FEDERAL COURT OF AUSTRALIA

Unsworth v Tristar Steering and Suspension Australia Limited [2008] FCA 1224

INDUSTRIAL LAW – conduct by employer – alleged breach of s 792 of the *Workplace Relations Act 1996* (Cth) – employer's business substantially ceased – where redundancy clause in certified agreement included generous redundancy provisions if long term employees involuntarily retrenched – where no breach of redundancy clause alleged – whether employer's failure to dismiss some employees was conduct of the employer – whether failure to dismiss caused injury to, or prejudicial alteration to, the position of those employees – whether failure to dismiss for prohibited reason – proceeding dismissed

WORDS AND PHRASES – "*injure*", "*alter … to the prejudice*", "*for a prohibited reason*"

Workplace Relations Act 1996 (Cth), ss 3, 170LJ, 298K, 400, 402, 778, 779, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 807, 809, 810, 811, 812, 813

Australian and International Pilots Association v Qantas Airways Ltd [2006] FCA 1441, (2006) 160 IR 1 cited
Australian Collieries' Staff Association v BHP Coal Pty Ltd (2000) 99 FCR 137 referred to
Australian Workers' Union v BHP Iron-Ore Pty Ltd (2001) 106 FCR 482 followed
BHP Iron Ore Pty Ltd v Australian Workers' Union (2000) 102 FCR 97 followed
Blackadder v Ramsey Butchering Services Pty Ltd (2005) 221 CLR 539 cited
Blair v Australian Motor Industries Ltd (1982) 61 FLR 283 cited
Brackenridge v Toyota Motor Corporation Australia Ltd (1996) 142 ALR 99 cited
Burnie Port Corp Pty Ltd v Maritime Union of Australia (2000) 104 FCR 440 cited
Commonwealth Bank of Australia v Finance Sector Union of Australia (2007) 157 FCR 329 discussed
Commonwealth Bank of Australia v Finance Sector Union of Australia (2002) 125 FCR 9 cited
Community and Public Sector Union v Telstra Corp Ltd (2001) 107 FCR 93 cited
Connington v Municipality of Kogarah [1913] AR (NSW) 40 cited
Downe v Sydney West Area Health Service (No 2) [2008] NSWSC 159 cited
Finance Sector Union of Australia v Commonwealth Bank of Australia [2001] FCA 1613, (2001) 111 IR 241 cited
Grayndler v Broun [1928] AR (NSW) 46 cited
Grayndler v Cunich (1939) 62 CLR 573 cited
Greater Dandenong City Council v Australian Municipal, Administrative, Clerical and Services Union (2001) 112 FCR 232 discussed
Hunt v Railway Commissioners (NSW); Ex parte Brown-Smith [1928] AR (NSW) 151 cited
Klanjscek v Silver (1961) 4 FLR 182 cited
Maritime Union of Australia v CSL Australia Pty Ltd [2002] FCA 513, (2002) 113 IR 326 cited

Maritime Union of Australia v Geraldton Port Authority (1999) 93 FCR 34 discussed
Martech International Pty Ltd v Energy World Corp Ltd [2007] FCAFC 35 cited
Moss v Fantil Pty Ltd t/as Central Coast Security Services (1994) 58 IR 118 cited
National Union of Workers v Qenos Pty Ltd (2001) 108 FCR 90 followed
Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3) (1998) 195 CLR 1 referred to
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355 cited
Squires v Flight Stewards Assn of Australia (1982) 2 IR 155 cited
Westen v Union des Assurances de Paris (1996) 88 IR 259 cited

INSPECTOR IAN UNSWORTH (WORKPLACE OMBUDSMAN) v TRISTAR STEERING AND SUSPENSION AUSTRALIA LIMITED ACN 004 311 111
NSD 232 of 2007

GYLES J
13 AUGUST 2008
SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **NSD 232 of 2007**

BETWEEN:	**INSPECTOR IAN UNSWORTH (WORKPLACE OMBUDSMAN)** **Applicant**
AND:	**TRISTAR STEERING AND SUSPENSION AUSTRALIA LIMITED ACN 004 311 111** **Respondent**

JUDGE: **GYLES J**

DATE OF ORDER: **13 AUGUST 2008**

WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT:

The proceeding be dismissed.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules. The text of entered orders can be located using eSearch on the Court's website.

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 232 of 2007**

BETWEEN:	**INSPECTOR IAN UNSWORTH (WORKPLACE OMBUDSMAN)** **Applicant**
AND:	**TRISTAR STEERING AND SUSPENSION AUSTRALIA LIMITED ACN 004 311 111** **Respondent**

JUDGE:	**GYLES J**
DATE:	**13 AUGUST 2008**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

1 This case is unusual. The respondent, Tristar Steering and Suspension Australia Limited (Tristar), is accused of contravening a section of the *Workplace Relations Act 1996* (Cth) (the Act) that is designed, so far as is relevant to this case, to protect freedom of association, because it victimised or discriminated against employees by not dismissing them.

FACTS

2 The critical facts can be gleaned from the agreed chronology, a copy of which, with some editing, is attached as a schedule to this judgment. The part of the redundancy provision of the 2003 Certified Agreement which is at the centre of the applicant's case, is as follows:

> "21.5 Severance Payment
> Employees who are retrenched involuntarily and voluntarily will be paid on the following basis:
>
> Less than 1 year of service Nil
> 1 or more years of service Rate of 4 weeks per year (including pro-rata for partially completed year)
> computed from the commencement of employment
>
> In the event of a voluntary redundancy, the maximum severance payment shall be capped at 52 weeks."

That, of course, is only one clause of a comprehensive collective agreement and cannot be read in isolation. However, on any view, its provisions were remarkably generous, particularly to long-serving employees who are involuntarily retrenched.

3 The gist of the applicant's case, although spelled out in different ways, is that there was a substantial surplus of employees of Tristar once manufacturing effectively ceased in 2006 and that Tristar thereafter managed the shedding of that surplus labour so as to minimise the obligation to pay severance pay through compulsory redundancy. In particular, the nominated employees were retained without any meaningful work to do with a view to the expiration of the Certified Agreement before their dismissal, because they were long serving employees who would be entitled to a considerable severance payment if made redundant. The gist of Tristar's case is that the shedding of labour was done in accordance with the Certified Agreement. The employees in question were retained because their skill and experience was suited to the work of remanufacturing and to work which might arise from the overseas joint ventures. The purpose of avoiding large redundancy payments was denied.

4 I am satisfied that the efforts by Tristar to obtain remanufacturing work, and the pursuit of the overseas joint ventures, were each genuine. It was reasonable to retain some labour to carry out that work if it were obtained. Most, if not all, of the retained employees had skill and experience that would be useful in carrying out that work. On the other hand, I am satisfied that the terms of cl 21.5 of the Certified Agreement were a factor in deciding how many employees to retain, and who they should be. Length of service was undoubtedly a significant reason for the retention of particular employees. To the extent that the evidence of the witnesses for Tristar was to the contrary, I reject it. The number of employees retained was greater than necessary to cope with the work that might have reasonably eventuated in the short to medium term. It is difficult to find an objective basis for the retention of at least some of the employees apart from length of service. The redundancies that followed the extension of the operation of the Certified Agreement point in the same direction. The evidence of the Tristar decision makers was not impressive.

5 There is no doubt that the retained employees were seriously underemployed with a number having no work to do or no work of the kind for which they were qualified and previously employed. I am satisfied that most, if not all, of the retained employees found the experience disturbing and stressful and some of them suffered some lasting psychological

trauma. However, it cannot be overlooked that Tristar was a union shop, and there was an industrial campaign on foot between the unions and Tristar with political implications. The dispute as to whether the employees could be directed to undertake remanufacturing work was one aspect of that campaign. That took many months to resolve. The retained employees did not work during that period by choice. In one sense, they were foot soldiers who were the victims of the wider campaign being conducted by the generals.

CERTIFIED AGREEMENT

6 The Certified Agreement was between Tristar, on the one hand, and four unions, on the other. It was certified pursuant to s 170LJ of the Act, as it stood in 2003 and 2004. The relevant terms of the Agreement were as follows:

> "**6. OPERATION AND APPLICATION OF AGREEMENT**
>
> 6.1 This agreement shall take effect from the beginning of the first pay period to commence on or after the date upon which it is certified by the Australian Industrial Relations Commission.
>
> 6.2 This agreement shall remain in force until the 30 September 2006. Three months prior to the end of the life of this agreement, the parties agree to commence negotiations with the aim of formulating a new agreement before the expiry date of this agreement is reached.
>
> 6.3 This agreement shall apply to each of the parties referred to in clause 4 in respect of the employment by Tristar Steering and Suspension Australia Limited of employees covered by the Metal Engineering and Associated Industries Award, 1998 Parts 1 and 2.
>
> …
>
> **10. RELATIONSHIP TO PARENT AWARD**
>
> This agreement shall be read wholly in conjunction with the Metal Engineering and Associated Industries Award 1998 Part 1 and 2. Where there is any inconsistency between this agreement and the Award, this agreement shall apply. The Company will not during the life of this Agreement offer employees an Australian Workplace Agreement.
>
> **11. CONSULTATION**
>
> 11.1 The parties acknowledge that an important factor in meeting the aims and objectives of this agreement is to develop and maintain consultative processes in all sections by which employees will be kept informed about developments at TSSA and have the opportunity to input into decisions that affect their work and their working environment.
>
> 11.2 Both parties accept that they have a responsibility for creating and

maintaining a consultative working environment and will work together to create such a culture.

