

## FREEDOM OF CHOICE IN EMPLOYMENT CONTRACTS.

It is trendy in current political circles to justify changes to laws regulating employment relations by reference to "Freedom of Choice". Expressions such as "Its all about choice", "We propose to give employees the right to choose"...and many others similar in vein, are heard to justify major changes in long-established industrial, commercial and social mores.

It is plain from the debates that there is little understanding of the nature of freedom in the making and varying of a contract of employment. Such misunderstanding deprives employers and employees of any real capacity to make judgements as to the value of the various proposals under consideration.

In the first place virtually all work is done pursuant to work contracts of one kind or another. Employment contracts are the most common with independent contracts a distant second. The common law applies to all these contracts.

At the very heart of all contracts is the mutual right to absolute freedom to agree or disagree with the terms of the contract. It is also fundamental that such mutual right extends to any subsequent variation of the terms of the contract. Anything that substantially vitiates that **freedom** vitiates the entire contract.

"The relationship of master and servant arises out of agreement and the general principles of the law of contract apply in considering the respective rights and obligations of employee and employer under a contract of service". (1) The "element of mutuality of obligation (that) is essential to the formation of such a contract. A contract of service is of its nature a bilateral contract." (2)

There are a number of prerequisites for the formation of a valid contract and one of these is the requirement that contracts and any variation of the terms of a contract be entered into with the genuine consent of the parties. A contract will be vitiated if the contract, or any of its terms, are entered into under duress or by reason of undue influence. The law recognises many forms of duress and one of them is economic duress.

"The essence of relief for economic duress is the unconscionable conduct of the stronger party". (3). **Unconscionable** conduct does not have to extend to physical stand-over or mental brow beating. A mere hint of job loss or career halt in some circumstances will be enough. **An** employer who 'suggests' that an employee might like to cash-out some annual leave, sign an AWA or the like will amount to duress if the employee feels that he or she has no practical option but to acquiesce.

"There must be pressure, the practical effect of which is compulsion or absence of choice. Compulsion is variously described in the authorities as coercion or the vitiation of consent. The classic case of duress is, however, not the lack of will to submit but the victim's intentional submission arising **from** the realisation that there is no other practical choice open to him." (4).

The common law has always considered that any curtailment of the **freedom** of a contracting party such as would govern the choice of a person to enter or accept a variation of a term of a contract of employment to be an unconscionable dealing.

"**Unconscionable** dealing looks to the conduct of the stronger party in attempting to enforce, or retain the benefit of a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so" (5)

Special disabilities may be of endless variation. They may arise **from** within the employee, the nature of the employment, the remoteness of the workplace, language **difficulties** and many other such. "Poverty or need of any kind, sickness, age, sex, **infirmity** of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation is necessary". (6)

The contract of employment was not called the "Master and Servant relationship" for most of its existence for nothing. It was, and remains today, a contract between a dominant party and a servient party. The bargaining power of an employer is greatly superior to that of the employee even where special disabilities are not immediately obvious.

The proposed changes to the federal legislation regulating industrial relations must be judged against this background. There can be no doubt that the new laws greatly strengthen the already overwhelming advantages enjoyed by employers. There is no equality of bargaining power between an employer and an individual employee as to the making or content of an AWA. The law has always recognised a level playing field where employees have been represented by a collective such as a union and where the dealings are underpinned by an independent umpire, bound by the rule of law, such as the Australian Arbitration Commission. Both these protective institutions are to be removed.

The simple fact of modern commercial and industrial life is that men and women must work to stay alive and to keep their families in food and shelter. They will do anything necessary to keep their jobs. In many parts of Australia to lose one's job is never to work again in that town. Some occupations are not in high demand or may be seasonal. To such workers the 'suggestion' that they might like to consider giving up half their annual leave or giving up their working conditions by going on to an AWA is equivalent to an order.

One leading judge put it succinctly by saying that 'Necessitous men are not, truly speaking, free men, but, to answer a present exigency, will submit to any terms that the crafty may impose upon them.' (7).

The creation of a substantially servile state is not an event likely to long survive. History records many occasions when tyranny of one kind or another **has** imposed limitations on such basic freedoms. The tyranny of a temporary majority is no less obnoxious than any other tyranny.

In his praise of the common law Sir John Fortescue commented: "Freedom is a thing with which the nature of man has been endowed by God. For this reason if it is to be taken away from man it strives of its own energy always to return".

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- 1). **Conpress Ltd v Thompson** (1952) 52 SR (NSW) 75 @ 79.
  - 2). **Dietrich v Dare** (1980) 54 ALJR. 388.
  - 3). **Hawker Pacific Pty Ltd v Helicopter Charter Pty Ltd** (1991) 22 NSWLR 298.
  - 4). **Universe Tankships Inc of Monrovia v International Transport Fdn** (1983) AC 366.
  - 5). **Commercial Bank of Australia v Amadio** (1983) 151 CLR 447 @474.
  - 6). **Bronley v Ryan** (1956) 99 CLR 362 @ 405.
  - 7). **Vernon v Bethel** (1762) 2 Eden 110, 113.
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