Howell a redundancy package of over $32,000. Ms Carlon, the managing director of Northern Tablelands, asked Howell verbally to return his office keys, pack his belongings and leave the premises immediately, which he did. Later that day, Carlon sent Howell a letter confirming that his position had been made redundant 'due to an internal restructure'; and advising that he was entitled to 28 days' salary 'in lieu of notice' and eight weeks' redundancy pay.

Soon after these events, Howell formed an association with another insurance broking firm in Armidale, and wrote insurance policies for several clients with whom he had dealt at Northern Tablelands. Northern Tablelands sought an injunction in the Supreme Court to enforce the post-employment restraint in Howell's employment contract.

Justice Barrett refused to grant the injunction, finding that Northern Tablelands had repudiated the contract by dismissing Howell with immediate effect and without providing him with the written notice required by the contract. This repudiation was accepted by Howell when he returned his keys, collected his personal belongings and left the premises. The acceptance of the repudiation brought the contract to an end. The fact that Northern Tablelands subsequently provided written notice and a separation package did not remedy the breach.

Because the contract had been terminated in this way, Justice Barrett found that Howell was no longer bound by the post-

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employment restraint. As a result, Northern Tablelands could not prevent him from approaching its clients.

Additionally, Justice Barrett found the restraint of trade clause 'for a period of 12, 24 or 36 months' was invalid, because it was unclear exactly how long the restraint would operate. The clause should have been accompanied by some form of interpretation that showed how the employer intended the period variables to apply.

Food for thought:

While this decision may ultimately be appealed, the case highlights that:

> it remains important to draft restraint provisions in employment contracts carefully to ensure enforceability

> if an employer fails to follow its own termination of employment provisions, it could risk a potential unfair and/or unlawful termination claim, and it may not be able to prevent the ex-employee from soliciting its staff, clients, customers or suppliers, and

> if several time period variables are used in a restraint clause, these options should be capable of applying at the same time; or there should be a method incorporated into the contract that identifies how the variables will be applied.

From 1 January 2010, when the National Employment Standards within the new *Fair Work Act 2009* (Cth) take effect, it will be mandatory for employers to provide employees with written notice of termination of employment before the employment ends.

If you would like to discuss your processes for promotion and demotion, your policies and procedures in respect of termination of employment, or the enforceability of your post-employment restraints, please contact one of our team members.

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