11.3 Introduction of Change – Duty to Notify

Where the company has made a definite decision to introduce major changes in production, programme, Organisation, structure or technology that are likely to have significant effects on employees, the Company shall notify the employees and their respective unions, through their delegates who may be affected by the proposed changes.

11.4 "Significant effects" include termination of employment, major changes in the composition, operation or size of the workforce or in the skills required, the elimination or diminution of job opportunities, promotion opportunities or job tenure; alteration of hours of work, the need for re-training or transfer of employees to other work or locations and the restructuring of jobs. Provided that where the Award makes provision for alterations of any of the matters referred to herein an alteration shall be deemed not to have significant effect.

Duty to Discuss Change

11.5 The Company shall discuss with the effected [sic] employees and their union, the introduction of the changes referred to in paragraph 11.3 above, the effects the changes are likely to have on employees, measures to avert or mitigate possible adverse effects of such changes on employees. The Company shall give prompt consideration to matters raised by the employees and/or their union in relation to the changes.

11.6 The discussions with employees affected and their union shall commence as early as practicable after the activities referred to in paragraph 11.4 hereof.

11.7 For the purposes of such discussion, the Company shall provide to the employees concerned and their union all relevant information about the changes, including the nature of the changes proposed, the expected effects of the changes on employees and any other matters likely to affect employees. Provided that the company shall not be required to disclose confidential information the disclosure of which would be damaging to the company's interests.

11.8 Where requested the employer shall provide information in languages other than English for employees of non-English speaking background.

…

21. REDUNDANCY

21.1 **Where the company has made a definite decision that it no longer wishes the job an employee has been doing performed by anyone, and that decision may lead to termination of employment, the company shall hold discussions with the employees affected and**

with their union.

21.2 The discussions shall take place as soon as is practicable after the employer has made a definite decision which will invoke the provisions of paragraph 1 hereof and shall cover any reasons for the proposed terminations, measures to avoid or minimise the terminations and measures to mitigate any adverse effects of any terminations on the employees concerned.

21.3 For the purposes of the discussion the company shall, as soon as practicable after making a decision but before any terminations, provide in writing to the employees concerned and their union, all relevant information about the proposed terminations. Provided that the company shall not be required to disclose confidential information, the disclosure of which would be inimical to the company's interests.

21.4 Notice
Retrenched employees will be given four weeks notice of termination of employment or four weeks pay in lieu of notice at the Company's discretion. Employees aged over 45 years with at least 2 years service shall be entitled to 1 extra weeks notice as per clause 4.3.1 (b) of the Metal Engineering and Associated Industries Award, 1998.

21.5 Severance Payment
Employees who are retrenched involuntarily and voluntarily will be paid on the following basis:

Less than 1 year of service Nil
1 or more years of service Rate of 4 weeks per year (including pro-rata for partially completed year)
computed from the commencement of employment

In the event of a voluntary redundancy, the maximum severance payment shall be capped at 52 weeks.

21.6 Loading of 17.5% to be applied to full pro-rata Annual Leave entitlements on retrenchment.

21.7 Subject to satisfactory evidence of an arranged job interview, employees will be given up to 1 day during each worked week of notice without loss of pay to attend such interviews.

21.8 All employees will be supplied with a Certificate of Service and Separation Certificate at the time of the retrenchment. An itemised Statement of Entitlements will be supplied to all retrenched employees.

21.9 **Selection of redundant employees – where surplus staff exists:**

(a) Identify the number of redundant positions, their employment categories and their location of employment.

(b) Call for volunteers within the identified area of

employment and employment category. The Company will attempt to accommodate requests for voluntary retrenchment; however, the final decision on acceptance or rejection of the request will lie with the Company.

(c) Should there be insufficient acceptable volunteers to fill the identified numbers, then the following will apply:

(d) Compulsory redundancy will have regard to maintaining a balance of skill and experience within the department. The Company will nominate those employees they wish to be made redundant.

21.10 Employees retrenched may leave at any time during the notice period to take up another position. In this event, the employee will be paid only for the period of notice he/she worked, and the severance entitlement under the redundancy provision.

21.11 Retrenched employees will receive payment of all accumulated sick leave.

21.12 An employee who elects for voluntary redundancy and who has untaken RDOs at the date of termination shall be paid in lieu for such days at ordinary rates. In the event of compulsory retrenchment the employee shall receive payment in lieu for untaken RDOs and such payment will be at penalty rates (each day to stand alone) to a maximum of 3 days. In the event that untaken RDOs exceed 3 days then such additional days shall be paid at ordinary rates.

In the case of compulsory retrenchment where an employee is required to take RDOs during the notice period and is unable to do so because of absence or other exceptional circumstance the employee shall be paid for up to 3 days at penalty rates (each day to stand alone). Untaken days in excess of 3 shall be paid at ordinary rates.

21.13 Long Service Leave for forcibly retrenched employees will be paid based on prorata years of service from the commencement of employment.

21.14 Shift allowance will be used in calculations only when the employee at the date of termination has been on afternoon or nightshift (including rotating shifts) for at least 6 months in the immediate 12 months prior to termination of employment.

21.15 In the event of an employee under notice of retrenchment, dying prior to the actual date of termination, all benefits payable in relation to provisions of this agreement shall apply and will be paid into the employee's estate.

21.16 In the event of redundancies the Company agrees to make available suitable financial counseling and/or outplacement services, provided that the cost to the company of providing such services shall not exceed $300 per employee."

(Emphasis added.)

STATUTORY PROVISIONS

7 Section 792 of the Act is contained in Div 4 of Pt 16. Part 16 is headed "Freedom of association" and the objects of the Part are set out in s 778 as follows:

> "In addition to the object set out in section 3, this Part has the following objects:
>
> (a) to ensure that employers, employees and independent contractors are free to become, or not become, members of industrial associations;
>
> (b) to ensure that employers, employees and independent contractors are not discriminated against or victimised because they are, or are not, members or officers of industrial associations;
>
> (c) to provide effective relief to employers, employees and independent contractors who are prevented or inhibited from exercising their rights to freedom of association;
>
> (d) to provide effective remedies to penalise and deter persons who engage in conduct which prevents or inhibits employers, employees or independent contractors from exercising their rights to freedom of association."

8 The following definitions are included in s 779(1):

> "***industrial association*** means:
>
> (a) an association of employees and/or independent contractors, or an association of employers, that is registered or recognised as such an association (however described) under an industrial law; or
>
> (b) an association of employees and/or independent contractors a principal purpose of which is the protection and promotion of their interests in matters concerning their employment, or their interests as independent contractors, as the case requires; or
>
> (c) an association of employers a principal purpose of which is the protection and promotion of their interests in matters concerning employment and/or independent contractors;
>
> and includes a branch of such an association, and an organisation.
>
> ***industrial body*** means:
>
> (a) the Commission; or
>
> (b) a court or commission, however designated, exercising under an industrial law powers and functions corresponding to those conferred

on the Commission by this Act; or

(c) a court or commission, however designated, exercising under an industrial law powers and functions corresponding to those conferred on the Commission by the Registration and Accountability of Organisations Schedule.

industrial instrument means an award or agreement, however designated, that:

(a) is made under or recognised by an industrial law; and

(b) concerns the relationship between an employer and the employer's employees, or provides for the prevention or settlement of a dispute between an employer and the employer's employees.

industrial law means this Act, the Registration and Accountability of Organisations Schedule or a law, however designated, of the Commonwealth or of a State or Territory that regulates the relationships between employers and employees or provides for the prevention or settlement of disputes between employers and employees."

