



HIGH COURT OF AUSTRALIA

Manager, Public Information

2 September 2009

TIMOTHY VISSCHER v THE HONOURABLE PRESIDENT JUSTICE GIUDICE & ORS
[2009] HCA 34

The High Court today held that the Australian Industrial Relations Commission must reconsider Mr Visscher's application for wrongful termination. The Commission had held that he had not been demoted from the position of Chief Officer in early 2004, because his earlier promotion to that position in September 2001 had been rescinded by his employer shortly thereafter. The High Court held by a 4-1 majority that general principles of contract law applied to the employee's actions and required Mr Visscher to have accepted the employer's repudiation before the contract came to an end. The AIRC had not determined the matter according to those principles.

A Full Court of the Federal Court also upheld the AIRC's decision on the basis that Mr Visscher's status fell to be determined according to the Certified Agreement. The High Court, by majority, held that that was not a subject dealt with in the Agreement.

Mr Visscher was employed with Teekay Shipping (Australia) Pty Limited. In September 2001 he was promoted from the position of Third Mate to the position of Chief Officer. Teekay gave Mr Visscher notice, some days later, that the promotion was rescinded. However, Mr Visscher continued to perform the duties of a Chief Officer and receive a salary equivalent to that of Chief Officer until early 2004. At that time, according to Mr Visscher, Teekay asked him to sail as a Second Mate. He considered this to be a demotion and subsequently treated this request as a termination of his employment.

A Certified Agreement between Teekay and the Australian Maritime Officers Union which came into effect in early 2002 listed Mr Visscher's position as being that of Third Mate.

The AIRC proceeded upon the basis that the rescission of Mr Visscher's promotion was effective to terminate his contract of employment as Chief Officer. This meant that Mr Visscher could not have been demoted from that position in early 2004. The Full Court of the Federal Court upheld this finding on the basis that contracts of employment, as contracts for personal service, have some special features. One of these was that the employment relationship may be effectively discharged by the employer's wrongful termination of the contract of employment, even if the employee remained in employment. The Full Court also held that, in any event, Mr Visscher's interests were subordinated to the "superior legal force" of the Certified Agreement, which listed him as a Third Mate.

The High Court, in allowing the appeal, confirmed that general contractual principles applied in the present case. This meant that Teekay's repudiation, in rescinding Mr Visscher's promotion, would not of itself be effective to terminate his contract of employment as Chief Officer. Mr Visscher must have first accepted the repudiation. Whilst the High Court did not have the necessary facts before it to determine whether Mr Visscher had in fact accepted Teekay's

repudiation, the majority noted that silence on the part of Mr Visscher would not necessarily amount to acceptance, or some form of estoppel. There would likely need to be some sort of obligation to speak, and evidence that Teekay acted to its detriment on the basis of Mr Visscher's conduct.

In regard to the Certified Agreement, the majority of the High Court held that it did not display an intention to alter the position of employees held at the time the Certified Agreement came into force. Rather, the reference to employees' positions in the Certified Agreement was to assist in determining future promotions and transfers.

The High Court remitted the matter to the AIRC for reconsideration.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*