9 Section 3 relevantly provides as follows:

"**3 Principal object**

The principal object of this Act is to provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia by:

…

(d) ensuring that, as far as possible, the primary responsibility for determining matters affecting the employment relationship rests with the employer and employees at the workplace or enterprise level; and

(e) enabling employers and employees to choose the most appropriate form of agreement for their particular circumstances; and

(f) ensuring compliance with minimum standards, industrial instruments and bargaining processes by providing effective means for the investigation and enforcement of:

(i) employee entitlements; and

(ii) the rights and obligations of employers and employees, and their organisations; and

…

(j) ensuring freedom of association, including the rights of employees and employers to join an organisation or association of their choice, or not to join an organisation or association; and …"

10 Division 1 of Pt 16 is preliminary; Div 2 deals with jurisdictional aspects; Div 3 is entitled "General prohibitions relating to freedom of association" consisting of s 789 dealing with coercion; s 790 dealing with false or misleading statements about membership of an industrial association; and s 791 dealing with industrial action for reasons relating to membership of an industrial association. Division 4 deals with conduct by employers or persons engaging independent contractors – I will come back to that division which is central to the case. Division 5 deals with conduct by employees or independent contractors, consisting of s 795 which is as follows:

> "**795 Cessation of work**
>
> (1) An employee or independent contractor must not cease work in the service of his or her employer, or of the person who engaged the independent contractor, as the case requires, because the employer or person:
>
> (a) is an officer or member of an industrial association; or
>
> (b) is entitled to the benefit of an industrial instrument or an order of an industrial body; or
>
> (c) has made or proposes to make any inquiry or complaint to a person or body having the capacity under an industrial law to seek:
>
> (i) compliance with that law; or
>
> (ii) the observance of a person's rights under an industrial instrument; or
>
> (d) has participated in, proposes to participate in or has at any time proposed to participate in any proceedings under an industrial law; or
>
> (e) has given evidence in a proceeding under an industrial law.
>
> (2) Subsection (1) is a civil remedy provision."

11 Division 6 of Pt 16 deals with conduct by industrial associations and officers and members of industrial associations, and consists of s 796 dealing with industrial associations acting against employers; s 797 – industrial associations acting against employees; s 798 – industrial associations acting against members; s 799 – industrial associations acting against independent contractors; s 800 – industrial associations acting against independent contractors to encourage contraventions; s 801 – industrial associations not to demand bargaining services fee; s 802 – action to coerce person to pay bargaining services fee; and

s 803 – industrial associations not prevented from entering contracts for the provision of bargaining services. Division 7 deals with conduct in relation to industrial instruments and consists of s 804 – discrimination against employer in relation to industrial instruments. Division 8 deals with false or misleading representations about bargaining services, fees etc, and is constituted by s 805. Division 9 deals with enforcement, two parts of which I shall return. Division 10 deals with objectionable provisions – s 810 defines objectionable provision. Section 810(1) is as follows:

> "(1) For the purposes of this Division, each of the following provisions (however it is described in the document concerned) is an ***objectionable provision***:
>
> (a) a provision that requires or permits any conduct that would contravene this Part, or that would contravene this Part if Division 2 were disregarded;
>
> (b) a provision that directly or indirectly requires a person:
>
> (i) to encourage another person to become, or remain, a member of an industrial association; or
>
> (ii) to discourage another person from becoming, or remaining, a member of an industrial association;
>
> (c) a provision that indicates support for persons being members of an industrial association;
>
> (d) a provision that indicates opposition to persons being members of an industrial association;
>
> (e) a provision that requires or permits payment of a bargaining services fee to an industrial association."

Section 811 deals with objectionable provisions in industrial instruments and s 812 deals with removal of objectionable provisions from awards. Division 11 is miscellaneous. Section 813 deals with freedom of association not being dependent on whether a person is the holder of a conscientious objection certificate.

12 Part 8 of the Act deals with workplace agreements. Division 10 deals with prohibited conduct. Section 400 prohibited, at the relevant date, action with intent to coerce another person to agree or not to agree to make, approve, lodge, vary or terminate a collective agreement, an Australian Workplace Agreement and some other instruments. Section 401 prohibits false and misleading statements causing a person to make, approve, lodge, vary or

terminate a workplace agreement or not to make, approve, lodge, vary or terminate a workplace agreement. Section 402 is as follows:

"**Employers not to discriminate between unionist and non-unionist**

(1) An employer must not, in negotiating a collective agreement, or a variation to a collective agreement, discriminate between employees of the employer:

(a) because some of those employees are members of an organisation of employees while others are not members of such an organisation; or

(b) because some of those employees are members of a particular organisation of employees, while others are not members of that organisation or are members of a different organisation of employees.

(2) Subsection (1) is a civil remedy provision."

13 Part 9 deals with industrial action. Part 10 deals with awards. Part 12 deals with the minimum entitlements of employees and Div 4 deals with termination of employment. Part 14 deals with compliance. Div 2 deals with penalties and other remedies for contravention of applicable provisions and Div 3 deals with general provisions relating to civil remedies. Part 22 deals with sham arrangements in connection with purported independent contracting arrangements.

14 Returning to Div 4 of Pt 16, s 792, so far as it is relevant, is as follows:

"**792 Dismissal etc. of members of industrial associations etc.**

(1) An employer must not, for a prohibited reason, or for reasons that include a prohibited reason, do or threaten to do any of the following:

(a) dismiss an employee;

(b) injure an employee in his or her employment;

(c) alter the position of an employee to the employee's prejudice;

(d) refuse to employ another person as an employee;

(e) discriminate against another person in the terms or conditions on which the employer offers to employ the other person as an employee.

(2) Subsection (1) is a civil remedy provision.

(3) For the purposes of paragraph (1)(d), an employer does not refuse to employ another person if the employer does not intend to employ anyone.

(4) An employer does not contravene subsection (1) because of paragraph 793(1)(i) unless the entitlement described in that paragraph is the sole or dominant reason for the employer doing any of the things described in paragraphs (1)(a), (b), (c), (d) and (e) of this section."

(Emphasis added.)

15 Section 793 is headed "prohibited reasons" and is as follows:

"(1) Conduct referred to in subsection 792(1) or (5) is for a ***prohibited reason*** if it is carried out because the employee, independent contractor or other person concerned:

(a) is, has been, proposes to become or has at any time proposed to become an officer, delegate or member of an industrial association; or

(b) is not, does not propose to become or proposes to cease to be, a member of an industrial association; or

(c) in the case of a refusal to engage another person as an independent contractor—has one or more employees who are not, or do not propose to become, members of an industrial association; or

(d) has not paid, or does not propose to pay, a fee (however described) to an industrial association; or

(e) has refused or failed to join in industrial action; or

(f) in the case of an employee—has refused or failed to agree or consent to, or vote in favour of, the making of an agreement to which an industrial association of which the employee is a member would be a party; or

(g) has made, proposes to make or has at any time proposed to make an application to an industrial body for an order under an industrial law for the holding of a secret ballot; or

(h) has participated in, proposes to participate in or has at any time proposed to participate in a secret ballot ordered by an industrial body under an industrial law; or

(i) is entitled to the benefit of an industrial instrument, an order of an industrial body or the Australian Fair Pay and Conditions Standard; or

(j) has made or proposes to make any inquiry or complaint to a person or body having the capacity under an industrial law to

seek:

(i) compliance with that law; or

(ii) the observance of a person's rights under an industrial instrument; or

(k) has participated in, proposes to participate in or has at any time proposed to participate in a proceeding under an industrial law; or

(l) has given or proposes to give evidence in a proceeding under an industrial law; or

(m) in the case of an employee, or an independent contractor, who is a member of an industrial association that is seeking better industrial conditions—is dissatisfied with his or her conditions; or

(n) in the case of an employee or an independent contractor—has absented himself or herself from work without leave if:

(i) the absence was for the purpose of carrying out duties or exercising rights as an officer of an industrial association; and

(ii) the employee or independent contractor applied for leave before absenting himself or herself and leave was unreasonably refused or withheld; or

(o) as an officer or member of an industrial association, has done, or proposes to do, an act or thing for the purpose of furthering or protecting the industrial interests of the industrial association, being an act or thing that is:

(i) lawful; and

(ii) within the limits of an authority expressly conferred on the employee, independent contractor or other person by the industrial association under its rules; or

(p) in the case of an employee or independent contractor—has not paid, has not agreed to pay, or does not propose to pay, a bargaining services fee.

(2) If:

(a) a threat is made to engage in conduct referred to in subsection 792(1) or (5); and

(b) one of the prohibited reasons in subsection (1) of this section refers to a person doing or proposing to do a particular act, or not doing or proposing not to do a particular act; and

(c) the threat is made with the intent of dissuading or preventing

> the person from doing the act, or coercing the person to do the act, as the case requires;
>
> the threat is taken to have been made for that prohibited reason."
>
> (Emphasis added.)

16 Section 794 deals with "inducements to cease membership etc of industrial associations etc". This proceeding is brought pursuant to s 807, and s 809 is applicable and is in the following terms:

> "**Proof not required of the reason for, or the intention of, conduct**
>
> (1) If:
>
> (a) in an application under section 807 relating to a person's conduct, it is alleged that the conduct was, or is being, carried out for a particular reason or with a particular intent; and
>
> (b) for the person to carry out the conduct for that reason or with that intent would constitute a contravention of this Part;
>
> it is presumed, in proceedings under this Division arising from the application, that the conduct was, or is being, carried out for that reason or with that intent, unless the person proves otherwise.
>
> …"

17 I have been referred to literally dozens of cases, from the High Court of Australia down, dealing with the application of similar provisions in earlier Commonwealth legislation dating back to 1904, and State legislation. These authorities need to be approached with considerable caution as few of them take into account the significant changes introduced, firstly, by the 1996 Commonwealth Act and none with the Act as it stood at the time of these events following the so-called "Work Choices" legislation in 2005. By and large, they do not relate to situations like the present and none dealt with comparable facts. Many are single judge decisions on their own facts. Indeed, the existence of this body of authority can distract from the task of construing the Act as it now stands. I will only refer to those decisions that are of most relevance to this case.

18 Part 16 deals with the freedom of association aspect of the principal object (s 3(j)) and, as set out above, has its own objects. The aspects of the principal object identified in s 3(d), (e) and (f) are dealt with in other Parts of the Act – in particular, Pt 8, Pt 10, Pt 13 and Pt 14. The structure of the Act in general and the objects of Pt 16, dealing with freedom of association, are quite different from those which pertained for most of the history of

industrial relations in Australia post Federation. Regulation was by way of award negotiated by trade unions with employer representatives and arbitrated by an industrial tribunal. As Mason J said in *General Motors-Holdens Pty Ltd v Bowling* (1976) 12 ALR 605 at 616 in dealing with s 5 of the *Conciliation and Arbitration Act 1904* (Cth):

> "The two subsections are, broadly speaking, designed to protect an officer, delegate or member of an organization against discrimination by his employer. They have a legislative history which extends back to the turn of the century when the trade union was a more fragile institution than it is today and when it stood in need of a large measure of protection from employers."

His Honour later referred to "the protection of trade unions and their representatives from discrimination and victimization by employers". That extended to employees who were members of the union and took advantage of union negotiated awards.

19 The Act as it stood in 2006 did not contain any vestige of special protection for trade unions or the members of trade unions compared with employers, organisations of employers or, more particularly, those who do not belong to a trade union. Nonetheless, the benefits of freedom of association are afforded to those who wish to belong to trade unions as well as to those who do not.

20 It will be observed that object (b) of s 778 picks up the words "discriminated against" or "victimised" that have traditionally been used in this field. In my opinion, as the provisions now stand, taken in context, s 792 can have no sensible operation unless it involves discrimination against, or victimisation of, an employee on some basis connected with union membership, no matter how broadly.

PLEADED CASE

21 The relevant portions of the second further amended statement of claim (which take into account certain events after the commencement of the proceeding) omitting particulars (except in the case of paragraph 7), are as follows:

> "5A. By at least about June 2006 (the ***Relevant Date***) the respondent
>
> (a) no longer wished the job or jobs that the Relevant Employees, or any of them, had been doing before the Relevant Date to be performed by anyone, and
>
> (b) had made a definite decision to that effect.
>
> …

5B. By at least, and since, about the Relevant Date, the respondent had engaged, and thereafter has continued to engage during such period the Relevant Employees, in the following conduct in relation to all or any one or more of the Relevant Employees, which conduct in relation to all or any one or more of the Relevant Employees is collectively, or, in the alternative, separately, called '***the Respondent's Conduct***':

(a1) The respondent has not compulsorily retrenched the Relevant Employees who remain employed by the respondent, not withstanding the facts and matters set out in paragraph 5A of this second further amended statement of claim, and contrary to the expectations of the Relevant Employees.

(a2) In respect of those Relevant Employees who have been compulsorily retrenched, the respondent did not compulsorily retrench those Relevant Employees during the period on and from about June 2006 until their respective Termination Dates, notwithstanding the facts and matters set out in paragraph 5A of this second further amended statement of claim, and contrary to the expectations of the Relevant Employees.

…

(b) The respondent has not provided any of the Relevant Employees with work of the same or materially similar kind as they had been performing before the Relevant Date.

(c) The respondent has not provided or, in the alternative, has ceased to provide, Relevant Employees with any work, or, in the alternative, any meaningful or productive work.

(d) The respondent has not provided, or, in the alternative, has ceased to provide, Relevant Employees with the opportunity to perform any work, or, in the alternative, any meaningful or productive work.

(e) The respondent has lost such contracts or orders, disposed of such plant and equipment, and retrenched such employees, as enabled it to be in a position to provide Relevant Employees with

(i) work of the same or materially similar kind as they had been performing before the Relevant Date, or

(ii) any meaningful or productive work.

(f) In the premises set out in subparagraphs 5B(b), (c), (d) and (e) of this second further amended statement of claim, the respondent has made substantial, exceptional and far reaching changes to the duties, work and working conditions of each of the Relevant Employees.

(g) The respondent has, in the case of each Relevant Employee, made the changes referred to in subparagraph 5B(f) of this

second further amended statement of claim unilaterally and without the consent of the Relevant Employee.

(h) In the premises set out in subparagraphs 5B(b), (c), (d), (d) and (f) of this second further amended statement of claim, the respondent has denied to the Relevant Employees, or, in the alternative, substantially reduced their opportunity to

(i) perform any work, or, in the alternative, any meaningful or productive work,

(ii) obtain the benefits of meaningful and productive employment,

(iii) use, maintain or develop their skills, competence and training, or

(iv) obtain alternative employment.

(i) The respondent has failed or neglected to consult, counsel or assist any Relevant Employees in relation to any of the facts or matters referred to in subparagraphs 5B(b), (c), (d), (e), (f) or (h).

(j) In the premises set out in subparagraphs 5B(b), (c), (d), (e), (f), (h) and (i) of this second further amended statement of claim, the respondent has

(i) damaged, diminished or undermined Relevant Employee's feelings of worth and confidence,

(ii) caused Relevant Employees to suffer insecurity, stress and anxiety, and

(iii) exposed Relevant Employees to the risk of psychological and other injuries.

(k) The respondent has conducted itself towards Relevant Employees in a manner that is likely to damage or destroy the relationship of trust and confidence between them, and that is neither good nor considerate, in that it has neglected them and their health, safety and welfare, and treated them without dignity of respect.

5C. By the Respondent's Conduct, either collectively or, in the alternative, any one or more of the separate instances of the Respondent's Conduct set out in paragraph 5B of this second further amended statement of claim, the respondent has injured all or any one or more of the Relevant Employees in their employment within the meaning of paragraph 792(1)(b) of the Act.

5D. Further, or in the alternative, to paragraph 5C of this further amended statement of claim, by the Respondent's Conduct, either collectively or, in the alternative, any one or more of the separate instances of the

Respondent's Conduct set out in paragraph 5B of this second further amended statement of claim, the respondent has altered the position of all or any one or more of the Relevant Employees to their prejudice within the meaning of paragraph 792(1)(c) of the Act.

5E. The respondent has engaged in the Respondent's Conduct, either collectively or, in the alternative, any one or more of the separate instances of the Respondent's Conduct set out in paragraph 5B of this second further amended statement of claim, for the reason, or, in the alternative, for reasons which include the reason, that the Relevant Employees have been and are entitled to the benefit of the Certified Agreement, and in particular to the Redundancy Provisions, and will continue to be so until termination of the Redundancy Provisions as set out in subparagraphs 3(e) and (f) of this second further amended statement of claim.

6. In the premises, the respondent has contravened, and continues to contravene, subsection 792(1) of the Act.

7. In the premises, the Relevant Employees, or any or more of them, have suffered, and, in respect of each of the Relevant Employees who have not been compulsorily retrenched, continue to suffer, damage as a result of the respondent's contravention of subsection 792(1) of the Act as aforesaid.

Particulars of the damage suffered by the Relevant Employees

The damage that the Relevant Employees have suffered, and, in respect of each of the Relevant Employees who have not been compulsorily retrenched, continue to suffer, includes the following:

(a) *In the premises set out in subparagraph 5B(a) of this second further amended statement of claim, the Relevant Employees who have not been compulsorily retrenched have been denied the benefit of the Redundancy Provisions.*

(b) *In the premises set out in subparagraphs 5B(b), (c), (d) and (e) of this second further amended statement of claim, the Relevant Employees have had imposed on them, unilaterally and without their consent, substantial, exceptional and far reaching changes to their duties, work and working conditions, particulars of which are given in the Schedule.*

(c) *In the premises set out in subparagraphs 5B(b), (c), (d), (d) and (f) of this second further amended statement of claim, the Relevant Employees have been denied, or, in the alternative, had a substantial reduction in their opportunities to*

(i) perform any work, or, in the alternative, any meaningful or productive work,

(ii) obtain the benefits of meaningful and productive employment,

(iii) use, maintain or develop their skills, competence and training, or

(iv) obtain alternative employment,

particulars of which are given in the Schedule.

(d) *In the premises set out in subparagraphs 5B(b), (c), (d), (e), (f), (h) and (i) of this second further amended statement of claim,*

(i) the Relevant Employee's feelings of worth and confidence have been damaged, diminished or undermined,

(ii) they have suffered insecurity, stress and anxiety, and

(iii) they have been exposed to the risk of psychological and other injuries,

particulars of which are given in the Schedule."

PRINCIPAL CASE

22 The principal basis upon which the case is put is that Tristar injured or altered the position of each of the employees to the employer's prejudice by not dismissing the particular employees, thus disentitling him or her to a severance payment in accordance with cl 21.5 of the Certified Agreement. In my opinion, that case cannot succeed. The problem underlying these circumstances was the loss of business rather than any operative decision of Tristar. In 2000, 370 persons were employed and by January 2006 the number was reduced to 177. When major manufacturing ceased, it was obvious that there would be the need for further significant reduction in employees. Clause 21 of the Certified Agreement was designed to cope with that situation, particularly cl 21.9, which dealt with the selection of redundant employees where surplus staff existed. It is obvious that the purpose of the clause was to avoid unnecessary involuntary retrenchments and then to manage the process. The clause makes it clear that, ultimately, it is at the employer's discretion as to which employees would be subject to compulsory redundancy. By August 2006 the numbers were reduced to 50 production employees and 19 staff employees. By August 2007, the production employees had been reduced to 19 and the staff positions to 13. There is no allegation in this case that Tristar breached cl 21 in any respect.

23 The applicant's contention is tantamount to treating cl 21.5 as a conditional contractual benefit for an affected employee like long service leave or superannuation. The unstated premise of the contention is that the employer had a duty to dismiss. That is a

misconception as to the purpose and effect of cl 21. No complaint is made in this proceeding about failure of Tristar to follow the procedures laid down by cl 21. If there had been, that could have been the subject of a dispute referred to the Australian Industrial Relations Commission or possibly of a proceeding in this Court to compel compliance. So far as this aspect of the case is concerned, Tristar simply maintained the employees in their position. The status quo remained. That did not "do" anything to "injure" an employee or "alter the position" of an employee.

24 A "before and after" test is usually applied to see whether there has been any injury to, or prejudicial alteration of, the position of the employee by reason of any act of the employer (eg per Evatt J in *Blair v Australian Motor Industries Ltd* (1982) 61 FLR 283 at 289, 3 IR 176; per Branson J in *Commonwealth Bank of Australia v Finance Sector Union of Australia* (2007) 157 FCR 329 at [127]). Applying what had been said by the Full Court in an earlier interlocutory appeal (*BHP Iron Ore Pty Ltd v Australian Workers' Union* (2000) 102 FCR 97 at [35]), it was succinctly put by Kenny J in *Australian Workers' Union v BHP Iron-Ore Pty Ltd* (2001) 106 FCR 482 at [54] as follows:

> "Before s 298K(1) can apply, it must be possible to say of an employee that he or she is, individually speaking, in a worse situation after the employer's acts than before them; that the deterioration has been caused by those acts; and that the acts were intentional in the sense that the employer intended the deterioration to occur."

The clarification of that approach by the Full Court in *Community and Public Sector Union v Telstra Corp Ltd* (2001) 107 FCR 93 at [21] does not detract from it for present purposes. The same questions must be asked. Here, there should be a negative answer to each limb.

25 Tracey J usefully summarised the authorities as to the former s 298K in *Australian and International Pilots Association v Qantas Airways Ltd* [2006] FCA 1441, (2006) 160 IR 1 at [13]–[22]. "Injury" is concerned with an adverse effect upon an existing legal right, or "compensable" injury. Prejudicial alteration of position goes beyond that concept. There are many examples in the cases. It is sufficient to refer to *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3)* (1998) 195 CLR 1 per Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ at [37] and [38]; *Community and Public Sector Union v Telstra Corp Ltd* 107 FCR 93 at [17]–[22]; *Greater Dandenong City Council v Australian*

Municipal, Administrative, Clerical and Services Union (2001) 112 FCR 232; and *Commonwealth Bank of Australia v Finance Sector Union of Australia* 157 FCR 329.

26 The decision in *Maritime Union of Australia v Geraldton Port Authority* (1999) 93 FCR 34 is a good illustration of where the dividing line might be drawn. Cases on the non-contravening side of the line include *Burnie Port Corp Pty Ltd v Maritime Union of Australia* (2000) 104 FCR 440 and *Australian Workers' Union v BHP Iron-Ore Pty Ltd* 106 FCR 482. A case with some similarities to the present is *National Union of Workers v Qenos Pty Ltd* (2001) 108 FCR 90. It dealt with a situation where there was a surplus of employees for genuine business reasons. A "spill and fill" selection and retrenchment process was held not to be capable of giving rise to an injury to any particular employee in his or her employment and could not be said to have altered the position of any individual employee to his or her prejudice. (See also *Australian and International Pilots Association v Qantas Airways Ltd* [2006] FCA 1441, (2006) 160 IR 1 at [29] and [31].)

27 If there were a duty to dismiss, to whom was it owed? The argument seems to be that Tristar owed a duty to every employee covered by the Certified Agreement to dismiss that employee during the course of 2006 when major manufacturing ceased. However, manufacturing and remanufacturing work continued for some time thereafter and, as I have said, Tristar was genuine in seeking that and other business. It was entitled to retain employees to carry out that actual and potential work. Once the employer has that choice, then no individual employee could claim that there was any obligation upon Tristar to dismiss that employee in order to trigger cl 21.5.

ALTERNATIVE CASE

28 What, then, of the alternative case, based upon the change in duties and, in particular, the lack of productive work that was available. As I have said, I accept that many of the employees who gave evidence found the experience unpleasant and some psychological damage was done to some of them. Again, the difficulty for the applicant's case is that Tristar was essentially passive so far as the particular employees are concerned. The work available was constrained by commercial considerations – there is no suggestion that it was contriving not to win work for some ulterior purpose. The decisions which it took in relation to premises, plant and equipment were the result of the commercial realities. The same can be said concerning the arrangements with the continuing employees. They were given such

tasks as were available. None of the affected employees was obliged to stay. If conditions were intolerable, then none was the subject of a long-term contract. No doubt, voluntary redundancy would have been available to most, if not all, of them.

29 There is a respectable argument that an employee cannot be indefinitely denied work to do if work of an appropriate kind is available (*Blackadder v Ramsey Butchering Services Pty Ltd* (2005) 221 CLR 539, particularly per Callinan and Heydon JJ at [80]; *Squires v Flight Stewards Assn of Australia* (1982) 2 IR 155 at 164; *Downe v Sydney West Area Health Service (No 2)* [2008] NSWSC 159 at [410]–[431]). No such appropriate work was available here.

30 There may be circumstances where the conduct of the employer towards an employee is such that the employee, upon leaving, can assert that he or she has been constructively dismissed, triggering whatever rights the employee may have upon dismissal (*Westen v Union des Assurances de Paris* (1996) 88 IR 259 at 261; *Brackenridge v Toyota Motor Corporation Australia Ltd* (1996) 142 ALR 99 at 106; in the case of position redundancy see *Commonwealth Bank of Australia v Finance Sector Union of Australia* (2002) 125 FCR 9 at [27]; cf *Martech International Pty Ltd v Energy World Corp Ltd* [2007] FCAFC 35 at [19]). In the present case, that may have included a claim pursuant to cl 21.5. That case could have been pursued by or on behalf of these employees. That course was adopted in *Finance Sector Union of Australia v Commonwealth Bank of Australia* [2001] FCA 1613, (2001) 111 IR 241 (although set aside in the result on appeal *Commonwealth Bank of Australia v Finance Sector Union of Australia* 125 FCR 9). Rather, the choice was made here to seek to use the freedom of association provisions to, in effect, act as a means of specific enforcement of cl 21.5.

31 In short, whatever the employees suffered by way of psychological distress was not caused by any act of Tristar. Rather, the choice they made to continue in employment was the operative reason for the prejudice (*Maritime Union of Australia v CSL Australia Pty Ltd* [2002] FCA 513, (2002) 113 IR 326 at [53] and [54]). In my opinion, none of these employees was injured, nor was the position of any of them prejudicially altered by any act of the employer as required by s 792.

PROHIBITED REASON

32 Even if the necessary injury or alteration of position had been established, a sole or dominant prohibited reason has not been established (s 792(4)). The selection of employees

for retrenchment had no scintilla of connection with freedom of association. All employees covered by the Certified Agreement had the benefit of that agreement without discrimination between them. There is no suggestion that selection for retrenchment was made for any reason associated with union membership or non-membership, or union activity or non-activity, or because these employees were covered by the Certified Agreement and other potential persons affected were covered by some other agreement. There is simply no basis for suggestion of discrimination or victimisation in any relevant respect. The employees the subject of this proceeding are only a proportion of the workforce as it stood in 2006.

33 So far as s 793(1)(i) is concerned, the affected employees were, or are, entitled to the benefit of the Certified Agreement in common with all production employees. There is no discrimination between employees in that respect. There is no suggestion that persons with the benefit of the Certified Agreement were being discriminated against as compared with people who did not have the benefit of that Agreement. The fact that the employer was, or may have been, advantaged by not dismissing particular employees because of the way in which cl 21.5 worked, is not pertinent to this statutory obligation. The content and effect of an agreement may not always be irrelevant – for example, if the way a particular clause operates is related to some relevant form of discrimination. The decision of the Full Court in *Greater Dandenong City Council* 112 FCR 232 may provide an example of that, although it is a difficult decision – as Branson J said in *CSL Australia Pty Ltd* [2002] FCA 513, 113 IR 326 at [54], it is not easy to derive a ratio decidendi. The decision in *Commonwealth Bank of Australia v Finance Sector Union of Australia* 157 FCR 329 may be another. In each case, the employer had work to be done by those employed pursuant to an industrial instrument. The proposed change meant that the work would be done by those who were willing to take alternative employment pursuant to different industrial instruments or perhaps no industrial instrument. That is not the case here.

34 Another instance may be provided by what was said by Street J in *Hunt v Railway Commissioners (NSW); Ex parte Brown-Smith* [1928] AR (NSW) 151 at 154 (albeit dealing with a differently framed section):

> "and the dismissal must, I think, be a dismissal by an employer really as a matter of victimisation, or the capricious use of his power to dismiss in order, to retaliate upon the employee for his having dared to assert a claim to rights under the award."

In dealing with that section, Evatt J in *Grayndler v Cunich* (1939) 62 CLR 573 said at 595:

> "we are not investigating a case where a business or department is being closed down, but a case where an employer has determined (1) that the enterprise as a whole shall be conducted entirely upon conditions of private bargaining which are less favourable to employees than award conditions, and also (2) that every employee who qualifies himself to obtain the better award conditions shall immediately be dismissed. This is one of the obvious cases which sec. 9 was designed to cover."

This case is not analogous to those examples.

35 Early in the history of these provisions it was established that they could not be used to restrict genuine business decisions by an employer, notwithstanding that the objective of the provisions then was the protection of unions and collective action (*Connington v Municipality of Kogarah* [1913] AR (NSW) 40 at 44; *Grayndler v Broun* [1928] AR (NSW) 46 at 49; *Klanjscek v Silver* (1961) 4 FLR 182 at 187; *Moss v Fantil Pty Ltd t/as Central Coast Security Services* (1994) 58 IR 118 at 127). The underlying principle is that a decision that may affect an employee or a class of employee does not discriminate against or victimise that employee or those employees if it is taken for a sound business reason. This principle has been applied in various situations in more recent times in considering a prohibited reason within the meaning of s 793 and similar provisions. Examples include *Qenos Pty Ltd* 108 FCR 90 at [119]–[126]; *Australian Collieries' Staff Association v BHP Coal Pty Ltd* (2000) 99 FCR 137, particularly at [66]–[67]; *CSL Australia Pty Ltd* [2002] FCA 513, 113 IR 326, particularly at [55]–[60]; *BHP Iron Ore Pty Ltd v Australian Workers' Union* 102 FCR 97 at [48]; and *Geraldton Port Authority* 93 FCR 34, particularly at [294]–[302].

36 There is no causal link between any injury or alteration of position which might be found to have been incurred and the alleged prohibited reason in this case. On one view, s 809 has no work to do in those circumstances (cf *CSL Australia Pty Ltd* [2002] FCA 513, 113 IR 326 at [56]–[60]). In any event, the evidence that was led for Tristar is inconsistent with the existence of any particular reason or intent connected with s 793(1)(i) notwithstanding that I accept that the length of service of the employees was a factor taken into account in not dismissing them because of the size of the severance payment which would have to be made. As I have endeavoured to show, that does not establish that any conduct of Tristar was for a prohibited reason. The manner in which the particular clause in

the Certified Agreement worked out in practice does not fall within s 793(1)(i) as construed in the context of the rest of s 793(1), the rest of Pt 16 and the objects and structure of the Act as a whole (*Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355).

CONCLUSION

37 Those conclusions mean that the case must be dismissed. There is no necessity to further consider the position of the "staff" employees who were not directly entitled to the benefit of the Certified Agreement, or to distinguish between the named employees in any other way. There will be no order as to costs. I do not find that the proceeding was instituted vexatiously or without reasonable cause, although, in the end, I concluded that there is no basis for the relief claimed. That conclusion was only arrived at after evidence, argument and analysis.

UNSWORTH v TRISTAR STEERING AND SUSPENSION AUSTRALIA LTD

Chronology

Date	**Event**
1921	Respondent founded.
27 March 1962	John Anderson commenced employment with the respondent.
November 1964	James Parsons commenced employment with the respondent.
1965	Charles Schofield commenced employment with the respondent.
28 February 1970	Peter Bitmead commenced employment with the respondent.
November 1971	Malcolm Brabant commenced employment with the respondent.
22 January 1973	John Gosano commenced employment with the respondent.
28 January 1974	Cecilia Maiolo commenced employment with the respondent.
7 April 1975	Simeon Kokinovski commenced employment with the respondent.
October 1975	Greg Rutherford commenced employment with the respondent.
1 June 1976	Jone Tui Vukici commenced employment with the respondent.
7 March 1977	Antonia Karabasis commenced employment with the respondent.
10 October 1977	George Kaloustian commenced employment with the respondent.
6 February 1978	Keith Sayles commenced employment with the respondent.
11 September 1978	Jordanka Brsakovska commenced employment with the respondent.
19 November 1979	Katerini Georganda commenced employment with the respondent.
May 1983	Toula Sousalis commenced employment with the respondent.
20 June 1983	Mitre Mitrevski commenced employment with the respondent.
27 October 1983	Michael Rutherford commenced employment with the respondent.
2 October 1984	George Stojcevski commenced employment with the respondent.
July 1986	James Hoose commenced employment with the respondent (for the second time following a three year break).
11 November 1986	Milos Sajinovic commenced employment with the respondent.
15 July 1987	The Da (Jason) Duong commenced employment with the respondent.
11 April 1988	Veselin Balovski commenced employment with the respondent.
27 April 1988	Van Nhan Lam commenced employment with the respondent.
29 May 1989	Nicolas El-Hawi commenced employment with the respondent.
1 September 1990	Gavin Avery commenced employment with the respondent.

Date	Event
1993	Respondent acquired steering gear business owned by James N Kirby Products Pty Ltd.
5 December 1995	Timothy White commenced employment with the respondent.
1 November 1996	Othman Jasmani commenced employment with the respondent.
1997	Respondent sold remanufacturing business.
3 February 1997	Huuson (Sunny) Nguyen commenced employment with the respondent.
27 October 1997	Blagojce (Bill) Kotevski commenced employment with the respondent.
7 June 1999	Respondent informed its staff employees of their entitlements on redundancy.
8 July 1999	Respondent offered to guarantee its employees' redundancy entitlements as an inducement to enter into the 1999 certified agreement.
16 August 1999	The Australian Industrial Relations Commission (AIRC) certified respondent's 1999 certified agreement.
20 December 1999	Arrowcrest Group Pty Limited purchased all issued shares in respondent.
20 December 1999	Respondent employed 390 employees at the time Arrowcrest acquired all the issued shares in the respondent.
6 January 2000	Respondent changed its name from TRW Steering & Suspension Australia Limited to Tristar Steering and Suspension Australia Limited.
6 January 2000	Cheng Hong commenced in role of Managing Director of the respondent.
17 March 2000	Respondent entered into insurance bond with National Australia Trustees Limited in respect of its employees' redundancy entitlements.
15 December 2000	Mr Hong intended to terminate insurance bond on expiry of bond on 1 March 2001.
2001	Cheng Hong directed Vincent Kong that cores returned under warranty should be retained for further use, as they were an asset which could be remanufactured.
30 April 2001	Respondent entered into five year agreement with Holden.
December 2001	Respondent entered into five year agreement with Ford for steering gears.
14 February 2002	Respondent entered into insurance bond agreement with National Australia Trustees Limited.
2002	Respondent's contract with Ford came to an end.
6 March 2002	The AIRC certified respondent's 2002 certified agreement.
13 March 2002	Respondent informed its staff employees of their entitlements on redundancy after the certification of the 2002 certified agreement.

Date	Event
18 April 2002	Mr Hong reported to the Directors that he believed that the respondent's forging business was dying out. Hong also reported that new business had been obtained from Mitsubishi and that a new quotation had been submitted to Holden.
13 June 2002	Mr Hong advised the directors of Arrowcrest of the respondent's loss of the Toyota and Dana business.
1 July 2002	Mr Vincent Kong became a director of the respondent.
20 February 2003	Mr Hong advised Directors that he and Mr Kong would be visiting China in early March to follow up business opportunities and believed there was a high growth market there for automotive products.
March 2003	Mr Hong and Mr Kong visit China to follow up business opportunities.
22 October 2003	Mr Hong reported to directors of Arrowcrest on his visit to China to meet with representatives from Nanjing Auto Group (who had expressed interest in a joint venture for the manufacture of steering gears) and Hefei Winking Assets Co Ltd.
6 January 2004	Respondent entered into three year lease with option to renew for three years over Marrickville factory.
19 February 2004	Mr Hong reported to directors of Arrowcrest that Nanjing Auto Group had accepted heads of agreement, however they had requested the equity be 50/50.
1 April 2004	Mr Gwinnett reported to directors of Arrowcrest that a joint venture agreement had been signed with Nanjing Automotive Company.
May 2004	Mr Hong and Mr Kong visit China.
6 May 2004	Respondent entered into insurance bond agreement with National Australia Trustees Limited.
24 May 2004	Respondent's 2003 certified agreement (Certified Agreement) certified by the AIRC. Nominal expiry date of Certified Agreement 30 September 2006.
19 August 2004	Mr Hong reported to directors of Arrowcrest that negotiations with Nanjing Automobile Group had reached a deadlock. Mr Hong also reported that discussions had been held with another Chinese company, Shanghai Shenzhen
19 August 2004	Cheng Hong reported to directors of Arrowcrest that the current profit could not sustain the rental costs, and that the respondent would have to move from the site.
7 September 2004	Respondent revised amount of insurance bond to $17,057,312.
December 2004	Respondent closed forge 1.
2005	A pilot run of 30 remanufactured gears was conducted.

Date	Event
1 March 2005	Respondent announced rationalisation of Tool Room and Die Shop into a new department to be known as Tool and Die Support. Applications for voluntary redundancy sought.
1 March 2005	Spicer Axle Australia terminated its supply contract for forged axles with the respondent. As a result, the respondent sought applications for voluntary redundancies.
March 2005	Respondent's contract with Spicer Axle came to an end.
April 2005	Managing Director of Ningbo Yongxin and Mon Forging Limited India visited Tristar to discuss possible forging joint venture.
May 2005	Mr Hong and Mr Kong visit China to continue negotiations with Nanjing.
July 2005	Respondent commenced working on a batch of remanufactured steering gears as a trial.
August 2005	Respondent entered into heads of agreement with Ningbo Yongxin Company Ltd for a joint venture to manufacture forging components in China.
October 2005	Mr Hong and Mr Kong visit China for further negotiations with several companies.
5 December 2005	Respondent entered into joint venture agreement with Ningbo Yongxin to set up a forging manufacturing business in Ninghai.
December 2005	Respondent closed forge 2.
January 2006 – March 2006	Respondent's contract with Mitsubishi came to an end.
January 2006	Respondent employed 177 employees following redundancies in 2005.
1 January 2006 – 1 April 2006	Respondent commenced discussions with Australian Power Steering in relation to a possible acquisition by the respondent of a part or the whole of Australian Power Steering.
March 2006	Respondent sold 30 remanufactured steering gears made during pilot program to Power Steering Parts Australia for $150 each.
12 April 2006	Respondent postponed March 2006 salary reviews due to uncertainty as to future business.
May 2006	Respondent's discussions with Foshan Hengwei Steering Gear Company come to a halt.
May 2006	Respondent continued discussions with Australian Power Steering in relation to possible acquisition by respondent of part or whole of company.
May 2006	Respondent's ball joint assembly department ceased substantive operations.
May 2006	Vincent Kong wrote to the Australian Manufacturing Workers' Union (AMWU) to inform it that the respondent was pursuing business opportunities in China and Australia for the after-market business.

Date	Event
June 2006	Mr Kong asked Mr Sayles whether he wanted to "head up" a forge in China as part of a proposed joint venture – Mr Sayles declined.
June 2006	Amit Misra had discussions with AMWU official, Martin Schutz, and union delegate, Colin Williams, about the respondent's desire to do remanufacturing work. Schutz said he would speak to employees about this.
June 2006	A meeting was convened in the canteen with 50 to 60 of the respondent's workers present. Shortly after the meeting, Schutz advised Misra the employees did not want to do remanufacturing work.
June 2006	Respondent made contact with Repco in relation to the potential sale of remanufactured steering gears.
June 2006	Respondent made contact with Burson Auto Parts in relation to potential sale of remanufactured steering gears
June 2006 – July 2006	Mr Misra told Cecilia Maiolo that she had been employed by the respondent for too long to get a redundancy (not admitted by respondent).
June 2006	Most of the respondent's business manufacturing original equipment had come to an end.
June – August 2006	Respondent's production department ceased its substantive operations
22 June 2006	Respondent notifies employees that all afternoon shift employees will be required to work day shift from 31 July 2006.
27 June 2006	The respondent planned to have only 68 employees by the end of August 2006.
27 June 2006	Respondent decided not to pursue acquisition of Australian Power Steering.
July 2006	Respondent made first contact with Coventry in relation to potential sale of remanufactured steering gears.
July 2006	Respondent made first contact with Supercheap Auto in Brisbane in relation to the potential sale of remanufactured steering gears.
July 2006	Respondent's contract with Holden came to an end.
4 July 2006	Mr Morelli, Mr Koorey and Mr Kong met with Graeme Heine of Repco to explore opportunities to supply remanufactured steering gears.
4 July 2006	Respondent knew that Australian Power Steering had secured Repco's agreement for the exclusive supply of remanufactured steering gears for three years from 1 March 2006.
July 2006 – December 2006	Respondent removed from its Marrickville premises all equipment from its four steering gear assembly lines, two input shaft assembly lines, pinion line, sleeve line, rack line, plating line and tie rod line.
13 July 2006	Mr Kong and Mr Morelli met with Martin Farrell of Bursons.
13 July 2006	Respondent made presentation to Repco.

Date	Event
19 July 2006	Planning meeting at which the feasibility of remanufacturing steering gears was discussed by the respondent's managerial and supervisory employees, including Mr Duong, Mr Hirdle, Mr Kong, Mr Misra, Mr Greg Rutherford, Mr Haschynski, Mr Hodson and Mr Koorey. At that meeting Mr Kong said "if we do not get the business from Repco that is it".
22 July 2006	One of the joint ventures being pursued by the respondent in China came to a halt.
25 July 2006	The dispute, which was the subject of arbitration before SDP Cartwright, was notified on behalf of the respondent's employees to the AIRC.
27 July 2006	Vincent Kong and George Koorey met with Product Category Manager of Supercheap Auto.
July – August 2006	The union invoked the status quo clause in the enterprise agreement. Misra understood this to mean the company could not require the remanufacturing employees to perform remanufacturing or packing work until the dispute was resolved.
1 August 2006 – 30 September 2006	Vincent Kong ceased to work in the role of General Manager of the respondent. As a result, Mr Misra became the respondent's most senior manager in NSW.
18 August 2006	Repco identifies shortcomings in the respondent's proposal to supply remanufactured steering gears.
August – September 2006	Respondent's tool room ceased substantive operations save for a couple of jobs.
September 2006	Respondent's electrical maintenance department ceased substantive operations.
1 September 2006 – 1 October 2006	Respondent decided to remove all the excess equipment not required for remanufacturing from its Marrickville premises to Caringbah.
September 2006 – October 2006	Respondent completed production of parts and accessories for car manufacturers, save for 5,000 tie rod assemblies to be produced by the Respondent for Toyota.
1 September 2006	Mr Kong and Mr Morelli met with Mr Heine to discuss Repco's concerns.
1 September 2006	Respondent intended to replace 2003 union Certified Agreement with employee certified agreement.
September 2006 – January 2007	Respondent instructed its electricians to disconnect machines in the Marrickville factory.
7 September, 15 September, 16 October, 27 October and 1 December 2006	Hearing of dispute before SDP Cartwright in AIRC.

Date	Event
7 September 2006	Martin Schutz of the AMWU gave evidence in the AIRC that employees held the view that it was not their job to do packing work which was formerly undertaken by employees who had been made redundant by the respondent.
8 September 2006	Respondent made offer to supply remanufactured steering racks to Repco.
September 2006	During the hearing in the AIRC, Aron Neilson of AMWU advised Amit Misra that if the respondent agreed to extend the EBA, all of the disputes could be off and that remanufacturing work would be performed without issue.
September 2006	Vincent Kong ceased to be the respondent's General Manager.
September 2006	Amit Misra took over the work of the panel to: (a) consider the question of which employees should be made redundant; and (b) make recommendations as to that to Cheng Hong.
September 2006 – October 2006	Vincent Kong left Sydney to work from Adelaide on the China joint venture project.
4 October 2006	Respondent applied to AIRC to terminate Certified Agreement.
17 October 2006	Respondent put to its landlord a proposal for a new lease.
19 October 2006	Respondent confirmed that it did not need all of the space leased by it.
October – November 2006	Toyota placed an order with the respondent for 5000 ball joints. In connection with that order, the respondent outsourced the forging work and part of the machining work to third parties because it did not have the capability to do that work in-house.
October – November 2006	Respondent ceased inspection of parts.
November 2006	Respondent's maintenance department ceased substantive operations.
10 November 2006	Submission by the respondent that it wanted to terminate the Certified Agreement in order to enhance the prospect of maintaining a viable business.
November 2006 – February 2007	Respondent met with unions on a number of occasions to attempt to negotiate a new redundancy package.
1 December 2006	Respondent confirmed that one of the important criteria in deciding who would be made redundant was the employee's length of service with the respondent.
1 December 2006	Respondent confirmed that it presently had no contracts to remanufacture steering gears.
Early December 2006	Mark Morelli told George Koorey that the respondent's efforts to try to get Repco's business had failed

Date	Event
4 December 2006	Martin Schutz of the AMWU gave evidence to the AIRC that the dispute before Senior Deputy President Cartwright concerned whether the respondent could transfer employees from afternoon shift to day shift, whether the respondent could transfer employees into positions that had been made redundant and whether the respondent had the ability to direct employees to carry out duties that they had not previously performed and that do not form part of their contract of employment, being remanufacturing duties. Schutz indicated that the respondent had sought that the employees perform remanufacturing work and in response the employees had indicated that if there was such work and if the company would continue to guarantee their current conditions of employment as set out in the certified agreement then the employees would be prepared to have discussions with the respondent about those duties.
Early December 2006	Respondent completed work on Toyota tie rod end contract.
15 December 2006	John Anderson accepted a voluntary redundancy and stopped working for the respondent.
December 2006	Vincent Kong handed over responsibility to Amit Misra for finding customers for the respondent's remanufactured steering gears
31 December 2006	Respondent has 15 staff employees and 29 shop floor employees left.
December 2006	Respondent's warehouse ceased substantive operations.
Late December 2006	Respondent shut down for Christmas break.
Late December 2006 – early January 2007	Remaining machines moved from respondent's premises.
January 2007 – February 2007	Respondent shipped all forging equipment sold to India.
5 January 2007	Respondent's lease over the Marrickville factory expired.
6 January 2007	Respondent entered into a new one year lease in respect of a 1,400 square metre part of the Marrickville factory, being about 10% of the size of the factory formerly leased by the respondent.
9 January 2007	Senior Deputy President Cartwright handed down his decision requiring the respondent's employees to comply with the respondent's direction to "undertake duties remanufacturing steering gears and such other tasks as may be within their skills, competence and training".
15 January 2007	Respondent's employees returned to work after the Christmas shutdown.
15 January 2007	Senior Deputy President Cartwright's decision took effect.
15 January 2007	Amit Misra advised Aron Neilson of AMWU that the respondent would now require employees to perform remanufacturing work.
16 January 2007	Amit Misra held a tool box meeting to inform employees that the AIRC had delivered a decision confirming that the respondent was able to direct them to perform remanufacturing work.

Date	Event
16 January 2007	Gavin Avery accepted a voluntary redundancy and ceased employment with the Respondent.
17 January 2007 – February 2007	Amit Misra absent from work for three weeks due to family circumstances.
January 2007	Amit Misra took over responsibility for the management of the respondent's Marrickville operations.
22 January 2007	Senior Deputy President Marsh handed down her decision terminating the 2003 Certified Agreement
30 January 2007	Orders made by Marsh SDP by which: (a) the Certified Agreement was terminated with effect from 6 February 2007; and (b) the redundancy provisions of the Certified Agreement were preserved in operation until 6 February 2008.
Early February 2007	Cheng Hong became aware that Marsh SDP had ordered the termination of the Certified Agreement, and that the redundancy provisions would come to an end early in 2008.
February 2007	Respondent sold 100 cores to Australian Power Steering.
19 February 2007	Applicant commenced proceedings in the Federal Court of Australia.
23 February 2007	Mitre Mitrevski accepted voluntary redundancy and his employment with the respondent came to an end.
23 February 2007	Veselin Balovski accepted a voluntary redundancy and his employment with the respondent came to an end.
28 February 2007	Vincent Kong approached Jason Duong about being a liaison person for a China joint venture based in an office in "Brownbuilt" in Caringbah – Mr Duong declined saying he was employed to work as a product engineer, not a translator.
March 2007 – April 2007	Amit Misra became desperate about the respondent's lack of any customers for remanufactured steering gears. Mr Hong then gave Mr Misra authority to go out and look for prospective customers.
15 March 2007	Mr Misra offered Mr Duong a new job as the Operations Manager for China – Mr Duong declined saying he did not have the skills for the job and was not keen on travelling to China all the time because of his family responsibilities.
23 March 2007	Timothy White accepted voluntary redundancy and his employment with the respondent came to an end.
23 March 2007	Huuson Nguyen accepted voluntary redundancy and his employment with the respondent came to an end.
28 March 2007	Respondent confirmed that it had not had any orders for remanufactured equipment.

Date	Event
28 March 2007	Respondent confirmed that it was not presently a party to any joint venture in which manufacturing was being undertaken.
April 2007	Mr Kong asked Mr Parsons if he wanted to become involved in a joint venture in China – Mr Parsons declined because he was not in a position to be able to travel to China in light of his wife's health.
April 2007	Respondent expected China joint venture building to be completed by the third week of June 2007.
3 April 2007	Respondent offered to sell remanufactured steering gears to Power Steering Parts of Australia Pty Limited following expression of interest.
April 2007	Mark Morelli left the respondent's employ.
April 2007	Vincent Kong left the respondent's employ.
7 May 2007	Peter McMahon of Power Steering Parts of Australia informed the respondent that he was having trouble selling the respondent's remanufactured steering gears into its rebuilder market but was still talking to customers in an attempt to sell the gears.
15 June 2007 – 15 July 2007	Mr Misra met with representatives of Sree Lakshmi Industrial Forge in India.
21 June 2007	Full Bench of AIRC handed down its decision to set aside the previous decision (by Marsh SDP) terminating the Certified Agreement. The effect of the Full Bench's decision, together with the amendments to the *Workplace Relations Act*, was to terminate the Certified Agreement and to extend the operation of the redundancy provisions in the Certified Agreement to 21 June 2009.
22 June 2007	Proposed commencement date of new certified agreement intended to cover the respondent's remaining employees.
June 2007	Cheng Hong became aware that the redundancy provisions in the Certified Agreement would continue to apply until the middle of 2009.
July 2007 – August 2007	The respondent's attempts to secure remanufacturing business from Motospecs had come to nothing.
15 July 2007	Cheng Hong and Amit Misra commenced discussions about making further employees redundant.
July 2007	Amit Misra first attempted to make contact with Repco.
27 July 2007	Amit Misra sent an email to Cheng Hong attaching a proposal to make further employees redundant.
30 July 2007	Amit Misra commenced discussions with the unions in an attempt to cut a deal on redundancies.
15 August 2007	Amit Misra told Cheng Hong that his negotiations with the unions were probably not going to come to a conclusion that was satisfactory to the respondent.
30 August 2007	Respondent announced further redundancies.

Date	Event
31 August 2007	Peter McMahon of PSPA visited Amit Misra.
31 August 2007	Telephone discussion between Amit Misra and Cheng Hong in which Mr Misra told Mr Hong of Peter McMahon's visit.
31 August 2007	Cecilia Maiolo, Antonia Karabasis, Michael Rutherford, James Hoose, Malcolm Brabant, Charles Schofield, Jordanka Brsakovska, Katerini Georganda, Nicolas El-Hawi, Derek Gentle, George Kaloustian and Peter Bitmead made redundant.
3 September 2007	Cheng Hong told Amit Misra that remanufacturing work was to cease at least for the time being.
3 September 2007	Respondent announced further redundancies.
30 November 2007	Date by which all relevant employees were made redundant.
21 June 2009	Redundancy provisions in Certified Agreement will expire.

I certify that the preceding thirty-seven (37) numbered paragraphs and the Schedule are a true copy of the Reasons for Judgment herein of the Honourable Justice Gyles.

Associate:

Dated: 13 August 2008

Counsel for the Applicant: Mr I Neil SC, Mr T Saunders

Solicitor for the Applicant: Clayton Utz

Counsel for the Respondent: Mr A Moses, Mr A Short

Solicitor for the Respondent: Minter Ellison

Dates of Hearing: 16–20 July, 6 and 10–14 September 2007, 15 February 2008

Date of Judgment: 13 August 2008